Warsaw, 26 June 2018

Constitutional Court
Al. Jana Christiana Szucha 12a
00-918 Warszawa

CC file number: **K 1/18**

AMICUS CURIAE BRIEF

by

The International Association of Jewish Lawyers and Jurists

IN THE MATTER

of Polish President's application to verify whether certain provisions of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for Investigation of Crimes Against Polish Nation (as consolidated in *Journal of Laws* of 2016, item 1575, and subsequently amended), as amended by the Act to amend the Act on the Institute of National Remembrance – Commission for Investigation of Crimes Against Polish Nation (*Journal of Laws* of 2018, item 369), are compatible with the Polish Constitution

The International Association of Jewish Lawyers and Jurists (Polish: *Międzynarodowe Stowarzyszenie Adwokatów i Prawników Żydowskich*) (**"IAJLJ"** or the "**Association**") **submits** this *Amicus Curiae* brief (the "**Opinion**") to the Constitutional Court (further also referred to as the "**Court**" or "**CC**") in the matter of the application dated 14 February 2018 by the President of the Republic of Poland (the "**Polish President**" and the "**Presidential Application**", respectively) to verify whether certain provisions of the Act of 26 January 2018 to amend the Act on the Institute of National Remembrance – Commission for Investigation of Crimes Against Polish Nation, the Military Graves and Cemeteries Act, the Museums Act and the Corporate Liability for Proscribed Punishable Conduct Act (*Journal of Laws*

of 2018, item 369) ("**INRA Amendment**"), are compatible with the Constitution of the Republic of Poland ("**Polish Constitution**"), and wishes to **point out** that in the opinion of IAJLJ:

I. **Article 55a** of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for Investigation of Crimes Against Polish Nation (as consolidated in Journal of Laws of 2016, item 1575, and subsequently amended) ("**INRA**" or the "**Act**"):

   a. is incompatible with **Article 2** and **Article 43** of Polish Constitution;

   b. is incompatible with **Article 54(1)** of Polish Constitution read in conjunction with **Article 31(3)** of Polish Constitution;

II. **Article 55a (1) and (2)** INRA, when read in conjunction with **Article 55b** INRA, is incompatible with **Article 2, Article 31(3)** and **Article 43** of Polish Constitution to the extent it imposes criminal liability under Article 55a (1) and (2) INRA on Polish citizens and foreign nationals regardless of the law of the place of commission of the offence.

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For the convenience of the Constitutional Court and the other parties in these proceedings, IAJLJ first provides a table of contents before embarking on its argument below.

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ARGUMENT

I. REQUEST FOR CONSTITUTIONAL COURT TO CONSIDER THIS OPINION

1. The International Association of Jewish Lawyers and Jurists ("**IAJLJ**") is an international non-governmental organization ("**NGO**") comprising legal practitioners and academic jurists in more than 50 countries. Among its founders were Supreme Court Justice Haim Cohn of Israel, US Supreme Court Justice and US ambassador to the United Nations Arthur Goldberg, and Nobel Peace Prize laureate René Cassin of France, the main author of the Universal Declaration of Human Rights. The Association's current President is Meir Linzen. The IAJLJ is affiliated with the World Jewish Congress.

2. The IAJLJ has Category II Status as an NGO at the United Nations, enabling it to participate in the deliberations of various UN bodies, including the Human Rights Council which assesses compliance with international standards for human rights protection across UN Member States. The IAJLJ presents opinions on international legal matters that are critical to protecting the rights and freedoms of individuals.

3. In its capacity, the IAJLJ concentrates on a wide range of issues related to human rights protection, with particular emphasis on fighting anti-Semitism by law, promoting peace and preventing genocide and war crimes, in addition to international cooperation based on the rule of law and democracy. The IAJLJ also participates in important events related to World War II history, such as the recent commemorations of the 75th anniversary of the Warsaw Ghetto Uprising, where a speech was delivered at the Nożyk Synagogue in Warsaw by the IAJLJ President Meir Linzen, who recalled the story of his close family whose survival throughout World War II was assisted by Poles.

4. This Amicus Curiae Brief submitted to the Polish Constitutional Court in case K1/18 re "Preventing the falsification of Polish history; protecting the good name of the Republic of Poland and of the Polish Nation" reflects the IAJLJ's involvement in issues that have legal and symbolic significance. Legally, the amendment to the Institute of National Remembrance Act concerns primarily the extent of lawful interference with the freedom of expression and scientific research with respect to Polish citizens and third-country nationals. As for its symbolic aspect, the amendment is placed in the context of historical events involving World War II and the occupation of Poland by Nazi Germany, the memories of countries and nations, and responsibility for crimes committed at that time.

5. Poland as an occupied country as well as Poles were victims of German Nazis. Many Poles displayed great heroism and sheltered Jews risking their own life and the life of their families. However, there were also Poles who were responsible for the death of Jews in hiding and who denounced them to the German authorities, sometimes out of hatred and purely anti-Semitic motives. These painful issues should be open to public debate and unrestricted historical

research, rather than being subject to criminal prosecution which will prove ineffective anyway and will surely not serve the best interests of Poles or Jews.

6. What is more, the controversies surrounding the INRA Amendment have come to be used to arouse enmities between Polish and Jewish communities, to provoke anti-Semitic statements or events and to tarnish the good Polish-Jewish relationships that have been built over the recent decades. That is why the Presidential Application and the Tribunal's opinion on it are crucial not only for the memory of the common past of both nations, but for their relations in the future.

7. This Opinion reflects an international NGO's involvement in an issue which the IAJLJ deems important, not least because every country has a duty to protect its good name, including by law. However, it is equally important to ensure that mechanisms intended to protect the good name are devised and used in compliance with national and international laws, taking into account the historical sensibility of various nationalities, the international dialogue and the public good in general. It is also important to note that the flawed INRA Amendment has already caused serious harm in relations between the two countries and their people as well as intensifying anti-Semitic developments. A judgment saying that it is incompatible with the Polish Constitution, to the extent indicated in the IAJLJ Opinion, would help mitigate the existing situation and restore good relations between Poland and Israel, and Poles and Jews throughout the world.

8. This Opinion does not disapprove of any legal concept of responsibility of those who tarnish the good name of Poland and Poles by attributing to them any crimes committed by German Nazis, nor does it approve of publicly disseminating terms such as "Polish concentration camps." The IAJLJ firmly opposes any such attempts to falsify history. However, the IAJLJ believes that there is a clear difference between applying traditional civil law remedies to protect the good name of a country and subjecting to criminal law the debate on, and the search for historical truth about, some of the most painful events of the past.

9. Finally, the IAJLJ wishes to make a point of noting that the IAJLJ members include persons whose ancestors survived the Holocaust thanks to their Polish neighbors. The IAJLJ therefore feels obliged and entitled to present its opinion in the ongoing legal debate before the matter is resolved by the Constitutional Court's judgment in case K1/18.

10. For all the reasons stated above, the IAJLJ kindly requests that you accept and consider this Opinion in your constitutional review of the INRA Amendment regulations following the Presidential Application.

II. SUMMARY OF ARGUMENTS AND CONCLUSIONS

2.1. Article 55a INRA is incompatible with Article 54 (1) in conjunction with Article 31 (3) of the Polish Constitution, as it excessively restricts the freedom of expression and freedom to express views

11. The statements referred to in Article 55a INRA (also in connection with Article 55b INRA) fall within the material scope of the freedom of expression prescribed in Article 54 (1) of the Polish Constitution. Yet the freedom of expression might be subject to restrictions under Article 31 (3) of the Constitution, the aim of such restrictions being to protect an important public interest, i.e. the good name of the Polish State and the Polish Nation, understood as the rights of "others", as well as public morals, construed as the duty to respect historical truth. However, the INRA provisions on review do not satisfy the conditions for acceptable restrictions of the freedom of expression stipulated in Article 31 (3) of the Polish Constitution.

12. The acceptability of restrictions of the constitutional freedoms and rights (of which the freedom of expression form a fundamental part) depends on whether or not such restrictions are "necessary in a democratic society" in order to protect the forms of legal interest indicated above.

13. **Article 55a INRA is not necessary in a democratic society, because it fails usefulness and indispensability tests**. Even if, for argument's sake, we assume that it does pass these tests, it would fail the proportionality test, **as the restriction of the constitutional freedom of expression imposed by it is too repressive, whereas the good name of the Polish Nation or the Polish State might well be protected by civil law (which is far less repressive for individuals than criminal law)**.

2.2. Article 55a INRA fails the legal specificity and decent legislation tests (Article 2 of the Polish Constitution) and the defined criminal sanction test (Article 42 of the Polish Constitution)

14. Contrary to constitutional standards, the INRA Amendment uses vague terms in imposing a criminal penalty. Article 55a INRA is so unclear and open to such a broad range of possible construals that many persons potentially falling within its ambit will be able to tell whether or not their statement amounts to a criminal offense. Indeed, there are concerns that law enforcement might use this provision to prosecute acts that are not comprised within its scope of application, in breach of constitutional standards applicable to criminal repression and the legislative intent.

15. **There is a real risk that the unintentional type of the crime (Art. 55a INRA) will become the principal enforcement vehicle, but** will not necessarily be applied to acts which were committed unintentionally, but whenever the statements concerned cannot be clearly proved to have been intended to attribute Holocaust liability to the Polish Nation or Polish State.

16. In addition, it is unusual under Polish law for a crime related to abuse of the freedom of speech to be legislated also as a non-intentional crime. In this sense, Article 55a (2) INRA imposes an absolutely exceptional and excessive restriction, and for this reason alone it is incompatible with the Constitution. It allows for prosecuting people for exercising their constitutionally safeguarded freedom of speech even if they had no intention ("non-intentional") of committing an offence.

17. The statutory justification described in Article 55a (3) INRA does not change the view that Article 55a INRA as a whole is incompatible with the Polish Constitution. **In criminal law rules that impose limits on the freedom of expression, an improperly designed statutory justification clause that uses vague statements can result in a chilling effect.** Such a justification clause does not serve its purpose because a situation where it is vague in addition to the definition of the crime itself being also imprecise significantly increases the risk of criminal prosecution being levied also against people who made the given statement in course of artistic or scientific activities. And it will be of no greater relevance that the prosecution should in the end be abandoned. **The mere possibility of being exposed to charges or given the status of a suspect can be enough to suppress artistic or scientific debate, precisely due to the uncertainty about the scope of the terms "artistic or scientific activities."**

18. The statutory justification in Article 55a (3) was too narrowly drafted to meet the constitutional standard set forth in Art. 54 (1) of the Polish Constitution, because it ignores exemption of criminal liability for statements related to journalistic activities. **Article 55a (3) INRA sets out no criteria for exempting journalists from liability for any such statements as may eventually prove to be untrue.** The necessity to determine such criteria was indicated in the case law of the ECHR, among others. Their absence in the legislation precludes debates by journalists (as they would be limited in advance to only such facts as have been proved beyond any doubt; however, every debate carries the risk of erroneous statements). Under Article 55a INRA, journalists would not be exempt from criminal liability even if their statement were based on a source because the veracity of information is the only criterion for criminal liability exemption. Consequently, in order to prevent any such risk, journalist would understandably avoid the topic(s) involved.

2.3. Article 55b in conjunction with Article 55a INRA is incompatible with Articles 2 and 42 of the Polish Constitution

19. Read together with 55b INRA, Article 55a INRA proves incompatible with Articles 2 and 42 of the Polish Constitution, in that it falls short of the standards concerning the specificity of laws and criminal penalties, as well as proper legislation. The material scope of the criminal law norm inferred from Article 55b INRA is the same as that inferred from Article 55a INRA. This proves that the reservations about Article 55a INRA are fully applicable to Article 55b INRA.

20. To the extent that it provides for criminal liability toward Polish citizens and foreign nationals under the rules laid down in Article 55a INRA, regardless of the applicable law of the jurisdiction where the offense was committed, Article 55a (in conjunction with Article 55b INRA) is incompatible with Article 2 of the Polish Constitution because it violates the rule of proportionality – the reasonable relationship between the proposed legislative objective and the regulatory measure with which to achieve it.

21. **If an offense defined in Article 55a INRA, in conjunction with Article 55b INRA, were committed abroad, its prosecution outside Poland would be ineffective (not a punishable act at the place of commission)**. In Poland, on the other hand, prosecuting such crimes would be **purposeless** as it would achieve an effect completely distorting the purpose of INRA Amendment, which is to counteract statements that tarnish the good name of Poland and Poles. For all practical purposes, effective enforcement could only be levied against Poles, i.e. those least inclined to "attribute, publicly and against the facts," responsibility for Nazi crimes to the Polish State or the Polish Nation. In effect, the criminal repression would affect nearly exclusively members of the Polish Nation, being precisely that community which the INRA Amendment was supposed to protect.

2.4. Article 55a INRA is incompatible with the international freedom of expression protection standards: the european ECHR standard and the universal U.N. standard.

22. The constitutional safeguards for freedom of speech are reinforced by standards arising under international law. There is established case law of international tribunals, including especially the European Court of Human Rights, to support a conclusion that Article 55a INRA in conjunction with Article 55b INRA excessively restrict freedom of expression while the criminal measures they introduce are surely not necessary in Poland as a democratic state governed by the rule of law to protect the good name of the Republic of Poland or of the Polish Nation.

23. The law now under the Court's review runs contrary to an increasingly visible trend in international human rights law to restrict the applicability of criminal sanctions to any content by which freedom of speech is exercised, except for a very narrow range of statements, usually those inciting to crime, including especially crime based on ethnic, racial, national or religious hatred. What is more, the law generally finds no counterpart in other jurisdictions.

24. Contrary to the stated reasons for the INRA, the provisions on review cannot be treated as an attempt to criminalize Holocaust denial under international law. **The reason is that the scope of the amended provisions clearly exceeds the acceptable standard of international law for the criminalization of statements denying, trivializing or belittling Holocaust crimes. Nor does Article 55a INRA satisfy the conditions for acceptable restrictions of the freedom of expression under international conventions and covenants (the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights).**

III. REVIEW OF PRESIDENTIAL APPLICATION'S ARGUMENTS

25. The Presidential Application requests the Constitutional Court to review the INRA Amendment as follows:

(1) review Article 55a INRA according to the following benchmarks:

- Articles 2 and 42(1) of the Polish Constitution read in conjunction with Article 31(3) of the Polish Constitution;
- Article 54(1) of the Polish Constitution read in conjunction with Article 31(3) of the Polish Constitution; and

(2) review the third indent of Article 1(1)(a) INRA, to the extent it includes "Ukrainian nationalists", and Article 2a INRA, to the extent it refers to crimes by "Ukrainian nationalists" and to acts committed in "Eastern Małopolska", according to the following benchmarks:

- Articles 2 and 42(1) of the Polish Constitution read in conjunction with Article 31(3) of the Polish Constitution.

26. In addition, the Presidential Application urges that the review of Article 55a INRA for its compatibility with the benchmark of Article 42(1) of the Polish Constitution should also include Article 55b INRA with its delineation of liability for Article 55a crimes.[1] It seems the Polish President wants the Constitutional Court to review Article 55a INRA in conjunction with Article 55b INRA also against the benchmark of Article 31(3) of the Constitution, as can be seen in how the Presidential Application expresses a belief (which we consider to be reasonable) that the criminal sanction imposed by the impugned law should be reviewed "*having regard to the need to ensure the freedom of expression, especially for those who were involved in or witnessed World War II crimes, including those living outside the Republic of Poland*".[2]

27. This Opinion is concerned with the Presidential Application inasmuch as it petitions the Court for a constitutional review of Article 55a INRA (or Article 55a INRA in conjunction with Article 55b INRA) in accordance with the named constitutional benchmarks. Within such area of interest of this Opinion, we wish to note that the Attorney General attempts to "reconstruct the target and benchmarks of review" in the present case.[3] We second the Attorney General's opinion that, contrary to the opening counts in its introductory part (*petitum*), the Presidential Application in fact strives to have the Constitutional Court review not the INRA Amendment but the INRA itself, as amended by the INRA Amendment.

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1 Presidential Application, pp. 2-3, 9.

2 *Ibid*, p. 13.

3 Attorney General's Position Statement, p. 7.

28. The Attorney General also rightly notes that count 1 of the Presidential Application "*should be extended to include also partial scope of application of Article 55b INRA*".[4] The way the Attorney General "reconstructs" what he thinks is the true target of the review requested by the Presidential Applications (in terms of both the laws to be reviewed and the review benchmarks) is by invoking the principle of *falsa demonstratio non nocet*, which the Attorney General says has been "*clearly endorsed by the Constitutional Court on numerous occasions*".[5]

29. We agree with the Attorney General that, according to the principle of *falsa demonstratio non nocet*, it is the merits of a case and not its description (designation) that take precedence. The principle has indeed been frequently invoked by the Constitutional Court in support of its power to correct a wrongly stated application, question of law or petition for constitutional review.[6] However, the principle has been used by the Court primarily where it was clear from the argument in support of the application (or of any other initial pleading) that the applicant has wrongly cited the law at which the review is to be targeted[7], or where references to the review benchmark needed amendment or correction.[8]

30. However, the Court's power is limited by the subject-matter of the petition for review. This subject-matter is defined by the following three building blocks:

(1) the rule to be reviewed;

(2) the rule that constitutes the review benchmark; and

(3) the arguments to demonstrate incompatibility between those rules.[9]

31. The above conclusion finds support both in Article 66(1) of the Constitutional Court Act of 1 August 1997 (*Journal of Laws* of 1997, no. 102, item 643, as amended) and in Article 50 of the Constitutional Court Act of 25 June 2015 (as consolidated in *Journal of Laws* of 2016, item 293). It is mainly that latter regulation, and specifically Article 50(2), that could be read as an expression of the legislative intention to ensure that the subject-matter of a petition for constitutional review both clearly indicates the normative act in question or its part (so-called

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4 *Ibid.*

5 *Ibid.*

6 See, e.g.: Ewa Łętowska, *Własność jako wartość konstytucyjna* [in:] Piotrowski i A. Szmyt (ed.), *Trybunał Konstytucyjny na straży wartości konstytucyjnych 1986-2016*, WKP 2017, Side Note 5, note 3; M. Wiącek, *Pytanie prawne sądu do Trybunału Konstytucyjnego*, Warsaw 2011, p. 307 ff.; M. Wild, *Wymagania formalne pytań prawnych w praktyce orzeczniczej trybunału konstytucyjnego* [in:] A. Siemaszko (ed.), *Stosowanie prawa. Księga jubileuszowa z okazji XX-lecia Instytutu Wymiaru Sprawiedliwości*, LEX 2011, Chapter 2.1.

7 See, e.g., CC judgments of 2 December 2014, P 29/13, OTK-A 2014/11/116; of 19 March 2001, K 32/00, OTK 2001/3/50; of 26 November 2013, SK 33/12, OTK-A 2013/8/124.

8 See, e.g., CC judgments of 8 July 2002, SK 41/01, OTK-A 2002/4/51; of 29 October 2002, case no. P 19/01, OTK-A/2002/67; 17. of 31 January 2005, P 9/04, OTK-A 2005/1/9; of 12 July 2005, P 11/03, OTK-A 2005/7/80; z 2 September 2008, K 35/06, OTK-A 2008/7/120; of 24 February 2009, SK 34/07, OTK-A 2009/2/10; of 9 July 2012, P 59/11, OTK-A 2012/7/76.

9 See A. Deryng, Rzecznik Praw Obywatelskich jako wnioskodawca w postępowaniu przed Trybunałem Konstytucyjnym, Lex 2014, Chapter 4.2.

review target) and expressly states allegations of incompatibility with the Polish Constitution, a ratified international agreement or a statute (so-called review benchmarks). This rule has been faithfully reflected in Article 67 of the current Constitutional Court law – the Constitutional Court (Organization and Procedures) Act (*Journal of Laws* of 2016, item 2072).

32. Legal scholars, too, argued – though only *de lege ferenda* – that CC's powers of *in abstracto* review should be expanded to include the power to take into account even those review benchmarks which have not been invoked by the applicant.[10] This suggests that, under the current law, there *are* limitations of the Court's discretion in amending or extending the subject-matter of applicant's petition for review and in "reconstructing" the true target and benchmark of review.

33. As explained by the Constitutional Court:

> "*what conclusively establishes the framework of review are the merits of the case, to be determined on the basis of the content of the petitioner's argumentation. Therefore, precedence is not to be attached to the mere formal reference in the petition's counts to the questioned regulations or the constitutional provisions which the petitioner invokes as review benchmarks.* ***If any of the counts in the petition incorrectly (erroneously) describes the review target or benchmark in that the petitioner has made a justifiable mistake as to the name of the given law but not as to its content****, then in accordance with the principle of falsa demonstratio non nocet,* ***such erroneous case description does not automatically trigger the Court's refusal to hear it***" [emphasis added].[11]

34. On the other hand, it is said that the Constitutional Court has no power to invoke any arguments of its own initiative unless such arguments have been submitted by whoever initiated the proceeding (applicant). All the more so, the Court may not of its own initiative select any laws to be reviewed or to serve as review benchmarks.[12] That latter observation has been elaborated upon in the case law of the Court itself:

> "*It must be remembered that to properly discharge his duty to name the constitutional values that have been violated by the laws targeted by the application (and to describe how they have been violated), the applicant must not only* ***formulate the fabric of his pleas and itemize those provisions of the Constitution*** *with which he believes the questioned laws are incompatible, but must also* ***precisely describe the***

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10 See M. Safjan, *Ewolucja funkcji i zadań Trybunału Konstytucyjnego – próba spojrzenia w przyszłość* [in:] K. Budziło (ed.), *Księga XXV-lecia Trybunału Konstytucyjnego. Ewolucja funkcji i zadań Trybunału Konstytucyjnego - założenia i ich praktyczna realizacja*, Warsaw 2010, p. 25-40.

11 CC judgment of 8 October 2015, SK 11/13, OTK-A 2015/9/144.

12 See, e.g., judgment of 3 December 2003, K 5/02, OTK-A 2002/9/98; judgment by full bench dated 11 May 2005, K 18/04, OTK-A 2005/5/49; judgment of 30 October 2006, P 36/05, OTK-A 2006/9/129; order of 16 October 2003, Ts 116/03, OTK-B 2004/3/181; order of 26 October 2004, U 5/02, OTK-A 2004/9/102; order of 14 January 2009, Ts 21/07, OTK ZU nr 2/B/2009/91; order of 17 December 2009, U 6/08, OTK-A 2009/11/178; order of 21 December 2010, Ts 16/10, OTK-supl. 2014/2/798.

constitutional values *which he derives from those provisions and which he claims have been violated by the lawmakers. This should be accompanied with a* ***detailed and precise argument*** *in support of his pleas.* ***From that duty the applicant may not be relieved by the Constitutional Court acting of its own initiative because, under Article 66 of the CC Act, the Court shall rule within the bounds of the application****, question of law or petition for constitutional review.*" [emphasis added].[13]

35. Thus, the limits for use of the *falsa demonstratio non nocet* maxim are established according to the distinction between the Court correcting what actually is applicant's *falsa demonstratio*, i.e. a mistaken description of the review target or benchmark, and the Court adding for the applicant any of the elements that define the scope of constitutional review.

36. Accordingly, we think there is no doubt that **the counts of the Presidential Application erroneously refer to the INRA Amendment instead of directly referring to the INRA and that this weakness should be corrected as proposed by the Attorney General** (see paragraphs 27 and 28 above). **However, we are concerned whether the Attorney General's "reconstruction" of the rules to be reviewed really involves a mere correction of the mistaken description of those rules or perhaps rather an addition of something that is otherwise beyond the bounds of the petition**.

37. Those concerns and doubts are even more relevant if we note that while the Attorney General considers Article 55a INRA to be compatible with the Polish Constitution, he questions the rule under Article 55b INRA[14], which actually is not expressly mentioned in any of the counts of the Presidential Application (see paragraphs 25 to 27 above).

38. However, according to IAJLJ, it is possible to argue that the Presidential Application questions the rule of Article 55a INRA as a whole whereas Article 55b INRA does not give rise to any self-contained rule (norm). It merely refers to one functional aspect of the Article 55a rule, i.e. its territorial application. In other words, since constitutional review is about hierarchical compatibility of rules and Article 55b INRA would be impossible to apply if Article 55a INRA is no longer deemed constitutional (because Article 55b rule would then be empty), then it is in

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13 CC order of 27 August 2010, Tw 4/10, OTK-supl. 2014/2/644.

14 We will note in passing that, in our opinion, the way the Attorney General sees the rule (norm) to be reviewed for compatibility with Article 2 of the Constitution is open to doubts. The Attorney General's Position Statement considers the rule in isolation based only on Article 55b INRA "*to the extent it imposes liability for offences under Article 55a(1) and (2) of the Act regardless of the law applicable at the place of their commission*". See Attorney General's Position Statement, pp. 1-2.

Yet, Article 55b INRA itself does not contain any independent criminal law rule that would be a "sanctioning norm" and does not contain any criminal law rule at all that would be a "sanctioned norm". What it does contain, though, is an overriding conflict of laws rule that mandatorily requires the application of Polish law in the defined circumstances, thereby extending liability, including that under Article 55a INRA, onto those acts which due to the place of commission would not otherwise give rise to criminal liability. As such, Article 55b INRA should be invoked in conjunction with Article 55a INRA, and not to the extent the former refers to the latter. After all, the Attorney General himself infers the incompatibility of the rule with the Polish Constitution from substantive characteristics of the crime defined in Article 55a INRA and from the resulting practical impossibility of successfully enforcing criminal lability against those who commit the crime abroad.

order to conclude that the Polish President's challenge to the constitutionality of Article 55a INRA rule forces the constitutional review to be targeted also at one of its functional aspects whose formulation as a separate editorial unit is merely a formal measure. However, IAJLJ is aware that a contrary approach to this matter is also viable.

39. Thus, while IAJLJ is of the opinion that it would be desirable and admissible for the Court to use the Presidential Application to constitutionally review both Article 55a INRA alone and Article 55b INRA in conjunction with Article 55a INRA, it may be feared that the Court will consider a review of the rule arising from both those articles in conjunction to be an inadmissible attempt to replace the applicant in defining the bounds of his petition.

40. **For those reasons, IAJLJ is of the opinion that, in order to resolve the formal concerns and the potential obstacles to the Court hearing the case within the scope intended by the applicant, the Polish President should refine the bounds of the petition for review set out in the Presidential Application, by clearly indicating that the Court's review is sought for both**:

(1) **Article 55a INRA itself (all of its sub-units) on an allegation that it is incompatible with Article 2 of the Polish Constitution, Article 42 of the Polish Constitution, and Article 54(1) read in conjunction with Article 31(3) of the Polish Constitution, and**

(2) **Article 55a (1) and (2) INRA in conjunction with Article 55b INRA, to the extent these regulations impose criminal liability under Article 55a (1) and (2) INRA on Polish citizens and foreign nationals regardless of the law of the place of commission of the offence, on an allegation that such a rule is incompatible with Articles 2, 31 (3) and 42 of the Polish Constitution. A relevant petition has been submitted together with this Opinion also to the office of the Polish President**.

IV. PURPOSE OF THE ACT – INTRODUCTORY NOTES

41. In order to establish if the law in question meets the legal specificity standard applicable to criminal law and if its restriction of freedom of expression is necessary in a democratic state governed by the rule of law, it will be relevant to recreate the legislative intent behind it so as to verify if the way the law defines the offence achieves this intent.

42. The quest for finding the legislative intent can be aided by legislative papers (see A. Bielska-Brodziak, *Materiały legislacyjne w dyskursie interpretacyjnym z perspektywy brytyjskiej, amerykańskiej, francuskiej, szwedzkiej i polskiej*, in: O. Nawrot, S. Sykuna, J. Zajadło (eds.), *Dywergencja czy konwergencja kultur i systemów prawnych*, Warsaw 2012), but mostly by the governmental explanatory memorandum for the proposed law. According to the memorandum, one reason why such a legislative proposal (INRA Amendment) has been raised was that

expressions such as "Polish death camps", "Polish extermination camps" and "Polish concentration camps" have been appearing in public, including abroad, for "many years".[15] The use of this kind of language is seen as a threat to the good name of the Polish Nation and Polish State.

43. The drafters also write that "*there have been publications and programs which intentionally falsify history, including primarily the most recent one*", and that "*there continue to appear in public discourse statements suggesting the Polish Nation's involvement, organization or responsibility in, of or for German Third Reich's crimes, and such statements stir justified protests among the Polish public*".[16]

44. Accordingly, the drafters intended not only to make sure that the public discourse no longer contains false statements such as "Polish death camps", but also to combat other false statements, rather unspecified (see below), referring to "Third Reich's crimes" and harming the good name of the Polish Nation or Polish State.

45. As regards the unintentional type of the crime, which is penalized in Article 55a (2) INRA, the drafters write that "Appropriate standards for publications in public media and for scientific publications are driven by the duty to proceed with care in the circumstances and to foresee the consequences of using false statements."

46. The drafters also proposed a stricter enforcement standard for the law in question in that they want the crimes defined in Article 53a (1) and (2) INRA to be prosecutable regardless of the law of the place of commission (see Article 55a(3) INRA). They support their proposal with the following argument: "The proposed regulation should be considered necessary to ensure effective enforcement given that many offences mentioned in the proposed Article 55a INRA are likely to be committed abroad."

V. ARTICLE 55A INRA IS INCOMPATIBLE WITH ARTICLE 54 (1) IN CONJUNCTION WITH ARTICLE 31 (3) OF THE POLISH CONSTITUTION, AS IT EXCESSIVELY RESTRICTS THE FREEDOM OF EXPRESSION AND FREEDOM TO EXPRESS VIEWS

5.1. Introductory Notes

5.1.1. Freedom of expression as a constitutional value and its limits

47. If interpreted, Articles 55a and 55b INRA submitted for review by the Polish President raise serious doubts about their constitutionality (cf. para 103 *et seq.*). The purpose of the provisions incorporated by the INRA Amendment is to criminalize certain statements about the Polish Nation or the Polish State with regard to crimes committed by the Nazis during World War II, among others. *Prima facie*, the provisions under consideration restrict the scope of

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15 Explanatory memorandum in support of draft INRA Amendment, parliamentary paper no. 806, p. 1.

16 *Ibid.*

freedom of expression (freedom of speech), which is one of the values protected by the Constitution (Article 54 (1) of Polish Constitution) and by rules of international law, including *explicite* those laid down in Article 10 of the European Convention on Human Rights.

48. The Polish Public Ombudsman has analyzed the impact of the subject INRA provisions on the freedom of expression. He has indicated that the INRA interferes primarily with the freedom to express views and obtain and disseminate information in the public as well as political spheres.[17]

49. The freedom of expression guaranteed by Article 54 (1) of the Polish Constitution is not absolute and it generally might be restricted by statute within the limits and on the terms stipulated in the general rule laid down in Article 31 (3) of the Polish Constitution. This view, which was expressed by all parties involved in this case,[18] should be recognized as established in the Constitutional Court's case law.[19] The IAJLJ, too, accepts it in its entirety.

50. We have doubts about the following statement by the Attorney General (which may perhaps be merely a result of its imprecise language):

> "[i]*t is particularly important to note in the context of this case that, in protecting all forms of expression, Article 54 (1) of the Constitution (...) extends only to those of its forms that are legal (see the judgment of May 12, 2008, case no. SK 43/05, op. cit.). That said, the freedom of expression so construed is not reduced to views that are received favorably or are perceived as harmless or neutral (see the Constitutional Court's judgment of March 23, 2006, case no. K 4/06, op. cit.)*".[20]

51. The Attorney General seems to have confused two protected aspects of the freedom of expression, with regard to which the legislator's freedom of interference varies. On one hand, the Constitution protects the form of a statement which can be determined by statute to a greater extent.[21] On the other hand, the Constitution protects the very content of a statement (i.e. the freedom to express views) which, if restricted, might produce a result similar to censorship, which is expressly prohibited under Article 54 (2) of the Polish Constitution.

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17 Cf. Public Ombudsman's Brief of April 5, 2018, pp. 5-7.

18 Cf.Presidential Application, pp. 13-15; Sejm's Position Statement, dated March 16, 2018, p. 16; Attorney General's Position Statement, dated March 20, 2018, pp. 35-37; Public Ombudsman's Brief, p. 7.

19 Cf. for example, the judgments issued by the Constitutional Court on May 12, 2008, SK 43/05, OTK-A 2008/4/57; July 6, 2011, P 12/09, OTK-A 2011/6/51; December 14, 2011 SK 42/09, OTK-A 2011/10/118; February 12, 2015 SK 70/13, OTK-A 2015/2/14; September 21, 2015, K 28/13, OTK-A 2015/8/120.

20 Cf. Attorney General's Position Statement pp. 35-36.

21 Cf. for example, the judgment issued by the Constitutional Court on July 6, 2011, P 12/09, OTK-A 2011/6/51 and the discussion concerning Article 10 of the European Convention of Human Rights and the ECtHR's case law. Cf. also the stance presented by the Attorney General in the above-cited case no. P 3/06, whereby the Attorney General distinguished between the right to unrestricted criticism of the Polish President with regard to content and the restricted freedom of the form of such criticism.

Consequently, legislators must proceed with particular restraint in introducing restrictions that affect the content of statements.[22]

52. The comments on the possible restriction of the statutory form of a statement in these proceedings seem insignificant, as Articles 55a and 55b INRA undoubtedly aim to criminalize the content of the statements defined by them.

53. Moreover, the remark that the Polish Constitution protects only statements that are legal is irrelevant in this case, because the purpose of the Presidential Application is to make the Constitutional Court determine whether or not the provisions restricting the freedom of expression are compatible with the Constitution. And so, the issue of whether or not the statements criminalized by Articles 55a and 55b INRA are legal will be determined by the Constitutional Court on review of the relevant provisions.

54. Equally irrelevant is the Attorney General's mistaken opinion that Article 54 (1) of the Polish Constitution should be interpreted as completely inapplicable to the statements defined in Article 55a INRA due to their being classified as hate speech, Holocaust denial or historical revisionism.[23] Neither the Constitutional Court's judgment quoted by the Attorney General nor any other judgment, nor the ECtHR's case law (which we cite only by way of example) confirms this opinion (cf. para 186 *et seq.* below, discussing primarily conclusions from the decisions in *Lehiduex and Isorni v. France* and in *Perincek v. Switzerland*).

55. The above notwithstanding, the acts criminalized by the relevant INRA provisions are not limited (and are completely inapplicable under the most valid interpretation) to hate speech, whereas their purpose is <u>not</u> to criminalize statements expressing racial or national hatred, propagating totalitarian ideology or inciting violence for the purpose of gaining power,[24] but to criminalize the public and contrafactual attribution of (or responsibility for) certain historical facts to the Polish Nation or the Polish State.

56. <u>In sum,</u> the statements referred to in Article 55a INRA fall within the material scope of the freedom of expression specified under Article 54 (1) of the Polish Constitution (and in Article 10 (1) ECHR). The freedom of expression, however, might be restricted under the rules laid down in Article 31 (3) of the Constitution (and, as far as international law is concerned, in Article 10 (2) ECHR). We should consider, then, whether or not the relevant INRA provisions

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22 Cf. for example, the judgments handed down by the Constitutional Tribunal on May 12, 2008, SK 43/05, *op. cit.*; May 5, 2004, P 2/03, OTK-ZU 5/A/2004/39; and March 23, 2006, K 4/06, OTK-ZU 3/A/2006/32. See also P. Sarnecki, [in:] *Konstytucja Rzeczypospolitej Polskiej, Komentarz*, edited by L. Garlicki, vol. III, Warsaw 2003, *komentarz do art. 54, Nb. 5.*

23 Cf. Attorney General's Position Statement pp. 38 and 39. Contrary to the Attorney General's claims, in a judgment of October 11, 2006, P 3/06, OTK-A 2006/9/121, the Constitutional Court contemplates the limits of the freedom of expression in the context of Article 10 (2) of the European Convention on Human Rights and Article 31 (3) of the Polish Constitution, and indicates that limitations on the freedom of expression involving manifestations of so-called hate speech may result directly from the legal system because "ex definitione *they do not fall within the axiology of a democratic state ruled by law.*"

24 See, for example, the judgment handed down by the Constitutional Court on October 11, 2006, P 3/06, *op. cit.*

fulfill the criteria for the compatibility of legislation with the constitutionality review model determined in Article 31 (3) of the Polish Constitution.

5.1.2. Standard for the constitutionality of restrictions of freedoms under Article 31 (3) of the Polish Constitution

57. Article 31 (3) of the Polish Constitution reads:

> "*Limitations upon the scope of exercise of constitutional freedoms and rights can be determined only by statute, and only if they are necessary in a democratic state for its security or public order, or for its environment, health and public morals, or for the freedoms and rights of others. No such limitations may affect the substance of freedoms and rights.*"

58. The above provision sets the standard for the compatibility of the introduced restriction of the constitutional freedoms and rights with the Constitution. In order for this standard to be met, the restriction must be

(1) **based on statutory law** (i.e. at least its framework must be determined with precision in a regulatory act equaling legislation in significance);

(2) **necessary in a democratic state for the protection of one of the values stated *expressis verbis* in Article 31 (3) of the Polish Constitution**, or for the protection of the constitutional **freedoms and rights of others**;

(3) **the restriction, moreover, may not affect the substance of the given freedom or right** (which means that the given constitutional freedom or right cannot become a completely empty concept in consequence of the restriction introduced).

59. Article 55a of the INRA essentially fulfills the first condition (subject, however, to concerns that it violates the standard for the specificity of criminal law).

60. As for the third condition, while Article 55a INRA seems to seriously restrict the freedom to discuss World War II crimes, *in abstracto* it appears that the "crux" of the constitutional freedom to express views (freedom of speech) under Article 54 (1) of the Polish Constitution remains intact.

61. In order to verify the constitutionality of Article 55a INRA, it is essential to check whether the interference with the freedom to express views satisfies the element of "*necessity in a democratic state*." To that end, the following two questions must be answered:

(1) Whether the protection of any of the constitutional values indicated in Article 31 (3) of the Polish Constitution essentially justifies a certain restriction of the freedom of expression by Article 55a INRA?

And, if the answer to the first question is affirmative:

(2) Whether the protection of the identified constitutional value at the expense of the freedom of expression is proportionate (i.e. whether the restriction of the freedom of expression is in proportion to the protection of the constitutional value involved)?

5.2. Re: protection of the good name of the polish nation and the polish state as a constitutional value essentially justifies some restriction of the freedom of expression

62. The Presidential Application does not question the rationale for the restriction of the freedom to express views, as indicated in Article 55a INRA, it being the need to protect the good name of the Polish Nation and the Polish State. The Polish President has stated that:

> "*attempts to link institutional responsibility for Holocaust crimes with the Polish Nation, which is not responsible for these crimes, and with the Polish State, the territory of which was occupied by a foreign state, justify the decision to introduce the legal regulations provided for in the legislation on review, including the penal provision criminalizing any attribution of such responsibility to the Polish Nation or to the Polish State. Indeed, the search for historical truth, which constitutes an integral part of the freedom of expression, cannot result in the denial of indisputable facts.*"[25]

63. The IAJLJ agrees with the Polish President that the good name of the Polish Nation and the Polish State constitutes an essential value that merits protection, also in the historical sense. This opinion should not be viewed as something of a demand because it is supported by the Polish Constitution, the preamble of which refers to a "*fight for independence entailing enormous losses*," the "*heritage of the Nation*," the historical "*tradition of the First and Second Republics*," and the "*over one-thousand-year old history*" of Polish statehood.

64. The identity of the Polish Nation and the constitutional status of the Polish State as a commonwealth (*res publica)*, a country for all citizens, founded for their common good and constituting their common organization, were invoked already in Article 1 of the Polish Constitution.[26] The constitutional character of the image and formal manifestations of the national identity of the Polish State were noted in Article 28 of the Polish Constitution, which establishes legal protection for the most important national symbols defined therein, such as the emblem, colors and anthem of the Republic of Poland.[27]

65. The Polish President was therefore right to stress that

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25 See, for example, the judgment issued by the Constitutional Court on October 11, 2006, P 3/06, *op. cit.*

26 Cf., for example, W. Sokolewicz, M. Zubik [in:] L. Garlicki, M. Zubik (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom I, wyd. II (2016), komentarz do art. 1, Nb. 6.*

27 Cf., for example, P. Sarnecki [in:] L. Garlicki, M. Zubik (ed.), *Konstytucja..., op. cit., komentarz do art. 28, Nb. 2.* The author has pointed out that the Polish national symbols were proclaimed with a view to confirming the identity of Poland, especially as they refer to the national symbols of the Second Republic of Poland. According to him, the constitutional provision in question is an expression of *"our gratitude to our ancestors for their work, their fight for independence which entailed enormous losses, and for Polish culture."*

"*protection of the good name of the Polish Nation and the Polish State merits our full appreciation in the system of values of the Polish Constitution.*" [28]

66. The Polish Sejm[29] and the Attorney General have described the object of the INRA's protection in similar terms, indicating the "*good name and image of the Republic of Poland and the Polish Nation*" in the appeal against the grounds for the INRA Amendment."[30] The Attorney General has also invoked other protected interests, such as "*public morals, as well as the honor and dignity of the victims of the crimes referred to in* [Article 55a]."[31]

67. The Public Ombudsman, in his turn, has argued that

> "*Protection of the good name of the Republic of Poland and the Polish Nation, ... undoubtedly fits the above understanding of the elements of public security and order. Indeed, it influences the identification of citizens with their state and is likely to impact the coexistence of individuals in an organized state, including their contacts with ethnic minorities, for example.*" [32]

68. The Public Ombudsman, for his part, expressed the view that the ECtHR would not agree that the purpose of Article 55a INRA is to protect national security or public safety, nor would it agree that the protection of the good name of Poland and Poles denoted the protection of the rights of "others" within the meaning of Article 10 of the European Convention on Human Rights, even though Article 55a INRA might be viewed as related to the protection of the rights and freedoms of others within the meaning of Article 31 (3) of the Polish Constitution.[33]

69. The purpose of the reviewed provisions of Articles 55a and 55b INRA is at least to protect morals understood as the "*shaping of interpersonal relations in a certain manner by requiring at least that one pursue values accepted by the entire society, such as truth, (...) justice ... .*"[34] Given the identity of the Polish State and the Polish Nation (construed as all Poles collectively) presented in the Constitution, the regulation on review should also be regarded as geared to the protection of legitimate "rights and freedoms of others."

70. The IAJLJ believes that there is no valid argument for the claim that the real purpose of criminalization under Article 55a INRA is to protect national security or public safety.[35]

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28 Cf. Presidential Application, p. 3.

29 Cf. Sejm's Position Statement, p. 17.

30 Cf. Attorney General's Position Statement, pp. 8-9, 39-40.

31 *Ibid.*

32 Public Ombudsman's Brief, p. 9.

33 *Ibid*, pp. 10-11.

34 See, for example, the judgments handed down by the Constitutional Court on July 12, 2016, K 28/15, OTK-A 2016/56; and on October 18, 2016, P 123/15, OTK-A 2016/80. See also Z. Cieślak, *Etyka urzędnika*, [in:] *Etyka. Deontologia. Prawo, red. P. Steczkowski, Rzeszów 2008*, p. 35.

35 This form of the protected constitutional interest has been noted only by the Attorney General (p. 39) and the Public Ombudsman (p. 9). That said, the Attorney General has done nothing to demonstrate that there is a link between the laws on review and the protection of the State and public safety. Although the

71. In conclusion, after examining Article 55a INRA (also in conjunction with Article 55b INRA) for compatibility with the constitutional standard laid down in Article 31 (3) of the Polish Constitution, we must point out that the freedom of expression was restricted with the aim of protecting an important public interest, i.e. the good name of the Polish State and the Polish Nation as the "*rights of others*," as well as public morals construed as the duty to respect historical truth.

72. Accordingly, the opinion on whether the restriction of the freedom of expression under the legislation on review is compatible with the standard set forth in Article 31 (3) of the Polish Constitution depends on the opinion on whether such restriction is "*necessary in a democratic state*" so as to protect the public interest referred to above.

5.3. Proportionality test

73. It is clear from the settled case law of the Constitutional Court that the proportionality test for the restriction of a constitutional freedom or right is deemed passed if

(1) the restriction of a constitutional freedom or right can achieve the intended effects (i.e. protection of a specific constitutional value) (usefulness test),

(2) the restriction is **necessary** in order to protect a given constitutional value, to which the restriction is connected (indispensability test/necessity for restriction) and

(3) **the effects of the restriction** of a constitutional freedom or right are not overly repressive and **remain proportionate to the burdens** the restriction involves (proportionality test *sensu stricte*).[36]

74. A closer look at Article 55a INRA shows that it fails the proportionality test so construed.

5.3.1. Usefulness test

75. It is a well-known fact, and thus requiring no proof (especially since it was further confirmed by the grounds for the INRA Amendment), that the INRA was amended primarily in order to counter statements about "*Polish extermination camps*" and "*Polish concentration camps.*" The vast majority of such statements (if not all of them[37]) are made by foreign nationals,

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Public Ombudsman indicated such a link, we find his view to be indirect and speculative ("*it might impact the coexistence of individuals within a state organization*"). We believe that the Public Ombudsman has gone too far in suggesting that practically every restriction of constitutional rights or freedoms might be classified as serving to protect national security.

36 For example, the judgments issued by the Constitutional Court on April 26, 1995, K 11/94 and June 28, 2000, K 34/99, respectively.

37 As far as Polish citizens are concerned, the term "*Polish camps*" was used in 1946, in different historical and cultural circumstances over 70 years ago, by Zofia Nałkowska in her book "*Medaliony*" (Medallions) (on page 41): "*Not tens of thousands and not hundreds of thousands, but millions of human lives were turned into raw materials and goods in* ***Polish death camps****. In addition to widely known places, such as Majdanek, Oświęcim [Auschwitz], Brzezinka or Treblinka, time and again we discover other less known places (...)*"; and by Jan Karski in his 1944 article "*Polish Death Camps*" (Collier's Weekly, October 14, 1944, pp. 18-19). It stands to reason that these two figures, who have contributed so much to Poland

usually abroad (and mostly in the press). However, revisions to Article 55a INRA (as well as the explanatory memorandum for the INRA Amendment) indicate that the drafters also intended to criminalize distortions of history (other than "*Polish camps*") meant to saddle the Polish Nation or the Polish State with responsibility for World War II crimes and atrocities – even though the amendment's proponents never cited examples of such "*distortions*" (see our comments on the indispensability test). In this context, the usefulness of the legislation on review must be considered not only in relation to phrases such as "*Polish death camps*," but other alleged distortions of history subject to Article 55a INRA.

76. The analysis of Article 55a INRA presented further below shows that it might be justified only if it were to be interpreted broadly, or perhaps even *contra legem*. Article 55a INRA was so vaguely drafted that one is unclear about the specific object to which it refers. This proves *per se* that the draft legislation on review is useless in a democratic state ruled by law (due to its unspecificity) for purposes of combating not only notions such as "*Polish death camps*," but any other distortions of history.

77. Moreover, given the arguments cited in the explanatory memorandum for the INRA Amendment and the well-known examples of phrases such as "*Polish camps*" (again, we stress the point that the proponents of the legislation never proved, or cited any examples of, any other alleged distortions of history criminalized by the legislation on review), there is no doubt that statement of this sort occur in the foreign media,[38] including the press. At this point, there is no data (and none was given by the proponents of the legislation) about the incidence of such distortions in the Republic of Poland. This means that, in reality, Article 55a INRA refers to acts which, it is safe to assume, will occur not in the Republic of Poland, but abroad, and which will be committed mostly (if not exclusively) by foreign nationals. In effect, it can be assumed that, in all likelihood, the practical application of Article 55a would be possible only in conjunction with Article 55b INRA, i.e. under a stricter protective rule that deviates from the territoriality principle governing Polish criminal penalties.

78. Article 55b INRA in itself does not fulfill the constitutional standards. Therefore, if applied, it would violate the Polish Constitution (cf. paras 160 - 182 below). Without the unconstitutional Article 55b INRA and the criminalization of acts committed abroad, Article 55a INRA will not be useful in countering statements about "*Polish camps*," or other falsehoods, for the simple reason that they occur abroad (cf. para 181 below).

79. Nevertheless, even the application of Article 55b INRA would not guarantee the usefulness of Article 55a INRA. In order to be effective, any prosecution under the legislation on review would require the offender to be present in Poland (to enable the application of the rules of

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and to the memory of the Holocaust, could hardly be accused of attributing responsibility for World War II crimes to Poland or the Polish Nation.

38 A case in point is the dispute between K. Tendera and the German TV station ZDF (the judgment issued by the Kraków Regional Court on April 24, 2016, I C 151/14).

Polish criminal procedure) – which is unlikely or which might occur only by accident – or his or her delivery to Poland (by extradition or, for example, the European Arrest Warrant). However, this is unfeasible for two main reasons:

80. ***First***, no other country in the world criminalizes the exact same acts as those indicated in Article 55a INRA, and the dual criminality requirement constitutes a fundamental rule of extradition procedures (this does not pertain to the EAW as regards certain types of offenses to which Article 55a INRA does not belong).

81. ***Second***, there is a serious risk that the current version of Article 55a INRA would be deemed irreconcilable with the rules of international law governing protection of the freedom of expression, which would provide an additional argument against delivering anyone to the Polish authorities on its basis (for more, see para 176 et seq. below).

82. As such, Article 55a INRA seems completely useless for purposes of combating statements such "*Polish extermination camps*" (or any other false statements). All that Article 55a INRA does is to declare that the Polish State disapproves of any statements to that effect. That, however, is not enough to warrant criminalization.

83. It is safe to assume, moreover, that attempts of Polish prosecutors to prosecute those who make statements about "*Polish camps*" under the rules of Polish criminal procedure will be frustrated in the offender's country. What is more, there is a probability bordering on certainty that attempts of this sort might discredit the entire campaign for the protection of the good name of Poland and Poles, as they might be put down to a lack of openness to criticism or to debates on history, or as the intention to "impose the only true opinions" by threatening criminal penalties.

84. It is therefore clear that Article 55a INRA fails the usefulness test.

5.3.2. Indispensability test

85. It should be noted at this point that any regulation of social relations and human conduct, especially one involving restrictions, must be a reaction to some real danger, or any such dangers as might actually be foreseen. Both Article 31 (3) of the Polish Constitution and its fundamental Article 2 imply that each legal regulation should serve a definite purpose, in the sense that it should seek to solve real, not imagined, problems. Such requirements are apparent not only from the Polish Constitution, but from *inter alia* § 1 of the Appendix "Principles of Legislative Technique" to the Regulation of the Prime Minister of June 20, 2002 concerning the "principles of legislative technique," as well as common sense.

86. The broad scope of Article 55a INRA clearly exceeds the problem of statements about "*Polish death camps.*" In no way, however, have the drafters proved the need for such broad scope. Specifically, they have cited no examples of "false statements" other than the widely known cases involving statements about "*Polish camps.*" Thus, they have furnished no proof that

such broad scope was really indispensable. Therefore, Article 55a INRA (in its broad sense) is not a reaction to any threat, real or reasonably foreseeable, warranting criminalization.

87. Moreover, there are serious doubts as to whether Article 55a INRA passes the indispensability test also as regards statements about "*Polish death camps.*" In the draft Amending Act, the drafters have not proved beyond doubt that the measures taken thus far (including diplomacy, education and the increasing number of instructions for the foreign press) were insufficient or that the projected legislation would guarantee better effects. This is all the more revealing as the Polish State has allocated (indirectly, through Treasury-owned companies) enormous funds for the Polish National Foundation, the core objects of which include protecting the good name of the Polish Nation and the Polish State. The drafters have given no proof that this measure could not produce better effects than the impugned legislation.

88. It should be emphasized that the failure of the Polish National Foundation to successfully protect the good name of Poland, despite the allocation of great funds for that purpose, does not have to mean that the provisions on review needed to be introduced. It might as well mean, for example, that the allocated funds were mismanaged and not fully utilized (for e.g. activities in the social media or "soft influence" upon public opinion abroad). Since the INRA Amendment drafters have made no such evaluation or analysis, it would be at least premature to claim that "soft" activities of a non-regulatory sort have exhausted their potential to deal with the problem of "*Polish death camps.*"

89. Legally speaking, the drafters have taken action which was hasty and legislatively undesirable as they introduced criminal penalties and engaged the authority of the Polish State and criminal law to such a considerable extent without analyzing or evaluating *ex post* the actions taken thus far.

90. Article 55a INRA therefore fails the indispensability test as well.

5.3.3. Proportionality test sensu stricte

91. The crux of this test is that any new legislation must be in keeping with its aim. In other words, in restricting a constitutional right or freedom, the drafters should choose legislative measures with particular caution and ensure that any such burdens and penalties as may be imposed upon individuals do not exceed the level required for the constitutionally justified legislative objective to be achieved:

> "*The principle of proportionality laid down in Article 31 (3) of the Constitution mandates that, in restricting rights and freedoms, one must choose measures that are the least burdensome for individuals. The provision introducing a restriction is incompatible with*

the Constitution if the same effects can be achieved by measures that restrict the exercise of a freedom or a right to a lesser extent."[39]

"(...) This principle places special emphasis on the adequacy of the objective pursued and the measure taken to achieve it. According to experts on this subject, this means that 'one should choose available (and legal) measures which are effective in accomplishing the intended objectives and, at the same time, which are the least burdensome for the entities concerned, or no more repressive than may be required for such objectives to be achieved."[40]

92. As demonstrated above, Article 55a INRA is not necessary in a democratic state, since it fails usefulness and indispensability tests. However, even if, for argument's sake, we assume that it does pass these tests, Article 55a INRA fails the proportionality test, as the restriction of the constitutional freedom of expression introduced by it is too repressive.

93. In deciding on legislation intended to deal with a certain problem, legislators have a broad choice of various regulatory models. It stands to reason that criminal law, which is the most repressive for citizens, should not be considered by the lawmakers to be applied as the first and core response. This is all the more true because in a particularly sensitive area such as the constitutional freedom of expression (the cornerstone of every democratic state ruled by law),

"the broadly conceived possibility to criminalize statements presented by the media must produce an inhibitory and "chilling" effect on the freedom of public debates. It is not a matter of indifference, then, whether the emphasis in setting the limits of the freedom of expression in law will be on criminal or civil remedies."[41]

94. At present, the good name of the Polish Nation or the Polish State can be protected by civil law (which is far less repressive than criminal law). Such a possibility was stated *expressis verbis* in Articles 53o-53p INRA. What is more, there is no doubt that such measures were available even before Articles 53o-53p were introduced.

95. Polish statutory law, supported by the rich case law on the Civil Code, envisages civil liability for statements and actions that tarnish the good name, violate the dignity or infringe other personal rights of persons, such as health, freedom or freedom of conscience (Article 23 of the Civil Code).

96. The list of protected personal rights is open and includes not only the rights named specifically in the relevant provision, but other aspects that make up the sphere of feelings, experiences

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39 Constitutional Court's judgment of October 30, 2006 (case no. P 10/06).

40 Constitutional Court's judgment of June 14, 2004 (case no. SK 21/03).

41 Judge M. Safjan's dissenting opinion on the Constitutional Court's judgment of October 30, 2006 (case no. P 10/06).

and identity of every human being, which Polish society considers sufficiently valuable to merit legal protection.[42] As the Supreme Court has stated,

> *"it is the opinion of society (or its vast majority) on whether a given value merits recognition as its legally protected personal right which should serve as the objective criterion and benchmark in verifying a subjective belief recognizing a given value as part of its personal rights."*[43]

97. The list of personal rights is not closed and it reflects changes to social and economic conditions.[44] Polish statutory law and case law have uniquely developed that notion by accepting as a personal right the "right to remember" a specific person or a group of persons, or to cultivate the memory of such persons by respecting their honor and good name, and ensuring that they are not disturbed by statements that compromise these values — depending on the existence of a special bond with the person seeking protection. The Polish case law has gradually expanded the scope of "memory laws" protected by civil law. The Supreme Court ruled in one of its judgments that these laws included national pride and family tradition.[45] Polish law also protects members of a certain military formation during the war (a specific Polish Home Army unit), with which its members feel a strong sense of identification.[46]

98. Bearing in mind the above concept of protection for personal rights and the evolution of Polish case law, we should now consider whether a bond with, or the memory of, a certain national group can be recognized as a personal right. These rights might be referred to as national identity (or dignity) or national heritage. While the Polish Supreme Court has expressed no

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42 Cf., for example, A. Szpunar, *Ochrona dóbr osobistych,* Warsaw 1979, p. 106; M. Pazdan [in:] K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz, t. I, 2002, komentarz do art. 23; S. Rudnicki, Ochrona dóbr osobistych na podstawie art. 23 i 24 k.c. w orzecznictwie Sądu Najwyższego w latach 1985–1991, PS 1992/1//34.*

43 Supreme Court's judgment of April 6, 2004 (case no. I CK 484/03), Legalis: 65944.

44 See the resolution adopted by seven Supreme Court Justices on July 16, 1993, I PZP 28/93, OSNC 1994/1/2: "*This notion* [Authors' Note: of personal rights] *should reflect the level of technological and civilizational development, the moral and legal principles adopted by society, and the existing type of social, economic or even political relationships."*

45 See the Supreme Court's judgment of February 28, 2003, V CK 308/02, OSNC 2004/5/82 ("*family tradition construed as the heritage, the legacy of, and identification with, the achievements and values represented by ancestors constitutes a personal right subject to protection under Articles 23 and 24 of the Civil Code*").

46 See the Supreme Court's judgment of November 14, 2000, III CKN 473/00. The Supreme Court has also used the personal bond criterion in a case where the plaintiff sought protection for his religious feelings as a result of offensive statements against Pope John Paul II. The Court has held that *"[a]n insult to the Pope may infringe personal rights in the shape of religious feelings and feelings of friendship of a clergyman who has a relationship of closeness and particularly strong emotional ties with the Pope."* Supreme Court's judgment of April 6, 2004, I CK 484/03, OSNC 2005/4/69, with B. Rakoczy's endorsement, PS 2006/10/160.

opinion on this subject, it should be stated, given recent views of legal scholars and courts, that Polish civil law protects a sense of national identity and national remembrance.[47]

99. The above-mentioned protection was confirmed expressis verbis in the Act of March 22, 2018 on Amending the Act of Court Costs in Civil Cases, which introduced, among others, changes to Article 95 of the Act on Court Costs in Civil Cases by adding 1b which stipulates that there is no charge for the claim for the protection of personal rights in a case involving patriotic traditions of the Polish Nation's fight against occupants, Nazism and Communism (the claim can also be filed by a non-government organization, whose core objectives are to protect the patriotic tradition of the Polish Nation's fight against occupants, Nazism and Communism).

100. The decision to incorporate such protection into Polish criminal law raises serious constitutional doubts given the fact that civil law (which is far less repressive for individuals) can be used to protect the good name of the Polish Nation and the Polish State. This is all the more true because the possibility of civil remedies has not been explored on a larger scale, except in rare cases (such as K. Tendera v. ZDF). Before the available civil remedies are verified, there are no grounds under the Constitution to permit criminal law to interfere with the freedom of expression. Moreover, even if using the available civil remedies may sometimes be difficult, legislators should first identify the reasons for possible shortcomings and propose corrections to existing provisions, considering more severe measures such as criminal penalties later, when such solutions fail (e.g. the problem of the charges for statements of claim was solved by the legislation referred to above, which shows that legislators can adopt milder solutions than Articles 55a INRA to better protect the good name of the Polish Nation and the Polish State).

101. We therefore conclude that Article 55a INRA does not meet the proportionality standard *sensu stricte*.

102. In sum, as a statutory provision restricting the constitutional freedom of expression, particularly the freedom of speech laid down in Article 54 (1) of the Polish Constitution, Article 55a INRA imposes a disproportionate restriction on it, which is incompatible with Article 31 (3) of the Polish Constitution.

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47 Judgments issued by the Warsaw Court of Appeal on March 31, 2016 in case no. I ACa 971/15, Legalis: 1461122; the Białystok Court of Appeal on September 29, 2015 in case no. I ACa 403/15; the Kraków Regional Court on April 24, 2016 in case no. I C 151/14; the Olsztyn Regional Court on February 23, 2015, I C 726/13.

Cf. also F. Rakiewicz *Poczucie tożsamości narodowej jako dobro osobiste w świetle polskiego prawa cywilnego, cz. 1–3, SPP 2011/2, 3–4 i 2012/1)*. The author rightly defines a sense of national identity as "*a state devoid of interference with a set of behavioral patterns, beliefs and views related to participation in a national community organized in a person's own state, with which the person identifies.*" A similar opinion was presented by P. Księżak [in:] P. Księżak i M. Pyziak-Szafnicka (ed.), *Kodeks cywilny. Komentarz. Część ogólna, wyd. II, LEX 2014, komentarz do art. 23, Nb.: 117.*

VI. ARTICLE 55A INRA FAILS THE LEGAL SPECIFICITY AND DECENT LEGISLATION TESTS (ARTICLE 2 OF THE POLISH CONSTITUTION) AND THE SPECIFIC CRIMINAL SANCTION TEST (ARTICLE 42 OF THE POLISH CONSTITUTION)

103. This analysis focuses on the two types of the crime in question which are considered by Article 55a INRA (intentional and unintentional).

6.1. Article 55a INRA – a logical and linguistic analysis

6.1.1. It is difficult to interpret the terms "Polish Nation" and "Polish State" in the context of those who would be attributed, "against facts", responsibility for the historical events named in the Act

104. The impugned provision opens with the statement "Who attributes, publicly and against the facts, to the Polish Nation or the Polish State (...)." To define the scope of application of Article 55a INRA, we should begin with decoding the meaning of the terms "Polish Nation" and "Polish State" as used in this law. The drafters explain in their explanatory memorandum (page 10) that the "Polish Nation" means, as in preamble to the Polish Constitution, "all the citizens of the Republic of Poland". But they are silent in their memorandum about the exact meaning of the term "Polish State" (which, after all, is used in INRA) and limit themselves to merely referring to the Republic of Poland. Be that as it may, those two expressions should be taken to refer to the entity that is the Polish State and as such require no further elaboration.

105. However, the reference to the "Polish Nation" raises questions even before any details are analyzed. It is unclear if its scope ("all citizens of the Republic of Poland") refers to:

(1) the Polish Nation as an abstract collective entity, or

(2) each of all the persons that make up the concept of the Polish Nation (and it is not clear if such persons must, as above, be Polish citizens or if the mere ethnic affiliation with the Polish Nation is sufficient).

106. In other words, it is unclear if Article 55a INRA will be relied upon for prosecution of those who attribute the relevant facts to some specified or unspecified person or group of persons with Polish citizenship (or, on a different interpretation, with Polish nationality), or – on the contrary – for prosecution of only those who make the attribution solely to the Polish Nation or Polish State as an abstract entity.

107. As the Polish Sejm [lower chamber of Polish parliament] explains,

> "*the expression 'attributes to the Polish Nation or the Polish State' the responsibility or co-responsibility means that the actus reus of the offence comprises charging the Polish State or the entire Polish Nation with responsibility for the crimes set out in Article 55a INRA or referring to them as perpetrators or organizers of those crimes. (...) As such, this criminal liability will attach to charging the 'Polish Nation' or the 'Polish State' and not any specific Poles who committed any of the crimes set out in*

Article 55a INRA. The Article 55a INRA regulation is not concerned with situations whereby the responsibility or co-responsibility for Nazi crimes committed by the German Third Reich is attributed to individual Poles or even Poles acting in groups or even organized groups. These do not constitute the Polish Nation." (see pp. 19 and 22 of Sejm's Position Statement).

108. A similar view was taken on this matter by Attorney General:

> "*The explanation that the 'Polish Nation' means 'all the citizens' conclusively establishes that this term does not include any individuals or groups of individuals who are or were characterized by having the Polish citizenship" (p. 9 of Attorney General's Position Statement). "Therefore, notwithstanding the meaning of the term 'Polish Nation', Article 55a INRA does not criminalize any kind of statements on censurable and drastic acts of any individual Polish citizens (or persons of Polish nationality), or even groups thereof. Accordingly, no criminal liability under Article 55a INRA may be imposed on anyone speaking about such persons' censurable conduct even if what he says is not true to facts.*" (p. 10 of Attorney General's Position Statement)

109. We should agree with how the terms "Polish Nation" and "Polish State" are construed above for the purposes of decoding the rule in Article 55a INRA. However, this construal does not do away with this law's ambiguity and even makes the ambiguity more pronounced, as will be seen in the analysis below.

6.1.2. The offence of "attributing responsibility" for Nazi and other crimes to the "Polish Nation or Polish State" is defectively defined

110. With the "Polish Nation" and the "Polish State" construed as above, it becomes controversial if they can be attributed any responsibility or co-responsibility for any crimes.

111. If the "attribution of responsibility" is intended by the lawmakers to mean "attribution of legal (criminal) liability" [Translator's note: In Polish there is one and the same word ('odpowiedzialność') for both 'responsibility' and 'liability' in these senses.] for the relevant crimes, then clearly neither the Polish Nation nor the Polish State are capable of being held so liable. In Polish law, criminal liability is generally attributable to perpetrators who are natural persons (not abstract entities or even organizations or legal persons), save exceptions concerning the quasi-criminal responsibility of collective entities. Neither is it likely for foreign jurisdictions to accept that criminal liability may be imposed on states or entire ethnic groups. As a purely theoretical exercise, one can imagine that somebody commits an Article 55a INRA offence by making a statement that attributes criminal liability for the relevant crimes to such abstract entities (i.e. points to the Polish Nation or the Polish State as perpetrators). But that statement will inherently involve a logical contradiction and as such will be explicitly false. Thus, hypothetically, if this is how Article 55a INRA is understood by the legislature (and assuming that will be so understood when applied in practice), then the words "against the

facts" in the opening part of Article 55a INRA would clearly be superfluous and as such unnecessary.

112. Based on the rational legislator assumption it is thus in order to conclude that the legislative intent was not that Article 55a INRA could apply to such a purely hypothetical and unlikely conduct, or at least that the intent was that this provision could apply to more than just such conduct. But then a major question is what other conduct may be meant here because the express language of the provision surely does not purport to indicate that any other conduct (than that described above) was intended to fall within the ambit of this law. This creates a significant risk that the criminal provision in question will be construed extensively, whether by criminal enforcement authorities or criminal courts, to make sure that it can be applied at all. Examples of such a potentially extensive construal may include the following interpretations:

(1) Article 55a INRA catches also conduct which involves attributing to the Polish State (or, more specifically, to some organs of the State) responsibility for acts which in themselves were not the relevant crimes but whose consequences involved commission of such crimes by some individuals. This could include stating that some organ of the Polish State ordered some perpetrators, whether or not officers of the Polish State (it is unclear if these should be limited to only perpetrators with Polish citizenship), to commit one of the relevant offences. This construal, however, certainly fails where the Polish Nation is concerned because the Polish Nation has no organs and, logically, is unable to make any decision or order.[48]

(2) Article 55a INRA catches also conduct which involves attributing to the Polish Nation or Polish State nothing more than moral responsibility for relevant crimes. Notwithstanding the fact that such an interpretation does not transpire from the text of the law, it is equally clear that references to such elusive value judgements as "moral responsibility" do not meet the test of legal specificity as applicable to criminal law. In addition, conduct involving attribution of "moral responsibility" cannot be verified in terms of the true/false criterion, and this would totally defeat the sense of the subject provision.

113. The drafting defect in Article 55a INRA, as described in this section of the Opinion, is that it cannot be rendered applicable unless one departs from its substance, and this is in itself a sufficient ground for concluding that the drafting is untenable. Such far-reaching legislative imprecision creates a real risk that makes the provision in question fail the test of compatibility with Articles 2 and 42 of the Polish Constitution. In addition, even if the provision is construed in ways that depart from its text, this will not offer any certainty that its scope of penal sanction can be determined with precision.

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48 We will at this point ignore any such formal actions of the Polish Nation as might reflected by a decision made as a result of a nationwide plebiscite, as that is irrelevant to the circumstances of this case.

6.1.3. The offence of "attributing responsibility" for crimes committed by "German Third Reich" is defectively defined

114. The law in question imposes criminal liability for attributing, to the above abstract entities (the Polish Nation or the Polish State), responsibility or co-responsibility for crimes committed (to be understood as committed in reality) by the German Third Reich. Importantly, the German Third Reich (this is how the German state was historically called from 1993 to 1945) is itself an abstract entity incapable of being held criminally liable for any offences which were committed in its name by individuals liable for their acts. In other words, in relation to any of the relevant crimes, the Third Reich as such was not and could not be the perpetrator as this term is understood by criminal law. Incidentally, this transpires even from the very document to which the impugned Article 55a(1) INRA refers, namely the International Agreement for the trial and punishment of major war criminals of the European Axis. That agreement is about trial and punishment of war criminals (see, e.g., Article 6 of the Charter of the International Military Tribunal) who committed crimes in the interests of the European Axis countries; as such, they were personally liable for those crimes.

115. This is another way in which the Article 55a INRA language is imprecise. If the provision were to be construed according to its text, it would be incapable of application. In the purely legal sense (as opposed to journalistic or historical approaches), the relevant crimes were committed not by the German Third Reich but by its individual officials. Paradoxically, judging by the text of the impugned provision, any person who attributes the responsibility for any WWII war crime to the Polish Nation or Polish State would, regardless of whether such a statement is true or false, be free from liability because, on its literal construal, Article 55a INRA does not make it possible to hold the person criminally liable (none of the war crimes committed during the Second World War was committed by the German Third Reich). Since the expression "committed by the German Third Reich" has no *designatum,* i.e. the class of objects to which it refers is null, therefore the entire Article 55a INRA does not have and will not have any *designatum.*

116. To make Article 55a INRA capable of application, we would again need to go beyond its substance and adopt a completely different construal than the one expressly arising from the wording. However, it is unclear what direction such construal should take (and the provision itself offers no guidance on this). And the potential directions are aplenty. Below are some examples of what could have been meant:

(1) war crimes committed by any of the public officials of the German state (German Third Reich);

(2) war crimes committed by any of the citizens of the German state (German Third Reich);

(3) war crimes committed by German Third Reich's citizens (e.g. Wermacht or SS soldiers and functionaries) on orders from its authorities;

(4) war crimes committed on orders from the authorities of any of the European Axis countries (German Reich with its European allies) by any of the citizens of those countries;

(5) war crimes committed by any individuals collaborating with occupation authorities of the German Third Reich or its collaborators, e.g. by persons with Ukrainian, French, Georgian, Latvian, Estonian, Russian, Dutch, Belgian or Lithuanian nationality who served in various military or police units of the German Third Reich (Waffen-SS, the staff of German extermination camps, etc.);

(6) crimes committed by any individuals at the instigation or with the permission of the German Third Reich's occupation authorities, e.g. the so-called *shmaltzovniks* (blackmailers).

6.1.4. Constitutional standard of legal specificity of criminal law

117. As regards the principle of legal specificity of criminal law (such as the law in Article 55a INRA), the constitutionality benchmark is provided primarily in Article 42 (1) of the Polish Constitution, with the addition of the general legal specificity requirement arising from Article 2 of the Polish Constitution. These rules reflect a principle that is crucial when reviewing any criminal law, i.e. the principle *nullum crimen sine lege*, or strictly speaking one of its aspects, i.e. *nullum crimen sine lege certa* (crimes should be defined in a maximally precise manner)[49].

118. As regards Article 2 of the Constitution, the Court has devised the following three-prong test for legal specificity of a law:

(1) the law must be precise, i.e. must form a concrete regulation of rights and duties which is drafted in a way that enables enforcement;

(2) the law must be clear, i.e. understandable for its addressees[50]; and

(3) the law must be legislatively correct, i.e. must meet the technical requirements applicable to legislation (statutory drafting).[51]

119. The Court has also made a point of noting on numerous occasions that:

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49 CC judgment of 9 June 2010, case no. SK 52/08. Cf. also A. Rychlewska, Zasada nullum crimen sine lege na tle współczesnej idei państwa prawa, Czasopismo Prawa Karnego i Nauk Penalnych preprint 7/2017, p. 2.

50 Clarity of law means that rules must be clear and understandable for those to whom they are addressed, cf. G. Koksanowicz, Zasada określoności przepisów w procesie stanowienia prawa, Studia Iuridica Lublinensia 2014, nr 22, p. 474. See also CC judgement of 18 March 2010, case no. K 8/08: *"The clarity of a law is to ensure that it is meaningful for its addressees, i.e. it must be comprehensible in the common parlance. An unclear law has the practical consequence of creating a legal uncertainty on the part of the addressee and of leaving control thereof to those who apply the law."*

51 CC judgment of 28 October 2009, case no. KP 3/09.

(1) a criminal rule should clearly indicate the person(s) to whom the prohibition is addressed, the constitutive elements of the prohibited act and the kind of sanction applicable if the act is committed;

(2) according to the legal specificity rule in Article 42 of the Constitution, the lawmakers must so describe a prohibited act (its constitutive elements) that whether or not any specific conduct meets its constitutive elements is clear beyond doubt both to whoever the criminal law is addressed to and to whoever enforces it and decodes its meaning through statutory construal;

(3) where a statute imposes punishment for prohibited conduct, it cannot leave individuals unaware or even uncertain as to whether any specific conduct is so punishable.[52]

120. The principle of *nullum crimen sine lege certa* does not preclude use of vague language or opinion language in a law, but this is acceptable only on condition "it is possible to specify the designatum thereof *[i.e. of such expressions]*".[53] Importantly, the interpretation of what such vague language means and refers to must be based on the existing body of statutory and case law[54] and must be axiologically grounded in the legal awareness of individuals[55], i.e. must not be done autonomously, *ad casu*, in the process of applying an already introduced provision by state authorities.[56]

121. The Court adds that:

> "*Compliance with the highest standards of legal specificity should be required of those criminal laws which interfere with freedom of speech. Its importance in a democratic state has been emphasized in numerous cases before this Court, including in its judgements issued on constitutional review of various criminal laws.*"[57]

122. Moreover, in accordance with Article 42(1) of the Polish Constitution, a prohibited punishable act must have its constitutive elements statutorily defined. This standard will not be satisfied

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52 CC judgment of 9 June 2010, case no. SK 52/08; CC judgment of 26 November 2003, case no. SK 22/02: *"Article 42(1) of the Constitution mentions a "prohibited act". This means some specific (concrete) conduct that may be attributed to an individual. While the conduct meant may involve different situations (acts, omissions), it is clear that the article requires that the conduct be precisely indicated (specified). Consequently, any broad indication that leaves plenty of room for interpretation of the conduct's constitutive elements or the scope of some kind of a conduct category may not be treated as compliant with the specificity requirement under Article 42(1) of the Constitution. (...) As rightly held by the German Federal Constitutional Court in one of its cases, "the very risk of criminal sanction should be recognisable for the addressees of the given rule* (BVerfG, 2 BvR 1881/99, 26 April 2000)."

53 CC judgment of 12 September 2005, case no. SK 13/05; por. also CC judgment of 16 January 2006, case no. SK 30/05; CC judgment of 28 January 2003, case no. K 2/02.

54 *Ibid*, SK 13/05.

55 J. Zaleśny, *Określoność przepisów prawa na tle orzecznictwa Trybunału Konstytucyjnego*, Przegląd Prawa Konstytucyjnego 2011/1, p. 162: *"Regarding use of vague terms, it is important if they are axiologically grounded in the legal awareness so as to give rise to a specific normative imperative."*

56 Cf. CC judgment of 16 January 2006, case no. SK 30/05; see also CC judgment of 22 February 2014, case no. SK 65/12.

57 CC judgment of 19 July 2011, case no. K 11/10.

by a law which does not allow such constitutive elements to be precisely recovered in course of its statutory construal, i.e. a law which does not make it possible to determine the semantic "outline" of such constitutive elements.[58]

123. In summary, regarding the specificity of criminal laws, the Constitutional Court requires above all that any prohibited act should have its constitutive elements defined in a way that makes it possible to discern their meaning and designatum. While this requirement does not preclude use of vague language altogether, the lawmakers should use expressions whose normative import can be decoded using linguistic rules and the existing body of judicial and scholarly authorities.

6.1.5. Conclusions

124. Article 55a INRA is open to such a broad range of possible construals that none of the persons potentially falling within its ambit will be able to predict in advance if their statement is or is not caught by it. In addition, on a logical and linguistic analysis, certain terms used in this law are such that it is to a large degree impossible to identify any objects to which they should refer. This is incompatible with guidance provided in Constitutional Court's case law on use of vague terms in law, and especially in criminal law. The unclear meaning of certain Article 55a INRA terms creates a risk that law enforcement authorities will be applying this provision to conduct which is not expressly comprised within its scope of application. This risk is not groundless because, as seen in the discussion above, the provision would likely be incapable of application otherwise.

125. Based on the body of Court's case law on the specificity of criminal law (see point 117 et seq.), the foregoing leads to a conclusion that the subject provision is incompatible with the Polish Constitution. Furthermore, the Court noted elsewhere that *"there shall be no room for any insufficiently precise formulation of any part of this rule such that would give relevant public authorities arbitrary discretion in its application, or for such authorities "appropriating" any spheres of life by penalizing conduct which has not been expressly prohibited in criminal law. The reason is not only that this could, as said, create uncertainty among individuals about what conduct is permissible and what is prohibited, but also that it could go against the constitutional principle of the rule of law and lead to arbitrary adjudication and, in the extreme, turn into a dangerous tool enabling state authorities to put pressure to bear on the citizenry. All that points to what is called "willful arbitrariness of the government", which is unacceptable in*

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58 Cf. CC judgment of 28 June 2005 , case no. SK 56/04, and the case law therein referenced. See also the following quote: *"In a democratic state ruled by law, criminal law has the function of not only protecting the state, the state institutions, the society and the individuals against criminals but also of protecting individuals against the arbitrariness of state authorities. Criminal law builds a barrier behind which individuals are supposed to feel safe in relations with authorities. An individual may not be held criminally liable without going beyond the boundary of what is prohibited and punishable. Criminal law must set a dividing line between the permitted and the forbidden. The barrier it builds may not be moveable, freely transferrable or otherwise subject to instrumental use by public authorities. It must restrict authorities in a precise and strict manner."* (J. Zaleśny, *Zasady prawidłowej legislacji*, Studia Politologiczne Vol. 13, p. 19).

a democratic state governed by the rule of law".[59] *"The principle of legal specificity as one of the rules of decent legislation is in fact designed to protect those to whom the law is addressed against a situation whereby substantive laws are shaped by authorities which apply them instead of the legislature which makes them."*[60]

126. With such substantial interpretation concerns, it is in order to conclude that the subject law does not meet the specificity standards applicable to criminal law because it does not allow the "punishability risk" to be sufficiently recognized by those to whom it is addressed.

6.2. The unintentional type of the crime: Article 55a(2) INRA

127. Under Article 9(2) of the Criminal Code:

> *"An offence has been committed unintentionally if the perpetrator, while not intending to commit it, has nevertheless committed it because he failed to exercise the degree of care required in the circumstances, even though he did or could foresee that the offence may be committed."*

128. Thus, when drafting Article 55a(2) INRA, the lawmakers meant to provide for a situation where a person publicly and against the facts attributes responsibility for Third Reich's crimes to the Polish Nation or Polish State, but:

(1) does not intend to commit an offence so defined; and

(2) still commits the offence due to his or her failure to exercise the degree of care required in the circumstances; and

(3) did or could foresee that the offence may be committed.

129. It is hard to imagine that, when attributing responsibility for Third Reichs' crimes to the Polish Nation or Polish State, a person who is sufficiently aware of the different historical reality makes such an attribution without intending to say what she has said, i.e. that the Polish Nation or Polish State is responsible. This would be saying that, for example, a person speaking of "Polish extermination camps" has never meant to attribute the responsibility for the creation and operation of extermination camps developed and managed by Nazi Germany in occupied Poland, such as Auschwitz-Birkenau or Treblinka, to the Polish Nation or Polish State (and does not think that it is Poles that have built them and murdered millions of people in them), but used the words to, say, indicate a geographical location, which however was a breach of objective standards of care requiring the maker of the statement to consider if its structure and context may lead any group of its addressees to believe that the maker attributes the responsibility for those camps to the Polish Nation or Polish State. The problem is that there are no such objective standards of care. People to which the law is addressed can be required not to misrepresent the truth but they can hardly be required to make their

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59 CC judgment, SK 22/02.

60 G. Koksanowicz, *op.cit.*, p. 476. See also CC judgment of 30 October 2001, case no. K 33/00.

statements so precise as to prevent any interpretation which would steer the addressees towards a meaning that is not true to historical facts.

130. What is more, Article 55a(1) INRA itself does not establish any objective standards of care (being standards applicable to an average person in the same circumstances) which would require the maker of a statement to consider if its structure and context may lead any group of its addressees to believe that the maker attributes responsibility for the relevant conduct to the Polish Nation or Polish State. Given that INRA lays down no such objective standards of care, imposing liability on anyone would mean that, in light of Article 55a(1) INRA, standards of care, which must be breached for non-intentionality to exist, may be subjective (and could involve, say, standards guiding the addressee on the basis of her knowledge or origin to make her understand the statement in some specific way) and not objective. However, the maker of a statement cannot in such circumstances be held under Article 55a to have made the statement unintentionally or intentionally because whether or not there has been any attribution of responsibility depends on how the statement is understood by its recipients.

131. But other than that, such as for example when somebody says that it is Poland that started the Second World War, there will be an obvious intent so there will be no non-intentionality to speak of with respect to the "attribution" element.

132. Accordingly, when looking for conduct that would fall within the ambit of Article 55a(2) INRA, we should seek to examine if the defendant knew that his statement is in conflict with the facts ("against the facts").

133. Naturally, this is not about cases where somebody erroneously assumes that the Polish Nation or Polish State is responsible for the relevant crimes, as long as his error is justifiable. The reason is that in such cases there is no offence at all due to the exclusion under Article 28(1) of the Criminal Code.

134. Instead, the situation described by Article 55a(2) INRA may be that, say, somebody erroneously believes that the liability for crimes which according to the facts were "committed by the Third Reich" should be attributed to the Polish Nation or Polish State, and her error is justifiable.

135. Let us now apply the above reasoning to the example of the "Polish extermination camps" language, assuming that the maker of such a statement intends to attribute responsibility for the development and operation of Auschwitz-Birkenau, Treblinka or other such camps to the Polish Nation or Polish State (which is not an obvious thing to prove and a failure to prove the intent will mean there cannot have been any "attribution"). Accordingly, the requisite situation would be that:

(1) according to the defendant's knowledge, it is the Polish Nation or Polish State that is responsible for creating death camps; and

(2) the defendant's error was not justifiable.

136. Thus, identification of unintentional conduct falling within the ambit of Article 55a(1) INRA crucially rests on finding situations whereby the defendant's error was not justifiable.

137. On interpretation, Article 28(1) of the Criminal Code purports to say that an error is justified when the defendant had neither the duty nor any opportunity to obtain information that would allow him to avoid the error and then it was objectively impossible for him to avoid the error in the circumstances.[61]

138. In that sense, any assessment of the relevant conduct as defined in Article 55a INRA will be materially affected by defendant's educational background and access to historical education and appropriate sources of information. The mere fact that knowledge about the Holocaust and its history is accessible does not mean that anyone, regardless of their educational background and country of residence (especially in the context of Article 55b INRA and its authorization to enforce the law outside Poland), has equal access to it and equal opportunity to learn about the historical events of the Holocaust. As a result, strict and elaborate findings of fact will have to be made but yet will very often be impossible. Consequently, it will be only in very limited cases, if at all, that liability for the unintentional type of the crime in question can be imposed.

139. Therefore, there is a real risk that Article 55a(2) INRA will in fact become a tool which law enforcement authorities will use whenever they have insufficient grounds for levying charges of intentional commission of the offence in question. But that is not the function unintentional offences have in criminal law. In other words, in the case of the "Polish death camps" language, it may be feared that, given the likely impossibility of proving criminal intent, the unintentional type of the subject crime will become the principal enforcement vehicle but will not necessarily be applied to acts which actually meet the definition of the crime in its unintentional form (i.e. will be applied whenever the statements concerned cannot be clearly proved to have been intended to attribute Holocaust liability to the Polish Nation or Polish State).

140. Note at this point that in *Vajnai v Hungary* (no. 33629/06) the ECtHR held that any limitations of the freedom of expression are justified only in so far as there exists a clear, pressing and specific social need. In that context, there is no approval for a blanket ban on symbols that can have multiple meanings only some of which would justify a ban.[62] This reasoning was followed by the Constitutional Court in case no. K 11/10. Thus, using such a general and imprecise criminal law as Article 55a INRA to prosecute people for making statements with potentially multiple meanings (such as "Polish extermination camps") gives rise to serious constitutional

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61 See M. Królikowski, Zawłocki, *uwagi do art. 28*, *Kodeks karny. Część ogólna. Komentarz do artykułów 1-116*, Warsaw 2017; A. Zoll, *uwagi do art. 28* [in:] W. Wróbel (ed.), A. Zoll (ed.), *Kodeks karny. Część ogólna. Tom I. Część I. Komentarz do art. 1-52.*

62 Judgment in *Vajnai v. Hungary*, paragraph 51.

concerns precisely because of the failure to pass the specificity test as applicable to criminal laws (see CC judgment in case no. K 11/10).

141. In addition, it is unusual under Polish law for a crime related to abuse of the freedom of speech (meaning essentially any crimes which by their very existence are a limitation of this freedom, whether or not justified) to be legislated also as a non-intentional crime (and in this sense Article 55a(2) INRA is absolutely exceptional). It seems that, if only for this reason, such a criminal law measure restricting freedom of expression should, to the extent it refers to statements that qualify as the non-intentional type of the offence, be deemed to be an excessive restriction and, as such, incompatible with the Constitution. It allows for prosecuting people for using their constitutionally safeguarded freedom of speech even if they had no intention ("non-intentional") of committing an offence.

142. Accordingly, as Article 55a(2) INRA (read in conjunction with Article 55a(1) INRA) does not meet the constitutional standards of specificity applicable to criminal laws, it, too, should be considered incompatible with the Polish Constitution.

6.3. Scientific or artistic activities as a justification

6.3.1. The justification described in Article 55a(3) INRA does not change the view that Article 55a INRA is unconstitutional

143. Article 55a(3) INRA: "A perpetrator of the offence specified in sections 1 and 2 shall not be considered to have committed the crime if the offence was committed in course of artistic or scientific activities."

144. According to the Presidential Application, the language of this exemption from criminal liability is imprecise and hence the exemption will be difficult to apply. In response, the Attorney General and the Speaker of the Sejm submit that, in contrast to the definition of an offence itself, the legislature has much more leeway in using vague language when defining statutory justifications (*kontratypy*). In the case at hand, such language is represented by the terms "artistic and scientific activities". While they are not precise, the Attorney General's and the Speaker's argument runs, it is possible to recover their meaning whenever this law is applied.

145. That argument does not support a conclusion that the law in question is compatible with the Polish Constitution. The reason is that the Article 55a(3) justification will have certain consequences that should be considered in conjunction with Article 55a(1) and (2) INRA. Even though an act itself will not be a crime if done in course of artistic or scientific activities, statements that can be potentially made in course of such activities will still be vulnerable to the so-called chilling effect.

146. According to the legislative intent, the justification concerned is supposed to model that in Article 256(3) of the Criminal Code. But that assumption is tainted in at least two respects.

147. **Firstly**, the drafters of the INRA Amendment omitted to note that the Constitutional Court has already criticized the effectiveness of using the justification under Article 256(3) of the Criminal Code to ensure constitutional compliance. As it held in case no. K 11/10:

> *"Also, this Court joins the Speaker in concluding that the insufficient specificity of the examined fragment of Article 256(2) CrimCode is not cured by the justification regulated in Article 256(3) CrimCode. (...) In addition to being un unnecessary interference with the rights of an individual, a too hasty prosecution of use of "Fascist, communist or other totalitarian symbols", even if its ultimate effect is not adverse to the accused (defendant), could, if anything, have* ***a chilling effect on public debate*** *and, not impossibly, could also strengthen extreme political movements which look to governmental repression as something to fuel their search for more followers."* (emphasis added)

148. The Constitutional Court's approach is realistic as it focuses not only on the wording of and cross-sectional comparisons among the specific editorial units of a legal provision, but also refers to its likely practical applications. The same direction for constitutional review of freedom of speech restrictions was posited by M. Safjan in his dissenting opinion for the Court's judgment in case no. P 10/06:

> *"The design of the regulation of matters which are particularly sensitive in a democratic society, such as the freedom of expression, may not omit to take into account the existing practices in the administration of justice, the habits and tendencies in the public media or the potential threats to the freedom of the press and other media. As discussed in CC's case no. P 3/06, regard must also be had to the changeability, uncertainty and unpredictability of assessments that may guide how, for example, the judiciary approaches the criteria which ultimately define criminal liability for defamatory or insulting statements. The law never operates in vacuum but always in some specific reality, and as such should avoid solutions which are particularly vulnerable to changeable opinions that depend on current political situation or on some specific preferences of the political powers that be."*

149. In criminal law rules that impose limits on the freedom of expression, an improperly designed statutory justification clause that uses vague statements (which are otherwise generally acceptable in statutory justification design, though) can precisely result in a chilling effect. Such a justification clause does not serve its purpose because a situation where it is vague in addition to the definition of the crime itself being also imprecise significantly increases the risk of criminal prosecution being levied also against people who made the given statement in course of artistic or scientific activities. And it will be of no greater relevance that the prosecution should in the end be abandoned. The mere possibility of being exposed to charges or given the status of a suspect can be enough to suppress artistic or scientific debate, precisely due to the uncertainty about the scope of the terms "artistic or scientific activities".

150. **Secondly**, there is a major difference between the actus reus defined in Article 55a INRA and that defined in Article 256(2) of the Criminal Code (to which the Article 55a(3) INRA justification refers). Take the artistic activities justification, for example. Much as one can theoretically imagine (under Article 256(2) of the Criminal Code) some printed or recorded content that promotes a Fascist regime being possessed or presented in course of artistic activities (such as in a feature film that reproduces excerpts from a speech by Adolf Hitler), it is more difficult to precisely define any conduct that amounts to "attributing the responsibility for Third Reich's crimes to the Polish Nation or Polish State" and is at the same time part of artistic activity.

151. By way of example, let us take an actor who as part of his role during a theatrical performance speaks words suggesting the Polish origin of death camps. Because that statement would be an artistic fiction, we would not be dealing here with "attribution" because the person would not really have any intent to "attribute" (moreover, he could not be accused of committing the crime unintentionally, either, because his statement was artistic fiction and artistic fiction does not require any special care).

152. And if, hypothetically, the actor deliberately used the medium of theatrical performance to do an act defined in Article 55a INRA, the law could hardly be thought to have been intended to allow such persons to avoid liability.

153. In consequence, the artistic activities justification seems unnecessary and superfluous and does not in any way limit the application of Article 55a(1) and (2) INRA. As such, it does not alleviate the adverse impact of these regulations on the freedom of speech and on the legal specificity standards.

154. In summary, the existence of the justification under Article 55a(3) INRA does not change the general conclusion that Article 55a INRA as a whole fails to meet the constitutional standards of specificity applicable to criminal laws.

6.3.2. Ignoring exemption of liability for journalistic activities

155. Article 55a Section 3 INRA provides an insufficient statutory justification for exemption of liability, given the constitutional standard laid down in Article 54 (1) of the Polish Constitution, as it ignores the exemption of criminal liability for journalistic activities. Analyzed in its entirety, Article 55a INRA imposes yet another form of restriction of the freedom of expression on journalists, in addition to Article 212 in conjunction with Article 213 of the Penal Code.

156. In other words, given the content of Article 55a INRA, journalists will have the right to make statements about the responsibility (if any) of the "Polish Nation or Polish State" for certain World War II crimes only if they have irrefutable (and hence unquestioned) evidence to prove that their statements are true. In fact, this precludes any journalistic debate on the issue at hand, because every debate carries the risk of erroneous statements. After all, statements often require further verification, and journalistic debates might serve as a spur to, for example, academic research.

157. Article 55a INRA imposes stricter restrictions on the freedom of expression in this regard than Article 23 in conjunction with Article 24 of the Civil Code, because it does not provide for any exemption of liability in case an untrue statement is made in a socially justified interest. Given such legislation, the "good name" of the Polish Nation or the Polish State is subject to greater protection than that of individuals, which raises concerns about its proportionality (in this regard, see our comments above). The regulation under discussion contains no such criteria for exempting journalists from liability in case any of their statements are found to be untrue. And yet, the ECtHR has indicated the necessity for such criteria in its case law:

> "*The Court considers that the applicant as clearly involved in a public debate on an important issue (see Braun, cited above, §50). Therefore, the Court is unable to accept the domestic courts' view that the applicant was required to prove the veracity of his allegations. It was not justified, in the light of the Court's case-law and the circumstances of the case, to require the applicant to fulfil a more demanding standard than that of due diligence.*"[63]

> "*Indeed, in situations where on the one hand a statement of fact is made and insufficient evidence is adduced to prove it, and on the other the journalist is discussing an issue of genuine public interest, verifying whether the journalist has acted professionally and in good faith becomes paramount. The domestic courts concentrated almost exclusively on the question of the truthfulness of the applicant's statements without analyzing whether he had acted diligently in gathering and publishing the information. (...) The failure of the domestic courts to examine in detail the applicant's diligence and, in particular, the steps taken by him to ensure the accuracy of the published information falls short of the standard required by Article 10 of the Convention.*"[64]

158. Failure to determine such criteria in the legislation prevents journalistic debates (which will be limited in advance to facts that have been proved beyond any doubt and are no longer questioned, a practical rarity). Under Article 55a INRA journalists will not be exempted from criminal liability also if their statements are based on a specific source, as the veracity of their statements is the only ground for exemption from liability under Article 55a INRA. Relying on a certain source, journalists will bear the risk that the information derived from it might prove to be untrue. In order to prevent it, journalists will understandably avoid any statements about any possible responsibility of the Polish Nation or the Polish State for World War II crimes and atrocities, as the information derived from their historical source might prove to be untrue upon disclosure of new facts or additional research.

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63 Judgment issued by the ECHR on July 5, 2016, no. 26115/10, LEX No. 2384186.

64 Judgment issued by the ECHR on January 13, 2015, no. 34447/05, LEX No. 1583335.

159. There is no doubt that the current version of Article 55a INRA excessively restricts the freedom of expression under Article 54 (1) of the Polish Constitution. This fact, along with the unspecificity of the criminal penalty stipulated in Article 55a INRA, proves that it is unconstitutional.

VII. ARTICLE 55B IN CONJUNCTION WITH ARTICLE 55A INRA IS INCOMPATIBLE WITH ARTICLES 2 AND 42 OF THE POLISH CONSTITUTION

7.1. The presidential application also covers review of article 55b inra for compatibility with the standards laid down in articles 2 and 42 of the constitution

160. In his application, the Polish President was right to note that:

> *"Article 55b INRA lays down an unlimited rule of protection criminalizing those who commit the offense specified in Article 55a INRA, regardless of their citizenship and the laws in force at the place where the act was committed. This fact should be considered in reviewing Article 55a INRA for compatibility with the above-cited requirements of Article 42 (l) of the Constitution ... Consequently, anyone who commits the act defined in Article 55a of the INRA abroad, however unintentionally, may be prosecuted by the Republic of Poland, regardless of the legality of the act under the law of the country in which it was committed."*[65]

161. While the Presidential Application does not specifically mention Article 55b INRA, in conjunction with Article 55a INRA, as the one to be reviewed for compatibility with the Constitution, we must agree with the Attorney General that, in accordance with the principle *falsa demonstratio non nocet,* Article 55b should also be deemed to be on review, as such an intention is clear from the grounds for the Presidential Application.[66]

7.2. Article 55b in conjunction with article 55a inra does not meet the standards for the specificity of laws and for proper legislation (article 2 of the polish constitution) or the specificity of criminal penalties (article 42 of the polish constitution)

162. In the opinion of the IAJLJ, Article 55b INRA, read together with Article 55a INRA, proves incompatible with Articles 2 and 42 of the Polish Constitution, since it violates the standards for the specificity of laws and criminal penalties, as well as for decent legislation.

163. This conclusion can be drawn from the very structure of Article 55b INRA which contains no autonomous norm of criminal law. Instead, it expands Article 55a INRA to include its applicability to acts committed outside the Republic of Poland, in countries that do not

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65 The Presidential Application, p. 9.

66 Cf. Attorney General's Position Statement, p. 7, 42-43, and the relevant case law of the Constitutional Court therein cited.

criminalize the acts defined in Article 55a INRA. Thus, the material scope of the criminal law norm inferred from Article 55b INRA is the same as that inferred from Article 55a INRA.

164. It is clear, then, that the Polish President's objections that Article 55a INRA is incompatible with Articles 2 and 42 of the Polish Constitution due to failure to meet the standards for the specificity of laws (criminal penalties, in particular) and decent legislation pertain also to Article 55b INRA. Therefore, the comments and conclusions presented in Section III hereof apply also to Article 55b INRA.

7.3. Article 55b in conjunction with article 55a inra does not meet the proportionality standard (article 2 of the polish constitution and article 31 (3) of the polish constitution)

165. The IAJLJ agrees with the Attorney General that, to the extent that it provides for criminal liability under the rules laid down in Article 55a INRA in relation to Polish citizens and foreign nationals, regardless of the laws applicable at the place where the offense was committed, Article 55b in conjunction with Article 55a INRA is incompatible with Article 2 of the Polish Constitution because it violates the rule of proportionality – i.e. of the reasonable relationship between the proposed legislative objective and the normative measure with which to achieve it.[67] However, since Article 55b in conjunction with Article 55a INRA also restricts constitutional freedoms and rights (in this case, the freedom of expression of the persons to whom it applies), the regulation at issue is also incompatible with Article 31 (3) of the Polish Constitution.

166. The Attorney General has indicated that the necessity to criminalize the acts referred to in Article 55a INRA is justified by the "*apparent ineffectiveness of former remedies*" and the need to express "*public condemnation of the offender, not counterbalanced by any other remedies, including civil ones.*"[68]

167. However, this view seems completely at odds with the reasoning presented in the same brief, where the Attorney General has rightly indicated that:

> "*the criminalization of the conduct described in Article 55a Sections 1 and 2 INRA is not the only legal remedy. The same amendment added Chapter 6c entitled "Protection of the good name of the Republic of Poland and the Polish Nation." These provisions broadened the application of norms relating to the protection of personal rights…* ***As for acts amounting to the offenses specified in Article 55a Sections 1 and 2 INRA, they are successfully protected under civil law currently in force, in Poland and abroad … In this context, there might be doubts as to the legal necessity to resort to criminal law*** *in relation to acts committed abroad (the President does not question the need for criminalization in the Republic of Poland).* ***If criminal and civil remedies are introduced simultaneously, legislators are***

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67 Cf. Attorney General's Position Statement, pp. 48-54.

68 *Ibid*, pp. 39-40.

unable to prove that civil remedies are ineffective. *Civil remedies, as determined in the amending act, have not had time to take effect, and it is therefore impossible to judge whether or not they can achieve the effects contemplated in the legislation.*" [Emphasis added].[69]

168. In the opinion of the Attorney General, who *lege non distinguente* refers both to Articles 55b and 55a of the amended INRA, the legislative intent can be achieved by civil remedies, especially since the Amending INRA has facilitated their application. Neither the Sejm nor any other participant has proved that these remedies are ineffective or insufficient to ensure the adequate protection of the good name of the Polish State and the Polish Nation.

169. On the other hand, apart from introducing civil as well as criminal penalties for the same offense, the regulation set forth in Articles 55a and 55b INRA is ineffective as the offense defined in Article 55a INRA does not fulfill the dual criminality requirement.

170. The authors of this Brief have compared the criminal law systems of eleven countries, where the good name of Poland and Poles was tarnished in recent years by phrases such as "*Polish extermination camps.*" These countries include the Czech Republic, Spain, Israel, Canada, Germany, Russia, Slovakia, the United States, Ukraine, the United Kingdom and Italy. Our analysis has clearly shown that Article 55a INRA in conjunction with Article 55b could not be enforced if the acts criminalized by these Articles were committed in any of these countries.

171. The results of our analysis are presented in the table below.

		GER	ISR	ITA	ESP	RUS	CZE	SVK	GBR	CAN	UKR	USA	Σ
1	Abuse of the freedom of expression — criminal liability, in general	+	+	+	+	+	+	+	+	+	+	–	10
2	Hate speech: insulting members of a certain group (race, nationality, religion, etc.)	+	+	+	+	+	+	+	+	+	–	–	9
3	Insulting one's own /foreign country or symbols/institutions of state	+	+	+	+	–	–	–	–	–	–	–	4
4	Insulting the Polish Nation by phrases such as "Polish death camps"	–	–	–	–	–	–	–	–	–	–	–	0

Table 1 Criminal liability for abuse of the freedom of expression (selected countries)

172. Although some of the analyzed countries do have laws in place that criminalize abuses of the freedom of expression, the criminal liability involved is interpreted very narrowly in their statutory law and still more narrowly in their case law. Typically, it applies only to relations between private persons, not unlike criminal liability for defamation under Polish law. In practice, however, prosecuting the offender abroad under Article 55a in conjunction with Article

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69 *Ibid*, pp. 48-49.

55b INRA will be impossible. The reason for this is that either certain countries (such as the United States) do not prosecute individuals for abusing the freedom of expression, or they make prosecution conditional (as with defamation under Article 212 of the Polish Penal Code) upon the filing of a request for prosecution by the aggrieved party (e.g. Italy or Russia).

173. Some of these countries criminalize exclusively statements which qualify as "hate speech" or "hate propaganda" and involve conduct aimed at humiliating a given person on account of his or her race, religion, etc. (e.g. Canada or the United Kingdom).

174. Some countries (e.g. Germany, Israel or Spain) provide for special liability for insulting symbols of state or the Head of State or the State as such, as do Articles 133, 135 § 5, 136 § 3-4 and 137 of the Polish Penal Code. In such cases, however, the grounds for liability are also interpreted strictly.

175. It should be stressed that Article 55a INRA criminalizes statements that are actually offensive to the Polish Nation or the Polish State. As such, it pertains to statements that can be classified as either true or false. Therefore, Article 55a INRA cannot be likened to the above-mentioned instances of criminalization of insults to state of symbols, constitutional authorities or the state itself (which are not classifiable as true or false).

176. However, even if we leave these important differences aside, the chances of starting criminal proceedings in jurisdictions where it is theoretically possible to prosecute, for example, a statement offensive to a foreign country (Poland), not to mention obtaining a conviction, would be minimal.

177. ***First***, criminal liability in the analyzed jurisdictions involves elements that are difficult to prove in practice — e.g. the offender must act with particular intent, such as humiliation or hatred (e.g. the Czech Republic, Canada, Italy and the United Kingdom), or the statement must pose an objective threat of certain harmful consequences, such as social unrest, acts of violence, etc. (e.g. the Czech Republic or Germany).

178. ***Second***, if anything, the prosecution of an insult to a specific community (such as a nation or a state), usually requires the discretionary action of a prosecutor. As it is, prosecutors in most of these countries tend to act on the assumption that it is, generally, not their task to set the limits for the freedom of expression. In 2013 in Germany, for example, only 8 of 10 cases involving actions offensive toward state symbols and emblems ended in convictions (which confirms that the prosecutors launched investigations only if they had a very strong case). In all litigations the courts resorted to mere fines. In the same period, the courts decided a total of only 9 criminal cases regarding insults to public figures, constitutional state authorities or

government representatives, or actions offensive toward symbols of foreign countries. However, there was no conviction in the period under discussion.[70]

179. Particularly noteworthy is the judgment in *Schwarz v. Rot-Senf* (case no. 1 BvR 1565/05). The German court convicted a neo-Nazi charged with insulting the German State and flag, levying a fine of 90 times a daily fine of 20 euros each, i.e. a total of 1,800 euros. However, the German Constitutional Court (*Bundesverfassungsgericht*) contested that judgment on the grounds that it amounted to an unlawful restriction of the citizen's right to criticize the authorities.

180. It should be concluded, then, that the remedy chosen to achieve the purpose of the Amending INRA, i.e. to protect the good name of the Polish Nation and the Polish State, which involves introducing criminal liability within the scope set forth in Article 55a in conjunction with Article 55b INRA, is ineffective (if not counterproductive, i.e. tarnishing the good name of the Polish Nation and the Polish State).

181. Prosecuting abroad offenses under Article 55b INRA in conjunction with Article 55a INRA that were committed outside Poland would be ineffective (as such an offense is not criminalized at the place of its commission). Prosecuting them in Poland, on the other hand, would be pointless. It would completely compromise the aim of the INRA Amendment, which is to protect the good name of Poland and Poles. In practice, such protection would be effective only with respect to Poles, i.e. the least inclined group of people to attribute responsibility for Nazi crimes to the Polish Nation or the Polish State "publicly and against the facts." Statistics may serve as a case in point: since the effective date of the Amending INRA, the NRA's prosecutors have not launched a single prosecution, even though the Institute of National Remembrance has received over 70 criminal offense notifications, as noted in Article 55a INRA (possibly in conjunction with Article 55b).[71]

182. Consequently, we must agree with the Attorney General who, in his response to the Presidential Application, stated that

> "*In deciding to criminalize the acts defined in Article 55a Sections I and 2 INRA with respect to criminal offenses committed abroad, regardless of the law applicable at the place where such offenses were committed,* ***the drafters of the legislation did not find the right balance between the need to protect the legal interest and the adequacy, effectiveness and repressiveness of the legal norm. The result is a de facto dysfunctional regulation likely to produce opposite results*** *and,*

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70 See *Statistisches Bundesamt, Rechtspflege. Strafverfolgung* (2013), https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/Strafverfolgung2100300137004.pdf?__blob=publicationFile.

71 Cf. Agata Łukaszewicz, *IPN: prokuratorzy nie chcą wszczynać śledztw* (*NRA: Prosecutors Refuse to Launch Investigations*), "Rzeczpospolita," May 18, 2018; the article is available at http://www.rp.pl/Prawo-karne/305179891-IPN-prokuratorzy-nie-chca-wszczynac-sledztw-ws-szkalowania-narodu-polskiego.html.

consequently, undermine the authority of the Polish State as being incapable of enforcing its own statutory law." [Emphasis added].[72]

VIII. MEMORY LAWS AND FREEDOM OF SPEECH RESTRICTIONS – A COMPARATIVE LAW AND INTERNATIONAL LAW PERSPECTIVE

8.1. Introductory Notes

183. Article 55a INRA, as introduced by the subject INRA Amendment, sets forth a new crime which involves publicly attributing, against the facts, the responsibility or co-responsibility for certain crimes to the Polish Nation or Polish State or otherwise grossly depreciating the responsibility of the actual perpetrators of such crimes; the crimes include Third Reich's Nazi crimes defined in Article 6 of the Charter of the International Military Tribunal or other offences that constitute crimes against peace or humanity or war crimes.[73] This new provision introduced by the Polish legislature is an example of what international human rights law and literature call *memory laws* (Polish *prawa pamięci*, French *loi mémorielle*).

184. Generally, memory laws are legal instruments and solutions relating to historical facts or events and their interpretations.[74] Such regulations typically take two forms: (i) a legally established orthodox version of history, which however is not accompanied by any prohibitions or sanctions, or (ii) a legal prohibition of specific interpretations of history, a breach of which is punishable. The most common form of the latter is a legal prohibition of denial, including primarily Holocaust denial. But memory laws are also said to include prohibition of tarnishing the good name of a nation or state in the context of statements on historical topics strictly related to the history of the given nation or state.

185. Countries make different uses of memory laws to provide various kinds and ranges of protection for the historical truth about their own past. In Poland, before the amendment to the subject regulations, these matters were directly governed by Article 55 INRA, which read that whoever publicly and against the facts denies crimes committed against Polish nationals or Polish citizens of any other nationality between September 1, 1939 and December 31, 1989, being Nazi crimes, Communist crimes, other crimes against peace, humanity or war crimes, shall be punishable by a fine or imprisonment of up to three years while the sentence given against him shall be published. There are abundant laws on historical references in France, but memory laws can be noted to exist actually in most of the European countries.[75] As such, memory laws are not something new or exceptional, whether in terms of the previous efforts of

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72 Cf. Attorney General's Position Statement, p. 54.

73 Attached to the International Agreement for the trial and punishment of major war criminals of the European Axis, signed in London on 8 August 1945.

74 For more on definitional aspects of the notion of memory laws, see E. Heinze, *Beyond 'Memory Laws': Towards a General Theory of Law and Historical Discourse* [in:] *Law and Memory. Towards Legal Governance of History*, red. U. Belavusau, A. Gliszczyńska-Grabias, Cambridge University Press 2017.

75 *Ibid.*

Polish lawmakers or in the context of comparative law. The key issue is, however, whether any particular memory law regulation is in compliance with national or international law (of which more later).

8.2. Admissibility of freedom of speech restrictions in the context of laws addressing statements about history – case law of international human rights institutions

186. The admissible legal measures to restrict freedom of expression in the context of statements[76] about history have found their broadest construal in the works of the Council of Europe, an international organization established mainly in response to the Second World War events and playing a preeminent role as a "*source of contemporary political and legal standards for our continent*".[77] The Council of Europe has shaped the European standards of human rights and freedoms, including those relating to freedom of expression, which result above all from the case law of the European Court of Human Rights based on the Convention for the Protection of Human Rights and Fundamental Freedoms, the core treaty underlying Council of Europe's human rights system. This case law also delineates the scope of admissible restrictions on freedom of speech in the context of memory laws and statements about history.

187. In its decisions and judgments, the ECtHR has through the decades, and unwaveringly, championed the fundamental role that freedom of expression has for individuals, the civil society and the democratic rule of law.[78] The ECtHR's standard is that freedom of expression is applicable not only to information or content that is generally acceptable but must also apply to information that offends, disturbs or even shocks.[79] The ECtHR is visibly critical towards laws which impose criminal liability for any statements (other than those which incite to hatred and as such are examples of hate speech), including especially statements related to important social topics in public discussion or statements made by journalists. The ECtHR usually considers these laws to be contrary to the ECHR although it has never held that the application of criminal law measures to speech is per se a breach of Article 10 ECHR (freedom of expression).[80] The ECtHR has paid special attention to what it calls a chilling (or, in other words, dissuasive) effect that may arise due to the mere possibility of being held criminally liable for one's speech.[81] It notes the threat of a situation where someone will be afraid to even

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76 Terms such as "statement", "speech" or "expression" should be understood broadly to include also such forms of exercise of the freedom of expression as use of specific symbols.

77 I.C. Kamiński, *Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka. Analiza krytyczna*, Warsaw 2010, p. 21.

78 ECHR Judgment of 7 December 1976 in *Handyside vs. the United Kingdom,* LEX No. 80798.

79 The first time this position was presented was in *Lingens v. Austria,* 9815/82 (see. judgment of 16 January 1987), application no. 9815/82., LEX No. 1734944.

80 See ECHR judgements of 2 November 2006 in *Standard Verlags GmbH and Krawagna-Pfeifer v. Austria*, application no. 19710/02; of 29 November 2005 in *Rodrigues v. Portugal,* application no. 75088/01, LEX No. 275205; of 18 April 2006 in *Roseiro Bento v. Portugal*, application no. 29288/02, LEX No. 255053.

81 Grand Chamber's judgment of 17 December 2004 in *Cumpănă and Mazăre v. Romania*, application no. 33348/96, RJD 2004-XI, LEX No. 403575.

join the public debate because this may expose the person to risk of criminal liability.[82] For example, the ECtHR held in *Kaperzyński v. Poland, "The chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident. (...),* and it works to the detriment of whole societies."[83]

188. However, even if the laws of a country do not provide for criminal sanctions against how freedom of speech is exercised, e.g. in the context of defamation, that freedom may still be in danger of being curbed by disproportionate means. This can happen when, for example, a journalist loses a civil defamation suit and is ordered to pay very high monetary damages. In such cases, the very amount of damages award may be held by the Strasbourg-based court to be contrary to the principle of proportionality.[84]

189. A similar approach is taken by the UN Human Rights Committee, which recommends that criminal measures should not be used for defamation to the broadest extent possible, including because of the chilling effect such measures have on the public debate.[85]

190. The line of authority and case practice (of both the ECtHR and UN HRC) described above permits certain important exceptions, which are strictly related to the subject-matter of this Opinion. Importantly, the ECtHR has never had any doubt that the so-called Holocaust deniers should not be afforded protection under Article 10 ECHR. So far, the ECtHR has dismissed as groundless each and every complaint by Holocaust deniers alleging curtailment of their freedom of expression, with such dismissals very often expressly relying on Article 17 ECHR (prohibition of abusing rights afforded by the ECHR for a purpose that runs contrary to the very essence of those rights). The ECtHR gave the fullest exposition of its position on the matter when hearing the *Garaudy v. France* case, which will be more particularly described further below.

191. However, importantly in the context of the compliance of Article 55a INRA with international human rights standards, the ECtHR's practice includes cases where it has a different approach (than in Holocaust denial cases) to other forms in which states curtail one's freedom of expression in the context of historical statements. The two most representative decisions in this regard are the ECtHR's judgment in *Lehideux and Isorni v. France* concerning statements praising Marshal Pétain[86], and its Grand Chamber's judgment of 2015 in *Perinçek v.*

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82 Dirk Voorhoof, The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society, EUI Working Paper RSCAS 2014/12, p.4.

83 ECHR, 3 April 2012, application no. 43206/07, *Kaperzyński v. Poland.*

84 See the judgments of 3 December 2013 in *Ungváry and Irodalom KfT v. Hungary*, application no. 64520/10, LEX No. 1396191; of 13 July 1995 in *Tolstoy Miroslavsky v. United Kingdom*, application no. 18139/91, A316-B, LEX No. 80421.

85 See, e.g., HRC decisions in case no. 909/2000, Kankanamge v. Sri Lanka, Views adopted on 27 July 2004, and concluding observations on Italy (CCPR/C/ITA/CO/5), concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2).

86 Judgment of 23 September 1998 in *Lehideux and Isorni v. France* (55/1997/839/1045), Legalis No. 135289.

Switzerland concerning criminalization of the denial of the Armenian genocide.[87] In both cases, the ECtHR ruled in favor of the applicants and held that state authorities acted in contravention of the ECHR by restricting the applicants' right to freedom of expression on historical topics. In the judgments, the ECtHR took the position that statements concerning historical facts or events or statements that assess historical figures should enjoy extensive protection if it cannot be clearly demonstrated that their aim or effect was, as is the case with Holocaust denials, to engage in hatred-based denial of historical truth that has been established beyond any doubt.

192. In the first of these two cases, the ECtHR held that -- other than negation or revision of clearly established historical facts, such as the Holocaust -- a historical debate enjoys the protection of Article 10 EHRC, even if it is about the most difficult events of the past. ***Lehideux and Isorni v France*** was concerned with the applicants' press advertisement in *Le Monde* in which they praised Marshal Pétain's accomplishments[88]. The advertisement began with the words "*People of France, you have short memories if you have forgotten...*". These particular words were then cited throughout the text and followed by a series of assertions describing Pétain's life in clearly positive or even laudatory terms. Omitted from that advertisement was information about Pétain's collaboration with the Nazi regime, among others. The purpose of the text was to encourage its readers to support associations for the Defense of Marshal Pétain's memory, which at the time were trying to rehabilitee him, reopen his 1945 trial and reverse the judgment that sentenced him to death and led to the forfeiture of his civic rights. The advertisement drew protests from associations of former members of the French resistance and led to its authors being convicted for publicly defending the war crimes and collaboration with the Nazis.

193. During the proceedings, the French Government asked the ECtHR to dismiss the complaint as inadmissible, arguing that the press publication in issue infringed the very spirit of the ECHR and was also a deliberate attempt at historical misrepresentation. The applicants argued on their part that the advertisement did in no way praise the Nazi crime and its sole aim was to contribute to a deeper reflection on the difficult period in the history of France, and to reopen Marshal Pétain's case and rehabilitate him.

194. To examine the case on its merits, the ECtHR had to answer the question whether the intervention of the French authorities was necessary in a democratic society. The ECtHR considered that the applicants did not act on their own behalf but expressed themselves on behalf of certain associations whose names were mentioned in their advertisement. These associations were legally constituted in France, operated in accordance with the law and, as was generally known, their object was to rehabilitate Marshal Pétain. Therefore, it should not

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87 Judgment of 15 October 2015 in *Perinçek v. Switzerland* (27510/08), LEX No. 1402705.

88 Analysis of the case of *Lehideux and Isorni v. France* based on: A. Gliszczyńska-Grabias, Przeciwdziałanie antysemityzmowi. Instrumenty prawa międzynarodowego, Warsaw 2014, s. 524-529.

come as any surprise that the advertisement portrays his figure in a favorable light. At the same time, the ECtHR noted that the French court's judgment convicting the applicants was mainly based on the fact that the advertisement's authors had not distanced themselves from or in any way criticized Marshal Pétain's darkest moments in life relating to the persecution of Jews, and especially to his signing, in October 1940, of the so-called Jewish laws which led to the deportation to the German Nazi death camps of tens of thousands of Jews in France. Although the applicants were not deniers, their deliberate failure to mention this fact had to be considered unacceptable because of the victims of those crimes.

195. The ECtHR noted that while any justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10, in the case at hand the applicants stated their disapproval of Nazis, of "Nazi atrocities and persecutions", and of "German omnipotence and barbarism", even though, admittedly, they failed to expressly indicate that Philippe Pétain was part of those acts. In particular, they omitted to mention his responsibility for the persecution and deportation the French Jews to the death camps. The facts they had chosen to conceal were not trivial; on the contrary, the related directly to the events of the Holocaust. The gravity of this crime increases the gravity of any attempt to downplay or draw a veil over it. Still, although it found the applicants' conduct morally reprehensible, the ECtHR held that this conduct had to be assessed comprehensively, in the light of all other circumstances of the case.

196. As noted by the ECtHR, the general principle should be that each member state of the Council of Europe should allow an open public debate about even the most controversial subjects concerning their history. Any derogations from this principle must satisfy the tests of necessity and proportionality. Moreover, the events referred to in the advertisement had occurred more than forty years before, which means that they can be interpreted differently, and with less severity, than what would be justified ten or twenty years previously. Finally, the content of the advertisement in issue corresponded directly to the object of the associations on whose behalf it was made.

197. For these reasons, the ECtHR considered the applicants' conviction for the offence of making a public defense of the crime of collaboration as disproportionate, unnecessary and without justification in a democratic society. In its Grand Chamber's judgment, the ECtHR held that there had been a breach of the applicant's right under Article 10 ECHR.

198. The ECtHR's Grand Chamber judgment in *Perinçek v. Switzerland* is another prominent, and extensively discussed, ruling to address the admissibility and scope of memory laws in the member states of the Council of Europe. The complaint concerned Doğu Perinçek, a Turkish political activist. After examining the case, the ECtHR held that Mr. Perinçek's conviction for his denial of the Armenian genocide in 1915 was in breach of Article 10 ECHR. Dogu Perinçek was convicted under the provision of the Swiss Criminal Code which prohibits publicly denying or condoning crimes against humanity or genocide, such as the crime against the Armenian people. Perinçek was indicted and convicted following his public comments at number of meetings and conferences in Switzerland when he denied that the crime committed against

the Armenians by the Ottoman Empire was in the nature of a genocide, described the idea of it as an "international lie".

199. The ECtHR held that Switzerland violated the ECHR and the applicant's right to freedom of expressions, offering the following main arguments for its judgment:

(1) the applicant's statements related to matters of public importance and did not constitute incitement to hatred or intolerance on ethnic or national grounds;

(2) the applicant's statements could not be interpreted as violating the dignity of the Armenian people in a way that would justify a criminal sanction;

(3) there is no obligation under international law to penalize statements such as those of the applicant's;

(4) it seems that the Swiss courts restricted the applicant's freedom of expression for the sole reason that his opinions differed from those that were generally acceptable in Switzerland.

200. The Grand Chamber's *Perincek* decision will be discussed in more detail further below due to its relevance and the fact that it is precisely this case that was referred to by proponents of the INRA Amendment in their explanatory memorandum.

201. It is also instructive to look at another aspect of the ECtHR's approach to memory laws and the legal regulations designed to prevent certain defective codes of memory and certain historical opinions from entering the public domain. The issue is about the kind of legal regulations which the so-called ex-Soviet bloc countries rely on to prevent any falsification or loss of memory of Stalinist-or communist-era crimes. The ECtHR's stance in these cases is markedly different from its approach to Holocaust denial motivated by anti-Semitic prejudice or hatred, and it generally considers that criminal measures against statements or conduct referring to Stalinist or communist past are a breach of the Strasbourg freedom of expression standard. One example of this is the ECtHR's judgment in *Vajnai v. Hungary.*[89] The applicant in the case was the then Vice-President of the Workers' Party, who complained about interference with his right to freedom of expression, among others. In 2004, Mr. Vajnai was convicted for violating the law prohibiting the public use of totalitarian symbols, which he did by wearing a red start on his jacket during a lawful demonstration. The Hungarian authorities argued that they had to avert a present danger that the communist dictatorship could be restored. However, the ECtHR held that the applicant's right had been violated and that the authorities' intervention, 20 years after the fall of communism in Hungary, was not necessary in a democratic society, because in his opinion there was no real danger of that regime being restored. The state's power of discretion was kept in tighter check, also because the case concerned a politician from a legal political party. The ECtHR admitted it was aware of the fact

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89 Judgment of 8 July 2008, application no. 33629/06, *Vajnai v. Hungary,* LEX No. 411923.

that the red star symbol is associated with mass violations of human rights during the communist rule in Hungary. Still, the ECtHR considered that it would be unacceptably onerous, and against the Strasburg freedom of expression standards, to allow an absolute ban on public displays of symbols such as the red star, where there is no link between the prohibition and the propagation of a totalitarian system, and when the prohibition affects a member of a political party with no "totalitarian ambitions".

202. An important aspect of the ECtHR's judgment in the *Vajnai* case is the danger it saw in the direct precedence of the dictates of public and social feeling over binding legal regulations. The court held: "*The Court is of course aware that the systematic terror applied to consolidate communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe. It accepts that the display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness among past victims and their relatives, who may rightly find such displays disrespectful. It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression (...).*"[90]

203. Such a *dictum* clearly shows that the ECtHR is firmly in favor of an extensive construal of freedom of expression relating to statements and conduct with historical connotations, except where they directly involve the Holocaust or the German Nazi past in combination with hate-driven or anti-Semitic motivations or incitement to hatred. This applies even to those references to the past which have special importance to a state or nation and can touch on extremely painful experiences from its past. Use of the "Polish concentration camps" language could likely be held by the ECtHR to be an example of precisely the historical connotations which are particularly painful for the Polish nation. However, that would not in any way be sufficient for the ECtHR to consider that Article 55a INRA is in compliance with the Strasbourg standard of protection.

204. Another source of crucial guidance on the establishment of memory laws and the prevention of defective memory codes, including through the use of legal instruments, is the UN-based universal human rights protection system. A particularly important guideline to be followed by state actors, which in this case include the states that are parties to the International Covenant on Civil and Political Rights ("Covenant")[91], is a fragment of General Comment No. 34 issued in 2011 by the UN Human Rights Committee ("HRC")[92]. In the context of permissible restrictions on freedom of expression and research, it states that laws which penalize the expression of opinions about historical events and facts are incompatible with the provisions of the Covenant relating to the respect for freedom of opinion and expression. The Covenant does not permit any general prohibition in domestic laws of expressions of an erroneous

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90 Translation taken from A. Gliszczyńska-Grabias, Przeciwdziałanie antysemityzmowi. Instrumenty..., *op.cit.*, pp. 548-549.

91 The International Covenant on Civil and Political Rights, adopted and opened for signature in New York on 19 December 1966 r. (*Journal of Laws* of 1977,No. 38, item 167, att.)

92 General Comment no. 34 of 21 July 2011, CCPR/C/GC/34.

opinion or an incorrect interpretation of past events. On the other hand, the Covenant does permit or even prescribes restrictions on statements which espouse racial, national or religious hatred or incite any discrimination on these grounds. Accordingly, where defective codes of memory have such behavior as their underlying motive, relevant restrictions could possibly be considered to be compatible with the Covenant. That approach is reflected in the HRC decision in *Faurisson v. France,* a case of the criminalization of denial, which will be discussed further below.

205. In conclusion, let us quote from I.C. Kamiński: "the Strasbourg standard seems to be underpinned by the methodological assumption that discussions about history are associated with uncertainty and that, therefore, it is necessary to tolerate minority views even if they are shocking or extravagant. The Court (or the national courts) should not step in to arbitrate such cases."[93]

206. The ECtHR has held on numerous occasions that it is extremely difficult to reach certainty and consensus in matters of history which are controversial and continue to be hotly debated in course of historical research[94] and that therefore legal measures should not, in its opinion, be used to interfere in a confrontation between opposing views and opinions on historical topics.[95] According to the ECtHR, it is an integral part of freedom of expression to seek historical truth, even if the resulting conclusions can hurt national pride or the belief of a nation's or state's positive role in history.[96]

8.3. Criminalization of denial as a special case of admissible freedom of speech restrictions – case law of international human rights institutions

207. While firmly holding that criminal measures against statements about history are incompatible with freedom of expression standards established in international human rights law, both the ECtHR and the HRC endorse the exception to that rule. This is criminalization of denial, but denial basically narrowed down to public statements of the Auschwitz lie only.

208. The need to ensure a more complete criminal law response to denial was invoked by the Polish legislature in justifying the subject amendment to the INRA. However, that reasoning is misplaced in two fundamental respects.

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93 Opinion for Ombudsman, p. 13.

94 Judgement of 123 September 2006 in *Monnat v. Switzerland*, application no 73604/01. The applicant was a journalist punished after a TV show programme which was highly critical about the conduct of the Swiss authorities and society during WWII and their attitude towards the Holocaust. Formally, he was punished for lack of objectivity and failure to warn viewers that the programme would present a one-sided view of the Swiss history. The ECHR held that there has been a breach of Article 10 of the Convention. The Court emphasized mainly the interest of the society in receiving various, and often conflicting, historical opinions, the need to ensure freedom of expression, the limited discretion of authorities with respect to issues of general interest, and the seriousness of the topic of the journalistic content and of the underlying historical research.

95 Judgement of 10 February 2009, *Guclu v. Turkey*, application no. 27690/03, LEX No. 479618.

96 *Monnat v. Switzerland.*

209. **Firstly**, penal provisions which made public Holocaust denial statements a crime had already been present in the INR Act before the amendment and continue in force to this day.

210. **Secondly**, the law now before the Constitutional ECtHR cannot be equated to criminal prohibition of the Auschwitz lie as such because these two regulations refer to other phenomena which are differently approached by such institutions as the ECtHR.

211. As said, criminal measures to prohibit denial are the most frequent and widely accepted category of memory laws. In the simplest terms, denial means denying the fact that certain crimes (genocide, war crimes, crimes against humanity) occurred.[97]

212. Anti-denial laws typically also ban certain public interpretations of such crimes, involving approval, gross disparagement, trivialization or banalization. Polish law directly addressed the crime of denial in Article 55 INRA even before the INRA Amendment.

213. The nature of such regulations can be illustrated by Czech criminal law, which reads that "whoever publicly denies, questions, approves, or attempts to justify Nazi, Communist or any other genocide or Nazi, Communist or any other crimes against humanity or war crimes or crimes against peace shall be punished by imprisonment of no less than six months and no more than three years (Article 405 of the Czech Civil Code)."[98]

214. In Italy, the Parliament amended the Criminal Code in June 2016 by adding a new article which penalizes disseminating, and instigating or inciting the dissemination of, the "Auschwitz lie" or the denial of other crimes of genocide, crimes against humanity or war crimes. [99]

215. The penalization of denial was taken up at the EU level in 2008 by the Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law. Article 1 of the Decision lists acts which the Member States must ensure are punishable if committed intentionally.[100]

216. While "denial" covers an array of techniques by which historical facts are denied, it typically refers to denying the Holocaust. Colloquially, the "Auschwitz lie" means mainly denying the

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97 Emanuela Fronza, *Memory and Punishment Historical Denialism, Free Speech and the Limits of Criminal Law*, the Hague 2018, pp. 4-9.

98 Penal Code, Act No. 40/2009 Coll. of January 8, 2009.

99 Law no. 115 of June 16, 2016.

100 These acts include the following forms of denial: publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal ECtHR, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group; and publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

Holocaust committed by Nazi Germany during World War II.[101] Although such denial, disparagement, trivialization or other distortion of the truth about German Nazi crimes affects all of us, and none more so than the victims of German genocide and their relatives, particularly but not just Jews, the "Auschwitz lie" most often refers to Jews and is a form of anti-Semitism.[102]

217. It is in this context that "Auschwitz lie" cases have been considered by major international human rights institutions, such as the HRC and the ECtHR. The ECtHR in particular has heard a host of such applications. In some of those cases, the ECtHR has found state interference with Article 10 ECHR rights to be "necessary in a democratic society".[103] In other cases, the ECtHR relied on Article 17 (which prohibits the use of rights to undermine the system for the protection of human rights) to find that applicants' complaints are incompatible *ratione materiae* with the provisions of the ECHR[104]. However, the two crucial precedents on the criminalization of the Auschwitz lie (ECtHR's decision in *Garaudy v. France* and HRC's decision in *Faurisson v. France*) emphasize the link between the Holocaust denying content and the anti-Semitic motivations of the deniers and treat public dissemination of the Auschwitz lie as an example of anti-Semitic statements or conduct.

218. In Garaudy v. France, the ECtHR made it clear that:

> "*Disputing the existence of crimes against humanity was (...) one of the most severe forms of racial defamation and of incitement to hatred of Jews. The denial or rewriting of this type of historical fact undermined the values on which the fight against racism and anti-Semitism was based and constituted a serious threat to public order. It was incompatible with democracy and human rights (...).*"

219. The ECtHR reached a similar decision after hearing the complaint filed by Robert Faurisson, a Holocaust denier. The applicant alleged that the French court had hampered his freedom of expression by convicting him on Holocaust denial charges.[105] The ECtHR decided that the French court had not infringed the applicant's freedom of expression, as his actions were motivated by anti-Semitism and resulted from long-term involvement in the Holocaust denial movement. This aspect of the case law concerning the criminalization of public Holocaust denial, which links the latter to anti-Semitic motives and feelings, should be seen as one of the key elements distinguishing the criminalization of Holocaust denial from that of the statements defined in Article 55a INRA.

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101 D.E. Lipstadt, *Denying the Holocaust. The Growing Assault on Truth and Memory*, New York 1994.

102 *Ibid.*

103 Decision on inadmissibility, 1 February 2000, *Schimanek v. Austria*, application no. 32307/96, LEX No.520200; Decision on inadmissibility, 7 June 2011, *Gollnisch v. France*, application no. 48135/08, LEX No.846452.

104 Decision on inadmissibility, 24 June 2003, *Garaudy v. France,* application no. 65831/01, LEX No. 285773.

105 Decision issued on November 8, 1996 in re complaint no. 550/1993 *Faurisson v. France*.

220. To justify the need for amendments to the existing INRA provisions protecting historical truth, the drafters of the INRA Amendment relied on excerpts from the judgment of the Grand Chamber in *Perincek v. Switzerland*. The Grand Chamber's judgment in that case is crucial to an assessment of whether the legal solutions adopted in the Polish legislation are permissible and compatible with the European ECHR. However, our analysis reveals that these solutions would most likely be rejected by the ECtHR due to contravening the Strasbourg standard concerning the freedoms of expression and academic research. For this reason, we suggest analyzing in-depth the judgment in the Perincek case in light of the criticism of the INRA Amendment under discussion, having regard to the general trend of the ECtHR's decisions in freedom of expression cases.

221. In all Holocaust denial cases examined by the ECtHR, the applicants were charged with denying or belittling, not with attributing responsibility for the Holocaust to countries other than those guilty of Holocaust crimes (there is a high risk that the ECtHR would see no analogy between the legal grounds for these cases and Article 55a INRA). According to the ECtHR's summary, all cases belonging to this category "*equally concerned statements that variously denied the existence of the gas chambers; described them as a "sham" and the Holocaust as a "myth"; called their depiction the "Shoa business," "mystifications for political ends" or "propaganda"; or called into question the number of dead and in ambiguous terms expressed the view that the gas chambers were a matter for the historians*" (Perincek, para 210). It is clear, then, that none of the cases where the ECtHR found the criminalization of Holocaust denial compatible with the ECHR involved attributing responsibility or joint responsibility to another country.

222. Moreover, in describing cases involving criminalization of the Holocaust denial, the ECtHR referred to Holocaust denial statements as "*almost invariably emanating from persons professing Nazi-like views or linked with Nazi-inspired movements*" (Perincek, para 209). This element is very unlikely to be applicable to persons expressing the views defined in Article 55a INRA. This proves that the ECtHR, which is in favor of criminalizing Holocaust denial, would most likely refuse to give the same treatment to cases affected by Article 55a INRA. In legal bans on Holocaust denial, the ECtHR sees a tool with which to ward off the threat of further dissemination of anti-Semitism and prevent the recurrence of the Holocaust, not a remedy for statements tarnishing the good name of a given state or nation.

223. It should be added that, in referring to the criminalization of Holocaust denial, the ECtHR made it crystal clear that

> "*the justification for making its denial a criminal offense lies not so much in that it is a clearly established historical fact but in that (...) its denial, even if dressed up as impartial historical research, must invariably be seen as connoting an antidemocratic ideology and anti-Semitism. Holocaust denial is thus doubly dangerous, especially in States which have experienced the Nazi horrors, and which may be regarded as*

having a special moral responsibility to distance themselves from the mass atrocities (...) by outlawing their denial." (Perincek, para 243).

224. Clearly, such *ratio legis* for legislation criminalizing Holocaust denial, which, according to the ECtHR, warrants the opinion that it is compatible with the ECHR, cannot apply to Article 55a INRA. The ECHRs key argument is that it is the country **guilty** of the Holocaust which is responsible for punishing Holocaust deniers. A country that **is not guilty** of the Holocaust is under no obligation to punish those who deny the identity of guilty persons (or countries).

225. Regardless of one's opinion on the ECtHR's interpretation and the logical consistency of Holocaust denial judgments with the ECtHR's case law in other cases involving criminal liability for "defective codes of memory" and for statements on historical issues, it is fair to conclude that the ECtHR will decide that the case law on Holocaust denial does not apply to penalties for the statements defined in Article 55a INRA.

226. It should be recalled that the ECtHR has repeatedly stressed that criminal penalties for statements other than those involving Holocaust denial are unusual and essentially incompatible with Article 10 of the ECHR. The ECtHR has ruled, citing its own case law, that a criminal conviction is a serious sanction, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies. (cf. Perincek, para 273). In this case, the ECtHR has noted that what matters is not so much the severity of the applicant's sentence, but the very fact that Perincek was criminally convicted, "*which is one of the most serious forms of interference with the right to freedom of expression*" (Perincek, para 273).

227. Given the existing ECtHR's case law, it is fair to assume that Article 55a INRA will be subjected to very close scrutiny (if the relevant case is litigated in the ECtHR) and, like other criminal remedies in non-Holocaust denial cases, found inconsistent with Article 10 of the ECHR. That is what the ECtHR did in the case of, for example, Article 261 bis § 4 of the Swiss Penal Code, based on which Perincek was convicted. According to the ECtHR,

> "*Indeed, an interference with the right to freedom of expression that takes the form of a criminal conviction inevitably requires detailed judicial assessment of the specific conduct sought to be punished. In this type of case, it is normally not sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general terms; what is rather required is that it was necessary in the specific circumstances*" (Perincek, para 275).

228. In the Perincek case, the ECtHR decided that no such interference was necessary.

229. Moreover, we quote the key passage, as the ECtHR (summarizing its previous reasoning in that case) states all the main reasons why a criminal sanction is not necessary, because all elements involved could also be applied to hypothetical criminalization under Article 55a INRA.

> "*Taking into account all the elements analyzed above – that the international obligation for Switzerland to criminalize such statements, that the Swiss courts appear to have*

censured the applicant for voicing an opinion that diverged from the established ones in Switzerland, and that the interference took the serious form of applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened tensions or special historical overtones in Switzerland, that the statements cannot be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland, that there is no criminal conviction – the ECtHR concludes that it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case." (Perincek, para 280)

230. This long quotation contains all crucial elements which must be considered in order to determine whether the criminalization of statements (statements and opinions on history) can be regarded as justifying the "necessity" for criminalization as a form of interference with the right under Article 10 of the ECHR. The decisive questions are:

(1) **Does the statement bear on a matter of public interest?** If so, the necessity for criminalization will be very unlikely. Article 55a INRA undoubtedly applies to statements bearing on a matter of public interest;

(2) **Could the statement be treated as a call for hatred or intolerance?** That would strengthen the case for criminalization. However, such interpretation of the statements defined in Article 55a INRA is unlikely;

(3) **Is the context of the statements marked by heightened tensions?** It seems that it is not, given the statements defined in Article 55a INRA;

(4) **Is the context marked by "special historical overtones"?** In an indirect way, such historical overtones might be found in Article 55a INRA (difficult Polish-Jewish relations and history);

(5) **Could the statement described in Article 55a INRA affect the dignity of the persons concerned by it?** Perhaps it could, but then the ECtHR's judgment stresses that such persons should belong to a minority group. That is what makes their position so special and necessitates special protection. As regards Article 55a INRA and the argument that the dignity of Poles might be affected due to attribution of complicity in Nazi crimes, this minority element does not apply;

(6) Is there an international obligation to criminalize all forms of "defective codes of memory"? There is no such obligation with regard to the scope of offenses under Article 55a INRA;

(7) **Is criminalization based on a critical opinion about a statement that was found to divert from the established one?** If so, the ECtHR will deny its necessity. This is true of Article 55a INRA.

(8) **Would interference involve a criminal penalty treated by the ECtHR with particular skepticism?** It would in the case of Article 55a INRA.

231. As this analysis reveals, of the eight elements treated by the ECtHR as relevant to the criminalization of a statement likely to be regarded (for the sake of argument) as similar to the statements defined in Article 55a INRA, only one (4), or possibly two (4 and 5), might be regarded as necessitating criminalization. The other elements clearly indicate that criminalization cannot be deemed compatible with the ECHR.

232. It is also important to indicate the manner in which the ECtHR balanced the values protected by Articles 10 and 8 of the ECHR. With regard to Article 8, the ECtHR decided that it justified protecting "*the identity, and thus the dignity of present-day Armenians*" (*Perincek, para* 156). That said, the ECtHR rejected the argument about the dignity of the victims as such. Presumably, a similar argument might be applied to Article 55a INRA.

233. We doubt whether a similar argument might be applied to the statements defined in Article 55a INRA, i.e. that they seriously affect the dignity of Poles, *construed as an element of their identity*. The main point about Armenians is that the *fact* of genocide is denied in a situation where they are a minority in all countries they inhabit (particularly in Turkey). It is their minority status which has a particular impact on the situation of Armenians. Any person committing the offense criminalized in Article 55a INRA might affect the dignity of many Poles, but it would be difficult to claim that he or she might affect their sense of identity, much less the identity of a minority group.

234. Based on the Perincek case it can be concluded with almost absolute certainty that the ECtHR would find a judgment issued under Article 55 INRA to be in breach of the Strasbourg freedom of expression standards.

8.4. Article 55a INRA – comparative law perspective

235. While various countries have adopted a number of laws classified as memory laws, many of which prohibit acts that offend, insult or deride symbols of state,[106] Article 55a INRA has no equivalent in any other legislation of the Member States of the Council of Europe, the U.S. or Canada.

236. There is only one provision of law, namely Article 301 of the Turkish Penal Code, which might be viewed as similar to Article 55a INRA.

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106 See the Council of Europe on Defamation and Freedom of Expression, H/ATCM (2003) 1; Legal provisions concerning defamation, libel and insult. Brief overview of related legislation in selected European countries, DH-MM (2003)006 rev.

237. In Turkey, any acts offensive to "Turkishness, the Turkish Republic or its state authorities and institutions" can be prosecuted under Article 301 of the Penal Code, enacted in September and remaining in force since June 2015. The Article stipulated that any person committing the offense so defined was liable to imprisonment from 6 months to 3 years.[107] While Article 31 did not refer expressly to any attribution of responsibility to the Turkish nation or State for specific crimes, it was used by the courts to punish persons who publicly referred to the slaughter of Armenians in 1915-1917 as genocide committed by the Ottoman Empire. Once adopted, Article 301 of the Penal Code was used for numerous litigations against prominent writers and journalists, such as the Noble Prize winner Orhan Pamuk, who in an interview for a Swiss newspaper spoke out about Turkey's responsibility for murdering 30,000 Kurds and one million Armenians.[108]

238. Article 301 was later amended due to widespread criticism, e.g. at the United Nations during the Universal Periodic Review, a periodic review of the human rights records of all UN Member States by the HRC (Human Rights Council).[109] The amended version of Article 31 has been in force since May 2008, yet it continues to draw valid criticism from leading international NGOs and the Venice Commission, among others.[110]

239. In the amended version of Article 301 of the Turkish Penal Code, the phrase "Turkishness" was narrowed down to the "Turkish Nation." The drafters also reduced the maximum penalty for the offense specified in Article 301 (from 3 to 2 years). Moreover, the application of Article 301 now requires prior approval of the Minister of Justice. Finally, the drafters of the amended version removed the part of the original provision which stipulated that if a Turkish citizen abroad made offensive remarks about "Turkishness," the maximum penalty would be increased by 1/3.

240. The original and amended Turkish legislation under discussion has also been challenged by the ECtHR. In *Dink v. Turkey,*[111] the ECtHR expressed serious doubts as to whether it was possible to achieve precision in defining the term "Turkishness," and thus satisfy the condition for the clarity and predictability of legislation. The ECtHR also expressed doubts about the fact that Turkish law protected the state authorities from insults of this sort in a situation where such insults were not accompanied by any calls for violence. In this context, the ECtHR noted

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107 Statute No. 5237.

108 Moreover, a well-known publisher was sentenced to one year in prison (the sentence was commuted to a fine) for publishing the Turkish translation of a book claiming that Turkey was responsible for the slaughter of Armenians in 1915. A Turkish court has resorted to Article 301 of the Turkish Penal Code in a case involving literary fiction ("The Bastard of Istanbul," a novel by Turkish bestselling author Elif Safak). However, the author was eventually acquitted, due in no small measure to the pressure of the international community.

109 UN DOC. A/HRC/15/13, pp. 20-22.

110 VENICE COMMISSION OPINION ON ARTICLES 216, 299, 301 AND 314 OF THE PENAL CODE OF TURKEY, CDL-AD(2016)002, pp. 20-24.

111 Judgment of September 14, 2009, complaints nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, LEX No. 603519).

that politicians enjoyed less protection in public discourse and stressed its key role with regard to important social issues. The ECtHR also pointed out that criminal penalties for the conduct defined in Article 301 of the Turkish Penal Code could only be applied in extreme cases related to calls for hatred or violence.

241. In another case (*Taner Akçam v. Turkey*[112]), the ECtHR referred to the amended Article 301. It noted that even though the term "Turkishness" was replaced with the "Turkish Nation," Turkish courts essentially had not changed their interpretation of the gist of the criminalized act defined in Article 301. Consequently, Article 301 remains a serious threat to the freedom of expression. **Given the unspecific term "attribution," the form and level of the penalty stipulated in Article 55a INRA, and the fact that this provision will affect historical debates, it is fair to assume that the example of the Turkish legislation and its evaluation by international human rights protection organizations, most notably the ECtHR, clearly indicates the manner in which the Polish legislation will be assessed**.

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112 Judgment of October 25, 2011, complaint no. 27520/07, LEX No. 1001020.

We, the undersigned, acting on behalf of The International Association of Jewish Lawyers and Jurists, respectfully submit that the Constitutional Court accept this Amicus Curiae Brief in case no. K 1/28 and the recommendations presented at the beginning hereof.

Meir Linzen
President

Daniel Reisner
Vice President

Encl.:

1) [Statute of the IAJLJ with amendments]
2) [Resolution of the IAJLJ]