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COMMUNIST CRIMES IN POLISH CRIMINAL LAW

Abstract. *This article explores regulations in Polish criminal law concerning the criminality of communist crimes, especially the statute of limitations of such crimes. The author briefly describes the legal situation in this respect after the fall of communism in Poland. She indicates that at that time there was the need to enact special provisions to enable the prosecution of perpetrators of communist crimes. Consequently, she evaluates relevant criminal law regulations and stresses the significance of some of them. The deliberations carried out lead the author to the conclusion that two specific statutory regulations on the criminality of communist crimes should remain in force. They should be kept as regulations being a peculiar monument of settling accounts with the communist past.*

Keywords: *communist crimes; Stalinian crimes; fall of communism in Poland; statute of limitations.*

Introduction. The subject of this article is the criminality of communist crimes in Poland [1]. The aim is to show the legal regulation of communist crimes in Polish criminal law in terms of the passage of time. The regulations had (and those still being in force – have) a character of settling accounts with the totalitarian past [12, p. 127]. They were an expression of the reaction of criminal law to “system unlawfulness” (to “criminality steered (controlled) by the state” [12, pp. 75]). It should be noted that the subject of this analysis is confined only to communist crimes. As to the criminal law reaction to Nazi crimes the reader should refer to the available literature [12, pp. 37; 17, pp. 134; 7, p. 5-13; 14, p. 108-112; 2, p. 104-108].

The fall of communism in Poland and the “round table” deliberations in 1989 took place a long time ago. The moment has arrived to review the relevant norms of criminal and constitutional law from a historical perspective. The time has also come to evaluate particular legal regulations concerning the criminality of communist crimes.

Discussion. The political changes in Poland in 1989 triggered not only the need for basic economic changes through the proclamation of freedom of economic activity and the creation of civic society through instilling the axiological bases of the democratic lawful state in the addressees of the legal norms and making people aware that the Republic of Poland is for the common good of all citizens. The need also arose to settle accounts with the totalitarian past. It was not possible to build a new state system without closing the previous chapter in the nation’s history.

With the new political conditions came the possibility to hold criminally responsible the perpetrators of crimes which were committed during the communist regime and were still remembered by people. “Historical justice” demanded that steps were undertaken in this direction

[11, p. 465]. It is worth emphasizing that after 1989 no new type of offence was introduced into the criminal law to retrospectively judge the politically motivated actions of the communist regime [12, p. 94]. Such legislative action was not necessary. Penalization of such behaviour, which was legal at that time, was not necessary since existing regulations of substantive criminal law contained the relevant types of offences. However, it was necessary to ensure the statute of limitations did not prevent those who committed communist crimes being brought to court. To this end a number of regulations were enacted that excluded some offences from falling under the statute of limitations, or modified the term of the statute of limitations regarding the perpetrators criminality.

The first legal act having the character of settling accounts with the communist past was a statute of 4 April 1991. It was entitled: The amendment to the statute of 6 April 1984 on the Head Commission of the Investigation of Hitlerian Crimes in Poland – the Institute of the Nation's Memory. It should be mentioned that in the preamble to the statute of 1984 an obligation was included to prosecute without time limit crimes against peace, war crimes and crimes against humanity. Article 1, subsection 1 of the statute of 1984 transformed the Head Commission of the Investigation of German Crimes in Poland (created in accordance with the decree of 10 November 1945 on the Head Commission and District Commissions of the Investigation of German Crimes in Poland) into the Head Commission of the Investigation of Hitlerian Crimes in Poland – the Institute of the Nation's Memory.

Article 1, point 3 of the statute of 4 April 1991 also transformed the Head Commission of the Investigation of Hitlerian Crimes in Poland – the Institute of the Nation's Memory into the Head Commission of the Investigation of Crimes against the Polish Nation – Institute of the Nation's Memory. This statute of 1991, which was enacted just after the political changes, introduced the term "Stalinian crimes" and defined them as "crimes against individuals or groups of people, committed in the period up to 31 December 1956 by the authorities of the communist state or inspired or tolerated by them" (article 2a of the amended statute). A new article (2b, subsection 1) stated that the crimes mentioned in article 2 (Hitlerian crimes, Stalinian crimes, other crimes being war crimes or crimes against humanity committed against persons of Polish nationality or Polish citizens of other nationality and also against other persons if committed on the territory of the Polish state), being war crimes or crimes against humanity under international law, shall not be subject to any statute of limitations.

Nonetheless, the legal definition and interpretation of the term "Stalinian crimes" is not unambiguous. The opinion has been expressed in the literature that the legislator treats all Stalinian crimes as crimes against humanity [17, p. 137]. According to an interpretation made by the Supreme Court in a judgment on 13 May 1992, there are Stalinian crimes which are crimes against humanity, but also other Stalinian crimes.

The next chronological change affected the penal code of 1969. In the statute of 12 July 1995 (on an amendment to the penal code and penal enforcement code and on raising lower and upper limits of fines and compensatory damages in criminal law) paragraph 2 was added to article 108a. It changed the period of limitations and stated: "The run of the term of the statute of limitations on intentional offences against life, body, freedom or the criminal justice system, punishable by imprisonment of more than 3 years, committed by public functionaries – in the period from 1 January 1944 to 31 December 1989 – while or in connection with performing their functions, begins from 1 January 1990. Article 2, paragraph 1 does not apply in such cases".

The enactment on 31 May 1996 of a statute on the exclusion of a few statutes on amnesty and abolition towards perpetrators of some offences, being left unprosecuted for political reasons in the years 1944-1989, was connected with this amendment to the penal code. Article 1 of this statute read: "Towards perpetrators of offences named in article 108, paragraph 2 of the penal code, the regulations of the statutes enacted before 7 December 1989 providing for amnesty or abolition are not applicable". The exclusion of the possibility of the application of further amnesty statutes was not explained by reference to the justice principle. At the time of their enactment, a new (non-communist) authority was already in power [5]. Without this statute of 1996 the intended result of the amendment to the penal code would not be achieved, since on the one hand, the statute of

limitations would no longer be an obstacle in the prosecution and conviction of perpetrators, but on the other hand, any regulation providing for amnesty or abolition could be an obstacle. The regulation of article 108, paragraph 2 of the penal code was adopted verbatim by article 9, paragraph 1 of the statute of 6 June 1997 – Introductory regulations to the penal code.

It is worth stressing that the criminality of offences identified by the communist government was limited to offences against life, body and freedom of citizens and did not encompass such violations of human rights that concerned the freedom of speech, freedom of assembly and freedom of parliamentary election. The reason for this legal situation was the circumstances in which communist authorities cooperated with the opposition during the political changes of 1989 [12, p. 137].

Then the statute of 18 December 1998 on the Institute of the Nation's Memory – the Commission of the Investigation of Crimes against the Polish Nation, which came into force on 19 January 1999, provided that the following shall not be subject to any statute of limitations (article 4, subsection 1 of the statute in its current form): Nazi crimes, communist crimes and other crimes being crimes against peace, crimes against humanity or war crimes, being under international law crimes against peace, crimes against humanity or war crimes, committed against persons of Polish nationality or Polish citizens of other nationality and also against persons other than Polish citizens if committed on the territory of the Polish state, for the period of 1 September 1939 to 31 July 1990.

Article 2 of this statute contains definitions of the terms “communist crime” and “communist state functionary”. In accordance with article 2, subsection 1 of this statute, “communist crimes, in the meaning of this statute, are acts committed by communist state functionaries in the period from 17 September 1939 to 31 July 1990, consisting of practising repression or other forms of violation of human rights directed towards individuals or groups of people or in connection with their practising, being offences under Polish criminal law statute in force at the time of their commission”. Communist crimes are also acts committed by those functionaries in the period referred to above, containing elements of prohibited acts from the 1932 penal code in articles 187, 193 or 194 (the statutory instrument of the President of the Republic of Poland of 11 July 1932) or the 1969 penal code in article 265 (paragraph 1) or article 266 (paragraph 1, 2 or 4) or article 267 (the statute of 19 April 1969). Communist crimes by functionaries also include all kinds of misuse of documents in the meaning of article 3, subsection 1 and 3 of the statute of 18 October 2006 on the disclosure of information about documents held by state security institutions from 1944-1990, and the contents of those documents (Dz. U. No. 218, pos. 1592 and No. 249, pos. 1832 and from 2007 No. 25, pos. 162) affecting persons identified in those documents. For clarity it should be explained that Polish criminal law does not have one type of offence called “communist crime” (as opposed, for example, to an offence of homicide or drink-driving). Communist crime can be recognized by various kinds of behaviour meeting elements of a range of offences described in a criminal law statute if they possess elements contained in the definition of communist crime quoted above.

Article 4, subsection 1a of the statute of 18 December 1998 provided that the term of the statute of limitations of criminality ran from 1 August 1990, but only for communist crimes (as defined by article 2) other than war crimes or crimes against humanity. The criminality of these crimes expires after 40 years if the act committed is a crime of homicide, and after 30 years if the act committed is another communist crime. *Expressis verbis*, article 4, paragraph 1 of the penal code does not apply to these cases. This provision provides that, in the event of a change in the law applicable to a given case between the commission of an offence and the sentencing, the law most favourable to the perpetrator shall apply.

The above regulations nullified the effects of the statute of limitations of criminality that had already occurred. In this respect, these regulations had an unusual aspect since one of the basic criminal law rules in Poland (as in every other state with a statute of limitations of criminality of offences) is that the fulfilment of the statute of limitations (the elapsing of time from the commission of the offence) has an irreversible nature and consists only of the elapsing of time (meaning the passing of the period of time determined in a statute for the offence in question). After

the period of the statute of limitations has elapsed a perpetrator may not be convicted and punished. In accordance with the provisions applying at the time of the commission of a criminal act, many acts being communist crimes at the time when new laws were enacted were already under the statute of limitations or neared the end of the term of their criminality. *Ergo*, perpetrators of communist crimes could not be brought to justice without the enactment of new regulations. The issue of the admissibility of the nullification of the effects of the fulfilled statute of limitations towards perpetrators of offences committed in the framework of the communist regime was a subject of deliberations in the Polish doctrine [15, pp. 538; 7, p. 5-13; 2, p. 104-108; 14; 9; 18; 12, p. 96; 11, pp. 465; 6]. An argument was given to justify the admissibility of bringing those perpetrators to justice, that they obtained the privilege of not being punished improperly and unjustly-acquired rights are not protected [3; 2, p. 108; 10]. An argument for the need to execute a demand for justice was also invoked [see e.g. 7, p. 11; 11, p. 477]. An introduction of legal regulations removing the consequences of the fulfilled statute of limitations was justified by reference to the concept that the statute of limitations could be stayed [for more see 15, pp. 541]. An opinion was expressed in the literature that: the communist regime could have brought its functionaries and persons who collaborated with them to justice, but did not do so; the term of the statute of limitations of criminality had indeed run out, but it justified the decision of the democratic legislator to overcome the effects of that fulfilled statute of limitations as the right had been acquired unjustly [15, p. 544]. It seems that just the fact of acquiring a right (obtaining a guarantee of not being punished for committing an offence as a result of the expiry of the term of the statute of limitations in accordance with regulations applying in the communist regime period) in an improper way allows the state to presume *ex post* that the limitation term was stayed. Summarizing, it can be said that the run of the term of the statute of limitations was stayed from the time the offence was committed to the time when it actually became possible to enforce criminal responsibility.

Taking a systematic approach, it should be pointed out that the grounds for the staying of the term of the statute of limitations are contained in two of the provisions currently in force and are an expression of the settling of accounts with the totalitarian past. These are: article 9, paragraph 1 of the statute – Introductory regulations to the penal code, and article 4, subsection 1a of the statute of 18 December 1998 on the Institute of the Nation's Memory – the Commission of the Investigation of Crimes against the Polish Nation.

Article 9, paragraph 1 of the statute – Introductory regulations to the penal code states: “The statute of limitations of intentional offences against life, body, freedom or the criminal justice system punishable by imprisonment of more than 3 years, committed by public functionaries during the period from 1 January 1944 to 31 December 1989 and during or in connection with performing their functions, runs from 1 January 1990. Article 4, paragraph 1 of the penal code does not apply in such cases”. This provision directly concerns the statute of limitations of criminality. However, it consequently makes it possible to apply a punishment for the offences in question. By virtue of this provision, the term of the statute of limitations of criminality was stayed from the time the offence was committed until 31 December 1989. The statutory term of the statute of limitations of criminality began to run from 1 January 1990. This term had to run for its entire length without including the period prior to 1 January 1990 to fulfil the statute of limitations. If other grounds for the staying of the term of the statute of limitations arose while it was running, then it could be stayed again.

The regulation in article 4, subsection 1a of the statute of 18 December 1998 on the Institute of the Nation's Memory – the Commission of the Investigation of Crimes against the Polish Nation has an identical aspect. In accordance with this provision, the term of the statute of limitations of communist crimes that are not qualified as crimes against humanity or war crimes (these two categories of crimes are not subject to any statute of limitations due to article 4, subsection 1 of the statute on the Institute of the Nation's Memory – the Commission of the Investigation of Crimes against the Polish Nation) runs from 1 August 1990.

The Constitution of 2 April 1997 introduced additional legal grounds in article 44 for the staying of the term of the statute of limitations of communist crimes. In accordance with this

provision: “The run of the statute of limitations for offences which are not prosecuted for political reasons, committed by public functionaries or on their order, is stayed until these reasons cease.” This provision only concerns the statute of limitations of criminality *expressis verbis*, but it consequently makes it possible to enforce a punishment for relevant offences. A consequence of the application of this norm is the staying of the run of the term of the statute of limitations until political reasons that had prevented earlier prosecution have ceased. The legislator did not determine the length of the staying period. This leads to the conclusion that there is no maximum period for the staying of the statute of limitations.

The legislator stressed the significance of the problem of the settling of accounts with the totalitarian past through the introduction of this norm to the Constitution. The genesis for the creation of this norm is related to offences committed in the period of the People’s Republic of Poland. Many offences which were committed in the communist era, especially in the period of Stalinian terror, were not investigated and prosecuted for political reasons. On the other hand, there were many faked political processes directed towards enemies of the communist state of that time resulting in conviction to the death penalty or a long imprisonment. Perpetrators of these violations of laws were not brought to justice during the terms provided for in the provisions of the penal code applying at that time. The elapsing of time could result in many functionaries of the communist state going unpunished. There was a need to undertake steps to mete out justice, once it was possible on the grounds of the new political conditions. To allow perpetrators of offences not to be prosecuted for political reasons and to go unpunished was in clear contradiction to the sense of justice felt by citizens. It was obvious that a failure to respond from the newly emerged democratic state would harm not only the persons directly affected but society as a whole as well.

The constitutional norm contained in article 44 applies not only to the settling of accounts with the past but also to criminal conduct taking place in the condition of the new political system. This norm concerns not only offences of a political nature (the murder of an opposition activist as an example [13, p. 534]), but also common offences, for example theft, road accidents, sexual intercourse with minor [13, p. 533-534]. A detailed analysis of this provision exceeds the scope of this study. The author made a detailed critical analysis of this regulation in a monograph [1, p. 496-502 and 508-515] and proposed that the regulation be repealed. It should be mentioned here that the range of offences encompassed by the hypothesis of this norm has not been characterized more clearly. As to the norm in question it can be noted that it is very rare in a democratic lawful state based on a pluralistic system that offences committed by a public functionary would not be investigated for political reasons [16]. Therefore, the analyzed norm has no great practical significance. In addition it is difficult to make a finding as to whether elements of this norm are fulfilled, because of the imprecise formulation of the provision [compare 16]. It is disputable whether an offence has been committed for political reasons [similarly 16; for more see 13, p. 534].

It should be stressed that the element “not prosecuted for political reasons” should be treated as an improper investigation and prosecution, regardless of any activity of investigator or prosecutor. The lack of a proper investigation or prosecution can also be presumed in a situation where an investigation procedure has been formally launched, or any activities have been undertaken, which were not intended to lead to the punishment of perpetrators. It should be stated that an offence has not been prosecuted for political reasons when the state bodies of investigation or prosecution either do not undertake any action or measure or they only pretend to investigate and prosecute. A proper investigation or prosecution for an offence should only be presumed to have taking place in the event of the undertaking of real activities aimed at uncovering and punishing the perpetrator. There is considered to be no investigation of offences for political reasons, for example, in a situation where the investigating officers do not conduct a real investigation because they want to cover up events embarrassing for the government of the day or particular prominent politicians.

Article 105, paragraph 2 of the penal code currently applying (the penal code of 6 June 1997, which entered into force on 1 September 1998) is also among the regulations having the function of settling accounts with the communist past. In accordance with this regulation the provisions of articles 101-103 do not apply to intentional offences of homicide, grievous bodily

injury, grievous bodily harm or freedom deprivation connected with particular abuse, committed by a public functionary in connection with his or her duty. Article 105, paragraph 2 excludes the application of the statute of limitations of both criminality and punishment enforcement towards the offences listed above. The enactment of such a regulation was without doubt motivated by the desire to avoid that offences committed by public functionaries and tolerated by the state authority would go unpunished [4, compare 8], however the provision itself does not indicate its *ratio legis*. It should be presumed that this *ratio* lies in the reasons preventing the enforcement of criminal responsibility during the statutory terms (in other words: this *ratio* is the lack of investigation for political reasons). This provision concerns not only offences committed in the time of the communist system, but also offences committed in the current political system. Moreover, it can be applied more frequently to perpetrators of offences committed nowadays than to perpetrators of offences committed before 1989 (most of those perpetrators are already dead or due to their health condition can not participate in criminal proceedings). The characterization of this provision would exceed the scope of this paper. The author made a detailed critical analysis of this regulation in a monograph [1, p. 502-515] and proposed that it should be repealed. It should suffice to mention here that the way this provision has been formulated has caused doubts to be raised, especially as regards to the range of types of offences encompassed. It seems that such a regulation is not necessary in a democratic state with an already stabilized political system. There are no arguments in favour of the more severe treatment of perpetrators of relevant offences in this aspect of the statute of limitations. Furthermore, the practical significance of this provision is minimized in a stable political system. The unjustified fulfilment of the statute of limitations is prevented by other legal regulations. The staying of the run of the term of the statute of limitations, in reference to the period when the investigation of a perpetrator was prevented by his or her immunity, is one such example. The mass-media plays an important role in uncovering and investigating offences committed by persons holding political office, which is a special type of controlling measure. Investigations are not prevented from taking place for political reasons because of parliamentary elections and the limited tenure of politicians and officials performing public functions.

Conclusion. After the elapsing of a quarter of century since the fall of communism, a question can be asked: do the regulations expressly designed to deal with communist crimes still have a purpose? It could be worth considering repealing them. It is likely that over the years it will be more and more difficult to find a justification for the further application of these regulations. Those are: article 9, paragraph 1 of the statute – Introductory regulations to the penal code and the provisions of the statute of 18 December 1998 on the Institute of the Nation's Memory – the Commission of the Investigation of Crimes against the Polish Nation. The need to enact these regulations did not require extensive justification. They were necessary to prevent perpetrators of many communist crimes going unpunished.

Looking to the future and at the provisions of article 9, paragraph 1 of the statute – Introductory regulations to the penal code and of the statute of 18 December 1998 on the Institute of the Nation's Memory – the Commission of the Investigation of Crimes against the Polish Nation, I have arrived at the conclusion that with time fewer and fewer people will survive for whom these provisions are relevant. These provisions will be applied in a diminishing number of cases with each passing year. Most of the perpetrators of the offences in question are either dead or in poor health and therefore unable to participate in criminal proceedings. *De facto*, the provisions will have significance only for those guilty of homicide and other communist crimes and only in the near future. Also of importance is the issue of the proof, since after the passing of a few decades from the time an offence was committed, the evidential difficulties can turn out to be too much to overcome.

Despite the shortcomings these provisions should remain in force. They should also be maintained in force as witnesses to the difficult path to democracy and as an expression of condemnation of behaviour that was not prosecuted in the reality of the communist system. One can foresee that these provisions, and especially the regulations of the statute on the Institute of the Nation's Memory – the Commission of the Investigation of Crimes against the Polish Nation, will

take on a symbolic significance. Their legal importance was, and is, substantial, but in time and quite naturally they will become regulations of historical significance as testament to many tragic events. They will be a peculiar monument to the settling of accounts with the communist past.

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