

## A nightmare Penal Code

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**The President has signed Ziobro's draconian code. We have a tightening of the repressiveness of the law, unprecedented since martial law. Pointlessly, needlessly, as servitude to Zbigniew Ziobro in return for his support in voting.**

The pre-election year has already seen the introduction of a new law on the support and rehabilitation of juveniles, under which children from the age of 10 will be punished for 'demoralization', and people from the age of 13 to 21, i.e. for up to eight years, will be sent to youth custody centres. Additionally, school principals are given the right to impose their own 'disciplinary punishments'. Another law changed the rules of imprisonment. Prisoners are no longer able to complain about their treatment: a complaint can be arbitrarily, irrevocably and without examination declared 'manifestly unfounded'. Contact with a defence counsel and the family has been restricted, while rewards have been abolished and only punishments remain. These laws were signed by President Duda despite the protest of the legal community, social rehabilitation and human rights professionals. Now, he has sealed Ziobro's Penal Code.

### A return to the past

'The Act takes Polish criminal law back to the communist era. This is because it is difficult to understand that, in the 21st century, in a country in which the Constitution refers to Christian and humanist values, social rehabilitation as one of the objectives of punishment is ruled out (...),' wrote 173 academics from university law faculties to the President calling for him to veto the Ziobro Code. The cover letter was signed by Professor Stanisław Waltoś, the doyen of Polish criminal law scholars, co-author of the Criminal Procedures Code.

The President signed Ziobro's Penal Code several days after this appeal. It will enter into force in three months. We will pay for this servitude to Ziobro with a return to communist criminal repression.

In fact, we are returning at full steam to the People's Republic of Poland: the judiciary, the prosecutor's office, ideologized education, the so-called public media, the indebtedness of the state, including in dollars, because the government issued bonds denominated in this currency. In the criminal repression, we are returning to a law that was meant to intimidate – the perpetrator and the public. Which provided not only for absurdly high sentences (further increased by decree during the period of martial law), but also for provisions forcing judges to make sentences extraordinarily severe and blocking the possibility of mitigating them. These laws produced an enormous army of socially excluded people at the time of the People's Republic of Poland, who were condemned to return to crime because, after many years in prison, they lost their family, their housing and their ability to cope when free, while the state did not help. It is not helping now either.

The Penal Code of 1997, which was still in force, despite being made stricter many times, was still oriented towards the individual and his social rehabilitation, namely his return to society, and not only to deterrence by the severity of the punishment. The times that it was enacted were not conducive to parting with the repressiveness of the communist state, as crime continued to rise. Now – over the past ten years – it has fallen by 30%. In the justification of Ziobro's code, the authors therefore primarily try to demonstrate that the increase in the severity of the penalties is nevertheless necessary: 'The rational tightening of criminal law (...) is a manifestation of modern penal policy, strengthening the actual level of protection of security of the citizens. It is not only the increase in the scale of crimes

of a given category that can justify an increase in criminal sanctions, but also the persistence of the number of crimes of certain categories.’ So: as long as there is crime – the law should be made stricter.

It is doubtful that the public will welcome this code, because it has completely different problems now, and it is expensive to overfill prisons and produce an army of repeat offenders who cannot live free. But there will always be people who find the very thought of the state taking harsh retaliation pleasing. This side of human nature has been immortalized in the literature and paintings for centuries, depicting reptilians watching executions and tortures. The shows were public, for exemplary deterrence. And here, in the justification of Ziobro’s law, we read that this is precisely the point: ‘Therefore, by rationally raising the sanctions, the legislator also achieves a socially desirable result, in the form of establishing the conviction in the legal awareness that such crimes are highly punishable and that their commitment will be punished, and therefore that it is unprofitable to behave in a way that harms legal rights constituting the object of protection by criminal law.’

In the justification of Ziobro’s code, the authors listed three techniques they used to make the penalties imposed more severe in practice: 1. they increased the statutory limits of the penalties, which forces the court to impose a harsher sentence, 2. they extended the possibility of extraordinary aggravation of the punishment and reduced leniency, 3. they changed the directives of punishment so that it serves to primarily deter rather than rehabilitate.

Of the specific solutions: life imprisonment without the right of early release and a sentence of up to 30 years in prison, 14-year-olds sentenced as adults, confiscation of vehicles, the crime of preaching ideologies and even something that has become known as thought-crime.

### **Punish by example**

The academics who wrote to the President indicate the motive of revenge and deterrence as the first evidence of the recommunization of Polish criminal law by Ziobro’s code. Deterring the public is becoming more important than justly punishing the offender. Today, the provision on the principles of administration of a penalty by the court mentions care that ‘its severity does not exceed the degree of guilt’ in first place, while ‘shaping the legal awareness of society’ is listed at the end. That is to say: man more important than deterrence. Ziobro’s code is the other way around: in the first place it mentions ‘the degree of social harmfulness of the act’, followed by deterrence of society (the ‘social impact’ of the punishment). In last place it mentions ‘the preventive objectives that it [the punishment] is supposed to achieve with regard to the convicted person’. In this respect, Ziobro’s code is therefore a humanitarian regression, including in comparison with the communist era, because the 1969 Code included rehabilitation (‘educational purposes’) among the objectives of the punishment, which has disappeared in Ziobro’s case.

Lawyers from the Krakow Institute of Criminal Law (in Polish ‘Krakowski Instytut Prawa Karnego’, referred to as KIPK) wrote one of the many critical opinions regarding Ziobro’s code. They write about the change in the rules of punishment: ‘it could lead to harsher penalties for, among other things, unintentional acts, including medical errors, minor petty crimes, light drug offences, illegal abortion, etc.’ In other words, for a joint or assistance with an abortion, the courts are to administer punishment in such a way as to make others shy away. If we want to go back to communist Poland, we should go all the way: back then, the courts received instructions from the ministry on the policy of administering penalties – which offences to punish more severely, which to treat more lightly.

Three years ago, an opinion from KIPK to Ziobro’s previous code, of which the current one is a clone, helped convince the President that the law was written poorly, full of errors and posed a social threat. The bill collapsed. They assess: ‘The enacted provisions repeatedly breach conventional and constitutional principles of criminal liability, including the principle of liability for the act and not for

the intentions themselves, the principle of humanity and human dignity, the principle of proportionality, expediency and need for a criminal response, equality before the law, the definiteness of the elements of the criminal act, the definiteness of the punishment, the citizen's right to a trial in a court and the principles of correct legislation. In many aspects, they give rise to the risk of absurd solutions and legal chaos after they enter into force.'

Lawyers from KIPK illustrate their comments with examples of the legal, moral and social consequences to which the ill-considered or the solutions of the legally ignorant authors of Ziobro's code could lead.

### **Juveniles behind bars**

The age at which a person can be convicted under the Penal Code is being reduced: from today's 15 to 14: 'A 14-year-old is free and mature enough to be criminally liable for his act and to spend up to 30 years in prison, but is not free and mature when it comes to deciding on his own behaviour in other spheres of social life,' the authors of the KIPK opinion point out. And they argue that the reason for such punishment is not the consideration of the child's welfare, but a desire to use the child as a tool to deter others from breaking the law.

Apart from being irrationally repressive, Ziobro's code is lacking in legal diligence, which leads to logical, legal and human absurdities. For example, for unknown reasons, genocide, a war crime or a terrorist attack are to be punished more leniently (from 12 years) than the murder of a single person in connection with taking a hostage, rape or robbery (from 15 years).

A new crime is being introduced: accepting an order to murder. In KIPK's report, this has been referred to as 'thought crime', because it will be possible to convict someone for not only doing nothing, but not even intending to do anything. 'The opening of the gate for punishing citizens for mere thoughts and intentions can lead to the proliferation of this type of thought-crime in the future in the Penal Code, also with regard to other types of offence, which will drastically worsen the level of protection of citizen's rights and freedoms,' the authors of the report predict.

The penalties for bribery are being increased strangely, but only for accepting a bribe. 'As a result, anyone who accepts a financial benefit of PLN 6 million will face the penalty of 3 to 20 years' imprisonment, while a perpetrator who gives such a benefit will only face 3 months to 5 years' imprisonment.' The gap is even bigger in the case of a bribe in exchange for an abuse of power: the recipient will face 5 to 25 years, while the giver will face 3 months to 5 years.

A new offence is created: the public promotion of an ideology 'inciting the use of violence to influence political or social life'. This smacks of a catch-all provision that will be applicable, for example, to publicists who harshly criticize the actions of the authorities or street opposition activists calling, for example, for resistance against police brutality. And it may not even be a matter of conviction (punishment of up to three years) – it will be sufficient to press charges and conduct an investigation, including surveillance.

Or, let's take the new penalty: forfeiture of the vehicle or its equivalent if the owner is drunk driving and has already been convicted of traffic offences. If the driver has more than 1.5 ‰, in addition to the normal punishment, the court must confiscate his car, even if he posed little danger because he was driving on an empty side road. Meanwhile, someone who had 1.4 ‰ will not lose his car, even if he was driving along a busy street, creating a major threat. This is an example of the dissociation of the punishment from the guilt and social harmfulness of the act. In addition, the severity of the punishment here will not depend on guilt, but on the value of the car. And forcing the judge to

confiscate – this is a breach of the constitutional principle of the judicial assessment of the penalty: the penalty will be imposed not by the court, but by the legislator.

Another example: the court will need the permission of the prosecutor to extraordinarily mitigate the punishment of a so-called small crown witness. This is another increase in the power of the prosecutor over the court. And a means for the prosecutor to steer the testimony of such a witness before the court.

The court will also need to increase the punishment for a ‘continuous act’, e.g. petty theft, of a person who is not fully sane. Normally, incomplete sanity leads to extraordinary leniency. The case of Radek Agatowski was headline news in Poland a few years ago. He was a man with a moderate degree of mental disability, who was sent to prison because he was persistently misappropriating bicycles. The public was outraged at how a man who does not even understand why he is in prison can be kept in prison. According to Ziobro’s code, not only would he have to remain in prison, not only would the court not be able to grant extraordinary leniency on the grounds of incomplete sanity, but it would still have to increase his punishment extraordinarily, even to twice the upper limit of the statutory penalty for theft.

Similarly, the penalty for acting to the detriment of a company cannot be mitigated if the offender remedies the damage in full.

The increase in the maximum penalty from 20 to 30 years’ imprisonment will result in a ‘serious risk of the re-criminalization of social life’, claims the KIPK. This, combined with the principles of imposing a cumulative penalty in the case of a conviction for several offences, ‘means that (...) an offender convicted of a dozen or so minor offences could face a joint penalty of as much as 30 years’ imprisonment’. Therefore, under Ziobro’s code, the aforementioned Radek Agatowski could receive a sentence of up to 30 years.

‘Blindly tightening repression with a ricochet can result in sentences which, in the public perception, will be considered unjust in comparison with the nature of the acts committed, including under a cumulative sentence of up to 30 years’ imprisonment, including in cases of petty crimes. The enacted amendment can also lead to an unjustified and drastic increase in the prison population and, consequently, to their overcrowding. Out of concern for the stability and axiological consistency of the legal system of the Republic of Poland, we appeal for a veto of the harmful amendments to the criminal law,’ concludes the 173 appeal of the lawyers to the President.

### **People have other problems**

The appeal remained a voice in the wilderness. No one is calling today for an amnesty or for the softening of the law, but neither is anyone calling for making it more severe. People have other problems. The worldwide, cyclical IPSOS survey ‘What worries the world?’ shows that Poles are the least afraid of crime in the world (out of 29 countries surveyed). It was mentioned as a source of fear by 4% of respondents, where the global average is 26%. Given that Ziobro’s party today has a fraction of a per cent of support – this 4% who are afraid of crime – is worth fighting for.

Ziobro is fighting for Solidarna Polska’s presence in the next parliament. PiS is fighting for Ziobro to be able to govern with his votes. Who will fight for the public interest? The president could have done this. Safely for his popularity, as people are no longer mobilised by the topic of increasing severity. And for his relationship with PiS, which did not care about whether the law enters into force, but he signed it.