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Articles

Studia Iuridica Lublinensia vol. 34, 5, 2025
DOI: 10.17951/sil.2025.34.5.193-212

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Polish Nationalism and Acts Criminalised under Article 256 §§ 1 and 1a of the Criminal Code

Polski nacjonalizm a czyny penalizowane na podstawie art. 256 § 1 i 1a Kodeksu karnego

ABSTRACT

This paper discusses the effects of amendments to Article 256 of the Criminal Code, in particular the addition of a provision prohibiting the public promotion of Nazi, communist or fascist ideology, or ideology inciting violence in order to influence political or social life. This amendment is a departure from previous criminal regulations, which, with the exception of the "Auschwitz lie" and incitement to hatred on national, ethnic, racial, and religious grounds (or lack of religious belief), did not interfere with freedom of expression. The author examines whether the new wording of Article 256 of the Criminal Code could lead to punishment for expressing nationalist views. To this end, the paper has been divided into two parts. The first part discusses the characteristics of Polish nationalist concepts (using a doctrinal and descriptive method). The second part examines the content of Article 256 of the Criminal Code (using dogmatic methods). As a result, the author argues that criminal liability will depend on whether a given "ideology" contains a component of consent to violence as a normal tool of political struggle, which, due to the need for specialist knowledge, will have to be entrusted to scientists.

Keywords: nationalism; ideology; doctrine; Nazism; fascism; communism

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INTRODUCTION

One of the important elements of contemporary Polish public debate is the attitude towards nationalism. The vast majority of statements made by people representing the mainstream of political life refer to this doctrine with reluctance or hostility, additionally linking it (and sometimes even equating it) with "fascism" or "incitement to hatred".[1] These statements are characterised by an attempt to arouse strong negative emotions in the recipient and convince them that nationalism, in its essence, promotes views that cannot be accepted in a democratic state and that they are prohibited by the Criminal Code. The provision that would play a fundamental role here falls within Article 256 § 1 of the Criminal Code, which prohibits the promotion of a totalitarian system and incitement to hatred on the grounds of national, ethnic, racial or religious differences or on the grounds of non-belief. From 1 October 2023, a new offence has also been introduced into the Criminal Code, which may become a tool in the fight against nationalism: public promotion of Nazi, communist or fascist ideology or ideology "inciting violence to influence political or social life" (Article 256 § 1a of the Criminal Code). This raises a real problem for the justice system and for legal scholarship: Is it legitimate to demand a ban on the expression of nationalist ideas with reference to the aforementioned provisions of the Criminal Code? To answer this question, I divide the material into two parts. In the first part, I summarise the main assumptions of nationalist ideologies (the plural form is used because there is no single nationalist ideology, as explained below) and highlight specific elements appearing in the Polish nationalist movement. In this regard, I use the doctrinal and descriptive method.[2] In the second part, I analyse the content of Article 256 §§ 1 and 1a of the Criminal Code, focusing both on the words and phrases contained therein and on the constitutional and doctrinal context, followed by an examination of the relationship between the aforementioned provisions of the Criminal Code and the expression of nationalist views. In this part, I use the dogmatic method. My goal is to demonstrate that the provisions of the Criminal Code outlined in the title of this paper cannot provide a basis to prohibit the expression of nationalist views in a democratic state governed by the rule of law, except in situations where a given

[1] For example, the information on the conviction of nationalist activist and suspended priest Jacek Międlar. See Ośrodek Monitorowania Zachowań Rasistowskich i Ksenofobicznych, *Jacek Międlar został prawomocnie skazany za zniesławianie uczestników Marszu Równości*, https://omzrik.pl/jacek-miedlar-zostal-prawomocnie-skazany-za-znieslawianie-uczestnikow-marszu-rownosci (access: 21.11.2024); D. Mrozowski, *Przestępstwa z nienawiści – przyczynek do dyskusji*, 28.11.2021, https://lexso.org.pl/2021/11/przestepstwa-z-nienawisci-przyczynek-do-dyskusji (access: 21.11.2024).

[2] See M. Maciejewski, T. Scheffler, *O doktrynologii. Rozważania dotyczące przedmiotu oraz metody doktryn politycznych i prawnych*, [in:] *Myślenie o polityce i prawie. Przedmiot, metoda, praktyka*, eds. I. Barwicka-Tylek, A. Czarnecka, M. Jaskólski, J. Malczewski, Warszawa 2015, pp. 263–297.

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nationalist movement recognises violence as a constitutive element of its worldview and action within a political community.

NATIONALISM AND POLISH NATIONALISM

The Polish national movement, understood as one of the variants of doctrinal and political-social nationalist movements, developed relatively late in comparison with other regions of Europe, in the last decades of the 19th century. One of the reasons for this delay was the lack of statehood and the associated rule over lands occupied by a culturally and linguistically Polish population by Russia, Prussia (the Second German Reich) and Austria (Austria-Hungary). These countries pursued policies that limited the formation of a sense of community that would compete with their imperial rule. Another factor that was not conducive to the emergence of modern nationalism in Poland was the legacy of political thought shaped by romantic ideas of the brotherhood of peoples, expressed in Lelewel's slogan "For our freedom and yours".[3] Factors that clearly contributed to the birth of the modern Polish national movement included increasing political and economic pressure on the Polish population generated by nationalist tendencies in the partitioning powers, the formation of nationalist tendencies in communities coexisting with the Polish-speaking population, and a certain fascination with the success of nationalist tendencies in Western countries.[4] Before proceeding to a brief discussion of the Polish national movement, it is necessary to recall some basic information about nationalism and chauvinism.

The origins of nationalism can be found in the distant past, e.g. in the exclusivism of the ancient Jews or Greeks, or in the writings of Dante, John of Paris or the Averroist Pierre du Bois (Dubois). Johann Gottfried Herder or Voltaire can also be considered the fathers of nationalism, although – it is worth noting – it is most commonly accepted that the movement's doctrinal foundations were developed to-

[3] See also K. Wnęk, *Za naszą i waszą wolność*, [in:] *Leksykon polskich powiedzeń historycznych*, eds. M. Wilamowski, K. Wnęk, L.A. Zyblikiewicz, Kraków 1998.

[4] M. Śliwa, a researcher of 19th and 20th centuries Polish political thought, assumed that "the development of Polish nationalism was undoubtedly an expression of a more general trend (…), namely the development of nationalist currents (…). It was also a reaction to the nation-building processes taking place among the non-Polish population of the former territories of the Polish-Lithuanian Commonwealth" (M. Śliwa, *Polska myśl polityczna w I połowie XX wieku*, Wrocław–Warszawa–Kraków 1993, p. 37). J. Majchrowski, a historian of political doctrines, included the following among the premises leading to the emergence of the Polish national movement: the desire to preserve national traditions and unity, the associated opposition to a policy of compromise that could lead to the absorption of Poles by the ethnic groups of the partitioning powers, and the fight against socialism, which was accused of undermining the national community. See J. Majchrowski, *Polska myśl polityczna XIX i XX wieku. U źródeł nacjonalizmu – myśl wszechpolska*, part 1, Kraków 1990, p. 6.

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gether with Jean-Jacques Rousseau's concept of the general will.[5] Despite all these noteworthy theses and intuitions, it remains an undeniable fact that it was the "cannonade of Valmy" on 20 September 1792 that symbolically marked the beginning of nationalism's march across Europe and the world, as it resulted in a lasting political stigma.[6] To generalise, it can therefore be assumed (as previously set out in another of my papers[7]) that nationalism refers to a post-terrorist political doctrine that emerged during the French Revolution, the key and fundamental element of which was the belief in the objective existence of a community that is primary to or superior to man, referred to as a nation; this community, for arbitrarily accepted reasons (e.g. linguistic, religious, cultural, racial, economic, etc. – or a combination thereof) was, on the one hand, distinguished from other groups or communities and, on the other hand, due to the relevant characteristic or characteristics, considered a relatively homogeneous community and superior to previously existing groups and communities (such as the family, clan, tribe, estate). The consequence of this assumption was the formation of modern nation states[8] and the granting of a privileged position to the "nation" within the political community. For the sake of accuracy, it is worth recalling in this context the apt opinion of W. Bernacki that nationalism, as a result of recognising national ties as "fundamental to the proper development of the individual and society (…) was based on a system of values in which the nation occupied a privileged position, although not always superior to other entities such as the individual/person or family".[9]

What must be clearly emphasised, however, is that nationalism was (and still is) such an internally diverse ideological current, where it would be more appropriate to speak of nationalisms rather than of a single nationalism. This diversity stems from the aforementioned *a priori* nature of the selection of distinctive national characteristics. This is why civic nationalism (republican or liberal) functioned differently in the public sphere than ethnic-biological (racist) nationalism; why socialist nationalism, represented, e.g., by Ferdinand Lassalle or the German Social

[5] See M. Baranowska, *U źródeł nacjonalizmu. Idea narodu w filozofii Jana Jakuba Rousseau*, "Studia nad Autorytaryzmem i Totalitaryzmem" 2013, vol. 35(2), pp. 7–24.

[6] See also E. Kozerska, T. Scheffler, *Projekty integracji europejskiej do 1952 r.*, [in:] *Prawo i gospodarka Polski po Traktacie Lizbońskim*, eds. E. Kozerska, P. Malinowski, T. Scheffler, Opole 2011, pp. 31–32.

[7] T. Scheffler, *Przestępstwo publicznego propagowania faszystowskiego lub innego totalitarnego ustroju państwa (art. 256 k.k.). Analiza doktrynologiczna wybranych wypowiedzi piśmiennictwa i judykatury. Część ogólna*, "Studia nad Autorytaryzmem i Totalitaryzmem" 2012, vol. 34(3), pp. 110–112. The findings concerning nationalism and chauvinism are taken directly from this paper.

[8] On the formation of modern nation states, see in particular E. Gellner, *Narody i nacjonalizm*, Warszawa 1991. The author drew attention to the necessary link between, firstly, the processes of industrialisation and the emergence of nationalism, and secondly, between state structures and the development of nationalism. Another important thesis put forward by Gellner is the claim that nationalism plays a nation-building role.

[9] W. Bernacki, *Nacjonalizm*, [in:] *Słownik społeczny*, ed. B. Szlachta, Kraków 2004, p. 721.

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Democrats, functioned differently from the communist nationalism of Karol Radek, Joseph Stalin, Mao Zedong or Pol Pot; and why cultural-linguistic nationalism, e.g. that of the Catalans, the Kashubians or the Irish, based on living and developing local communities (traditional ethno-nationalism), differed from other types of cultural-linguistic nationalism, e.g. that of the Israeli Jews or the Indonesians, radically rebuilding or even creating a new national entity (creationist ethno-nationalism). In countries such as France, Great Britain and the United States of America, civic (republican) nationalism was the absolute leader. In the case of Italy, civic nationalism and traditional ethno-nationalism dominated. Fascists drew on both of these sources, but due to the genetic link between their doctrine and Hegelianism, the model of civic nationalism, which assumed the domination of the state over the nation, ultimately gained greater significance (an attempt to refer to the biological trend in fascism at the doctrinal level did not occur until 1936–1938). In the first four decades of its existence, the Polish national movement referred to republican nationalism (which, despite its potential to take root in the pre-partition tradition, proved to be of little use in political struggle due to the lack of statehood at that moment in history) and cultural-linguistic nationalism.[10] It was not until the mid--1920s that ethnic-biological concepts began to gain popularity in the national movement, contributing to the emergence of radical nationalist groups. Finally, in Germany during the 19th century and the first half of the 20th century, we encountered practically all varieties of nationalism. What is important for the currently dominant popular view of nationalism is the fact that Nazism, through *völkism*, drew primarily on ethnic-biological (racist) nationalism, which led to the emergence of a simplification consisting in identifying nationalism with this particular trend. It is a mistake to confuse or equate civic nationalism, or even ethnic-cultural nationalism, with ethnic-biological (racist) nationalism. However, it is worth recalling in this context that every type of nationalism (like most other socio-political ideas, such as liberalism or democracy) could lead to criminal acts. This also applies to civic nationalism (typical, as I mentioned, of France, Great Britain and the USA); suffice it to recall the massacre of the Vendee[11] or the Boer War.[12]

The word ‘chauvinism’ is often, though not always appropriately, associated with nationalism. This term derives from the name of a Napoleonic soldier, Nicolas Chauvin, who was said to have become famous for his bravery and sacrifice (wounded seventeen times) and his unparalleled and uncritical adoration of Napo-

[10] M. Śliwa (*op. cit.*, p. 42) assumed that “the concept of biological national ties” was accepted by national democrats from the very beginning. However, it should be noted that he did not support this with relevant quotations.

[11] The most comprehensive study of this issue is currently available in R. Secher, *Ludobójstwo francusko-francuskie. Wandea – departament zemsty*, Warszawa 2003.

[12] See more broadly S.B. Spies, *Methods of Barbarism: Roberts and Kitchener and Civilians in the Boer Republics January 1900 – May 1902*, Cape Town 1977.

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leon I Bonaparte. This character was immortalised in European culture thanks to the comedy by Charles-Théodore and Jean-Hippolyte Cogniard titled *La Cocarde tricolore, épisode de la guerre d'Alger* (1831),[13] and became a model for a specific worldview characterised by an extremely emotional and irrational attitude towards reality, assuming unquestioning recognition of a specific national or state community and its leadership as an expression of a perfect existence with which the individual should identify and to which he or she should fully submit in order to achieve happiness. This Averroist belief also implied the rejection of everything foreign, on the one hand, because of the lack of participation of the foreign in what was ideal and flawless, and on the other hand, because of the threat that foreignness – inherently flawed and sick – posed to what was healthy and perfect. It is worth noting that this concept itself also contains a certain element of a national mission. One of the most famous researchers of totalitarianism, H. Arendt, wrote about chauvinism as follows: "Chauvinism is almost a natural product of the national concept, because it derives directly from the old idea of the 'national mission'. (…) [The mission] of a nation can be interpreted precisely as bringing light to other, less fortunate nations which, for whatever reason, have been miraculously left by history without a national mission. As long as this concept did not transform into the ideology of chauvinism and remained in the rather vague sphere of national or even nationalistic pride, it often resulted in a high sense of responsibility for the welfare of backward people".[14] To sum up: chauvinism originally referred to uncritical adoration of a nation and its state (especially France) and its creator and leader (e.g. Napoleon Bonaparte). Very quickly, with the birth of other nations (particularly European ones), chauvinism spread to other social and political communities. Today, chauvinism is commonly used to describe any attitude of unreflective adoration for a particular community or group combined with equally unreflective hostility towards foreigners. The term is also often misused or deliberately used in contemporary discourse to stigmatise the interlocutor and avoid substantive debate. The inadequacy of automatically linking nationalism with chauvinism stems, on the one hand, from the fact that not all nationalism assumes that one's own national community has reached its optimal state of development, and therefore that it should already be the object of "adoration", and

[13] See more on this subject in G. de Puymège, *Chauvin, le soldat-laboureur. Contribution à l'étude des nationalismes*, Paris 1993. It is worth noting that the song sung by Nicolas Chauvin in the Cogniard brothers' play, whose refrain went "Je suis Français, je suis Chauvin, je tape sur le Bedouin" became very popular and was often used in operettas and vaudevilles (at the place of the play's premiere, i.e. at the Théâtre des Folies-Dramatiques in Paris, it was performed continuously until 1860). This is probably why the claim is sometimes made in Poland that the character of Chauvin was created by the outstanding French playwright and well-known librettist of operettas and operas Eugène Scribe (see, e.g., *Chauvinism*, [in:] *Encyklopedia PWN*, vol. 6, Warszawa 1996, p. 201).

[14] H. Arendt, *Imperialism, Nationalism, Chauvinism*, "The Review of Politics" 1945, vol. 7(4), p. 457.

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on the other hand, that most forms of nationalism do not assume hostility towards foreigners, but call for respecting one's own (native) community and putting its interests first. These two attitudes are not the same.

As mentioned above, the Polish national movement crystallised over the last two decades of the 19th century, on the wave of modern Polish political thought developed after the fall of the January Uprising. At that time, there was increased pressure (least of all in the Austrian Empire and then in the Austro-Hungarian Monarchy) for the full "integration" of the Polish population into the societies of the partitioning powers. The associated fear of a potential loss of national identity caused strong anxiety among some independence activists. One of the most famous and influential Polish politicians of the time, Z. Miłkowski, put it this way: "The Polish question in (…) the beliefs of tripartite loyalty is divided into Moscow, Prussian and Austrian types. Breaking down into types (…) leads the nation straight to degradation (…), turning the nation into wax that can be moulded into Muscovites, Prussians and Austrians of Polish origin (…)".[15] The focus on the nation as a supra-ethnic entity, on its interests, on the protection of its cultural heritage, including in particular its language, and on the creation of economic ties that would ensure financial support for the existence of the Polish nation among other ethnic groups, thus became the foundation of the early national movement. The first issue of "Przegląd Wszechpolski" (1895) declared that the pan-Polish idea strives "for cultural unity and national unity (…) regardless of nationality and historical rights (…)". It was added that this idea "does not seek the partition or pogroms of other nations, but, given the distribution of the Polish population across various territories, desires only the free development of its own nationality and recognises the need and possibility of different nations living together in harmony".[16] It should be clearly emphasised here that this optimistic picture was quickly and negatively revised in the context of growing nationalism. The initial strong anti-Russian stance (linked to the recognition of Russia and Russians as the main anti-Polish element) was replaced by anti-Germanism and anti-Semitism. Germans and Jews were considered greater enemies than Russians, because, according to the National Democrats, both ethnic groups (and in the case of Germans, also as a political community) were better organised than the Polish element. According to R. Wapiński (one of the leading experts on the history of the National Democracy during 1893–1908), alongside anti-Germanism, the basic elements of the national democratic concept also included extreme nationalism, national solidarity, the con-

[15] Z. Miłkowski, *Skarb Narodowy Polski. Nieco o Lidze Narodowej. Rozdział jeden z pamiętnika: Od kolebki przez życie*, Lwów 1905, p. 3. I. Zaleska recalled a noteworthy opinion about Miłkowski published in the Krakow conservative newspaper "Czas" in 1908: "Lieutenant Colonel Miłkowski (T.T. Jeż) occupies more or less the same position among the seniors of national democracy as Mr Bolesław Limanowski does in Polish socialism" (I. Zaleska, *Zygmunt Miłkowski (Tomasz Teodor Jeż) a Narodowa Demokracja*, "Klio" 2021, vol. 59(3), p. 115).

[16] Quoted after M. Śliwa, *op. cit.*, p. 38.

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cept of the nation state, affirmation of the Catholic Church and religion, and hostility towards socialism and all universalist doctrines.[17] As we can see in this list, there are some incorrect elements. The author uses vague terms (e.g. what is "extreme nationalism" and whether it was more "extreme" than the nationalism of the "young" in the 1930s – Wapiński himself never articulated such a view), anachronistic (e.g. early nationalism was a modernist doctrine that was critical of Catholicism), and makes contradictory statements (on the one hand, "affirmation of the Church", i.e. an institution preaching a universalist doctrine, and on the other, "hostility" towards "all universalist doctrines"). Despite these weaknesses, Wapiński's statement is important because it presents a specific point of view on the Polish national movement, which has become entrenched in popular imagination and, in combination with emphasised anti-Semitism, creates a picture of what native nationalism was, detached from its time. In fact, elements such as a critical (and sometimes hostile) attitude towards other nations, especially Jews and Germans, and the idea of a nation state in which the economic system is based on free market principles and politics to the rules of parliamentary democracy (in both cases with the proviso that this refers to a state ruled by the elite of the Polish national community) would become the foundation of nationalist thinking until the 1930s.

I have already mentioned in several places a certain ideological modification that appeared in the national movement at the beginning of the fourth decade of the 20th century. At that time, new ideological currents appeared, characterised by radicalisation of political slogans and ideas, related to the economic crisis and the entry of a younger generation of activists into public life. The previously dominant cult of industrialisation and economic anti-statism were criticised. Assuming that the source of social evil was capitalism promoted by Jews and Germans, a concept of a "national economic system" was proposed, recognising agriculture and small and medium-sized domestic manufacturing as the basis for the economic functioning of the state. It was even proposed that the state should take care of economic life by creating a system of corporations modelled on medieval solutions.[18] For the sake of accuracy, it is worth recalling the obvious fact that the demand for the creation of a corporate system was not a peculiar invention of the Polish national movement, but rather a manifestation of the general prevailing mood in Europe (e.g. the concept of Pius XI[19] or the economic reforms introduced by Mussolini's government).[20]

[17] R. Wapiński, *Narodowa Demokracja 1893–1939. Ze studiów nad dziejami myśli nacjonalistycznej*, Wrocław 1980, pp. 326–327. M. Śliwa (*op. cit.*, p. 39) adds to this list anti-compromise, anti-socialism, and the idea of a pan-Polish nation.

[18] M. Śliwa, *op. cit.*, pp. 138–139.

[19] For more details, see E. Kozerska, *Państwo i społeczeństwo w poglądach Piusa XI*, Wrocław 2005, pp. 117–131. On Pius XI's attitude towards fascist corporatism, see *ibidem*, pp. 179–180.

[20] One of its leading ideologists and propagators of corporatism in the interwar period, M. Manoilescu, ventured to say that the coming decades would be a period of full self-government for workers,

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In terms of political systems, the younger generation was clearly attracted to programmes and ideas that rejected the principles of parliamentary democracy (a critical attitude towards the so-called in Polish *sejmokracja*, or parliamentocracy) and advocated for the creation of a strongly centralised, authoritarian state. In the Principles of the National Radical Camp, one of the main organisations shaping the Polish national movement just before World War II, it was specified that the state system should be built "on a hierarchy resulting from the degree to which the fate of each Pole is linked to the fate of the nation as a whole, and not on a hierarchy of money and a materialistic attitude towards the state, on which today's systems, both parliamentary and police, are based. Power in the state should be exercised by a hierarchical organisation of the nation, in which every Pole in the appropriate territory cooperates in the national government. The national system must restore dignity and the rule of law (…) and replace the rule of mechanical force with the rule of state authority. Holding a higher position (…) will impose greater duties and greater responsibility on everyone, rather than becoming a source of privileges and benefits".[21] Even more radical views on the state system were expressed by the leader of the National Radical Movement "Falanga" (and later, under communist rule, the founder of the collaborating PAX organisation) Bolesław Piasecki, who postulated the creation of a hierarchical state led by a leader elected for a five-year term by an elite group of distinguished political and social activists, in which legislative power would belong to the collegial leadership of the "political organisation of the nation", and matters giving rise to divergent opinions would be decided by Polish citizens in a referendum. For the sake of clarity, it should be added that in this trend, nationalism increasingly referred to biological categories and that these proposals for a new political system had the hallmarks of totalitarian solutions (this concept was self-identified as a "total national state" or "total Catholic state of the Polish nation").

After World War II, the Polish national movement was relatively effectively and, it must be remembered, often bloodily eradicated from public life in the country by the communist regime. It was not until the emergence of the Solidarity trade union movement (1980–1981) and the following years that circles began to form which referred more openly to the National Democracy tradition. Organisations such as the National Rebirth of Poland, All-Polish Youth and the National Radical Camp only began to function in public life with complete openness after 1989 and the

liberal professions and entrepreneurs who, through their organisations, in consultation with and under the control of political authorities, would shape the entire social, economic and cultural life of individual states (see M. Manoilescu, *Le siècle du corporatisme*, Paris 1937). See also T. Scheffler, *Wprowadzenie*, [in:] *Kodeks Etyki Radcy Prawnego. Komentarz*, ed. T. Scheffler, Warszawa 2022, p. 11.

[21] Quoted after M. Śliwa, *op. cit.*, pp. 148–149. In the interwar period, there were political organisations in Poland that directly referred to Nazi models (e.g. the National Socialist Workers' Party and the Polish National Socialist Party), but it should be noted that they were completely marginal: they are mentioned for chronicle purposes rather than because of their social influence.

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downfall of the Soviet regime. Due to their anti-Semitic tendencies (which varied in intensity among individual organisations and circles), they were ostracised by the political and media mainstream (i.e. placed outside the Overton window). This led to the radicalisation of slogans and methods of political struggle in organisations such as the NOP (Pol. Narodowe Odrodzenie Polski) and ONR (Pol. Obóz Narodowo-Radykalny), even resorting to the idea of physical combat with opponents, which was common to virtually all political movements in the 1930s. A key element of a significant part of the contemporary Polish national movement has been the reference to the Russophile inclinations of pre-war nationalism and criticism of the integrationist tendencies in Europe and the US military presence on our continent.[22]

For the contemporary national movement, the nation remains the most important category. It is essentially understood as a natural, objectively existing community formed by people who feel a sense of unity in terms of culture, mentality, morality and, to a certain extent, territory. This sense of unity gives rise to the community's desire to give itself a certain political, legal and socio-economic structure in the form of a state. Therefore, the idea of the primacy of the nation over the state dominates today's national movement, which results in opposition to the "absolutisation" of the latter. An institutionalised political community is only one form of social organisation, a form of a special kind and of special significance. It is the nation that is a fact, independent of any social organisation, which needs the instruments of the state apparatus to cultivate community values.[23]

There is no consensus within the contemporary national movement on the proposed form of government. Criticism has been levelled at solutions associated with demoliberalism, which is accused of a mechanical understanding of political community detached from the nation and other natural communities. Classically totalitarian systems are also criticised, as they are considered, on the one hand, alien to the native tradition, and on the other hand, leading to the deification (absolutisation) of such elements of social life as social class, race or the state. Even the nation (often written as "Nation") is an ontological and axiological entity whose actions should be within the limits set by religion (Christianity[24]). In place of these solutions, various visions of an elitist, and sometimes even leader-based (NOP) system emerge, in which the rulers would operate as an emanation of the national commu-

[22] For more information, see T. Wrzosek, *Dyskurs nacjonalistyczny w Polsce – główne idee*, "Journal of Modern Science" 2016, vol. 26(3), pp. 349–362.

[23] A. Gmurczyk, *Istota nacjonalizmu*, 2.1.2020, https://www.nacjonalista.pl/2020/01/02/adam-gmurczyk-istota-nacjonalizmu (access: 27.12.2025).

[24] In this case, this does not apply to the movement associated with Jan Stachniuk and the Zadruga milieu, which rejected Christianity (accused of leading to the downfall of Poland and of having Jewish connections) and referred to pre-Christian Slavic beliefs. For more information, see B. Kowal, *Wizja ustroju państwa w myśli politycznej środowiska Zadrugi*, "Polityka i Społeczeństwo" 2012, no. 10, pp. 61–70.

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nity (spirit). At the same time, the national movement calls for the decentralisation of the state through the creation of a strong and independent local government with a strictly defined scope. In the economic sphere, proponents advocate for solutions combining capitalism and state interventionism. They criticise classical economics based on free market forces and the idea of the "night watchman" state, as well as the concept of collective ownership and centralised economic management. In this regard, they advocate for a model of a national, protective economy with limited state intervention. They refer to the idea of a subsidiary and corporate state promoted in the social teachings of the Church (notably during the pontificate of Pius XI), as well as to distributism rooted in British thought. In particular, they are advocates of the promotion and protection of private property as the basis of an economic system. Recognising the need for the national economy to dominate, they proclaim its independence from the influence of foreign capital.[25]

At the end of this summary, it is worth referring to the issue of how power is acquired in the state. In the statements of various nationalist circles, the prevailing opinion is that the best mechanism for achieving political goals is participation in the political life of the state through democratic mechanisms. Differences concern the acceptance of additional mechanisms for influencing potential voters, which would include physical and psychological violence (intentionally causing fear or anxiety in individuals or specific populations). Among the currents referring to the "old National Democracy", i.e. in the All-Polish Youth movement, there is no ideological acceptance for such behaviour that goes beyond the standards accepted by political parties and the mainstream media. The situation is different in circles that refer to the "young" movement of the 1930s, a trend that accepted violence as a tool of political struggle. In addition, some of these organisations (or individual activists) have established cooperation with the Autonomist movement, which emerged in Western Europe at the beginning of the 21st century and represents a new form of nationalism. It is characterised by a combination of the glorification of Europe and European culture as opposed to "external" cultures (e.g. Muslim, American, African) with the pursuit of economic change in the spirit of socialist solutions and the adoption of political struggle techniques from organisations such as Antifa. The latter, in particular, contributes to the recognition of struggle and violence as a legitimate and acceptable element of public life.[26]

[25] E. Kozerska, *Anti-Communism as a Legitimising Element in the Political Narrative of the National Rebirth of Poland* (unpublished). Regarding Młodzież Wszechpolska, I refer to interesting environmental research conducted by W. Bartoszewicz, *Nacjonalizm na przykładzie Młodzieży Wszechpolskiej*, "Biuletyn Polskiego Towarzystwa Kryminologicznego im. prof. Stanisława Batawii" 2019, no. 26, pp. 161–175.

[26] M. Pielużek, *Autonomiczni Nacjonaliści. Próba zewnątrz- i wewnątrzsystemowej charakterystyki subkultury politycznej reprezentującej nowy typ nacjonalizmu*, "Zeszyty Prasoznawcze" 2021, vol. 64(4), pp. 25–54.

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ANALYSIS OF THE CONTENT OF ARTICLE 256 §§ 1 AND 1A OF THE CRIMINAL CODE IN THE CONTEXT OF EXPRESSING NATIONALIST VIEWS

Article 256 of the Criminal Code currently consists of five sections. As a result of the amendment that came into force on 1 October 2023, several elements of this provision have been changed.[27] The most important is the modification of the wording of § 1, which now prohibits the public promotion of Nazi, communist, fascist or other totalitarian state systems. This section maintains the general prohibition of incitement to hatred on grounds of national, ethnic, racial or religious differences or on grounds of non-belief. From a theoretical point of view, this change has brought the wording of this provision in line with Article 13 of the Polish Constitution, which also (albeit in a different context) distinguishes between all three classic totalitarian systems. From a practical point of view, it cuts short discussions on the relationship between fascism and Nazism, ruling that, from the perspective of the public authorities in Poland, these are two separate doctrines. The amendment introduced another important (perhaps the most important) novelty to the Criminal Code in the form of § 1a, which criminalises behaviour consisting in the public promotion of Nazi, communist or fascist ideology or ideology "inciting violence to influence political or social life". It is worth noting that the legislator did not use the term "totalitarian ideology" here, but only the term "ideology". This provision has thus become one of the most controversial legislative solutions in the Criminal Code, as it directly encroaches on the constitutional sphere of freedom of speech and expression. It is to be hoped that, due to its unconstitutionality (Article 54 of the Polish Constitution does not provide for the possibility of statutory restriction of this freedom), it will be examined by the Constitutional Tribunal. The content of § 2 has also undergone some changes related to earlier proceedings before the Constitutional Tribunal. In its current wording, the penalty specified in § 1 applies

[27] In October 2023, the journal "Studia nad Autorytaryzmem i Totalitaryzmem" organized an academic seminar devoted to the above-mentioned amendment to the Criminal Code. It brought together experts on the subject, whose opinions were subsequently published in 2023 (vol. 45, no. 4). See T. Scheffler, A. Muszyńska, *Wprowadzenie do tekstów powstałych w ramach Seminarium „Studiów nad Autorytaryzmem i Totalitaryzmem"*, "Studia nad Autorytaryzmem i Totalitaryzmem" 2023, vol. 45(4), pp. 33–36; M. Budyn-Kulig, *Znamiona przestępstw z art. 256 § 1–2 k.k.*, "Studia nad Autorytaryzmem i Totalitaryzmem" 2023, vol. 45(4), pp. 37–52; M. Urbańczyk, *Penalizacja propagowania ideologii. Uwagi na marginesie nowelizacji art. 256 k.k.*, "Studia nad Autorytaryzmem i Totalitaryzmem" 2023, vol. 45(4), pp. 53–70; K. Łucarz, A. Muszyńska, *O zasadności zmian zakresu penalizacji przestępstwa propagowania faszyzmu i totalitaryzmu*, "Studia nad Autorytaryzmem i Totalitaryzmem" 2023, vol. 45(4), pp. 71–94; J. Lachowski, *O potrzebie utrzymania przepisu art. 256 § 3 k.k.*, "Studia nad Autorytaryzmem i Totalitaryzmem" 2023, vol. 45(4), pp. 95–108; M. Jasińska, H. Paluszkiewicz, *Kilka uwag o problemach dowodowych w procesach o czyny z art. 256 k.k.*, "Studia nad Autorytaryzmem i Totalitaryzmem" 2023, vol. 45(4), pp. 109–124.

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to anyone who, for the purpose of dissemination, produces, records or imports, acquires, disposes of, offers, stores, possesses, presents, transports or transmits a print, recording or other object containing the content specified in §§ 1 or 1a or being a carrier of Nazi, communist, fascist or other totalitarian symbols used in a manner serving to propagate the content specified in §§ 1 or 1a. In this case, too, there is a problem of introducing restrictions on freedom of expression, which § 3 attempts to resolve ("The perpetrator of an act prohibited under § 2 shall not be guilty of an offence if he committed the act in the course of artistic, educational, collecting or scientific activities"). The last part of this provision (§ 4) states that "in the event of a conviction for an offence specified in § 2, the court shall order the forfeiture of the items referred to in § 2, even if they are not the property of the perpetrator".

What conclusions can we draw from the existing exegetical efforts of doctrine and jurisprudence on Article 256 § 1 of the Criminal Code?[28] First of all, let us note that so far neither the literature nor the courts have managed to develop a uniform position on *the ratio legis* of this provision: whether its purpose is to defend against totalitarian ideologies (as A. Sakowicz argues), to defend the democratic rule of law (the prevailing view), or to defend against the glorification of crimes (as L. Gardocki predicted back in 1993 and, to some extent, the Constitutional Tribunal agreed with in its 2011 ruling). Each of these views raises significant doubts. In the case of the thesis on protection against ideologies: this position was opposed, e.g., by the constantly recurring proposals to modify the provision by introducing a ban on their propagation (*a contrario* as long as there is no such provision, it is not subject to criminalisation, and therefore this factor did not determine the creation of the provision), and this is now confirmed by the introduction of the regulation contained in Article 256 § 1a of the Criminal Code. The idea of defending the democratic rule of law is contradicted by the fact that the provision penalises only the promotion of totalitarian state systems, and not every system that is incompatible with the paradigm of the democratic rule of law. This view, based on the incorrect assumption that a totalitarian system is the opposite of a democratic system, is also misguided for at least two reasons. Firstly, democracy itself has a huge despotic element and can therefore be a breeding ground for totalitarianism.[29] Secondly, if we understand totalitarianism as the pursuit of complete control (domination) of public authority over individuals, then the opposite of such a system is anarchism. However, there is no indication that the legislator's intention was to defend anarchism with the tools of state criminal repression. It should be added in this context that despite calls in the media to punish those who seek to

[28] The following statements are based on the findings made in T. Scheffler, *Przestępstwo publicznego propagowania faszystowskiego lub innego totalitarnego ustroju państwa (art. 256 k.k.). Analiza doktrynologiczna wybranych wypowiedzi piśmiennictwa i judykatury. Część szczególna III*, "Studia nad Autorytaryzmem i Totalitaryzmem" 2019, vol. 41(2), pp. 21–25.

[29] This issue has been most comprehensively addressed by J.L. Talmon in his book *Źródła demokracji totalitarnej* (Kraków 2015).

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change the current demoliberal system in favour of more authoritarian structures (e.g. those proclaimed within the national movement) under this provision, the wording of Article 256 § 1 of the Criminal Code does not allow for such an application (this would not even be an extension of the interpretation, but rather an application of analogy). In the latter case (defence against praising crimes), accepting this view would require accepting the idea that the two acts criminalised in Article 256 § 1 of the Criminal Code are closely related. Consequently, we would arrive at the position that not only is criminality a feature of totalitarianism, but also that crimes in the name of the state are committed only in totalitarian systems, which raises several questions, e.g. would the British concentration camps during the Boer Wars or Belgian genocidal acts in the Congo indicate that these states were totalitarian?[30] It seems, however, that this interpretation of Article 256 would lead to too many aporetic statements.

An analysis of doctrinal and judicial statements leads to the conclusion that it is forgotten that concepts such as totalitarianism, National Socialism (Nazism), communism and fascism are theoretical constructs developed in the social sciences and, therefore, their interpretation cannot be based solely on so-called colloquial language (i.e. they were not taken from this language by the legislator). It is also certain that the literature should assist the courts by indicating, as far as possible, clear and easy-to-apply meanings of the concepts found in the Criminal Code. However, these meanings should not be determined arbitrarily, without even rudimentary justification and in isolation from scientific findings, including, above all, the results of the work of lawyers dealing with political and legal doctrines. It might seem tempting to refer to the principle that a legal paper should be interpreted in accordance with the meanings given to individual words in everyday language, but it is easy to point out the inadmissibility of this postulate, resulting, e.g., from the fact that there is no fully developed and universally accepted procedure in criminal science for determining the meanings of words in everyday language (both the judge's categories of thought are "tainted" by specialist categories of legal education, and dictionary or encyclopedic definitions and pseudo-definitions express the selected intuitions of specific representatives of the humanities or social sciences; in both cases, they differ

[30] For example, T. Plaszczyk titled one of his papers: *Crime under Article 256 of the Criminal Code – Practical Remarks* (*Przestępstwo z art. 256 k.k. — uwagi praktyczne*, "Przegląd Bezpieczeństwa Wewnętrznego" 2011, no. 5, pp. 82–90). I would like to point out that the title of this paper uses the singular form in reference to the offences specified in Article 256 § 1 of the Criminal Code. On the Police website, the acts criminalised under Article 256 are treated collectively and defined as "Public promotion of fascism, incitement to hatred" (http://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-13/63613,Publiczne-propagowanie-faszyzmu-nawolywanie-do-nienawisci-art-256.html, access: 12.2.2019). Here, too, we can see how dangerous interpretations can arise from this way of thinking. See T. Scheffler, *Przestępstwo publicznego propagowania faszystowskiego lub innego totalitarnego ustroju państwa (art. 256 k.k.). Analiza doktrynologiczna wybranych wypowiedzi piśmiennictwa i judykatury. Część szczególna III*, "Studia nad Autorytaryzmem i Totalitaryzmem" 2019, vol. 41(2), pp. 21–23.

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from the everyday perceptions of citizens). At the same time, the application of the principle of colloquiality in the exegesis of papers containing specialist terms may have dangerous consequences. For example, in one of the criminal cases pending in Wrocław, the indictment included the use of a swastika identified by the prosecutor exclusively, and therefore contrary to centuries-old tradition, including Polish tradition, with a Nazi symbol, and it was assumed that displaying the Rodło symbol was tantamount to using Nazi symbols.[31] Such conduct, resulting in the adoption of meanings of concepts that are inconsistent with reality in the course of adjudication, leads to a violation of the principle of *nullum crimen sine lege stricta*, and thus to questioning one of the fundamental principles of the criminal justice system of a state governed by the rule of law.[32]

The lack of broader reflection in the literature on the complexity and ambiguity of the content behind the aforementioned concepts is also striking. Referring to encyclopaedias (even if it is the PWN Encyclopaedia) without considering the possibility of using alternative sources of knowledge and without indicating the reasons why this particular publication (e.g. the PWN Encyclopaedia) should co-construct the norm on which the ruling is based is inconsistent with the rules of proper exegesis. It is worth recalling here that over the last few decades, science has developed several fundamental models for understanding the concept of totalitarianism. Recognising that a given act is propaganda for a totalitarian regime can therefore be understood as someone demanding the introduction of a state system that would, e.g., fulfil the Friedrich syndrome or the Arendt syndrome or Sartori's postulates. Under no circumstances, however, should this involve referring the perpetrator's demands to some undefined, incoherent mixture of views presented by science and drawn from common perceptions, invented *ad hoc* by the adjudicating body. Such a course of action would be contrary to the constitutional principle of the specificity of criminal law. At the same time, however, it should be emphasised that adopting one of the above-mentioned theoretical models of totalitarianism as the basis for a ruling will result in the emergence of a different norm as a result of the interpretation of Article 256 § 1 *in principio* of the Criminal Code. Therefore, a ruling (and especially its justification) that is not based on a conscious choice of one of the competing models of totalitarianism is flawed and subject to review by a higher court (depending on the circumstances, Article 438 (1) or (3) of the Criminal Procedure Code or Article 425 § 2 second sentence of the Criminal Procedure Code may apply). However, even if we were to accept the legal fiction of the existence of some synthetic general the-

[31] See the content of the indictment in the case file of the District Court for Wrocław-Śródmieście (case no. V K 2407/07).

[32] T. Scheffler, *Przestępstwo publicznego propagowania faszystowskiego lub innego totalitarnego ustroju państwa (art. 256 k.k.). Analiza doktrynologiczna wybranych wypowiedzi piśmiennictwa i judykatury. Część szczególna III*, "Studia nad Autorytaryzmem i Totalitaryzmem" 2019, vol. 41(2), pp. 23–24.

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ory of totalitarianism, it would still be incorrect in this context to seek grounds for criminal liability in these elements of potential acts (clearly present in the literature on the subject and in case law), or even to seek, contrary to the clear wording of the Act, grounds for criminal liability in those elements of potential acts which do not constitute constituent elements of totalitarianism. In particular, neither chauvinism, nationalism, collectivisation of property, racism, nor even anti-Semitism determine the totalitarian nature of a given state system. Moreover, conducting evidentiary proceedings to establish the existence of these circumstances is unnecessary, as it does not lead to the determination of the existence of the elements of a crime in a given act – Article 256 § 1 of the Criminal Code prohibits the promotion of a totalitarian state system, not the promotion of broadly understood political, legal or economic doctrines. In other words, the public promotion of such doctrines is prohibited by criminal law only to the extent and the part (fragment) in which these doctrines would postulate the establishment of a totalitarian state system. A broad interpretation in a democratic state governed by the rule of law, which Article 256 § 1 of the Criminal Code protects, is unacceptable. It should also be noted in this context that the focus of criminal law scholars and practitioners on historical examples of totalitarian regimes carries with it a serious danger of overlooking (as Sartori wrote) that true, real totalitarianism will come with technological development, which will allow those in power to fulfil their dream of exercising complete control over human life. It might therefore be worth considering such a transformation and exegesis of Article 256 of the Criminal Code, and work on amending the wording of this article, which would result in the development of an effective criminal law tool to defend civil society and the rule of law against totalitarianism resulting from the information revolution.[33]

My thesis that Article 256 § 1 of the Criminal Code does not cover the proclamation of doctrines, but only actions that implement the postulates of such doctrines, can be proven by the introduction of a new editorial unit to this provision in the form of the already quoted § 1a. Recall that this paragraph prohibits the public promotion of Nazi, communist, fascist ideologies or ideologies "inciting violence to influence political or social life". As already noted, a puzzling feature of this provision is that the legislator did not use the term "totalitarian ideologies", purposely limiting the term to "ideologies". I will devote a separate paper to this issue, which is very important from a practical point of view. Here, I only draw attention to the potential possibility of its application in relation to the promotion of nationalist ideologies.

First of all, it should be noted that nationalist ideologies are not identical to either fascism or communism, despite the presence of nationalist elements in both. These

[33] R. Bäcker, *Totalitaryzm w cywilizacji informatycznej*, "Studia nad Autorytaryzmem i Totalitaryzmem" 2017, vol. 39(1), pp. 9–18. T. Scheffler, *Od totalitaryzmu do neototalitaryzmu*, [in:] *Natura totalitaryzmów. Od modelu Carla J. Friedricha i Zbigniewa Brzezińskiego po zagrożenia XXI wieku*, ed. E. Habowski, Warszawa 2023, pp. 116–127.

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doctrinal families give priority to communities other than the national community, and therefore, by definition, cannot be equated with any of the classic nationalist movements. The situation is different in the case of Nazism, which in its early phase (1920) could be considered one of the Volkist organisations.[34] However, the later evolution of National Socialism as preached by the NSDAP, characterised by an emphasis on racism and geopolitics,[35] clearly separated this doctrine from the Volkist movement and allowed for the creation of a new ideology called Nazism. Therefore, despite the existence of a very strong Volkist component (ethnic-biological nationalism) in Nazism, the relationship between nationalism and Nazism is one of intersection rather than absorption. Thus, nationalist doctrines are not prohibited under the three classic totalitarian doctrines listed in Article 256 § 1a of the Criminal Code, as they are not identical to them (except for the Volkist concept, which, with appropriate interpretation, could be linked to Nazism due to the early form of the NSDAP doctrine).

The question therefore remains as to whether the expression of nationalist views is permissible in the context of the second part of Article 256 § 1a of the Criminal Code, i.e. in connection with the prohibition of incitement by a given ideology to use violence in order to influence political or social life. As I pointed out when discussing Polish nationalism, the use of violence to an extent that deviates from the political norms of the time and place is not a constitutive element of all nationalist movements. When considering a given case, the court should always consider whether it is dealing with an ideology that incites violence or "only" with a person who incites such violence, even though the ideology with which such incitement is identified does not contain it as a constitutive element. The application of Article 256 § 1a will therefore require, if it is to be done with respect for constitutional freedoms, very detailed scientific research, not at the political science level, but at the doctrinal level, as it will require the study of ideology in the context of the legal system. And this is precisely the subject of research in the branch of law known as doctrinal (political and legal doctrines).

CONCLUSIONS

The great merit of the authors of the 1997 Criminal Code was that they broke with the totalitarian approach to one of the fundamental human rights, namely freedom of expression. There is no need to convince anyone that the free exchange of thoughts, ideas and concepts is the foundation of a pluralistic society and a modern state governed by the rule of law, and justifying restrictions on freedom of expression by the need to defend democracy is nothing more than a return, in a modified

[34] For more on this subject, see M. Maciejewski, *Ruch i ideologia narodowych socjalistów w Republice Weimarskiej (1920–1923)*, Warszawa–Wrocław 1985.

[35] M. Zmierczak, *Spory o istotę faszyzmu. Dzieje i krytyka*, Poznań 1988.

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form, to the criminal Jacobin formula of "No freedom for the enemies of freedom". The authors of the Code, consciously abandoning the solutions typical of the 1969 regulations, have thus succeeded in excellently defining in words a crime whose object of protection is the minimum requirement of the rule of law and the essence of human dignity (human subjectivity): the public promotion of a totalitarian state system. Unfortunately, the amendment to Article 256, consisting in the addition of § 1a, undermines this liberal approach. As a result, proceedings may be initiated on the basis of rather vague findings attributing, e.g., totalitarian ideology to a national movement (which in itself, according to the literal wording of Article 256 § 1a, is not a crime) or by adding the element of "incitement to violence" to all nationalist movements. Experience to date indicates that referring to objective categories developed by science (distinctive features of a given category) in prosecutorial and judicial proceedings is not standard practice. It is to be hoped that practice in this area will change and that in cases brought under this provision, when determining whether we are dealing with the public promotion of "Nazi, communist or fascist ideology" or with cases where law enforcement authorities seek to prove that we are dealing with the public promotion of an ideology inciting "to use violence to influence political or social life", they will first seek the assistance of specialists. On the other hand, as long as the aforementioned provision exists in the legal system, members and activists of all organisations associated with the contemporary national movement must refer to the traditions of the Polish national movement in a balanced manner, as ideological theses and assumptions developed in a different historical context may become the basis for recognising that an ideology calling for "the use of violence to influence political or social life" is being propagated. It should be remembered that despite lofty declarations about the defence of freedom and the need to protect the liberal-democratic order, practice shows that in politically charged cases, the totalitarian paradigm of criminal law (whose formulation is attributed to Soviet prosecutor Andrei Vyshinsky) will prevail: "Give me a man, and I will find a paragraph".

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ABSTRAKT

Artykuł dotyczy skutków zmian brzmienia art. 256 k.k., a w szczególności dodania przepisu, który zakazuje publicznego propagowania ideologii nazistowskiej, komunistycznej, faszystowskiej lub ideologii nawołującej do użycia przemocy w celu wpływania na życie polityczne lub społeczne. Zmiana ta jest odstępstwem od wcześniejszych regulacji karnych, które – poza wyjątkiem dotyczącym „kłamstwa oświęcimskiego" oraz nawoływaniem do nienawiści na tle narodowym, etnicznym, rasowym i wyznaniowym (bądź dotyczącym braku wyznania) – nie ingerowały w sferę wolności słowa. Autor bada, czy nowe brzmienie art. 256 k.k. może doprowadzić do karania za głoszenie poglądów nacjonalistycznych. W tym celu tekst został podzielony na dwie części. W pierwszej omówiono cechy charakterystyczne polskich koncepcji nacjonalistycznych (za pomocą metody doktrynologiczno-opisowej). W drugiej poddano badaniu treść art. 256 k.k. (za pomocą metod dogmatycznych). W efekcie autor stawia tezę, że karalność zależeć będzie od ustalenia, czy dana „ideologia" zawiera w sobie komponent zgody na przemoc jako zwykłe narzędzie walki politycznej, co z kolei – ze względu na potrzebę posiadania wiedzy specjalistycznej – będzie musiało być zlecane naukowcom.

Słowa kluczowe: nacjonalizm; ideologia; doktryna; nazizm; faszyzm; komunizm