Is One Offended Pole Enough to Take Critics of Official Historical Narratives to Court?

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In a recent interview with *Verfassungsblog*, Wojciech Sadurski lists his fears accompanying the high probability of the Law and Justice forthcoming electoral victory. He mentions fundamental rules and values, such as the constitutional order, an independent judiciary, fair elections and free press. However, what can also be at stake and what just seemingly may be considered of lesser importance, is the possible conclusion of the process of reshaping the historical narratives and introduction of a state-imposed vision of historical truth.

This vision does not accept the painful way of coming to terms with one's nation's past, like it happened when in 2015, Olga Tokarczuk, the just announced winner of the Nobel Prize in Literature, spoke about the Poles' shared responsibility for the fate of Jews and crimes committed against Ukrainians:

> "We contrived a narrative of Polish history depicting Poland as a tolerant, open country, one which has never disgraced itself with any wrongdoing towards its minority groups (…). Meanwhile, as colonizers and an ethnic majority, we did appalling things, suppressing minorities; we were slaveholders and murderers of Jews."

As a consequence, Tokarczuk received death threats, she was accused of being an "enemy of the Nation". But the fact is also that under present legal provisions and their interpretation by the courts, the words she uttered could still be found damaging the good name of the Polish Nation.

Last year, also on *Verfassungsblog*, those exploring the impact of law on memory were wondering what effects the amendments to the Polish Act on the Institute of National Remembrance are likely to have on the practical use of what are known as memory laws. Even though the most controversial provisions introduced in the first amendment of January 2018, which sparked an international diplomatic scandal, have been erased, the laws in force left the door open to bids to stifle debates on troubling historical issues using the tools of law.

Interestingly, it seems that no lawsuits have as yet been brought before the Polish courts in reliance on the controversial amended regulations. So perhaps those arguing that it is practically impossible for lawsuits of this kind to be allowed in Polish courts were right after all. Then again, it may in fact be the case that the NGOs entitled to sue under the amended regulations have chosen to lay low for now and not exercise these rights for political reasons. In a parallel development, however, Polish courts are increasingly becoming venues for settling disputes about the past,

and the most recent court judgments prove just how far-reaching the effects of legal incursions into the sphere of historical memory can be.

A highly problematic trend has emerged just recently, creating a precedent in the Polish legal doctrine. In January 2017, the Polish edition of *Newsweek* magazine published an article by Paulina Szewczyk entitled “After the Liberation of Nazi Camps, Did the Poles Open Them Again? ‘The Little Crime’ by Marek #uszczyna”. The author of this article stated that after 1945 Poles re-opened the #wi#toch#owice-Zgoda camp, a branch of the former Auschwitz-Birkenau camp. A lawsuit against *Newsweek*’s editor-in-chief was brought by Maciej #wirski, the president of the Polish League Against Defamation (RDI), based on the press law provisions. In January 2018, the court decided in his favour, ordering the editor-in-chief to publish a corrigendum admitting that the assertion of the existence of “Polish concentration camps” created by Poles is false. This initial ruling was subsequently upheld by the Court of Appeal and eventually the Supreme Court, the latter finding *Newsweek*’s last resort appeal (cassation) to be unfounded.

The revolutionary reasoning of the Polish courts in this case was well summarized by Monika Brzozowska-Pasieka, Mr. #wirski’s attorney, who described it as an „absolute novelty and certainly a precedent”. As she explained, „the courts of all instances, including the Supreme Court, stated that there was no need for the name of Maciej #wirski to appear in the contested press material. It is sufficient that the text concerns Poles, and then Maciej #wirski — as a Pole and also due to his social involvement — may demand the material to be corrected. The trial court also argued that national identity and national dignity are in fact personal rights and untrue references to ‘Polish concentration camps’ infringe those rights”.

This viewpoint, novel in Polish case law, is also apparent in a more recent judgment in which the Regional Court in Warsaw ordered the German newspaper *Frankfurter Rundschau* to apologize to Mr. #wirski for its publication criticizing the Polish government for its historical policy portraying the Holocaust as a “purely German” atrocity. The Warsaw court found that to deny the sole responsibility of the German nation for the Holocaust is to attack the Polish nation — and thus every Pole. The central concern — without going into the legitimacy or otherwise of the statements made by *Frankfurter Rundschau* or the efforts of some groups in Germany to transfer the responsibility for the Holocaust to other nations under German occupation during World War II (or rather to “share” this responsibility with those nations) — is that in this case Mr. #wirski was deemed a person authorized to take legal action on behalf of the nation so insulted.

However, not only the scope of legal standing remains a problematic issue here. The right to one’s national identity is not explicitly mentioned in Article 23 of the Polish Civil Code that protects personal rights. The existence of this right is a point of contention among both legal scholars and courts and, even if some judicial decisions may be seen as suggesting that it may in fact exist, there is no established consensus in this respect. There are doubts as to whether a characteristic of an entire ethnic or national community can be considered a legitimate individual right, given that it is the community rather than any one of its members that has a legitimate interest in such a characteristic. Moreover, a critique of some events in the

history of Poland and the Polish Nation cannot be considered to be violating national self-respect and identity because a lot of Poles may agree with such critical remarks, and especially because debate and criticism may address conduct the victims of which also included Polish citizens and which therefore was equally part of what formed the identity and history of the Polish Nation. Therefore, what is protected in the personal right involving self-respect and national identity is not one's subjective idea of a flawless heroic nation, but one's freedom from humiliating statements concerning nationality, from offensive remarks being made against members of some ethnic group because of their ethnicity, or from insults made against the community generally.

From the reasoning presented by Mr. #wirski in both of the cases mentioned, it seems that the claims include also a rather contrived right to have a history of World War II presented truthfully – however, it is not understood as a right to protect personal history of a plaintiff or plaintiff's relatives but rather as a demand to have history presented and related in a certain way, being considered as true by a plaintiff. Obviously, there is no such right (as long as we accept the individualised notion of personal rights). While there is no doubt that history should not be falsified, it is unclear how this relates to the legal construction of individual rights. Basically, accepting that one has a claim to have history presented truthfully would do away with the notion of individual rights in the context of statements about historical facts, giving everyone the related right. Needless to say, there is nothing in the Polish civil law that would support such a doctrine.

This new trend emerging in court rulings marks a radical departure from the requirement prevailing thus far for there to be a direct relationship between a person harmed and the action detrimental to this person's good name, honor or the memory of this person's deceased loved ones. The described approach turns each personal rights' claim in memory and history cases into *actio popularis*, i.e. generally everyone (or at least everyone who is legitimated by one core feature – affiliation to the Polish Nation) is entitled to sue an alleged perpetrator of defamation of a good name of the Polish Nation, even despite the fact that linkage between the personal situation of such party and alleged defamation act remains rather weak. If this trend would continue, it could open Pandora's box by granting the right to sue those infringing the good name of a certain group (transsexuals, vegans, fans of certain football club, etc.) to each member of such group. This would of course result in a loop of claims between antagonized groups in the society.

As previously stated, the new approach in the jurisprudence of the Polish courts facilitates the process of reshaping the views regarding Polish history (as some claim – in defence of historical truth against its distortion). But what really is at stake here is the risk of whitewashing the uncomfortable truths. Even greater risk, however, arises from the temptation of the governments to leave the legal battles over history to individuals or organisations close to the ruling circles. This way the governments may avoid entering into diplomatic disputes that can turn into open international conflicts. This in turn can even open space for potential politically inspired actions restricting free speech (or at least causing "chilling effect"),

supported and, sometimes, informally directed by the government, while formally being still just individually pursued claims.

The controversial nature of these recent verdicts of Polish courts stands out in even sharper relief when viewed in the light of constitutional and international standards of protection of freedom of speech. These standards call for the widest possible freedom of speech in historical debates and emphasize — excepting the case of Holocaust denial — the primacy of freedom in discussions of even the most controversial statements about the past. Polish courts meanwhile have now apparently taken the opposite course and want to restrict this freedom, such as by granting the kind of far-ranging right to sue as was granted to Mr. #wirski. Let us just briefly signal the prevailing standards that Polish courts may be breaching. The general position in this regard of the ECHR was best summarized by Judge Nussberger in the judgment of the Grand Chamber of the ECHR in *Perinçek v. Switzerland*:

> There is not one historical truth that could remain permanently immutable. On the contrary, new research and new discoveries of documents and evidence may shed new light on what has been deemed to be an uncontested view. Therefore, debate and discussion about history is an essential part of freedom of expression and should in principle never be curtailed in a democratic society, especially not by defining taboos on what events have to be excluded from free assessment in public debate or by establishing certain “official views” that must not be contested.

The most important aspect of the *dictum* of the Polish courts presented above is the fact that for the purposes of trials regarding the Polish past and Poland’s good name, Mr. #wirski, as a Pole engaged in historical disputes, seems to have become an “emanation” of Polishness and of the Polish nation. Such understanding of the legal concept of personal rights stands in stark contrast with the previous Polish case law where an immediate and direct link between the harm done and the person harmed was generally considered to be mandatory. Further developments in this regard, highly relevant for the shaping of history with legal means, must be monitored closely.
