



PATRIA NOSTRA ASSOCIATION

THE POLISH POINT OF VIEW

Olsztyn, 20 November 2020

The main themes and a summary of Attorney Lech Obara's lecture to be given during the international scientific conference on 26 November 2020.

A brief history of the Patria Nostra Association and its mission

The Patria Nostra Association unites former concentration camp prisoners and their descendants, as well as lawyers, scientists, and all those who care about the historical truth. Attorney Lech Obara is the president of the Association, and Janina Luberda-Zapaśnik, a former prisoner of the concentration camp in Potulice (Lebrechtsdorf), is the vice-president

The idea to establish the Patria Nostra Association appeared in 2009. It was established due to the habitual use in international media of phrases constituting “defective memory codes”, such as “the Polish concentration camp”, “the Polish death camp”, “Polish Nazis”, “Polish crimes against humanity”, “Nazi Poland” or “the Polish Gestapo”.

The common use of the term “the Polish extermination camp” or “the Polish concentration camp” leads to a dangerous image for Poland and for the Polish historical policy alike, to the impression in the historical consciousness of foreign societies that it was not the Germans, but the Poles who set up these criminal camps.

Since 2004, the Polish Ministry of Foreign Affairs has been carrying out diplomatic activities to combat the usage of the phrase “the Polish extermination camp” by international media.

Between 2008 and 2017 Polish diplomats from all over the world conducted 1,412 interventions of different types. Between 2008 and 2013, their number was fairly constant, at around 100 per year. In 2014, however, it increased to as many as 151. The largest number of interventions occurred in 2015 – as many as 277, and a year later – 241. In 2017 there were as many as 233 interventions in connection with the use of defective memory codes in other countries.

As you can see, the number of false phrases distorting history is not decreasing, but even increasing. This inspired the Patria Nostra Association to fight against the phrase “the Polish extermination camps” in court and to sue the media that have been distorting history.

To this end, the Patria Nostra Association monitors all forms of media reports – the press, radio, television, internet websites and film – for the appearance of “defective memory codes”. In the

case of unsuccessful calls to publish the text of the apology, the Association has undertaken to enforce it in court.

THE PRESS...

In 2009, the first claim against **Axel Springer SE, the publisher of the Die Welt daily newspaper**, was filed by Zbigniew Osewski, the grandson of a former prisoner of the German labour camp in Sztum and a former prisoner of the German camp in Deutsch Eylau. The claim was filed by the Law Firm “Lech Obara i Współpracownicy”, representing Zbigniew Osewski, and from 2012 also by the Patria Nostra Association, with the Regional Court in Warsaw. Initially, the Regional Court in Warsaw rejected the claim, but due to the fact that the Court of Appeal in Warsaw allowed the complaint, the claim was processed in 2011 (File no. II C 10/11). On 5 March 2015, the Regional Court in Warsaw dismissed the claim, which was challenged by the claimant on appeal to the Court of Appeal in Warsaw. On 31 March 2016 the Court of Appeal in Warsaw (I ACa 971/15) held that, first of all, the case may be decided by a Polish court; secondly, the Polish law should be applied in the claim; thirdly, that the interests indicated in the claim, i.e. national dignity and national identity, fall within the category of personal interests protected under Article 24 of the Civil Code; fourthly, that the phrase “the Polish concentration camp”, which is incriminated in the claim, may infringe the personal interests of the grandson of the former prisoner of one of the concentration camps; fifthly, that of the forms of remedying the infringement of personal interests provided for in the Civil Code, an apology is appropriate in this case – a statement with the appropriate content and form. Since the defendant had previously and in the course of the lawsuit made a public statement of apology, this was considered by the court to be a sufficient sanction to remove and remedy the claimant’s harm.

The next defendant is **Mittelbayerischer Verlag KG**, with its registered office in Regensburg.

In the newspaper’s online publications, the German extermination camps in Sobibór, Treblinka and Bełżec were called “Polish camps”. The Polish Union of Former Political Prisoners of Hitler’s Prisons and Concentration Camps, represented by president Stanisław Zalewski, felt hurt by this fact and it was on his behalf that the lawyers from Patria Nostra filed a lawsuit.

WEBSITES...

The lawsuit filed by Janina Luberda-Zapaśnik, a former prisoner of the Lebrechtsdorff camp, represented by lawyers of the Patria Nostra Association, against the publisher of FOCUS Online – Tommorow Focus Media GmbH for the publication of the phrase “the Polish extermination camp” with reference to the camps in Sobibór and Treblinka.

TELEVISION...

The lawsuit filed by Karol Tendera, a former Auschwitz prisoner represented by the lawyers of the Patria Nostra Association, against channel two of the German public television ZDF for calling the Nazi concentration camps in Oświęcim and Majdanek “Polish extermination camps”.

RADIO STATIONS...

Another lawsuit for the protection of personal interests and recompense was brought in January 2018 by the Patria Nostra Association against Bayerischer Rundfunk, a radio station in Bavaria (Munich). In the station's online publications, the German extermination camps in Sobibór, Treblinka and Bełżec were called "Polish camps". It was also in this case that the lawyers of Patria Nostra filed a lawsuit on behalf of Stanisław Zalewski.

MONITORING THE APPEARANCE OF THE PHRASE "POLISH EXTERMINATION CAMPS" AND CALLS FOR THEIR REMOVAL

In July 2018, the Patria Nostra Association, using the civil path provided by the amended Act on the Institute of National Remembrance (IPN), filed a summons against the Italian website globalist.it.

The phrase "Polish camps" appeared on this Italian website in late May 2018. The globalist.it website in the article titled "Ciao Alberto Mieli, ultimo testimone di Auschwitz" describes the life of an Italian prisoner of the Auschwitz camp, calling him in the text "the last witness of Auschwitz" and "a witness to the atrocities of Nazi fascists".

A summons was also filed against the largest French-language newspaper "Le Soir", published in Belgium. The phrase about "Polish camps" appeared in the newspaper on 30 June 2017.

Does Polish law provide sufficient protection of the Polish historical memory?

Of the tools that can be used to defend historical truth, the civil law is definitely the best. In recent years, mechanisms have emerged to respond effectively to attempts to distort our history. Reaching for civil measures is often contrary to the will of many Poles who would like to see a sharper response to the most vile historical lies, such as statements about "the Polish death camps" or attributing complicity in other German crimes to the Poles. Some people would like to prosecute such liars primarily under the Criminal Code. Yet, we need to be aware of what the practice is like in such cases. The most frequent lies that undermine Polish historical memory are formulated outside the borders of our country. This means that we would have to bring a citizen of another country before the Polish court, and they will most likely not be willing to appear in Poland for this purpose. Meanwhile, the law, to be respected, must be effective. Therefore, it is the civil law that gives the Poles more opportunities to defend our historical memory than the criminal law. An audible apology or an award of a high recompense may deter potential liars in the future as well as a threat of prison.

The situation is difficult. Not only in Germany, which is the most infamous for our interventions. While Observing the situation with growing anxiety, we, the Polish lawyers who wish to protect the image of our nation, have decided to act. Since we operate in one European legal system, where court judgments issued in one country should be automatically enforced in

another EU country, we have decided that Polish regulations should be used to prosecute lies from abroad.

On the one hand, we have tools at our disposal to protect personal interests, as provided for in the Civil Code. In the Criminal Code, however, we have the defence against insult (Article 133 of the Criminal Code), combating the propagation of fascism and communism (Article 256 of the Criminal Code) and preventing lies about German crimes and communist crimes (Article 55 of the Act on IPN).

It was on the basis of the Polish civil law that we sued the most powerful foreign publishers, representing various media channels – ZDF television, Die Welt newspaper, Bayerischer Rundfunk radio and the regional Mittelbayerische magazine. Also the large Focus online website, where the claimant was the vice-president of the association, dr Janina Luberd-Zapaśnik, a former Lebrechsdorf prisoner.

The case of Zbigniew Osewski against the publisher of the daily newspaper Die Welt has become a milestone in the Polish case-law.

In fact, we had nowhere to start before the case was taken to court. What should we call the feeling that a descendant of the victims of German crimes in concentration camps experiences when reading the phrase “the Polish camp” in German press? Articles 23 and 24 of the Civil Code refer to personal interests under the protection of Polish law, including health, freedom and dignity. Initially, other experts advised us against getting involved in this case, claiming that Polish law does not mention the interests that were infringed in the case of Mr Osewski. However, we made a decision that we would argue before the Polish court that the case was about national dignity and national identity. And finally, this argumentation was accepted by the court. These interests are currently protected in the Polish legal order, and national dignity and identity are mentioned in the comments to the Civil Code as examples of personal interests and recognized in subsequent rulings of common courts. That was absolutely crucial.

The second challenge that we faced was the so-called individualization. The idea was to demonstrate that something that concerns a group may also concern an individual member of that group.

Another issue was the question of jurisdiction of the Polish court and Polish law. In short, why should the lawsuit be brought in Poland rather than in Germany? It is assumed that the lawsuit is filed with the court that has jurisdiction for the defendant. Initially, the regional court in Poland declined jurisdiction to handle the case of a German newspaper, but the court of appeal expressed a different opinion.

The EU regulations provide that in a situation of tort, which is the case here, lawsuit can be brought where the damage occurred. Meanwhile, Mr Osewski was harmed when he was reading about “the Polish camps” while at home in Świnoujście. And this was the argumentation that the court of appeal admitted.

This would not have been feasible 10 years ago because the general opinion was that it was impossible to indicate a particular type of personal interests that the phrase “the Polish camps” could infringe. In the context of the lawsuits, I have to mention professor Aurelia Nowicka, an expert in European law, whose assistance in the formulation of the claim was invaluable. The lawsuits were also co-authored by attorney Szymon Topa.

The following persons also demonstrated their active commitment: Monika Brzozowska and attorney Jerzy Pasięka from Reduta Dobrego Imienia. They filed a lawsuit for the infringement of personal interests of the Home Army (AK) soldier, captain Zbigniew Radłowski, against the producer of the series “Nasze matki, nasi ojcowie” [*Generation War*], in which Poles were portrayed as anti-Semites. The World Association of Home Army Soldiers joined in the lawsuit. We managed to win in the first instance, but the defendant filed an appeal.

German lawyers, including attorney Peter Duber and attorney Rajmund Niwiński have also made a contribution to this case.

The most famous case, however, was the lawsuit of Karol Tendera, an Auschwitz prisoner who felt offended by the text that was published in 2013 on the ZDF website. The text discussed a documentary about German extermination camps. There was the following sentence in it: “Discovery of the Polish extermination camps in Majdanek and Oświęcim in July 1944 and January 1945”.

Thanks to the path presented above, which we managed to clear, Mr Tendera’s lawsuit was processed by the Polish courts. Although ZDF apologized to Mr Tendera, it was done privately. Mr Tendera decided that since the lie was told in public, the apology should also be public so that as many Germans as possible could learn the truth about the functioning of the German extermination machine. The Polish courts admitted that the former prisoner’s claim was well-founded and decided that ZDF had to post an apology on its website for 30 days. Unfortunately, the German station was not willing to do it. Hence, we turned to German courts. We were represented before them by a great lawyer working in Berlin, attorney Peter Duber, who did it *pro publico bono*. We sent a letter from Mr Tendera to the German judges, we also sent them his memoirs. ZDF was represented by the best law firm in Germany. They tried to make us look like troublemakers, claiming that we have been implementing the historical policy of the Law and Justice party, which allegedly intends to drive a wedge between the Poles and the Germans. The ZDF representatives also claimed that the judgment is unfair because the judges in Poland are not independent... However, the court in Karlsruhe concluded that freedom of speech must be out of the limelight in view of Mr Tendera’s suffering. The German judges also admitted

that the phrase “the Polish camps” cannot be regarded as a geographical term, because an inexperienced reader will regard it to be the nationality of the perpetrators. In this way, the German court confirmed the validity of the Polish court’s judgment and ordered that ZDF apologize to Mr Tendera. However, the ZDF lawyers appealed to the Federal Court of Justice in Karlsruhe.

At the time, it became clear that there are some exceptions to the principle of automatic enforcement of judgments handed down in other EU countries... Unfortunately, the automatic enforcement did not work. The key judges in Germany somehow reopened the case and began to review it as to the substance! They acted like another instance above Polish courts. Ultimately, they found that journalists, even though they had no right to write about “the Polish extermination camps”, could not be forced by court to deny this statement. According to the Court in Karlsruhe, the media cannot be forced to publish the opinions of other people, including those set out in a court judgment. The Court in Karlsruhe held that the statement ordered to be published by the court ruling that there were no Polish death camps is an opinion.

This is a very unusual approach because the Germans are trying to demonstrate that they are a nation that speaks openly about its crimes. It would be difficult to imagine a similar judgment as regards even the Jewish victims of the Third Reich. Undoubtedly, no German court or tribunal would consider the phrase “the Jewish concentration camp” to be an opinion; it would certainly be condemned as a disgusting lie.

German journalists are aware of this, they are very sensitive about it, and such a “mental shortcut” about the camps is absolutely unthinkable in Germany. However, Poles are not covered by such protection...

The Patria Nostra Association is currently handling a case whose resolution may have truly serious consequences for future lawsuits in defence of Polish historical memory.

In January 2018, we filed lawsuits with the Warsaw Regional Court against a radio station and a newspaper in Bavaria. On their websites, the media called the German extermination camps in Sobibór, Treblinka and Bełżec “the Polish camps”. The claimant is Stanisław Zalewski, president of the Polish Union of Former Political Prisoners of Hitler’s Prisons and Concentration Camps. This former extermination camp prisoner demands an apology and a payment of PLN 50 thousand to the association.

A Polish court unexpectedly made a reference for a preliminary ruling to the CJEU in one of these cases – whether the claimant’s domicile should definitely determine the jurisdiction of the Polish court in such cases. We will see what the CJEU’s answer will be. In addition, there is a risk that judgments of Polish courts will not be enforced in other EU countries. Now there is an additional threat that in cases where so far EU law has referred to jurisdiction determined by the venue where the damage was caused, there will be a reinterpretation of this rule. Hence,

it is likely that we will have to sue the German media directly before the local courts. This would, of course, make our work very difficult and definitely reduce the chances of obtaining a favourable judgment, especially after the judgment of the Federal Court of Justice in Karlsruhe.

Actions of the European Commission

If the German court fails to enforce the judgment, the Vice-President of the European Commission, as guardian of the Treaties, should intervene “automatically”. She should have moved to the CJEU in order to defend the right of the UU under Article 258 of the Treaty on the Functioning of the European Union, but she did not do so and stated that this was not her role. We have been writing petitions to her and we are still struggling to make her deal with the subject. There is even more to that – the EC expressed its position on the reference for a preliminary ruling concerning Mr Zalewski. In the opinion of the EC, it is the German courts that should deal with such lawsuits. We are now waiting for the CJEU ruling, which will determine whether we will still be able to use the “Polish path” in such cases.

Are the Poles not fighting a losing battle here?

We have to fight, we have to publicize these outrageous stories. If the blend in the phrase “the Polish camp” is preserved in the memory of Western societies, there can only be one consequence. We will be the ones who will be considered Nazis. Professor Witold Kieżun warns against this mechanism. How does it work? The whole world knows that it was the Nazis who built the extermination camps. If the West commonly believes that the extermination camps were actually Polish, these mythical Nazis will automatically acquire a nationality. The Nazis will become Poles, not Germans. We cannot let that happen. The Polish government may also try to change this state of affairs and file a complaint with the CJEU under Article 259 of the Treaty on the Functioning of the European Union against Germany for violation of EU law.

Our actions are also supported by a book published by the Patria Nostra Association and edited by professor Arkadiusz Radwan and dr Marcin Berent. “Prawda historyczna a odpowiedzialność prawna za jej negowanie lub zniekształcanie” [*Historical truth and legal responsibility for denying or distorting it*]. The publication is based on the experience gained by the Association in the lawsuits against international media, using the phrase “the Polish extermination camps” that distorts history. It is the contribution from the representatives of the academia, working with the Patria Nostra Association in the preparation of the above-mentioned lawsuits. This is a valuable source of knowledge and a basis for discussion on the Polish historical policy from a multidimensional perspective.

The publication has already received several valuable reviews. Among the reviewers is professor Adam Redzik from the University of Warsaw, a highly reputable member of the scientific community. He stated that the book undoubtedly encourages reflection on the boundaries that should not be crossed and on the responsible policy of the state in the sphere of history, which in this aspect is not a closed chapter of the past. In his opinion, historical policy



can, on the one hand, help to combat myths and half-truths and, on the other, create new myths. Consistent historical policy of the state, aimed, for example, at removing or blurring responsibility for wars, war crimes and crimes against humanity, often even leads to the creation and infiltration into the societies of the lies that result from such a policy. These lies affect other countries and other nations.