“Competitive Victimhood” in Poland

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On 10 July 2024, the 83rd anniversary of the Jedwabne pogrom, an alternative commemoration was held near the monument to the massacre of Jews by their Polish neighbours. Replete with Roman-Catholic religious references, it boiled down to prayers for Poland and the presentation of posters and slogans: “We demand the truth about Jedwabne!”, “We demand exhumation!”. Participants in the official commemoration of the murdered Polish Jews were confronted with an almost physical, violent narrative. As a result, they could not reflect in peace on the suffering of the savagely murdered.

The situation in Jedwabne can be considered the quintessential example of the phenomenon of “competitive victimhood”. Over recent years, this phenomenon has grown exponentially, manifesting itself in the mushrooming of new commemoration sites, historical institutes, and celebrations, all focused on Polish victimhood set in contrast to Jewish victimhood. To such an extent, in fact, that some of the politicians of the former right-wing coalition have even directly used the term ”Holocaust of Poles”, and some of the monuments intended to honour Polish heroism in rescuing Jews turned out to be embarrassing manipulations.

The introduction of a legal component into this already complex and emotionally charged mosaic of memory, instead of calming and ordering the disputes, seems only to reinforce antagonistic attitudes, whether on the Polish, Jewish or Ukrainian side. In such a situation, the law can become a weapon both for and against historians and politicians alike, but it can also harm the witnesses of history, the still living victims of past crimes, or their relatives.

Competitive victimhood in mnemonic constitutionalism

The legal governance of history and memory, of which legal regulations concerning competitive victimhood are an important part, has been a consistent pattern in modern politics around the world. Its presence varies thematically, geo-politically and ideologically, appearing in different settings. One such setting is constitutionalism, understood as a coherent system of limitations of governmental powers, where the authority and legitimacy of the government are recognised only if such limitations are respected. Placed in this context, mnemonic constitutionalism, a term coined by Uladzislau Belavusau, can be broadly defined as a process of embedding specific historical paradigms in the structures and framework of national constitutional law, European law, memory laws (understood as provisions of the law shaping, imposing or even sanctioning the collective understandings of historical events). Mnemonic constitutionalism also includes judicial assessments of interpretations of the past – ranging from the evaluation of the constitutionality of specific laws by the constitutional courts, to regular judicial reasoning dictated by ideological and political pressure.

References to the victimhood of the Polish nation can be found in Polish constitutionalism in many of its elements, starting with provisions penalizing Holocaust denial which explicitly mention people of Polish nationality or Polish citizens of other nationalities. In principle, such provisions do not constitute anything exceptional or *a priori* violating of standards for the protection of freedom of expression. However, when their enactment or interpretation is taken over by very strongly nationalistically tinged authorities, they can lead to distortions recognizing only one national victimhood, and even to a distortion of historical facts.

Victimhood with a legal stamp under PiS

The most well-known attempt to decree the victimhood of the Polish nation into law was initiated by the Law and Justice party (PiS) and their coalition nationalistic members in 2018, on the eve of the International Day of Holocaust Remembrance. It was the infamous Amendment to the Bill on the Institute of National Remembrance, that soon became labelled as the Holocaust Bill. It introduced new legal measures for protecting the good name of the Republic of Poland and the Polish Nation, most prominently in its highly controversial Article 55a. This article established criminal liability for any act of public and false attribution of responsibility or co-responsibility to the Polish Nation or the Polish State for crimes committed by the German Third Reich or for any other crimes that are crimes against peace, crimes against humanity or war crimes.

What followed was the mix of fierce legal and international reactions, including by top free speech scholars, Jewish community leaders and administrations of Israel and the US. President Andrzej Duda, dependent on political will of PiS, signed the bill, at the same time referring it, uncertain about its constitutionality, for *ex post* review to the Polish Constitutional Tribunal, also captured by PiS.

However, this judgment's significance was weakened by the fact that by the time of its announcement, the second amendment to the same Bill entered into force on 17 July 2018, leaving only provisions for civil remedies in cases alleging infringement of personal rights relating to protection of the good name of the Republic of Poland and the Polish Nation. Therefore, the sanctions of the criminal law have disappeared not through legal analysis or judicial evaluation, but as a result of political interventions.

The second amendment was accompanied by a joint declaration by the Israeli and Polish prime ministers. Its idea was (although resulting, as it seems, not from a desire for reconciliation but from political calculation) to acknowledge the victimhood "of the other side". The Declaration stressed that the term 'Polish death camps' is blatantly erroneous and that the wartime Polish Government-in-Exile 'attempted to stop this Nazi activity. The Declaration also rejected anti-Semitism and "anti-Polonism", equating these terms in a kind of an equilibristic attempt. As noted by recently deceased Yehuda Bauer, the leading expert on the Shoah and a world-class Holocaust scholar, the Declaration was not only factually erroneous but also a betrayal of the memory of the genocide victims, motivated by mundane present-day political considerations.

The purely political dimension of this legal saga is evidenced by another point: not a single court case has been run on the basis of the new provisions since they came into effect. The usual path of civil law and personal rights protection laws has proved much more popular. Thus, there have been judgments in Poland declaring a certain person, involved in protecting the good name of the Polish nation, to be the victim of a violation of personal rights in a case involving inappropriate media coverage of "Polish camps" (despite the fact that he was not alive during World War II and had no personal connection to the case). Such abuses were, in a sense, stopped by the Court of Justice of the EU, which ruled that Polish courts have no jurisdiction to adjudicate against a German publisher for using the phrase "Polish extermination camp", initiated by a Polish survivor of German Nazi concentration camps..

Who should apologise?

In Poland, in addition to Polish-Jewish relations, "competitive victimhood" also affects another important area of memory, concerning Polish-Ukrainian history. Polish-Ukrainian relations bear a heavy historical burden related to centuries of economic exploitation and the suppression of the identity of Ukrainians and other minorities by the Polish nobility, which partly provoked the heinous acts of mass ethnic cleansing of Poles by the Ukrainian Insurgent Army (UPA) and Stepan Bandera's faction of the Organisation of Ukrainian Nationalists (OUN) in Volhynia and Eastern Galicia in 1943-45 (then in Nazi German-occupied Poland). The unhealed wounds caused by these events also brought serious political and legal repercussions. The Russian 2022 war against Ukraine miti-

gated them in part, but it neither eradicated them from public consciousness, nor deprived them of their political potential to sustain past feuds.

Polish-Ukrainian relations remain one of the most sensitive points on the European memory map, outlined by the contours of the law. Polish expectations, discerned broadly within the society and governmental circles, for the Ukrainian authorities – and Ukrainians – to "apologize for Volhynia", are a proxy for what is likely to become an even more controversial topic after the end of the Russo-Ukrainian war. On the other hand, some statements from the Ukrainian side, expressed in the past, by, among others, the head of the Ukrainian Institute of National Remembrance Institute, Antoni Drobovych, should also be considered problematic. For example, for a long time he didn't see the possibility of Ukraine lifting the ban on searching for and burying the remains of tens of thousands of Polish victims of the crimes of Bandera. Ukraine's current memory laws, which protect the memory of UPA fighters responsible for murdering Poles and Jews, are extremely difficult to accept from the point of view of the Polish historical narrative.

In this case, it seems that the only way to compromise is by dropping the "competitive victimhood" and recognizing the perspective of the other side. The latest Ukrainian position seems to be moving in this direction: the Polish authorities have been asked for precise lists of sites where exhumation is to be carried out. At the same time, however, a demand has been made that Poland guarantee the prevention of "acts of vandalism at memorial and burial sites" of Ukrainians. This was a reference to the Mount Monasterz, where a plaque with the names of 62 UPA members was destroyed in 2015. Even though the restoration has already taken place, the restored plaque does not contain the problematic names of UPA fighters, but commemorates the historical event itself.

Poland, in turn, must look at the mnemonic constitutionalism of Ukraine through the prism of one more dimension, defined by Maria Mälksoo as "memory-based security" (mnemonic security). Here security is based on the assumption that a certain understanding of the past should be decreed in public memory and consciousness, thereby creating a defence mechanism against various kinds of dangers threatening a given statehood(among others, dangers of a military and armed nature). In case of Ukraine, this dangers have been clearly indicated as coming from the side of Russia.

Historical Policy after PiS

The pursuit of a particular historical policy is the domain of all governments, regardless of their ideological preferences. Therefore, after the elections won by the Polish pro-democratic opposition in October 2023, there was no radical turn in the historical narrative based on Polish victimhood. Important changes have taken place, such as those concerning the directors of some of the key memorials and museums – although not everywhere: the PiS-appointed director of the Institute of National Remembrance, remains unchanged. Furthermore, the legislative changes introduced by the PiS party remain in force. Clearly, some of the changes cannot be made quickly or without violating the law, and this cannot be allowed to happen: a large part of PiS' governance was based on such violations.

However, it would certainly be important to have some sort of state message, formulated if only in a narrative layer, in which the Polish state would officially dissociate itself from the politics of 'competitive victims' and speak of their common fate, suffering, and memory. An important decision in this regard was recently made by the Polish Minister of Justice, Professor Adam Bodnar. In particular, the Minister of Justice requested disciplinary proceedings against the Rector-Commander of the Academy of Administration of Justice, Michal Sopiński, for posting, on his social media, an entry calling for the humiliation, physical violence ("shaving heads") and causing social harm (deprivation of citizenship and academic titles) to Professors Grabowski and Engelking in connection with their statements about the results of their long-standing scientific research on the Holocaust. In a request issued on July 15th, the Minister of Justice demanded that disciplinary proceedings be conducted as Sopiński, contrary to the statutory obligation to

remain apolitical systematically and demonstratively engaged in the current political struggle – violated ethical and academic standards.

National victimhood and the rule of law

What has certainly changed, however, is the restoration of the rule of law and independent judiciary. The topic of democratic backsliding in Poland has been addressed very often on *Verfassungsblog*, and the dangers created by this backsliding are profound. They also had a direct bearing on the situation of those who opposed the vision of a single, Polish, national victimhood, as was best illustrated by the lawsuit against the aforementioned Holocaust scholars. In Poland of 2016-2023, it was also possible to pass any law, even the most contrary to human rights standards, because the checks and balances system of laws was paralyzed by the political will of those in power. Today this is no longer possible.

At the same time, politics still inevitably dictates attitudes toward the legal governance of the phenomenon of national victimhood. In Poland this applies mostly both to the Polish-Israeli and Polish-Ukrainian relations. Russia's brutal onslaught and war against Ukraine has paradoxically created a window of opportunity for a profound Polish-Ukrainian historical reconciliation, which nevertheless faces a number of difficulties. It is the responsibility of those in power to take advantage of these (and to initiate, for example, a critical working group together). As always, historical facts should remain the core and starting point – but their interpretation, including that recognised by law, must take into account different perspectives and different victimhood. Only then can the law fulfil its essential, harmonising role in the social sphere, which is certainly not to antagonise entire communities or nations.

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