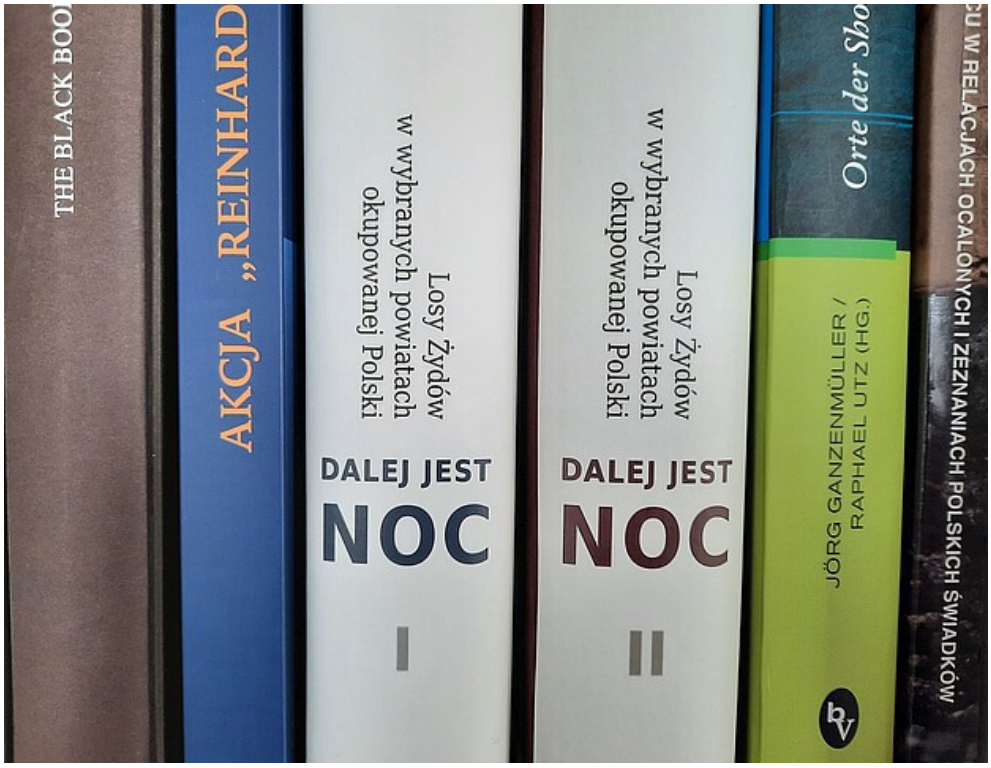

The two-volume study "Night without end. The Fate of Jews in Selected Counties of Occupied Poland" by Jan Grabowski and Barbara Engelking

Photo: Raphael Utz

A Ruling Against Survivors – Aleksandra Gliszczyńska-Grabias about the Trial of Two Polish Holocaust Scholars

Interview

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The recent verdict against two Holocaust researchers in a Polish civil law court raised much concern about the increasing juridification of history in Poland. The Cultures of History Forum asked the legal scholar and civil rights lawyer Dr. Aleksandra Gliszczyńska-Grabias about the legal and political background of this lawsuit, as well as about antisemitism and the role of the judiciary in the Polish government's 'historical policy'.

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A Ruling Against Survivors – Aleksandra Gliszczyńska-Grabias about the Trial of Two Polish Holocaust Scholars

On 9 February 2021, a Warsaw district court ruled that the two Holocaust historians, Barbara Engelking and Jan Grabowski, had tarnished the memory and reputation of the wartime Polish village elder (sołtys) Edward Malinowski. The verdict was based on a very short passage in the 2018 edited volume Night Without End. The Fate of Jews in Selected Counties of Occupied Poland. In that passage, Barbara Engelking describes Malinowski's dealings with a Jewish woman, Estera Drogicka, who, in November 1942, had escaped from Drohiczyn and was hiding in the forest. According to Engelking, Malinowski assisted Drogicka in establishing a non-Jewish identity and getting to the Reich as a Polish forced labourer, while simultaneously using the opportunity to rob her of her possessions. In December 1942, Drogicka arrived in Rastenburg. While there, she traded with another village man with the same name as the elder, Edward Malinowski. In the book, this coincidence of names had been overlooked – a mistake that Engelking willingly admitted. According to Engelking, Drogicka was aware of the elder Malinowski's joint guilt (współwinny) in causing the deaths of several dozen Jews who had been hiding in the forest. However, in a trial immediately after the war, she did not divulge this in order to save his life.[1] Engelking mainly based her conclusions on testimony Estera Drogicka had given to the Shoah Foundation in 1996. In their decision, the court demanded that the authors apologise to the plaintiff, Filomena Leszczyńska – Malinowski's 80- year-old niece, but rejected her demand for financial compensation, pointing out that it did not intend to suppress historical debate.[2]

The lawsuit and verdict were widely commented on in the international media.[3] It was also highly controversial in Poland itself. As an internationally renowned scholar of law and memory,[4] Aleksandra Gliszczyńska-Grabias was a legal adviser to the defence team, headed by Michał Jabłoński, in this particular lawsuit and thus brings a legal as well as scholarly perspective to the case. The Cultures of History Forum therefore invited her to discuss the legal framework and political background of this case. The interview was recorded on 17 February 2021, just a week after the court had publicly announced its verdict in the case.

The trial against Jan Grabowski and Barbara Engelking is not the first time that legal proceedings have been initiated against a Polish historian for researching the involvement of Poles in the Holocaust. In October 2015, an investigation was launched against Jan Tomasz Gross. What are the differences between his case and the one against Grabowski and Engelking?

The charges against Professor Gross were based on article 133 of the Criminal Code, which makes "the defamation of the good name of the Polish nation" a punishable offence. The charges against Grabowski and Engelking were based on the construction of personal rights in the Polish Civil Code. The

crucial difference is that, in the earlier case, a penalty of up to three years in prison was at stake, whereas in the case of personal rights violations no such penalty is available. There is the option of monetary compensation, of course, which can amount to substantial sums.

In addition, the pressure that comes with criminal trials, with the realisation that you are the subject of criminal proceedings, is much greater. Professor Gross was indeed put under considerable pressure and summoned several times for questioning. That case is now closed. So, Professor Gross is safe for now, even though – and here I would make the link to the Grabowski/Engelking case – he still remains one of the most hated public figures for people on the right-wing spectrum of the Polish political and ideological landscape. But, if Gross was enemy number 1 of – what certain individuals define as – "Polishness" in a very nationalistic, xenophobic narrative that is also supported by those in power today, then I would argue that Jan Grabowski is now the new frontrunner in this "competition". In thousands of internet comments, people have thrown the vilest anti-Semitic insults at him and denied him the right to claim that he is a "true Pole". Likewise, Professor Engelking has been the target of similar hate campaigns.

I am convinced that the lawsuit against Grabowski and Engelking, the alleged violation of the personal rights of Filomena Leszczyńska, is not just a regular libel case. Rather, it is one element in a broader strategy being pursued by various actors of public life. As we know, Leszczyńska has been actively supported by the Polish League Against Defamation (Reduta Dobrego Imienia), which has not hidden its role in this case in any way, even though it is not formally part of the proceedings as such and was not acting as a plaintiff. This has begun to happen more and more often – even when a lawsuit is filed by a private person, there is an entire established organisation behind it.

The criminal case against Jan Gross was built around things he said in interviews to newspapers as well as a newspaper article he wrote. In the civil lawsuit against Engelking and Grabowski, a work of historiography was being investigated. Is there a difference?

There is a profound difference, although what Jan Gross said in the interview he gave to Gazeta Wyborcza was also linked to the results of his research. In the case of Grabowski and Engelking, we have 1700 pages of historical facts, footnotes compiled in a scholarly fashion, presented to the academic community. This means that we are moving in a very dangerous direction, where we will see direct interventions in purely scholarly debates. This was also one of the arguments raised in response to the lawsuit: that the court is not the place to tackle historical debates and to evaluate the results of academic research. However, the court did not share these concerns.

If we look at the broader context of the trial, the 2018 Amendment to the Act on the Institute of National Remembrance (IPN) – the so called 'Holocaust bill' – comes to mind. It allowed for a criminal lawsuit against anyone who claimed, "publicly and contrary to the facts, that the Polish Nation or the Republic of Poland is responsible or co-responsible for Nazi crimes committed by the Third Reich." This new clause was later scrapped, but the option of pursuing legal action still remains. What is the connection between this law and the current civil lawsuit against Grabowski and Engelking?

To my knowledge, not a single lawsuit has been successfully pursued on the basis of the so called 'Holocaust bill', which is interesting in and of itself. Only now, in fact only yesterday, Ordo Iuris, an ultra-catholic organisation, which has taken, for example, a fundamentalist anti-choice position in the controversies about recent changes to the legislation governing abortion, announced that it will sue the public radio station France Culture for allegedly defaming Poland by claiming that Poles were involved in

crimes committed by the Nazis.

In general, the vast majority of similar lawsuits are based on the civil code provisions that protect personal rights. The introduction of the 2018 'Holocaust bill' was accompanied by enormous controversy as well as a very strong international reaction, which may be one reason why there is a strong hesitation against using this legal tool.

Was there any mentioning of this law during the trial, did it play any role in the plaintiff's argumentation, for example?

No, it was not mentioned, but the core idea behind this kind of lawsuit and behind the 'Holocaust bill' is the same – the ostensible protection of the dignity and good name of Poland. This became obvious, for example, in a Twitter comment posted by Minister of Justice Zbigniew Ziobro immediately after the court ruling on 9 February. He presented the ruling as a victory for an older lady who stood in defence of the good name of the Polish nation. Here you have the whole formula of the 'Holocaust bill' in a nutshell. This is also rather disturbing from a legal perspective, because what kind of message – delivered by the Minister of Justice – does this give to the Court of Appeal? That any other verdict, different from the one handed down by the court of first instance would be defamatory to the good name of the Polish nation and consequently anti-Polish?

The category of the "right to national identity" was part of the lawsuit (pozew**). This is something that goes beyond personal rights – how do you see this from your perspective as a lawyer?**

It is important to understand that the catalogue of personal rights in Polish civil law is open and continuously shaped by existing case law. Of course, there is a sub-catalogue of very obvious personal rights that are most often involved in court disputes: your good name, your privacy, your reputation, your image – these are the classic categories. One of these classic personal rights is also the right to honour the memory of a deceased relative. This was the one that was accepted by the court. Traditionally, this right encompasses such elements as the right to the respect of a gravesite and the like, but it has also been invoked when certain statements about a deceased person insult the family. The family then has the right to object to the publication or public dissemination of such statements. However, we find such an interpretation of this right to be very controversial and will try to challenge it.

A new category of personal rights is now emerging in Poland, which includes such rights as the "right to national pride", the "right to national identity" and the "right to true history" (prawo do niezakłamywanej historii) – actually, the more precise translation from Polish would be a right to a "history without lies". This is very disturbing. In the Grabowski/Engelking case, the plaintiff could argue for a violation of these rights as there are previous rulings by Polish courts affirming that such rights exist. In one of the most recent cases, for example, a Warsaw court ruled that the German newspaper Frankfurter Rundschau must apologise to Maciej Świrski, head of the Polish League Against Defamation, for criticizing the Polish historical policy that portrays the Holocaust as a "purely German" atrocity. The court found that this constituted a violation of Mr Świrski's "national identity, heritage and good name as a Pole", who – due to his social activities, professional engagement in matters concerning history and such – has a right to demand an apology.

Given the right-wing media attacks (or slandering) regularly suffered by, for example, Polish Jews – couldn't this, in theory, also work the other way round? Could, for example, the Polish Jewish community also claim that their right to a positive memory of the deceased and their right to true

history has been violated?

Of course, this is possible. And this option is being considered by many who argue that an anti-Polish action, which the other side claims they are fighting against, can also be an anti-Jewish action. In other words, Polish Jews also have the right to claim that their rights as Poles have been violated by, for example, anti-Semitic publications. If and when a case like this comes before the courts, it will be a test for the equal treatment of different identities within the realm of "Polish identity". But that is still to come.

Let us take a closer look at the lawsuit brought against Engelking and Grabowski. As Engelking wrote, village elder Edward Malinowski – and we know that there were two men with that name in the village – traded with Estera Drogicka, a Jewish woman. And Filomena Leszczyńska, Malinowski's niece, felt insulted by this. Can this be seen as antisemitic, that she feels offended by the fact that the book discusses him trading with a Jewish woman? More generally put, what role did antisemitic images play in the plaintiff's charges and in the trial itself?

The plaintiff, indeed, stated that this claim (as well as the fact that Professor Engelking had unintentionally confused the two Malinowskis is this instance) offended her. But at the same time, Engelking had stressed that by trading with a Jewish woman, Malinowski was actually helping her. So it really should be seen as a reason for the niece to be proud of him. As to the antisemitism that accompanies the discussions surrounding the case: even though it cannot be claimed that the lawsuit contained antisemitic motives, the public reactions – and in particular, online comments that emerged in the thousands after the verdict – can only be described as an unprecedented explosion of antisemitism.

What about the two testimonies by Estera Drogicka that played a role in this case and the fact that she said two different things about Malinowski: in the post-war trial against him and then in a later testimony. Do you see antisemitic undertones in this attempt by the plaintiff to undermine a Jewish individual's testimony?

This goes to the core of the whole case and the judgement, which is why I can only answer this question in full once I have read the written verdict, which is not available yet. From what we have heard so far, it is the most dangerous element of the ruling. The court actually played the role of historian and treated Estera's testimony given just after the war differently from the testimony she gave years later in the safe environment of the Shoah Foundation. Here, as it seems, the court actually stepped into the role of someone who assesses the value of a historical source, the testimony of a survivor.

Moreover, the court apparently did not take into consideration something that was raised by both Professors Engelking and Grabowski, namely the reality of post-war Poland and the court system at the time, which had nothing to do with the rule of law. In addition, Polish-Jewish relations at that time – the threats, the atmosphere, all of these things that the book in question also discusses – are important factors to consider. So here we are: Drogicka saved Malinowski's life by lying to the court in 1946. Today, our court deems her 1996 testimony inconsistent and points to various discrepancies. It claims that the later testimony – which is extremely long and detailed – does not necessarily support Professor Engelking's conclusions. But these are genuine questions of historical research and not legal ones.

During the trial, Drogicka's two sons were also called to testify; one of them came all the way from Australia. Both categorically confirmed that the version of events imparted by their mother in private conversations was the one she had also given to the Shoah Foundation. In other words, not only did we have Engelking's research, but we also had witness testimonies, and still: from the oral reasoning presented thus far, it still did not convince the court that the second testimony was valid.

In fact, the plaintiff demanded that the court also allow an expert on language and speech to go through the whole testimony that Estera Drogicka gave in 1996 and analyse the "actual" meaning of the words she used. The court dismissed this. From this alone, we can see that the plaintiff wanted to discredit the survivor's testimony.

Would you say then that this ruling is an attempt to obfuscate what actually happened, or an attack on reality itself?

I would rather concentrate on the lawsuit itself as a desperate attempt to prevent a public conversation about historical truth. After reading 1700 pages of shocking, heart-breaking facts, what can you do if you consider them an attack on "Polishness"? You do whatever it takes to fight back. Whatever it takes, you do not accept the obvious. What the book describes happened all over Nazi-occupied Europe – maybe to different degrees or on different scales – but still it happened everywhere. Denying that this also happened here in Poland makes no sense. Of course, even right-wing circles and the government admit that, yes, there were isolated cases of such behaviour and they should be condemned as "anti-Polish". However, by introducing a narrative about "singular cases" of crimes committed by Poles against Jews, they are denying the actual scale of what happened here on Polish soil.

Did historians other than Barbara Engelking and Jan Grabowski play a role in the trial?

The plaintiff did ask the court to be allowed to present the works of selected historians (with publicly-known ideological perspectives) in order to suggest that Engelking and Grabowski's work was dishonest, but the court dismissed that request. On the defence side, we hoped that arguments about the quality of the historical methods employed by the defendants would be sufficient. Our response to the lawsuit pointed to the professional prestige of the two scholars in question, their long lists of articles in top journals and with prestigious academic publishers, the number of prizes and grants they have received, their academic work, professional memberships and so forth. The court decided differently.

How does the verdict impact academic freedom?

It seems that there is an evident internal contradiction in the court's verdict. The court underlined that it does not want to silence historical debate. But in fact, it did just that. Because what is academic freedom? It is about choosing, after years of research, what you are going to write based on the materials you have collected. And you have the right to do so, as long as you are basing your analysis on sources. The verdict will have a chilling effect on academic freedom despite the judge's motives.

How has this specific case and the broader legal context been discussed among legal experts?

Certainly, there will be many case notes and commentaries to this case in the coming years! It has

already been announced, by both sides, that this case will eventually be brought all the way to Strasbourg, to the European Court of Human Rights. In other words, I am sure it will be the subject of vivid academic debates. From what I can see now, also among legal practitioners, the current verdict is the subject of critique.

Not only the verdict, but also the lawsuit as such has been widely criticized, the very fact that it was allowed to go to trial at all. For many lawyers, this was a clear attempt to silence the discussion or to punish Professors Engelking and Grabowski for their positions in the debate about the Holocaust. The lawsuit should thus be considered an example of a SLAPP (strategic lawsuit against public participation).

Where are the fault lines within the legal community in Poland? Or, to put it even more simply: For the rule of law to work, you need a social foundation, which also includes a professional legal community that broadly shares the same values and convictions. Is this community as divided as the rest of Polish society?

Yes, it is divided, even though I prefer to believe that the vast majority is just, sadly, indifferent to the destruction of the rule of law taking place in Poland today. There are well-organised and well-financed groups of lawyers whose agenda is representative of the policy and ideology promoted by the current government. Ordo Iuris is one such organisation, for example and there are many more. Opposing government circles are those who support the rule of law and insist on the independence of judges and a respect for fundamental rights and constitutional order. Creating a professional organisation of lawyers that would concentrate solely on 'fighting back' – for the protection of academic freedom, public participation, LGBTQ+ rights – and other social activism is a must if we are to take the efforts to save the rule of law in Poland seriously. However, such undertaking demands various resources that are very difficult to attain.

Given what you just said, what effect did the international outcry in connection with the Grabowski/Engelking case, from organisations like Yad Vashem and professional associations of Holocaust researchers, have, if any?

Well, the spokesperson for the Minister-Special Services Coordinator (Rzecznik Ministra-Koordynatora Służb Specjalnych) Stanisław Żaryn, who is the son of former IPN historian and former Senate member for Law and Justice (PiS), Jan Żaryn, recently stated publicly that the international media campaign that was activated in defence of Grabowski and Engelking has had a negative impact on Polish "information safety" (bezpieczeństwo informacyjne).[5] In the domestic Polish media, the international interest in the case has likewise been presented as an attack in defence of those who hate Poland.

I think a lot has changed since the time of the 'Holocaust bill' in 2018/19. Back then, international pressure did have an effect. Now, barely three years later, those in government power in Poland no longer care much.

Why do you think that is?

Partly, the EU is to blame. If the Polish government and the President of Poland face no consequences for ignoring the decision by the European Court of Justice on the illegal activities of the [Polish] Supreme Court's disciplinary chamber, which revokes the immunity of judges and wants to remove them from judicial service and public life by means of criminal charges[6], they definitely will not waste a second

thought on Yad Vashem's statement or any other letter of protest. Instead, the government can show its strength and send out a strong message to its voters: "This is our Polish matter, we defend the good name of Poles and we do not care what others say."

What exactly is at stake?

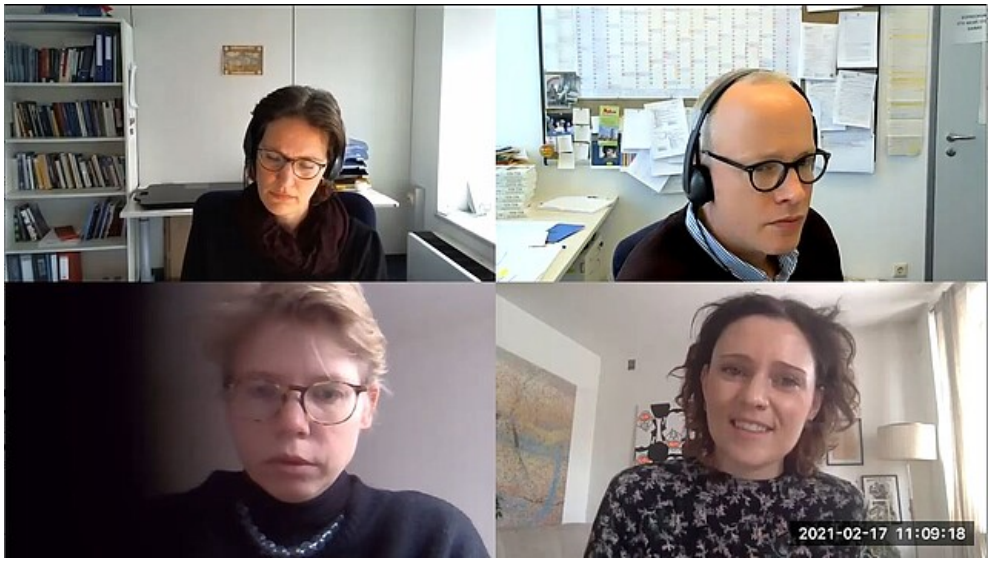
The next parliamentary elections, I suppose. The rule of law has not been fully destroyed, not yet. But if the government continues to ignore the judgements of the EU Court of Justice in Luxembourg in cases that concern the judiciary, while, at the same time, there is still no decisive response from the European Commission, I think we may as well stop talking about a European community of values. In fact, we can even stop talking about a community of law.

We thank you very much for this conversation.

Interviewers: Eva-Clarita Pettai, Katrin Stoll and Raphael Utz, Imre Kertész Kolleg Jena

Notes:

1. Barbara Engelking, Powiat bielski, in Dalej jest noc. Losy Żydów w wybranych powiatach okupowanej Polski, edited by Barbara Engelking and Jan Grabowski, Warsaw: Stowarzyszenie Centrum Badań nad Zagładą Żydów, 2018 (vol. 1), pp. 149–150.
2. See Fears rise that Polish libel trial could threaten future Holocaust research, The Guardian (2 February 2021); Gabriele Lesser, Das Recht auf Nationalstolz, taz, die tageszeitung (7 February 2021), both retrieved 22 February 2021.
3. Alan Charlish and Anna Włodarczak-Semczuk, Polish court orders historians to apologize over Holocaust book, Reuters (9 February 2021); Andrew Higgins, A Massacre in a Forest Becomes a Test of Poland's Pushback on Wartime Blame, The New York Times (8 February 2021); Polish court tells two Holocaust historians to apologise, BBC News (9 February 2021), all retrieved 22 February 2021.
4. See, for example, Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias, eds., Law and Memory. Towards Legal Governance of Memory, Cambridge: Cambridge University Press, 2017.
5. A few weeks after the verdict, Stanisław Żaryn repeated his claims that there is "an ongoing, complex smear campaign targeting the country and its people." He concludes that "Poland has to defend its corner and protect its image. Apart from the preservation of historical truth from manipulation, the security of the whole country—its citizens and residents—is at stake here." Stanisław Żaryn, Why Poland Is Trying to Control Holocaust Memory, Tablet (22 February 2021), retrieved 23 February 2021.
6. For more details on the attacks on judicial independence in Poland, including the most famous case, involving Judge Igor Tuleya, see the Report of the American Bar Association (20 November 2020) on the state of judicial independence in Poland.



From the top left: Eva-Clarita Pettai, Raphael Utz, Katrin Stoll and Aleksandra Gliszczyńska-Grabias, Interview, 17 February 2021. Photo: Imre Kertész Kolleg