Memory Laws and the Rule of Law

Strategic Lawsuits against Public Participation (SLAPPs), the Governance of Historical Memory in the Rule of Law Crisis, and the EU Anti-SLAPP Directive

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Strategic Lawsuits against Public Participation (SLAPPs) – the rule of law backsliding – governance of historical memory – academic freedom – EU Draft Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings

INTRODUCTION

Under populist rule, strategic lawsuits against public participation, known as SLAPPs, become a crafty way of suppressing free speech and silencing the government's critics. The article distinguishes between 'classic' SLAPPs filed by powerful private individuals or entities[1] and government-sponsored SLAPPs, which can also take the form of government SLAPPs by proxy, for example when filed by government-friendly individuals or organisations.

[1] *See* J. van Erp and T. van der Linden, 'Silencing Those Who Speak Up against Corporate Power: Strategic Lawsuits against Public Participation (SLAPPs) in Europe', in N. Lord et al. (eds.), *European White-Collar Crime* (Bristol University Press 2021) p. 207-220.

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Public criticism of state authorities, their policies, institutions, ideologies and representatives takes on a different dimension under a populist government that disrespects the rule of law. It is no longer perceived as a legitimate and vital element of public debate, but rather a dangerous attack on the ruling elites and their political agenda. However, when the 'pandemic of populists'[2] hints of nationalism, a specific, unilateral and only heroic-oriented vision of the national past becomes the official, state-imposed narrative. Various measures are being applied to secure it, including legal instruments limiting freedom of expression, targeted at anyone involved in public conversations about the complicated past.

This article demonstrates that a particular subcategory of SLAPPs related to the state's official historical policy is used to further strengthen historical narratives preferred by the government. Moreover, it contributes to a chilling effect on the public debate about the past, including by harassment of those who reveal and discuss the dark sides of the nation's history. This phenomenon is analysed using the case study of Poland during the rule of law backsliding, specifically focusing on the civil lawsuit against Holocaust scholars Barbara Engelking and Jan Grabowski. Subsequently, the article contextualises this case of harassment of academics within the framework of the European standard for safeguarding academic freedom.

Furthermore, the article examines the EU legal responses to the threat posed by SLAPPs, critically assessing the Recommendation[3] and the Draft Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings.[4] It argues that protection of scholars in Europe, including those who are engaged in research on topics deemed sensitive or controversial by national governments in member states, should be expanded by means of the anti-SLAPP Directive.

The phenomenon and implications of SLAPPs

The phenomenon of SLAPPs has been well known in legal discourse since the 1980s in the common law legal culture. George W. Pring and Penelope Canan invented the notion to describe the practice of suing individuals and organisations

[2]W. Sadurski, *A Pandemic of Populists* (Cambridge University Press 2022).

[3]Commission Recommendation (EU) 2022/758 of 27 April 2022 on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation'), C/2022/2428, OJ L 138, 17 May 2022, p. 30-44.

[4]Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation'), COM/2022/177 final.

who were exercising their rights stemming from the Petition Clause under the First Amendment.[5] They prepared extensive studies analysing the social, legal and political impacts of such litigation, especially initiated by corporations. According to them, SLAPPs can chill the public debate on specific issues, deter individuals from attempting to counter certain societal problems or using available means of raising concern; and this occurs in the majority of cases.[6] However, there might also be positive outcomes when SLAPPs spur the political activity of targets or provide for their more significant mobilisation.[7]

According to the definition by Pamela Shapiro, the central purpose of SLAPPs is to 'silence representations being made in the public sphere by the person being sued, when the impugned representations have to do with an issue of social significance'.[8] SLAPP might be used to deter the defendant from dealing with a given case; its primary objective is not to win the case but to involve the defendant in the litigation regarding the case. The time that the defendant spends on the case cannot be used for other public interest-related purposes. According to the report by Index on Censorship, a non-governmental organisation, 'laws are being used by powerful and wealthy individuals in the hope of intimidating and silencing journalists who are disclosing inconvenient truths that are in the public interest'.[9] Therefore, the financial aspect of SLAPPs is significant. Consequently, those targeted by SLAPPs may be discouraged from publishing, commenting on or undertaking any other public participation actions.

The concept of SLAPPs and the defence against them developed significantly in the American legal culture. In the US, different types of statutes protect defendants against SLAPPs. Their principal objective is to define the public interest that legislation should protect against unnecessary, harmful litigation. They also indicate what kind of procedural measures the defendant can take to stop offensive litigation. Additionally, they define the role of the courts and decision-making authorities in the rejection of specific lawsuits. Scholars discuss whether different models of anti-SLAPP legislation properly balance the need to

[5]G.W. Pringe, 'Intimidation Suits against Citizens: A Risk for Public Policy Advocates', 7 *National Law Journal* (1985) p. 16.

[6]P. Canan and G.W. Pring, 'Strategic Lawsuits against Public Participation', 35 *Social Problems* (1988) p. 506; P. Canan, 'The SLAPP from a Sociological Perspective', 7 *Pace Environmental Law Review* (1989) p. 23.

[7]P. Canan and G.W. Pring, 'Studying Strategic Lawsuits against Public Participation: Mixing Quantitative and Qualitative Approaches', 22 *Law and Society Review* (1988) p. 385 at p. 393.

[8]P. Shapiro, 'SLAPPs: Intent or Content? Anti-SLAPP Legislation Goes International', 19 *Review of European Community & International Environmental Law* (2010) p. 14.

[9]*A Gathering Storm. The Laws Are Being Used to Silence the Media* (Index on Censorship 2020), https://www.indexoncensorship.org/wp-content/uploads/2020/06/a-gathering-storm.pdf, visited 31 January 2024.

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protect public interest and the possibility of lawsuits being filed by private parties.[10]

The phenomenon exists, however, also in countries with civil law traditions. Renowned Turkish journalist Ece Temelkuran argued that legal action against the opposition was one stage in Turkey's undemocratic transition – instead of organising pickets and demonstrations, producing letters or proclamations, many protesters were suddenly forced to defend their freedom of expression.[11] This is where the strength of the SLAPP tactic becomes evident in the rule of law backsliding context. It compels the government's critics to engage in activities vastly different from their intended pursuits, all while ostensibly safeguarding values such as a good name and reputation. This strategy compels protesters to allocate their time and resources toward their own defence. Simultaneously, those initiating the lawsuits often invest minimal effort. Public entities, business leaders, and corporations have the means to hire adept legal counsel and cover the expenses of legal proceedings. In Europe, the discussion about SLAPPs applies more broadly to the quality of democracy, the rule of law and freedom of expression.[12] It is not just a question of defence against powerful business interests (as was the origin of SLAPPs in the US) but rather a discussion about the power of individuals to defend themselves against the abuse of the law to allow for full public participation in matters of general concern.[13] We will expand below on the understanding of SLAPPs in the EU.

This article distinguishes between 'classic' SLAPP, the government-sponsored SLAPP, and the seemingly neutral civil or press law based lawsuit, which should be nonetheless considered as SLAPP. The 'classic' SLAPP is understood here as legal action filed by a more powerful private entity – usually a business – against individuals or a public interest watchdog organisation. The government-sponsored SLAPP refers to the practice that is widespread in the rule of law backsliding context, especially in Poland and Turkey. In those countries, state institutions captured or financially controlled by the ruling majority file criminal and civil lawsuits against their critics, including journalists, representatives of various professions attacked by the government (judges, teachers), human rights

[10]S. Hartlzer, 'Protecting Informed Public Participation: Anti-Slapp Law and the Media Defendant', 41 *Valparaiso University Law Review* (2007) p. 1235.

[11]E. Temelkuran, *How to Lose a Country. The Seven Steps from Democracy to Dictatorship* (Harper Collins 2019).

[12]J.B. Barthet and E. Ferguson, *An Anti-SLAPP Curriculum for Lawyers in the European Union* (Pioneering anti-SLAPP Training for Freedom of Expression PATFox 2023), https://aura.abdn.ac.uk/bitstream/handle/2164/21372/CENTRAL_CURRICULUM_FINAL.pdf?sequence=1, visited 31 January 2024.

[13]*See* P. Bárd et al., *Ad-hoc Request. SLAPP in the EU Context* (EU-Citizen Academic Network on European Citizenship Rights 2020).

activists (such as LGBTQ+ rights activists and women's rights activists), and academics publicly criticising the government. However, the government often acts by proxy. The government-friendly entities, including non-governmental organisations or individuals, file lawsuits which are seemingly neutral civil or press law based. However, their broader context, such as framing of the case in the government-controlled media or the fact that the plaintiff belongs to or receives support and advice from an organisation generously funded from the public money, warrants characterising the case as a SLAPP.

Constraints on government critics' freedom of expression in the rule of law backsliding democracy

Since 2015, under the populist right-wing ruling majority, the free speech of the government's critics has been systemically attacked in Poland through various attempts to silence independently-operating media, civil society activists and organisations, and 'unruly' scholars. This attitude has been manifested in a growing wave of SLAPPs directly or indirectly initiated by the state against those who raise doubts, concerns, criticisms or accusations against the ruling elite and its policies.

The attacks on media freedom in Poland have included the politicisation of media regulators, the takeover of public media and turning them into party propaganda outlets, the acquisition of private, foreign-owned media by government-controlled companies ('media re-polonisation'), legal harassment of media outlets through legislation and SLAPPs, and various other forms of pressure on journalists, including smear campaigns, physical assaults, and obstruction of their work.[14]

For example, a leading liberal daily newspaper *Gazeta Wyborcza*, which has been in unwavering opposition to the government and scoring its mistakes and violations of the rule of law, has been targeted with over 100 lawsuits and other forms of legal harassment between 2015 and mid-2022.[15] Some of the most powerful people in Poland, including Law and Justice party (PiS) chairman Jarosław Kaczyński, and prominent institutions, such as Polish national TV, have

[14] *International Press Institute and Media Freedom Rapid Response Report from the Mission to Poland* (International Press Institute 2021), https://ipi.media/events/report-launch-mfrr-press-freedom-mission-to-poland-feb-11-2021/, visited 31 January 2024.

[15] '"Gazeta Wyborcza" otrzymała ponad 100 pozwów, które można uznać za SLAPP', *Press* (3 June 2022), https://www.press.pl/tresc/71089,_gazeta-wyborcza_-przez-ostatnie-siedem-lat-otrzymala-ponad-100-pozwow_-ktore-mozna-uznac-za-slapp, visited 31 January 2024.

sued *Gazeta Wyborcza*.[16] Independent public interest journalism and non-profit outlets have also fallen victim to SLAPP lawsuits initiated by individuals in positions of power. OKO.press, a non-profit news and investigative online media outlet, has been sued, among others, by Konrad Wytrykowski, a judge of the illegally operating Disciplinary Chamber in the Supreme Court,[17] and by the state-funded Polish National Foundation tasked with Poland's promotion abroad.[18] The proliferation of this type of lawsuits is an effective tool of democratic backsliding, especially insofar as they are not designed to be won but rather to embroil the defendants in legal defence that takes them away from their engagements and activities.

SLAPPs intended to silence other 'disloyal' participants of the public debate compounded threats to freedom of expression and democracy in Poland. For example, SLAPPs against civil society activists, included the case against LGBTQ+ activists and women's rights activists.[19] Moreover, SLAPPs against 'unruly' scholars commenting on the rule of law backsliding have been on the rise.

These developments had taken place in the particular and troubling context of the eight-year-long process of dismantling the rule of law.[20] The defence against SLAPPs, often in a courtroom with a judge appointed in violation of the law,[21] could not be seen as guaranteeing the right to an independent and impartial tribunal established by law, within the meaning of EU law and the European Convention on Human Rights.[22] Furthermore, legal possibilities to defend one's rights before the Constitutional Tribunal, which is neither independent nor impartial, had been eliminated.[23]

[16]"'Gazeta Wyborcza" z nowymi pozwami od TVP. "W związku z atakami napastliwych mediów", *Wirtualne Media* (29 April 2022), https://www.wirtualnemedia.pl/artykul/gazeta-wyborcza-pozwy-tvp-za-co-ile, visited 31 January 2024.

[17]ECJ 15 July 2021, Case C-791/19, *Commission* v *Poland*, declaring that the Disciplinary Chamber of the Supreme Court is contrary to EU law.

[18]A. Wójcik (ed.), *Case Study: SLAPP in Poland* (Pioneering anti-SLAPP Training for Freedom of Expression PATFox 2022), https://static1.squarespace.com/static/6207bcea748e2b774b938d66/t/63edfd7e1d852803a5bebeb5/1676541311386/CASE+STUDY+POLAND.pdf, visited 31 January 2024.

[19]Ibid.

[20]For the most comprehensive account of this process, *see* W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).

[21]*See* M. Szwed, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR', 15 *Hague Journal on the Rule of Law* (2023) p. 353.

[22]*See* C. Rizcallah and V. Davio, 'The Requirement that Tribunals be Established by Law: A Valuable Principle Safeguarding the Rule of Law and the Separation of Powers in a Context of Trust', 17 *EuConst* (2021) p. 581.

[23]M. Szwed, 'The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights: ECtHR 7 May 2021, No. 4907/18, *Xero Flor w Polsce sp. z oo* v *Poland*', 18 *EuConst* (2022) p. 132.

SLAPPs securing the 'historical truth' in the rule of law backsliding context

This article will delve into a sub-group of SLAPPs in Poland related to governance of collective historical memory, initiated against scholars opposing and providing nuance to the official, often nationalistic, version of history. Examining this category of cases is important not least because it is a less-researched issue than SLAPPs against journalists or activists.[24]

The PiS government in the years 2015–2023 sought to legitimise its extensive changes, including extremely negative alterations concerning the rule of law, human rights, and a departure from European legal standards in legislation, the application of law and interpretation of Polish constitutional law, EU law[25] and the European Convention on Human Rights.[26] One of the elements of this populist strategy was distancing the state from grassroot voices and narratives that nuanced the history of 20th-century Poland, often presenting challenging and shocking facts to the public, rather than idealised visions about the relationship between Poles and national and ethnic minorities.[27] The governance of historical memory under PiS has been characterised by attempts to whitewash the shameful past with legal tools, including through memory laws,[28] and by supporting narratives that present Poles as victims or saviours and never, or only in isolated cases, as perpetrators of crimes against others, primarily against minorities.

The authorities not only distanced themselves from historical facts presented by historians, but also used smear campaigns in the ruling party-controlled media and SLAPP lawsuits to punish them. The state supported or initiated lawsuits demanding the protection of an alleged 'historical truth' and 'national identity'. Such lawsuits were often baseless and aimed at exercising a chilling effect on the public debate and enhancing the preferred, official historical narrative.

In her Nobel Lecture, Polish writer Olga Tokarczuk said:

[24]J.B. Barthet et al., *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society* (European Parliament Committee on Legal Affairs JURI 2021), https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf, visited 31 January 2024.

[25]*See* A. Gliszczyńska-Grabias and W. Sadurski, 'Is It Polexit Yet? Comment on Case K 3/21 of 7 October 2021 by the Constitutional Tribunal of Poland', 19 *EuConst* (2023) p. 163.

[26]*See* A. Ploszka, 'It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional', 15 *Hague Journal on the Rule of Law* (2023) p. 51.

[27]A. Gliszczyńska-Grabias (ed.), *Memory Laws in Poland and Hungary. Report by the Research Consortium 'The Challenges of Populist Memory Politics and Militant Memory Laws (MEMOCRACY)* (Publishing House of the Institute of Law Studies, Polish Academy of Sciences 2023) p. 27.

[28]On memory laws definitions *see* A. Gliszczyńska-Grabias and U. Belavusau, 'Introduction' in U. Belavusau and A. Gliszczyńska-Grabias (eds.), *Law and Memory. Toward Legal Governance of History* (Cambridge University Press 2017) p. 1 at p. 2.

> How we think about the world and – perhaps even more importantly – how we narrate it have a massive significance. A thing that happens and is not told ceases to exist and perishes. This is a fact well known to historians but also (and perhaps above all) to every stripe of politician and tyrant. He who has and weaves the story is in charge.[29]

Indeed, the ruling elite in 2015–2023 and those close to them were eager to 'weave the story' about Poland's past, including through legal means.[30]

For decades, the most important 'story' for this political camp concerned Polish-Jewish relations and, above all, the question of Poles' responsibility for the crimes committed against Jews during and after the Second World War. A pivotal moment in the formulation of this historical policy occurred in the year 2000, with the publication of Jan Tomasz Gross's book, *Neighbors: The Destruction of the Jewish Community in Jedwabne*. The book recounts a pogrom in 1941 in which Poles burned their Jewish neighbours alive in a barn, resulting in the tragic deaths of over 300 women, men, and children, and the theft of their belongings.[31] The exposure of the Polish public to the darkest chapters of national history led to two contrasting reactions: one which acknowledged historical truth and expressed sorrow and regret for the tragedy of the Polish Jews, and one which involved an increase in hatred, along with the distortion and denial of these historical findings. This division persists and has been further exacerbated by the introduction of nationalistic motives into the mainstream of public discourse.[32]

One of the most telling examples of the urge to control the past by the PiS ruling majority was adopting a new memory law. The amendment to the Act on the Institute of National Remembrance (*Ustawa o Instytucie Pamięci Narodowej*) enacted in January 2018 penalised the defamation of the Polish state and nation by falsely claiming their responsibility or joint responsibility for crimes committed by German Nazis during the Second World War in occupied Poland.[33] The amendment was partly repealed in June 2018 due to international pressure. The criminal law sanctions were removed, with the civil law part remaining in force. The political agenda behind this memory law and the mechanism used in it,

[29]O. Tokarczuk, 'The Tender Narrator', https://www.nobelprize.org/uploads/2019/12/tokarczuk-lecture-english-2.pdf, p. 3, visited 31 January 2024.

[30]M. Bucholc, 'Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland after 2015', 11 *Hague Journal on the Rule of Law* (2019) p. 85.

[31]J.T. Gross, *Neighbors: The Destruction of the Jewish Community in Jedwabne, Poland* (Princeton University Press 2001).

[32]P. Machcewicz, 'Neighbors, the Jedwabne Massacre of Jews and the Controversy that Changed Poland', *Contemporary European History* (2023) p. 1-8.

[33]A. Gliszczyńska-Grabias, 'Deployments of Memory with the Tools of Law – the Case of Poland', 44 *Review of Central and East European Law* (2019) p. 464; K. Kończal, 'Mnemonic Populism: The Polish Holocaust Law and its Afterlife', 29 *European Review* (2021) p. 457.

including authorising non-governmental organisations to file lawsuits, have the objective of bringing to trial anyone who dares to challenge the heroic vision of the national past. Thus, the law turned out to serve as an instrument of top-down control of the social perception of history, with significant implications for both the present and the future. Even though there has not yet been a single court verdict issued on the basis of this memory law,[34] it has contributed to the broader deterioration of freedom of expression and academic freedom in Poland.

One of the most well-known, including internationally,[35] lawsuits initiated in the context of a public discussion about Poland's past (and especially the past related to the crime of the Holocaust and other atrocities committed against the Jews during the Second World War in occupied Poland), was the lawsuit for the protection of personality rights filed against distinguished and internationally recognised Holocaust scholars, Barbara Engelking and Jan Grabowski.[36] Importantly, it was not based on the amendment mentioned above or any other memory law – it turned out that ordinary civil law tools can be used to achieve the goal of memory governance in lines with the government's historical policy. The Polish legal system (as well as all other legal systems which guarantee the protection of personality rights) allows for the initiation of actions against individuals or institutions by anyone who believes that his or her personality

[34]It should be noted, however, that there was a case initiated by Mr Karol Tendera, Auschwitz survivor, who claimed that the German TV station ZDF violated his dignity and good name by using the notion 'Polish concentration camps': *see* judgment of the Appeals Court in Krakow of 22 December 2016.

[35]The world's leading media outlets covered the case, including *The Guardian* (J. Glanville, '"A Gift for Holocaust Deniers": How Polish Libel Ruling Will Hit Historians' (*The Guardian*, 12 February 2021), https://www.theguardian.com/books/2021/feb/12/a-gift-for-holocaust-deniers-how-polish-libel-ruling-will-hit-historians, visited 31 January 2024) and *The New York Times* (A. Higgins, 'A Massacre in a Forest Becomes a Test of Poland's Pushback on Wartime Blame' (*The New York Times*, 8 February 2021), https://www.nytimes.com/2021/02/08/world/europe/poland-massacre-jews-nazis-blame.html, visited 31 January 2024). It also sparked strong reactions from international institutions and organisations, including Yad Vashem: 'Yad Vashem Statement Regarding the Verdict Rendered by the Polish Court' (11 February 2021), https://www.yadvashem.org/press-release/11-february-2021-11-27.html, visited 31 January 2024.

[36]Professor Barbara Engelking is a psychologist, sociologist, co-founder and Director of the Polish Centre for Historical Research, Institute of Philosophy and Sociology of the Polish Academy of Sciences. She was the chair of the International Auschwitz Council (2014–2018) and curator (together with Jacek Leociak) of the 'Holocaust' gallery in the Core Exhibition of POLIN Museum of the History of Polish Jews. In 2021, Engelking was honoured with the Irena Sendler Award for her overall academic achievements. Professor Jan Grabowski, from the Department of History at the University of Ottawa, is one of the leading Holocaust scholars in the world. His academic excellence has been recently confirmed by him being awarded the 2022 Impact Award, which recognises the highest achievements in the Social Sciences and Humanities Research Council-funded research, knowledge mobilisation and scholarship.

rights have been breached. Therefore, the lawsuit against Engelking and Grabowski could have been considered an 'ordinary' civil law lawsuit to protect 'ordinary' personality rights. However, several elements of this particular case require greater consideration, which can lead to the conclusion that the lawsuit should be classified as a SLAPP.

The lawsuit applied to a brief passage in the 1,700-page academic book, co-authored and co-edited by Barbara Engelking. Jan Grabowski was sued as a co-editor of the book. The book, published in 2018, summarised a several-year research project by the Polish Centre for Holocaust Research of the Institute of Philosophy and Sociology of the Polish Academy of Sciences, entitled 'Strategies of Jewish Survival during the Occupation in the General Government, 1942–1945. A Study of Selected Counties'.[37]

In the disputed passage of the book, Engelking recounted the testimony of a Holocaust survivor, Estera Drogicka (after the war known as Maria Wiltgren):

> However, Estera Drogicka (née Siemiatycka), after losing her family, being in possession of documents purchased from a Belorussian woman, decided to leave for Prussia to work, and was supported by the village leader of Malinowo, Edward Malinowski (he robbed her at that time) – and in December 1942 she ended up in Rastenburg (Kętrzyn) to work as a domestic help in the German Fittkau family. Not only did she meet her second husband there (a Pole who worked with her), but she also developed her commercial operations by sending Malinowski packages with items for sale. She visited him when she went on holiday 'back home'. She realised that he was co-guilty of the death of a few dozen Jews who were hiding in the forest and were turned over to the Germans; in spite of this, she gave false testimony to defend him during the trial after the war.[38]

These dozen or so lines of text formed the basis of a lawsuit brought against Engelking and Grabowski by village leader Malinowski's niece, Filomena Leszczyńska. Leszczyńska (the plaintiff) claimed that several of her personality rights had been breached by the scholars, including her right to the cult of the memory of the deceased, the right to dignity, and the right to national pride and identity. Additionally, Leszczyńska also claimed that her right to an 'unadulterated history' had been breached. This can be considered an attempt to expand the list of personality rights, with an apparent ideological motivation of securing 'the proper truth' about Polish heroism in general. The plaintiff demanded the publication of an extensive apology (including its publication in Poland's most

[37]B. Engelking and J. Grabowski (eds.), *Dalej jest noc. Losy Żydów w wybranych powiatach okupowanej Polski, tom I i II* [*Night without End: The Fate of Jews in Selected Counties of Occupied Poland, vol. I and II*] (Stowarzyszenie Centrum Badań nad Zagładą Żydów 2018).

[38]B. Engelking, *Powiat bielski*, ibid., Vol. I, p. 149-150.

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prominent daily newspaper), financial compensation of 100,000 zlotys jointly from both defendants and, in the case of a reprint of the book, not only the removal of the contested parts, but also the insertion of a notice in which Engelking admits that she had made up information that was unfavourable for the plaintiff's uncle and apologises to Edward Malinowski's family for turning the 'doubtless Polish hero' into a 'murderer and thief'.

The judgment passed in the first instance by the Regional Court in Warsaw in February 2021 stated that the plaintiff's personality right of respect for the memory of the deceased had been breached.[39] The court ordered Engelking and Grabowski to apologise to Leszczyńska, albeit in a much more modest and limited form than initially demanded. The remaining claims were dismissed. Both the plaintiff and the defendants appealed and, in August 2021, the Court of Appeal in Warsaw overruled the judgment passed in the first instance, dismissing the claim in its entirety.[40] There were two core motives and lines of the judicial reasoning in the appeal: the court's acknowledgement of the prevailing need to protect academic freedom and freedom of expression and, second, the recognition that the role of a judge is not to step into the role of a historian and that the court's task is not to assess historical sources and materials. Both of these decisive factors have also been firmly rooted in the case law of the European Court of Human Rights, extensively quoted by the Polish Court of Appeal. This confirms that, when historical and ideological disputes are transferred to the courtroom when researchers of the past are sued or accused,[41] the role of the courts is significant.[42] As emphasised by Judge Garlicki in the European Court of Human Rights, in his dissent in *Adamsons* v *Latvia*, judges are 'experts in law and legality, but not in politics and history' and therefore must not 'venture into these territories unless in cases of absolute need'.[43]

One of the most important indicators of the SLAPP nature of this case is the involvement (including in financial terms) on the plaintiff's side of a non-governmental organisation – Reduta Dobrego Imienia – Polska Liga Przeciw

[39]Judgment of the Regional Court in Warsaw of 9 February 2021, Case III C 657/19.

[40]Judgment of the Court of Appeal in Warsaw of 16 August 2021, Case I ACa 300/21.

[41]A private indictment of this kind was launched on the basis of the Polish Penal Code in July 2019 by Marek Chodakiewicz against Holocaust and anti-Semitism scholar Alina Cała, for calling Chodakiewicz an anti-Semite in the context of his academic publications and opinions. The case reached the level of the Polish Supreme Court, which dismissed it in September 2023.

[42]*See*, in particular, the reasoning of the European Court of Human Rights in the following cases: ECtHR 23 September 1998, No. 24662/94, *Lehideux and Isorni* v *France*; ECtHR 24 June 2003, No. 65831/01, *Garaudy* v *France*; ECtHR 15 October 2015, No. 27510/08, *Perinçek* v *Switzerland*.

[43]ECtHR 24 June 2008, No. 3669/03, *Adamsons* v *Latvia*. For more on the Court's dealing with the past *see*, in particular, A. Wójcik, 'European Court of Human Rights, Freedom of Expression and Debating the Past and History', XVII *Review of International, European and Comparative Law* (2020).

Zniesławieniom (*Polish League Against Defamation*), whose financial and ideological links to the former Polish authorities were disclosed by the independent Polish media.[44] The top priorities of its activities include the so-called protection of the 'good name of Poland and Poles',[45] primarily through the initiation of strategic litigation cases in the area of history (and its current implications) and the history of the Second World War in particular.[46] The League has been successful in some significant court proceedings, including in a case that can also be classified as a SLAPP-type litigation, in which it demanded the publication of a corrigendum by the editors of the Polish edition of *Newsweek*, stating that the information previously published by this weekly magazine – that Poles in Poland set up Polish concentration camps – was false. The passage was contained in the article 'After the liberation of the Nazi camps, Poles reopened them?' and referred to the book *A Little Crime* by Marek Łuszczyna.[47] The book discussed how the former Nazi concentration camps facilities located in Poland were used by postwar Communist authorities to imprison Silesian minority, Germans, and political opponents, including anti-Communist partisans.

Interestingly, the legal action had been initiated personally by Maciej Świrski, the president of the League, who claimed to be entitled to act on his behalf as a Pole involved professionally in issues regarding Poland's past. The courts agreed with this interpretation of his standing. The attorney representing Świrski pointed out that the courts of all instances, including the Supreme Court, held that Świrski's name did not need to appear in the disputed press material: it was enough for him to be a Pole, additionally working on Polish history and, because of his social and organisational involvement – he was entitled to demand a corrigendum. It was confirmed by the courts adjudicating in this case that such personality rights as national identity and national dignity exist and should be protected, and that untrue information about the so-called 'Polish concentration camps' constituted an unlawful breach of these rights.[48] In another case, regarding

[44]*See*, for example, A. Dabrowska and R. Kalukin, 'Reduta Świrskiego – czyli jak prawica walczy "ze zniesławieniem narodu"' [*Świrski's Reduta – or how the right wing fights 'with the defamation of the nation'*] (*Polityka*, 13 February 2018), https://www.polityka.pl/tygodnikpolityka/kraj/1737838,1,reduta-swirskiego–czyli-jak-prawica-walczy-ze-znieslawieniem-narodu.read, visited 31 January 2024.

[45]W. Mrozek, 'Czy Netflix szkaluje Polaków? Sprawdza to Reduta Dobrego Imienia' [*Is Netflix slandering Poles? Reduta Dobrego Imienia checks this*] (*Gazeta Wyborcza*, 27 May 2020), https://wyborcza.pl/7,75410,25979048,czy-netflix-szkaluje-polakow-sprawdza-to-reduta-dobrego-imienia.html, visited 31 January 2024.

[46]Information concerning the League is available on its website: https://rdi.org.pl/english/mission/.

[47]Information on the judgment posted on the Reduta Dobrego Imienia website, https://rdi.org.pl/sprawa-przeciwko-newsweek-pl/, visited 12 February 2024.

[48]Ibid.

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an article posted on a German newspaper's website, the court upheld a claim by Świrski for the protection of his personality right to national identity, allegedly violated by the German press material. The article analysed the historical policy of the former Polish government, which, according to its author, was intended to 'portray the extermination of Jews as a purely German act – with no Polish involvement'. While accepting the claim filed by Świrski – who was born after the Second World War and who was not personally affected by the contested press material in any way – the District Court in Warsaw acknowledged that any Pole could file similar claims.[49] Such 'generous' interpretation of the standing status for individuals and organisations has not been confirmed in many other high-profile cases, concerning, in turn, hatred and discrimination. This inevitably leads to the conclusion that political and ideological considerations may play a significant role in this context. Two telling examples of the opposite approach to legal standing include the refusal to grant the status of plaintiffs to publicly known LGBTQ+ persons, who were suing an activist of the pro-life movement (ideologically close to PiS) who had publicly called such persons 'deviants'. The judge in the case argued that, as none of them had been defamed 'by name', it could not be assumed that they had standing to claim a violation of their personality rights.[50] Shockingly, the judge adjudicating in the case demanded that the plaintiffs submitted an expert opinion from a sexologist confirming the sexual orientation of each of them.[51] The second prominent case concerned criminal investigation into the so-called Kalisz events: the lack of reaction of law enforcement and responsible officials to a wholly anti-Semitic gathering where calls of 'death to the Jews' were heard. Various Jewish organisations were deprived of the status of victims in these proceedings.[52]

[49]Judgment of the District Court in Warsaw of 24 July 2019, Case II C 598/17. *See also* Decision of the Polish Supreme Court of 12 July 2019, Case I CSK 642/18. Interestingly, in its 2021 judgment, the ECJ decided that the Polish courts did not have jurisdiction to hear the case against a German publisher for using the phrase 'Polish extermination camp' which had been brought by a Polish survivor of German Nazi concentration camps, because the claimant could not be objectively identified from the contested publication: ECJ 17 June 2021, Case C-800/19, *Mittelbayerischer Verlag KG* v *SM*.

[50]This approach had been overruled by the verdict of the Court of Appeal in the same case where it has been explicitly stated that the plaintiffs have full standing as being directly targeted by the homophobic statements and easy to identify as belonging to the defamed group.

[51]On the litigation of various cases concerning LGBT+ rights in Poland *see* J. Urbanik and P. Marcisz, 'Juristocracy Rainbow-Tested. The Case of Poland', in J. Urbanik and A. Bodnar (eds.), *Περιμένοντας τους Βαρβάρους. Law in a Time of Constitutional Crisis. Studies Offered to Mirosław Wyrzykowski* (Warsaw 2021) p. 705-742.

[52]P. Żytnicki, 'Nie słyszeli antysemityzmu, bo uciekli do ciepłego pokoju' [*They didn't hear anti-Semitism because they escaped to a warm room*] (*Gazeta Wyborcza*, 21 June 2023), https://kalisz.

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The unilateral, open and public involvement of state officials and institutions in the case is another significant element enabling the legal action filed against Engelking and Grabowski to be referred to as a SLAPP. The then Minister of Justice (and simultaneously the Prosecutor General), Zbigniew Ziobro, publicly commented on both judgments in the case, praising the first and declaring the judgment in the appeal 'an embarrassment to the court' and even 'a judicial attack on justice'.[53] Leaving aside the inadmissible form of such an 'evaluation' of the work of an independent court by the person at the head of the justice system – which should never happen in any state that respects the rule of law – the opinions praising a particular ruling in the first instance may have been a form of pressure on the Court of Appeal, which was ostentatiously informed of the Minister's preferences. Adding to this the ongoing process of undermining judicial independence and initiating disciplinary proceedings against judges who ruled against these preferences and boldly applied European law,[54] it is clear that concerns about the consequences of issuing a judgment that differed from the first instance dictum might have been legitimate.

Also, the government-controlled and government-friendly private media were active in speaking out extremely critically of the defendants, adding to the narratives that it was 'in the interest of the state' to reach a specific, clearly defined ruling. Attacking Engelking and Grabowski by publicly putting them in a highly negative, 'anti-Polish' light strengthened the potential for a chilling effect on others even further, including, in particular, younger researchers embarking on their academic careers.[55] The particular practice of portraying many Holocaust and prejudice scholars in Poland as contributing to 'anti-Polish' attitudes worldwide was already ongoing before the trial in the *Engelking and Grabowski* case began. It involved, among other things, the depreciation of the results of their research and accusations of defaming the good name of Poland and Poles.[56]

wyborcza.pl/kalisz/7,181357,29888361,wyborcza-ujawnia-nie-slyszeli-antysemityzmu-bo-uciekli-do.html, visited 31 January 2024.

[53]A. Leszczyński, 'Atak furii prawicy po sądowej wygranej autorów "Dalej jest noc". Ziobro: "Zamach na sprawiedliwość"' [*Right-wing fury attack after court win for authors of 'Further is the night'. Ziobro: 'The assault on justice'*] (*OKOpress.pl*, 18 August 2021), https://oko.press/atak-furii-prawicy-po-sadowej-wygranej-autorow-dalej-jest-noc/, visited 31 January 2024.

[54]K. Gajda-Roszczynialska and K. Markiewicz, 'Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland', 12 *Hague Journal on the Rule of Law* (2020) p. 451.

[55]*See* right-wing media outlet footage of the judgment in the appeal of 16 August 2021, https://wpolityce.pl/historia/562671-dr-gontarczyk-komentuje-wyrok-ws-dalej-jest-noc, visited 12 February 2024.

[56]J. Grabowski, 'Poland's Militant Nationalists are Targeting Holocaust Scholars, with Help From an Israeli Historian' (*Haaretz*, 19 May 2019), https://www.haaretz.com/world-news/2019-05-19/ty-article-opinion/.premium/the-israeli-historian-helping-polands-nationalists-target-scholars-of-the-holocaust/0000017f-e2bd-d568-ad7f-f3ffd9510000, visited 31 January 2024.

Another significant lawsuit belonging to the same category was the one against Professor Michał Bilewicz, the Head of the Center for Research on Prejudice at the University of Warsaw, sued for calling the works of a right-wing cartoonist an expression of anti-Semitism.[57] Therefore, even though the lawsuits, such as those in the *Engelking and Grabowski* or *Bilewicz* cases, have not been initiated directly by the government or institutions taken over by the ruling majority, in a complex political and social reality, there may be situations in which a seemingly neutral civil or press law based lawsuit can also be defined as a SLAPP, when filed against 'unruly' individuals, groups or organisations. Undoubtedly, these cases also fit the definition of SLAPP proposed by Shapiro: they were intended to silence representations being made in public on issues of social significance.

SLAPPs filed against Polish scholars – and in particular against those involved in research on Holocaust and anti-Semitism – have targeted the most prominent and well-known of them, whose scholarly reputation is international. Arguably, the decisions to take legal action against them may have been driven by three main motives. First, showing the Polish public that thsoe whose works are known and appreciated internationally are the ones supporting anti-Polish narrative, which proves that this 'foreign world' is anti-Polish. Second, their works resonate abroad, which is why they are seen as particularly 'dangerous' by the SLAPPs' authors. Third, and finally, publicising the legal action taken against well-known academics has a much greater media impact – in other words, it gives visibility to the SLAPPs' authors.

An exaggerated or baseless lawsuit about historical narratives can have devastating effects on the freedom of public debate and, more broadly, on safeguarding the core of the democratic system. It is simultaneously difficult to assess the full and authentic scale of the chilling effect caused by SLAPPs, as they involve not only strictly legal, procedural measures but also other ways of discouraging individuals from publicly presenting their opinions, information or the results of their academic research and speaking out in the public debate. The

[57]On 9 April 2021, the Court of Appeal in Warsaw dismissed all claims in a lawsuit initiated by Cezary Krysztopa against Professor Michał Bilewicz (V ACa 24/21). The Court shared in full the position of the Warsaw Regional Court taken in its judgment of 19 November 2020, in which the Regional Court found the lawsuit baseless. The Court of Appeal stressed in particular that in his comments Professor Bilewicz did not go beyond the limits of free speech and was raising a matter of anti-Semitism which should be considered an issue of great public importance. In March 2018, during a public lecture at the POLIN Museum in Warsaw, Professor Bilewicz presented a drawing by Cezary Krysztopa, a well-known caricaturist closely linked to national and rightwing circles in Poland. He called Krysztopa a 'notorious anti-Semite' and indicated that his drawings provoke a wave of vicious anti-Semitism online. These statements were based on the entire series of Krysztopa's earlier drawings and public statements. Krysztopa sued Professor Bilewicz for violation of his personality rights.

loss of a job, media reprisals, the fear of not obtaining funding for research on specific topics: all of these auxiliary aspects of SLAPPs are probably considered by those who already face a threat or observe what happened to others who became targets of state-initiated or state-inspired efforts of silencing.

SLAPPs also prove that there is a significant correlation between the guarantees of freedom to participate in the public debate and judicial independence, both being preconditions for concluding that a given state applies the rule of law. Only an independent judiciary and public prosecutor's office can ensure that individuals or institutions targeted by SLAPPs are fully guaranteed of the right to an independent court under European law. A state applying the rule of law is one that guarantees and protects the plurality of voices and opinions – a state that strengthens the instruments of social and civil society control over those in power and engages the prosecutorial and judicial apparatus against abuses of power and not against individuals or organisations sounding the alarm about such abuses.

Undoubtedly, publishing the results of academic research, particularly in the area of social sciences and especially results that can shatter the collective 'peace of mind' and the long-established historical or political narrative, should be treated as a form of essentially meaningful participation in open debates on issues of public interest.

European standards on academic freedom

EU law strongly safeguards academic freedom. According to Article 13 of the EU Charter of Fundamental Rights, 'The arts and scientific research shall be free of constraint. Academic freedom shall be respected.' This provision indicates that academic freedom is not just a part of the freedom of speech, but has its own underpinnings.

The European Court of Justice emphasised the value of academic freedom in the *Central European University* case.[58] The Court stated that 'academic freedom in research and teaching should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and to distribute knowledge and truth without restriction'.[59] Furthermore, the European Court of Justice indicates that academic freedom should be considered broadly as 'not restricted to academic or scientific research, but that it also extends to academics' freedom to express freely their views and opinions'.[60]

[58]ECJ 6 October 2020, Case C-66/18, *Commission* v *Hungary*. *See also* R. Uitz 'Finally: The CJEU Defends Academic Freedom', *Verfassungsblog* (8 October 2020), https://verfassungsblog.de/finally-the-cjeu-defends-academic-freedom/, visited 31 January 2024.

[59]*Commission* v *Hungary*, ibid., para. 225.

[60]Ibid.

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In order to verify the attempts of the Hungarian government to expel the Central European University from Hungary, the European Court of Justice made specific reference to various soft law documents regarding academic freedom and autonomy of higher educational institutions: (i) Recommendation 1762 (2006) of the Parliamentary Assembly of the Council of Europe 'Academic freedom and university autonomy' and (ii) the Recommendation concerning the status of higher-education teaching personnel, adopted by UNESCO.[61] These documents also apply to the academic freedom of individual scholars and researchers, which could be the subject of pressure mechanisms.

According to point 4.1 of the Recommendation of the Parliamentary Assembly of the Council of Europe, 'academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction'.[62] Meanwhile, the UNESCO Recommendation focuses on the status of academic teachers and their daily practice of the profession. Interestingly, the Recommendation provides that:

> Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies.

Most importantly, it emphasises that teachers should 'have the right to fulfil their functions without discrimination of any kind and without fear of repression by the state or any other source'.[63]

In the recent Bonn Declaration on Freedom of Scientific Research, the freedom of researchers was defined as including, among other things, 'freedom of researchers to express their opinion without being disadvantaged by the system in which they work or by governmental or institutional censorship and

[61]Recommendation concerning the Status of Higher-Education Teaching Personnel, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO), meeting in Paris from 21 October to 12 November 1997, at its 29th session, available at https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching-personnel, visited 31 January 2024.

[62]PACE Recommendation No. 1762/2006, adopted on 30 June 2006, available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17469&lang=en, visited 31 January 2024.

[63]Ibid., para. 27.

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discrimination'.[64] This Declaration was adopted as a follow-up to contemporary threats and in the context of reprisals against the Central European University.

The EU response to the problem of SLAPPs

The SLAPP phenomenon is a subject of great interest to the EU. A Maltese journalist, Daphne Caruana Galizia, has become a symbol for the EU that journalists should be protected against lawsuits and other legal intimidation from business people, corporations and state bodies. Before she was murdered in 2017, she was the target of more than 40 libel lawsuits.[65] The increasing number of SLAPP lawsuits in Poland after 2015, during the rule of law crisis, is also noted in the European discussion on the topic. In 2022, the Coalition Against SLAPPs in Europe[66] named Poland 'the SLAPP country of the year' and highlighted lawsuits targeting media, journalists, and civil society activists.

The growing pressure from human rights and free speech organisations[67] resulted in the European Commission making a political decision to address the issue of SLAPPs[68] by preparing the Recommendation[69] and in 2022 presenting the Draft Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings.[70] In what follows, this article will critically discuss the Recommendation and the Directive and argue that their exclusive focus on the media and human rights defenders weakens the potential protection of academics or public intellectuals. Examples from Poland,

[64]Bonn Declaration on Freedom of Scientific Research, adopted at the Ministerial Conference on the European Research Area on 20 October 2020 in Bonn, available at https://www.bmbf.de/bmbf/shareddocs/downloads/files/_drp-efr-bonner_erklaerung_en_with-signatures_maerz_2021.pdf?__blob=publicationFile&v=1, visited 31 January 2024.

[65]P. Milewska, 'SLAPPs, Daphne's Law, and the Future of Journalism', *Verfassungsblog* (15 June 2023), https://verfassungsblog.de/slapps-daphnes-law-and-the-future-of-journalism/, visited 31 January 2024.

[66]The Coalition Against SLAPPs in Europe, *see* https://www.the-case.eu/, visited 31 January 2024.

[67]Letter from 27 organisations of 27 January 2020, https://www.greenpeace.org/static/planet4-eu-unit-stateless/2020/01/20200127-Letter-to-Commissioner-Jourova-SLAPP-lawsuits.pdf, visited 31 January 2024. *See also* letter of 28 May 2020 from 30 MEPs to Vera Jourova, available at https://cdn-others.timesofmalta.com/43c01a750746e307b713dd0195dab8e8aa8a2ee0.pdf, visited 31 January 2024.

[68]The promise was made by Vera Jourova in May 2020 by including work on the Anti-SLAPP Directive into the European Democracy Action Plan. *See* letter responding to the request by a coalition of NGOs, https://www.rcmediafreedom.eu/content/download/6026/55176/version/1/file/Jourova+letter+on+SLAPP.pdf, visited 31 January 2024.

[69]Commission Recommendation (EU) 2022/758, *supra* n. 3, p. 30–44.

[70]COM/2022/177 final, *supra* n. 4.

including the discussed case against Engelking and Grabowski, prove that the proposed tools may thus be insufficient to address all challenges provoked by SLAPPs.

The SLAPP Recommendation provides for general measures that may be undertaken by EU member states to reduce the possible negative impact of SLAPP litigation. These measures include training lawyers, raising awareness, building capacity to support victims of SLAPP litigation and data collection. The SLAPP Recommendation generally contains 'soft' measures that can help mitigate risk with negative consequences of such litigation.

The Draft Directive has a different approach. It requires EU member states to adopt specific measures to reduce the number of SLAPP cases or to create a level playing field in legal proceedings. To this end, the Draft Directive allows for the court's early rejection of the lawsuit (manifestly unfounded proceedings) or gives victims access to additional legal aid and state-paid representation. It also provides additional remedies against abusive proceedings (such as requiring legal costs to be paid by those who initiate unfounded proceedings). It cannot yet be said at this stage which of the proposed remedies will remain in the final text of the Directive.

The SLAPP Recommendation and the Draft Directive refer to two categories of individuals who should be protected against SLAPP litigation. These are journalists and human rights defenders. Recital 7 of the SLAPP Recommendation emphasises that human rights defenders play an important role in European democracies because of their contribution to the public debate. The Recommendation lists the rights protected by individuals and organisations referred to as human rights defenders as: environmental and climate rights, women's rights, LGBTQ+ rights, the rights of people with a minority racial or ethnic background, labour rights or religious freedoms.

Recital 7 of the Draft Directive goes in a similar direction. It says that:

> Human rights defenders refer to individuals or organisations engaged in defending fundamental rights and a variety of other rights, such as environmental and climate rights, women's rights, LGBTIQ rights, the rights of the people with a minority racial or ethnic background, labour rights or religious freedoms.

However, Recital 7 adds a critical paragraph (as compared to the SLAPP Recommendation), stating that 'Other participants in public debate, such as academics and researchers, also deserve adequate protection'.

Article 1 of the Draft Directive outlines its general objective. Article 2 refers to the scope of the Directive, which is civil and commercial litigation. Article 3 defines what should be regarded as a 'public participation' and 'matter of public interest'.

According to Recital 7, academics and researchers appear to be protected by the text of the Draft Directive. Even so, a more explicit formulation of the relevant provisions could be expected. For example, 'public participation' is:

> any statement or activity by a natural or legal person expressed or carried out in the exercise of the right to freedom of expression and information on a matter of public interest, and preparatory, supporting or assisting action directly linked thereto. This includes complaints, petitions, administrative or judicial claims and participation in public hearings.

This definition refers to typical forms of journalistic or human rights activists, and not the results of the work of academics and researchers. Indeed, books, reviews, or scholarly articles could be regarded as 'any statement . . . in the exercise of the freedom of expression'. However, greater precision could be expected, stipulating that the protection offered by the Directive also covers academics.

The study 'SLAPP in the EU context', commissioned by the European Commission, pointed out that scholars may be subject to excessive strategic litigation.[71] The study highlights a notable example of law professor Wojciech Sadurski, who has been targeted for his comments about the operation of Polish state media channel TVP and practices of the ruling PiS party. Indeed, Sadurski's activities, which resulted in SLAPP litigation against him, should be qualified as a form of exercising academic freedom in the broader sense, namely the ability to freely express views and opinions related to his academic expertise as legal scholar. That is why Sadurski's case was the subject of mass academic protests involving scholars worldwide. In an open letter they clearly explained that silencing individual scholars poses a threat to the whole environment of public discourse: 'any attempt to silence any one of us who writes for and reads publications such as this one is an attempt to repress and silence all of us'.[72] However, other cases are also mentioned in the study 'SLAPP in the EU Context'. Some of these were related to generally practising the academic profession, such as access to documents required for research.[73] However, there were also cases where government-related officials had attempted to silence scholars by using defamation cases.[74]

[71]Bárd et al., *supra* n. 13.

[72]G. de Búrca and J. Morijn, 'Open Letter in Support of Professor Wojciech Sadurski', *Verfassungsblog* (6 May 2019), https://verfassungsblog.de/open-letter-in-support-of-professor-wojciech-sadurski/, visited 31 January 2024.

[73]ECtHR 26 May 2009, No. 31475/05, *Kenedi* v *Hungary*.

[74]E.g. Janos Kis, the famous political philosopher, was sued by the General Prosecutor. István Eörsi was sued by a prominent historian affiliated with the ruling party. *See* Bárd et al., *supra* n. 13, p. 49.

It is possible that scholars in Europe today can be targeted for the content of their research. Increasing polarisation and divisions in European societies affect the public discourse on many issues. Furthermore, we observe growing authoritarian trends in certain countries. Specialised non-governmental organisations involved in the consultations on the anti-SLAPP Directive have pointed out the general threat of the 'chilling effect' arising from possible litigation against scholars. Scholars at Risk Europe emphasised, 'If scholars are to be encouraged and indeed expected to speak out in public forums, then they must be afforded real protection from vexatious, abusive and meritless legal suits.'[75] Moreover, in the draft anti-SLAPP law prepared by a coalition of non-governmental organisations, academics are explicitly mentioned as a group that should be protected.[76] Academics and public intellectuals deserve solid protection from SLAPPs in Europe and the Draft Directive should be improved in this regard. The work on the Directive is not yet finished and there is still time to add relevant provisions protecting these particular professional groups against SLAPPs.

The discussed example of the case against Holocaust scholars demonstrates the necessity of improving protection for scholars in Europe, who are engaged in knowledge production, including on the past. While journalists are silenced for dissemination of historical narrative, scholars are being threatened for offering new narratives based on their research findings. The proposed Directive should take this into account and address this threat.

Concluding remarks

SLAPPs play an important role in the process of dismantling the rule of law and the weakening of constitutional rights and freedoms. The examined Polish example showed that SLAPPs, generally used to silence voices that are critical of ruling majorities or other powerful players linked to the government, have also proved helpful in disputes over historical memory. In Poland, the amended Act on the Institute of National Remembrance opens the road for lawsuits 'for the protection of the good name of the state and the nation' to be filed by a state institution, such as the Institute itself, as well as by organisations that may be affiliated with the government in various ways. Simultaneously, as evidenced by the *Engelking and Grabowski* case, ordinary civil law and lawsuits for the

[75] *Scholars at Risk Europe Statement*, 4 April 2022, https://sareurope.eu/sar-europe-recommends-the-inclusion-of-academics-in-any-legislative-proposal-designed-to-combat-slapps/, visited 31 January 2024.

[76] *A Proposal for an EU anti-SLAPP law: Protecting Public Watchdogs across the EU* (European Centre for Press and Media Freedom 2020), https://www.ecpmf.eu/a-proposal-for-an-eu-anti-slapp-law/, visited 31 January 2024.

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protection of personality rights can also be abused to serve as SLAPPs against academics.

Such SLAPPs are even more dangerous in countries where the rule of law dismantling has been going on for years, and where judicial independence is structurally threatened, along with the absence of an independent prosecutor's office. The same applies to places where the government utilises state resources to support organisations that subsequently, as proxies, combat the ruling majority's critics or even those who dare, in the context of their professional work, to challenge narratives preferred by the government.

In the EU, high legal standards for the protection of academic freedom are in place, as evidence by the EU Charter of Fundamental Rights and the case law of the European Court of Justice, which also references rich soft law standards. In recent years, the EU has taken steps to fight rule of law backsliding in some of its member states and has also striven to protect against the pervasive phenomenon of SLAPPs. These efforts should be consolidated in the Directive against SLAPPs. The Directive should expressly broaden its protection to encompass scholars who face the potential of being entangled in abusive legal proceedings. This direct provision for the safeguarding of scholars carries both practical and symbolic significance. A more explicit revision of Recital 7 in the Directive would represent a positive and necessary step.

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