[PL] Appeal court decides on obligation for ZDF and UFA Fiction to issue public apology

IRIS 2021-6:1/29

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Following an appeal by Zweites Deutsches Fernsehen (ZDF) and UFA Fiction GmbH, the Kraków appeal court has amended a first-instance decision requiring them to issue a public apology for breaching the personality rights of members of the Polish Home Army (AK) and to pay compensation in relation to the broadcast and production of the film series *Unsere Mütter, unsere Väter* (Our mothers, our fathers). While the compensation order was quashed, the obligation to issue a public apology on Polish television and the German channels ZDF, ZDFneo and 3sat was upheld. The written grounds for the decision have not yet been published. However, in a press release of 24 March 2021 (case No. I ACa 808/19), the appeal court reacted to criticism of the decision within Poland by stressing the importance of free speech and highlighting the essential lines of argument contained in the oral reasons for the decision.

The legal dispute followed actions brought by a Polish war veteran and the World Union of Soldiers of the National Army against ZDF and the production company UFA Fiction GmbH. The plaintiff had himself served in the Polish Home Army (AK), an armed underground movement that resisted the German occupation of Poland during the Second World War. He claimed that the portrayal of the AK in the three-part mini-series *Unsere Mütter, unsere Väter*, which was first broadcast in Germany in 2013, had violated his personality rights by containing scenes that, in his view, suggested that the AK was partly responsible for crimes against the Jewish people.

The Kraków appeal court fully rejected the war veteran’s complaint on the grounds that an individual could not make a claim for protection of the rights of a national community. The court also held that it was not entitled to make a judgement about historical and scientific truths that, by their very nature, should be the subject of free public debate. The plaintiffs therefore had no claim to protection on the grounds that the nation’s reputation should be protected if that protection extended beyond that which resulted from their individual position and legal situation.

The court examined whether the depiction of the Polish AK in the mini-series was covered by the artistic and narrative freedom of the film producers and explained the need to weigh the plaintiff’s personality rights against the producers’ artistic

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freedom. Regarding the storyline of the series *Unsere Mütter, unsere Väter*, the court concluded that the creators had not, as a rule, overstepped the boundaries of creative freedom. Elements of the plot suggesting anti-Semitic attitudes among Polish people were justified by the need to depict the fate of one of the film's main characters (a German Jew in hiding in Poland). Historical knowledge suggested that the authors were entitled to deal with these themes in this way. Under these circumstances, the film-makers' freedom of expression therefore took precedence over the war veteran's individual rights, especially since the latter could not be directly identified as one of the characters in the film.

As a result, the court ruled that the boundaries of creative freedom had not been crossed because, in accordance with historical knowledge, the producers had been entitled to write the scenes to fit the logic of the film and portray the fate of its main characters in this way. The Poles' anti-Semitic tendencies in the film were therefore covered by artistic freedom. The court also referred to the fact that the plaintiff's general personality rights had only been breached in a minor way because he could not be directly identified in any of the scenes.

The action brought by the World Union of Soldiers of the National Army, on the other hand, was partially upheld. The court specifically referred to the film's depiction of a group of soldiers wearing white and red armbands and the abbreviation 'AK'. These soldiers had therefore been identified as members of a certain military organisation. The court held that this had been unreasonable on the film-makers' part because it was unnecessary for the storyline. It ruled that, in order to portray the heroes' fate, it would have been sufficient to show scenes including Polish soldiers without associating them with a particular military organisation. To have done so was especially reprehensible given that there was no historical evidence that the AK was an anti-Semitic organisation.

ZDF and UFA Fiction GmbH will decide whether to appeal against this ruling when the written grounds are issued. In particular, they do not think their artistic freedom was sufficiently taken into account.

Sąd Apelacyjny w Krakowie, Komunikat w sprawie I ACa 808/19 dot. filmu „Nasze matki, nasi ojcowie", 24/03/2021

https://krakow.sa.gov.pl/komunikat-w-sprawie-i-aca-80819-dot-filmu-nasze-matki-nasi-ojcowie,new,mg,1,279.html,637

Press release of the Kraków appeal court, 24 March 2021

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