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Group Defamation in West Germany

Manfred Zuleeg*

IN EACH HUMAN SOCIETY, there are social prejudices against certain groups¹ which suffer a more or less discriminating treatment by the other parts of the population. Sometimes the discrimination becomes aggressive. Group defamation and actions of persecution are the consequences.² German scholars agree with American sociologists that social prejudices and discriminations are not connected as cause and effect, but as interdependent factors.³ The origins of a social prejudice are traced by sociologists to an aggressive attitude because of personal or group conflicts or shortcomings.⁴ It is difficult, however, for sociologists to explain why the prejudice is directed against just this or that group. Generally, they can only refer to the historical events and circumstances.⁵ Hence, a glance into recent German history is unavoidable to determine the principal aims and causation of social prejudices and discriminations in general, and of group defamation in particular.

During the Industrial Revolution, a new class of workers came into being, and was discriminated against for economic reasons. In the course of development towards a welfare society, however, class discriminations tend to disappear.

Apart from the complex Jewish problem, discriminations against religious groups are also of decreasing importance because the influence of religion on daily life is diminishing and people are becoming accustomed to religious co-existence.

Ethnic minorities, especially the Polish population, presented difficulties only in the Wilhelminian era, but by separation of

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¹ Peter Heintz, *Soziale Vorurteile. Ein Problem der Personlichkeit, der Kultur und der Gesellschaft*, Cologne, 1957.

² See Bruno Bettelheim and Morris Janowitz, *Dynamics of Prejudice*, New York, 1950; G. B. Simpson and J. M. Yinger, *Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination*, New York, 1953.

³ For the American side: Joseph H. Fichter, *Sociology*, Chicago, 1957, pp. 197 et seq.; for the German side: Manfred Reh binder, *Die Diskriminierung: Ihre Ursachen und ihre Bekampfung*, *Kolner Zeitschrift fur Soziologie und Sozialpsychologie*, vol. 15 (1963), pp. 10 et seq.

⁴ John Dollard, Neal E. Miller, Leonard W. Doob et al., *Frustration and Aggression*, New Haven (Conn.), 1939.

⁵ Heintz, *op. cit. supra* note 1, pp. 64 et seq.; Reh binder, *op. cit. supra* note 3, p. 16.

almost all the territories with non-German inhabitants of the Reich and the assimilation of non-Germans in the other parts of the country (especially of Poles in the Ruhr district) the difficulties no longer existed. At present, the rather high number of foreign workers,⁶ mainly Italians, Spaniards, Greeks, and Turks, form a new minority which could be the object of social prejudice and discrimination. Certainly there are such attitudes toward the "guest" workers, but they are of relatively small importance, thanks to the economic prosperity which prevents envy, and to the good adaptation by the foreigners.

The principal targets of group discrimination and persecution in Germany were the Jews. The roots of the social prejudice were of a religious nature, but that explains modern anti-semitism only to a small extent. This prejudice against the Jews was connected for the most part with nationalism. In the 19th century, when national feeling arose in Germany, the Jews formed a religious *corpus alienum* among the other parts of the population because they, with fellow-believers all over the world, were a distinguishable minority. Thus the national disappointment after the first World War turned against this *corpus alienum* under the pretext of "racial inferiority," though it is hardly possible to speak of a special Jewish race. The anti-semitic feeling, systematically fomented by National-Socialists, exploded into abominable persecution under the regime of Hitler.⁷ Naturally, after the second world war anti-semitism did not die out overnight. But there were only a few Jews left in Germany and the German people were still under the impression of the horrors of the Third Reich. Under these circumstances, there were only a limited number of cases in which radical diehards showed anti-semitic reactions. Anti-semitism has little appeal to youth.

Today, racial discriminations could also be directed against the so-called "Besatzungskinder" (illegitimate children of colored soldiers of the allied troops) and against foreign students of other races. Thus far, only a few cases of racial discrimination against the latter have been reported.

Thus the picture shows that group discrimination presently plays a rather small role in Germany. Nevertheless, tendencies

⁶ In the beginning of June, 1963, there were 802,200 foreigners working in the Federal Republic and West Berlin (*Handelsblatt*, July 8, 1963, p. 3).

⁷ As to the origins and role of antisemitism in Germany, see H. G. Adler, *Die Juden in Deutschland*, Munich, 1960; A. Leschnitzer, *Worterbuch der Soziologie*, edited by Wilhelm Bernsdorf and Friedrich Bulow, Stuttgart, 1955, sub verbo "Antisemitismus" (p. 16).

in this direction have to be combated from the very beginning, to avoid persecutions like those against Jews. But even without persecutions, group discriminations in all forms are an evil. They make living together of humans difficult, and endanger democratic life, which is based upon the image of a free and equal citizen membership in one or another social group.⁸

Because of the interdependence of social prejudice and discrimination, an essential contribution is the fight against prejudice by means of enlightenment and education. Of equal importance, however, is the fight against group discriminations themselves. The principal weapon for this purpose is the law, though it is not in itself sufficient.⁹

The aggressive forms of group discrimination are the most dangerous ones, and thus are the chief objects of legal suppression. The first step of aggressive discrimination is always in the depreciation of the social esteem of a group: the group defamation. The example of Nazism shows that instigation precedes persecution and prepares the minds of the people to agree with extreme forms of discrimination. Therefore, the legal protections against group defamation are of great importance. The following investigation will illustrate which protections of this kind exist in the free part of Germany, and whether they are efficient.

Penal Sanctions

Now, as before, penal law is the most effective means of protection. It is relatively easy to discover the penal sanctions on group defamation in Germany, because the rule *nulla poena sine lege*¹⁰ requires a written fixation. Apart from this, the most important penal statutes are codified under federal law. The code is the Strafgesetzbuch (StGB) for the North German Federation of May 31, 1870. It became the penal code for the Reich by act of May 15, 1871,¹¹ and is still valid as federal law, although with a series of alterations. At the same time, the *Länder* (states) competence for legislation is only left for subjects which are not exclusively ruled by federal law.¹²

⁸ See Leschnitzer, *op. cit.*, p. 20.

⁹ Against an over-estimation of the legal means warns Brierly, *Die Zukunft des Völkerrechts*, Zurich, 1947, p. 22.

¹⁰ Art. 103 para. 2 Grundgesetz (GG).

¹¹ *Reichsgesetzblatt*, p. 127.

¹² § 2 Einführungsgesetz (introductory law), As commentary to that see *Leipziger Kommentar*, 8th ed., edited by Heinrich Jagusch, Edmund Mezger et al., Berlin, 1958, ann. IV 2 A.

I. Honor

The rules against infringement of a person's *honor* seem to offer the most obvious protection. These defamation rules are stated in §§ 185 StGB, *et seq.* German law does not differentiate between libel and slander, but between insult (*Beleidigung*, § 185, which includes the expression of depreciating facts towards the infringed person), and the expression of such facts towards other persons (*üble Nachrede*, § 186, and *Verleumdung*, § 187).¹³ Defense of truth is possible against §§ 186 and 187, whereas defense of legitimate interests is also possible against § 185. Both defenses exclude punishment, if they are verified. § 189 StGB protects the reputation of deceased. §§ 185, 186 and 187 lead to punishment only on request of the infringed person, § 189 on request of the near relatives. For the victims of the Nazi regime a personal application is not necessary, if there are no remaining kin. The defamator is sentenced by the penal courts. In general, the infringed person has to sue the defamator before the penal courts (*Privatklage*), but the public prosecutor can indict if this lies in the public interest.

This system shows two things: First, the subject of defamation is completely ruled by federal law, so that the law of the *Länder* is excluded. Secondly, the necessity of an application of the infringed person and the *Privatklage* demonstrate the extreme individualistic conception of the defamation rules. A group defamation, however, offends a plurality of men. How are such pluralities protected against defamation? One way was taken by the *Reichsgericht* in the judgment of March 12, 1936.¹⁴ It declared communities and corporations as possible objects of defamation, if they are recognized by law, and if they render public services under approval of the State. Though the *Reichsgericht* turned away from the individualistic concept during the Nazi time, that was not enough to give any protection to the persecuted groups, especially the Jews. On the contrary, the clause "under approval of the State" favored only Nazi organizations. After World War II, the *Bundesgerichtshof* enforced the position of corporations and communities. Decisive was the judgment of January 8, 1954,¹⁵ by which a limited liability com-

¹³ See Kohlrausch-Lange, StGB-commentary, 13th ed. by Richard Lange, Berlin, 1961, ann. I before § 185.

¹⁴ RGSt (official publication of penal judgments of the *Reichsgericht*), vol. 70, p. 141.

¹⁵ BGHSt (official publication of penal sentences of the *Bundesgerichtshof*), vol. 6, p. 186.

pany publishing a newspaper was punished.¹⁶ The new formula of the Bundesgerichtshof was that a corporation or community can be the object of defamation if it fulfills social functions appreciated by law, and if it is able to form a uniform will regardless of the status of a legal person. This jurisdiction met with general consent, so that today such groups are protected against defamation if they are organized in the manner stated above. This can be of importance, for instance, to a Jewish Community.

However, the defamed group is usually not organized in the form of a community or corporation or, at least, is not defamed as an organized group. Therefore, we have to consider the second way developed by German jurisprudence to depart from extreme individualism. It consists of a punition of defamations under a collective denomination. This is consistent with §§ 185 StGB *et seq.*, only if single persons are involved under the collective denomination. That is the reason why the Courts established the following requirement: It must be possible to individualize the members of the group defamed under a collective denomination. This requirement is necessary because of the individualistic conception of §§ 185 StGB *et seq.*, although certain difficulties in the application cannot be avoided.

For instance, what persons are meant if somebody expresses depreciating opinions about "the Jews" or members of the "Jewish race"? What is the "Jewish race"? Does it mean those people who adhere to mosaic religion? The Oberlandesgericht Neustadt in its decision of April 6, 1949,¹⁷ and the Supreme Court of the British Zone in its decision of December 12, 1949,¹⁸ capitulated before this difficulty. But the Bundesgerichtshof, in its decree of February 28, 1958,¹⁹ found a way out: Defamations of Jews after World War II are deemed to be directed against the people living in Germany who were considered Jews by Nazis and hence persecuted. Thus the defamed persons can be quite easily individualized, and protection against group defamation where it is most necessary becomes possible even with an individualistic law.

In other cases, however, such clever formulations could not be found, so the Bavarian Oberste Landesgericht in its decision

¹⁶ Critical Kohlrausch-Lange, *op. cit. supra* note 13, ann. III to § 185.

¹⁷ Hochstrichterliche Entscheidungen in Strafsachen (HESst), vol. 2, p. 270.

¹⁸ Official publication (OGHBZ), vol. 2, p. 291.

¹⁹ BGHSt, vol. 11, p. 207.

of April 9, 1952,²⁰ denied the possibility to individualize "attorneys in patent suits." The Bundesgerichtshof denied this possibility for "those involved in denazification" in its decision of November 23, 1951,²¹ but held an affirmative position concerning the "resistance fighter in the Third Reich."²²

Thus §§ 185 StGB, *et seq.*, gives only partial protection against group defamation, namely to an organized group which is defamed, or to the persons who can be individualized from a collective denomination which has been defamed.

II. Public Order

Group defamation can, however, also cause a danger to *public order* as outlined previously. The penal statutes for the protection and maintenance of public order are contained in §§ 123 StGB, *et seq.* Until a short time ago, the only rule relevant for our subject, § 130 StGB, was restricted to a very narrow field of application:

He who incites publicly different classes of the population in a way which endangers public peace, to commit actions of violence against each other, will be imprisoned up to two years, or fined.

Though the jurisprudence interpreted "class of the population" in a very broad sense,²³ it could not include the usual group defamation under this rule, because incitement to actions of violence was lacking.

Even after 1945 neither the Allied nor the German legislature deemed it necessary to enact a provision against all group defamations. Only Bavaria made an exception: By Law of March 13, 1946²⁴ expressions of race mania or national hatred were penalized if they disturbed the population and thus endangered public peace and order. Before the creation of the Federal Republic, such authority was without doubt vested in the Land Bavaria. But even after the Grundgesetz²⁵ came into force, the Law re-

²⁰ Neue Juristischer Wochenschrift (NJW), 1953, p. 554.

²¹ BGHSt, vol. 2, p. 38.

²² Decision of May 8, 1952 (NJW, 1952, p. 1183).

²³ Reinhart Maurach, Deutsches Strafrecht, Besonderer Teil, 3rd ed., Karlsruhe, 1959, p. 343. Compare, for instance, the decision of the Reichsgericht of November 10, 1899 (RGSt, vol. 32, p. 352), where it considered the Jews to be a "class of the population," thus not using the notion in a narrow Marxist sense.

²⁴ Bayerische Bereinigte Sammlung, vol. III, p. 149.

²⁵ Constitution of the Federal Republic.

mained valid, since the federal rules for the protection and maintenance of public order do not completely cover this matter. Thus at least defamations of racial or national groups could be punished in Bavaria.

The Bund planned for a long time to introduce a similar federal law, but it was only under the impression of the anti-semitic excesses which occurred at the turn of the year from 1959 to 1960, that the Bundestag rather quickly passed a bill²⁶ modifying § 130 StGB as follows:

He who attacks the dignity of other men in a way likely to disturb public peace, by

- 1) inciting hatred against parts of the population,
- 2) instigating actions of violence or despotism against them or
- 3) insulting, ridiculing or defaming them,

will be imprisoned not less than three months, and may be fined.

This Federal law combines protection of the dignity of men and of public peace.²⁷ It abolished the Bavarian Law, having rendered it superfluous. The modified version of § 130 StGB has an even broader field of application than the Bavarian Law, protecting all kinds of groups. Intentionally, the words "parts of the population" were used to exclude all doubts that the group must be distinguished from other people.²⁸ All kinds of general defamations are covered by the rule. The only restriction is the necessity of a danger to the public peace. An actual disturbance of public peace, however, is not required. Thus § 130 StGB establishes a rather far-reaching and complete protection against group defamations and prevents group persecutions at an early stage.²⁹

III. Integrity of the State

Additionally, rules concerning crimes against the integrity of the State are applicable in certain cases. A decision of the Bundesgerichtshof of February 28, 1959,³⁰ based the confisca-

²⁶ 6th Strafrechtsänderungsgesetz of June 30, 1960 (Bundesgesetzblatt, part I, p. 478).

²⁷ Kohlrausch-Lange, *op. cit. supra* note 13, ann. II to § 130, modified version.

²⁸ Report of the Legal Committee of the Bundestag (German Bundestag, 3rd election period, printings No. 1746). See also printings No. 918 and 1143 including the report of deputy Benda (appendix to printings No. 1143).

²⁹ Schafheutle, *Juristenzeitung* 1960, pp. 470 et seq., who speaks of the complementary functions of § 130 and § 220 a StGB (penalizing genocide).

³⁰ BGHSt, vol. 13, p. 32.

tion of a brochure against Jews in leading positions upon § 93 StGB (prohibiting publications which are in favor of overthrowing the constitutional order). The Bundesgerichtshof held that it was the purpose of the brochure to oppress democratic freedom.

IV. Result

The result is that with the penal statutes, German law presently provides sufficient protection against group defamation. If more than one of the mentioned statutes are violated, then they are applicable at the same time because they protect different values.³¹ As penal law, the statutes punish human acts, but they can also lead to confiscation of property,³² even without punishment, as was the case in the decision of the Bundesgerichtshof of April 21, 1961,³³ by which the anti-semitic, inflammatory book "The Federal Reserve Conspiracy" by Eustace Mullins was confiscated. The Bundesgerichtshof held that it was of no importance whether the book was forbidden in the United States or not.

Other Legal Protections against Group Defamations

I. Civil Law

Besides the penal law, the civil law contains provisions to protect against group defamations. In general, these provisions are closely connected with the penal law.

Like penal law, civil law is codified on the federal level. The code is the Bürgerliche Gesetzbuch (BGB) of August 18, 1896,³⁴ with numerous modifications. The BGB regulates the law of torts in §§ 823 *et seq.*, § 823 para. 1, protecting absolute rights, mentions only the honor of a person as a right which could be affected by group defamation. Besides this, the right of personality (Persönlichkeitsrecht) could be touched. It is well settled law that the general clause "and other rights" of § 823 para. 1 comprises such a right of personality.³⁵ To invoke this law, group defamation must affect the right of personality or honor of one person or a number of individual persons.

³¹ See § 73 StGB.

³² § 86 StGB.

³³ NJW 1961, p. 1364.

³⁴ Reichsgesetzblatt, p. 195.

³⁵ See decision of the Bundesgerichtshof of May 20, 1958 (official publication of the civil law decisions: BGHZ, vol. 27, p. 286).

§ 823 para. 2 requires only that a "Schutzgesetz" (protective law) is infringed. A "Schutzgesetz" is especially the StGB. Nevertheless, group defamation comes within the terms of § 823 para. 2 merely if the number of persons hurt can be individualized, for the law of torts aims to protect individual rights. The same is the case with § 826 BGB which grants restoration for deliberate damage. The consequence of all three rules, §§ 823 para. 1, para. 2 and 826, is that the offender has to restore the damage cause. But group defamation will cause, in general, only immaterial damage, and the BGB gives restoration of immaterial damages only in exceptional cases.

One of these exceptions is to be found in the law of torts in § 847 BGB. While in former times jurisprudence stuck to the wording of § 847, which requires that either a person's body, health or freedom is hurt, today it follows a much broader interpretation. It applies § 847 BGB *per analogiam* on infringements of the right of personality.³⁶ This principle is important for cases of group defamations, because the right of personality always will be infringed when the persons hurt by the defamor can be individualized. Should, therefore, all the members of the group be able to ask for restoration of immaterial damages? This will be the unavoidable consequence of the mentioned doctrine, but since the compensation granted by § 847 BGB is not a penalty or an atonement but a sort of satisfaction,³⁷ the number of persons affected can be taken into account.

Through §§ 403 Strafprozessordnung, *et seq.*, provides for the possibility of combining the action for restoration of damage with the penal procedure, people usually do not take advantage of this possibility,³⁸ and therefore, they must sue the defamor before the civil courts.

The BGB gives still another means of protection against group defamation: the *Unterlassungsklage*, also based upon §§ 823, *et seq.*, but without the requirement of *culpa* (guilt).³⁹ The *Unterlassungsklage* comprises both the action for revo-

³⁶ Decision of the Bundesgerichtshof of February 14, 1958 (BGHZ, vol. 26, p. 349); confirmed by the decision of September 19, 1961 (BGHZ, vol. 35, p. 363).

³⁷ Josef Esser, *Schuldrecht*, 2nd ed., Karlsruhe, 1960.

³⁸ For the reasons see Eberhard Schmidt, *Commentary to the Strafprozessordnung*, part II, Göttingen, 1957.

³⁹ Enneccerus-Lehmann, *Schuldrecht*, 15th ed., Tübingen, 1958, with reference to the jurisdiction.

cation of a defamatory expression which continues to have harmful consequences, and the action to procure an injunction against imminent defamations in the future. This is a rather effective weapon against group defamation if the persons hurt can be individualized, which requirement is valid as well for the *Unterlassungsklage*.

II. Police Law

Police law is another instrument against group defamations. The police fulfill preventive and repressive tasks as well as prosecuting tasks. As prosecuting authority, the police act only as an organ of the public prosecutor, who indicts criminals. This activity leads to a trial where the provisions of penal law come into force. The preventive and repressive tasks of the police are independent activities. Nevertheless, a close connection to penal law exists because the police must always have a legal basis for their activities. The legal basis for preventive and repressive actions of Bavarian police refers expressively to the penal statutes and to assaults on the constitutional order.⁴⁰ In the other *Länder*, the rules authorizing preventive or repressive actions of the police do not mention penal statutes. The general clause "offense against public peace and order" contained in all these statutes includes infringements of penal statutes.⁴¹ Group defamations usually represent infringements of penal statutes, thus empowering the police to undertake preventive and repressive action. Which actions they will take lies within their discretion.

III. Constitutional Law

Constitutional law in the Federal Republic guarantees as fundamental rights the dignity of man, freedom, and equality before the law.⁴² These rights are to be upheld by the State. More and more, however, doctrine and case law tend to transfer these principles into civil law as well, so that they obligate private per-

⁴⁰ Art. 5 *Polizeiaufgabengesetz* of October 16, 1954 (Bayerische Bereinigte Sammlung, Vol. I, p. 442, amended by law of July 15, 1957 (Gesetz- und Verordnungsblatt, p. 160) and of November 28, 1960 (Gesetz- und Verordnungsblatt, p. 266).)

⁴¹ Alfred Bochalli, *Besonderes Verwaltungsrecht*, 2nd ed., Cologne/Berlin/Bonn/Munich, 1963, p. 76.

⁴² Art. 1, 2 and 3 GG.

sons. The extent and method of the transposition is presently one of the most discussed problems of jurisprudence in Germany.⁴³ For the campaign against group defamation this is not of direct importance because thus far special sanctions against defamations are not derived from Art. 1, 2 and 3 GG. The existing protections in penal, police and civil law are considered to be sufficient. It may be that a discriminatory act is at the same time a defamation. If constitutional law applies to this case, it is not directed against the defamation as such, but against the discriminatory act.

Constitutionality

Finally, the constitutionality of the legal means in fighting group defamations must be examined.

Under the division of authority between the Bund and the Länder, there are no objections against the mentioned rules. The Bund has competence for legislation in the field of penal and civil law according to Art. 74, no. 1 GG; the Länder have authority to pass bills concerning police law according to Art. 70 para. 1 GG.

Art. 5 para. 1 GG guarantees the freedom to express one's opinion in speech, writing or picture. Is this fundamental right touched by the legal protections against group defamations?

Art. 5 para. 2 GG establishes the limits of the freedom to express one's opinion. These are general laws, rules for the protection of youth and of a person's honor. There is no doubt that the BGB,⁴⁴ the StGB⁴⁵ and the police law⁴⁶ belong to the general laws in the sense of Art. 5 para. 2 GG. Since the protections against group defamation are anchored in these laws their constitutionality with respect to Art. 5 para. 1 GG follows from Art. 5 para. 2. This is justified since the dignity and the fundamental rights of other men may not be injured under the pretext of free expression of opinion.

The guarantee of freedom of art, science, research, and

⁴³ See especially Walter Leisner, *Grundrechte und Privatrecht*, Munich, 1960, pp. 306 *et seq.*; Hans C. Nipperdey, *Grundrechte und Privatrecht*, Festschrift Erich Molitor, Munich/Berlin, 1962, pp. 17 *et seq.*

⁴⁴ Decision of the Bundesverfassungsgericht of January 15, 1958 (official publication: BVerfGE, vol. 7, p. 234).

⁴⁵ Bundesgerichtshof, decision of February 1, 1954 (BGHZ, vol. 12, p. 202).

⁴⁶ Decision of the Bundesgerichtshof, *supra* note 45.

teaching⁴⁷ is not limited by Art. 5 para. 2 GG.⁴⁸ But group defamation can hardly be considered art, science, research or teaching. Even if this were possible, the constitutional limitation would come into force, which is valid also for Art. 5 para. 3 GG.⁴⁹ This limitation includes the fundamental rights of other men; for instance, their dignity.

Conclusion

Because of bad sociological effects of group defamation it is the duty of the law to contribute to the suppression of group defamation.

In §§ 88 *et seq.*, 130 as well as 185 *et seq.* StGB, penal law provides for a complete set of rules penalizing group defamation. It permits defamatory publications to be confiscated. Additionally, civil law offers to individuals the possibility of bringing actions for restoration of damage, for revocation, or for an injunction before the civil courts.

Police law empowers the police to prevent or repress activities which are crimes according to the StGB, as is the case with group defamations.

All of these possibilities to combat group defamation are constitutional, both with respect to the federalistic division of competences and with respect to Art. 5 GG, guaranteeing the freedom to express one's opinion, and the freedoms of art, science, research and teaching.

⁴⁷ Art. 5 para. 3 GG.

⁴⁸ Therefore it is especially not restricted by general police law (Bundesverwaltungsgericht, judgment of December 21, 1954, official publication: BVerwGE, vol. 1, p. 303).

⁴⁹ Bundesverwaltungsgericht, judgment cited above, p. 307.