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# Group Defamation in the Netherlands

W. H. Bijleveld\*

IN THIS PAPER we shall discuss the ways in which Dutch law protects against group defamation.

## Criminal Law

### A. Individual Defamation

Defamation of natural persons is laid down in Book II, Section XVI, of the Penal Code. Defamation might be described as "intentional injury of a person's honour and good name."<sup>1</sup>

The prevailing opinion is that this section (XVI) is concerned only with individual natural persons. According to this section (XVI), legal persons and groups can not be defamed.<sup>2</sup> There are many arguments in favour of this opinion:<sup>3</sup>

If a defamation of a collectivity were to attain an individual character, section XVI would be applicable.<sup>4</sup> Without this individual character nobody would take offence. For groups, the problem has been solved by provisions of the penal law concerning group defamation, discussed below.

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[Note: Meaning of abbreviations:

M.v.T. (Memorie van Toelichting) = Minister's explanatory memorandum on a bill.

V.V. (Voorlopig Verslag) = Interim report; viz. comment by Chamber-committee.

M.v.A. (Memorie van Antwoord) = Minister's memorandum reply to interim report, after discussion of a bill in the Second and First Chambers.

N.J. (Nederlandse Jurisprudentie) = Publication of Dutch court decisions.

W. (Weekblad) = A Dutch law review, last published in 1936.

The Editors regretfully were obliged to shorten this article (much longer in manuscript) because of space limitations.]

<sup>1</sup> van Bemmelen—van Hattum: Hand- en leerboek van het Nederlandse Strafrecht, Deel II—Bijzondere delicten. P. 488.

<sup>2</sup> Noyon—Langemeyer, Het Wetboek van Strafrecht verklaard—vol. II, p. 248. Also Supreme Court 16-2-1891 W.6083.

<sup>3</sup> Noyon—Langemeyer II, pp. 248 and 249.

<sup>4</sup> M.v.T. on Section XVI of the Penal Law. In the same way: Supreme Court 31-10-1892 W.6261, where somebody was sentenced on account of individual defamation because he had expressed his opinion on the whole police force of the town in highly defamatory language to a policeman of that force.

We concur with van Bemmelen, who holds the view that legal persons *can* be defamed. The author mentioned thinks, however, that the present text of the law in section XVI does not cover the case, and should be altered.<sup>5</sup> We differ. We do not agree with the prevailing opinion that section XVI is useless as to corporate or other groups.

Defamation of public authority, public corporations, and public institutions is possible, though the last mentioned are often incorporated. According to article 137a and 137b of the penal code these collectivities can be offended. These provisions, introduced in 1934 together with articles 137c and 137d, concerning the defamation of groups of persons, need no further discussion as they read the same as articles 137c and 137d, discussed below.

City councils, police forces, the cabinet council, or a municipal waterworks, come under public authority, public corporations, and public institutions.

Three classes of defamation exist:

a. "Smaad" = Libel

This is injuring a person's honour or good name by charging him with certain facts with the intention to make it known.

b. "Laster" = defamation contrary to truth

If, for his defense, the defendant appeals to the public interest, the judge may demand proof of the truth of defendant's opinion. Should the defendant fail to give this proof, then conviction because of "laster" is possible.

c. Simple defamation

This is intentional defamation not having the character of "smaad" or "laster," i.e., a defamation lacking either the charging of a certain fact, or the making it known.

In practice the defamation will be an utterance in wilful defamatory form, e.g., the use of abusive terms, slapping a person's face, etc.

Only simple defamation needs further discussion, since, as we shall see, in group defamation only the defamatory form is made punishable.

"Injury of a person's honour or good name." Honour or good name need not actually be harmed. The point is whether the remark is of a character such that, in general, injury can be expected.

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<sup>5</sup> van Bemmelen, pp. 488, 489.

The form in which the remark has been made must be of an offensive character. In most cases the meaning of the remark itself will decide whether it is defamatory or not. However, account should be taken of the milieu.

The remark may consist of spoken words, a document, a picture, or acts of violence.<sup>6</sup> For instance, a picture may consist of a caricature; acts of violence may consist of spitting at a person's face, or a blow in the face.<sup>7</sup>

The intent consists of the "Animus Iniuriandi." It is irrelevant whether the defamation came home. The intent will often arise from the remark itself.

Defamation is a delict on complaint; so, without permission of the offended person the public prosecutor shall not proceed to prosecution. Complaint is prerequisite for prosecution.<sup>7a</sup>

An appeal to the public interest, or to necessary defense, to preclude punishability, is not possible. In case of "smaad" or "laster" an appeal may well be possible, because from the society point of view it is sometimes useful to make certain facts public. We need only think of the press.

### *B. Group Defamation*

Prior to 1934 Dutch law contained no penal provision against group defamation.<sup>8</sup> With the rise of national socialism it appeared necessary to protect against group defamation in criminal law.

The Government was of opinion that the circumstances made it imperative to revise the penal law with regard to public policy,<sup>9</sup> since repeatedly remarks were made in public which were injurious and insulting to certain groups of the population. Among other things the Government recalled recent expressions concerning Jewish fellow citizens.<sup>10</sup> There also were defamations of other groups of the population.<sup>11</sup>

During the discussion of the proposed draft of a new law on the subject of group defamation in the second, and first chambers, heated debates took place.

<sup>6</sup> Art. 226, Penal Code.

<sup>7</sup> A blow in the face will be considered rather as criminal maltreatment.

<sup>7a</sup> W.P.J. Pompe, *Handboek van het Nederlandse Strafrecht*, p. 533.

<sup>8</sup> Under article 2 of the Act of May 16, 1829 a form of group defamation existed. However, with the introduction of the new Penal Code it was abolished in 1886.

<sup>9</sup> M.v.T., *Wetgevingsbijlage Nederlands Juristenblad* XCIII p. 4.

<sup>10</sup> M.v.T. p. 7.

<sup>11</sup> M.v.T. p. 7.

The upholders referred to article 4 of the Constitution: "All those who are within the territory of the state are equally entitled to protection of person and goods." It is the honour and good name that are the integral part of the personality.<sup>12</sup>

Opponents of the (new) provisions appealed to article 7 of the Constitution: "Nobody needs previous permission to publish thoughts and feelings through the press, barring responsibility according to the law." The principle of freedom of the press expressed in this article was considered to be impugned by introduction of the provisions.<sup>13</sup>

This is an extremely weak argument. Freedom of the press is too often regarded as an absolute right, thereby ignoring the text of the Constitution. For, according to the law, one is always responsible. The bill proposed made no mention of preventive censure.

The Government's reply to this objection carried conviction, and holds also for the entire problem of freedom of speech, against the infringement of which difficulties were raised.<sup>14</sup>

Criticism remains possible whether it is true or not. However, there should never be any reason to do this in defamatory form.<sup>15</sup>

Should the remark "communists are dirty traitors" entail criminal proceedings?<sup>16</sup> Public opinion would not accept this.

Another objection against the proposed Bill was that a general penal provision was aimed to protect only a special group of the population in a special period, namely the Jews.<sup>17</sup>

Actually the Government had declared that the proposed provisions would also apply to defamation of other groups, *e.g.*, clergymen, the Roman Catholic clergy,<sup>18</sup> the communists, and the freemasons.<sup>19</sup>

In addition, throughout Europe symptoms of group defamation were observed, which were certainly not directed against

<sup>12</sup> M.v.T. p. 7.

<sup>13</sup> V.V. (Interim Report) pp. 48 and 49.

<sup>14</sup> V.V. First Chamber p. 49.

<sup>15</sup> M.v.A. First Chamber p. 55. M.v.A. Second Chamber p. 27. Contra: van Bemmelen p. 111.

<sup>16</sup> It should be noted here that the communist party is not forbidden in the Netherlands, so that the communists cannot be denied the predicate "population group."

<sup>17</sup> V.V. Second Chamber p. 11. V.V. First Chamber p. 19.

<sup>18</sup> M.v.T. p. 7.

<sup>19</sup> M.v.A. Second Chamber pp. 55 and 56.

the Jews alone. These insults occurred especially in the religious field, *e.g.*, against the Roman Catholics, and ministers of religion.

The main argument of the government to proceed to the introduction of the articles 137c and 137d was to maintain public order.

Group defamation endangers the nation's feeling of solidarity.<sup>20</sup> Indeed it is a direct threat to public order.

To those who doubt whether it is just anti-semitism that will endanger public order, that reports concerning it were exaggerated,<sup>21</sup> and that after all society will cure itself,<sup>22</sup> one may reply that maintenance of public order is not only a national problem but also an international one. Because of increasing economic and mental contacts political movements easily spread from one country to another.<sup>23</sup> That public order would be threatened by defamation of the Jewish part of the nation is obvious.

In 1934 articles 137c and 137d, already mentioned, after the passing of the bill in question, were inserted in the Penal Code. At the same time the articles 137a and 137b (not discussed here) were introduced, with a view to protect against defamation of public authority, public corporations and public institutions. Also in the latter articles only the defamatory form was made punishable.

Articles 137c and 137d largely aimed at maintenance of public order. Only in second place came the protection of the persons defamed.<sup>24</sup> For this reason they were not inserted in Book II section XVI concerning defamation, but in book II section V dealing with offences against public order.

From this we first and foremost understand that prosecution of group defamation requires no complaint.

Art. 137c: He, who in public gives his opinion orally, in writing or picture in a defamatory form about a group of the population or a group of persons partly belonging to the population shall be punished with imprisonment of at most one year or a fine of at most six hundred guilders.

The words "in defamatory form" mean first of all that if the opinion was directed at an individual person there would be

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<sup>20</sup> M.v.T. p. 7.

<sup>21</sup> V.V. Second Chamber p. 11.

<sup>22</sup> V.V. First Chamber p. 46.

<sup>23</sup> M.v.A. Second Chamber p. 19.

<sup>24</sup> M.v.A. Second Chamber p. 59.

question of a personal individual offence according to section XVI, namely of simple defamation.<sup>25</sup>

The argument "that to make the defamatory form punishable is not correct because everybody speaks according to character and that the principal thing is *what* has been said and not *how*"<sup>26</sup> does not hold.<sup>27</sup>

The judge decides by considering the milieu in which it took place.<sup>28</sup>

For the offence of group defamation the same intent is required as for individual defamation, hence the *animus iniuriandi*. It is not necessary that the group is actually injured in their honour and good name, it is sufficient that the form is really offensive. The intent can often be proved from the meaning of the expression itself.<sup>29</sup>

To be able to speak of a "group of the population" two requirements are called for:

1. The offensive expression must refer to several persons of our population.
2. In this expression these persons should be indicated collectively. This indication may refer to an objectively existing common characteristic or to a common quality or function, but it may also be based on a subjective summing up coming from the person who expresses himself offensively.<sup>30</sup>

Defamation of one group can more readily be established than that of another. To make distinction, however, by naming the (various) groups of the population that can be defamed or not, the Minister considered to be impossible.<sup>31</sup>

In order to know who should be included in the concept of "group of the population" one may refer to article 83 bis of the Penal Code, which, with a view to the introduction of articles 137c and 137d, was inserted at the same time. It defines that by "population" one shall understand all those within the territory

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<sup>25</sup> M.v.A. Second Chamber p. 19.

<sup>26</sup> M.v.A. Second Chamber p. 26.

<sup>27</sup> Van Bemmelen p. 111.

<sup>28</sup> Report of Verbal deliberation pp. 41 and 43.

<sup>29</sup> District Court at the Hague 21-2-1936 N.J. 1936 No. 180.

<sup>30</sup> M.v.A. First Chamber p. 53.

<sup>31</sup> Report verbal deliberation pp. 42 and 43.

of the State in Europe.<sup>32</sup> "All" means: also those who at the time the offensive expression occurred happen to be within the territory of the State. On this point article 4 of the Constitution states that everybody within the territory of the State is equally entitled to protection of person and goods.<sup>33</sup> This is the right view, for besides the maintenance of the public order art. 137c and 137d also aim at protecting honour and good name.<sup>34</sup>

As an example, action for defamation of Dutch colonists in the former Dutch East Indies was accepted, because, usually, some of them would be staying in the Netherlands.<sup>35</sup>

The concept "a group of persons partly belonging to the population" had to be included in article 137c because there are many groups of an international character which as groups live but partly in our country.<sup>36</sup> For instance, the Jews, the Roman Catholics, and the Freemasons.

He who does not himself commit the group defamation but takes care that the defamation is disseminated is guilty of the offence of dissemination under article 137d.

Art. 137d: A person who disseminates, exhibits publicly, makes audible in public, or has in stock for that purpose, a writing or picture that contains a defamatory expression of a group of the population shall be punished with imprisonment of at most 6 months or a fine of at most 600 guilders if the disseminator knew, or had serious reason to presume that the writing or picture contained such an expression.

The most important part of this provision is that intent is not required. It is sufficient that the offender was aware, or had serious reasons to presume, that the writing he disseminated contained a communication in defamatory form of a group of the population.

In case of such knowledge the disseminator may be reasonably expected to have satisfied himself of the character of the writings.<sup>37</sup> Van Bemmelen is of opinion that booksellers and sellers of newspapers and journals are obliged to exercise a kind

<sup>32</sup> At that time the former Dutch East Indies formed part of the State; at present only Surinam and the Netherlands Antilles.

<sup>33</sup> M.v.T. p. 7.

<sup>34</sup> M.v.A. Second Chamber p. 29.

<sup>35</sup> Supreme Court 17-4-1939 N.J. 1939 No. 927.

<sup>36</sup> M.v.A. Second Chamber p. 25.

<sup>37</sup> M.v.A. Second Chamber p. 25.



of censure themselves. Freedom of the press would thereby be endangered.<sup>38</sup>

In our opinion there is no such danger, provided that the word "serious" is indeed seriously taken by the judge. The judge in the Netherlands is appointed for life and is completely independent, and is not apt to fail in his inquiry.

He who distributes more than one copy of a writing or picture must be considered to be the disseminator. It does not imply (a much broader concept) the person who makes public the idea-content of a writing or picture.

For instance, he who cites or discusses defamatory expressions in a journal or newspaper is not a disseminator in the sense of our Penal Code<sup>39</sup> unless he does so only to make the defamation known.

Between 1936 and 1940 the courts applied articles 137c and 137d in six cases. After the 2nd World War, insofar as we could trace it, no prosecution concerned with group defamation occurred. The cases were:

I. District Court at the Hague 21-2-1936 N.J. 1936 no. 180. In N.S.B.-paper (Fascist) a defamatory article on the Jews. The writer of the article was prosecuted according to article 137c.

The court considered:

- a. The form of the statement was extremely defamatory.
- b. The intent to defame, by wilfully writing down the defamatory words and making them public, was implicit absolutely.
- c. Appeal to personal conviction should never be an excuse for committing a criminal offence.
- d. In connection with the age of the defendant (74 years) no imprisonment, but a maximal fine of 300 guilders.<sup>40</sup>

II. District Court Rotterdam 16-7-1937 N.J. 1938 no. 736.

A writing in which the New Malthusian Society was accused of "publicly inciting to murder of unborn creatures." Defendant was prosecuted for distributing this writing according to article 137d.

The court considered:

- a. It is a statement in defamatory form.

<sup>38</sup> Van Bemmelen p. 104.

<sup>39</sup> M.v.A. First Chamber p. 53.

<sup>40</sup> In 1954 the maxima of the fines of 137c and 137d were increased to 600 guilders.

- b. The members of the New Malthusian Society in fairly great numbers hold principles that are well known and thus form a community.
- c. No punishment was reported at the place of reference.

### III. Supreme Court 17-4-1939 N.J. 1939 no. 927.

Book on the planter's life in the Indies. In it defamatory expressions about the planters (Dutchmen who, as colonists, exploited plantations in the former Dutch East Indies).

The author was prosecuted according to art. 137d.

The court held:

- a. Adverse opinion on the planter's life in the Dutch East Indies is given in a needlessly defamatory form.
- b. Irrelevant whether the planter's life, as pictured, corresponds to reality.
- c. Sentence: One month conditional imprisonment with a probationary of three years<sup>41</sup> and a fine of fl. 300. — with the alternative of 100 days imprisonment.

### IV. Supreme Court 19-2-1940 N.J. 1940 no. 754.

The N.S.B.-paper "Volk en Vaderland" (National Socialist) contained an article having the following passage: "International Jewry, which as the eternal parasite on labour, knows how to play their part under all circumstances, also in times of permanent unemployment and slump."

The editor, who denied writing the article, was prosecuted in accordance with article 137c.

The court held:

- a. The passage cited does not consist of allowable pertinent remarks, but, considering the highly unfavourable meaning of "parasite," this passage contains a needlessly debasing qualification and hence a communication in defamatory form ex article 137c.
- b. The term "International Jewry" can have no other meaning than that it includes all other Jews living in different countries. Consequently it is a community one is dealing with, and not a mental attitude, as is claimed by the defendant.
- c. "To communicate by writing" is to express one's own thoughts or feelings. The editor did not disclaim these communications, for he failed to leave them to the responsibility of the writer.

<sup>41</sup> That is, the sentence is not executed except when the condemned person is again guilty of a criminal offence during the probationary period, or misbehaves in some other way, or does not abide by the conditions made in the sentence.

d. Sentence: fine of fl. 25.-, with the alternative of 25 days imprisonment.

V. Supreme Court 4-3-1940. N.J. 1940 no. 830.

Pamphlet of a defamatory nature against ministers of religion. Defendants are prosecuted according to article 137d because of distributing the pamphlets and having these in stock.

The court held:

- a. The actual defamatory form.
- b. The defendants' defence that they felt called upon by religious conviction to profess the truth, does not hold. The conviction may justify fighting against the ministers of religion, but this should not be done in defamatory form.
- c. Sentence: 14 days conditional imprisonment with a probationary period of two years.

VI. Supreme Court 29-4-1940 N.J. 1940 no. 831.

Defendant had in stock to distribute copies in writing that were defamatory of the Roman Catholic clergy.

The latter were characterized as a "godless class" and "the most ungodly and blasphemous of all those who occupy the earth." He was prosecuted according to article 137d.

The court found:

- a. Actual defamatory form.
- b. Since the defendant had read the leaflets he "knew" the defamatory form.
- c. Sentence: fine of fl. 50.- with the alternative of 25 days imprisonment.

### **The Administrative Aspect**

We now discuss the power of public authorities to protect against group defamation without judgement of a court. In other words, the question should be raised, how far public authority may restrict freedom of expression and, consequently, group defamation.

This question is first controlled by article 10 of the Convention of Rome for the protection of human rights and fundamental freedoms, contracted in 1950 by the countries affiliated to the West-European Union.

Art. 10-1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

-2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

We will consider the Dutch legal provisions concerning these matters.

### *Radio Broadcasts*

#### *I. Legal Provisions Before the 2nd World War*

Article 3 of the Telegraph and Telephone Act of 1904. In this article the government had power to make provision concerning license for broadcasting, the contents of the broadcast, control and possibility of interference with a broadcast, authorizing the government to enforce a penal sanction of a maximal imprisonment of six months or a fine of one thousand guilders.

In 1930 the government made use of the power and issued two orders in Council, the so-called radio rule, and the radio control rule. On these two rules the whole judicial system of broadcasting has been built up. Broadcasting requires a license.<sup>1</sup>

No license is granted when the interests of national security, public safety or public morality are endangered.<sup>2</sup> The contents of a broadcast should not endanger the security of the state, public safety or public morals.<sup>3</sup> It should not lead to the undermining of religion, morality, public authority and the nation's health, nor should the broadcast apparently be intended for foreign countries, if it is known that a friendly nation would not admit it. Information of a political character shall contain only objective exposition of political principles.<sup>4</sup>

It is clear that these rules far exceed the articles concerned with the criminal defamation. For instance the undermining

<sup>1</sup> Art. 2 paragraph 1 Radio Rule.

<sup>2</sup> Art. 2 paragraphs 2, 3 and 4 of the Radio Rule.

<sup>3</sup> Art. 9 Radio Rule.

<sup>4</sup> Art. 2 paragraph 2 Radio Rule.

mentioned may certainly occur without actual expression in defamatory form. Accordingly "laster" of a community, though stated in decent terms, can be prevented.

There is a preventive control which is exercised by the broadcasting control committee.<sup>5</sup> This control implies that the broadcasting companies shall timely submit their programs to the control committee for approval.<sup>6</sup> This committee may even demand the text and ask for all information they think necessary.<sup>6</sup>

In case the control committee forbids a certain broadcast, the broadcasting corporation concerned may appeal to the minister. The latter may suspend or reverse the committee's decision because it is in defiance of the law or against the public interest.<sup>7</sup>

Breaking off the broadcast is possible if a broadcasting organisation is broadcasting a program that is different from the one given permission for. This is the exclusive reason for breaking off a broadcast.<sup>8</sup>

In the cases when reprehensible broadcast escaped the attention of the control committee, or when the program differs from the one that was given permission for, there is naturally also repressive control.

Repressive control consists of listening to the programs and, if necessary, tape recording them by officials added to the control committee for this purpose.<sup>9</sup>

The sanctions that may be applied are:

- a. Withdrawing the license.<sup>10</sup>
- b. Prohibition to broadcast during a certain period.<sup>11</sup>
- c. Penal sanction of a maximal imprisonment of six months or a fine of maximal fl. 1000.<sup>12</sup>

## *II. Present Legal Provision*

Dominated by article 10 of the Roman Convention, in 1944 the Dutch government in London promulgated a decree in which

<sup>5</sup> Art. 1 Radio-Control-Rule.

<sup>6</sup> Art. 7 paragraph 1 Art. 12 Radio-Control-Rule.

<sup>7</sup> Art. 13 Radio-Control-Rule.

<sup>8</sup> Art. 8 Radio Control Rule.

<sup>9</sup> Art. 9 and Art. 2 Radio Control Rule.

<sup>10</sup> Art. 3 Radio Rule.

<sup>11</sup> Art. 11 Radio Control Rule.

<sup>12</sup> Art. 73 Radio Rule and Art. 11 Radio Control Rule.

the radio rule and consequently also the radio control rule were declared, with some irrelevant exceptions, to be no longer applicable. All licenses so far granted were withdrawn.<sup>13</sup>

With a decree of 1946 the Minister of public instruction, arts and science was ultimately given the legislative power to make a provision in view of article 3 of the Telegraph and Telephone Act.<sup>14</sup> This he did with the ministerial ordinance-air-time distribution of January 15, 1947. The present provision is based on the ordinance-air-time distribution and on a royal decree of 1954, stating that article 2 paragraph 1 of the radio rule is again applicable, so that just as before the war, a license is required for broadcasting under the Royal Decree of 1954 just mentioned.

Control is exercised in the name of the minister of public instruction, arts and science by the government's representative for the broadcasting organisation.<sup>15</sup> The government no longer exercises preventive control; however, it was agreed upon between the government and the broadcasting corporations that the latter would themselves exercise an internal, preventive control.

Preventive control by the minister will always be possible in virtue of an ordinance to be promulgated by him.

The sanctions are:

- a. Temporary or permanent withdrawal of the broadcasting license.<sup>16</sup>
- b. The Government's representative can forbid certain people to cooperate in programs for a certain period, if they have given cause.<sup>17</sup>
- c. Withdrawal or suspension of the wireless moneys the broadcasting companies are entitled to under this ordinance.

### *Television*

Just as with the radio the minister of public instruction, arts and sciences has general management with respect to television. After the minister had issued a T.V.-ordinance for a provision of the T.V. at its experimental stage in 1951, the crown came a few

<sup>13</sup> Royal Decree of 17 Sept. 1944 Stb.E.118.

<sup>14</sup> Royal Decree of July 2, 1946 Stb.G.167.

<sup>15</sup> Air-time distribution Art. 2.

<sup>16</sup> Air-time distribution Art. 22.

<sup>17</sup> Air-time distribution Art. 17.

years later with an order in Council, the so-called T.V. decree, which represents the present provision.

Television broadcasting requires a license<sup>18</sup> granted by the Minister of practical instruction, arts and science.

Contents of the programs shall contain nothing that endangers the national security, public order or public morals. This requirement is stated in article 4 T.V.-decree and results also from article 3 of the T.- and T. Act.

Supervision and control are exercised in the name of the minister by the government's representative for the broadcasting organisation. The control is repressive.<sup>19</sup> This means only that demanding beforehand perusal of the programs and verbal text, are precluded. Other preventive measures remain possible, however, the minister has further the power to break off the programs partly or completely if he considers it necessary in the public interest.

The repressive measures are:<sup>20</sup>

- a. Withdrawal of the television license;
- b. The prohibition to broadcast during a certain period;
- c. Prohibition of certain people in the program for a certain period, if they transgressed provisions of the T.V.-decree.

We now have to apply the points discussed to group defamation. Starting from article 10 of the Rome Convention we see that legal restriction of the freedom of expression is also admissible for the protection of the good name of others. Curbing the freedom of expression is therefore certainly permitted for the protection of the good name of communities.

Dutch law has inserted the restriction of group defamation in article 3 of the T.- and T. Act. This signifies that whenever injury of the good name of communities leads to the endangering of the national security, of public order or of public morals, the government may act under the valid provision of radio-and T.V. organisation.

One has to appeal to article 3 of the T. and T. Act, because an appeal to the Ordinance-air-time-distribution and the T.V.-decree is not directly possible. These two provisions are not law, but a ministerial ordinance and a Royal decree respectively, while article 10 of the Convention of Rome prescribes criteria

<sup>18</sup> T.V.-decree Art. 17.

<sup>19</sup> T.V.-decree Art. 6.

<sup>20</sup> T.V.-decree Art. 20.

mentioned in an Act. In practice there is no difference between on the one hand the ordinance and the decree and on the other the Telegraph and Telephone Act, since they all make use of the same criteria, public order and public morals.<sup>21</sup>

The importance of the government's powers, in this case those of the Minister of public instruction, arts and science, is quite clear.

He is permitted to refuse broadcasting licenses to organisations which previously had been guilty of injuring the good name of communities, whether in defamatory form or not. With the pre-war preventive control it was possible to forbid broadcasts that contained group defamation. In such a case the broadcasts could also be suspended. Should group defamation actually occur during broadcasting, then the repressive measures discussed above are possible; before the war there was also the penal sanction. All of them are sufficient to compel the broadcasting corporations to proceed with caution.

Of course the penal sanctions of articles 137c and 137d remain in force also for group defamation in radio and T.V. beside the measures to be taken by the government, also the judge can pronounce a sentence.

1. In 1938 the lecture "New modernistic tendencies in the Roman Catholic Church" was forbidden, because this lecture contained a continuous aggression against the Roman Catholic Church, because of the extremely one-sided way in which the modernism was dealt with. According to the control committee, broadcasting it would have endangered public order.<sup>22</sup>

2. In 1939 the radio play "The Command" was forbidden. In this play the sacrificing of 10,000 soldiers was treated so as to arouse an unjustifiable reaction in the listeners against the army in general. Broadcasting it would have been in defiance of the public order.<sup>23</sup>

3. In 1937 the discourse "The Righteous Judge" was forbidden because it pictured the double-faced morality of a judge who acted in his private life quite differently from what he considered to be right for his office. The control committee saw in it a veiled injury of confidence in the judiciary. To broadcast it would have been in defiance of the legal prescriptions.<sup>24</sup>

<sup>21</sup> W.F.Prins, in *Nederlands Juristenblad* (1963) p. 248.

<sup>22</sup> Annual report of the Radio Control Committee (1938) p. 62.

<sup>23</sup> Annual report of the Radio Control Committee (1937) p. 56.

<sup>24</sup> Annual report of the Radio Control Committee (1937) p. 59.



4. In 1936 there was the question of a lecture titled: "The Apostolate among the Jews." The lecture was not forbidden, but the control committee suggested to the broadcasting corporation not to broadcast it. The main objection of the committee was that, apart from the possibility that orthodox Jews would be insulted in their profoundest conviction by listening to it, the exceptional character of this mission work (evangelization) not only entails a prudent but also a highly individual way of proceeding. The committee considered general propagating by radio-broadcast not suitable.<sup>25</sup>

Since the war, pre-war preventive control has been abandoned.

### *Public Film-Shows*

Again article 10 of the Rome Convention is the starting point. Dutch law may decide on the license to show films, the control and the sanctions to be applied in case of transgression.

The Dutch legal provision is laid down in the Cinema Law of 1936.

A license is granted by the municipality.<sup>1</sup> It is refused when there is a risk that the applicant will not observe the provisions of the Cinema Act.<sup>2</sup>

Films are censored beforehand by the Central Committee for the Censorship of Films residing at the Hague. The criterion is that film shows should not be in conflict with public morals or public order.<sup>3</sup>

The Central Committee is permitted to make cuts<sup>4</sup> and may even forbid the public showing.<sup>5</sup> It also establishes the age-limit at which the film is open to the public. Films may be admissible to all age-limits, to older than 14 years, or to older than 18 years.<sup>5</sup> The criterion for this age-limit is admissibility, a concept not found in the Dutch law and so to be determined by the Central Committee itself. The criterion for persons older than 18 years is the danger to public morals or public order.

When the Central Committee bans a film, re-examination is

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<sup>25</sup> Annual Report Radio Control Committee (1936) p. 46.

<sup>1</sup> Art. 1 Cinema Act.

<sup>2</sup> Art. 3 Cinema Act.

<sup>3</sup> Art. 16, Art. 15 Cinema Act.

<sup>4</sup> Art. 23 paragraph 6 Cinema decree.

<sup>5</sup> Art. 16 Cinema Act.

permitted by the Cinema Decree,<sup>6</sup> no further appeal whatever is possible.

A question is whether the civil court can forbid a film show, partly or completely, once the central committee has admitted the film. This power the civil court really has, but only when the film would be a tort against one or more persons.<sup>7</sup> It shall not decide on whether the show would be a violation of public order or public morals, for then it would enter the domain where only the Central Committee is authorized to act.

In the opinion of the Central Committee the film "Guys and Dolls" was defamatory of the Salvation Army, because of the depiction of a drunk salvationist, a woman who also visited a night club and there, from the salvationist's point of view assumed somewhat "funny" airs. After some cuts the film was ultimately admitted. "Tyl Uylenspiegel" was also prohibited and admitted only after some cuts, because the Roman Catholics might feel defamed by an incorrect presentation of letters of indulgence. "Mother Johanna of the Angels" was a similar case, but it was finally admitted after re-examination. In this film some nuns were shown, possessed by the devil, indulging in excessive behaviour in conflict with their status. Many Biblical films met with severe criticism from certain quarters. They were generally admitted, except one, "The Sign of the Cross," which was considered to be defamatory of the Christian community on account of the depiction of Maria Magdalena. After cuts the film was admitted.

### *Theatrical Performances*

Administration concerning theatrical performances is placed in the hands of the mayor of the municipality under the Municipality Act of 1855.

No license is required for giving theatrical performances.

The criterion is that the performances shall not endanger the public order or public morals.

The powers of the mayor are derived from article 221 Municipality Act. This article prescribes that he "police" the theatres and that he must guard against performances that are in conflict with public order or public morality.

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<sup>6</sup> Art. 28 Cinema decree.

<sup>7</sup> President of Court of Rotterdam 24-10-1932 N.J. 1932 p. 1602.

He can exercise preventive control by previously demanding the texts of the plays and so verify whether they are not contrary to public order or public morals. In such a case he can forbid the performance.

When performances in a theatre have been given that were in conflict with the legal criteria, he may take repressive measures which will consist of prohibiting the performance of plays in that theatre for a certain period, if he is of opinion that by doing so he will prevent the risk of endangering public order or public morals.

He can also break off the performances by having the house cleared, if necessary by means of the strong arm. Against the mayor's decision there is no appeal.

#### *Powers of the Mayor in General*

The mayor is authorized to take all measures to oppose actual disturbance (of the peace).<sup>1</sup> In this case he may even call in the military force.<sup>2</sup> For the measures he takes, he is liable to no authority whatever, just as with the theatrical performances.

While the mayor can interfere with theatrical performances in case of conflict with public order (used in a broad sense) and public morals, in other spheres he has this power only in case of danger to public order (used in a narrow sense), hence when there is danger to actual disturbance.

These powers can be of importance in group defamation. He may forbid demonstrations against groups and have these broken up by the police. He may prevent the dissemination of group defamatory writings by seizing them.

#### **Group Defamation in Civil Law.**

In the Netherlands group defamation in civil law is hardly of interest. As far as we know code decisions never mention it, and the literature disposes of it in one single sentence.

Beside Article 1401 of the Civil Code, which gives a general action of tort, the Civil Code also knows a special action of defamation. The latter is prescribed in Articles 1408-1416 Civil Code.

The action of defamation is possible only when the expression is defamatory according to criminal law. See Supreme Court

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<sup>1</sup> Art. 219 Municipality Act.

<sup>2</sup> Art. 217 Municipality Act.

10-1-1896 W 6761, when an appeal was made to the history of the law and to the text of article 1408 and following articles, which had been brought into agreement with article 261 and following of the criminal law.

*The Civil-Defamation-Action Is Threefold:*

- I. Damages for pecuniary loss.
- II. Compensation for injured feelings.
- III. Statement in the sentence that the expression is defamatory, with the possible demand that the sentence be posted in public.

The Code decisions are divided on the question whether a legal person can be defamed under articles 1408-1416 Civil Code.<sup>1</sup> The literature answers the question largely in the affirmative.<sup>2</sup> In our opinion a legal person cannot act under articles 1408-1416 Civil Code.

There are two kinds of interest in this question. First, damages for injured feelings are not possible in a general-action-of-tort, ex 1401 Civil Code, but in defamation-action it is. Secondly, the defamation-action has a period of limitation of one year, the general-action-of-tort a period of limitation of thirty years. This is very important because the Supreme Court has decided that, after a lapse of one year, the defamation-action cannot again be based on the general action of 1401 Civil Code.<sup>3</sup>

Articles 1408-1416, in our opinion, have not been written for defamation of legal persons, for a legal person cannot be compensated for injured feelings. Neither can a group of the population be defamed under articles 1408-1416.

*The General-Action-of-Tort of 1401 Civil Code*

In civil law defamation of legal persons and communities can lead only to a general action of tort ex article 1401 Civil Code. A defamation-action as such is no longer considered.

<sup>1</sup> pro: Distr. Court at Rotterdam 2-11-1937 N.J. '38, 451.

" Court of Appeal at 's-Hertogenbosch 30-6-1953, N.J. '53, p. 759.

contra: Distr. Court in Amsterdam 5-1-1925 N.J. '25, 403.

" Court at Dordrecht 8-12-1926 N.J. '27, 1008.

" Court of Appeal at The Hague 31-10-1940 N.J. '41, 100.

<sup>2</sup> Asser-Rutten, *Verbintenissenrecht* II, p. 572; Hofman-Drion-Wiersma, *Het Nederlandse Verbintenissenrecht* II, p. 286; Wolfbergen bl. 184; Meyers in: *Opstellen over Hedendaagsrecht*, p. 181.

<sup>3</sup> Supreme Court, 10-4-1959 N.J. '60, 114.

Article 1401 Civil Code: Every tort inflicting damage to another person will make the person causing the damage responsible for compensation.

According to the Supreme Court<sup>4</sup> an act constitutes a tort if it:

- a. It violates the subjective right of another, or
- b. Is contrary to the legal duty of the offender, or
- c. Runs counter to public morals, or
- d. Contravenes the care that behooves one in social intercourse with respect to the other person or person's property.

The right to honour and a good name is a subjective right.<sup>5</sup> It can be violated without making use of an offensive form. Also public morals and the proper carefulness cover many such remarks.

For the general action of article 1401 it is not important whether the remark was aimed at an individual person or at a community as a whole. The only relevant point is if an individual person has suffered damage by the remark used.

The difficulty with the defamation action (who is to act as plaintiff in the process) is absent here. Every individual person who has suffered damage by the remark may bring an action, whether he is defamed directly or not. Intent is not required, the guilt may also consist of negligence (inadvertence).

The essential requirement is that there shall be a causal relationship between the act and the damage.

Here the Supreme Court applies the adequacy-theory, according to which the offender is responsible for the damage, only when it can be reasonably expected to be the result of his tort.<sup>6</sup>

This limitation of liability does not hold for the amount of damage. Then predictability is not required. For instance, when a stone is thrown into a dilapidated house, and thereby a costly Rembrandt is destroyed, one is liable for the whole damage, even though one could not expect a so costly painting to hang in a house like that.

In the case of group defamation it is a difficult question when to speak of a reasonably expected result. Is it reasonable to ex-

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<sup>4</sup> Supreme Court 31-1-1919 N.J. '19, 161.

<sup>5</sup> Asser-Rutten II pp. 449-450.

<sup>6</sup> S.C. 3-2-1927, N.J. '27, 636.

pect that the windows of a Negro shopkeeper will be smashed in an anti-Negro campaign?

The difficulty is that, in contrast with many other forms of tort, here intermediate actions of other people are needed to have damage follow. With the incautious handling of a rifle the case is different, for no actions of others are involved.

With an action as meant in 1401 Civil Code only damages for pecuniary loss can be demanded. Compensation for injured feelings is not possible.<sup>7</sup>

This is the great difference from the defamation action, for in that case smart-money is possible. Pecuniary loss may, for example, consist of a drastic decrease in the turnover of a Jewish shopkeeper's trade, caused by injury of honour and good name of the Jewish community in general.

Besides damages for pecuniary loss under article 1401 Civil Code one may also demand:

#### *I. Restitution to the Previous Condition.*

Thus, a member of a defamed community may demand that posters which injure the honour and good name of the community be removed by the offender. In this case he will have to prove that he suffered pecuniary loss or will suffer by these posters in future.

#### *II. The Statement That the Act Constitutes a Tort.*

This may occur when a newspaper has published an article which is defamatory of a certain group. In this paper it will have to be stated clearly and visibly that the publication of this article was a tort.

#### *III. Prohibition to Commit a Certain Act.*

The plaintiff may demand that certain acts shall not take place in future, because they may lead to a tort.

For instance, the plaintiff may demand that a meeting, of which may be expected that it will be of an anti-papist or anti-semitic character, shall not take place. Of course he will have to prove that if the meeting is held he will suffer damage.

An act loses its character of a tort on grounds of justification. The grounds are first of all "force majeure," stress of necessity, executing a legal prescription, and complying with official com-

<sup>7</sup> Supreme Court 14-11-1958 N.J. '59, 15.

mand.<sup>8</sup> However, these grounds are apt not to occur in group defamation. Besides, there is also an appeal to public interest. This interest may bring with it that, as a warning to the public the private interest of certain persons will be sacrificed, for instance by mentioning of their names.<sup>9</sup> The requirement is that the remark shall be concerned with a cause which, according to general opinion, is considered to be a public interest.<sup>10</sup> There is further the tendency to grant the press rather than an individual person an appeal to public interest, because the latter's own interest may be involved.<sup>11</sup>

Conclusion: As we have already remarked, the civil law aspect of group defamation is of little interest. On the one side this is mainly due to the fact that group defamation is of little significance in Dutch society, on the other because the causal relationship as well as the damage will be difficult to prove. There is not reason to assume that in future much will appear in this respect.

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<sup>8</sup> Asser-Rutten II p. 459.

<sup>9</sup> Court of Appeal in Amsterdam 25-2-1960 N.J. '60, 502.

<sup>10</sup> Court of Appeal in Amsterdam 24-10-1935 N.J. '35, 1623.

<sup>11</sup> District Court Groningen 5-8-1956 N.J. '56, 506.