

“nullum crimen sine lege” - “nulla poena sine lege”:
“Insult” – On the state of the art in current Germany*)

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„Whenever I think over Germany at night / I can't sleep any longer tight.” (Heinrich Heine, 1844: Deutschland – ein Wintermärchen)

„Any executioner nowadays has got an honourable tenure profession. Why should, consequently, not every honourable civil servant latently bear a hangman ? – But civil servants don't kill human beings ! – That's exactly what they're doing, Kafka replied, they are virtually transforming developable living human beings into dead registration-numbers which are not able to develop any longer.” (Franz Kafka, 1917: Gespräch mit Gustav Janouch)

„Justice is living at a floor to which judiciary has no entry.” (Friedrich Dürrenmatt, 1985: Justiz. Roman)

I. Seventy years ago, after having realized what the abolition of central juridical principles constituting the penal law of any *rule of law* (“Rechtsstaat”) really means, a distinguished scholar, Jerome Hall, reflects on the double formula *nulla poena sine lege* and *nullum crimen sine lege*, which means that (i) nobody is be punished without a statute fixing a penalty for “criminal” behaviour; (ii) no conduct is to be held “criminal” without a specific description according to the behavioural “circumstance element of a penal statute”, which (iii) must be “strictly construed”; and (iv) penal laws shall not be given “retroactive effect” (Hall 1937).

Five years later a refugee scholar, Franz Leopold Neumann, a former democratic lawyer representing the small social and democratic sector of the legal profession in Weimar Germany and her culture (Gay 1969) before the Nazi gang overtook power (in 1933), in his first US-book 1942 named the very reduction of professional judges in Nazi-Germany similar to what the German Marxist intellectual Rosa Luxemburg (1871-1919) once sarcastically called “Polizeibüttel” [bailiff] – this is: “police official”, “administrative official”, “mere policeman” (Neumann 1944²; 1966³: 444, 447, 458). Moreover, Franz L. Neumann characterized what was running in Germany at that time as a graphic violation of the traditional basic principle of “old Europe” based on: „nulla poena sine lege, nullum crimen sine lege” – no crime without law, without law no punishment [and no punishment without guiltiness]. The very reason of that empirical involution of justice, right, and law, and its dramatic consequences, lays, indeed, in the permanent ignorance of what Montesquieu (1689-1755) called “*separation of powers*” (originally “la puissance séparée” [1]) – which, in German/y, is stupidly translated as “Gewaltenteilung” (i.e. “division of powers”), even from those prominent figures, representing the legal profession in Germany like Dr Carlo Schmid (1948) , and Dr Ernst Forsthoff (1992²): “Gewaltenteilung” in fact is not only as cretinistic as confusing translation of what has to be translated as “Gewaltentrennung” [2] leading to permanent rubbish talk within the academic world but also to sustainable denial of a relevant aspect of legal normatively, producing a pathological mechanism named “selective ignorance” whenever social psychologists discuss the cloudy issue as a matter of moral and intellectual obscurity.

II. As an experienced German social scientist who is both still alive and still living within Germany To-day, I worked out, in 2005, the very meaning of this setting in the field of a petty little crime named „insult” (“Beleidigung”) - and so called “abusing” radical critique („Schmähkritik”) - which is in a broader sense regarded as a human statement or action affronting other human/s. Until now, “insult” is not defined within the German penal law (which merely contains a hint on the penalties) but obviously punished by “independent” professional judges as life-long civil servants none of them ever had, until now, applied the basic principle „nullum crimen sine lege, nulla poena sine lege, sine culpa nulla poena” in this specific field. This is the truth, the only truth, and nothing but the very truth characterizing the actual status of justice in current Germany within this specific field: no individual professional judge did, since the Federal Republic of Germany (FRG) was, in 1949, founded, ever refuse to condemn anybody who was prosecuted because of “insult” – a petty little crime which is, until now, written down, and proclaimed, as such but not definitely defined in § 185 of the current German Penal Law ... and even whenever you are using an internal manual (officially named “*Richlinien für das Strafverfahren und das Bußgeldverfahren*” [RiStBV]) which

was at first created in 1977, generalized in 1999 and which is meanwhile widely accepted as a helpful tool for coping with the juridical business as run by any public prosecutor, and also by many professional judges, you will, in its intra-directives no's 229-232, not at all find any hint on what "insult" could mean or really means – but instructions how to (i) manage the public accusation (229), (ii) suppress aspects of the truth (230), (iii) publish the condemnation formula (231), and, finally, (iv) handle the problem of "insult" whenever members of the juridical staff itself are involved (232) – just as if the current German Penalty Law (in 2007) has nothing better to do than to verifying the critical note Franz L. Neumann (1944²: 457) gave us when commenting the business of successful "advocates of the phenomenological school: They never define a crime; they describe types of criminals ..."

It is true that current German Penalty Law (GPL, i.e. StGB: Strafgesetzbuch) does contain a paragraph (§ 90a) titled "denigrating the state and the symbols of the state", enumerating (§ 90 a [1]) the constitutional order of the Republic or one of her Federal States and (§ 90 a [2]) the colors, the flag, the emblem or the hymn of the Republic or one of her Federal States, but it is as well true that current GPL does *not* include the statutory offences well-know in Imperial Germany (*Deutsches Reich* until 1918) named "insult of the Emperor" (at last His Majesty Wilhelm II: "Majestätsbeleidigung") or "subversive instigation" of public enemies against the state ("Staatsfeindliche Hetze") in the German Democratic Republic (GDR) until 1989. The very blank within actual GPL, however, means that, in principle, every administrative body may reclaim for being affronted by any either public or private verbal attack/s labelled as "insult" of the authority – an absurd and bizarre situation: When you are calling any public prosecutor agency as such, for example, "a criminal association" without naming anybody of her agents – whenever the chief public prosecutor feels one of his officers *could be meant*, in current Germany you may be publicly accused of "insult" and, finally, condemned valid.

III. Some forty years ago Dr Ralf Dahrendorf identified "the role of the Public Prosecutors" as "the most relevant part within the German criminal procedure", mentioning also the German myth declaring that specific juridical agency for the "most objective administrative body in the world" (Dahrendorf 1965, 162). Unfortunately Sir Dahrendorf forgot to connect both phrases: For the German public prosecutors legend is as constitutive as blanketing their very role as a most powerful political instance: German public prosecutors are in fact part not of the "ideological" but of the "repressive state apparatus" (Louis Althusser), acting as "functionaries of the public administration." (Landtag NRW 2005, 58)

Given this societal situation, the most prominent "insult" case within current Germany is the valid condemnation of the first Federal Minister for Culture (1998-2002) which became final September 3rd, 2004. Dr Michael Naumann, coeditor of the German quality weekly *Die Zeit*, indeed publicly named, as guest of a TV-talk-show, the General Public Prosecutor of Berlin [GPPB] as a high ranked political figure (Dr Hansjürgen Karge) a "manic" guy being virtually off his trolley. All German courts valued Naumanns sentence as "abusing" personal critique, misusing the citizens right of free speech. Consequently, Naumann, as a well situated member of the German political and media "elite", had to pay 9.000 Euro (€) as the very fee due to his invective metaphor publicly used:

<http://www.berlin.de/sen/justiz/gerichte/kg/presse/archiv/20040910.22224.html>.

IV. In 2005, a public eulogist declaimed somebody as a bold writer and mentioned the authors fearless civil right attacks on the German judge Victor Henry de Somoskeoy at Cologne, which lead, on the one hand, to Henryk M. Broders' condemnation for 2.500 German Marks October 22th, 1979, but also established the very career of this guy as a prominent civil-right figure not only within the German Rhineland: http://www.schubaart.de/2005_03_20a.htm. Most recently, a journal titled *The German's Judge Paper* ("Deutsche Richterzeitung" [DRiZ] 2007) published a short commentary written by the former militant left, now a prominent German-Jewish writer, on the state of the art of the most phantom petty little crime named "insult":

"About four percent of German citizenship" – the author points out – "are accused every year, most of them because of a petty crime like driving too fast or rubbish little conflicts between neighbours over their garden-fences [...] Nevertheless most of the German ordinary people until now did not at all realize that the juridical apparatus is, indeed, a social world of its own, not only a closed-shop milieu but also a hard-core bureaucratic hierarchy, still hiding from any public control. Whenever German judges and public prosecutors are compared with other professional groups, for example with medical doctors, the latter seem to live in a green house whereas the first seem to belong to a secret society."

Lamentations like that one quoted from a guy who was also publicly accused of “insult” the last year, 2006, but acquitted even by the public prosecutor who had, some weeks before, accused him, are as usual as confusing, just reproducing what, within the last years of the Weimar Republic, in Germany was a popular critique of the way judges are acting against ordinary people when convicting them: “For they know what they are doing” (Ernst Ottwalt 1931). Moreover, there is, until now and nowadays, a great variety of work – above all books, essays, and articles – in various media in Germany, accusing figures like public attorneys, and professional judges, for what they do and the way they are doing their juridical business.

What was once named “the ideological state apparatus” (Louis Althusser) is still working, doing business as usual as if any public control of the juridical apparatus was a mere demand without any practical relevancy plotted by militant grouseers, yesterday lefties and pathological troublemakers disturbing any legitimate business of that juridical figures when prosecuting and condemning humans ...

V. Whosoever is historically cutting back to what was running in Germany at the very beginning of the last century within the literary scene will realize that, in the historical Wilhelmenian period of Imperial Germany, there did exist a sort of societal tolerance due to the European enlightenment: it is true that in public controversies on relevant literary subjects like the best-selling novel *Buddenbrooks. Verfall einer Familie* [1901], written by the later Nobel-price winner Thomas Mann (1875-1955), the author not only publicly affronted one of his critics, the German-Jewish intellectual Theodor Lessing (1872-1933) – who, in spring 1933, fled outside Germany, but nevertheless was, in August 1933, murdered by Nazi agents at his exile in Mariánské Lázně – a “real pauper, and poor old chap forever, not at all able to produce a single word of poetry” (“ein ewig namenloser Schlucker, dem die Trauben der Dichtung zu hoch hängen”). Thomas Mann libelled Theodor Lessing as a “disadvantaged dwarf who really should be happy that the sun is shining even at him” (“benachteiligter Zwerg, der froh sein sollte, daß auch ihn die Sonne bescheint”). Theodor Lessing, as an essayist and polemic, later on the author of a highly relevant philosophical approach to history (Lessing 1919), offensively fought back, publicly naming Thomas Mann “the highly sophisticated marchpane-man from Lübeck full of damned personal vanity” (“hochgezüchteter Marzipan Mann aus Lübeck [...] verdammte Eitelkeit”) (all quotations from Schmitt 2003).

Given this comparative setting, one might remember that (i) the very shape of public insult in Germany historically, moreover review a certain sort of tolerance traditional European egg-heads were able to practise mutually, and realize that (ii) in current Germany, at the beginning of the 21st century, the “insult”-phenomenon more and more transformed into an instrumental puppet of obscure adolescent “masculinity” within puberty due to young lads and their oriental, and Islamic, cultural pattern allowing men and their “infantile code of honour” (Peter Briody) permanently felt personally hurt and mentally labelled by publicly discussed conflicts, debates, and discourses as run in the very, and best, tradition of the European enlightenment – a sort of as hidden as small “islamization” of every-day-life in the sense the German writer Siegfried Kracauer once methodically worked out, in 1927, when declaring any “analysis of inconspicuous superficial details” as more relevant for the study of societal culture than any ideological statement about the culture of society coined out by the societal agents themselves (Kracauer 1977, 50).

VI. Peter Briody, a former British captain, described the development especially of the petty little crime in Germany named “insult” (§ 185 German Penalty Law) like the well-know pattern that little shit happens often, not to exaggerating that this specific crasy little shit still happens too often: in 1927, for example, in Germany about 50.000 cases were registered whereas fifty years later, in 1997, nearly 130.000 were. According to the German criminal statistic, a short decade later, in 2005, nearly 180.000 “cases” of being publicly accused of “insult” were documented (including “sexually” related “insult”, in 2005 about 20.000 cases).

In a first approach Briody (2004) graphically visualizes the state of the art telling the “insult” story of a German dissident figure known as the “Remstall rebel”, Helmut Palmer (1930-2004). Within the last 35 years of his life, this rebel with a cause, 1968-2003 was punished for nineteen times paying thousands and thousands of German Marks for decades, and was imprisoned thrice (in 1968, 1978, and 1999).

VII. An extraordinary “insult”-career is, most recently, absolved by Claus Plantiko, a former high-ranked regular officer, since 1999 licensed as a lawyer in Bonn (the former capital of the Federal Republic of Germany), and down there, in 2005, elected as independent deputy of a citizens groups in an honourable capacity. Not only that this sophisticated professional publicly demands direct elections of professional judges by the people for time without any tenure in general but also, as a professional lawyer when doing his job, helping and supporting his clients, permanently reminds any professional judge he has to do with

on his – or her - very duty, i.e. applying personally to his/her Federal Minister of Justice to be elected by the people for time, in this way *strictu sensu* contributing to practise not only the very separation of powers in particular but also recurring to the well-known civil-right-theorem “*nemo plus iuris ad alium transferre potest quam ipse habet*” which means: nobody is allowed to delegate more responsibility (or power) to another than that one has got himself. As a dissident, Plantiko was convicted for “insult” (and/or “defamation”) the last years, 2003-2006, for eight times, the last verdict became final March 9th, 2007 condemning this civil right activist to pay 18.000 Euro (€). But Plantiko was not, as far as I know, until now jailed. Needless to add that the German professional corporative organisation, the chamber of the lawyers, situated in Cologne, since 2002 tries to withdraw Plantikos license, and I ‘m afraid this well-known policy of *Berufsverbot* will, in the end, succeed in ...

Meanwhile Claus Plantiko created an highly sophisticated juridical formula not only for his own self-protection but also for demonstrating his very position. Moreover, in the philosophical tradition Ernst Bloch represents, the authors phrase should make knowable what should be generally known according to the juridical system within Germany Today; the *Plantiko-formular* runs as follows:

“Not a word of the following juridical typeset either as a single word or within the very context is to be interpreted in a manner that the author wants to insult anybody by hurting the personal honour of a human - on the contrary: every word of this message just intends to realize, as soon as possible, what is empirically neglected within current German juridical system but is basically constitutive as proclaimed, and guaranteed, within the German constitution and her articles 1, 20, 79 [3]: *dignity of any human, sovereignty of the people, separation of powers, rationality, and the rule of law.*” [3]

VIII. The most childish thing in Germany Today Peter Briody (2007) plastically calls “*infantile code of honour*”: “insult” in German Penal Law, and “defamation”, too, is, however, by no means a peanut affaire. According to the statistical data Briody presents, public accusations in Germany dramatically increased not only within the 20th century in general but also progressively within the last years.

This development and “career” of “insult” in Germany in fact exemplifies an extremely contradictory relationship: on the one hand since the German Penal Law was created after the founding of the German *Reich*, in 1872, the petty little crime named “insult” has never legally defined, in other words: whenever anyone in Germany is accused, and the more sentenced, for “insult” (§ 185 GPL) an obvious violation of that leading principle of any law - *nullum crimen sine lege, nulla poena sine lege* – is to be stated. On the other hand, however, the German juridical, and political, authorities do not care about at all, being sustainable busy when accusing and sentencing every year more than hundred thousand humans, actually about 180.000 in 2005. It seems as if a grounded principle of Human Rationality and the Age of Enlightenment – both basic presuppositions for any democratic institutional setting – has, perhaps except that short period called “Weimar Culture”, never arrived in Germany until nowadays.

IX. I really cannot know anything about the juridical worst case within current Germany. But there are at least three things I know for sure: (i) Not surprisingly that the most illegal ‘legal’ court procedure until now ever run in the Federal Republic of Germany since 1949 happened against a German citizen who was accused of “insult”: What in German/y is publicly named “*Beleidigungsfarce*” [the farce of being accused for “insult” / being accused for “insult” as a farce] was from the very beginning to the last end sustainable manipulated in a manner that, in this juridical case, not even the “seem” of ‘fair trial’ as typically produced by any juridical trial as a legal institute (“process-produced legitimacy”: Niklas Luhmann) , could be cared: the accused civil rights activist had no chance of any ‘fair trial’ [4]; ii) whenever the very relevancy of that theorem well-known as *Radbruch’s Formula* is to be illustrated, the mass-phenomenon named “insult” in German legislation is to be mentioned for indeed thousands and thousands of citizen had, have been, are until now – and will be in the future - still punished without any definition of “insult”. That is not only an “unjust law” (*gesetzloses Recht*) for it has got, *strictu sensu*, not the status of law at all, but, in the very meaning Gustav Radbruch (1878-1949) sketched, is basically “legal injustice” (*gesetzliches Unrecht*) expressing the very lack of the nature of law at all [5]; iii) neither *political corruption* nor *societal corrupting* is to be cured by the current juridical system as relevant part of the general societal system as such. And that is why I take the liberty, if I may, and remind my scholarly reader/s on what the old German radical philosopher G.F.W. Hegel advised us, by quoting him, applying his counsel to that actual juridical business in Germany Today:

“*The most reasonable thing children can do with their toy is to break it to pieces.*”

*) In this first short essay the author discusses a relevant formal aspect of what is running within current German society. In a second one the author will try to take up productively the approach David Riesman did, in 1942, in three scholarly essays on "Democracy and Defamation" and "Civil Liberties" in a period of societal transition (as published in "Columbia Law Review" and "Public Policy")

[1] «Lorsque dans la même personne ou dans la même corps de magistrature, la puissance législative est réunie à la puissance exécutive, il n'y a point de liberté; parce qu'on peut craindre que le même monarque ou le même sénat ne fasse des lois tyranniques pour les exécuter tyranniquement [...] Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice. Si elle était jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens serait arbitraire: car le juge serait législateur. Si elle était jointe à la puissance exécutive, le juge pourrait avoir la force d'un oppresseur. Tout serait perdu si le même corps des principaux, ou des nobles, ou du peuple, exerçaient ces trois pouvoirs: celui de faire les lois, celui d'exécuter les résolutions publiques, et celui de juger les crimes ou les différends des particuliers.» («De l'esprit des lois» [1748, VI/6]: http://fr.wikisource.org/wiki/De_l%27esprit_des_lois). The central phrase of the most famous chapter Montesquieu (1689-1755) wrote on the English constitution (1748) is polar to any tyranny of the ancient regime: "Whenever the same person or the same public office simultaneously holds both the legislative power and the executive power, there cannot be any freedom and liberty. Moreover, liberty and freedom cannot be guaranteed whenever the power to judge is not separated from the legislative and executive powers."

[2] The German wikipedia-version is following this falsified trait, in a cretinistic manner translating instead of «Gewaltentrennung» - "Gewaltenteilung", like "Arbeitsteilung", i.e. "division of labour": <http://de.wikipedia.org/wiki/Gewaltenteilung>; http://de.wikipedia.org/wiki/Charles_de_Secondat%2C_Baron_de_Montesquieu. The English version correctly translates «separation of powers» (http://en.wikipedia.org/wiki/Separation_of_powers; http://en.wikipedia.org/wiki/The_Spirit_of_the_Laws; http://en.wikipedia.org/wiki/Charles_de_Secondat%2C_baron_de_Montesquieu). Moreover, "Encyclopaedia Britannica" also translates correctly "separation of powers" in her entries "Montesquieu" and "liberalism". Finally, "Enc. Brit." has not got an entry for "insult" in particular although "insult" is mentioned several times in other contexts. (2004: 2nd CD-Rom-edition)

[3] „Kein Wort dieses Schriftsatzes, weder als einzelnes noch i.V.m. anderen, darf dahin ausgelegt werden, daß es die Persönlichkeit oder Ehre irgendjemandes beeinträchtigt, vielmehr dient jedes ausschließlich der möglichst zügigen Verwirklichung der im Justizwesen z.Z. real inexistenten, nach Art. 79 (3) GG aber GG-rechtsstaatskonstitutiven Verfassungsgrundsätze: Menschenwürde, Volkshoheit, Gewaltentrennung, Rationalität und Recht, s. Art. 1 und 20 GG.“

[4] As documented by the author <http://de.geocities.com/earchiv21/beleidigungsfarce.htm>

[5] Radbruch (1946) discussed the Nazi-system in Germany 1933-1945 and its juridical face as a seem of justice, and human right, stressing the overall meaning of justice, and equality (before the law), as the basic features of any juridical system. As a late critique of legal positivism and its function encouraging Nazi-legalism and its right-or-wrong-law-is-law position, Radbruch declared another 'natural law' position publicly in this way: "Whenever justice is not even striven for, whenever equality which indeed is the hard-core meaning of any justice is denied consciously in the enactment of positive law, the law is not only 'unjust law' but consequently lacks the nature of law at all." Radbruch carried out the fascist „legal injustice“ expressing the lack of the very nature of law at all, marking the point of no return: "Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als »unrichtiges Recht« der Gerechtigkeit zu weichen hat. Es ist unmöglich, eine schärfere Linie zu ziehen zwischen den Fällen des gesetzlichen Unrechts und den trotz unrichtigen Inhalts dennoch 'geltenden Gesetzen; eine andere Grenzziehung aber kann mit aller Schärfe vorgenommen werden: wo Gerechtigkeit nicht einmal erstrebt wird, wo die Gleichheit, die den Kern der Gerechtigkeit ausmacht, bei der Satzung positiven Rechts bewußt verleugnet wurde, da ist das Gesetz nicht etwa nur »unrichtiges Recht«, vielmehr entbehrt es überhaupt der Rechtsnatur. Denn man kann Recht, auch positives Recht, gar nicht anders definieren denn als eine Ordnung und Satzung, die ihrem Sinn nach bestimmt ist, der Gerechtigkeit zu dienen.“

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