

# Germany is NOT a democracy!

German Chancellor Angela Merkel has come under intense international scrutiny over authorizing state attorneys to prosecute a TV comedian over a vulgar, satirical poem he performed lampooning Turkey's brutal dictator Tayyip Recep Erdogan. But the issue goes far beyond Merkel's cozying up to the tyrant in Ankara; Germany's libel and anti-insult laws have long been a weapon of choice for those seeking to suppress the marketplace of ideas. Hitler himself, prior to assuming power, was also a vicious libel plaintiff. In Germany, you can even get into free speech trouble for "libeling" the dead!

## **The Boehmerman case and the wrong debate about free speech law**

Whenever he is not busy having [Kurds killed](#), [imprisoning journalists](#), or [denying the Armenian Genocide](#), Turkish strongman Erdogan is a sensitive, fragile snowflake, easily offended by the many people who laugh at his ridiculous and scary regime. Having Turkish citizens who [purportedly compare him to Gollum from Lord of the Rings prosecuted](#) apparently doesn't satisfy his urges; Recently, Erdogan's regime has attempted to muzzle the laughter in Germany to. It started off with calling in [Germany's Ambassador to Turkey in late March after satire show](#) Extra 3 on Germany's state-owned TV channel NDR had run a song mocking Erdogan's human rights record, saying "a journalist who writes anything that Erdogan doesn't like, he'll be in jail by tomorrow". They had also suggested Erdogan's vision of equal rights for women consisted of cops beating up female anti-government protesters as well as the men.

It was in the context of this row that another state TV comedian, Jan Boehmermann, dedicated his show to discussing the extent of the free speech rights guaranteed on paper by

Article 5 of the German Basic Law. He highlighted that laws draw the limit of the permissible at a legal concept known as *Smäh-Kritik*, vilifying criticism. He said he would perform a poem named after the concept to exemplify that, and introduced it saying “what comes next would be forbidden in Germany”. Then he went on to read out a vulgar text hyperbolically accusing Erdogan, among many other things, of fellating with a “hundred sheep”, having a small penis, smelling worse than the fart of a pig and watching child porn as well as beating women. He concluded his poem saying, “this is what you can’t say in Germany”.

The rest is history. [Erdogan complained about the poem under two separate German anti-insult laws, firstly the arcane Article 103 of the criminal code, banning “the insulting of foreign heads or institutions of state” \(which requires authorization by the government for prosecution to occur\) and then secondly filed a legal request for prosecution under the regular law banning insults against persons, Article 185 of the criminal code](#) (which any person can use, without any special authorization). Merkel’s embattled government then issued the authorization for prosecution under Article 103, much to the surprise of [press commentators. They had](#) argued the second complaint was a “bridge” over politically hot waters that Erdogan had built for Merkel, allowing her to refuse to issue the controversial authorization under the arcane and unpopular Article 103, [which even she herself has said she intends to repeal soon](#), but still ensuring criminal charges against comedian Boehmerman could proceed under a different law

The attack on Boehmerman’s speech rights is not the first time Article 103 has been used to suppress democratic speech at the behest of the powerful. In the 1960s it has used so frequently to persecute pro-democracy movement refugees from Iran that it [became known as the “Shah-article”](#). In the 1980s it was used to [legitimize police action](#)

[against protests who held up a banner describing Pinochet's murderous regime in Chile as a "gang of murderers"](#), a historically accurate statement. The court's chilling justification: if police had [not intervened to confiscate the banner](#), "the correct bilateral relations between Germany and Chile would have suffered to a not insignificant degree". In 2003, [the president of police in Potsdam, a suburb of Berlin, wanted to use to law to prosecute an Iraq Waropponent](#) who installed a "Bush Fuck You" placard at his home in an upscale neighborhood close to the German capital. Bush hadn't complained (so no prosecution went ahead), but well-to-do neighbors had not taken to the sign favorably. The threat of prosecution no doubt sent a chill down the war opponent's spine, and put a smile on their face

Despite this, Boehmerman's case also shows how Germany's conversation about free speech is broken. Much of the critical public reaction has not been to defend Boehmerman's right, per se, to engage in such satire, but rather has become an exercise in not-so productive group outrage against Article 103. Politicians have described [the law as a "pre-democratic"](#) remnant of an age where insulting kings was still seen as a major crime, highlighting that the law establishes much higher maximum penalties (5 years in jail) than the regular law against insults (one year in jail). The popular Focus Magazine prominently featured a bow-tie wearing constitutional law expert arguing [that this violates the principle of equality before the law](#), making it incompatible with Germany's Basic Law. The problem with this line of reasoning is that every moment spent discussing this redundant law is one not spent discussing the wider host of censorious, unnecessary libel laws that stifle free thought in Germany, including the very same Article 185 that could yet be used to prosecute Boehmermann. The Boehmerman case has already had a knock on effect, with [a Berlin administrative court banning the reprinting of his poem for a planned demonstration](#) against "insulting goats" that free speech activists had intended to

hold outside of the Turkish embassy, although the judges did not rule on the legality of his poem more widely.

## **Germany Anti-Insult and Libel Laws – Anti-Democratic and Stupid**

Germany has a plethora of highly restrictive libel and anti-insult laws of the sort one would more expect to find in Hitler's Nazi-Germany than Merkel's supposedly tolerant Germany. Aside from the laws already mentioned, the rarely used [Article 189 bans the](#) "disparagement of the memory of the dead", [Article 188 establishes particularly high penalties for](#) "smearing and defaming" a "person involved in political life" if the speech in question is connected to the person's political activities and "makes their public work significantly harder". [Article 192 explicitly says](#) that the truth of a statement does not preclude it from constituting an illegal, punishable form of expression if it is insulting in the context of the way the statement was made. Underlying these laws is the idea that people have "personality rights" (Persönlichkeitsrechte) that a democratic state is obliged to protect from being compromised by demeaning speech.

Much of this can be traced down to the haste and post-war compromise with which the Basic Law, (then Western-) Germany's quasi-constitution was developed in the late 1940s after the fall of Hitler's Nazi dictatorship. Article 5, its' provision on free speech, reflects this perfectly. It states that everyone [shall have a right to freedom of expression, information and art, without the existence of censorship, but then goes on to qualify this, making clear](#): "These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour". [Theodor Heuss, a deputy to the 1948](#) parliamentary council that drafted the Basic Law, later said Article 5's limiting provisions were consciously vague and implied that the "right to personal honour" arose out of an egalitarian desire to ensure that the same protections against

smears would not just be available to officials of the state (as had de facto been the case in Nazi Germany, where the dignity of dissidents and democrats had not been respected by the state), but to all people.

This ties in with the Basic Law's wider rhetoric of the "inviolability of the dignity of man", a vague and unspecific platitude that would no doubt have been acceptable to both socialists and conservatives in post-Hitler West Germany. The Basic Law was originally, as it itself stated, intended to be only a [compromise placeholder until such a time as a reunified Germany could pass a new constitution](#). But, given that the Basic Law gradually became a powerful emotive symbol of a new, post-totalitarian sense of Germanness, there little chance of this happening, and Germans will remain stuck with its inadequate free speech protections.

But the historical lack of emphasis on true free speech still does not explain the reluctance of Germany's current political, social and literary elites to demand a long-overdue expansion of speech rights. An understanding of this must be found elsewhere. An opinion piece penned by the editor-in-chief of Berlin's well-regarded, intellectual Berliner Zeitung exemplifies what many in Germany's cultural elites think about the Boehmerman case. [Peter Huth wrote](#) "Merkel did everything right... Even if there is a guilty verdict, Boehmermann will easily be able to live with the fine". It is unquestionably true that with a good (expensive) lawyer, waves of public support and a well-regarded professional background, no German TV presenter or big-league newspaper editor is likely to face jail or financially crippling fines for any insults he/she may throw at anyone. The almost certain knowledge that they themselves will never face such a predicament is exactly why many in Germany's powerful cultural and political elites find it so difficult grasp the chilling, censoring effect Germany's anti-insult laws can have on those less privileged financially, socially or professionally; Local bloggers, small

town newspapers, court case defendants, dissident refugees and historical researchers who already live on the economic margins of society but are the lifeblood of public debate. To many of these people, even the threat of a time-consuming police investigation or state prosecution can be the determining factor in not pursuing a news story, not expressing their opinion or even not exercising their fundamental due process rights.

Far from the egalitarian impulse that supposedly led to the constitutional "right to personal honour", in practice, Germany's anti-insult laws give immense power to officials to threaten small-time critics and trouble-makers who hold inconvenient opinions with legal repercussions. In 2014, a local court in the Rhineland region of Germany imposed a 6 month jail sentence for "insults" on [an elderly man who had spent years writing letters to officials complaining, allegedly in crude and sometimes sexist terms, of inefficiency, ineptitude and of alleged corruption.](#) Meanwhile, In the Schwarzwald region, an unemployed man who was dependent on social assistance [received a 3 month jail sentence for using an insulting word in a telephone conversation with a local government official by whom he was told that more paperwork was needed before a permit he had requested could be issued.](#) Last year, [Germany's Constitutional Court overturned a guilty verdict](#) issued by a local court under the anti-insults laws against a woman who encountered police while wearing a "fuck cps" sticker. The local court had characterized this as an expression impacting the "social worth of the affected persons in their official capacity and reducing it". In the 1990s, [the Constitutional Court famously](#) overturned a similar conviction against someone who had displayed a banner saying in (bad) English " a soldier is a murder [sic]", although the decision appears to be partially based on the reasoning that 'a soldier' did not specify troops from any specific national army or regiment in particular. Nonetheless, a regional higher court found that [shouting "ACAB" while pointing at an](#)

individual police officer is an illegal and specific insult.

In 2008, a small-time hotel operator who had been detained on charges of unlicensed commerce, was visited by a police inspector in jail who informed him that prosecutors had just obtained and fulfilled a search warrant for his private apartment. The hotel operator protested vigorously to the police inspector. He said that his lawyer should have been present during the search, and called the state prosecutor who had requested the search warrant a “breaker of the law whose days in the judicial system are counted”. He was later investigated, prosecuted and convicted by a county court of “disparaging criticism” and “defamation” towards the state prosecutor for saying this, as well as of other charges unrelated to those comments, but an appeals court eventually overturned the verdict in 2011. Criminal charges of “smearing” (*Verleumdung*) were also used by the state to prosecute a victim of child sexual abuse who has forced to work in an illegal child brothel in the 1990s. Mandy K. had claimed in an interview with prosecutors investigating the case and publically, that that a senior judge had been among those visiting the brothel as a client. Her case sparked a national debate about allegations of judicial corruption as well as police attitudes to victims of sexual assault, and there is no record of her being convicted of the charges. But even being investigated by police and taken to court is a time-consuming, costly experience that discourages critical expression in the face of officialdom.

Germany’s libel laws also have an unfortunate history of stifling the discussion of vital political topics. One of contemporary Germany’s most prominent far-left politicians, Gregor Gysi, has, since the 1990s, faced allegations of having collaborated with communist Eastern Germany’s feared Stasi ‘state security’ agency to inform on his clients, some of whom were dissidents, while he was a solicitor in Eastern Germany prior to re-unification. He vehemently denies the allegations,

which have never been proven, and became known as the [“red law-suit monger” in 1990s](#) over his successful efforts to sue those making such allegations for defamation. Despite the fact that a parliamentary committee of inquiry had deemed the allegations of informal collaboration with state security to be credible and had accused Gysi of being [included in an effort to bring about the](#)

[“as-effective-as-possible suppression of the democratic opposition in the GDR \[Eastern Germany\]”](#), Gysi was able to use to the judicial system to obtain an

injunction under libel law banning former Eastern German [dissident Freya Klier from repeating comments suggesting that Gysi had ‘not represented his clients but had instead spied on them and sought to control them together with his comrades’](#).

Prestigious news-magazine Der Spiegel characterized the efforts to silence (in effect, if not necessarily intent) the debate using the judicial system as ultimately unsuccessful. But it also described the consequences of [Gysi’s lawsuits for free expression at the time in no uncertain terms](#); “regional newspapers reacted in a scared manner, in some editors offices one preferred to think twice about whether one should report about Gysi and the Stasi- and then didn’t”.

Even something as removed from day-to-day politics as historical research has come under attack under the absurd Article 188. In 2000, a Bavarian court issued an injunction banning a newspaper from making claims in a local history article that a deceased World-War-Two-era local figure had been “War-criminal who was sentenced to death”. [Reviewing the historical record, the court said that the deceased man had only been an “alleged war criminal”, not a “Nazi-criminal”, and that the death-sentence-carrying war crime conviction had been “only by Czech Courts in 1945”, which](#) according to the court hadn’t settled the matter of whether he was actually one. Penalties for contravention of the injunction were set at up to one month imprisonment or a not insubstantial 100000 German Marks fine. Other historical researchers have also



found their work scrutinized by Article 188 complaints submitted by angry relatives of the long-dead, although usually with less success. In 2013, a Northern German court ruled that a historical case study calling the notorious First World War German colonial military commander Lettow-Vorbeck a war criminal in regards to his activities in South-West Africa at the time did not constitute a crime, [because the historical study was constitutionally protected pursuant to freedom of science. Similarly, in the 1960s, a German appeals court overturned a five month prison sentence](#) that had been imposed under Article 188 on a journalist who had written a historical piece questioning whether Nazi diplomat Ernst Von Rath, famously assassinated in 1938 in Paris, had been engaged in homosexual activities and had been killed in a sexual dispute. Such pointless legal action not only wastes court time, but is also a clear deterrent to research on important historical issues. If you are on a tight budget or timeline, and receive a legal threat from an incensed relative, wouldn't it seem much easier to avoid all the legal time-wasting by leaving out that sentence about the war-crimes committed by their deceased ancestor?

Of course, when vague laws exist, is there nothing to stop them from being used counter to the way lawmakers intended. Modern German Neo-Nazis have developed considerable expertise in attempting to use anti-insult laws and libel complaints to hassle journalists and anti-racist campaigners, [href="http://www.spiegel.de/spiegel/print/d-13683058.html"](http://www.spiegel.de/spiegel/print/d-13683058.html)>a strategy they themselves called "penetrant legalism". Even [Hitler, prior to taking power in 1933, himself filed a vexatious libel lawsuit in 1930 against Karl Rabe,](#) the editor of the pro-democratic Munich Telegram newspaper. Rabe had been responsible for an article suggesting that Hitler had attempted to bully and threaten Crown-Prince Rupert of Bavaria in case he publically expressed criticism of a ballot measure Hitler has advocating for. Yes, that's correct, a soon-to-be dictator commanding an army of thuggish, Sturm-Abteilung death

squads had his thin skin offended by an editor who documented how he had acted like school-ground bully towards an ageing aristocrat. And the very democratic, judicial institutions he was trying to destroy humoured him by allowing him to bring his vexatious and censorious suit.

Meanwhile, Germany's cultural and political elites love pointing the finger at supposed violations of free speech and press freedom elsewhere in the world, particularly in neighboring Poland. There, their criticisms of the current Law & Justice Party government were perceived to be so out-of-touch that they attracted furious condemnation even from one of the [country's main opposition leaders, the maverick Pawel Kukiz](#). He urged them to look "more closely at democracy in your own country". Perhaps they should take his wise words to heart and start by throwing out Germany's useless, repressive anti-insult laws. All of them.