"L'État, c'est moi!"

THE DEFAMATION OF FOREIGN STATE LEADERS IN TIMES OF GLOBALIZED MEDIA AND GROWING NATIONALISM

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I. INTRODUCTION

There are numerous things that people associate with Germany. Humor is not one of them. Nevertheless, in March 2016 the German comedian Jan Böhmermann, made a name for himself far beyond the borders of Germany, appearing on *Late Night With Seth Meyers*. To put it bluntly, Böhmermann is not the Jerry Seinfeld of Germany. Quite the contrary, he is more like the noisy neighbor who loves to pick a fight. The reason why Böhmermann garnered worldwide attention was that he picked a fight with the Turkish President Erdoğan, whose only similarity with Germany is his lack of humor. When the Turkish government requested the take-down of a satirical song about Erdoğan which aired on a German television show, it caused an outcry in the German public about the rather blunt attempt to violate the freedom of speech. Böhmermann took this outcry to another level and recited a poem, fittingly titled "Schmähkritik" ("defamatory critique"), on his television show to "educate" his audience about the fine line between acts of speech that are protected by the constitution and those that are not. This short poem had a landslide effect. First, it caused both the Turkish government and president to initiate criminal proceedings against the comedian, based on a law that had gone unnoticed in the German Criminal Code, Article 103, entitled "Defamation of organs and representatives of foreign states." Second, it created a political crisis, because the German government granted requisite approval for prosecution, very much to the dismay of the German public. Third, it caused Böhmermann to temporarily abstain from all

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television appearances. To restore public support, German Chancellor Angela Merkel announced, within weeks, the government's intent to request that parliament abolish Article 103 by way of an amendment to the German Criminal Code. What followed was an unprecedented demonstration of parliamentary fast-track legislation. On July 7, 2017 – roughly a year after the Turkish President initiated criminal proceedings against Böhmermann – the German parliament voted to abolish the law criminalizing the defamation of heads of state. The law came into force January 1, 2018, and Article 103 is no more.

The author of this Article was one of the appointed experts of the German Ministry of Justice and argued against the abolishment of Article 103 of the German Criminal Code. Only a few weeks after Erdoğan pressed charges, I warned in an op-ed against legislative politicking and against abolishing Article 103 or the ensuing revision to the German defamation law. The op-ed caused readers of the newspaper to submit angry comments where the words "deranged" and "confused" were amongst the milder evaluations of my view. In neither the public debate nor the parliamentary hearing could arguments of reason prevail against political opportunism.

This Article is about these arguments of reason against the abolishment of laws that criminalize defamation of heads of state. My argument is that if states decide to criminalize attacks on foreign heads of state and diplomats, these attacks should – within the confines of the constitution of course – include defamatory attacks, due to the important role of the reputation of states in foreign policy today. After providing a short summary of the case that brought down Germany's law criminalizing insults of foreign state representatives (Part II), sketching both the substantial (Part III) and procedural (Part IV) conditions of the law, I will demonstrate how rarely the law had been applied before its repeal (Part V), which is the direct result of Germany's constitutional protection of free speech (Part VI). The heart of this Article is an evaluation of the decision to repeal Article 103 from both a political and legal perspective (Part VII). As I will show, former United States President George W. Bush and current President Donald Trump had an impact on the repeal decision that cannot be overstated (Part VII-A). The legal analysis of the repeal decision is generally divided into two questions: First, do states have an obligation to criminalize attacks on foreign state representatives (Part VII-B) and did Germany have such an obligation (Part VIII); and second, should these attacks include defamatory attacks (Part IX)?

The answer to the first question is both descriptive and analytic. I describe International Treaty and Customary Law and analyze whether it carries an obligation to criminalize attacks on foreign representatives. The relevant treaty norms are: Article 29 of the Vienna Convention on Diplomatic

Relations, and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents ("Protection of Internationally Protected Persons Convention"). Both treaty norms require states to specially protect foreign representatives. Article 29 of the Vienna Convention on Diplomatic Relations explicitly mentions "dignity" as a protected good and that criminal sanctions are an appropriate step to prevent attacks on that good. Nevertheless, no obligation can be derived from Article 29 to enact a distinct libel law that specifically sanctions the defamation of foreign representatives. The same holds true for the Protection of Internationally Protected Persons Convention.

The question of the existence of a Customary International Law norm to criminalize defamatory attacks on foreign representatives is a little harder to answer. It is widely acknowledged that a constant and uniform state practice and a corresponding *opinio juris* can lead to the evolution of a customary norm,[1] obliging states to prevent and punish attacks by private individuals upon the person and liberty of foreign heads of state. However, whether a parallel customary obligation also exists to criminalize private attacks against the *dignity* of foreign heads of state is less clear. Here, I employ an extensive analysis of the existing libel laws of selected states and the case law of the European Court of Human Rights. In fact, many states in the world still criminalize defamatory attacks on foreign heads of state, such as Norway, Denmark, and Portugal. For most commentators, these criminalization tendencies are not sufficient to establish an *opinio juris*. However, even those states that have abolished their laws making defamatory attacks on heads of state a punishable offense either retained some sort of dignity protection for heads of state (as did Sweden)[2] or completely restructured their defamation laws to also decriminalize attacks on the domestic head of state's dignity (as did France).[3] As shown by the parliamentary debate in Germany regarding the abolishment of Article 103, proponents of abolishment find it hard to resist the temptation to superficially refer to other states' decriminalization of defamation of foreign heads of state, although these states adjusted their defamation laws. After Germany abolished Article 103, the attempted slap in the face of a foreign head of state is still punishable as a specific offense, while the severe defamation of a foreign head of state is not.

The normative question of whether laws protecting foreign heads of state from being attacked *should* include defamatory attacks warrants an empirical study as to the effects of insulting heads of state in comparison to the effects

[1] JOANNE FOAKES, THE POSITION OF HEADS OF STATE AND SENIOR OFFICIALS IN INTERNATIONAL LAW 18 (2014).

[2] Org. for Sec. and Co-operation in Eur. [OSCE], *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, at 223 (Mar. 2017), https://www.osce.org/fom/303181.

[3] *Id*. at 94-95.

of physical attacks. I will show that various sources throughout the world, primarily the mass media, shape states' reputations in the eyes of individuals, organizations, governments, and the general public. A state's reputation often has concrete implications for its population. Via a short trip to the philosophy of Jürgen Habermas, I will show that this reputation is especially relevant in today's global context, one that has been created through modern communication systems and markets. Moreover, the global context also increases the effects of the defamation of heads of state.

II. THE HISTORY OF THE BÖHMERMANN CASE

The case that sealed the fate for Article 103 in Germany started long before comedian Böhmermann recited his now infamous satirical poem "Schmähkritik." It goes back to an episode of another satirical show called "Extra 3." Extra 3 is a weekly political satire show on German television established in 1976, produced by public TV broadcaster Norddeutscher Rundfunk.[4] Since the German pronunciation of the number "three" is "drei," the name is a pun exploiting the homonymous nature of "three" and "dry," and refers to the "extra dry" humor of the show. In an episode that aired in March 2016, the show presented a parody of German singer-songwriter Nena's song "Irgendwie, Irgendwo, Irgendwann" titled "Erdowie, Erdowo, Erdogan," in which it criticized the Turkish president's treatment of unwelcome journalists and his understanding of freedom of speech. Even though the piece was surprisingly more of an entertaining parody than a bitter satire, Erdoğan weighed in and once again made it very clear that he did not take such criticism lightly. As he had previously done on occasion, he summoned the German ambassador to Ankara. In turn, this prompted the German Foreign Office to state decisively that this type of criticism was protected by freedom of speech in Germany and the government was neither able nor willing to interfere with satirical shows.

These antecedents, especially Erdoğan's rather disproportionate reaction, are crucial because Böhmermann's poem is an immediate reaction to them, and they present the context within which it needs to be interpreted. In his late-night show, "Neo Magazin Royale," Böhermann used the rising conflict between "Extra 3" and the Turkish president as an opportunity to elaborate on the fine line between protected and unprotected speech under German law. To illustrate this, he presented his poem "Schmähkritik" (which translates to "defamatory critique" – thus explicitly borrowing from legal terminology to illustrate that what he was about to perform was *not* covered by freedom of speech under German law) following an explicitly sarcastic

[4] Extra 3, IMDB Episode Guide, https://www.imdb.com/title/tt0073989 (last visited Nov. 22, 2020).

and now infamous introduction: "This is NOT allowed." Before reading the poem, the host himself and his sidekick Ralf Kabelka staged a mock debate where they weighed the consequences of broadcasting the poem: removal of the episode from the broadcaster's website, lawsuit, injunction, declaration to cease and desist and so on. Here, Böhmermann demonstrated his desire for revelation and exposure because his predictions proved to be accurate. The TV station did in fact remove the episode from their website merely a day later, and Erdoğan was quick to take action. On April 10, Turkey informed the German Foreign Office of its demands of legal action against Böhmermann. Approximately one month later, on May 17, the Higher Regional Court of Hamburg granted Erdoğan's request for an injunction, prohibiting Böhmermann from repeating large portions of his poem. What Böhmermann most likely had not predicted were the political consequences of his performance.

On April 3, in a conversation with Turkish Prime Minister Davutoğlu, Chancellor Merkel described the poem as "purposely insulting" – a politically and legally unwise evaluation that she later openly regretted. By making such an evaluation, Merkel antagonized large parts of the population. Furthermore, the legal community criticized a rather blunt violation of the separation of powers, since Merkel used specifically used legal terms that allow acts of speech to be criminalized. This, however, was a judgment for the judicial branch to make, not for the executive. Beyond that, on April 15, the Chancellor authorized the investigation of Böhmermann – as I will show, contrary to other offenses in the German Criminal Code, an investigation into an alleged defamation of a head of state requires the authorization by the government. The public response was intense and declarations of solidarity with Böhmermann poured in from all over the world.

III. ARTICLE 103 AND ITS ELEMENTS

The repealed Article 103 read in its first paragraph:

> Whosoever insults a foreign head of state, or, with respect to his position, a member of a foreign government who is in Germany in his official capacity, or a head of a foreign diplomatic mission who is accredited in the Federal territory shall be liable to imprisonment not exceeding three years or a fine, in case of a slanderous insult to imprisonment from three months to five years.[5]

Article 103 requires the insulted person to be in Germany in his or her official capacity and the insult itself to be immediately directed at that

[5] STRAFGESETZBUCH [STGB] [PENAL CODE], former § 103.

capacity. Both criteria apply to members of a foreign government, while heads of foreign diplomatic missions only need to fulfill the latter criterion (meaning they are *not* required to be in Germany). Foreign heads of state are protected regardless of both criteria[6] because the position as head of state is one which is held *erga omnes*, at all times.[7] That means that Erdoğan was neither required to be within German territory, nor was it necessary for Böhmermann's poem to insult him with respect to his position as the president.

The conduct sanctioned by Article 103 does not only include defamation as sanctioned by the regular insult law (Article 185),[8] but also any acts of speech punishable under Articles 186 (defamation or malicious gossip)[9] and 187 (slander).[10] In a nutshell, this includes insulting value judgments (Article 185) or assertions of fact uttered in the presence of the victim (Article 190) or to a third person on the condition that the assertion is not proven to be true by the offender when in court (Article 186) or when the assertion is proven to be false and the offender was aware of that.[11] Article 103 does not only sanction insults expressed publicly, but also privately.[12] Insofar, this law differs from disparaging the German president (Article 90)[13] and disparaging the constitutional organs of the German state (Article 90b),[14] which only sanction public acts of speech.[15] The sister-article of Article 103 is Article 188 criminalizing the defamation of "a person involved in the popular political life,"[16] which sanctions defamation in public and private contexts alike.[17]

Böhmermann's poem "Schmähkritik" *per se* clearly fits the definition of defamation, as it "entirely or partly negates [President Erdoğan's] basic

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[6] Claus Kreß, 3 MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH § 102, mn. 4 (Klaus Miebach & Wolfgang Joecks eds., 2012).

[7] FOAKES, *supra* note 1, at 63.

[8] STRAFGESETZBUCH [StGB] [PENAL CODE], § 185. The German Penal Code has been translated by Michael Bohlander and is treated as the official translation by the German Federal Ministry of Justice and Consumer Protection: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.). The reference to the translation will not be repeated in similar footnotes.

[9] STRAFGESETZBUCH [StGB] [PENAL CODE], § 186.

[10] STRAFGESETZBUCH [StGB] [PENAL CODE], § 187; *see generally* Kreß, *supra* note 6, at mn. 5.

[11] Hannes Kniffka, WORKING IN LANGUAGE AND LAW 122-123 (2007).

[12] STRAFGESETZBUCH [StGB] [PENAL CODE], § 103.

[13] STRAFGESETZBUCH [StGB] [PENAL CODE], § 90(1).

[14] STRAFGESETZBUCH [StGB] [PENAL CODE], § 90b (1).

[15] *See* Kreß, *supra* note 6, at mn. 6.

[16] STRAFGESETZBUCH [StGB] [PENAL CODE], § 188 (1). About the expansion of Article 188 through a recent law reform see *infra* note 167.

[17] *See* OSCE, *supra* note 2, at 101-05.

human value or his ethical and social value, thus violating his basic . . . unconditional right to dignity," which makes it an expression of disregard for him.[18] The fact that Böhmermann might have defended himself by claiming that he never meant to insult Erdoğan is not particularly relevant for the *actus reus*. What matters, rather than the intent behind the utterance, is how its recipients will commonly understand it.[19] Even Böhmermann's creative trick of embedding the poem into a context which turns it into an illustration of prohibited, as opposed to protected, act of speech has no effect in that regard. As Christian Fahl rightly points out, criminal liability cannot simply be avoided by adding the disclaimer "I'm *not* saying that…" before saying exactly that, because no prolepsis can undo the insult caused by words already spoken.[20]

The lack of proof that Böhmermann willingly insulted Erdoğan is of course the crux of the case and eventually led to the decision in Mainz (the *ratione loci* of the prosecution in Mainz stems from the fact Böhmermann recited the poem in the studio of the Second German Television, usually shortened to ZDF, a German public service television broadcaster based in Mainz)[21] not to prosecute Böhmermann.[22] Nevertheless, the state of mind, or "mens rea" requirements are met if Böhmermann believed it to be at least realistically plausible that Erdoğan was President of Turkey[23] – which was undoubtedly the case – and his satire was intended as an insult rather than a joke, in particular if it was intended for Erdoğan to understand it as such.[24] Indeed, the aggressive use of hyperbole – a rhetoric tool employed by Böhmermann to parody the "humorless knee-jerk indignation" displayed by those who criticize Erdoğan's continued intimidation of journalists[25] – creates an appearance of lacking the seriousness that might be indicative of

[18] *Cf*. Kristian Kühl, STRAFGESETZBUCH: KOMMENTAR § 103, mn. 4 (Karl Lackner & Kristian Kühl eds., 2014) (translated by author).

[19] Eric Hilgendorf, LEIPZIGER KOMMENTAR STRAFGESETZBUCH § 185, mn. 19 (Wolfgang Ruß & Heinrich Wilhelm Laufhütte, eds. 2009); Christian Fahl, *Böhmermanns Schmähkritik als Beleidigung*, NEUE ZEITSCHRIFT FÜR STRAFRECHT (New Criminal Law Journal), 315 (2016) (Ger.).

[20] Fahl, *supra* note 19, at 315.

[21] STRAFPROZESSORDNUNG [StPO] [CRIMINAL PROCEDURE CODE], § 7 (1), *translation at* https://www.gesetze-im-internet.de/englisch_stpo/index.html (Ger.).

[22] *See* Bernd Heinrich, *Über die Entbehrlichkeit der Tatbestände der §§ 103, 353a StGB*, 129 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 425, 427 (2017) (Ger.).

[23] Kreß, *supra* note 6, at mn. 6.

[24] As decided in an early case by the Higher Regional Court of Bavaria (Bayerisches Oberlandesgericht – BayObLG), NEUE JURISTISCHE WOCHENSCHRIFT [NJW], Oct. 25, 1957, at 1607-1608 (Ger.).

[25] Eva Bucher, *"'Ach du Scheiße, es geht wieder los'" – Jan Böhmermann ist wieder da und so gut wie kein anderer*, DIE ZEIT (Sept. 1, 2016), at 35 (referring to this rhetoric tool as Böhmermann's "double twist").

an intent to defame.[26] However, the staged debate that took place between Böhmermann and his sidekick Kabelka before and after the performance of the poem quite clearly illustrates that Böhmermann did indeed expect Erdoğan to take the poem seriously, even seriously enough to take legal action.[27]

IV. THE PROCEDURAL CONDITIONS OF AN INVESTIGATION INTO THE DEFAMATION OF FOREIGN HEADS OF STATE: ARTICLE 104A

Article 104a read in its version that was in force during the Böhmermann case:

> Offences under this chapter shall only be prosecuted if the Federal Republic of Germany maintains diplomatic relations with the other state, reciprocity is guaranteed and was also guaranteed at the time of the offence, a request to prosecute by the foreign government exists, and the Federal Government authorizes the prosecution.[28]

Article 103 therefore had four procedural conditions: existing diplomatic relations with the other state, guaranteed reciprocity, request to prosecute by a foreign government, and authorization of the prosecution by the German government.[29] A law amending Article 104a came into force June 24, 2020 and dispensed of the requirements of guaranteed reciprocity and the authorization of the prosecution by the German government.[30]

When categorizing these conditions as "procedural conditions," it should be noted that it is passionately debated as to whether some of these conditions are in fact procedural or so-called objective conditions of liability ("Objektive Bedingungen der Strafbarkeit"). Objective conditions of liability are somewhat "external" to the wrong constituted by the offenses and therefore need not to be included in the defendant's mens rea.[31] In a way,

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[26] Fahl, *supra* note 19, at 317.

[27] *Id.*

[28] STRAFGESETZBUCH [StGB] [PENAL CODE], former § 104a.

[29] In spite of the wording of the law, which states "offences under this chapter *shall only be prosecuted if*," there is controversy as to whether all of its four conditions are purely procedural requirements or whether some of them are objective requirements of strict liability, i.e., whether they need to be present in addition to mens rea and actus reus.

[30] 58TH LAW TO AMEND THE STGB – DISPARAGEMENT OF THE EUROPEAN UNION AND ITS SYMBOLS, CRIMINAL PROTECTION (Bundesgesetzblatt [Federal Law Gazette] 2020 I No. 28, 1247).

[31] JOHN SPENCER & ANTJE DU BOIS-PEDAIN, APPRAISING STRICT LIABILITY 254 (Andrew Simester ed., 2005); Eric Hilgendorf, LEIPZIGER KOMMENTAR STRAFGESETZBUCH §186, mn. 12 (Wolfgang Ruß & Heinrich Wilhelm Laufhütte eds., 2009); Hendrik Schneider, GESAMTES STRAFRECHT – HANDKOMMENTAR § 186, mn. 13 (Dieter Dölling et al. eds, 2017); Jörg Eisele and Ulrike Schittenhelm, SCHÖNKE/SCHRÖDER STRAFGESETZBUCH KOMMENTAR §186, mn. 10 (Adolf

much of the debate about "objective conditions of liability" in German law mirrors the discussion of strict liability in the Anglo-American tradition,[32] even though the offenses that use those elements are much rarer in Germany and are much more disputed due to German criminal law's uncompromising commitment to the culpability principle (*Schuldprinzip*).[33] For our purposes, it should suffice to say that most commentators see the Article 104a conditions as procedural requirements. Consequently, if one of the elements is not fulfilled, the proceedings can be dismissed but they cannot – as would be the case when an objective condition of liability is not fulfilled – result in an acquittal.[34]

Returning to the Böhmermann case, the first requirement was met, since Germany maintains diplomatic relations with Turkey (and did so at the time Böhmermann performed his poem). As to the reciprocity requirement, already a crucial factor in the Vienna Convention on Diplomatic Relations,[35] there had to be a special criminal offense akin to Article 103 in the Turkish legal system.[36] This criterion – which has been criticized ever since and has thus been deleted from the current version of the Article – was met by Articles 337 and 340 of the Turkish Criminal Code (as amended on September 26, 2004).[37] As to the third condition, the foreign state's request to prosecute was met by a letter from the Turkish government dated April 7, 2016 that reached the Foreign Office on April 8, 2016. This request for prosecution is not subject to special requirements regarding its form or

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Schönke & Horst Schröder eds., 2019); Klaus Geppert, *Zur Systematik der Beleidigungsdelikte und zur Bedeutung des Wahrheitsbeweises im Rahmen der §§ 185 et seq. StGB*, JURISTISCHE AUSBILDUNG, 820, 822 (2002); Ernst Helle, *Die Unwahrheit und die Nichterweislichkeit der ehrenrührigen Behauptung*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW], 841, 842 (1964) (Ger.); Jörg Tenckhoff, *Grundfälle zum Beleidigungsrecht*, JURISTISCHE SCHULUNG, 618, 622 (1988) (Ger.).

[32] Spencer & du Bois-Pedain, *supra* note 31, at 279.

[33] *Id.* at 243, 249.

[34] Claudius Geisler, ZUR VEREINBARKEIT OBJEKTIVER BEDINGUNGEN DER STRAFBARKEIT MIT DEM SCHULDPRINZIP 536 (1998).

[35] FOAKES, *supra* note 1, at 19.

[36] Cf. Claus Kreß, 3 MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH § 104a, mn. 19 (Klaus Miebach ed., 2017).

[37] Article 337 Offenses against the President of a foreign country:

(1) Punishment to be imposed on a person committing an offense against President of a foreign country is increased by one eighth. In case the offense requires punishment of life imprisonment, the offender is sentenced to heavy life imprisonment.

(2) If the felony creates the consequences of an offense of which investigation or prosecution is bound to complaint, the complaint of the foreign country is sought for commencement of investigation and prosecution.

Article 340 Reciprocity condition:

Application of the provisions stated in this section is based on reciprocity condition.

timing, can be withdrawn at any time,[38] and must be directed at any state organization that is authorized to represent the German state (i.e., the request cannot be sent to a Public Prosecutor's Office).[39]

As previously described,[40] Chancellor Merkel authorized the investigation against Böhmermann in a press statement, fulfilling the last requirement of Article 104a. The peculiarity of that statement was not only that Merkel combined it with an announcement to repeal the law she just applied, but that the statement was not hers to make. The principal competence for granting the authorization lies with "the Federal Minister responsible for external relations"[41] and not the head of government. However, as always, the small print of the statement provides further insights. The authorization was granted by Chancellor Merkel on April 15, 2016 and published under the title "Announcement by Chancellor Merkel regarding the Federal Government's reaction to the Turkish message to the Foreign Office, published on April 15, 2016 in Berlin."[42] Upon first glance, this may seem like she authorized the prosecution, even though it was not her authorization to give. However, the statement was made "regarding the Federal Government's reaction," and the federal government is allowed to seize the competence comprised by Article 104a.[43] The government's decision to act as a whole here is all too understandable taking into consideration the politically explosive nature of the subject matter at hand. The intention was to demonstrate consensus and unity.[44] In addition to Merkel's lack of competence, the statement in itself displayed irregularities up to the point where a clear misunderstanding of the legal nature of Article 103 and its procedural requirements became visible. At one point, Merkel politically justified her decision to authorize an investigation, declaring that it was up to

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[38] *See* STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 77e 77d(1).

[39] Kreß, *supra* note 36, mn. 23.

[40] Section II, *supra*.

[41] Albin Eser, SCHÖNKE/SCHRÖDER STRAFGESETZBUCH KOMMENTAR § 104a, mn. 3 (Adolf Schönke & Horst Schröder eds., 2019); Thomas Fischer, STRAFGESETZBUCH: STGB § 97 mn. 5 (2016).

[42] Bundesregierung, *Erklärung von Bundeskanzlerin Merkel zum Vorgehen der Bundesregierung nach der türkischen Verbalnote an das Auswärtige Amt* (Apr. 15, 2016), https://www.bundesregierung.de/Content/DE/Mitschrift/Pressekonferenzen/2016/04/2016-04-15-erklaerung-bkin.html.

[43] Eser, *supra* note 41.

[44] Bundesregierung, *supra* note 42. A fitting section of the Federal Government's statement reads:

> The government has examined this request according to common state practice. The Foreign Office, the Federal Ministry of Justice, the Federal Interior Ministry and the Federal Chancellery all took part in this examination. There were differences of opinion between the coalition partners, CDU and SPD.

This last sentence probably explains why the Federal Government authorized the request but the Chancellor made the corresponding statement by herself.

the public prosecutor's offices and the courts to balance the individual rights of the victim against protected speech, and that the authorization to prosecute merely meant "that the legal evaluation of the subject matter is delivered to the independent judiciary so that public prosecutors and courts rather than the government will have the final say."[45] As understandable as it sounds to involve the courts to get legal clarification, Article 104a's procedural condition that the German government must first make a decision to trigger an investigation is based "exclusively on considerations of political expediency."[46] In other words, the legislator deliberately created a *political* mechanism amongst the procedural requirements – one of which the German government formally triggered while the Chancellor explicitly continued to deny its existence.[47] For some commentators such as Thomas Vormbaum, the government thereby violated discretionary standards.[48] As mentioned above, in a recent amendment act the legislator deleted the political mechanism,[49] precisely to avoid the political ramifications that were created in the Böhmermann case, and to make the matter one for the courts.[50]

V. PREVIOUS CASES OF HEAD OF STATE DEFAMATION IN GERMANY

Until the investigation against Böhmermann, it is doubtful that the broader population of Germany was aware that insulting a foreign head of state would invoke a more severe sentence than insulting just anyone would. Unsurprisingly, the instances where Article 103 was applied were very rare. In fact, there was not a single conviction based on Article 103. By comparison, Germany's 2013 insult law (Article 185) led to 21,454 convictions, its defamation law (Article 186) resulted in 267 convictions, and its slander law (Article 187) had 242 convictions.[51] The defamation of the German president (Article 90) bears the same fate as Article 103 and has never been basis of a conviction.[52]

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[45] *Id*.

[46] Fahl, *supra* note 19, at 314.

[47] *See also* Thomas Vormbaum, *§ 103 StGB – bald Rechtsgeschichte? Elf Fragen zur "Affaire Böhmermann" und elf Versuche zu ihrer Beantwortung*, 10 JOURNAL DER JURISTISCHEN ZEITGESCHICHTE 47, 49 (2016) (Ger.).

[48] *Id*.

[49] *Supra* note 30.

[50] As emphasized during the deliberations to enact the law, see EXPERT COMMENT BY JÖRG EISELE, at 5, https://kripoz.de/wp-content/uploads/2020/02/Stellungnahme-Eisele-EU-Symbole.pdf.

[51] Griffen & Trionfi, *supra* note 2, at 103.

[52] *Id*.

In 1967, Article 103 received the epithet "Shah-Article"[53] – a name that was reactivated by the press during the reporting of the Böhmermann case[54] – when the Shah of Persia took offense at banners reading "Shah murderer" and "Plundering the Persian People" during his visit to Germany. Just like in the Böhmermann case, the request to prosecute was expressed via a *note verbale*, delivered by Ambassador General Mozaffar Malek.[55] The preliminary proceedings that followed were discontinued.[56]

Eight years later, a case reached the Federal Administrative Court. In the summer of 1975, during a protest in front of the Chilean embassy in Bonn, police seized a banner that allegedly insulted the Chilean Ambassador.[57] The banner measured about one hundred by seventy-five centimeters and read: "Italy, Sweden, UK, the Netherlands – No money for a mob of murderers! Why is Germany paying?"[58] When the organizers of the event initiated legal action against the confiscation of the banner, the Federal Administrative Court seized the opportunity to test for criminal liability according to Article 103 and held that the banner was not protected by freedom of speech, constituting an offense pursuant to Article 103.[59]

On August 12, 2006 during the Christopher Street Day celebrations in Munich banners were shown depicting Pope Benedict XVI wearing condoms and an AIDS solidarity ribbon. The police ordered the removal of the banners and a doll representing the Pope, informing the owners that these depictions might reasonably fall within the scope of Article 103.[60] In the following proceedings before the Higher Administrative Court of Munich, the Court held that no defamation whatsoever had taken place, and consequently there could have been no defamation of a head of state according to Article 103.[61]

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[53] Bernd Heinrich, *supra* note 22, at 429.

[54] Vanessa Steinmetz, *Der Moderator und der Schah-Paragraf*, SPIEGEL ONLINE (Apr. 11, 2016), http://www.spiegel.de/politik/deutschland/boehmermann-rechtliche-grundlagen-moeglicher-ermittlungen-a-1086555.html.

[55] *Schah-Reise – Gegen Unbekannt*, DER SPIEGEL (Jan. 5, 2018), http://www.spiegel.de/spiegel/print/d-46211803.html.

[56] Paul Munzinger, *Als 1967 der Schah-Paragraf unterlaufen wurde*, SÜDDEUTSCHE ZEITUNG SZ.DE (Jan. 5, 2018), http://www.sueddeutsche.de/politik/paragraf-wie-der-schah-paragraf-unterlaufen-wurde-1.2951845.

[57] Federal Administrative Court, *BVerwG* NJW 1982, 1008.

[58] *Id*.

[59] *Id*. at 1010 *et seq*.

[60] Bavarian Constitutional Court, *VGH München* NJW 2011, 793.

[61] *Id*. at 795.

Finally, in 2007, a Swiss citizen living in Bavaria was convicted of insulting Swiss President Micheline Calmy-Rey and sentenced to pay a criminal fine. The prosecution was requested by the Swiss Federal Police.[62]

VI. THE PROTECTION OF FREE SPEECH IN GERMANY AND ARTICLE 103

The way the above-mentioned cases unfolded and eventually disappeared rather inconspicuously demonstrates first that there have been proceedings on the basis of Article 103 in the past that never resulted in an outcry even remotely similar to the one that followed the Böhmermann case; and second, the lack of outcry might be explained by the fact that the Böhmermann case has a unique aspect to it, making it remarkable and complex. Namely, the issue of freedom of speech and of the arts (protected by the German constitution as per Article 5 Paragraph 3 and applicable due to the fact that Böhmermann's medium to insult the Turkish president was a satirical poem).

Even though a large part of the First Amendment doctrine in the United States is not older than the similar doctrine in Germany, the German approach to freedom of speech and the arts is both politically and philosophically very different. For obvious reasons, this Article is not the place to go into much detail – it suffices to say, a deeper analysis would fill an entire bookshelf.[63] To understand why Germany retained – until very recently – a law that criminalized the head of state defamation and to find out whether this is model worth being adopted by other states, a look at the culture of free speech protection in Germany *vis-à-vis* the U.S. is not only illuminating, but necessary.

The protection of free speech has ancient roots and is accepted in many human rights covenants today.[64] At the same time, freedom of speech is rarely

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[62] Felix Schindler, *Schweizer Bundespräsidentin übel beschimpft*, TAGESANZEIGER (Apr. 13, 2016), https://www.tagesanzeiger.ch/schweiz/standard/schweizer-bundespraesidentin-als-folterschlampe-beschimpft/story/16716749; *see also* Griffen & Trionfi, *supra* note 2, at 104.

[63] For a very instructive comparison see Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247 (1989).

[64] THOMAS DAVID JONES, HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS 34-37 (1998); *see* Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art. 10, 213 U.N.T.S. 221; Convention on the Elimination of Racial Discrimination, Art. 5, 660 UNTS 195; International Covenant on Civil and Political Rights, Art. 19, 999 U.N.T.S. 171; American Convention on Human Rights, Art.13 (1144 O.A.S.T.S. 123); African (Banjul) Charter on Human and Peoples' Rights, Art. 9, OAU Doc. CAB/LEG/67/3 rev. 5.; Michael O'Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34*, 12 HUM. RTS. L. REV. 627, 630 (2012).

absolute and therefore subject to limitations.[65] In its General Comment No. 10 (about Article 19 International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee of the UN emphasized that "[i]t is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual's right."[66] A restriction of the freedom of expression in Article 20 of the ICCPR requires States' Parties to prohibit by law "[a]ny propaganda of war" and "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."[67] Article 10(2) of the European Convention on Human Rights (ECHR) qualifies Article 10(1) by stating:

> 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.

Consequently, many states of the world have laws that disallow certain types of speech, such as "directing insults, slurs, or derogatory epithets at such persons or otherwise ridiculing such persons; publicly disseminating ideas based on the inferiority of such persons; and the public use of any words, signs, or symbols that are deeply insulting or offensive to such persons. Instances of this cluster can be found in domestic criminal statutes and penal codes."[68]

In the U.S., the First Amendment provides for an extreme protection of free speech – much broader than the protection afforded by the human rights

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[65] Mordechai Kremnitzer & Khaled Ghanayim, *Incitement, Not Sedition*, *in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 147, 148 (David Kretzmer & Francine Kershman Hazan, eds., 2000); Onder Bakircioglu, *Freedom of Expression and Hate Speech*, 16 TULSA J. COMP. & INT'L L. 1, 2 (2008).

[66] U.N. Office of High Comm'r for Human Rights, *General Comment No. 10: Freedom of Expression (Art. 19)*, U.N. Docs. CCPR General Comment No. 10, ¶ 3 (June 29, 1983), https://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo10.pdf.

[67] U.N. Office of High Comm'r for Human Rights, *International Covenant on Civil and Political Rights*, Art. 20, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. About the criticism voiced during the drafting of the provision, see Ineke Boerefijn & Joanna Oyediran, *Article 20 of the International Covenant on Civil and Political Rights*, STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 29, 29 (Sandra Coliver, ed., 1992); Bakircioglu, *supra* note 65, at 33.

[68] ALEXANDER BROWN, HATE SPEECH LAW: A PHILOSOPHICAL EXAMINATION 23 (2015).

covenants mentioned above.[69] There are three prominent justifications for protecting free speech in the United States: (1) it acknowledges human autonomy and dignity, (2) it promotes the marketplace of ideas,[70] and (3) it is an effective tool of democracy.[71] Only speech that falls into the following categories may be restricted: advocacy intended and likely to incite imminent lawless action (a likelihood to produce illegal action and an intent to cause imminent illegality);[72] obscenity;[73] defamation;[74] child pornography;[75] "fighting words";[76] fraud;[77] true threats;[78] speech integral to criminal conduct;[79] and speech presenting a grave and imminent threat the government has the power to prevent.[80] The case law on false speech is less clear. While earlier case law allowed for some "breathing space"[81] for freedom of expression in the face of false remarks about, *inter alia*, public officials (i.e. for a certain degree of protection of false statements), recent decisions tend to be more even favorable to false speech in general.[82]

The German protection of free speech differs substantially from this approach. Both freedom of expression and freedom of the press enjoy constitutional protection in Germany, under Article 5 of the Basic Law. At

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[69] Texas v. Johnson, 491 U.S. 397, 414 (1989); Winfried Brugger, *Ban on or Protection of Hate Speech - Some Observations Based on German and American Law*, 17 TULANE EUROPEAN & CIVIL L. FORUM, 1, 2 (2002); Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1523 (2003); *see also* Bakircioglu, *supra* note 65, at 20.

[70] Alexander Tsesis, *Deliberate Democracy, Truth, and Holmesian Social Darwinism*, 72 SMU L. REV. 495, 496-503 (2019).

[71] Thomas J. Webb, *Verbal Poison - Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 WASHBURN L.J. 445, 448-49 (2011).

[72] Brandenburg v. Ohio, 395 U.S. 444 (1969); Mari Matsuda, *Dissent in a Crowded Theater*, 72 SMU L. REV. 441, 441-56 (2019). About the application of the Brandenburg test to speech acts uttered via social media to incite violent protests, see Alexander Heinze, *Planning and Inciting Violent Protests Through Social Media: A Criminal Law and Comparative Law Perspective*, 2 CRIM. L. & PRAC. REV. 29-51 (2018). Comparing U.S. law and the law in England and Wales on dangerous speech, see Jeffrey W. Howard, *Dangerous Speech*, 47 PHILOSOPHY & PUBLIC AFFAIRS 208 (2019).

[73] Miller v. California, 413 U.S. 15 (1973).

[74] New York Times v. Sullivan, 376 U.S. 254 (1964).

[75] New York v. Ferber, 458 U.S. 747 (1982).

[76] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[77] Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[78] Watts v. United States, 394 U.S. 705, 709 (1969).

[79] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

[80] N.Y. Times Co. v. United States, 403 U.S. 713, 727 (1971) (per curiam); Near v. Minn. ex rel. Olson, 283 U.S. 697, 716 (1931); *Chaplinksy*, 315 U.S. at 572; *see generally* Daniel S. Harawa, *Social Media Thoughtcrimes*, 35 PACE L. REV. 366, 380 (2014); G. Edward White, *Falsity and the First Amendment*, 72 SMU L. REV. 513, 519-20 (2019).

[81] *See Sullivan*, 376 U.S. at 272 (1964).

[82] For an overview, see White, *supra* note 80, at 516 *et seq*.

the same time, German civil law prohibits and criminalizes incitement of hatred and attacks on human dignity because of race, religion, ethnic origin, or nationality.[83] It is not a requirement that speech lead to a clear and present danger of imminent lawless action before becoming punishable.[84] Rather, a "distant and generalized threat to the public peace and to life and dignity, particularly of minorities, suffices for legal sanctions irrespective of whether and when such danger would actually manifest itself."[85]

Admittedly, this descriptive account of free speech protection in the U.S. and Germany does not answer the question of why a provision criminalizing the defamation of a foreign head of state could survive for such a long time in a modern democracy. Nor does it provide an explanation for the open resentment that was expressed when I attempted to justify the existence of such a provision at the Global Fake News and Defamation Symposium. Only a glimpse behind the facade of free speech protection may reveal what is really at hand when the U.S. and Germany protect free speech: both approaches reflect a substantially different political and philosophical tradition and have reached different results through different methods of adjudication.[86] The ink used to describe these differences could easily fill oceans. It therefore does not do justice to distill the main elements of difference and yet, the confinements of an article require just that: (1) the historical element; (2) the protection of dignity and its constitutional role; (3) the balancing of individual rights versus constitutional interests; and (4) the interpersonal effect of the constitution.

Germany's hate speech laws are widely a result of World War II and the Holocaust.[87] Conversely, in *New York Times Co. v. Sullivan*, Justice Brennan suggested that free speech protection in the U.S. has Lockean roots.[88]

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[83] *See* John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539, 541 (2006); *see* Deborah Levine, *Sticks and Stones May Break My Bones, But Words May Also Hurt Me: A Comparison of United States and German Hate Speech Laws*, 41 FORDHAM INTERNATIONAL L. J. 1293, 1318 (2018).

[84] *See* Guy E. Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 BOSTON UNIVERSITY INTERNATIONAL L. J. 277, 329 (2008); Levine, *supra* note 83, at 1318-19.

[85] *Id*.

[86] *See generally* Quint, *supra* note 63, at 251.

[87] Rosenfeld, *supra* note 69, at 1525; Levine, *supra* note 83, at 1317; Quint, *supra* note 63, at 251 ("It is perhaps inevitable that a nation with a monarchical and aristocratic tradition that lasted into the twentieth century-along with the catastrophic history of the Nazi period-would develop views of the role of political speech and other forms of expression that to some extent reflected the impact of that experience.").

[88] Brennan stressed the premise "that the Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty.' The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was 'altogether different' from the British form, under which the Crown was sovereign and the people were subjects." *Sullivan*, 376 U.S. at 254 (1964); *see also* Dale A. Herbeck, *New York Times v. Sullivan: Justice Brennan's Beautiful Lie*, 28

Historically, free speech protection in Germany's Constitution and early case law was more stringent as it was in the U.S.[89] However – and this is the second element of difference – Germany's Federal Constitutional Court decided that human dignity was so central for Germany's constitutional tradition, that it narrowed the scope of Article 5 over time.[90] In Germany, "human dignity" is "broadly defined as an attack on the core area of [the victim's] personality, a denial of the victim's right to life as an equal in the community, or treatment of a victim as an inferior being excluded from the protection of the constitution."[91] The German Federal Constitutional Court found that individuals have a personal constitutional right not to be defamed, protected by Article 2 Paragraph 1 in conjunction with Article 1 Paragraph 1 of the Basic Law.[92] Dignity is not valued in the United States in the same way as it is in Germany.[93] In fact, there are no explicit guarantees of "human dignity" or "the free development of the personality" in the U.S. Constitution.[94] These guarantees are central in the German constitutional tradition, especially after the experiences during dark Nazi times.[95] As Quint puts it: "[A]s a substantive matter, the American doctrine views the interest of an individual in remaining free from libel as an interest that generally does not rise to independent constitutional status."[96] This foreshadows element

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FIRST AMEND. STUDIES (FORMERLY FREE SPEECH YEARBOOK) 37, 48 (1990). Tushnet even recognizes an interplay between the respective history of Germany and the U.S. and their free speech protection *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1278 (1999).

[89] *See, e.g.*, Federal Constitutional Court [BVerfG], *Lüth*, Urteil vom 15. Jan. 1958 – 1 BvR 400/51 –, BVerfGE 7, 198 ("[G]eneral laws which have the effect of limiting a basic right must be read in the light of its significance and always be construed so as to preserve the special value of this right, with, in a free democracy, a presumption in favor of freedom of speech in all areas, and especially in public life." [translation by Tony Weir, https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1369]); *see also* Federal Constitutional Court in BVerfG, *Schmid/Spiegel*, Urteil vom 25. Jan. 1961 – 1 BvR 9/57 –, BVerfGE 12, 113 (translation by Nomos Verlagsgesellschaft, https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=653); *see generally* Levine, *supra* note 83, at 1327.

[90] *See* Federal Constitutional Court in BVerfG, *Mephisto*, Urteil vom 24. Feb. 1971 – 1 BvR 435/68 –, BVerfGE 30, 173 (translation by J.A. Wier, https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1478); *see generally* Levine, *supra* note 83, at 1327.

[91] Knechtle, *supra* note 83, at 553; *see also* Levine, *supra* note 83, at 1320.

[92] This right was developed by the German Federal Supreme Court in 1954, which was acknowledged by the Federal Constitutional Court in BVerfG, *Soraya*, Beschluss vom 14. Feb. 1973 – 1 BvR 112/65 –, BVerfGE 34, 269-293, juris, mn. 6; the Court has continued to adhere to and elaborate its judicature on this right, for example in its famous decision BVerfG, *Caroline von Monaco III*, Beschluss vom 26. Februar 2008 – 1 BvR 1602/07 juris.

[93] Levine, *supra* note 83, at 1320. From a both comparative and philosophical perspective, see PHILIPP GISBERTZ, MENSCHENWÜRDE IN DER ANGLOAMERIKANISCHEN RECHTSPHILOSOPHIE: EIN VERGLEICH ZUR KONTINENTALEUROPÄISCHEN BEGRIFFSBILDUNG 109 (2018).

[94] Quint, *supra* note 63, at 315-16.

[95] *Id*. at 315.

[96] *Id*. at 315-16.

three. In Germany, the right of the defamed person – the right to reputation, personality, or the like – is balanced against the right of speech, press, or artistic expression asserted by the defendant-speaker.[97] By contrast, in the U.S. the conflicting interests are two individual ones. It is the speaker's First Amendment interest against the interest of the state in regulating the kind of speech in question, even though the state may represent the interest of the defamed person.[98] This leads to what is probably the most important difference between the protection of free speech in the U.S. and Germany (element number four). While free speech is restricted in Germany by countervailing constitutional rights of the defamed person, in the U.S. it is restricted by the state's interests.[99] It is therefore hardly surprising that the American public is reluctant to interpret these interests broadly, while the public in Germany is less reluctant to grant the defamed person a minimum amount of dignity protection. In other words, allowing the state to restrict my right to free speech for policy reasons feels less intuitive than for reasons that protect the person I am directing my speech at. This goes to nothing less than the relationship between the state and society. In the United States Constitution there is a clear distinction between the state and society – an "essential dichotomy" between state and private action – and adheres to the position that only the state is bound by the fundamental law.[100] To a certain extent, society must be free from constitutional restraint and, "although individuals and private groups can be substantially regulated, that regulation must be undertaken by statutes or other measures of positive law which are subject to continuing contemporary adjustment unlike the more rigid rules of constitutional law."[101] The German doctrine is very skeptical that a clear line can be drawn between the public and the private sphere.[102] As a result, certain constitutional values such as dignity, "permeate state and society."[103] In

[97] *Id*.

[98] *Id*.

[99] *Id*. at 316.

[100] *See* National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-50 (1974) ("The mere fact that a business is subject to state regulation does not, by itself, convert its action into that of the State for purposes of the Fourteenth Amendment."); Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982) ("A major consequence is to require the courts to respect the limits their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.").

[101] Quint, *supra* note 63, at 339.

[102] *See generally* Heinrich de Wall & Roland Wagner, *Die sogenannte Drittwirkung der Grundrechte*, JURISTISCHE ARBEITSBLÄTTER, 734 (2011); Quint, *supra* note 63, at 340.

[103] Quint, *supra* note 63, at 340; *see* Federal Constitutional Court in BVerfG, *Lüth*, Urteil vom 15. Januar 1958 – 1 BvR 400/51 –, BVerfGE 7, 198 ("Basic rights are primarily to protect the citizen against the state, but as enacted in the Constitution they also incorporate an objective scale of values which applies, as a matter of constitutional law, throughout the entire legal system." [translation by

practical terms, this means that constitutional values play a certain role when individuals interact with each other – in contractual relations or when one person insults another. Civility, respect, and honor are so central in the German legal tradition that the German legislator decided that protection through civil damages is not enough and declared it as a legal good in the criminal law sphere.[104] Thus, sections 26, 30, 86a, 111, and 185 through 200 address defamatory speech.[105] The protection of reputation and personality through German criminal law becomes an easy target for commentators from the U.S. when the above-mentioned constitutional tradition is disregarded, and when Germany's lack of a system for punitive damages is overlooked.[106]

The essence of these rather general remarks on the constitutional tradition in Germany and the U.S. is to serve two purposes: an explanatory and a normative one. First, they attempt to explain why Germany retained a law that criminalized the defamation of a foreign head of state. Second, they are the basis for my argument that this law should not have been repealed.

Summarizing the comments and analyses of the constitutional ramifications of the Böhmermann case, it is certainly fair to say that any balancing of Böhmermann's free speech rights on the one hand and Erdoğan's right to dignity on the other hand goes to the favor of the former.[107]

Tony Weir, https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1369]).

[104] *See* James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1282-83 (2000); Levine, *supra* note 83, at 1318. About the criminalization of hate speech with a view to the harm principle and offence principle, see RAPHAEL COHEN-ALMAGOR, SPEECH, MEDIA AND ETHICS 3 (2001).

[105] Levine, *supra* note 83, at 1320-1321.

[106] *See* Madeleine Tolani, *U.S. Punitive Damages Before German Courts: A Comparative Analysis With Respect to the Ordre Republic*, 17 ANNUAL SURVEY OF INT'L AND COMPARATIVE L. 185, 186 (2011); *see also* Volker Behr, *Punitive Damages in America and German Law--Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHICAGO-KENT L. REV. 105, 106 (2011):

> German civil law and criminal law are separate. Punitive damages are punishment, and, while a wrongdoer may be punished exclusively under the concept of criminal law, by no means is such punishment allowed under the concept of civil law. In the course of time, the very idea of punitive damages has become so unfamiliar to German law that blackletter doctrine on damages scarcely gives the notion of punitive damages, or its German equivalent *Strafschadensersatz.*

[107] Alexander Thiele, *Erlaubte Schmähkritik? Die verfassungsrechtliche Dimension der causa Jan Böhmermann*, VERFASSUNGSBLOG (Jan. 5, 2018) http://verfassungsblog.de/erlaubte-schmaehkritik-die-verfassungsrechtliche-dimension-der-causa-jan-boehmermann; Thomas Fischer, *Kunst ist strafbar. Warum auch nicht?*, ZEIT ONLINE (Jan. 5, 2018) http://www.zeit.de/gesellschaft/zeitgeschehen/2016-05/jan-boehmermann-kunst-strafe-fischer-im-recht; Stephan Christoph, *Die Strafbarkeit satirisch überzeichneter Schmähkritik*, JURISTISCHE SCHULUNG 599 (2016); Anja Brauneck, *Das Problem einer „adäquaten Rezeption" von Satire mit Anmerkungen zum Beschluss des LG Hamburg vom 17.5.2016 im Fall Böhmermann*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT 710 (2016); Thomas Vormbaum, *supra* note 47, at 47. *Cf.* Fahl, *supra* note 19, at 315.

However, on May 17, 2016 the Higher Regional Court of Hamburg – as cited above – reached a different conclusion in a civil suit and prohibited Böhmermann from repeating certain passages of his poem because it considered these passages to have crossed the boundaries of satirical criticism, simple defamation and formal insults. In doing so, the Court – according to Anja Brauneck – removed the poem from its context after all, taking the verses in question "basically 'literally.'"[108]

VII. REPEALING ARTICLE 103 FROM A POLITICAL AND LEGAL PERSPECTIVE

As of January 1, 2018, the infamous Article 103 is no more. On July 7, 2017 – roughly a year after the Turkish president initiated criminal proceedings against Böhmermann – the German parliament voted to abolish the law criminalizing the defamation of heads of state. The law was labeled a relic from the pre-democratic era, akin to lèse majesté, a type of offense from a dark era. Within the blink of an eye, the German public handed down its verdict. Article 103 no longer fits into our modern society and needed to be repealed – the sooner, the better. The German government took the opportunity to combine the authorization to investigate Böhmermann with the public announcement to repeal Article 103. A day before the government's statement was issued, members of Parliament from the Green Party had already drafted a "[l]aw to amend the Criminal Code by abolishing the criminal offen[s]e of lèse majesté (§ 103 Strafgesetzbuch (StGB))," in which they described Article 103 as a "relic from the time when Germany was still a monarchy" and recommended its abolition in entirety from the Criminal Code. Soon thereafter, the federal states Hamburg, Bremen, Nordrhein-Westfalen, Schleswig-Holstein and Thüringen filed a petition with the Bundesrat to repeal Article 103 in which they explained that the punishment imposed by the law was based on "an anachronistic, cooperationist understanding of States which even burdens individual citizens with fulfilling the State's duties."[109]

A. *The Political Explosiveness of Article 103 – The Long Shadows of Bush and Trump*

Politically, this makes sense. In times of increased attacks by state leaders on free speech and the press, a law that criminalizes the defamation of foreign heads of state and makes the investigation dependent on a request

[108] Brauneck, *supra* note 107, at 715.

[109] Bundesrat, *Drucksache 214/16, Entwurf eines Gesetzes zur Aufhebung des § 103 des Strafgesetzbuches*, 28.4.2016, at 2.

by the offender's government puts that government in a tight spot. If it decides not to trigger an investigation, it risks diplomatic tensions. Whereas, if it does decide to trigger the investigation, it risks outrage amongst the people it represents. Merkel – as always – tried to find a compromise by first triggering the investigation against Böhmermann to make sure the European Union's deal with Turkey to stem the flow of refugees into Europe would not be harmed, and then announcing the repeal of Article 103 to avoid public outrage. Some say another reason for the incredibly fast repeal of the law was Merkel's fear of Germans insulting Donald Trump, and Trump requesting an investigation on the basis of Article 103. To be clear, the procedural conditions of the law would not be met anyway, because one of the conditions for prosecution (Article 104a) was so-called reciprocity, that is, the victim's (Trump's) home state needs to have a law similar to Article 103. Turkey has such a law (Articles 337 and 340 of the Turkish Criminal Code), but the U.S. does not. Article 103 could therefore not have been triggered. However, there is still a political effect in trying to trigger Article 103: it gets the attention of the respective state, because the government has to deal with it. This would not be the case if Trump just brought a claim under regular rules on libel, since it would become the matter of a regional prosecutor's office and not the government.

The unease of the German government surrounding Article 103 in combination with U.S. politics was made obvious in 2003 when sixty-nine-year-old Franz Becker, a retired butcher, used his vacant butchery in the German city of Marburg to display posters, pictures, newspaper clippings, and comments describing former U.S. President George W. Bush and other members of the U.S. administration as "state terrorists," because of the war in Iraq.[110] Becker, who survived an air raid during WWII that turned him into an anti-war activist, also declared that Bush's character showed an "explosive mixture of simplemindedness and stupidity, of sanctimonious obsession and sense of mission, coupled with a delusion of power and a highly developed recklessness."[111] Following a notice by the local authorities, police seized the posters. A district court judge found that two other posters reached the level of suspicion for the commission of a defamatory offense (Article 103).[112] What makes this particular case remarkable enough to warrant such a detailed description is that it disappeared from the German records, even though it

[110] Gesa Cordes, *Metzger darf Bush durchgeknallt" nennen – Strafverfahren gegen Marburger, der in seinem Schaufenster gegen Irak- Krieg protestierte, wird eingestellt* [translated: Butcher is allowed to call Bush "crazy" – Criminal proceedings against the butcher from Marburg, who protested against the Iraq war, were discontinued], FRANKFURTER RUNDSCHAU 27 (Dec. 29, 2003).

[111] *Id*. at 33.

[112] *Id*.

went up to the German Ministry of Justice. Due to the explosive political potential of Article 103, the German Ministry of Justice immediately forwarded the case to the Frankfurt General Prosecutor's Office which quickly stopped the investigation without involving the U.S. government, since the reciprocity requirement had not been met.[113] The case would have been lost forever had it not been for the generous support of a journalist with the *Frankfurter Rundschau* who rediscovered two articles in the newspaper's archives.

B. *The Legal Necessity of Article 103*

The way the fate of Article 103 was sealed is very much reminiscent of the witch scene in *Monty Python and the Holy Grail*: "We have found a witch! (A witch! a witch!) Burn her burn her! – How do you know she is a witch? – She looks like one!"[114] Without success, the witch reminds her accusers that she is (a) not a witch and (b) has been given a false nose to make her appear like a witch. Nevertheless, the antagonized mob has already made up its mind: "burn her anyway! (burn her burn her burn!)"

In Germany – as probably in most other states – criminalizing or decriminalizing an act needs to follow the rules and theories of criminalization.[115] Within the very complex debate about "what the legislature can and should be able to forbid its citizens under threat of punishment,"[116] the two main approaches are: the protection of legal goods (*Rechtsgüter*) in the civil law tradition and the prevention of harm in the common law tradition.[117] Both approaches have either a normative and prescriptive or an explanatory and descriptive appearance.[118] The protection of legal goods circumscribes the approach that criminal laws should be designed to protect "the essential preconditions for communal living,"[119] such as the protection of life and bodily integrity, freedom, and property.[120] The harm principle was first promoted by John Stuart Mill, who stated, "[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to

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[113] *Id.*

[114] MONTY PYTHON AND THE HOLY GRAIL (Python Pictures, Ltd. 1975).

[115] In detail Tatjana Hörnle, *Theories of Criminalization*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 679 (Markus Dubber and Tatjana Hörnle, eds., 2014).

[116] KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW, VOL. 1: FOUNDATIONS AND GENERAL PART 60 (2013).

[117] *Id.*

[118] CELIA WELLS & OLIVER QUICK, RECONSTRUCTING CRIMINAL LAW 10 (2010).

[119] AMBOS, *supra* note 116, at 62; *see also* Markus Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. COMP. L. 679 (2005).

[120] Hans-Heinrich Jescheck & Thomas Weigend, STRAFRECHT ALLGEMEINER TEIL 6 (1996).

others."[121] However, the principle has been somewhat diluted over the years[122] due to the fact that its application creates some difficulties.[123]

This is not the place to debate the complicated legal good(s) of Article 103; I have done so elsewhere extensively.[124] It suffices to say that media reports created the false narrative that Article 103 grants special protection to the dignity of heads of state which can no longer be considered acceptable nowadays – an interpretation which neatly fits the 140-character mold of a Tweet, but frankly mutilates the diversity that is inherent in the discussion about legal goods beyond recognition.

Another question, one that is perhaps more interesting for a non-German audience, is whether states have an obligation to criminalize attacks on foreign state representatives – and if so, whether these attacks should include defamatory attacks.

1. International Treaty Law

With regard to the protection of foreign heads of state and diplomats in general, the following norms of international treaty law become the focus of attention. Article 29 of the 1961 Vienna Convention on Diplomatic Relations (*VCDR*) (ratified by the U.S. in 1972 and by Germany in 1964),[125] Article 40 of the 1963 Vienna Convention on Consular Relations (*VCCR*) (mirroring the aforementioned Article 29; ratified by the U.S. in 1969 and by Germany in 1971),[126] Article 29 of the 1969 Convention on Special Missions (*CSM*) (also mirroring the same article; neither ratified by the U.S. nor by

[121] John S. Mill, ON LIBERTY 73 (1869); *see* WELLS & QUICK, *supra* note 118, at 9-10.

[122] AMBOS, *supra* note 116, at 113-14.

[123] WELLS & QUICK, *supra* note 118, at 9-10 (perceiving the harm principle "neither as ideal nor as explanation, but rather as an ideological framework in terms of which policy debate about criminal law is expressed," "exceed the harm principle," or "fail to meet it").

[124] Alexander Heinze, *Lex Non Grata – Kann der Rechtsgüterschutz § 103 StGB retten?*, GOLTDAMMER'S ARCHIV 767 (2016); Alexander Heinze, *Mehr Zynismus wagen! Aspekte der causa Böhmermann*, BONNER RECHTSJOURNAL 81 (Feb. 2016); Alexander Heinze, *Expert Comment on the draft law on the abolishment of s. 103 of the German Criminal Code (defamation of organs and representatives of foreign states) For the public hearing of the Committee for Legal Affairs and Consumer Protection of the German Parliament* (May 2017), https://www.bundestag.de/resource/blob/506908/cacefa19deadf7e07a3e85b61f45e404/heinze-data.pdf; Alexander Heinze, *Der "Schah-Paragraph" § 103 StGB: Bei Nicht-Gefallen Gesetz zurück*, LEGAL TRIB. ONLINE (Jan. 4, 2018), http://www.lto.de/persistent/a_id/19087.

[125] "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." *See also* FOAKES, *supra* note 1, at 18-19.

[126] "Protection of consular officers: The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity."

Germany),[127] and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents ("Protection of Internationally Protected Persons Convention," ratified by the U.S. in 1976 and by Germany in 1977). They all require states to protect foreign representatives.

Article 29 of the VCDR, Article 40 of the VCCE, and Article 29 of the CSM explicitly refer to "dignity" as a protected good and that criminal sanctions are an appropriate step to prevent attacks on that good. As Joanne Foakes demonstrates with the example of the UK:

> [U]nder the State Immunity Act 1978, those provisions of the VCDR which apply to the head of a diplomatic mission and have the force of law, shall also apply to a head of State with any "necessary modifications." Accordingly, the UK is obliged to treat a head of State with "due respect and take all appropriate steps to prevent any attack on his person, freedom and dignity."[128]

In a similar vein, the Supreme Court of the Netherlands, in *JAM v. Public Prosecutor*, found that an insulting attack on a foreign head of state in the local press violated the obligation to prevent attacks on the dignity of such a person.[129] Nevertheless, no obligation can be derived from Article 29 of the VCDR (or Article 40 of the VCCR or Article 29 of the CSM, respectively) to enact a distinct libel law that specifically sanctions the defamation of foreign representatives. Rather, the receiving state is merely required to treat foreign states' representatives "with due respect" and to "take all appropriate steps" to prevent attacks on their dignity (amongst the other protected goods). Which steps are appropriate is left open to interpretation. It can be argued that the existence of general laws sanctioning attacks on those goods protected in Article 29 – which *also*, if not *exclusively* or *specifically*, apply to foreign states' representatives – suffices to fulfill the "appropriate steps" requirement.[130] This argument is at least sufficiently plausible to conclude

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[127] "[P]ersonal inviolability: The persons of the representatives of the sending State in the special mission and of the members of its diplomatic staff shall be inviolable. They shall not be liable to any form of arrest or detention. The receiving State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity." *See also* FOAKES, *supra* note 1, at 19.

[128] *Id.* at 62, fn. 133.

[129] JAM *v.* Public Prosecutor, Netherlands Sup. Ct., Jan. 21, 1969, YBIL 222-273 (1970).

[130] Andreas Zimmermann & Robert Pfeiffer, *President Erdogan versus Jan Böhmermann: Do Bad Poems Make Bad Law? – Reforming the Defamation of Foreign Heads of States Under German Criminal Law,* EJIL: TALK! (June 23, 2017), https://www.ejiltalk.org/president-erdogan-versus-jan-bohmermann-do-bad-poems-make-bad-law-reforming-the-defamation-of-foreign-heads-of-states-under-german-criminal-law.

that an obligation to specifically sanction the defamation of state representatives cannot be deduced from Article 29.

The same holds true for the Protection of Internationally Protected Persons Convention,[131] specifically regarding its Article 2. Article 2 Paragraph 1, however, only refers to attacks on the person and liberty of protected persons and omits any dignity protection. Only Article 2 Paragraph 3 states that obligations derived from this convention do not in any way derogate from other existing obligations under international law "to take all appropriate measures to prevent other attacks on the person, freedom *or dignity* of an internationally protected person" (emphasis added). Since Article 2 Paragraph 3 explicitly attributes the protection of dignity to other international treaties, it can be concluded that the contracting parties deliberately excluded the obligation to protect dignity from this Convention and that, consequently, no obligation to enact any type of libel law can be derived from it.[132]

2. International Customary Law

This leaves the possibility of an obligation for Germany under customary international law to uphold Article 103 German Criminal Code and criminalize attacks on foreign state representatives. A duty to penalize attacks on the physical integrity of state representatives is commonly recognized as part of international customary law. Attacks on their dignity, however, are more controversial – with skepticism on the rise.[133] The existence of an obligation to create special criminal offenses according to international customary law is somewhat controversial as well, but mostly negated due to a lack of consistent common practice.[134] For example, the British Court of Appeals stated in a 2007 judgment that it was "far from convinced of the existence of a rule of customary international law requiring States to take steps to prevent individuals from insulting foreign heads of state abroad."[135]

It is widely acknowledged that a constant and uniform state practice and a corresponding *opinio juris* can lead to the evolution of a customary norm, obliging states to prevent and punish attacks by private individuals upon the

[131] *See supra* VII.B.1.

[132] Zimmermann & Pfeiffer, *supra* note 130.

[133] *See* Claus Kreß, 3 MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH Vorbemerkung zu § 102, mn. 2 (Klaus Miebach ed., 2017); *see also* Zimmermann & Pfeiffer, *supra* note 130. In favour of abolishing laws sanctioning head of state defamation, see Jan Oster, MEDIA FREEDOM AS A FUNDAMENTAL RIGHT 156 (2015),

[134] Claus Kreß, *supra* note 133, at mn. 2, 18 – 20. *Cf.* Zimmermann & Pfeiffer, *supra* note 130.

[135] Aziz vs. Aziz et al., Sultan of Brunei Intervening, No. [2007] EWCA Civ 712 (June 2007) http://www.bailii.org/ew/cases/EWCA/Civ/2007/712.html.

person and liberty of foreign heads of state.[136] However, whether a parallel customary obligation also exists to criminalize private attacks on the *dignity* of a foreign head of state is less clear. This question calls for an analysis of existing libel laws (though naturally, only a limited number of selected states can be considered within the scope of this article) and the case law of the European Court of Human Rights.

(i) *Comparison of Existing Libel Laws*

In fact, many States around the world still criminalize defamatory attacks on foreign heads of state. Such states include, for instance, Belgium, Greece, Italy, the Netherlands, Poland, Portugal, and Spain.[137] Examples of comparably harsh anti-defamation laws protecting (their own) heads of state can be found in Poland, the Netherlands, Spain, Switzerland, Thailand, Saudi Arabia, Venezuela, Lebanon, Norway, Kuwait, Jordan, Morocco and Malaysia.[138] Amongst European countries, the tendency to strictly enforce defamatory attacks on foreign state representatives prevailed until recently. In 2015, out of the then thirty-one member and candidate states of the EU, twenty-one had laws sanctioning insult with a prison penalty or a large fine.[139] Still, for most commentators, these criminalization tendencies are not sufficient to establish an *opinio juris*.[140] What contributes to this is the decreasing tendency to criminalize defamation of heads of state. Since the 1990s, the special offense has been removed from the criminal codes of Hungary, the Czech Republic, Belgium, France, and Romania. Where it is still in place, it is rarely enforced and when it is, it is usually with a mild sentence.[141]

However, even those states that have abolished laws making defamatory attacks on heads of state a punishable offense have either retained some sort of dignity protection for heads of state (as did Sweden)[142] or completely restructured their defamation laws to also decriminalize dignity attacks on the domestic head of state (as did France).[143] There is, in summary, no

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[136] Zimmermann & Pfeiffer, *supra* note 130.

[137] Veronika Bilkova, *Thou shalt not Insult the (Foreign) Head of State?*, EJIL TALK! (Apr. 28, 2016), https://www.ejiltalk.org/thou-shalt-not-insult-the-foreign-head-of-state. In more detail, see Griffen & Trionfi, *supra* note 2, at 5.

[138] Joanna Gill, *Beyond A Joke: Seven Countries Where It's A Criminal Offence to Insult A Head of State*, EURONEWS (Apr. 15, 2016), http://www.euronews.com/2016/04/15/beyond-a-joke-7-countries-where-is-it-a-criminal-offence-to-insult-a-head-of.

[139] *Id.*

[140] *See* Zimmermann & Pfeiffer, *supra* note 130.

[141] Bilkova, *supra* note 137.

[142] Griffen & Trionfi, *supra* note 2, at 223.

[143] *Id*. at 95; Bilkova, *supra* note 137.

uniform state practice which would allow for the conclusion that states are under any obligation to enact distinct libel laws.[144]

(ii) *Case Law of the European Court of Human Rights*

These types of laws have been treated rather unfavorably by the European Court of Human Rights (ECtHR). A leading case is *Colombani et al. v. France*.[145] In this case, the applicants, the newspaper *Le Monde*, a journalist, and a managing director of the publication, were prosecuted and convicted under section 36 of a law[146] enacted July 29, 1881, criminalizing insults against foreign heads of state.[147] The applicants had published an article about drug trafficking on Moroccan land that allegedly insulted the King of Morocco.[148] The ECtHR found a violation of Article 10 of the European Convention on Human Rights (ECHR) because "it is not necessary in a democratic society to criminalize such behavior"; where general criminal offenses of defamation exist, these "suffice to protect heads of state and ordinary citizens alike from remarks that damage their honor or reputation or are insulting."[149] The Court spoke of "a special privilege that cannot be reconciled with modern practice and political conceptions" and concluded that "the offence of insulting a foreign head of state is liable to inhibit freedom of expression without meeting any 'pressing social need' capable of justifying such a restriction."[150]

In *Pakdemirli v. Turkey*, the Court did not decide on special legislation, but on a Turkish court's judgment which had found a politician guilty according to general insult laws.[151] He was found guilty because the insulted person was the president and "acts constituting a crime against him cannot

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[144] Zimmermann & Pfeiffer, *supra* note 130.

[145] Colombani et al. v. France (No. 51279/99), Eur. Ct. H.R. 22 (2002); *see generally* Dan Kozlowski, *For the Protection of the Reputation or Rights of Others: The European Court of Human Rights' Interpretation of the Defamation Exception in Article 10(2)*, 11 COMMC'N L. & POL'Y 133, 145-46 (2006); Jean-François Flauss, *The European Court of Human Rights and the Freedom of Expression*, 84 INDIANA L.J. 808, 822 (2009).

[146] "Section 36: It shall be an offence punishable by one year's imprisonment or a fine of 300,000 francs to insult a foreign head of State, a foreign head of government or the minister for foreign affairs of a foreign government." Colombani et al. v. France (No. 51279/99), Eur. Ct. H.R. 22 (2002).

[147] *See also* Elena Yanchukova, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 COLUM. J. TRANSNAT'L L. 861, 882 (2003).

[148] Colombani *et al*. (No. 51279/99).

[149] *See Colombani et al. v. France*, ¶ 67.

[150] *Id.* ¶¶ 68-69.

[151] Ankara High Court ("Tribunal de grande instance d'Ankara"), Judgment from 12 July 1995 (cited in ECHR Second Section, *Pakdemirli ./. TUR*, No. 35839/97, Judgment, 22 February 2005 ¶ 51, http://hudoc.echr.coe.int/eng?i=001-68374) (translated by author).

be considered reasonable . . . Insults of the President do not only hurt the moral personality of the head of state, but also damage the Republic of Turkey's reputation in foreign states."[152] The ECtHR reiterated that "protection by a special law concerning insult is not, in general, in line with the spirit of the Convention," and that this holds true even more when the special protection was not afforded by a law but by judges within their margin of appreciation.[153] The ECtHR in *Artun and Güvener v. Turkey* confirmed its finding that such special protective laws for heads of state "cannot be reconciled with the practices and political conceptions of today."[154]

VIII. REPEALING ARTICLE 103 AND BAD LEGISLATIVE DRAFTING

The extent to which international law imposes a duty upon states to sanction offensive conduct by private individuals is unclear. However, it certainly does not impose a compulsory obligation to create special laws sanctioning private individuals' offensive conduct against foreign heads of state.[155] In spite thereof, many nations choose to do so, as did Germany until the repeal of Article 103. Thus, repealing Article 103 would at least require an in-depth debate about whether it might be warranted to reverse the decision of the German parliament made in 1953 to retain Article 103 in the form as we know it today. Labeling Article 103 as "lèse majesté" and thus a relic from a long-gone era – a "relic from Germany's days as a monarchy," to quote from the draft law presented by MPs Ströbele et al. on April 14, 2016[156] – therefore rather meets the requirements of populism than those of an informed debate. Nowhere in Article 103 is a reference to lèse majesté,[157] nor does it contain the characteristic conflation of violation of dignity and violation of awe.[158] Moreover and rather unsurprisingly, Articles 102 to 104 share a similar history. Article 102 is also a relic – a "remnant of what used to be a much more extensive criminal law system of protection of foreign states against treasonous acts" – that has its roots in the Prussian Civil Code

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[152] *Id.*

[153] *Id.* ¶ 52.

[154] Affaire Artun Et Güvener c. Turquie (No. 75510/01), Eur. Ct. H.R. ¶ 31 (2007).

[155] FOAKES, *supra* note 1, at 69.

[156] Deutscher Bundestag, *Drucks. 18/8123, Gesetzentwurf der Abgeordneten Ströbele et al*., April 14, 2016, at 1.

[157] *See* Hans Hugo Klein, *Neue Umgangsformen*, FRANKFURTER ALLGEMEINE ZEITUNG FAZ (Apr. 28, 2016), at 6 (providing, as translated by the author, "Whoever reads these texts [i.e., Articles 103 and 104a as well as the section's title] without prejudice will inevitably find that they have nothing to do with 'lèse-majesté.'"); *see also* Vormbaum, *supra* note 45, at 47-48; *see also* Thomas Vormbaum, *Kurzbeitrag Majestätsbeleidigung*, JURISTENZEITUNG, 413, 414 (2017).

[158] Awe, in contrast to dignity, is defined as "a high degree of esteem, a certain fear of behavior violating a person's dignity based on one's high esteem for said person." SIEGFRIED BLEECK, DIE MAJESTÄTSBELEIDIGUNG IM GELTENDEN DEUTSCHEN STRAFGESETZ 31, 32 (1914).

of 1794.[159] Similarly, Article 103 goes back to the Prussian Criminal Code of 1851, and after briefly being abolished in 1946[160] was reintroduced in 1953 with the intention of demonstrating solidarity to other states and overcoming the legacy of the war.[161] Therefore, naturally, in prolonged times of peace these laws' relevance has somewhat dwindled – between 2007 and 2014, only five people were convicted for crimes against foreign states.[162]

Thus, there is nothing wrong with the decision not to criminalize insults of foreign heads of state. However, once this decision has been made, the question remains of what a law repealing Article 103 should look like. This question was left unanswered by the debate leading up to the repeal of Article 103. In other words, Article 103 was simply abolished without amending any of the laws that are now impacted by the repeal. Specifically, no changes were made to the surrounding Articles (Article 102: Attacks on organs and representatives of foreign states; and Article 104: Violation of flags and insignia of foreign states). In fact, Article 104 has even been expanded by the same law that amended the above-mentioned Article 104a.[163]

It is generally ignored that even after Article 103 was removed from the Criminal Code without replacement, attacks on foreign heads of state remain punishable according to separate laws. These attacks may be so weak they even fail to reach the threshold of causing actual harm. Article 102 sanctions *any* attack on a foreign state's representative which *aims* to cause him or her harm, even if no harm is actually done – with the limitation that the attack must in principle be fit to cause the intended harm.[164] In other words, Article 102 created a special criminal offense sanctioning the mere *attempt* at causing any foreign state's representative *some* level of harm. How can it be justified that so much as a failed attempt at slapping a foreign state's representative in the face might be punishable as a special offense, while a grave insult – one that affects both a head of state and an entire country – no longer warrants the same level of legal protection, leaving the representative with no other option than to invoke the general criminal offenses protecting

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[159] Hans-Heinrich Jescheck, *Straftaten gegen das Ausland, in* FESTSCHRIFT FÜR RITTLER 274, 278 (Siegfried Hohenleitner, Ludwig Lindner & Friedrich Nowakowski eds., 1957); *see also* Jenny Gesley, *Lèse-Majesté in Germany – A Relic of a Long-Gone Era*, LIBRARY OF CONGRESS BLOG, (Feb. 23, 2017), https://blogs.loc.gov/law/2017/02/lse-majest-in-germany-a-relic-of-a-long-gone-era/.

[160] Repealed by law No. 11 of the Control Council for Germany, Annex C, Article 1 and IV, cited in U.S. War Department, THE STATUTORY CRIMINAL LAW OF GERMANY (August 1946), at 85, 213-15.

[161] Gesley, *supra* note 145.

[162] *Id.*

[163] *Supra* note 30 and main text.

[164] Jürgen Wolter, 3 SYSTEMATISCHER KOMMENTAR ZUM STRAFGESETZBUCH § 102, mn. 6 (Jürgen Wolter ed., 2019).

his or her *personal* dignity? How can it be justified that disparaging the German president (Article 90) and disparaging the constitutional organs of the German state (Article 90b) are still special offenses while the defamation of the president of a foreign nation is not? If the answer is that Article 103 was so irrelevant that it never once led to a conviction, the same applies to Article 90. It comes as no surprise that disparaging the German president (Article 90) and disparaging the constitutional organs of the German state (Article 90b) still require an official authorization to investigate.[165] The same authorization was deemed politically inappropriate in the context of Article 103. How can Article 188, criminalizing unpublicized defamatory speech against "a person involved in the popular political life," be retained while unpublicized defamatory speech against the president of a foreign nation is no longer afforded special protection? Unsurprisingly, one of the few public figures that openly criticized the rapid repeal of Article 103 was the then German President Joachim Gauck.[166] In an almost ironic twist of events, as a reaction to an increasing amount of online hate speech against regional politicians, Article 188 – again, providing a *special protection* to political figures – underwent a considerable expansion in the course of the enactment of a new German hate speech law, while a similar special protection to foreign political figures has been repealed.[167]

This leads to the main question: given that Germany does provide a framework of special legal protection for representatives of foreign states – is it justified to remove only attacks on the representatives' dignity from the sphere of this special protection? The removal of Article 103 sent a clear message: bodily harm, however mild, to a foreign state's representative has a different effect than bodily harm to a German citizen; that is, an effect on that state's dignity and Germany's relationship with that state. However, there is no consideration of any such effect with harm to a person's dignity. Since January 1, 2018, insulting a foreign head of state, no matter how severely, is not even investigated automatically by the prosecution, as most crimes are. In principle, Germany – contrary to the U.S. – rests on the idea of "legality" or "compulsory or mandatory prosecution," whereby the relevant official agency is expected to act on a formal standard when dealing with all

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[165] STRAFGESETZBUCH [StGB] [Penal Code], Article 90(4) and 90b(2).

[166] *Gauck kritisiert vorschnelle Abschaffung von Paragraf 103*, ZEIT ONLINE (Apr. 22, 2016), https://www.zeit.de/politik/deutschland/2016-04/erdogan-satire-bundespraesident-joachim-gauck-paragraf-103-abschaffung.

[167] The enactment procedure including the relevant proposals and decisions can be found at https://kripoz.de/2019/12/19/entwurf-eines-gesetzes-zur-bekaempfung-des-rechtsextremismus-und-der-hasskriminalitaet. *See also* Alexander Heinze, *Böhmermann, FC Bayern und eine Strafgesetzgebung auf Zuruf*, LEGAL TRIBUNE ONLINE (Dec. 12, 2019), https://www.lto.de/recht/hintergruende/h/hate-speech-hass-kriminalitaet-netz-188-stgb-kommunalpolitiker-boehmermann.

breaches of criminal law which come to their attention.[168] Germany's regular defamation laws, by contrast, are so-called "Antragsdelikte," i.e., they are not "automatically" prosecuted by the State, but only upon special request by the offended party.[169] In the final paragraph of Chapter 5 section 5 of the Swedish Criminal Code, Sweden acknowledges the problem of privately prosecuting the defamation of foreign heads of state, providing: if an offence of defamation or insult is committed against a foreign head of state in Sweden or a foreign diplomatic representative in Sweden, *the case is to be handled by prosecutors upon approval of the government*.[170]

IX. THE GRAVITY OF DEFAMATION IN A GLOBAL SPHERE

Rather than rely on superficial international comparisons and flimsy historical arguments, the answer to the normative question should be sought in a comparison of the effects of insulting[171] heads of state to the effects of physical attacks. It has been argued that the law in question serves the purpose of promoting Germany's good working relationships with other states.[172] If this is the case, then any attack that is equally fit to perturb such relationships should necessarily be equally sanctionable by law. In an instructive and extensive analysis, Elad Peled demonstrated that "various sources throughout the world, primarily the mass media and nongovernmental organizations, routinely publish reports on the conduct and circumstances of states."[173] These reports impact states' reputations in the eyes of individuals, publics, organizations, and governments.[174] While most reporting may be presumed accurate, disinformation inevitably finds its way into the international public domain through mass media and especially social media. Jürgen Habermas already spoke of world societies because communication systems and markets have created a global context.[175] Today,

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[168] *See* Alexander Heinze & Shannon Fyfe, *The Role of the Prosecutor*, *in* 1 CORE CONCEPTS IN CRIMINAL LAW AND JUSTICE 364-66 (Kai Ambos et al. eds., 2020); HANNA KUCZYŃSKA, THE ACCUSATION MODEL BEFORE THE INTERNATIONAL CRIMINAL COURT: STUDY OF CONVERGENCE OF CRIMINAL JUSTICE SYSTEMS 94-111 (2015); Christopher Harding & Gavin Dingwall, DIVERSION IN THE CRIMINAL PROCESS 1 (1998).

[169] Kniffka, *supra* note 11, at 118.

[170] MEDIA LAWS DATABASE SWEDEN (Jan. 4, 2018), http://legaldb.freemedia.at/legal-database/sweden.

[171] For a general semantic and sociological analysis of insults and their effects, see Ruth Colker, *The Power of Insults*, 100 BULR 9-15 (2020).

[172] Gesley, *supra* note 145.

[173] Elad Peled, *Should States Have a Legal Right to Reputation? Applying the Rationales of Defamation Law to the International Arena*, 35 BROOK. J. INT'L L. 107, 109 (2010).

[174] *Id.*

[175] Jürgen Habermas, *Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight*, *in* PERPETUAL PEACE – ESSAYS ON KANT'S COSMOPOLITAN IDEAL 113, 131 (James Bohman & Matthias Lutz-Bachmann eds., 1997).

we are close to what James Bohman describes as a "public sphere" to change and create democratic institutions.[176] I have unfolded the argument elsewhere in detail.[177] This public sphere discusses issues of "tolerance, civic virtue, and public morality."[178] In complex societies, public debate is mediated "not only by the powerful institutions of the state but also by the mass media, which have the capacity to reach a large and indefinite audience."[179]

It is widely agreed that publicly made false remarks and disinformation may have a considerable impact on both individuals and entire states.[180] As Peled rightly points out, "Whether such disinformation is a product of biased agendas, interests of political actors, omissions of relevant details, or merely a matter of honest mistakes, it might do injustice to the states concerned."[181] Dignity has been described as an antiquated concept on the international level but it is still an inherent characteristic of sovereign states which other states are under a duty to respect.[182] In 2001, the Institute of International Law adopted its resolution "Immunities from Jurisdiction and Execution of heads of state and of Government in International Law."[183] Article 1 of the resolution reads:

> When in the territory of a foreign State, the person of the Head of State is inviolable . . . The Head of State shall be treated by the authorities with due respect and all reasonable steps shall be taken to prevent any infringement of his or her person, liberty, or *dignity*.[184]

A state's reputation often has concrete implications for its population. Böhmermann's poem is proof of just that. Turkey's vice prime minister called the poem a "grave crime against humanity" – a poem, poorly written,

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[176] James Bohman, *The Public Spheres of the World Citizen*, *in* PERPETUAL PEACE – ESSAYS ON KANT'S COSMOPOLITAN IDEAL 179, 187 (James Bohman & Matthias Lutz-Bachmann eds., 1997).

[177] Alexander Heinze, *The Statute of the International Criminal Court as a Kantian Constitution*, *in* PHILOSOPHICAL FOUNDATIONS OF INTERNATIONAL CRIMINAL LAW: CORRELATING THINKERS 378-381, 399-403 (Morten Bergsmo and Emiliano J. Buis eds, 2018).

[178] Bohman, *supra* note 176, at 189-90.

[179] *Id.* at 196.

[180] For examples, see, *inter alia*, Björnstjern Baade, *Fake News and International Law*, 29 EJIL 1357 (2018); Udo Fink & Ines Gillich, *Fake News as a Challenge for Journalistic Standards in Modern Democracy*, 58 U. LOUISVILLE L. REV. 263, 263-64 (2020); Russell L. Weaver, *Free Speech in an Internet Era*, 58 U. LOUISVILLE L. REV. 325 (2020).

[181] Peled, *supra* note 173, at 109.

[182] Foakes, *supra* note 1, at 61.

[183] Session of Vancouver 2001, Justitia Et Pace Institut De Droit International (Providing Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law), http://www.idi-iil.org/app/uploads/2017/06/2001_van_02_en.pdf.

[184] *Id*. (emphasis added).

by an average comedian in a television show with a poor audience rating (it was watched by 400,000 people – by way of comparison, the Saturday Sports News in Germany is watched by four million people on average). It has long been established on the basis of findings presented by the political and social sciences that a state's reputation is a crucial factor in the entry into international treaties.[185] This is largely due to the increasing democratization of many countries which prompts them to pay more attention to the reputation other states have with their population.[186] It has been demonstrated that possible human rights violations in particular have a significant effect on other states' willingness to enter contracts with a state.[187] In short, national dignity has become a factor of foreign policy.[188] The German Federal Administrative Court has previously addressed the issue as follows:

> Personal dignity is an indispensable prerequisite for the peaceful coexistence of individuals, which is why it is a protected good under Article 5 Paragraph 2 of the Basic Law ("Grundgesetz"). Likewise, the dignity of states partaking in International Public Law – represented by their head of state or the head of their diplomatic representation – is a necessary and indispensable institutional minimum prerequisite for the peaceful coexistence of states and must therefore be protected against violations, not least in the interest of the receiving state . . . This minimum prerequisite is of particular importance for the peaceful relationships between states which differ fundamentally in terms of their societal structures.[189]

From a criminal policy point of view, the *raison d'être* of the good protected by Article 103 hinges entirely on whether or not it is possible to harm an entire state's dignity by means of defamation and fallacious allegation of fact.[190] In this regard, the Böhmermann case is a textbook example in that it illustrates exceptionally well how political coverage in the media and the public's political interest paralleled each other. While Western media coverage of conflicts in regions like Africa or the Middle East is only

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[185] Peled, *supra* note 173, at 123.

[186] Eytan Gilboa, *Searching for a Theory of Public Diplomacy,* 616 ANNALS AM. ACAD. POL. & SOC. SCI. 55, 56 (2008); *see* PHILIP M. TAYLOR, GLOBAL COMMUNICATIONS, INTERNATIONAL AFFAIRS AND THE MEDIA SINCE 1945, at 58 (1997).

[187] JOSEPH S. NYE JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS 36-37, 129-130 (2004).

[188] *See* Anthony Giffard & Nancy Rivenburgh, *News Agencies, National Images, and Global Media Events*, 77 JOURNALISM & MASS COMM. QUARTERLY 8 (2000).

[189] Federal Administrative Court, *BVerwG* NJW 1982, 1008, 1010.

[190] *See generally* Winfried Hassemer, *Darf es Straftaten geben, die ein strafrechtliches Rechtsgut nicht in Mitleidenschaft ziehen?, in* DIE RECHTSGUTSTHEORIE 57 (Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers eds., 2003); Heinz Koriath, *Zum Streit um den Begriff des Rechtsguts*, GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 561, 575 (1999).

fragmentary (which is partly due to repressive measures taken against journalists working in these regions and partly due to a simple lack of financial means),[191] the percentage of people – young people, in particular – who obtain their information on foreign states and conflicts mainly from satirical programs has risen dramatically.[192] Taking into consideration the demonstrably direct correlation between media coverage and a nation's reputation with the general public,[193] it cannot be denied that satirical programs (such as Böhmermann's show) hold a certain power. They influence "actual political events in the world",[194] labelled by the *Time Magazine* as the "John Oliver Effect."[195] The same applies to (legal) documentaries that are becoming increasingly popular.[196] Defamation or fallacious allegations of fact about a state aired on such a program are certainly fit to damage a foreign state's reputation – even more so than, for example, an attempt at inflicting mild bodily harm on a foreign head of state made by a protester during a speech, seeing as a satirical television show typically reaches a large audience (not at least due to its dissemination on the internet). It would be a mistake to confuse the lack of a state in satisfying the burden of showing that a dignity violation took place by a false remark with the fact that a false remark is able to violate a state's dignity or reputation respectively.[197]

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[191] *See* Andrea Backhaus, *Mittlerer Osten – Diese lauten, unscharfen Bilder*, ZEIT ONLINE (May 26, 2016), http://www.zeit.de/politik/ausland/2016-05/mittlerer-osten-medien-bilder-journalismus.

[192] Friederike Haupt, *Böhmermann und Co. – Pubertär statt Politisch*, FAZ ONLINE (Apr. 11, 2016), http://www.faz.net/aktuell/politik/inland/satire-von-jan-boehmermann-co-pubertaeer-statt-politisch-14169614.html.

[193] Peled, *supra* note 173, at 132..

[194] For an analysis and more examples, see Daniel Tippens, *Comedy as Socratic Journalism*, BLOG OF THE APA (Feb. 5, 2019), https://blog.apaonline.org/2019/02/05/comedy-as-socratic-journalism.

[195] Victor Luckerson, *How the "John Oliver Effect" is Having a Real-Life Impact*, TIME (July 10, 2015), https://time.com/3674807/john-oliver-net-neutrality-civil-forfeiture-miss-america.

[196] Victor Li, *Documentaries are shaping public opinion and influencing cases*, ABA JOURNAL (Aug 1, 2020), https://www.abajournal.com/magazine/article/documentaries-are-shaping-public-opinion-and-influencing-cases.

[197] In a case before the East African Court of Justice, for instance, Tanzania made a state-dignity argument to underline the legitimacy of a defamation law: Media Council Of Tanzania & others v A.G. Of The United Republic Of Tanzania (Reference No.2 of 2017) [2019] EACJ 2; (28 March 2019), ¶ 88. The Court did not refute this argument but simply found that Tanzania's submission was insufficient (*id.* ¶ 89). For a detailed account of the decision, see Tetevi Davi, *A Victory for Media Freedom and another Blow Dealt to Criminal Defamation and Sedition Laws by the East African Court of Justice*, OPINIOJURIS (Aug. 20, 2019), http://opiniojuris.org/2019/08/20/a-victory-for-media-freedom-and-another-blow-dealt-to-criminal-defamation-and-sedition-laws-by-the-east-african-court-of-justice.

X. CONCLUDING REMARKS

It goes without saying that the media is central to democracy as a primary source of information, and citizens must be informed if they are to act effectively as such. Constitutional safeguards make sure that newspaper reports cannot be suppressed just because they reveal an inconvenient truth. In many countries of the world, public officials enjoy less protection from criticism than others, since freedom of the press affords the public one of the best means of discovering and forming an opinion about the ideas and attitudes of political leaders. Nevertheless, there is a difference between the *ought to* and the *is*. In today's global communication context and in the face of nationalist movements, it is a fact that the alleged insult of state representatives, a flag or an insignia, or a state institution triggers strong emotional reactions. Among state leaders today, there seems to be a renaissance of King Louis XIV of France's remark over 300 years ago: "L'État, c'est moi!" – "I am the state." If the *ratio legis* of offenses punishing head of state defamation – that is, the retention of diplomatic relations between states and the protection of state representatives – is taken seriously, the Böhmermann case is just the beginning of an intense struggle to balance constitutional rights and political will.

While there is no obligation under international law to extend special protection – that is, protection by means of special criminal offenses – from attacks by private individuals to foreign state representatives, there are strong arguments to suggest that there should be such laws. What happened in the wake of the Böhmermann affair was a remarkable case of fast-track legislation blindly swayed by the public opinion on daily politics that left behind grave systematic inconsistencies within the German Criminal Code. The decision made by the German parliament can be considered regrettable at best and it can only be hoped that through thorough analysis from a legal and a criminal policy point of view other states can be prevented from making the same mistake.

Repealing a law that criminalizes free speech is a success. Repealing a law for symbolic reasons on the basis of a sham debate that turns the legislative process into its own caricature is something we already experienced in Germany. It did not turn out so well.