



## Media lawyers: Böhmermann could become a case for the Constitutional Court

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What is satire, what is a criminal offence? With his Erdogan poem, Jan Böhmermann is walking a very fine line. For legal professionals, the case raises issues that may need to be clarified by the Supreme Court.

According to the Hamburg-based media lawyer Stefan Engels, the case of Jan Böhmermann may have the potential to pass through all instances up to the German Federal Constitutional Court. In an interview with the Deutsche Presse-Agentur, he explained why Böhmermann's "smear poem" addressed to the Turkish head of state Recep Tayyip Erdogan is so difficult to assess in legal terms and what will happen next after the legal proceedings that have been instituted from Ankara.

**Question: Turkey is now requesting through official channels that legal proceedings be instituted against Böhmermann. Why is this step so decisive?**

Answer: German law contains the special feature that insulting a foreign head of state from within the country can specifically lead to criminal proceedings. Compared with the simple offence of insult, Section 103 of the German Criminal Code provides for a period of imprisonment of up to three years. However, for this to apply, the foreign government must file a complaint. Turkey has now met this requirement.

**Question: What exactly do lawyers understand by an insult?**

Answer: The general criteria for abusive criticism apply in this case. Abusive criticism is deemed to apply when it no longer concerns the facts of the matter but only defamation of the person. Consequently, if no further argument based on facts is taking place and no sharp or targeted criticism is being made, but instead the person is simply becoming a target, such as in terms of his or her physical characteristics.

**Question: Is Böhmermann's poem insulting according to these criteria?**

Answer: The important thing is to view every utterance in its context – and this is something that has so far been somewhat lacking in the discussion. The poem is called "Schmähkritik" ["smear criticism"] and in my view also contains comments ranging from abuse to formal insults. However, one mustn't view the poem independently of its character, and in particular without its integration into the programme.

**Question: What effect does this integration have?**

Answer: Böhmermann is criticizing the fact that Erdogan is upset by something that he himself does not see as abuse but instead as permissible satire. And in order to illustrate the limit of abusive criticism, he provides an example – again of course in the form of satire. In other words, primarily he does not wish to abuse Erdogan, but is

imply giving an example of what abuse of Erdogan would be like. And he also embeds this into his contribution, accordingly, several times over. An additional factor in the appraisal comes from the very conscious political aggravation of a heated situation caused by the contribution. To this extent, the contribution wants the political and state reaction as part of the performance.

**Question: And within this framework is everything then allowed?**

Answer: A lot yes, but not everything. It particularly raises the question that if you wish to illustrate something as an example or provoke something, does it then need to be so extensive and so coherent? Wouldn't one or two lines also have been sufficient? Yet Böhmermann goes on to make an entire poem out of it. The main point of contention will certainly concern whether this overstretches the character of the example, and hence transgresses the boundary into disparagement. Taking into account the satirical character, this would in fact be the core of any examination by the public prosecutor's office and the courts. However the guiding principle is: if in doubt, opt for freedom.

**Question: The courts right up to the German Federal Constitutional Court?**

Answer: Certainly. I haven't experienced a case of this intensity before. The way Böhmermann demonstrates the boundaries is highly political and makes the intervention part of the satire. At the end of the day, Karlsruhe may have to redefine the boundaries here.

**Question: Now what happens next?**

Answer: In the next step, the German federal government would have to grant what is known as the authorization to prosecute. This is because the German Criminal Code reserves the decision for the government as to when the defamation of a foreign head of state in Germany is pursued particularly rigorously and when not. This raises additional questions: are you allowed to insult a despot but not the leader of a friendly state? What would have happened in the case of (France's President François) Hollande, and then in the case of (North Korea's ruler) Kim Jong Un? Why does this special criminal law still exist at all? If Böhmermann were intending to take this to its extremes, he would have succeeded in something extraordinary. This may not protect him against prosecution.

**Question: Erdogan has now also filed a criminal complaint on grounds of defamation as a private individual. What implications does this have for the case?**

This means that the responsible public prosecutor's office now has to examine, without the need for authorization by the federal government, whether a case of insult has been committed (pursuant to Sections 185 ff. of the German Criminal Code). Consequently, there will in any case be an examination of Böhmermann's satire in terms of criminal law even if the federal government should not ultimately grant authorization.

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