[DE] Federal Constitutional Court rules on admissible social media criticism of the government

IRIS 2024-6:1/23

Sven Braun
Institute of European Media Law

On 11 April 2024, in a legal dispute concerning a tweet by journalist Julian Reichelt on the X social media platform, in which he claimed that the German federal government had paid millions of euros in development aid "to the Taliban", the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) ruled that the lower court had wrongly classified the tweet as a false statement of fact without taking the context into account and that its decision should therefore be overturned. The lower court had ignored the importance of freedom of expression in relation to criticism of the government. The Constitutional Court's decision is particularly relevant because it contains fundamental provisions on the assessment of attention-grabbing headlines in social media, which should be viewed in their overall context, taking any linked content into account.

In August 2023, Julian Reichelt published the following tweet, criticising the government, on the X platform: "Germany has paid 370 MILLION EUROS (!!!) in development aid to the TALIBAN (!!!!!!) in the last two years. We live in a madhouse, in an absolute, complete, total, historically unique madhouse. What kind of government is this?!" The message ended with a link to an online news portal with the headline "Germany is again paying development aid to Afghanistan". Two federal ministers were also pictured in a cover photo displayed beneath the link. The federal government filed for an injunction against the tweet on the grounds that it was a false statement of fact likely to endanger public trust in the government. In the first instance, the *Landgericht Berlin* (Berlin Regional Court) considered that the tweet was not a statement of fact, but an exaggerated criticism of the government. In the second instance, however, the *Kammergericht Berlin* (Berlin Higher Regional Court) ruled that the tweet was a false statement of fact because the federal government supported non-governmental organisations such as the World Bank and UNICEF in Afghanistan rather than the country's rulers. In particular, the content of the linked article did not contradict this interpretation because it was not apparent to readers without further "research". According to the established case law of the Federal Constitutional Court, such false statements of fact did not merit the same level of protection under freedom of expression as value judgements, so when weighed against competing interests they should often – as in this case – carry less weight. Furthermore, the description of the federal government as a "madhouse" unlawfully harmed the government's public image. The Berlin Higher Regional Court therefore banned

the disputed tweet. Believing that his fundamental right to freedom of expression, enshrined in Article 5(1) of the *Grundgesetz* (Basic Law) had been violated, Reichelt appealed to the Federal Constitutional Court.

However, the Federal Constitutional Court ruled that, taking into account the recognisable context of the tweet, it did not constitute a false statement of fact but an opinion. The Berlin Higher Regional Court had only based its decision on the wording of the statement, ignoring its linguistic context and other accompanying circumstances. The link to the article in the online news portal, including a photo, created a recognisable link between the tweet and the article. The Berlin Higher Regional Court had therefore wrongly failed to take other possible interpretations into account. For example, the article could be understood as meaning that, although the federal government had not made any payments directly to the Taliban, its payments could have indirectly benefited those in power in Afghanistan. The Berlin Higher Regional Court had also lost sight of the fact that statements were also protected if they mixed facts and opinions, in which case an overall assessment was required. On the basis of the Federal Constitutional Court decision, the Berlin Higher Regional Court, whose ruling was overturned, must now decide, after weighing up all the circumstances, whether or not the post on X is protected under Article 5(1) sentence 1 of the Basic Law. The Federal Constitutional Court stressed that it would need to bear in mind that the state had no fundamental right to protection of honour and that legal entities under public law only had limited legal protection against statements that diminished their reputation. In particular, the state must, in principle, be able to tolerate harsh, polemical criticism, while protection from verbal attacks must not lead to the state being shielded from public criticism.

The Federal Constitutional Court decision on the scope of lawful criticism of the government in social media sets an important precedent for the protection of freedom of speech, both in terms of the need to take into account the context of an expression of opinion and, in view of the democratic importance, of allowing governments to be criticised. The Federal Constitutional Court cannot itself decide whether a statement is lawful or not, since that is the task of the specialised courts. However, as it also stressed, a more intensive examination must be carried out in relation to the interpretation of freedom of expression in order to avoid incorrect weighting of rights and ensure the substance of fundamental rights is not affected.

Bundesverfassungsgericht , Beschluss vom 11. April 2024, Aktenzeichen 1 BvR 2290/23

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2024/04/rk20240411_1bvr229023.html

Federal Constitutional Court decision of 11 April 2024, case no. 1 BvR 2290/23