[DE] Federal Constitutional Court on the difference between expression of an opinion and defamatory criticism

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In a decision of 14 June 2019, the Bundesverfassungsgericht (Federal Constitutional Court) issued a decision explaining the conditions under whichthe expression of an opinion should be categorised as defamatory criticism, meaning it was not protected under the freedom of expression enshrined in Article 5(1)(1) of the Grundgesetz (Basic Law). Thedecidingfactor was whether the remarks had a factual basis. Whether they represented an insult under criminal law depended on the balance between freedom of expression and the personality rights of the individual concerned.

In the case at hand, the plaintiff in a civil court procedure had been fined for insulting the judge. He had criticised the judge's handling of the case, saying that: "The way the judge influenced the witnesses and conducted the proceedings, and her attempt to exclude the plaintiff from the proceedings" was highly reminiscent of "the court procedures of Nazi special courts." He also compared the judge's handling of the case to a "medieval witch trial." Two appeals against the sentence had already been rejected.

The Bundesverfassungsgericht cancelled the fine and referred the case back to the Landgericht Bremen (Bremen District Court). It decided that the complainant's fundamental right to freedom of expression had been violated by the lower-court judgments because his remarks had wrongly been categorised as defamatory criticism. Comments could only be classified as defamatory criticism if they were not – as was usually the case – part of a factual discussion but were, in substance, aimed solely at defaming a person, such as in the context of a private feud; the reason for and context of the remarks should therefore be determined.

In principle, deciding whether comments should be punished as an insult under Article 185 of the Strafgesetzbuch (Criminal Code) or whether they were protected by freedom of expression involved a weighing-up process. This process can only be dispensed with if the comments are categorised as '*Schmähkritik*' (critical defamation) or '*Formalbeleidigung*'(an insult resulting from the form of the comment) because freedom of expression often takes second place to the need to protect a person's honour. However, for this reason, strict, independent benchmarks must be applied when categorising a comment as defamatory

criticism.

In this case, the Bundesverfassungsgericht did not consider these conditions to be met. The comments had not constituted pure defamation of the judge, but criticism of her handling of a civil court procedure. Historical comparisons with National Socialism or allegations of a ‘medieval’ attitude could carry particular weight in the weighing-up process, but did not, in themselves, constitute defamatory criticism. The right to heavily criticise measures taken by public authorities without the fear of state sanctions was a central component of the freedom of expression.

Bundesverfassungsgericht, Beschluss der 2. Kammer des Ersten Senats vom 14. Juni 2019- 1 BvR 2433/17 -, Rn. (1-23)

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2019/06/rk20190614_1bvr243317.html;jsessionid=9028565B37092757CB94B142C7D6510E.2_cid394

Federal Constitutional Court, Order of the Second Chamber of the First Senate of 14 June 2019 - 1 BvR 2433/17 -, margin (1-23)