Developments

Freedom of Speech for Public Officials vs. the Political Parties' Right to Equal Opportunity: The German Constitutional Court's Recent Rulings Involving the NPD and the AfD

By Thomas Kliegel[*]

Abstract

Public Officials are bound by the fundamental rights when they are acting in their political function. Acting as such they cannot, in general, claim the freedom of speech for themselves as normal citizens do. If they give statements regarding other political parties they have to abide by the principle of neutrality. Statements that could be understood as negative will be – especially if they are made during the election process – a violation of the right of political parties to equal opportunity, which is an indispensable element of the free and open process of forming popular opinion. The delineation of whether a public official is appearing as such, as a "party politician" or "private individual" can, however, be difficult and it is the obligation of the public official to leave no doubt about the role he is exercising. Different from any other public official the Federal President needs not comply with the principle of neutrality. He has a broad margin of assessment and only transgresses his legal boundaries if he violates the integrative task of his office in an arbitrary manner.

[*] Dr. iur., Judge at the District Court (*Landgericht*) in Essen, Germany. From 2013-2016 the author was a Judicial Clerk to Justice Peter Müller of the German Federal Constitutional Court. Justice Müller was the reporting Justice in 2 BvE 2/14 and 2 BvQ 39/15. This article reflects the author's personal opinions. The author expresses his gratitude to Dr. Andrew Cannon, Deputy Chief Magistrate, Magistrates Court of South Australia, and Dipl.-Jur. Christopher Hunt, for their very helpful remarks.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

A. Introduction

The Second Senate of the German Constitutional Court in two judgments - delivered on 10 June 2014 and 16 December 2014 - rejected applications of the National Democratic Party (*Nationaldemokratische Partei Deutschlands* [NPD]) against Federal President Joachim Gauck and the Federal Minister for Family, Senior Citizens, Women and Youth Manuela Schwesig because of negative statements they made during electoral campaigns concerning the NPD.[1]

On 10 June 2014,[2] the Court held that within the boundaries of the Constitution and the laws the Federal President is generally free to decide how to perform the representational functions and integrative tasks connected to his office, as long as he does not take sides in an arbitrary manner. On 16 December 2014,[3] the Court then held that the standards applying to statements made by the Federal President regarding political parties as well as to judicial review of such statements are not transferable to statements made by members of the Federal Government. Unlike the Federal President, members of the Federal Government must ensure, when participating in political competition, that they do not use the means and possibilities of their office, because if they do, they are bound by the principle of neutrality. With these two judgments *Karlsruhe* laid down the general principles applying to statements by public officials and drew a clear distinction between the Federal President and members of the Federal Government. However, these principles as well as the distinction leave room for interpretation and have been intensively discussed by legal scholarship. Besides, one must not forget that these judgments were delivered, while the party-ban proceedings against the NPD were still pending.

The first application of the general principles was not long in coming: On 7 November 2015,[4] the Second Senate granted a preliminary injunction in favor of the party "Alternative for Germany" (*Alternative für Deutschland* [AfD]) and against the Federal Minister for Education and Research Johanna Wanka because of a negative press release on the homepage of the Ministry regarding an upcoming assembly of the AfD.

---

[1] The author has provided more extensive analysis of these court rulings in German. *See* Thomas Kliegel, *Äußerungsbefugnisse von Amtsträgern gegenüber politischen Parteien*, *in* LINIEN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS 413 (Scheffczyk & Wolter eds., 2016).

[2] Federal President Case, 136 BverfGE 323 (2014) [hereinafter *Federal President Case*].

[3] Schwesig Case, 138 BVerfGE 102 (2014) [hereinafter *Schwesig Case*].

[4] Wanka Case, BVerfG -- 2 BvQ 39/15, November 7, 2015, *available at* http://www.bverfg.de/SharedDocs/Entscheidungen/DE/2015/11/qs20151107_2bvq003915.html [hereinafter *Wanka Case*].

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

The following note starts with describing the basis and the development of the principles laid down by the Court (Section B.). This introductory part is followed by a brief résumé of the facts of the three recent cases (Federal President, Minister Schwesig, and Minister Wanka) in Section C and a short summary of the judgments and the preliminary injunction in Section D. The focus is laid on Section E. in which the critique and impact of the decision on the law will be described and valuated. The note closes with a short conclusion (Section F.).

B. Origin and Development of the Principles

It was the first time in history the German Constitutional Court was called upon to decide on the constitutionality of (oral) statements made by public officials that may have harmed the political parties' right to equal opportunity. The question of political parties' right to equal opportunity in the face of other barriers or burdens had, however, already been the subject of several decisions by the Court. One fundamental decision in this line of cases was the 1977 judgment on public relations of the Federal Government before elections to the *Bundestag* (Federal Parliament).[5] Revisiting that important decision lays an important foundation for the discussion of the Court's more recent cases.

I. The 1977 Judgment on Public Relations of the Federal Government

During the federal electoral campaign of 1976 the German Press and Information Office and the publications divisions of several federal ministries distributed millions of leaflets, pamphlets, and brochures disclosing the records of and the benefits conferred by various governmental agencies. Although some of these publications were informational, many advanced the cause of the SPD-FDP coalition government. In addition, funds allocated to the publications divisions of various agencies were used to take out advertisements in prominent magazines and newspapers, listing the accomplishments of the incumbent government. In *Organstreit*[6] proceedings, the opposition party CDU challenged these publications and expenditures.

---

[5] *See, e.g.,* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 177 (2d ed. 1997).

[6] An application to the Federal Constitutional Court may be filed if supreme federal organs, or actors that are equivalent to such organs, disagree on their respective rights and obligations under the Basic Law. This type of proceeding is necessary because the organs have no authority over each other. *Organstreit* proceedings make it possible for constitutional organs to judicially scrutinize each other's actions; thus, *Organstreit* proceedings protect political decision-making by enforcing the separation of powers.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

The Court held that elections can confer democratic legitimation in the sense of Article 20(2)[7] of the *Grundgesetz* (Basic Law or Constitution) only if they are free.[8] Not only must the actual act of casting the ballot remain free of coercion and undue pressure as stipulated by Article 38(1)[9] of the Basic Law, but the voters must be able to form and express their opinions freely and openly.[10] The Court explained that the formation of the popular will takes place through the act of voting, rising from the people to the constitutional organs, and not *vice versa*. The decisions of the majority can be regarded as the opinion of all only if the majority emerges in the free and open process of forming popular opinion. The Court further insisted that, during the decision-making process the majority must bear in mind the common good, particularly the rights and interests of the minority, whose chances of becoming a majority must neither be taken away nor curtailed.[11]

The Court also concluded that the guarantee of equal opportunity in the competition for votes is an indispensable element of the free and open process of forming popular opinion. In a modern parliamentary democracy, this process requires the existence of political

---

[7] Article 20 of the German Basic Law [Constitutional Principles - Right of Resistance]

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

[8] Public Service Case, 44 BVERFGE 125, 139 (1977).

[9] Article 38 of the German Basic Law [Elections]

(1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.

(2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.

(3) Details shall be regulated by a federal law.

[10] Party Finance I Case, 20 BVERFGE 56, 97 (1966).

[11] Public Service Case, 44 BVERFGE 125, 139 (1977).

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

parties, which are granted a constitutional status by the Basic Law in Article 21[12]. This provision guarantees their free formation and the participation in forming the popular will. It also lays down rules to secure their equal rights and chances in the competition for votes.[13] Those principles apply to the process of the election itself, as well as the preparation for the election.

The right of political parties to participate in the formation of popular opinion is violated when state institutions or agencies intervene in the electoral campaign in favor or to the detriment of a political party.[14] Such an intervention violates the principle of neutrality of the state and the integrity of forming the popular will through elections and other votes. State organs can have a strong effect on the formation of popular will and public opinion and by their conduct influence voters' decisions. Because of this ability they must not use their official capacity to try to influence the formation of the popular will by employing additional special measures before or during elections in order to secure or gain power over these organs. They are constitutionally barred from identifying themselves, as state organs, with political parties during electoral campaigns and from supporting or opposing political parties with public funds. This applies in particular to attempts to influence the decision of voters through advertising. Organs of the state must serve everyone and remain neutral in electoral campaigns. This obligation of neutrality applies to all parties, as long as the Federal Constitutional Court has not declared them unconstitutional. Of course, this does not prevent a member of the Federal Government bureaucracy from entering the electoral campaign on behalf of a political party in a non-official capacity.

Based on these principles the Court proceeded to invalidate the public relations measures taken by the government during the 1976 federal electoral campaign. The Court concluded

---

[12] Article 21 of the German Basic Law [Political parties]

(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.

(2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.

(3) Details shall be regulated by federal laws.

[13] Public Service Case, 44 BVERFGE 125, 139 (1977).

[14] *Id*. at 143-144.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

that the publications and expenditures contravened the idea of democracy (Article 20[15]), violated the principle of equality among political parties (Article 21[16]), and contravened the principle of free and equal elections (Article 38[17]).

II. Development of the New Principles

Taking this judgment as the basis, the Court developed (new) standards for statements by public officials that concern political parties. In the first judgment on the statement by the Federal President, the Court granted the President a wide margin regarding his public statements and justified it with his special representative and integrative role in the German democracy. However, the judgment was delivered, while some public officials in Germany tried to make a point against right-wing or even extremist parties using harsh, sometimes offensive language. Especially the NPD filed applications to the constitutional and administrative courts of the German states (*Länder*), where the party most often lost.[18] The courts' standards, though, still awaited clarification. Furthermore, some of the courts made reference to the standards of the judgment of the Second Senate regarding the Federal President, but did not sufficiently take into account that those standards might not apply to other public officials.[19] So when the NPD filed its application against Minister Schwesig the Constitutional Court used this opportunity to clarify the standards concerning statements made by public officials on political parties and - most important - drew a clear distinction between the Federal President and members of the Federal Government. The standards of the judgment on Schwesig were confirmed in the preliminary injunction against Minister Wanka.

---

[15] *See supra* note 7.

[16] *See supra* note 12.

[17] *See supra* note 9.

[18] *See, e.g., Verfassungsgerichtshof Rheinland-Pfalz*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT RECHTSPRECHUNGS-REPORT 665 (2014); *Thüringer Verfassungsgerichtshof*, Judgment on December 3, 2014 – VerfGH 2/14 –, juris; *Saarländischer Verfassungsgerichtshof*, Judgment on July 8, 2014 - Lv 5/14 - BeckRS 2014, 53505; *Verwaltungsgerichtshof Kassel*, Court Order on November 24, 2014 - 8 A 1605/14 - BeckRS 2015, 42621; *Verwaltungsgerichtshof Kass*el, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT RECHTSPRECHUNGS-REPORT 815 (2013). *See also*, Kliegel, *supra* note 1, at 420-423.

[19] *See, e.g., Saarländischer Verfassungsgerichtshof*, *supra* note 18. Although the court recognized the difference between the Federal President and holders of government office, it cited the judgment of the Second Senate and drew difficult comparisons.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

C. Facts of the Three Recent Cases: Federal President, Minister Schwesig, and Minister Wanka

I. Statement by the Federal President (Case 2 BvE 4/13)[20]

In August, 2013, the Federal President took part in a discussion with several hundred vocational school students between the ages of 18 and 25 in a school in Berlin-Kreuzberg.[21] During the event—which had the motto "22 September 2013 – Your Vote Counts!"—the President emphasized the importance of free elections for democracy and encouraged the students to become involved in social and political activities. In response to a student's question the President addressed certain incidents related to protests that members and supporters of the far-right National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands* – NPD) had launched against an asylum accommodation center in Berlin-Hellersdorf. The press coverage of the discussion quoted the President as having said the following: "We need citizens who take to the streets and show the nutcases their limits. All of you are called upon to do so;" and "I am proud to be the President of a country in which citizens defend their democracy."

The NPD argued in an *Organstreit*[22] complaint filed before the Constitutional Court that this statement violated its right to equal participation laid down in Article 21(1)[23] and Article 38(1)[24] of the Basic Law.[25]

II. Statement of Minister Schwesig (Case 2 BvE 2/14)[26]

In June, 2014, Manuela Schwesig – the Federal Minister for Family, Senior Citizens, Women and Youth – took part in the opening of the "Summer Academy for Democracy, Cultural

---

[20] *See* Federal President Case, at 324–27.

[21] The facts are set out in the judgment. *See* Federal President Case, at 324–27.

[22] *See supra* note 6.

[23] *See supra* note 12.

[24] *See supra* note 9.

[25] *See supra* note 21.

[26] *See* Schwesig Case, at 103–07.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

Openness and Tolerance" in Weimar during the run-up to the 2014 elections in the federal state of Thuringa. On the sidelines of the event Minister Schwesig gave an interview to a regional newspaper concerning different topics, including the fight against right-wing extremism.[27] Asked how one should deal with motions filed by the NPD – in the event that the far-right party were to obtain seats in the legislature – Schwesig said: "But I will support the Thuringian campaign to ensure that such a situation does not even arise. It must be the top priority to prevent the NPD from winning seats in the legislature."[28] Context and other information added to the interview referred to Schwesig's public office and to the fact that she is a member of the Social Democratic Party of Germany (*Sozialdemokratische Partei Deutschlands* – SPD).

The NPD argued in an *Organstreit*[29] complaint filed before the Constitutional Court that this statement violated its right to equal participation laid down in Article 21(1)[30] of the Basic Law.

III. Statement of Minister Wanka (Case 2 BvQ 39/15)[31]

The right-wing political party Alternative for Germany (*Alternative für Deutschland* – AfD) announced an assembly in Berlin to be held on November 7, 2015. The event's motto was "Red card for Merkel - Asylum has limits."[32] Days before the assembly was to take place, on November 4, 2015, Johanna Wanka – the Federal Minister for Education and Research – published a press release on the homepage of the Ministry containing the following statement: "Red card for the AfD. Johanna Wanka on the planned assembly of the AfD: 'The red card should be shown to the AfD and not the Chancellor. Björn Höcke and other speakers of the party aid and abet radicalism in society. Such actions award unacceptable support to right-wing extremists who openly incite to racial hatred.'"[33]

---

[27] Gerlinde Sommer, *Schwesig: "Ziel muss sein, dass die NPD nicht in den Landtag kommt"*, THÜRINGISCHE LANDESZEITUNG, June 25, 2014, *available at* http://www.tlz.de/web/zgt/politik/detail/-/specific/Schwesig-Ziel-muss-sein-dass-die-NPD-nicht-in-den-Landtag-kommt-1783547207.

[28] *See* Sommer, *supra* note 27.

[29] *See supra* note 6.

[30] *See supra* note 12.

[31] *See* Wanka Case, at paras. 1–5.

[32] *Id*.

[33] *Id*.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

The AfD argued in a motion for provisional measures filed before the Constitutional Court that this statement violated two constitutional guarantees: its right to equal participation laid down in Article 21(1)[34] of the Basic Law; and its freedom of assembly under Art. 8 of the Basic Law. The AfD demanded the removal of the statement from the Ministry's homepage.

D. Summary of the Judgments and the Preliminary Injunction

I. 2 BvE 4/13 (Federal President)[35]

The Second Senate of the Constitutional Court held that the statements made by the Federal President were not objectionable under constitutional law and, therefore, did not violate the NPD's right to equal opportunity for political parties.

1. General Principles

The first and most prominent justification the Second Senate offered for its judgment is the special constitutional function the Basic Law ascribes to the Federal President: The President represents the state and the people of the Federal Republic of Germany both externally and internally and is called upon to embody the unity of the state. The Court explained that the holder of the office of Federal President is generally free to decide how to give specific shape to the representational functions and integrative tasks connected with the office.[36] If an important task of the Federal President consists in making the unity of the polity visible by his appearances in public, and to further that unity via the authority of this office, then he must have a broad margin of assessment in this respect. The Federal President can only live up to the expectations connected to the office, the Court reasoned, if he can respond to developments in society and to general policy challenges according to his assessment. In so doing the President is free to choose the topics and to decide what form of communication is adequate in the given context.[37] For these reasons the Court concluded that the Federal President does not require statutory authorization, beyond the authority to make public

[34] *See supra* note 12.

[35] *See* Federal President Case, at 330–38.

[36] *Id*. at 332.

[37] *Id*.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

statements that is inherent in his office, when he refers to groups or persons while pointing out undesirable developments or warns of dangers in society.[38]

The Court acknowledged, however, that the Federal President's actions are limited by the Constitution and the law.[39] These limits include the President's duty to respect a number of constitutional rights, such as the political parties' right to equal opportunity under Article 21(1)[40] of the Basic Law and, insofar as equal opportunity in elections is concerned, Article 21(1) in conjunction with Article 38(1)[41] or Article 28(1)[42] of the Basic Law. With this in mind the Court conceded that, Presidential statements containing negative judgments regarding a political party's aims and activities could have a negative effect on the party's equality of opportunity in political competition.[43]

Yet, even with these constitutional limits in mind, the Court insisted that its ability to police the realm of Presidential statements must also be limited. The Court concluded that when reviewing statements by the Federal President that affect the political parties' equality of opportunity, it must take into account the fact that it is exclusively for the Federal President

---

[38] *Id*.

[39] *Id*. at 333.

[40] *See supra* note 12.

[41] *See supra* note 9.

[42] Article 28 of the German Basic Law [Land constitutions – Autonomy of municipalities]

(1) The constitutional order in the Länder must con form to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law. In each Land, county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections. In county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accord with European Community law. In municipalities a local assembly may take the place of an elected body.

(2) Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by a law, associations of municipalities shall also have the right of self-government according to the laws. The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based up on economic ability and the right to establish the rates at which

these sources shall be taxed.

(3) The Federation shall guarantee that the constitutional order of the Länder conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article.

[43] *See* Federal President Case, at 333.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

to decide how to perform the functions and integrative tasks connected to the office.[44] The extent to which the Federal President respects the concept of a "neutral Federal President" cannot be subject to judicial review, neither as an abstract matter nor in concrete cases. But the Court accepted that it would contradict the principle of the rule of law if political parties, whose right to equal opportunity is an essential element of the democratic basic order, had no legal protection vis-à-vis the Federal President.[45] Faced with this constitutional dilemma the Court concluded that it is both necessary and sufficient to judicially review the Federal President's negative remarks about a political party to determine whether he made them in a way that clearly neglects the integrative task of his office, and thus in an arbitrary manner.[46]

2. Application of the Principles to the Case

Applying this standard and giving the President's statements an objective interpretation, the Court concluded that the references to resisting the NPD did not demonstrate support for or approval of violent protests against the applicant.[47] At the beginning of his remarks, the Court emphasized, the Federal President explicitly pointed out that even tearing off posters was unacceptable.[48] This convinced the Court that there could be no doubt about his clear disapproval of violent conflicts with the applicant. Additionally, the Court found it significant that, in reference to the constitutional concerns raised by the NPD, the President referred to the importance of the freedom of expression and assembly and called for full participation in the political struggle of opinions. The Court explained that the President has the authority to issue these statements.[49]

The President's use of the term "nutcases" (*Spinner*) in the specific context, the Court explained, was also unobjectionable under constitutional law. With this term, the President made a negative judgment about the applicant and its members and supporters. If considered in isolation and out of context, the Court conceded, the term might be regarded as defamatory and could indicate an objectionable discrimination against the persons

[44] *Id*. at 336.

[45] *Id*.

[46] *Id*.

[47] *Id*. at 336–37.

[48] *Id*. at 337.

[49] *Id*.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

against whom the statement was directed. Here, however, from the Court found that the term was less offensive when considered in the context of the overall style of the President's statements, throughout which he used the term "nutcases" and terms such as "ideologists" and "fanatics" to refer to people who have not learned the lessons of history and who, unimpressed by the dreadful consequences of National Socialism, hold nationalist and anti-democratic opinions.[50] The Court reasoned that the exaggeration contained in the term "nutcases" was intended to make clear to the participants in the discussion that the persons thus labeled would never change; it was also meant to emphasize that they hoped in vain to succeed with their ideology if the citizens "show them their limits." Building on the lessons to be learned from the tyrannical rule of National Socialism, the Court concluded that the President was merely calling for the involvement of citizens against political views that pose threats to the free and democratic basic order. In so doing, the President was merely identifying a way of dealing with these views that conforms to the Basic Law. For all of these reasons the Court held that the President did not cross the boundaries regarding negative remarks about political parties set by the Constitution.[51]

II. 2 BvE 2/14 (Minister Schwesig)[52]

1. General Principles

On the basis of the Court's 1977 decision (described above) and the decision concerning the Federal President, the Court again emphasized that the right of political parties to equal participation in the political process is violated if state organs seek to influence the political process by favouring or disfavouring individual parties. But the standards the Court applied to statements made by the Federal President are not applicable to members of the Federal Government because they are directly derived from the particular role the Basic Law assigns to the Federal President.[53] As opposed to the Federal Government and its members, the Federal President does not participate directly in the contest with other political parties and he does not possess comparable means to influence public opinion.

Due to the Federal Government's status under the Constitution and to its powers and functions, public statements by its members must be reviewed by a different standard. The Court reasoned that the Federal Government exercises functions of governing the state, which include the power to maintain public relations. This function encompasses, *inter alia*,

---

[50] *Id*.

[51] *Id*. at 338.

[52] *See* Schwesig Case, at 108–24.

[53] *Id*., at 111–13.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

the power to present and explain the government's policies as well as to inform the public about questions of general interest - even outside of its own political actions. In exercising these functions, the Court explained, the Federal Government is bound by the fundamental rights as well as by law and order (Articles 1(3)[54] and 20(3)[55] of the Basic Law). This fact alone bars the government from engaging in what, in a different context, would be judged as "vile criticism" in the meaning of §§ 185 *et seq*. of the Penal Code.[56] This aspect notwithstanding, the Court insisted that Federal Government is obliged to respect the political parties' right to equal participation that is secured by the first sentence of Article 21(1)[57] of the Basic Law as well as the resulting principle of neutrality.[58]

Since the Government's agenda reflects the positions of the parties of which it is composed, and since the public associates its actions with these parties, public perception of such actions influences the governing parties' chances of success in the political contest. This fact is part of the free democracy envisaged by the Basic Law and must be accepted as such.[59] The Court insisted, however, that the Federal Government must refrain from any actions that are apt to influence the political contest and are not part of its official functions.[60] The Constitution bars the government from identifying with any political party and from using the possibilities and state assets at its disposal to aid or hinder any party in its work.[61] The Court insisted that the same standards apply to individual members of the Federal

---

[54] Article 1 of the German Basic Law [Human dignity – Human rights – Legally binding force of basic rights]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

[55] *See supra* note 7.

[56] *See* English version of the German Penal Code under https://www.gesetze-im-internet.de/englisch_stgb/.

[57] *See supra* note 12.

[58] *See* Schwesig Case, at 114.

[59] *Id*., at 115.

[60] *Id*.

[61] *Id*.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

Government.[62] The Court acknowledged that this standard constitutes a fine-line because government ministers and other high-ranking officials cannot be barred from participating in political competition outside their official capacity. Such a limitation would create the opposite problem and constitute an unjustified form of discrimination on the governing parties.[63]

The Court nevertheless affirmed that those in government office who participate in political competition must ensure that in doing so they do not make use of the means and possibilities of their office.[64] Of course it is impossible to strictly place actions of government members in the categories of "Federal Minister," "party politician," or "private individual." Public perception, too, views holders of government office both as Federal Ministers and as members of their party. The role to which any particular statements belong, must be established on a case-by-case basis. Statements will usually fall into the field of "Federal Minister" if they make express references to the government office or if they exclusively concern actions of the respective ministry. The same goes for statements that are made through official channels such as press releases or the official homepage of the public authority. A statement's context may also warrant subtler classification: e.g. using state insignia or public funds or making the statement on the ministry's premises. The same applies to statements made in the context of government events or events in which the minister participated exclusively in his or her official capacity. Participating in party events like conventions etc., however, qualifies as mere participation in the political contest.[65]

The Court concluded that events of general political discussion (such as talk shows, discussions, and interviews) must be examined in a differentiated manner: Holders of government office may participate in any one event both in their official capacity and as private individuals or members of their party.[66] Limiting holders of government office to official statements would violate the parties' right to equal participation. But statements that make specific use of the office's authority must comply with the principle of neutrality. The question of whether the principle of neutrality applies and whether it has been respected, is subject to complete judicial review by the Federal Constitutional Court.[67]

---

[62] *Id*., at 116–17.

[63] *Id*., at 117.

[64] *Id*., at 117–19.

[65] *Id*. at 119.

[66] *Id*., at 119–20.

[67] *Id*., at 120–21.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

2. Application of the Principles to the Case

Applying these standards, the Court held that the challenged statement did not violate the NPD's right to equal participation under Article 21(1)[68] of the Basic Law. Minister Schwesig's statements, the Court concluded, constituted a mere act of participation in the political contest and were not subject to the principle of neutrality under the first sentence of Article 21(1) of the Basic Law. If the NPD wishes to counter such statements, the Court explained, the party must do so using the means of political competition.

III. 2 BvQ 39/15 (Minister Wanka)[69]

Referring to the Court's 1977 decision and the two judgments discussed above, the Court repeated that a violation of the right of political parties to equal participation in the political competition occurs when holders of government office make use of the means and opportunities associated with their office in the political struggle of opinions. It is especially problematic that these resources are not available to other political competitors.[70]

The Court held that the press release published by Minister Wanka appeared on the ministry's homepage without any link to the assigned tasks of the ministerial office. The fact that the press release did not refer to the ministerial office was not enough to avoid constitutional problems in this case. The Court expressed concern about the fact that the Minister used official resources by spreading the statement over the ministerial homepage. Of course, these are resources that are available to her only because of her government office and that are not available to political competitors. For these reasons the Court could not exclude the possibility of a violation of the AfD´s right to equal participation in the political competition.[71]

The Court also could not exclude the possibility of a violation of the basic right of freedom of assembly secured by Article 8(1)[72] of the Basic Law, because the Minister voiced her

---

[68] *See supra* note 12.

[69] *See* Wanka Case, at paras. 6–15.

[70] *Id*., at para. 9.

[71] *Id*., at para. 10.

[72] Article 8 of the German Basic Law [Freedom of assembly].

(1) All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

opposition against the assembly of the AfD explicitly. The Court concluded that the press release could therefore be understood as an official demand for boycott.[73]

Against this background and after balancing the consequences the Court granted the requested provisional measures. If the preliminary injunction were not issued but the substantive *Organstreit*[74] were later to be successful, the Court explained, then the rights of the AfD would be severely violated. If the preliminary injunction were issued but the *Organstreit* were unsuccessful, then the Minister would not be prevented from repeating the uttered opinion.[75]

E. Critique and Impact of the Decision on the Law[76]

I. The Person Making the Statement

In these three recent judgements, the Second Senate drew a very clear distinction between, on the one hand, statements[77] made by the Federal President and, on the other hand, statements by holders of government office (or other public officials)[78] concerning political parties. This fundamental distinction was justified by reference to the different

---

(2) In the case of outdoor assemblies, this right may be restricted by or pursuant to a law.

[73] *See* Wanka Case, at para. 12.

[74] *See supra* note 6.

[75] *See* Wanka Case, at para. 15.

[76] *See, e.g.*, Kliegel, *supra* note 1, at 424–37.

[77] This case-law of the Second Senate affects, of course, written as well as oral statements. Differently Mandelartz, *Informations- und Öffentlichkeitsarbeit der Bundesregierung*, DIE ÖFFENTLICHE VERWALTUNG 326, 328 (2015), who draws an unnecessary distinction at this point.

[78] This case-law of the Second Senate is not limited to holders of government office. All public officials with an important office and the ability to make public statements that could influence the decision of voters, are bound by the established rules. That counts, of course, for mayors if they make negative statements concerning political parties. *See Verwaltungsgericht Düsseldorf*, Court Order on January 9, 2015 - 1 L 54/15 -, BeckRS 2015, 40408; *Oberverwaltungsgericht Münster*, Court Order on January 12, 2015 - 15 B 45/15 -, BeckRS 2015, 40521); Barczak, *Die parteipolitische Äußerungsbefugnis von Amtsträgern*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1014, 1019 (2015). Putzer points out correctly that the constitutional situation changes when the mayor refers to non-party organizations. This is neither a question of Article 21 nor of Article 38 of the Basic Law, but might be a violation of the freedom of speech and the freedom of assembly of the affected organization. Putzer, *Verfassungsrechtliche Grenzen der Äußerungsbefugnisse staatlicher Organe und Amtsträger*, DIE ÖFFENTLICHE VERWALTUNG 417, 424-5 (2015). *See also* Barczak, *supra*, at 1019.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

constitutional functions the Basic Law assigns to the Federal President and holders of government office:

The Federal President has a broad margin of assessment when it comes to such statements. This deference is amplified by the limited judicial oversight the Constitutional Court will exercise in these cases. The boundaries of the President's freedom will be transgressed only if the statement contains (criminal) defamation or violates the integrative task of his office in an arbitrary manner.[79] Apart from this, the President's statements need not comply with the principle of neutrality. It is his personal decision, one that is not judicially reviewable, to determine the extent to which he adapts the role model of a "neutral Federal President."[80] Even the use of a usually defamatory term like "nutcases" (*Spinner*) can be justified, the Court held, if the Federal President has good reasons for using it. In the case of the NPD, the Court explained, the President had the good reason that he was combating those who deny the dreadful consequences of National Socialism. For obvious reasons this is a particularly important concern in Germany.[81] In other cases, however, the use of such a term could be a violation of the party´s right to equal opportunity.[82]

Those who occupy government offices, on the other hand, do not benefit from a margin of assessment when they make use of the means and possibilities of their office in order to issue negative comments regarding (other) political parties. In exceptional cases a negative statement of a member of Government concerning a political party can be justified due to governmental responsibilities to provide information, e.g. the Minister of the Interior can inform the public about a political party's unconstitutional activities in the yearly report of the intelligence services.[83] However, the constitutionality of (negative) statements by public

---

[79] Putzer is critical concerning this broad margin, which "will hardly ever be violated in the constitutional reality." *See* Putzer, *supra* note 78, at 421. Barczak disagreed and would limit the broad margin of the Federal President to statements referring to parties or organizations that identify themselves with the NSDAP. *See* Barczak, *supra* note 78, at 1020.

[80] *See* Federal President Case, at 336. Barczak affirmed this position. *See* Barczak, *supra* note 78, at 1020. Tanneberger and Nemeczek were critical. See Tanneberger/Nemeczek, *Anmerkung zu Schwesig*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 215 (2015).

[81] See the disputable *Wunsiedel Case* of the First Senate of the Constitutional Court, which permits (criminal) restrictions of the freedom of speech for statements glorifying the National Socialism. Wunsiedel Case, 124 BVerfGE 300 (2009); critical also Barczak, *supra* note 78, at 1020 (with further references).

[82] *See also* Barczak, *supra* note 78, at 1020.

[83] *See* Putzer, *supra* note 78, at 423; Barczak, *supra* note 78, at 1016–17.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

officials concerning political parties is usually not a question of permissible governmental information activity, but rather of the function or position the speaker is using while making the statement.[84] Holders of government office have therefore generally to refrain from making negative statements concerning political parties if they make specific use of the authority or the resources of their government office. By doing so nevertheless, they violate the principle of neutrality. Moreover, the question of a violation of the principle of neutrality is – in contrast to the Federal President – subject to complete judicial review by the Constitutional Court.

The reason for that is the Federal President's different role. The Court held that the President does not participate directly in the contest with other political parties and does not possess comparable means to influence public opinion. The Government, by comparison, is composed of members of political parties. Their actions as public officials always influence public opinion, so they must refrain from actions influencing the public opinion that are not part of their public office if they do not make it clear that they are acting outside of their official capacity.

The distinction between the President and the government has been criticized.[85] One could also reverse its assumptions and hold that the actions by the Federal President as a neutral figurehead of the country have much more impact on the people than actions by holders of government office, who belong - obviously and discernible - to a certain party.[86] Thus, one could also advocate the theory that because public opinion is more easily influenced by statements made by the Federal President, he should refrain from negative statements concerning political parties. Furthermore, some scholars argue that it is doubtful whether the distinction is really a question of resources.[87] After all, the Federal President also has a reasonable budget at his disposal, and he does not necessarily need it to attract the voters' attention.

---

[84] Barczak views this differently. *See* Barczak, *supra* note 78, at 1016-18. Mandelartz complains that the Court did not clarify whether the statement of Minister Schwesig was made within her competences as Minister for Family, Senior Citizens, Women and Youth. *See* Mandelartz, supra note 77, at 327. This criticism is quite surprising because no Federal Minister can intervene like this in the electoral campaign of one of the states (*Länder*) using the means of his or her office because of his/her competences. This would surely be the case for the Federal Minister for Family, Senior Citizens, Women and Youth. It seems obvious that the statement would have been a violation of the party's right to equal opportunities if Schwesig had used the specific authority of her office.

[85] *See* Putzer, *supra* note 78, at 421; Tanneberger & Nemeczek, *supra* note 80, at 215.

[86] *See* Putzer, *supra* note 78, at 422–23; Tanneberger & Nemeczek, *supra* note 80, at 215.

[87] *See* Tanneberger & Nemeczek, *supra* note 80, at 215.

In the end, however, the argumentation of the Second Senate is consistent and convincing.[88] The Federal President is not part of the fight for votes, does not participate in electoral campaigns, and operates as a neutral figurehead. Even if the Court could have been stricter regarding his very wide margin of assessment,[89] the standards concerning statements made by public officials are undoubtedly necessary limits to their freedom of speech, which they can still exercise in electoral campaigns and in circumstances in which they do not make use of the authority or resources of the office they hold. To illustrate this argument one has only to imagine the Chancellor making public statements in television one week before the federal elections concerning other political parties in a negative way, or even suggesting that the public refrain from voting for a certain party, all while sitting in her office with the insignia of her power in the background, having been introduced as Chancellor of the Federal Republic of Germany. In those circumstances, it would be very clear that the parties' right to equal opportunity is violated. In fact, it is very similar to the case the Court decided in 1977, concerning the production and publishing of informational material in favour of the governing parties. That does not mean that the Chancellor cannot participate in the struggle for votes and in electoral campaigns. Obviously, she can, for example, appear in the federal convention of her party and make negative statements concerning other political parties. In this case, she is clearly participating in the political competition outside of her official capacity. That is important because the right to equal opportunity also prohibits putting the governing parties at a disadvantage for the mere fact that they are governing the country.

II. The Circumstances of the Statement

The delineation of whether the holder of government office is appearing as a "public official," as "party politician," or "private individual" (the distinction of the latter is not relevant for the principle of neutrality) can, of course, be much more difficult than in the given example and sometimes even impossible. Yet it is a necessary delineation[90] that has to be made on a case-by-case basis:[91]

---

[88] *See, e g.,* Barczak, *supra* note 78, at 1017, 1020.

[89] *See* Putzer, *supra* note 78, at 421; Barczak, *supra* note 78, at 1020 (arguing for limits on the wide margin of the Federal President - too strictly - to statements referring parties or organizations that identify themselves with the NSDAP).

[90] *See* Barczak, *supra* note 78, at 1016. Tanneberger and Nemeczek have a different view. *See* Tanneberger & Nemeczek, *supra* note 80, at 216 (criticizing Barczak's "all-or-nothing-solution"). But the separation of the different roles as far as possible is the exact purpose of the judgment.

[91] Schwesig Case, at 118.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

Delineation of some statements is easy. For example, statements that make express reference to the government office concerning actions of the ministry, using official channels (such as ministerial publications, press releases, or the homepage of the ministry). In these cases, the office-holder makes specific use of the authority and/or the resources of his or her office. The circumstances of a statement can also indicate that the means and possibilities of the office are being used, for example, for a statement made on the premises of the ministry, the use of state insignia, or using the ministry's financial resources. It might be possible to clarify that a public official is acting as "party politician," such as when he or she makes an appearance or a speech at a party's convention, appears at a party's event during an electoral campaign, makes a statement on the premises of the head office of the party, or makes a statement with an unambiguous reference to the speaker's party function. The same goes for statements with a clear reference to the private life of the office-holder.

As the *Schwesig* judgment demonstrates, however, it can be very difficult to classify statements made during events that are neither official nor party nor private appointments. Contrary to opinions in legal scholarship,[92] even if a classification of a statement is not possible, a legal solution is available, due to a simple rule of doubt. Such events, which can be talk shows, discussions, or interviews, are mixed events that must be classified depending on the content of the discussion. While one sentence can be strictly official, the other sentence may refer to the private opinion of the public official, and the next question may refer to the person as a party official.[93] It is also common that in events like this the person is introduced as both holder of government office and with a reference to his or her status in a political party. In those cases, the public official is responsible for the public perception of his or her statement. If the topic changes from private or party content to official content, he or she has to make clear that he or she is talking as a party politician or private individual, especially when he or she is attacking a political party.

It is very important to bear in mind that in such cases public officials are not given the benefit of the doubt.[94] Thus, if a negative statement concerning a political party cannot be clearly assigned to the public or party/private function of an office-holder, then it has to be

---

[92] *See* Putzer, *supra* note 78, at 423; Tanneberger & Nemeczek, *supra* note 80, at 216; Krüper, *Anmerkung*, JURISTENZEITUNG 414, 417 (2015); Mandelartz, *supra* note 77, at 329.

[93] Mandelartz disagrees. *See* Mandelartz, *supra* note 77, at 329 (speaking of an artificial separation of one statement, but does not offer a practical solution).

[94] Barczak disagrees. *See* Barczak, *supra* note 78, at 1016. *See also* Putzer, *supra* note 78, at 423. Tanneberger & Nemeczek appear to say that the holder of government office should not be given the benefit of the doubt, which is, in fact, already the case. The reason for rejecting the application was not that Minister Schwesig has been given the benefit of the doubt but that there was no doubt about the role she used when making the statement. See Tanneberger & Nemeczek, *supra* note 80, at 216.

gathered that he or she is acting as a public official using the authority of his or her office and, therefore, is violating the principle of neutrality. Critical opinions in legal scholarship tend to overlook this crucial point and merely speak of the impossibility to differentiate.[95] The rule is simple: When a holder of government office harshly criticizes a political party and leaves the objective debate on a certain topic,[96] then he or she has to be aware of the role he or she plays in this moment. If, due to the nature of the event, this role is not clear, then it is his or her obligation to clarify what role he or she is exercising at the time. Thus, every office-holder can still objectively debate political issues with other parties' politicians without having to be afraid of violating their right to equal opportunity. This goes especially for debates in parliament where the office-holder usually speaks about his or her area of responsibility and where he or she can confront the opposition with factual matters. Of course, in this setting the opposition can reply and defend themselves or attack the speaker in the same arena.[97]

The office-holder may even criticize another party in a way that is harsh, discriminating, and biased. In such cases, which he or she should be able to notice without difficulties, the office-holder has to be sure of the role he or she is exercising. This role is usually evident. The past year shows that the distinction appears to work in practice without greater difficulty. The Constitutional Court had to deal with only one case of a possible violation of a party's right to equal opportunity due to a negative statement of office-holder (the *Wanka Case* – which contains some factual differences).

But it should also be clear that not every use of the means and possibilities of the office signifies that the statement is made in the function of an office-holder. The mere use of the official car, a ministry's driver, or of the official mobile phone does not necessarily imply that the public official is acting in his or her official function. In a difficult and time consuming job it is simply not possible and cannot be expected that the public official changes "his or her entire gear" just for one statement. Therefore, it was not a problem in terms of using the resources of the public office when Minister Schwesig was taken in her official car to the

---

[95] *See* Krüper, *supra* note 92, at 417; Putzer, *supra* note 78, at 423. Contrary to this opinion the legal certainty for holders of government office is not a great issue because it is their decision where and when to attack other political parties in a disparaging way.

[96] It is important to mention that an objective debate on a political topic between politicians is not the subject-matter of the legal question discussed in this article. The statement must always in some way be subjective and evidently take one side and thereby transgress the boundaries of the usual political debate.

[97] This is misunderstood by Tanneberger & Nemeczek, who hold the opinion that real debate is no longer possible in Parliament. *See* Tanneberger & Nemeczek, *supra* note 80, at 216.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

event in Thuringa. Firstly, it was an official appointment and the interview was just a side event.[98] The Minister probably would not have given the interview, at least not in Weimar, had she not been there for the official event. Secondly, a Minister of the Federal Republic of Germany can use his or her official car for private appointments, too; it is, so to speak, part of the job description.[99]

III. The Timing of the Statement

The preliminary injunction the Constitutional Court granted the AfD against Minister Wanka was almost a typical case, taking into account the Schwesig judgment. As this judgment emphasizes, it is a clear indicator of acting in the public function if the office-holder uses official channels – particularly the ministry's homepage – for his or her (negative) statement. The objection of Minister Wanka that her press release concerning the assembly of the AfD made no reference to her governmental office appears rather weak in this context. A press release of the minister on the homepage of the ministry does not need any reference to the minister's office in order to represent an official statement of the minister. It is even doubtful whether the minister was allowed to make an express private statement in form of a press release on the homepage of the ministry. A minister is definitely not allowed to publish statements of his political party as ministerial press releases.

A new legal point is made in this decision because the statement of Minister Wanka was not made in the preparation of an election or during an electoral campaign, but in the context of a (ordinary) public assembly of a political party. Therefore, it is not a combination of Article 21(1)[100] and Article 38(1)[101] of the Basic Law that was jeopardized here. Instead it was a combination of Article 21(1) and Article 8[102] of the Basic Law (the freedom of assembly). That also demonstrates that the case-law of the Second Senate concerning negative statements made by office-holders regarding other political parties is not restricted to statements made during the election process or before, in electoral campaigns.[103] In fact, the principle of neutrality is violated by every negative statement an office-holder makes regarding another political party, if he or she uses means in the political competition that

[98] Mandelartz disagrees. *See* Mandelartz, *supra* note 77, at 328–29 (combining unnecessarily the two separate events into one).

[99] *See* Barczak, *supra* note 78, at 1016.

[100] *See supra* note 12.

[101] *See supra* note 9.

[102] *See supra* note 72.

[103] *See* Wanka Case, para. 9. *See also* Barczak, *supra* note 78, at 1019. *But see* Putzer, *supra* note 78, at 423.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

are only available due to his or her office and that are not available to political competitors.[104] The gravity of the violation of the principle of neutrality and the necessary level of justification rise with the proximity of elections (or a public assembly),[105] which is not a matter of a certain time frame but of a case-by-case decision,[106] taking into account the direct reference to such elections (or the assembly) and, of course, the wording and the extent of the recourse to public resources. The intensity of the Court's review changes according to the changes in these circumstances.

E. Conclusion

In two judgments and one preliminary injunction the Second Senate of the Constitutional Court has laid down the principles applicable to public officials when they make negative statements regarding other political parties. The Federal President possesses a broad margin of assessment, which he abuses only if he violates the integrative task of his office in an arbitrary manner. Government office-holders, to the contrary, have to abide by the principle of neutrality, which does not allow them to make negative statements regarding other political parties in their political function. This is always the case when they make specific use of the authority or the resources of their office. The principle of neutrality becomes stricter when the statement refers to upcoming elections or assemblies of the party that is being attacked. The public official has to ensure that the role he or she is using while making the statement is not misinterpreted by the public. He or she is not given the benefit of doubt. Any statement made in his or her official capacity that could be understood as negative will be a violation of the principle of neutrality and the right of political parties to equal opportunity.

Lastly, it has to be pointed out that the fact that the attacked political party is a right-wing extremist party is of no legal importance whatsoever. There is no "good cause" that justifies a violation of political parties' right to equal opportunity, even if it concerns an allegedly "unconstitutional" party. The Basic Law provides for party ban proceedings to declare a political party unconstitutional. As long as a party is not prohibited by the Constitutional Court, it enjoys the same rights as every other party. Article 21(2)[107] of the Basic Law, which

---

[104] *See* Wanka Case, para. 9.

[105] That goes for written statements as well as for oral statements. *But see* Mandelartz, *supra* note 77, at 327.

[106] *See* Barczak, *supra* note 78, at 1019 (favoring a period of three months before any election, during which time the "rule of the utmost reserve" applies for holders of government office when referring to other political parties).

[107] *See supra* note 12.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press

contains the requirements for a party's prohibition, is an exception to the rule laid down in Article 21(1)[108], which guarantees the freedom of political parties and their right to equal opportunities.[109] Even pending party ban proceedings against the NPD do not allow violations of the party's right to equal opportunity before a judgment banning the party is issued by the Court.[110] This is a core principle of German democracy that is of great importance because - unlike in other democracies - the Basic Law already provides for the possibility to ban a party from the political competition. Any misuse of this *ultima ratio* of the parliamentarian democracy must be prevented.

---

[108] *See supra* note 12.

[109] *See* Henke, *Art. 21*, *in* BONNER KOMMENTAR ZUM GRUNDGESETZ para. 346 (1991). See also the recent judgment of the Constitutional Court rejecting the application to prohibit the NPD BVerfG -- 2 BvB 1/13, January 17, 2017, para. 524, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/01/bs20170117_2bvb000113.html [hereinafter *Prohibition Case*] with an English press release *available at* http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-004.html.

[110] *See* Prohibition case, at para. 526.

https://doi.org/10.1017/S2071832200021908 Published online by Cambridge University Press