**Headnote**

**to the judgment of the Second Senate of 10 June 2014**

– 2 BvE 4/13 –

**Decision regarding the Federal President's authority to make statements concerning political parties.**

BUNDESVERFASSUNGSGERICHT

– 2 BvE 4/13 –

Pronounced
on
10 June 2014
Kunert
*Amtsinspektor*
as Registrar of
the Court Registry

**IN THE NAME OF THE PEOPLE**

**In the proceedings**

**on the**

**application to declare**

that the respondent violated the rights of the applicant arising Article 21 section 1 sentence 1, and Article 38 section 1 of the Basic Law (*Grundgesetz* – GG), by appearing before pupils of a secondary school in Berlin-Kreuzberg on 29 August 2013, and as part of this appearance publicly supported the protests against the applicant in Berlin-Hellersdorf, had referred to the members, activists and supporters of the applicant as "nutcases", and in doing so had breached his obligation to remain neutral in party political matters, to the disadvantage of the applicant, and thereby had interfered in the then ongoing election campaign.

Applicant: The National Democratic Party of Germany (Nationaldemokratische Partei Deutschlands - NPD)
- Federal Association -
as represented by its incumbent
Party leader, Udo Pastörs
of Seelenbinderstr. 42, 12555 Berlin

- Authorised Rechtsanwalt Dipl.-Jur. Peter Richter, LL.M.,
of Birkenstraße 5, 66121 Saarbrücken -

Respondent: The Federal President, The Office of the Federal President,
Spreeweg 1, 10557 Berlin

- Authorised Professor Dr. Joachim Wieland, LL.M.,
of Gregor-Mendel-Straße 13, 53113 Bonn -

the Federal Constitutional Court - Second Senate -

with the participation of Justices

President Voßkuhle,

Lübbe-Wolff,

Gerhardt,

Landau,

Huber,

Hermanns,

Müller,

Kessal-Wulf

held , on the basis of the oral hearing of 25 February 2014:

**Judgment**

**The Application is dismissed.**

**R E A S O N S**

**A.**

The applicant contends that the statements made by the respondent in the run-up to the German federal elections 2013 violated the applicant's equal opportunities in the contest of the political parties. 1

**I.**

1. […] 2

2. […]

3. […] 3

4. […]

*[Excerpt from press release no. 51/2014 of 10 June 2014*:

In August 2013, in a school in Berlin-Kreuzberg, the respondent, the Federal President, took part in a discussion with several hundred vocational school students be-

tween the age of 18 and 25. During the event, which had the motto "22 September 2013 - Your Vote Counts!", the respondent inter alia emphasised the importance of free elections for democracy and encouraged the students to become involved in social and political activities. Answering a student's question, the respondent addressed certain incidents related to protests which the applicant's members and supporters had launched against an asylum accommodation centre in Berlin-Hellersdorf. The press coverage of the discussion quoted the respondent as follows: "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 the citizens defend their democracy."

*End of excerpt.]*

**II.**

[…] 5-18

**B.**

The application is admissible. 19

[…] The applicant contends that the respondent, in his capacity as another constitutional organ (cf Decisions of the Federal Constitutional Court,*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 62, 1 <33>), violated its rights as a political party to equal opportunities in elections pursuant to Art. 21 sec. 1, Art. 38 sec. 1 of the Basic Law (*Grundgesetz* – GG) (cf. BVerfGE 121, 30 <57> with further references; 44, 125 <137> with further references). The applicant objects to a legally relevant measure (cf. BVerfGE 118, 277 <317> with further references) by claiming that the respondent had exceeded the constitutionally permissible limits of his right to freedom of expression, and that in doing so he interfered improperly and to the applicant's detriment in the election campaign. Considering the applicant’s pleading it does not seem to be excluded from the outset that the respondent violated the applicant’s right to equal opportunities in elections with the statements at issue here (cf. BVerfGE 40, 287 <293>; 44, 125 <146>; 63, 230 <243>). […]. 20

**C.**

The application is unfounded. The respondent's statements which the applicant challenges are not objectionable under constitutional law, and therefore do not violate the applicant's right to have the equal opportunities of political parties respected. 21

**I.**

In addition to carrying out the tasks explicitly assigned to him by the Constitution, the Federal President, in his official function, must also act with a view to the integration of the community. The Federal President may generally decide autonomously how to exercise that function; in this respect he has broad discretion (1.). The Federal President's actions are limited by the Constitution and the laws (2). Accordingly, the Feder- 22

al President must respect the right of political parties to participate freely and equally in the formation of the political will of the people under Article 21 GG. However, specific statements by the Federal President, which affect the equality of opportunities of political parties, can only be judicially objected to if the Federal President uses these statements to take sides in a way that evidently neglects the integrative task of his office, and thus takes sides arbitrarily (3.).

1. The Federal 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 (cf. Judgment of the Senate of 10 June 2014 – 2 BvE 2/09, 2 BvE 2/10 ,– para. 91 et seqq.). The holder of the office of Federal President is generally free to decide how to enliven the representative and integrative functions connected with the office. If an important task of the Federal President consists in making the unity of the polity visible through his appearances in public, and to promote the unity via the authority of this office, he must have a broad margin of appreciation in this respect. As the respondent argued convincingly, the Federal President can only live up to the expectations connected with the office if he can respond to developments in society and to general-policy challenges in accordance with his appreciation, and if in so doing, he is free to choose both the topics and whichever communication form he deems adequate in the given context. Therefore, the Federal President does not require a statutory authorisation beyond the authority to make public statements, which is inherent in his office, even when he points out undesirable developments or warns of dangers and in so doing names the groups or persons he considers responsible. 23

It is in accordance with the constitutional expectations of the office of the Federal President, as well as the established constitutional tradition since the foundation of the Federal Republic of Germany that the Federal President should keep a certain distance to the objectives and activities of political parties and groups in society (cf. Judgment of the Senate of 10 June 2014 - 2 BvE 2/09, 2 BvE 2/10 -, para. 95 with further references). However, this alone does not lead to any justiciable specifications for performing the office. In particular, contrary to the applicant's assumptions, the Federal President is not legally obliged to always base his statements on comprehensive and comprehensible considerations, and to justify these considerations in his statements accordingly. 24

2. The Federal President exercises state authority within the meaning of Art. 20 sec. 2 GG. Pursuant to Art. 1 sec. 3 and Art. 20 sec. 3 GG, the Federal President is also bound by the fundamental rights and the law. This is repeatedly reaffirmed in the oath of office (Art. 56 GG), indirectly in the rules on immunity (Art. 60 sec. 4 in conjunction with Art. 46 sec. 2 GG), and also in the prerequisites for an impeachment set out in Art. 61 sec. 1 sentence 1 GG. It is common ground that the Federal President is by no means "above the law”. 25

3. Rights that the Federal President must respect include the political parties’ right to equal opportunities under Art. 21 sec. 1 GG, and, insofar as equal opportunities in 26

elections are concerned, Art. 21 sec. 1 GG in conjunction with Art. 38 sec. 1 GG or Art. 28 sec. 1 GG. This right can be violated by organs of the state interfering in an election campaign either to the benefit or to the detriment of a political party (cf. BVerfGE 44, 125 <146>). A party can also be negatively affected to an extent that undermines its equality of opportunities in competition by statements reflecting negative value judgments on the party's objectives and activities (cf. BVerfGE 40, 287 <293>). Whether this is the case depends on the respective circumstances of the case.

a) Thus the Senate has developed criteria in order to distinguish permissible public relations work by the government from (impermissible) public relations work which would influence the election campaign in a partial manner; such criteria are intended to avoid a situation whereby any publicly funded publicity work supports the governing parties and disadvantages the opposition parties (cf. BVerfGE 44, 125 <148 et seq.>). The primary purpose in these scenarios is to ensure that the process of a free and open formation of the will and opinion of the people is protected against interferences by the Federal Government that are not warranted by the public's interest in information and which favour the governing parties. In contrast, the constitutional restrictions on negative value judgments in reports on the protection of the Constitution (*Verfassungsschutzbericht*) by the Federal Ministry of the Interior need to be assessed from a different perspective. Any such value judgment must be seen in its context of the constitutional obligation to protect the free democratic basic order, and as such value judgments are generally permissible; any political party affected by this is free to defend itself against such value judgments in its fight to win over the public opinion (cf. BVerfGE 40, 287 <291 et seq.>). Value judgments only become impermissible if they are based on considerations which are irrelevant and thereby arbitrarily undermine the affected party's right to equal opportunities in competition (cf. BVerfGE 40, 287 <293>). The Senate reiterated this approach also with respect to the involvement of state bodies in the public discussion on opening an application to prohibit the applicant in its capacity as a political party. Furthermore the Senate held that the right of political parties to equal opportunities, which is a fundamental component of the democratic basic order, bars state bodies from publicly expressing the suspicion that a political party, which has not been prohibited, essentially pursues objectives and activities that are unconstitutional, if such an approach is incomprehensible in light of a reasonable appreciation of the guiding objectives of the Basic Law, and it is thus obvious that this approach is motivated by considerations which are irrelevant (BVerfG, Order of the Second Senate of 20 February 2013 - 2 BvE 11/12 -, *Neue Zeitschrift für Verwaltungsrecht* – NVwZ 2013, p. 568 <569>, para. 22, on appreciations of negative value judgments in reports on the protection of the Constitution regarding press products cf. BVerfGE 113, 63 <75 et seq.>). 27

b) These considerations cannot simply be applied to a constitutional assessment of negative statements by the Federal President in respect of certain political parties. The Federal President is neither a direct competitor of political parties, vying with them for political influence, nor, unlike the Federal Government, for example, does he 28

have access to means, which enable him to extensively influence the formation of opinions and the will of the public by pursuing a far-reaching information policy. Nor is it within his powers to regularly inform the public about any radical endeavours, or to decide upon an application for a decision on whether a political party is unconstitutional (Art. 21 sec. 2 GG). On the other hand, statements made by the Federal President do have significant weight due to his official position, and any public argument with the Federal President will be governed by different conditions than arguments with immediate political rivals or with a Federal Government supported by political rivals. As a result, the parameters of the Federal President's entitlement to express himself freely must be determined separately.

In fulfilling his representative and integrative functions, it is incumbent on the Federal President to rise to speak in the interest of maintaining and furthering the community, and to use such statements to draw the public's attention to any deficits or undesirable trends he has identified, particularly those that would endanger the social cohesion and the peaceful coexistence of the population, and to encourage the public to help to address any such deficits or undesirable trends. However, the Federal President can only act as an integrating force if he is free to not only identify any risks or dangers for the common good, but also to identify any possible causes and responsible parties. If the Federal President reaches the conclusion that certain risks and dangers emanate from a particular political party, then he is not prevented from addressing the thus recognised connections in his public statements. This is not contrary to the constitutional expectation that the Federal President should maintain a certain degree of distance to the objectives and activities of political parties and social groups - particularly in times of an election campaign (para. 25 above), because this expectation is not linked to the impression of a politically indifferent office-bearer. This means that statements made by the Federal President are not objectionable under constitutional law insofar as they are evidently aimed at the common good, and not given in order to ostracise or favour a particular party for their own sake. 29

In accordance with these basic principles, it is also at the Federal President's discretion to decide on what occasion he wants to make a statement, what form such a statement should take and in what way he responds to the given communicative situation. In particular the Federal President is not barred from expressing his concern in a hyperbolic manner if he finds that this is appropriate. That said, statements which do not contribute to a factual discourse, but which have an ostracising effect, as is generally the case when it comes to statements that are insulting, or particularly in cases which would, in other contexts, be considered to constitute "abusive criticism" (*Schmähkritik*), are not compatible with the Federal President's representative and integrative function (cf. BVerfGE 93, 266 <294> with further references). 30

c) When reviewing statements by the Federal President that affect the political parties' equality of opportunities, the Federal Constitutional Court must take into account that it is exclusively for the Federal President to decide how to perform the functions and integrative tasks connected with the office. The extent to which the Federal Presi- 31

dent, in so doing, adheres to the concept of a "neutral Federal President" is neither generally nor in individual cases subject to judicial review. On the other hand, it would contradict the principle of the rule of law if political parties, whose right to equal opportunities is an essential element of the democratic basic order, had no legal protection vis-à-vis the Federal President. Against this backdrop, it seems both necessary and sufficient to judicially review the Federal President's negative remarks about a political party in consideration of whether he made them in a way that evidently neglects the integrative task of his office, and thus takes sides arbitrarily .

**II.**

According to this standard, the respondent's statements that the applicant challenged are not objectionable under constitutional law. As can be deduced from the general context in which the statement was made, the respondent, in making his statements, which were also aimed at the applicant, positioned himself against ideologies which are ignorant of history, racist and xenophobic, and rallied listeners to use democratic means to prevent such ideologies from becoming accepted. In doing so, the respondent did not exceed the limits of his representative and integrative functions, nor did he arbitrarily position himself against the applicant. 32

1. Insofar as the applicant claims that its rights are violated due to the fact that the respondent publicly supported protests against the applicant in Berlin-Hellersdorf, the application is unsuccessful. Contrary to the submissions put forward by the applicant, under the necessary objective interpretation, it cannot be inferred from the Federal President's statements that he supported or approved of violent protests against the applicant. At the beginning of his remarks, the Federal President explicitly pointed out that he even assumes that tearing off posters is unacceptable. Therefore there could be no doubt that he disapproves in particular of violent confrontations with the applicant. Subsequently, he merely addressed the freedom of expression and assembly (Arts. 5 and 8 GG) and appealed for participation in the political struggle of opinions. In doing so, he did not exceed his competences. 33

2. The use of the term "nutcases" (Spinner) in the specific context is also unobjectionable under constitutional law. With this term, the respondent made a negative value judgment about the applicant and its members and supporters which, seen in isolation, could in fact be regarded as defamatory, and which could indicate an unobjective ostracism of the persons thus named. Here, however, as follows from the overall style of the respondent's statements, the term "nutcases", in addition to the terms "ideologists" and "fanatics", serves as a collective term for 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 (on the constitutional order as a counterpiece to nationalist tyranny and despotism, cf. BVerfGE 124, 300 <327 et seq.>). The exaggeration contained in the term "nutcases" was not only intended to make clear to the participants in the discussion that the persons thus termed would never change; it was also meant to emphasise that they hoped in vain 34

to succeed with their ideology if citizens "show up the limits". Building on the lessons to be learned from the tyrannical rule of National Socialism, the respondent called for the involvement of citizens against political views which, in his opinion, pose dangers to the free democratic basic order and which, in his view, the applicant advocates. In so doing, he advertised for a way of dealing with these views that conforms to the Basic Law (cf. BVerfGE 124, 300 <330 and 331>). He thus did not cross the constitutionally determined limits on negative remarks made in public about political parties.

Voßkuhle Lübbe-Wolff Gerhardt

Landau Huber Hermanns

Müller Kessal-Wulf

**Bundesverfassungsgericht, Urteil des Zweiten Senats vom 10. Juni 2014 - 2 BvE 4/13**

**Zitiervorschlag** BVerfG, Urteil des Zweiten Senats vom 10. Juni 2014 - 2 BvE 4/13 - Rn. (1 - 34), http://www.bverfg.de/e/es20140610_2bve000413en.html

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