# 4

# Communication of State Authorities

## *The Power of the Office*

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### 4.1 INTRODUCTION

During the Trump presidency in the United States of America, the social media network Twitter (now known as X) became a new, unofficial media channel through which the former president issued many political statements and informed the public about planned activities and new decisions. At the same time, however, he also continued to use this venue for more personal information, most frequently somehow connected to his office, for example on the size of his 'nuclear button' in comparison to that assumed to be the North Korean leader's one after a news report. This type of communication was until then unknown as a general communication strategy at least for most public officials. Press conferences and bulletins were the typical means of informing the public and professionally interested parties about the standpoints of the government, its actions and its plans. Also, government information was typically delivered in a rather neutral and down-to-earth tone and was carefully drafted and revised, rather than being spur-of-the-moment ideas frequently dismissing other ideas using direct, sometimes offensive language. It is obvious that the statements of the president of a leading nation and the largest democracy in the world will attract attention. However, the Twitter postings under the Trump presidency attracted more attention than the usual; Trump's tweets reached millions of followers and generated countless clicks. The criminal proceedings and the impeachment process following the storming of the Capitol in January 2021 were based on the realization and consequently the recognition of the impact of those communicative acts on Trump's followers.[1]

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[1] E.g., Nicholas Fandos, 'Trump Impeached for Inciting Insurrection', *The New York Times*, 13 January 2021, www.nytimes.com/2021/01/13/us/politics/trump-impeached.html.

A contrasting picture can be found across the Atlantic in Germany. There, Chancellor Angela Merkel also contributed to a Twitter channel throughout most of her chancellorship.[2] It was – unlike that of the US President during his term of office – officially handled by Merkel's spokesperson, and it included no personal information or personal statements, let alone commenting on news coverage, current affairs or giving imprudent, discriminatory or abusive assessments. However, German history knows well how heads of state may misuse and mislead the media and abuse the attention given to them due to their office in order to manipulate an entire people, even into the worst atrocities and a catastrophic world war.

Therefore, the question of the legal boundaries of state communication is not only of historical importance but is a cornerstone of the relationship between a state and its citizens, and, at the same time, part of a democracy-enabling and -defending communication relationship. States need to communicate their doings and decisions to the public in order for society to be informed and to prepare the people for participation and elections as the core instrument of control.[3] The use of digitalized formats of communication of (not so) 'new' media is something democratic states urgently needed to integrate into their communication strategy in order to stay in touch with their sovereign and to shape the constitutional and administrative space.[4] Transparency laws or rights to freedom of information requests complement this as active tools of citizens.[5] At the same time, however, not only the content but also the format, mediator and tone of the communication influence the resulting perception of the state, and may also contributing to forming the opinions of the constituency.[6] Thus, not only does access to information need to be legally established to ensure a solid and resilient democracy but also the means of communication. This can only be done if not only the protagonists at the top of the government – the heads of state and ministries – but also the state officials act within a predetermined and controllable legal framework.

[2] https://twitter.com/RegSprecherStS.

[3] Konrad Hesse (ed.), *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Heidelberg: C. F. Müller, 1995) para. 152; Felix Drefs, *Die Öffentlichkeitsarbeit des Staates und die Akzeptanz seiner Entscheidungen* (Baden-Baden: Nomos, 2019) p. 52; Tobias Hinderks, 'Staatliche Kommunikation in den neuen Medien' (2023) 67(1) *Zeitschrift für Urheber- und Medienrecht* 26, at 29.

[4] Utz Schliesky, 'Digitalisierung – Herausforderung für den demokratischen Verfassungsstaat. Ein Beitrag zur Zukunftsfähigkeit des Grundgesetzes am Vorabend des 70. Geburtstags' (2019) 38 *Neue Zeitschrift für Verwaltungsrecht* 693; Sophie Tschorr, 'Wenn der Staat Fake News verbreitet' (2021) 60 *Zeitschrift für Digitalisierung und Recht* 381, at 384.

[5] BVerfGE 105, 279, at 302; annotated by Marion Albers, 'Rethinking the Doctrinal System of Fundamental Rights: New Decisions of the Federal Constitutional Court' (2002) 3(11) *German Law Journal*; BVerfGE 105, 252, at 269, English version: www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2002/06/rs20020626_1bvr055891en.html.

[6] Tobias Mast, 'Gute Öffentlichkeitsarbeit und die Europäische Union' (2021) 81(2) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 443, at 458.

Section 4.2 analyses the actors and different means or formats in which government communication can take place, focusing on executive communication. It examines non-individualized communication in which state officials issue statements to a general public. Thus, other typical communicative acts between the state and its citizens such as individualized requests for information by a regulatory agency or the processing of data by the intelligence services are not part of the scope of this chapter, although many of its findings also apply to those individual interactions. In Section 4.3, the problem will be outlined: There are hardly any legal rules which cover this field. Section 4.4 will describe the special characteristics of information and perceptions of it. Section 4.5 then explores the existing legal setting from a legal theory perspective, with reference to German law. At the bottom of any regulation, there is an understanding of the conflict between the private and the public person (Section 4.6). The chapter concentrates on the constitutional perspectives for solving this problem, first by establishing the core framework in Section 4.7, then by dealing with more specific aspects connected to the principle of proportionality or the balancing of interests in Section 4.8. A short analysis of the right to counterattack and the changes in the previously developed principles follows in Section 4.9. A conclusion and outlook round off the findings.

## 4.2 ACTORS AND FORMATS

A large number of executive state actors communicate with the public, and the informative content they convey differs greatly. Also, the format and the media used vary. Some examples: The United States Environmental Protection Agency (EPA), an independent agency, informs the public about July being Ocean Month,[7] or publishes information on how to apply for or manage an EPA grant through its homepage on the Internet. A European data protection authority issues a statement through a written press release which is then distributed to the press, declaring that it finds the use of Microsoft Office 365 to be in violation of the General Data Protection Regulation.[8] The German Financial Regulation Agency (BaFin) publishes a guideline on securities supervision or cross-sectoral issues to the subscribers of its email lists.[9] The US Federal Drug Agency (FDA) warns professionals about the use of a certain medicine by sending out letters to pharmacists and medical doctors.[10]

[7] www.epa.gov, 3 July 2023.

[8] For example, https://www.edps.europa.eu/press-publications/press-news/press-releases/2024/european-commissions-use-microsoft-365-infringes-data-protection-law-eu-institutions-and-bodies_en Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance).

[9] www.bafin.de/EN/DieBaFin/Service/Newsletter/newsletter_node_en.html.

[10] www.fda.gov/drugs/enforcement-activities-fda/warning-letters-and-notice-violation-letters-pharmaceutical-companies.

Vaccinations against measles are recommended by the Centers for Disease Control and Prevention in the USA.[11] A municipality displays an organization diagram on its webpage.[12] The German consumer protection agency outlines the choices available in disability insurance and advises on the most important aspects to consider.[13] The US Department of the Treasury publishes press releases on various topics on its website.[14] A publicly funded research institute issues a printed activity report. The Irish Data Protection Commission publishes information about the amount of a fine it has imposed on Meta.[15] During a public session, a German regulatory authority shows pictures of violations of hygiene and food regulations in individual restaurants two years ago to demonstrate its level of activities.[16] A secretary of state gives an interview to a radio station on the political status quo and her opinion on the Ukraine War.[17] The head of the antitrust agency holds, as an adjunct professor of a state university, a competition law seminar on the recent case law of his agency. A prosecutor informs the press about the allegations made against a famous TV moderator by his former girlfriend,[18] or demands that a famous politician is forced into a perp walk because of the allegations of a prostitute.[19]

## 4.3 THE PROBLEM: WHERE ARE THE RULES?

These examples illustrate the diversity of messages and information conveyed by official bodies and their representatives. They can range from offers of advice and consultation to general information on organizational structures, to declarations of activity, to clear warnings and orders. The information can be directed at the general public with low barriers of access, such as information shared on the Internet, or be passed on through individualized communication such as email. Social media interaction has become a common tool in recent years.[20] Even at first glance, the

[11] www.cdc.gov/vaccines/vpd/mmr/public/index.html#:~:text=CDC%20recommends%20that%20people%20get,date%20on%20their%20MMR%20vaccination.

[12] www.stadt-koeln.de/politik-und-verwaltung/dezernate/index.html (the website is available in English, the diagram is not).

[13] www.verbraucherzentrale.de/wissen/geld-versicherungen/weitere-versicherungen/berufsunfaehigkeit-wie-sie-sich-gegen-verlust-des-einkommens-absichern-13931.

[14] https://home.treasury.gov/news/press-releases.

[15] www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-announces-decision-in-facebook-data-scraping-inquiry.

[16] www.berlin.de/ba-pankow/politik-und-verwaltung/aemter/ordnungsamt/veterinaer-und-lebensmittelaufsicht/downloadservice/artikel.240708.php.

[17] www.zdf.de/nachrichten/politik/baerbock-waffenlieferung-mehr-hilfe-ukraine-krieg-100.html.

[18] https://de.wikipedia.org/wiki/Kachelmann-Prozess.

[19] On the criticalities of perp walks, Clyde Haberman, 'For Shame: A Brief History of the Perp Walk', *The New York Times*, 2 December 2018, www.nytimes.com/2018/12/02/us/perp-walk.html.

[20] See also the overview at Indra Spiecker genannt Döhmann, '§ 23 Informationsverwaltung' in Wolfgang Kahl and Markus Ludwigs (eds.), *Handbuch des Verwaltungsrechts* (Heidelberg: C. F. Müller, 2021) Vol. I, para. 71 et seq.

wide variety of these measures and the different impacts they have on individuals is obvious. The depiction of hygiene deficits at a restaurant two years previously interferes with the rights of the new restaurant owner. The recommendation of a particular product changes the competitive setting.[21] Making public the information about investigations may violate the integrity of the individual, and hampers the guarantees of 'innocent-until-proven-guilty'.[22]

This also includes the communication of public officials in political offices. Hardly anyone would deny that a statement made by public authorities, let alone the head of state, has a special impact on and influences public opinion.[23] Does it make a significant difference whether John Doe in a pub near his home or the President of the United States comments on social media about the House of Representative's bill for tax regulation? Who expresses what through which means may influence elections and thus impede individuals' rights, considering both the individual voter and the individual candidates. It shapes the democratic state, and reinforces the principles of the rule of law.

Interestingly, hardly any written legal rules exist as to what types of information may be distributed, by whom and under what conditions or in which format. Even fewer rules do so on a differentiated basis which reflects the differences in format, the potential impact of communication and the actors. Mostly, a rugged set of legal boundaries have been set by – typically few – court decisions which may not serve as a comprehensive and conclusive framework.[24] Both freedom of information laws and transparency laws typically address adverse situations, where individuals are interested in information within the realm of the state which the state does not freely distribute and perhaps even restricts access to. This type of regulation covers the passive distribution of information by the state – passive because the state responds to a request rather than initiating communicative procedures. This chapter, in contrast, discusses the kinds of proactive communication and distribution described above.

## 4.4 INFORMATION DOES NOT HURT AND NEEDS NO REGULATION

One reason for the silence of the law on the distribution of public information may be that a general understanding exists that in a democracy, the public as the sovereign needs to know what its officials are doing.[25] Freedom of information laws

[21] Christoph Gusy, 'Verwaltung durch Information – Empfehlungen und Warnungen als Mittel des Verwaltungshandelns' (2000) 53(14) *Neue Juristische Wochenschrift* 977, at 986.

[22] Anne-Sophie Landwers, *Behördliche Öffentlichkeitsarbeit im Recht* (Baden-Baden: Nomos, 2019) p. 93 et seq.

[23] BVerfGE 154, 320, para. 50; Sebastian Nellesen, *Äußerungsrechte staatlicher Funktionsträger* (Tübingen: Mohr Siebeck, 2018) p. 21.

[24] Friedrich Schoch, 'Die Schwierigkeiten des BVerfG mit der Bewältigung staatlichen Informationshandelns' (2011) 30 *Neue Zeitschrift für Verwaltungsrecht* 193, at 193.

[25] BVerfGE 40, 296, at 327.

are part of a reconstruction of this understanding in terms of rights and interests.[26] This approach also includes some active informational measures by the state itself,[27] typically if the state expects increased interest in particular information. In such cases, the state shall present the information proactively.[28] This is, for example, the rationale behind rules like Article 552(a)(2)(D)(ii)(I) and (II) of the US Freedom of Information Act (FOIA), which allows and even requires public agencies to distribute information under certain circumstances. This, however, is no less than a proactive means of reducing the resources spent on both sides of the information request. A freedom-of-information perspective allows any statement and distribution of information by officials to seem to be part of a desirable transparency of the state, enabling its control. Therefore, no regulation seems necessary.

The second, and most probably more forceful, reason for the silence of the law on the active communication of the state may lie within the common misunderstanding that informational measures are non-intrusive, and thus have little impact on individuals' rights.[29] Unlike law-and-order approaches, informational measures are frequently considered to be less infringing than other approaches to regulation.[30] If one believes this then, even under a strict rule of law (such as Article 20 (3) of the German Constitution (*Grundgesetz*)), no active entitlement is necessary for the state to issue communicative acts. Where infringements are impossible, no legal framework is required. Both arguments, however, are critical and short-sighted from all perspectives.

First of all, the assumption that the availability of information has no legal impact has long been proven wrong. Freedom of speech and communication take place within the private sphere, a non-state-influenced realm. As a starting point of the analysis, there is no place for the state to participate in communication as such. The state itself has no 'freedom of speech', it is not a legally valid participant in a private activity. However, it has long been acknowledged that communication about

[26] For example, the explanatory memorandum to the German Freedom of Information Act (*Informationsfreiheitsgesetz*) states that it is intended to promote the democratic formation of opinion, see BT-Drs. 15/4493, at 6; Matthias Hong, 'Das Recht auf Informationszugang nach dem Informationsfreiheitsgesetz als Recht zur Mobilisierung der demokratischen Freiheit' (2016) 35 *Neue Zeitschrift für Verwaltungsrecht* 953, at 945; for the US Freedom of Information Act (FOIA), see Daniel Solove and Paul Schwartz, *Information Privacy Law* 7th ed. (Los Angeles: Aspen, 2021) p. 630.

[27] Landwers, *Behördliche Öffentlichkeitsarbeit* (n 22) pp. 46 and 56.

[28] BVerfGE 44, 125, at 147; Hinderks, 'Staatliche Kommunikation' (n 3), at 28.

[29] OVG Münster, 5 June 1987 – 13 A 1273/86, LMRR 1987, at 35; Dietrich Murswiek, 'Das Bundesverfassungsgericht und die Dogmatik mittelbarer Grundrechtseingriffe' (2003) 22 *Neue Zeitschrift für Verwaltungsrecht* 1, at 4; Gertrude Lübbe-Wolff, 'Rechtsprobleme der behördlichen Umweltberatung' (1987) 40 *Neue Juristische Wochenschrift* 2705, at 2711.

[30] OVG Münster, judgment of 5 June 1987 – 13 A 1273/86, LMRR 1987, at 35; of the opinion that correct information is not an infringement, see Gabriele Britz, Martin Eifert and Thomas Groß, 'Verwaltungsinformation und Informationsrichtigkeit – Pflichten und Ansprüche nach dem Umweltinformations- und dem Informationsfreiheitsgesetz' (2007) 60 *Die öffentliche Verwaltung* 717, at 721.

activities of the state is a part of the self-serving purposes of the state. A democratic institution needs to exchange information with its constituents: the citizens need to know what their state is doing, why and how. This opens the door to communication that potentially influences the discourse on matters of state: if a state authority warns people about a product, this has a significant impact on the competitive value of that product. The use of certain products or even a recommendation by official authorities creates interest in these products. A visit by the head of state during a municipal election campaign typically increases the likelihood of a win for the candidate backed by that individual. Information released by the government is usually considered more 'correct', more authentic and more reliable than other types of information. The publication of a suspect's photograph on a police Facebook page[31] increases the likelihood of that suspect being turned in.[32] Examples like these illustrate that state communication does take place and that it does change the framework within which private communication and private action happens, and under which private rights are enacted.

Secondly, it is often assumed that informational measures have little potential for severe infringements in comparison to other measures, in particular law-and-order measures. Information is considered to be at best part of soft – non-legally binding – law, to have little impact, to be of little power.[33] A principle of proportionality test, it is assumed, would therefore typically allow informational measures as there would be no other, less infringing means.

Thirdly, and closely connected to this argumentation, is the consideration that due to the weak power for infringement of information and communication, the interest of the public would justify any potential infringement of rights. This again employs the argument that a democratic state needs transparency in regard to state actors, thus allowing for only limited and diffuse regulation of information activities as the interests of transparency, open communication and freedom of information would override any private interest. The only exception that is typically addressed is a potential violation of business and trade secrets, or sometimes also of private

[31] On the serious doubts of the legality of the use of Facebook pages through the press office of the federal government, see the order of the Federal Data Protection Authority, www.bfdi.bund.de/SharedDocs/Pressemitteilungen/DE/2023/06-Untersagung-Betrieb-Fanpage-BReg.html?nn=251944.

[32] On the legal problems of such measures Sönke F. Gerhold, *Münchener Kommentar zur Strafprozessordnung* 2nd ed. (München: C. H. Beck, 2023) § 131 para. 1 et seq. with further references.

[33] See Lübbe-Wolff, 'Rechtsprobleme' (n 29), at 2711 et seq.; see also Dietrich Murswiek, 'Staatliche Warnungen, Wertungen, Kritik als Grundrechtseingriffe – Zur Wirtschafts- und Meinungslenkung durch staatliches Informationshandeln' (1997) 112 *Deutsches Verwaltungsblatt* 1021; Lars Bechler, *Informationseingriffe durch intransparenten Umgang mit personenbezogenen Daten* (Halle-Wittenberg: Univ.-Verlag Halle-Wittenberg, 2010) p. 162 et seq. Compare also the analysis on infringement by information by Spiecker genannt Döhmann, '§ 23: Informationsverwaltungsrecht' (n 20), at 109 et. seq.

secrets.[34] It neglects, however, to consider that even if transparency is the driving force, the matter of when, why, how and by whom (that is, format, style, timing and framing) is left open for regulation.

Even from a historical standpoint, it is surprising that an understanding that communicative measures need little regulation is upheld: evidence from the dictatorial episodes in the histories of modern democracies illustrate the fatal impact of communication.[35] This directly relates to the latest developments where impulsive, intrusive and often even targeted wrongful statements by state officials are being used to influence public opinion in a so far unknown manner. Such influence is wielded by unfair means, undermines democratic standards, violates tolerance and the freedom of opinion, and challenges the acceptance of the democratic, rule-of-law state as such.[36]

## 4.5 THE STATUS QUO: THE CASES BEFORE THE GERMAN CONSTITUTIONAL COURT

In the past seventy years, Germany's Constitutional Court has ruled on only a few cases relating to communication acts by state authorities. They illustrate well the status quo of the legal framework, in particular, since in most cases no regulatory measures have followed. Despite some of the attention these cases have garnered – especially on warnings about religious groups and on the consumption of particular wines – the practical results remain opaque and do little to answer the questions arising from recent developments surrounding state officials' communicative acts. Nevertheless, the German jurisprudential experience may shed some light on core issues and suggest legal answers to the questions posed. It illustrates the scope of the field. Most importantly, the court's decisions help us to understand and analyse the core guidelines on state communication beyond the German Constitution for any democratic, rule-of-law-based state.

[34] The explanatory memorandum to the German Freedom of Information Act (Informationsfreiheitsgesetz) that public information shall be as transparent as possible and provide as much protection of secrets as necessary, see BT-Drs. 15/4493, at 6; Gerhard Wiebe, 'Der Geschäftsgeheimnisschutz im Informationsfreiheitsrecht' (2019) 28 *Neue Zeitschrift für Verwaltungsrecht* 1705; Rainer Wolf, 'Grundrechtseingriff durch Information? Der steinige Weg zu einer ökologischen Kommunikationsverfassung' (1995) 28(3) *Kritische Justiz* 341, at 349.

[35] So common understanding goes, for example, on the rise of the Nazis in Germany due to the impact of communication, www.nzz.ch/ueber-hitlers-sprache-ld.808406?reduced=true; see the motivation of the project on editing Hitler's speeches, www.ifz-muenchen.de/en/research/ea/research/collection-of-adolf-hitlers-speeches-1933-1945, doubted recently by Peter Selb and Simon Munzert, 'Examining a Most Likely Case for Strong Campaign Effects: Hitler's Speeches and the Rise of the Nazi Party, 1927–1933' (2018) 112(4) *American Political Science Review* 1050–1066.

[36] Tschorr, 'Wenn der Staat Fake News verbreitet' (n 4), at 382 et seq. and 389.

### 4.5.1 *Government Public Relations: Transparency and Part of State Action, No Legal Justification Necessary*

That the topic of information has not been at the core of constitutionally charged conflicts can be illustrated easily by the fact that the first decision of the German Constitutional Court dealing with it was only in 1977.[37] It took roughly thirty years after the constitution was enacted for the Court to deal with state communication for the first time. In this case, the governing parties had used a variety of communication options, some of them quite cost-intensive, to draw attention to their achievements and thus to campaign for re-election. The opposition filed a complaint against this. The Court established the principle that state officials and state institutions of the government of Germany, representing the most prominent executive institution, may distribute general information. It argued along the lines of transparency and found that no special legal ground for this action was needed as it is included in the general task of 'state action' (*Staatshandeln*). It even stressed – again in line with the argument for transparency – that there even existed a duty to inform the public about its decisions and the background of its actions. The legal consequence of this is that public informative statements are allowed, but their limits are where election advertising begins.

### 4.5.2 *Warning–Religious Freedom–Governing Sufficient*

The second case followed almost fifteen years later: Various members of the federal and state (*Länder*) governments mentioned and provided information about a particular religious organization. This group organized popular clubs for young people. Their members were, due to their peculiar attire and active missionary activities, quite visible in larger cities. The Federal Secretary of Youth, Family and Health warned the public in a press conference about this organization, labelling it as a sect; the federal government officially called the group 'destructive' and 'pseudo-religious'.[38] The Constitutional Court concentrated on potential infringements of religious freedom, and established the interpretation that information can be an infringing means only to a limited extent.[39] It found that a right to publicity (and thus to providing such information) can be derived from the federal government's general task of governing the state (*Staatsleitung*). However, this would not cover measures that are a substitute for interventionist means such as orders or prohibitions. In the end, the description of the group as a 'sect' was considered to be constitutionally acceptable because it was factual while the description as

[37] BVerfGE 44, at 125.
[38] BT-Drucks 8/2790.
[39] BVerfGE 105, 279.

'destructive' and 'pseudo-religious' was held to be unconstitutional because it was considered to be defamatory.

### 4.5.3 *(Commercial) Side Effects of Warning of Dangerous Goods*

The Court issued on the same date another decision on state warnings, this time one that was somewhat more difficult and legally challenging. A scandal had rocked the German wine industry in the 1980s; in many vineyards illegal and even unhealthy additives had been added to give wine extra taste and sweetness. The ministry of one of the *Länder* issued a list of such wines in order to warn consumers. The rationale behind this activity was the fact that wineries did not keep records of all the bottles sold in their business-to-company dealings, and as many bottles were traditionally sold locally, it was impossible to reach ordinary customers and warn them.

The Constitutional Court addressed the problem from a strictly dogmatic point of view.[40] It stressed that while the warning about the wines mentioned was legal (as they were indeed dangerous), the side effects of this announcement led to severe economic consequences for the vineyards involved: customers would not only avoid buying and consuming the contaminated sorts but would in general refrain from doing any business with the wineries on the list, thus also not buying non-affected sorts. Here, the Court found that under certain circumstances, those informational measures could constitute an infringement of the commercial rights of the wineries (and of the resellers, but that was not discussed), if the side effects were not accidental and the state act was intended to regulate business. This took care of the common understanding that informational measures were irrelevant and needed no legal framework. Only in these cases, however, did the Constitutional Court consider that there was a legal requirement for the legitimation of the informational measure, while in general they were devoid of legal boundaries.

### 4.5.4 *Deemed 'Nutcases' by the President*

In the first of several cases where prominent members of government voiced opinions, the President of Germany had, in response to questions from students, referred to members, activists and supporters of a right-wing party as 'nutcases'. The Constitutional Court held that this was lawful,[41] from the starting point that it is a requirement of the President to observe the right of the parties to free and equal participation in the formation of the political will of the people in the political discourse. However, the Court accepted different rules for the President in

[40] Ibid. at 252, English version: www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2002/06/rs20020626_1bvr055891en.html.

[41] BVerfGE 136, at 323, English version: www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/06/es20140610_2bve000413en.html.

comparison to government politicians due to his special position, as he is not part of the elected government and does not allocate resources for a campaign, thus referring explicitly to the 1977 judgment. In particular reference to his position, the Court clarified that the President is in general obliged to safeguard and promote the common good and a free society; hence limits to statements exist, but only in the case of an evident neglect of his integration task as a president and if thus the statement became arbitrary and unrelated to his professional task.

### 4.5.5 *Relevance to Political Party: Statement 'Red Flag'*

A later decision covered the case in which the Federal Minister of Education and Research mimicked the slogan ('red flag') of a right-wing party's event on the webpage of the ministry she headed, and clearly stated her belief that the positions of this party were not in accordance with democratic values and that they promoted neo-Fascist thinking and action. The Constitutional Court found this to be a violation of the right-wing party's right to fair elections since the minister had violated a duty of neutrality.[42] The Court in general acknowledged that the government's authority affects its actions, even if not in direct connection to an election campaign. Therefore, the government must not identify with individual parties and use state resources for their own ends. This established a substantive standard, that a duty to neutrality exists in general and at all times.

### 4.5.6 *Relevance to Political Party: Interview*

In another very similar case discussed by the Constitutional Court, a minister, this time the Federal Minister of Interior, had expressed disparaging assessments about the same right-wing party in an interview.[43] Again, this touched upon the fairness of elections, but the court only found it to be in violation of the duty of neutrality because this interview was posted on the webpage of the ministry and as such combined his position with his personal opinion. Although it was not quite clear whether this would also have been a violation if the interview had been published independently, it was clear that the combination of office and official means of distributing this opinion triggered the courts' sanctions.

### 4.5.7 *Head of State Comment on Election Result*

In a dramatic vote, the same right-wing party as in the other cases seemed to have enabled a liberal to become president of one of the *Länder*, which caused a public

[42] BVerfGE 148, 11, English version: www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/02/es20180227_2bve000116en.html.

[43] BVerfGE 154, 320.

outcry. The Chancellor commented, in a statement given during a press conference held far from Germany (in South Africa), that his election ought to be reversed. The Court found that the constitutionally guaranteed competences within the Federal Government give the Chancellor an extended right to issue political statements.[44] Nevertheless, this statement violated the fair election rights of this party because neutrality and objectivity had to be adhered to by all those in all public positions.

### 4.5.8 *Twitter Chancellor*

Two more instances have prompted lawyers to discuss the legality of statesmen's (and stateswomen's) expressions in public: the most prominent one, and shadowed by the President of the United States' actions, was the German Chancellor's official Twitter account. This channel was in her name, but it was administered by her press officer. When she left office, she offered to turn her Twitter account over to her successor. However, due to Twitter's terms and conditions, this would have meant that all her and her press officer's statements would now be attributed to the new Chancellor and his press officer. Therefore, the account remained in her name and under her supervision, but has been dormant since her departure from office.[45]

### 4.5.9 *The Berlin Pankower List of Disgust ('Ekelliste')*

Another instance has been publicized among lawyers,[46] but has not been in the public eye to the same degree. In this case from the 2000s, a Berlin hygiene control unit of the municipal administration published a list of findings of hygiene deficiencies in restaurants, together with the names of the restaurants and pictures, for example of mice excrement in a storage room, rotten chicken breasts or other

[44] BVerfG, judgment of 15 June 2022 – 2 BvE 4/20, 2 BvE 5/20, English version: www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/06/es20220615_2bve000420en.html.

[45] 'Twitterkonto von Steffen Seibert wird archiviert', *Spiegel*, 12 March 2021, www.spiegel.de/netzwelt/web/steffen-seibert-twitter-konto-des-regierungssprechers-wird-archiviert-a-a8a2a07d-0a56-4dd4-95c8-b00647f79a5f.

[46] For example, Thomas Holzner, 'Die "Pankower Ekelliste" – Zukunftsweisendes Modell des Verbraucherschutzes oder rechtswidriger Pranger?' (2010) 29 *Neue Zeitschrift für Verwaltungsrecht* 489; Ferdinand Wollenschläger, 'Staatliche Verbraucherinformation als neues Instrument des Verbraucherschutzes' (2011) 102(1) *Verwaltungsarchiv* 20; Elke Gurlit, 'Zeitwert von Verbraucherinformation und Rechtsschutzanforderungen' (2011) 30 *Neue Zeitschrift für Verwaltungsrecht* 1052; Friedrich Schoch, 'Neuere Entwicklungen im Verbraucherinformationsrecht' (2010) 63 *Neue Juristische Wochenschrift* 2241, at 2246; Fritz Ossenbühl, 'Verbraucherschutz durch Information' (2011) 30 *Neue Zeitschrift für Verwaltungsrecht* 1357; Alexander Schink, 'Smileys in der Lebensmittelkontrolle – Verfassungsrechtliche Zulässigkeit einer amtlichen Information der Öffentlichkeit über die Ergebnisse der amtlichen Lebensmittelkontrolle' (2011) 126 *Deutsches Verwaltungsblatt* 253.

disgusting evidence.[47] The reason why this information was shared with the public was not clearly stated, but at least one potential reason was a demonstration of the hygiene department's efficiency and activities, including shaming of the individual restaurants and as warnings to the public. The problem, however, was that some of the violations of the law had been committed quite some time before, and it was unclear whether the owners were still the same (and whether the wrongdoings were continuing). Moreover, there was no mechanism for taking the information down, requiring correction or checking the veracity of its content.

The case never went to court, but it led to the relevant law being altered to include a passage stating that under certain circumstances, and taking into consideration the principle of proportionality, publication of such warnings was – to a limited extent – possible. This was upheld by the Constitutional Court.[48] Here, the common understanding was that the administration must have legal grounds, according to the rule of law, on which it could act and that there need to be certain minimum standards of control, accuracy, monitoring and take-down procedures which could in individual cases supersede the competitive interests of the company.

## 4.6 GOVERNING THE CONFLICT BETWEEN OFFICE AND POLITICAL OPINION

Behind most of these problems lies a conflict between different interests rooted in the actions of a single person acting in different roles: A secretary of interior is a political person in a political office serving particular goals. As such, the person represents certain interests, that of their office, or maybe that of the democratic government as such. Already here, interests may collide as the government's interests may not align with the interests of the department. At the same time, this is a private person with political opinions.[49] They may not agree with the general position of the government or indeed that of the department. Finally, every politician is interested in remaining in office, in being re-elected and in creating their own legacy, according to public choice theory.[50] Thus, statements may serve any of these

[47] Thomas Heinicke, in Olaf Sosnitza and Andreas Meisterernst (eds.), *Lebensmittelrecht* (Munich: C. H. Beck, 2023) p. 185; EL Dezember 2022, VIG, § 6 para. 11; see www.berlin.de/ba-pankow/politik-und-verwaltung/aemter/ordnungsamt/veterinaer-und-lebensmittelaufsicht/downloadservice/artikel.240708.php.

[48] BVerfG, Order of 21 March 2018 – 1 BvF 1/13, English version: www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/03/fs20180321_1bvf000113en.html.

[49] See dissenting opinion in *Rottmann*, BVerfGE 44, 125, at 186.

[50] Emanuel Towfigh, 'Rational Choice and Its Limits' (2016) 17(5) *German Law Journal* 763, at 769; see also Emanuel Towfigh and Niels Petersen, '§ 6: Public and Social Choice Theory' in Emanuel Towfigh and Niels Petersen (eds.), *Ökonomische Methoden im Recht* 3rd ed. (Tübingen: Mohr Siebeck, 2023) para. 333; The first edition is available in English, Emanuel Towfigh and Niels Petersen (eds.), Economic Methods for Lawyers (Cambridge: Cambridge University Press, 2017).

different roles and conflict with the interests of the other role. Government politicians are, therefore, typically in at least a double position.[51]

This is usually unproblematic if all three (or four) roles are in synchronization, if the private person agrees with the political person interested in re-election, with the statesperson and with the general government political line. This is probably frequently the case and may be considered to be the norm. After all, a politician chooses a particular party because of their general concordance with the party's positions, and the defending and upholding of those positions while in office will be in line with the government's positions, of which the party is part.

However, more prominent, socially discussed and legally interesting situations are those involving conflicting opinions. A parliamentary representative may issue unfair, non-substantial, potentially pejorative and derogatory statements about political opponents or other political ideas in order to further their chances of re-election: The individual in this case trumps the democratically elected representative of the entire people. A head of state may misinform others about a political situation in order to avoid impeachment: the private person who is afraid of public shame and degradation trumps the commitment of the statesman to truth and honesty.

These examples illustrate that the communication of people in public service and of state authorities is potentially conflict-laden and as such calls for both socially and legally binding norms to keep this conflict in check. To reveal how this can be achieved requires us to take a closer look at the legally recognized interests which can be affected by public communication. The above-mentioned examples, which have illustrated the reasons for defining public and private interests that may be potentially infringed by state communication, may serve as a background for a more general understanding of the situation.

## 4.7 THE CONSTITUTIONAL PERSPECTIVE: CONFLICT OF INTERESTS AND ROLES

Taking into account that most of the cases involving administrative communication – or at least those which the German Constitutional Court decided on – have involved the heads of departments and thus members of the governing authority and designated representatives of the government, a first analysis needs to consider constitutional aspects. It should be noted at this stage that a large proportion of public communication also takes place at lower levels of government and with less nationwide attention – although perhaps with just as many consequences for the individuals and institutions about and to which information is distributed. Nevertheless, the statements of (directly) elected officials, namely heads of state or leaders of departments or public agencies can have a severe impact on the political

[51] BVerfG, 2 BvE 4/20, 2 BvE 5/20 [77].

discourse, the fairness of elections and democratic values and practices per se. Consequently, they need to be in accord with the constitutional structure.

### 4.7.1 *The Dominance of the Public Office*

All individuals are protected by constitutionally granted human rights. This is true also for persons performing tasks in the executive branch. In general, holding public office does not completely preclude the application of constitutional rights, whether in an elevated position such as head of state or fulfilling a rather down-to-earth function as an accountant in a small municipality. States and branches of the state power, such as the executive, individual state institutions, departments and agencies, typically do not have constitutional rights, as human rights protect the individual of the state and not the state itself. Therefore, constitutional rights of the municipality – not of the restaurant owners – are not affected directly if an agency, department or institution publishes statements that do not show any personal linkage, but which clearly represent the opinion of the state, of the administrative agency or of the institution. Thus, the distribution of pictures portraying hygiene deficiencies in restaurants by the competent regulatory agency does not fall under the protection of any individual constitutional right of the municipality or the person acting on its behalf. It is a different matter if the person behind the agency is clearly visible, for instance, if a head of state, the head of a department or an individual officer issues a statement or declares a position. This is certainly the case if a communication occurs under the name of the private person, not of their office.

Freedom of speech is the constitutional right which typically protects communication. Although this freedom exists in very many different manifestations depending on its exact constitutional understanding, it is everywhere considered to be one of the essential human rights for any free and democratic society.[52] Freedom of speech as such is an important backbone of any democratic society:[53] Only the continuous enjoyment of this constitutional right enables citizens to form an opinion, to weigh arguments, to accept different opinions and to express convictions of their own. In this way, freedom of speech promotes democratic self-governance.[54] Consequently, the existence and use of freedom of speech prepares citizens to become empowered citizens, to form their own political convictions, to

[52] Déclaration des droits de l'homme et du citoyen (Declaration of the Rights of Man, 1789), Art. 11: 'The free communication of ideas and opinions is one of the most precious of the rights of man'; 'freedom of thought and speech … is the matrix, the indispensable condition, of nearly every other form of freedom', Benjamin Cardozo in *Palko* v. *Connecticut*, 302 US 319 (1937), para. 10. Also BVerfGE 7, 198, [31], English abstract: www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1958/01/rs19580115_1bvr040051en.html.

[53] BVerfGE 7, 198, [31].

[54] Ian Curie, 'Freedom of Expression and Association' in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds.), *Routledge Handbook of Constitutional Law* (Abingdon: Routledge, 2012) p. 235.

judge candidates and political parties and to use their voting rights in a free and autonomous way, so the common understanding goes.[55]

Thus, any legal framework which regulates the communication by a person might be understood to threaten the infringement or even a violation of the freedom of speech. Any such infringement must be justified for a higher good. Nevertheless, no constitutional rights exist without restrictions: Where the practice of a constitutional right violates those of others, a balancing of both rights has to take place, and thus restrictions of the exercise of a human right may be justified. This may lead to the possibility of restrictions on issuing statements or on realising individual freedom of speech under particular circumstances and in particular positions such as statements in relation to one's role as part of state administration.

A person does not forfeit their constitutional status and rights by assuming public office or starting to work for the executive;[56] justification is also required for the regulation of their communication in office. Therefore, the human right of freedom of speech remains an especially important factor in determining where the potential boundaries of state action lie and how a legal framework for legitimate communication of the state can be construed. On the other hand, the fact that someone speaks in relation to their executive function in general allows a restriction of this particular area of freedom of speech.

This framework of state communication includes the determination of where the public and the private person are legally separated as well as whether potential spheres of legal friction may exist between those two (and more) roles.[57] Nobody would consider it to be legally problematic, for the colleague or for the democratic system, for a police officer to tell his wife that his colleague is an idiot. However, this evaluation would change if the police officer issued that statement at an official press conference on the quality of police service in a municipality. It is highly questionable whether such a statement could be legally assessed without taking into account the potential effects on the general political atmosphere, the acceptance of police measures and even the support of the state monopoly of use of force let alone the special circumstances of the statement.

[55] Ibid.; Anna-Bettina Kaiser, 'Art. 5' in Horst Dreier and Frauke Brosius-Gersdorf (eds.), *Grundgesetz-Kommentar* 4th ed. (Tübingen: Mohr Siebeck, 2023) s. 1 para. 41.

[56] BVerfG, 2 BvE 4/20, 2 BvE 5/20, [76]; see also Thomas Kliegel, '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' (2017) (18)1 *German Law Journal* 189, at 201, who says that the government is composed of party members and therefore the party's agenda also influences the government's decisions. A similar finding was also reached by Janet McLean and Mark Tushnet, 'Administrative Bureaucracy' in Tushnet, Fleiner and Saunders, *Routledge Handbook of Constitutional Law* (n 54) p. 124.

[57] RhPfVerfGH, Order of 21 May 2014 – VGH A 39/14, NVwZ-RR 2014, 665, at 667; BVerfG, judgment of 16 December 2014 – 2 BvE 2/14, [56]–[58], English abstract: www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/12/es20141216_2bve000214en.html; Kliegel, 'Freedom of Speech' (n 56), at 202.

A decisive factor is that any person working for a state authority in a free state is there by their own free will. Thus, any restrictions due to the office are part of the autonomous decision of the individual to prefer the advantages of this office over avoiding potential restrictions. The circumstances of the state authority for which a person works determine the boundaries and burdens on their freedom of speech in a publicly relevant manner. The impact of this distinction between the private person and the administrative person becomes quite clear if we contrast the two ends of the spectrum: a conversation at a private dinner table between family and friends is typically a private issue where freedom of speech is unaffected by the office one holds (see also Section 4.7.3.3).[58] However, a discussion of current issues as a background interview in a café constitutes an official communicative act, even though only two persons are present in a relatively private environment.

The private person merges with the public person when performing a public administrative function. This leads, on the one hand, to the protection of the private person: It is not the private person who acts, but the holder of the position; errors are attributed to the office or the agency, not the private person; damages are paid by the state. On the other hand, this may be viewed as a restriction, as the actions of the private person may not collide with the functions of the office. Thus, considerations of the public office override individual rights in matters concerning the non-private communication of a state official. This indeed leads to a restriction of constitutional rights, in particular of the freedom of speech, in all but exclusively private communications. The exact boundaries and the exact design of a framework for public communication will be described on the basis of the following analysis of competing interests.

### 4.7.2 *Constitutional Conflicting Interests*

A dominance of the public office over the private person exists when a communicative act is closely linked or directly attributed to that office.[59] This boundary between the two fluctuates, however, and this depends on a number of factors that will be further developed in the course of this chapter. There are two groups of constitutional interests which trigger restrictions on a state authority officer's freedom of speech: first, individual rights exist which can be affected by public communication. Second, there are more generalized, common-good interests which may

[58] However, this is different if those considered to be family and friends themselves work for public authorities, the press or may use these private communications, as this is then not a solely private matter. A helpful distinction can be the definition of 'personal use' as applied in the GDPR in order to set a border between GDPR-relevant data processing, and those, solely private, not under GDPR restrictions, see Vagelis Papakonstantinou and Paul De Hert, 'Art. 2' in Indra Spiecker genannt Döhmann et al. (eds.), *General Data Protection Regulation. Article-by-Article Commentary* (Hart, Beck and Nomos, 2023) n. 54 et. seq.

[59] Thomas Spitzlei, 'Die politische Äußerungsbefugnis staatlicher Organe' (2018) 58(9) *Juristische Schulung* 856, at 857.

potentially be infringed by public communication. These latter constitutional interests are especially likely to influence the position of the individual in general because they constitute minimum standards of neutrality, fairness, correctness and disinterestedness of communication, to name just a few (see Section 4.7.3.2 and following).

#### 4.7.2.1 Individualized Interests

A wide variety of individual constitutional rights may potentially be infringed. Almost any individual right may be affected directly or indirectly by state communication. The cases from the German Constitutional Court discussed in Section 4.5 display an impressive range of those rights: While rights connected to commercial interests, fair elections, personality or ensuring free competition are easily identified, freedom of religious expression would not necessarily come to mind at first glance as potentially suffering from the negative consequences of state communication. Almost all the individual rights which may be affected by public speech may thereby justify restrictions on a public official's freedom of speech in fields such as schooling and education, property, press, assembly, labour, informational self-determination, telecommunications – to name just the obvious. The German Constitutional Court has also stressed the rights of political parties to a fair election several times. It has thus extended the set of counterbalancing rights also to the political sphere.[60]

#### 4.7.2.2 Common Good Interests: Democracy, Rule of Law, Fairness of Elections

Any official who acts in the course of a public office fulfils public duties beyond their individual official tasks. They represent the state in general, and this means also representing the idea of the democratic state, based on the rule of law. Any action by the executive is attributed to 'the' state and to 'the' democratic system as such.[61] The quality, content, style and format of statements are interpreted as representing the status of democracy. The interaction between any citizen and any state official is directly linked to larger concepts such as the acceptance of the state–government relationship and thus the democratic system.[62] Therefore, actions of a public official may also violate these general common interests of the democratic state, which means that its personnel represent the state per se.

[60] Equal chances of the political parties: BVerfGE 14, 121 (133); BVerfGE 6, 84 (90); Rudolf Streinz, 'Art. 21' in Hermann von Mangoldt, Friedrich Klein and Christian Starck (eds.), *Grundgesetz-Kommentar* 7th ed. (Munich: C. H. Beck, 2018) para. 123.

[61] This is true also for the legislature and judiciary, but due to the focus of this chapter, this is not further developed.

[62] Drefs, *Die Öffentlichkeitsarbeit des Staates* (n 3) p. 187 et seq.

A number of common goods are integrated into any constitution. They typically depend on the history and cultural background of the given state and may vary substantially from one state to another. For the purposes of this chapter, only the two most dominant interests will be explicitly taken into account: democracy and the rule of law. Both are essential pillars of a free society and the essence of state organizations, enabling far-reaching individual freedom and autonomy.[63] Thus, the democratic, rule-of-law-based state has a legitimate interest in self-preservation.[64]

Democracy establishes, among other things, the rule of the many over the few, while also including the protection of minority rights. As the minority of today can in theory become the majority of tomorrow, a democracy must protect minority groups within the population.[65] Human rights are an expression of this. Therefore, democracy and human rights are intertwined.[66] Democracy also installs the personnel of the state in a non-permanent way: Although civil servants may serve over the long term in order to assure a high professional quality of administrative decisions, the leaders of democratic institutions must be politically responsible – their positions are non-permanent and they must win elections on a regular basis, which serves as an instrument of control for the people.[67]

The other aspect which influences the actions of persons in official functions is the rule of law. Although the concept is fuzzy and is differently understood in different jurisdictions, the core concept is that of legality: the state is legally responsible for its actions and has to base its actions on legal grounds.[68] This is also closely connected to democratic values: while individuals may act freely and even arbitrarily, the democratic state has to act in accordance with the will of the people as expressed by the vote of the electorate and the institutions formed on this basis. Thus, the state may not act arbitrarily but is required to adhere to a minimum of rationalizability, if not rationality. Indra Spiecker genannt Döhmann, Staatliche Entscheidungen unter Unsicherheit (Tübingen: Mohr Siebeck, 2025, in print).

In addition, any democratic system depends on the freedom of elections. Elections are one of the main instruments by which the sovereign, the people,

[63] For democracy, see Horst Dreier, 'Art. 20 (Demokratie)' in Horst Dreier (ed.), *Grundgesetz-Kommentar* 3rd ed. (Tübigen: Mohr Siebeck, 2015) [Verfassungsprinzipien; Widerstandsrecht] para. 61; for the rule of law, see BVerfGE 144, 20 para. 547, and Hans Jarass, 'Art. 20' in Hans Jarass and Bodo Pieroth, *Grundgesetz für die Bundesrepublik Deutschland* 17th ed. (Munich: C. H. Beck, 2022) para. 37.

[64] See, in general, Helmut Rumpf, 'Die Staatsräson im demokratischen Rechtsstaat' (1980) 19(2) *Der Staat* 273.

[65] Indra Spiecker genannt Döhmann, 'Kontexte der Demokratie: Parteien – Medien – Sozialstrukturen' in *Fragmentierungen, 77 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (Berlin: Walter de Gruyter, 2018) 9, at 24.

[66] Horst Dreier, *Dimensionen der Grundrechte: Von der Wertordnungsjudikatur zu den objektivrechtlichen Grundrechtsgehalten* (Hannover: Hennies & Zinkeisen, 1993) p. 54.

[67] Spiecker genannt Döhmann, 'Kontexte der Demokratie' (n 65), at 22 et seq.

[68] Very clearly so, see Grundgesetz (German Basic Law), Art. 20 s. 3.

and those enacting state power, the administration, are linked.[69] Every act of state power must be traceable to the will of the people and the government is answerable to them.[70] This requires fair elections, including both fairness during the campaign prior to the actual election and during the term of office.[71]

### 4.7.3 *Core Constitutional Requirements: Neutrality, Self-Restriction and Competence of Office as Balancing of Interests*

Both democracy and the rule of law affect the behaviour of persons acting in an official function, and they therefore also affect the informational output of state authorities and the means by which state authorities may communicate.

#### 4.7.3.1 Competence and Self-Restriction

The most straightforward consequence of the rule of law is a requirement of competence: in a public function, state officials may only communicate with the public or selected people in their official function if they are competent to do so in regard to territory and content-wise.[72] A police officer in Minnesota may not, as a Minnesota police officer, criticize the actions of colleagues in Florida, not being competent to do so while fulfilling a public position in a different state. A New York hygiene law enforcement agency may not issue pictures of violations of hygiene laws in Vermont. This extends to substantial competence, not just territorial competence: a French police officer may not comment on the actions of the building authorities in the municipality as this is not the officer's material area of competence.

Democratic communication also includes elements of control, and communications about the actions of state authorities form an important part of this. Therefore, the matter of competence may allow for statements on comparable actions – for instance, whether a similar action as those of colleagues in Florida or Italy was legal under Minnesota or French law. However, such statements may not violate competence, so they must not give the impression that the authority which issues a statement is actively commenting on actions within the competence of another authority.

Also, there has to be a certain amount of self-restriction which goes back to the differentiation between the private and the public position, since even a statement

[69] Paul Kirchhof and Josef Isensee, *Handbuch des Staatsrechts der Bundesrepublik Deutschland II* 3rd ed. (Heidelberg: C. F. Müller, 2003) § 24 para. 11; BVerfGE 83, 60, at 71 et seq.; Christoph Degenhart, *Staatsrecht I, Staatsorganisationsrecht* 38th ed. (Heidelberg: C. F. Müller, 2022) para. 28.

[70] BVerfGE 83, 60, at 71 et seq.

[71] BVerfGE 44, 125, at 152.

[72] BVerfGE 44, 125, at 149; Tristan Barczak, 'Die parteipolitische Äußerungsbefugnis von Amtsträgern' 34 (2015) *Neue Zeitschrift für Verwaltungsrecht* 1014, at 1016 et seq.

made by a person working for a state authority who is obviously not competent in that field may, in the context of this authority be accorded special status because it derives from a state authority. As such, any public servant has a heightened responsibility not to abuse this natural authority of state officials.

The line may be fine when judging exact practical statements. However, in abstract terms, this line can be clearly construed: where an informative act exceeds the legal borders of the competence of the issuing state authority, be it territorial or substantial in nature, the statement is illegal regardless of its content. The principle of self-restriction is useful in doubtful cases: if in doubt, a state official should remain silent. Consequently, any communicative act crossing this line has to be recalled and any consequences addressed.

#### 4.7.3.2 Duty to Rightful Information Responsibly Researched and Properly Monitored

A core element of state communication and information concerns the truth of the information to be distributed.[73] Again, the people can legitimately expect that when state officials claim a special authority in their field of expertise this is indeed the case. Democratic communication should be free of manipulation. In consequence, it can be expected that the executive only issues statements which are thoroughly researched, properly checked and are to the best of its knowledge 'right' and 'truthful',[74] or actually 'true'.[75] What is currently being discussed under headings such as 'fake news' or 'alternative news' is not a means of communication appropriate for the state or any of its officials.[76]

This does not require state authorities to only distribute information that is absolutely certain and undisputed, but in cases of uncertainty, reasonable doubts and at least an overview of the reasons for and sources of those doubts must be

[73] BVerfGE 105, 252 [57].

[74] Ibid. [58]; see also OVG Bremen, Order of 31 May 2021 – 1 B 150/21, NVwZ-RR 2021, 886 [15].

[75] The exact meaning of the word has been disputed: Plato in *Cratylus* already addressed the question whether there is a natural meaning of words, or the meaning of words is created by convention, see https://plato.stanford.edu/entries/word-meaning, s. 2.1. For further references to what truth is, see Rob Cover, Ashleigh Haw and Jay Daniel Thompson, 'What Is Fake News? Defining Truth, Fake News' in Rob Cover, Ashleigh Haw and Jay Daniel Thompson, *Digital Cultures: Technology, Populism and Digital Misinformation* (Bingley: Emerald, 2022) p. 18 et seq.

[76] For the purposes of this chapter and its character as an overview, the discussion on when fake news is fake will not be described further; see, e.g., Tschorr, 'Wenn der Staat Fake News verbreitet' (n 4), at 382 and 388 et seq.; Bernd Holznagel, 'Phänomen "Fake News" – Was ist zu tun?' (2018) 21 *Multimedia und Recht* 18; Thorsten Quandt et al., 'Fake News' in *The International Encyclopedia of Journalism Studies* (Hoboken: John Wiley & Sons, 2019) p. 1; Jessica Pepp, Eliot Michaelson and Rachel Katharine Sterken, 'What's New about Fake News' (2019) 16(2) *Journal of Ethics and Social Philosophy* 67; Cover, Haw and Thompson, 'What Is Fake News?' (n 76)

shared. Therefore, a European head of state could only claim that a national holiday ceremony attracted more people under their term of office than any other national holiday ceremony had to date if that claim was previously checked by accepted independent means, for example with pictures or police reports.

A further consequence of this is that the validity of informational statements has to be continuously monitored, as otherwise the information distributed would violate these standards. Even if a statement may be correct at the time of publication, as long as it is part of the official communication channels its ongoing correctness needs to be monitored and, if later found to be wrong or disputed, it must be corrected.[77] Information that is no longer accurate, because it is outdated for instance, may not be distributed except for historical or archival reasons. This increases the authority of the state and the quality of the information which it distributes to the public. For instance, a report on the hygiene standards of restaurants[78] in New York City's Theatre District in January 2022 displaying pictures of particular restaurants with their names would be a violation, as the city of New York's hygiene executive body could not claim that these were still true in July 2023 and thus there is no reason to continue to share that information. Similarly, if the above-mentioned head of state's claims about the unprecedented size of a ceremony on a national holiday were found to be inaccurate, they would have to inform the public about this, and certainly not repeat it – and ensure that others do not repeat it either.

#### 4.7.3.3 Office, Not Person in Communication

The dominance of the public office (see Section 4.7.1) due to the democratic and rule-of-law impact on state communication also has consequences for the communicative power of the individual who holds an office in administration. As the office and the private person are intertwined,[79] the office may not be damaged by the actions of the individual. This is closely linked to the requirement of self-restraint mentioned above (Section 4.7.3.1).

Legal rules reducing the impact of the individual, private person and thus concentrating on the duties and responsibilities of the office exist in different manifestations throughout the entire law. Civil servants are restricted when undertaking commercial enterprises in order for them to concentrate on their public duties; any personal interest in a decision leads to the exclusion of officials from that

[77] Tobias Mast, *Staatsinformationsqualität* (Berlin: Duncker & Humblot, 2020) p. 270; for differentiating regarding warnings, see Bernd Tremml, 'Amtshaftung wegen behördlicher Warnungen nach dem Produktsicherheitsgesetz' (1997) 50 *Neue Juristische Wochenschrift* 2265, at 2271.

[78] For example, health inspection results for New York City's 27,000 restaurants can be found on ABCEats, www.nyc.gov/site/doh/services/restaurant-grades.page.

[79] BVerfG, 2 BvE 4/20, 2 BvE 5/20 [77].

decision; there are duties to act rationally and to present justifications for official decisions to avoid decisions driven by personal reasons. The personal interest – which can be financial, but which may also be otherwise motivated – shall not compromise the fairness of the procedure, so that there is a fair decision.[80] Behind all of these restrictions is the motive to restrict the impact of the private in the office and thus to require the individual to be subordinate to the public duty. Thus, trust in the democratic, rule-of-law-based, objectively and neutrally deciding state is fostered and the integrating and legitimizing function of the law is strengthened.[81]

In communication, the dominance of the office requires the private person to be separated from the official person. As a consequence, the general rule is that private communication with any impact on or relation to the administrative position has to remain private. In general, private communication with the public is not allowed, in order to avoid anything that the private person states being attributed to the office and the public service. This rule is applied in a flexible way depending on several factors, among them the significance, the likely level of public attention and the current relevance of the subject, as well as the importance of the office holder and the content and political charisma of the position. Thus, a head of state or the head of the migration office during a migration crisis is bound to a stricter division of private and public speech than a janitor in a public school or a clerk in a social security office, and an autobiographical recounting of one's time as the head of the Environmental Agency during an energy crisis may take place years after.

Thus, social media accounts in particular have to be restricted in their accessibility and moderated with clear and enforced rules not to transfer any of the contents of these private communications to anybody outside the private group. A secretary of state may have a private social media account, but may not use it as a public forum, even less announce the government's policy on the Ukraine war through it. Moreover, the secretary may subscribe to other – private or official – sites but may not comment on them because of their position. This restriction means that only an exclusive and select group of people who are in a private relationship with an official may have access to their private opinions. Confidentiality is thus obligatory for officials both as a sender and a receiver of messages.

Of course, officials are not completely restricted in their private communication because freedom of speech remains an important human right, as are similar rights such as the rights to assemble or to demonstrate. However, the content, the format or the style of their public intercourse may not interfere with their role as a civil servant or as part of the democratic establishment. Accordingly, it is possible to test whether interest in this communication would also exist if the person had no public position.

[80] See Sophie Boyron and Wendy Lacey, 'Procedural Fairness Generally' in Tushnet, Fleiner and Saunders, *Routledge Handbook of Constitutional Law* (n 54) p. 267.

[81] See Margarethe Schuler-Harms in Friedrich Schoch and Jens-Peter Schneider (eds.), *Verwaltungsrecht – Verwaltungsverfahrensgesetz* 3rd ed. (Munich: C. H. Beck, 2022) § 21 VwVfG mn. 2.

In one of the German Constitutional Court cases related to this issue, the secretary of interior gave an interview in which his stance towards a right-wing party was of special interest because as secretary of interior he also headed the police and security force as well as the secret service and the office for protection of the constitution. A light background biographical article ('homestory' in German) on a rancher running for governor is of public interest because of the insights into his personality and thus his eligibility for office (so some say). In the first example, the content is political in nature, and the person interviewed discusses another party while acting and speaking his official capacity. In the second case, the content is clearly private; therefore a 'homestory' fluff piece would only be possible to the extent that it introduces certain values to the public which will play a role in the position, otherwise it would be illegal.

Such boundaries exist not only during an official's term of office but also for period of time after leaving office – for instance, a politician being voted out or retiring – in order not to interfere with their successor's position. Again, it is the office that binds, and this binding power does not end immediately on leaving office, although this, of course, depends on the office. A head of state's assessment of decisions will be of common historical interest even years after their retirement while the common interest in a janitor's assessment of an office building ends shortly after his change of jobs.

#### 4.7.3.4 Objectivity

Similarly, a mixture of rule of law and democratic principles requires that officials do not exploit the power of their office and the easy access they enjoy to the public. Objectivity and calmness are thus deemed fitting for this style of communication. This derives from the democratic feature of equal access to information and the requirement of a fair democratic discourse. The fact that an official takes part in the democratic exchange has to be diminished in its effects, and objectivity is one important tool to achieve this. A person in a public office typically has advantages in communication for at least two reasons: for one, they speak with the power of the office.[82] Therefore, it can be expected that anyone hearing or reading those statements will pay special attention to the information.[83]

[82] 'Authority of the Office', see BVerfG, Judgment of 27 February 2018 – 2 BvE 1/16, [39]; 52, English version: www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/02/es20180227_2bve000116en.html; Hans-Jürgen Papier and Meinhard Schröder, 'Verfassungsrechtliche Grenzen kommunaler Publikationen' 132 (2017) *Deutsches Verwaltungsblatt* 1, at 5. Compare Hinderks, 'Staatliche Kommunikation' (n 3), at 35, who criticizes this as a 'blanket insinuation', citing further references.

[83] BVerfG, 2 BvE 1/16 [64]–[66]; Sebastian Nellesen, *Äußerungsrechte staatlicher Funktionsträger* (Tübingen: Mohr Siebeck, 2019) p. 21.

The second advantage worth examining for the purposes of this chapter derives from the competitive situation in a state just prior to elections: the incumbent has advantages over any competitor, being able to demonstrate practical ability and suitability for the official position. The incumbent is much more prominent in the public discussion because of the office, which enables more frequent and effective communication with the public. State resources in terms of personnel, technology, media and finance are available and can have a lasting impact on the formation of the political will – this involves the risk of distorting the competition between the political parties.[84] The incumbent can also act and publicize strategically.[85] Thus, communication by a person in office should be performed in a manner that lets the office, not the person speak. Self-promotion has to be avoided; objectivity ought to be the typical style of communication.

#### 4.7.3.5 Neutrality

Democracy enables continuous change in personnel *and* in political positions. This hinders the accumulation of power over time and to certain persons as well as helping to avoid irreversible decisions.[86] It thus demands restrictions on the actions of persons in office in order to ensure the change in persons, thoughts and positions. In principle, such a change is only possible if those in charge and who work in the executive branch actively contribute to the possibility of their own disengagement. This is – from an individual perspective, in particular from a rational choice theory point of view – against the individual's best interest, which is to remain in the position. Therefore, a law that enables and sustains the democratic state needs to create institutional arrangements to allow for such smooth transitions. Continuous financial contributions for politicians after their removal from office is one instrument, along with their status as a civil servant, which enables individual security while at the same time requiring high flexibility. Civil service systems in particular are designed to promote independence.[87]

In more general terms, the institutional arrangement has to be one that hinders the incumbent from using their position to actively restrict competitors. State authorities and their officials may not use the power and position of their office to improve their own political situation, the situation of a candidate of their party or their interests in general.[88] Any activity by which office holders exploit their position

[84] BVerfG, 2 BvE 2/14 [46].
[85] Hinderks, 'Staatliche Kommunikation' (n 3), at 36; Mast, *Staatsinformationsqualität* (n 78) p. 102.
[86] Democracy also means ruling for a certain time, see Dreier in Dreier, *Grundgesetz-Kommentar* (n 63) para. 73; Bodo Pieroth, 'Das Demokratieprinzip des Grundgesetzes' (2010) *Juristische Schulung* 473, at 479; Spiecker genannt Döhmann, 'Kontexte der Demokratie' (n 65) at 18 et seq.
[87] See McLean and Tushnet, 'Administrative Bureaucracy' (n 56), at 125.
[88] BVerfG, 2 BvE 4/20, 2 BvE 5/20 [73] and [74].

in the administration must be avoided. Rules against corruption and beyond, especially against partiality, are a typical set of instruments to achieve this, which can also be interpreted as a means to protect the personal integrity of the person in the position and thus may also be in their best interests. In regard to communication, this means that officials must refrain from any direct evaluation of their competitor's practices, such as commenting actively on the campaigns of other parties. The examples within some of the German Constitutional Court decisions illustrate this: a secretary of interior is first and foremost the secretary of interior. They may not use the power of their office to denounce a political party on the department's official webpage, in an interview or through their private, but widely accessible social media account.

#### 4.7.3.6 No Direct Influence of Administrative Staff in Electoral Campaigns

Officials are often connected and intertwined with political parties: the likelihood of being selected to many positions, especially political ones, is influenced by the party affiliation of the candidates, and success in elections often depends on party affiliation. Parties, as the mediators between the public and the state,[89] frequently influence the selection process, sometimes even directly determining the candidates and office holders, certainly when appointing people to leading positions. Thus, any election leads to a change in personnel. Even if a governing party remains in office, elections typically trigger a round of new appointments, changes to positions, retirements and removals from office. Such changes in personnel may often have already started prior to an election because those who foresee changes and thus fear the loss of their positions protect their own interests by securing an alternative professional future for themselves.[90]

Any administration relies on competent staff to produce high-quality decisions. Competency, among other factors, grows with education, specific knowledge and experience. Networks and connections play a role in the success of projects. Thus, the highest and most exposed positions in the administration, especially in government, are typically considered to be 'political' positions prone to political change. This is usually legally and factually enabled through non-permanent civil servant status, straightforward procedures for the dissolution of contracts and the retraction of positions. To counterbalance the resulting personal instability in leading administrative positions, salaries are high and the positions promise power, a leadership

[89] So explicitly the German Constitution, see Jarass, 'Art. 21' in Jarass and Pieroth, *Grundgesetz für die Bundesrepublik Deutschland* (n 63) s. 1; the German Constitutional court stated that political parties are 'intermediaries between individuals and state authorities' in BVerfGE 44, 125, at 145; Spiecker genannt Döhmann, 'Kontexte der Demokratie' (n 65), at 25 et. seq.

[90] Emanuel Towfigh and Niels Petersen, '§ 6: Public Choice Theory' in Towfigh and Petersen, *Ökonomische Methoden im Recht* (n 50) para. 333.

position and the potential of influence on government decisions, including agenda-setting power.

Even though most administrative systems in democracies establish only a very limited number of political positions that are prone to change due to elections, this nevertheless also influences lower positions: During their time in office, politically unproblematic or aligned persons usually have easier access to career positions and thus rise in the hierarchy, drawing with them other, lower positions. As the head of a department, an agency or any administrative body drafts the guidelines of this institution and defines its core focus, the selection of personnel as well as the content and the direction of impact of the administration's decisions is potentially influenced by political interests, typically party positions and party networks.

This political dimension of the administration and thus the potential conflicts need to be reflected in the boundaries set for statements by state authorities. The functionalities of democracy – especially the potential for change – demand this. Any person working in the executive branch has to be aware that any statement in the course and competence of their office will not only be attributed to the democratic state as such, but also reflect the status of fairness among the political parties. This connection is heightened the more exposed within a political party or a political office someone is and the closer an election is. Again, position (both in the administration and a political party), timing, content, context and exposure matter. Thus, a head of state must refrain from actions and statements which may have a direct impact on an election and a direct connection to their party's campaign, while the head of an environmental municipal department does not have to be so careful. A secretary of state who is also the head of a political party has to restrict their statements close to the elections in one of the states in a federal state.

### 4.7.4 *Intermediate Conclusion*

The Constitutional Perspective shows that a framework for state authority communication exists: The public office overrides the private person in public communication; this condition demands a balancing of the freedom of speech of the official with the individual rights that may potentially be infringed as well as the requirements of fostering democracy and the rule of law as the most prominent and pressing state-preserving common interests.

## 4.8 THE CONSTITUTIONAL PERSPECTIVE: THE PRINCIPLE OF PROPORTIONALITY AND ITS SPECIFICATIONS

These general guidelines, however, can be defined even more specifically when taking into account further constitutional requirements, first and foremost the principle of proportionality.

### 4.8.1 *General Understanding of Balancing of Interests or Principle of Proportionality*

Most democratic, rule-of-law-based constitutional regimes involve something similar to the principle of proportionality. It is typically part of any constitutional testing of state measures. The principle of proportionality, in all its variations, provides an additional barrier for justified infringements of human rights and constitutional principles. In the final analysis, it provides for a standard test for the instruments the state uses to achieve a particular legally valid goal.

The modern form of the principle probably originates from German law. There, it has blossomed since the early twentieth century, with its legal foundation as early as the late eighteenth century in Prussian police law.[91] By now it has been developed into a four-step test[92] which assesses the legality of the means and the goals of a law or an administrative action and tests, in its fourth step, the relationship between them. This fourth step is in essence a balancing-of-interests test, in which the legal weight of the state's goal is evaluated in the light of the infringements and legal consequences for individual interests. In the course of extensive practice of this test in the courts, a fine-tuned assessment of the balance between goals and means has been established, including procedural safeguards.[93]

Within the EU, the principle was first applied as a test of approximation. The European Court of Justice (ECJ) in particular typically only tested whether the goal of the common good and the infringements arising from applying the legal instrument were not completely disproportionate.[94] Only in the more recent past has the

[91] Michael Sachs, 'Art. 20', in Michael Sachs (ed.), *Grundgesetz – Kommentar* 9th ed. (Munich: C. H. Beck, 2021), para. 145; Andreas Voßkuhle, 'Grundwissen – Öffentliches Recht: Der Grundsatz der Verhältnismäßigkeit' (2007) *Juristische Schulung* 429; Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge: Cambridge University Press, 2013) p. 24 et seq. Often, the Magna Charta Libertatum of 1215 is cited as the first written source, and also that the ancient Greeks were familiar with the principle, see, e.g., Karl-Peter Sommermann, 'Art. 20', in Mangoldt, Klein and Starck, *Grundgesetz-Kommentar* (n 60) para. 309; Eric Engle, 'The History of the General Principle of Proportionality: An Overview' (2012) 10(1) *Dartmouth Law Journal* 1, at 2; Bartosz Makowicz, 'Das Prinzip der Verhältnismäßigkeit – ein Strukturvergleich zwischen deutschem und polnischem Recht' (2010) 56 *Osteuropa-Recht* 167, at 168.

[92] For German law, see Sachs, *Grundgesetz – Kommentar* (n 92), at 149; for a more general perspective, see Cohen-Eliya and Porat, *Proportionality* (n 92) p. 17.

[93] See Andrej Lang, 'Der Verhältnismäßigkeitsgrundsatz in der Rechtsprechung des Bundesverfassungsgerichts – Eine rechtsempirische Untersuchung mit rechtsvergleichenden Perspektiven' (2020) 145 *Archiv des öffentlichen Rechts* 75 (the article includes an English summary); Mathias Dumbs, 'Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts' (2016) 131 *Deutsches Verwaltungsblatt* 691.

[94] For example, in Case 104-75, *Adriaan de Peijper*, preliminary ruling, judgment of 20 May 1976; see Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 *European Law Journal* 158, at 174; Bernhard Oreschnik, *Verhältnismäßigkeit und Kontrolldichte: Eine Analyse der Rechtsprechung des EuGH zu den Grundrechten und Grundfreiheiten* (Wiesbaden: Springer, 2019) p. 79.

ECJ sharpened the standard in a more complex way to increase its resemblance to the German dogmatic approach, in particular by assessing more closely the exact configuration of infringements and thus establishing more refined tests of the balancing of interests.[95]

Although the US law explicitly addresses the principle of proportionality only infrequently, many of the judicial standards by which infringements caused by law or administrative action are tested show great similarities to the European understanding of the principle of proportionality.[96] Although the standards may differ, the general idea of a refined requirement for the balancing of interests that is enforced by a court is present in US law, as it also is in many other jurisdictions. Consequently, the principle of proportionality needs to be adhered to when the state authorities communicate with the public or others. Of course, considering the breadth of state communication and its different formats, styles, framing, context, history and content (see Section 4.2), each test carried out according to the principle of proportionality will produce different results depending on the individual constitutional and legal setting. Therefore, the following individualized manifestations are naturally approximations of what the exact framework could be. They cannot take into account the particular characteristics of a specific constitutional regime. However, they do drive stakes into the ground which democratic, rule-of-law-based nations would generally agree on and which thus constitute a common ground to start from.

The following remarks take into account the core elements of the matrix regarding the person communicating, the office or position held by the person, the format, the time frame, the specific characteristics of the information and the consequences of releasing it. With these cornerstones, the principle of proportionality or any balancing-of-interest test can be brought to life and tailor-made for the individual circumstances.

### 4.8.2 *Inability to Retract Information or Irreversibility of Disclosure*

Information is a special good. Among other features, it can be classified as a common good in the economic sense – that is, a good that does not involve competition for resources and which it is also difficult to restrict access to.[97] Although this is not always the case – for example, it is not true of secrets – it is

[95] Oreschnik, *Verhältnismäßigkeit* (n 95) p. 80; Eckhard Pache, 'Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung der Gerichte der Europäischen Gemeinschaften' (1999) 18 *Neue Zeitschrift für Verwaltungsrecht* 1033, at 1034. For a more general overview see Engle, 'The History' (n 92), at 8.

[96] The similar doctrine used in US law is 'balancing'. Balancing can be found to be similar to the principle of proportionality. Cohen-Eliya and Porat, *Proportionality* (n 92) p. 17 et seq., show similarities and analytical differences.

[97] For example, Spiecker genannt Döhmann, '§ 23: Informationsverwaltungsrecht' (n 20) para. 31; Roger A. McCain, 'Information as Property and as a Public Good: Perspectives from the

useful to understand that once information is 'out' it can hardly be retrieved and reversed. A scandal cannot be erased from the public memory once the information it was based on is found out. Once information is saved in a person's memory it cannot easily be unlearned. While the – wrong – information about a lioness walking through a European capital, supposedly captured on amateur video footage, may attract many reactions on social and classical media, the information that the animal in question was probably a boar is viewed and digested much less often. Thus, wrong information is frequently not retracted and remains believed by many earlier recipients, especially when conveyed in a sensational way. The impact factor of information is thus uncontrollable and needs to be generally considered as high.

As state information and state communication typically has a special impact and authority (see at Section 4.3), any information released by the state consequently needs to be especially carefully researched and tested before being distributed (see also Section 4.7.3.2): its authenticity and source, as well as its fact-oriented and science-based nature are core requirements prior to its disclosure in order to minimize the risk of infringement of those who are impacted by it. Beyond this, however, the special qualities of information – and consequently of communication – also require officials to consider the far-reaching consequences of information distribution: As retraction is hardly possible and immaterial damages are the only feasible recompense, following the release of wrong information, the use of the wrong style or wrongful communication one can never fully re-establish the status quo ante. This additionally strengthens the duties to maintain neutrality, objectivity and self-restraint (see Sections 4.7.3.1, 4.7.3.4 and 4.7.3.5).

### 4.8.3 *Procedural Safeguards: Right to Hearing*

Proportionality often requires countermeasures to restrict the legal impact of a measure. Procedure is often used to diminish the weight of infringements at the substantive law level. It can also be employed in communicative settings. One core element of procedure is the right to a hearing. The following remarks concentrate on this procedural element because it is little recognized when discussing the boundaries of state communication. In some legal regimes this right has a constitutional rank, for example as part of the due-process clause of the US Constitution[98] or as part of the rule of law under the German Constitution.[99] However, even without any constitutional foundation of its own, the potential impact of informational measures on individuals is such that it typically requires an executive body

Economic Theory of Property Rights' (1988) 58(3) *The Library Quarterly: Information, Community, Policy* 265, at 271 and 278.

[98] In the recent past, this started with *Goldberg* v. *Kelly*, 397 US 254 (1970); see Henry J. Friendly, 'Some Kind of Hearing' (1975) 123 *University of Pennsylvania Law Review* 1265, at 1267.

[99] BVerfGE 9, 89, at 95; Sachs, *Grundgesetz – Kommentar* (n 92) 163.

to grant a legal hearing to those who would be affected by the planned release of information to the public.

A legal hearing often constitutes a less infringing means in comparison to informing the public right away. This, of course, depends greatly on the goal which is pursued by the information and the exact context. If the information aims at inciting a particular action from individuals, it might be similarly effective to inform those individuals themselves rather than the general public. This is particularly true in cases of "shaming" (see Section 4.8.4). However, a right to a hearing may also have the desired effect in other areas. For example, in competition law cases, informing the public that a particular market situation is now officially being observed because there are grounds for investigating potential violations of the law would not be necessary if the competition agency informed the relevant actors that their behaviour is being scrutinized and this causes reactions to their commercial behaviour.

This again underlines how volatile state information can be and how strictly it must be checked and evaluated before being published (see Section 4.7.3): even the fact of being named in an investigation might influence public opinion about those named, with potentially severe consequences, such as loss of reputation or loss of business. This also has consequences for the right to a hearing: being informed about the intention of the state to name a person or company may make them refrain from activities that, were they taken to court, would be considered to be legal. The mere threat of publicity takes its toll on private action.

In any case, legal hearings allow the private entity or person to participate in the state communication themselves. It gives them the chance to interact with the officials and to influence the state authority's decision to communicate with the public. It might also bring to light additional information that was not available to the administration, which may influence its further actions. In addition, it allows the private entity or person to deploy countermeasures – for example, to prepare for the expected attention being drawn to them. If a warning is issued about particular products, the producer may take measures to communicate itself, or to recall those products from the market on a large scale, even prior to the announcement by the authorities. Thus, the – unwanted – effects on the market of business-related state information may be levelled out and potential dangers better assessed and counteracted, which is in the best interests of all. Exceptions to a procedural safeguard of the right to hearing exist, of course. This may especially be the case if prior information would hinder the successful achievement of the goals of releasing the information (for example, in a search), or if a rapid reaction (for instance, fake news going viral) is necessary.

### 4.8.4 *Reduction of Content*

Often, public statements include information about private persons or institutions. One way to lessen the risk of infringing is typically to exclude this particular piece of information, to anonymize the person or to generalize the details so that

identification of the individual is more difficult or even impossible. Thus, the negative side effects of an informational measure might be avoided. Typical public relations or transparency measures which aim at informing the public about the activities of the administration fall into this category.

This, of course, would only be employed if the information about the exact situation and private persons and institutions is not vital to the goal of publication. This requires a careful assessment of what the goal behind a communication measure involving an official truly is. Therefore, the communicative measures of officials have to be judged while bearing in mind the potential private interests that could interfere with democratic and public interests: only a public goal may justify infringements on third-party interests, and thus the requirements may only be suspended after full consideration. An example of this is the interview situation: it is expected that a politician will declare their political ambitions and convictions. An interview is a legitimate means to fulfil this – private – goal. It is also a legitimate – public – goal to inform the public about the measures their department has taken and the results which the strategy pursued by the office has had. In general, however, a 'homestory' involves too much – private – information.

The exact circumstances such as the context and content and the position of the speaker have to be taken into account: for anyone who is in a non-elected position in the government, no reason exists why the public would need to know this information. However, for a person in an office that is closely linked to elections, a certain amount of knowledge about the person might be appropriate to help inform the public about their qualities. However, an interview or biographical piece set in a person's home, concentrating on creating an image of a sympathetic individual would go too far and disclose too much – private – information about the person behind the office. This, again, reflects the fine line between desirable transparency and non-legal display of the private which requires close consideration of what is being published. There may be a legal interest in giving citizens easy access to those serving the state and allowing them to easily monitor them, but it may not be used to display the private as a private goal hidden behind the state communication.

### 4.8.5 *Shaming and Purposeful Public Disclosure*

Aspects of the disclosure of information in general, such as transparency or monitoring, have to be distinguished from cases where information is disclosed with the intention of putting social pressure on a person or institution, by so-called shaming.[100] Information released by one public official about another public official

[100] See David A. Skeel, Jr., 'Shaming in Corporate Law' (2001) 149 *University of Pennsylvania Law Review* 1811; Sharon Yadin, 'Regulatory Shaming' (2019) 49(2) *Environmental Law* 407; Judith van Erp, 'Shaming and Compliance' in Benjamin van Rooij and D. Daniel Sokol (eds.), *The Cambridge Handbook on Compliance* (Cambridge: Cambridge University Press, 2021) ch. 30, pp. 438–50.

may also fall into this category, especially in times of election campaigns where one competitor or one party tries to discredit their opponent or another party.

First, when describing the legal framework for such state communications, the boundaries (such as objectivity, neutrality, and so on; see Sections 4.7.3.4. and 4.7.3.5) are fully binding. Second, the principle of proportionality additionally governs the use of the release of specific information which informs the public about wrongdoing by private persons or companies: as information is not retrievable, especially given the functionalities of the Internet ('the Internet never forgets'), the social stigma a person or institution receives through this directed negative public attention should not be underestimated. The principle of 'innocent until proven guilty' also puts additional pressure on the state to justify why public shaming is still a permissible means of administrative action in the twenty-first century prior to adjudicated convictions.

### 4.8.6 *The Format*

Surprisingly little attention has been paid to the effects of different formats of communication, despite it having immediate consequences for the exact balance between the legal interests involved. A press communique released to media professionals differs greatly in its effects from an interview to a broadcaster lasting a maximum of three minutes. An advisory opinion issued by a specified agency authored by leading scientists after a months-long process may claim to have higher relevance, thoroughness and validity than a 120-character post on social media. Information provided by the EPA on an altered process to calculate the impact of certain chemicals addresses (and reaches) a different clientele than a report about the president 'pardoning' a turkey at Thanksgiving. A warning about an imminent thunderstorm on the radio has to be analysed by different standards of format (and context and content) than the information that the president will be serving Moselle Riesling 'Piesporter Goldtröpfchen' (Golden Drop of Piesport) wine from a particular vineyard, as printed on the menu card of a state dinner.

This is not the place to analyse the different means by which state authorities may communicate with the public and how information that is aimed at certain groups (for example, professionals, the guest at a state dinner, students) may be framed. The examples merely illustrate that different aspects must be considered when judging the impact of how the state authorities release information and the varying effects of their use of certain media. Publication theory and communication theory need to assist the law to find the relevant standards; the law, even if clear standards are yet to be finalized, nevertheless has to address this.

### 4.8.7 *Equality of Information Access*

One distinct aspect is the use of various media outlets, or, if viewed from another perspective, the requirement of public officials to make information accessible to all

media on equal terms. This means that although state authorities may prefer specific formats, they have to ensure that all the media has access and that no particular private media outlet is considered to be the dominant source of information. A typical format, therefore, should be publication of information by the executive through its own channels – that is, via press conferences (post-COVID also in a hybrid format) or press statements, as well as information on official webpages. Interviews may be selective, but may not be given exclusively to certain journalists. The use of social media has to be legal and open to everyone (which excludes some platforms that violate data protection laws through micro-targeting or which are not accessible if a reader is not registered).

#### 4.8.8 *The Timing*

The proximity of elections heightens the requirements on the principle of proportionality as the need to ensure the fairness of elections comes into effect. Issuing potentially misleading information, which at any time is difficult to justify, must be avoided even more at such times.[101] Defamatory judgements by high-ranking politicians about their opponents are particularly harmful, as are false or misleading news stories. Photographs of a meeting between two high officials of the Secretary of Treasury with a leading bank's officials during a financial crisis may have a different impact on the public prior to an election than the same people meeting in a period of financial stability. It may then be imperative not only to publish the photograph, which would leave ample room for speculation, but to explain the content and results of this meeting.

#### 4.8.9 *Intermediate Conclusion*

The principle of proportionality sharpens the general balancing of interests. Due to its different manifestations under different legislation, the exact weighing of interests may lead to different results. Procedural safeguards, restrictions on the distribution of information due to the irreversibility of information release, care when providing direct information about private persons and companies, and a more informed approach to the various media outlets of public communication are some of the outcomes of using this test.

### 4.9 COMMUNICATION AS A PROCESS: THE RIGHT TO COUNTERATTACK

In theory, administration typically initiates active communication. In practice, executive bodies are constantly reacting to societal discussions and political

[101] BVerfGE 44, 125, at 151 and 153.

currents.[102] Society and administration are in a continuous relationship. The executive is not, however, faced by one people with one voice and one opinion in one format. While some citizens may send emails and post individualized statements on the Internet, others use simpler means of expressing their opinion, such as 'like buttons' or clicks or sharing links and reposting on social media. All of these expressions form part of a digitalized democratic exchange of information and opinions and thus lead to a renewed relationship between the administration and the people.

While the rules for neutrality, objectivity, disinterestedness, and so on, of political bodies have in general been well established (see Sections 4.7.3.4 and 4.7.3.5), the debate on what constitutes private rules of public communication is presently still raging. The most hotly discussed topics in this debate include whether hate speech can be banned in the light of freedom of speech and how a civilized discourse can proceed in an era of digitalized communication. Moreover, the regulation of private information intermediaries, in particular on the Internet, is still incomplete. In the EU, important legal rules have been established, among them the Network Enforcement Act (*Netzwerkdurchsetzungsgesetz*) in Germany or the Digital Services Act of the EU. These regulatory impulses have been shadowed by rising right-wing and populist movements, which have had surprising success on both sides of the Atlantic despite historical experiences, in particular in Europe, with extremist and fascist parties.

These developments influence public discourse not only between individuals and private entities, but also between the state authorities and the public. The increase in potentially offensive language and the speed of communication and unforgiving nature of the Internet, best represented by 'shitstorms', are also used to judge and comment on administrative action. On the other hand, political activists and state officials have been interacting in a wider variety of formats; one of the most highlighted effects of the Internet and social media is the direct access of the people to their representatives in administration.[103]

It is thus an important question whether the framework of state communication as described undergoes changes if we are evaluating official statements as part of a communication process rather than one singular act. An example where the analysis of state action covers a process would be when a member of a political party aggressively comments on the decision of an administrative agency using untrue facts to smear it ('fake news'). Another example would be offensive speech used in an anonymous post on a social media network directed against the head of an administrative agency which attracts thousands of 'likes' or other agreeing posts and clicks over several hours. In both instances, the framework thus created would require

[102] For example, the statement of the Federal Minister of Education and Research (see Section 4.5.5) was a reaction to an assembly of the 'red-wing' party, using the same expression towards the then chancellor ('Rote Karte für Merkel' – 'red flag for Merkel'), see BVerfGE 148, 11.

[103] See Spiecker genannt Döhmann, 'Kontexte der Demokratie' (n 65), at 28, for political parties, see also p. 39 with further references.

neutrality, objectivity and self-restraint – which would restrict the response of the authorities. Considering a statement as an answer or a direct response might, however, change the binding elements of the framework.

An administrative agency in this situation could post correcting statements. It could also issue a statement on netiquette and on the inappropriateness of the original postings. However, the effort would most probably not be very successful, and not gain much attention. The administration could look weak, while the response would be seen as inadequate. Would a post on behalf of the agency ridiculing the language of the author of the post together with a correcting message on the wrong content be appropriate? Could the agency make – albeit to a lesser degree than the aggressor – pointed remarks? According to the principle of objectivity and self-restraint, this would hardly seem appropriate. However, one could argue that the democratic exchange of arguments needs to take into account that the relationship is not determined by one side only and that the history of a communicative relationship influences the standard of neutrality, self-restriction and so on.

Without applying to this problem the in-depth analysis it would need, as a starting point this chapter argues that communication functions in a sender–receiver process, especially when it is individualized. Thus, state authorities act on the basis of this relationship. If the state initiates the communication, thus acting first, then the communication has to adhere strictly to all the criteria described earlier. If, however, there is an individualized communicative process, some of the standards may undergo modifications to reflect the relationship and the process in order to communicate authentically. If the private sender acts in a fair, friendly, rational, non-discriminatory and non-defamatory manner, the state is strictly bound. If, however, the private actor has previously and blatantly violated the rules of fair conduct first, that is, by distributing inaccurate information, using hate speech or aggressive speech against the state, threatening or incriminating core democratic and human rights values and the like, then the framework alters because the balancing of interests alters. The decisive legal factors in this respect are the common good interests in democracy and the rule of law that any state official is bound by. State officials are required to protect those values and must become active defenders of democracy not only in their actions (such as by defending the parliament against violators) but more frequently in words. An ironic or even sarcastic response that discredits the private offender may then be in order.[104] Other relevant

[104] The German Constitutional Court changed its opinion on this matter: in an earlier decision, the Court agreed (BVerfGE 40, 287 (293 f)), however, in the 'red-flag' decision the Court explicitly rejected a right to counterattack, see BVerfGE 148, 11 para. 60. See, as here, but with a different argument, Christoph Degenhart, 'Der Staat im freiheitlichen Kommunikationsprozess: Funktionsträgerschaft, Funktionsschutz und Funktionsbegrenzung' 41 (2010) *Archiv für Presserecht* 324, at 331. On the latest Constitutional Court decision, see Mast, *Staatsinformationsqualität* (n 78) p. 215 et seq; Matthias Friehe, 'Anmerkung zu BVerfG, Urt. v. 27.2.2018, 2 BvE 1/16' (2018) 11 *Neue Juristische Wochenschrift* 928.

circumstances, however, such as timing, opaqueness, publicity, speed of distribution and position, would also have to be considered.

## 4.10 CONCLUSION AND OUTLOOK

As always, a right without sanctions and enforcement is of little value and is a 'toothless tiger'. Not only does state communication need a legal framework; it must also be one that is enforceable and will thus be adhered to. Otherwise, the incentives to violate neutrality, objectivity and fairness and to let the conflict between office and person work to the advantage of the person and the detriment of the office would be too strong. At the risk of being repetitive, it is important to stress that information can rarely be retrieved, and that a violation of privacy or wrongful dissemination of information can hardly ever be fully compensated for. Therefore, damages and other sanctions post-violation are of scarcely any use. Information is a powerful tool of the state, and it is also a powerful tool for private interests hidden behind the public face of those in office and serving the state.

Therefore, a democratic society, based on rule of law needs to clearly define the standards of communication by state authorities in all its facets. Despite the many distinctive characteristics of and differences between different jurisdictions and legal regimes, the common impetus of democracy and the rule of law, of fairness of elections and protection of human rights leads to the emergence of a general framework. The dominance of the public over the private, which requires private interests of public officials to be subordinated to the public good is an important consequence of this. Requirements of competence, impartiality and self-restraint should be taken into consideration in a general balancing of interests. The principle of proportionality, in its essence, requires procedural safeguards, reduction of the scope of content and individualization, care in sharing direct personal information, distinguishing between media outlets and treating them equally, and attention to framing, context and timing.

What is also needed is a change in the juridical system in order to ensure that these legal requirements are not futile. The procedural problem is a common obstacle to this. Violations of the established requirements can be brought before courts only if there is an interested party that has full standing. This is typically the case if individual rights are violated, but that is often difficult to prove, for example in hate speech or in the discriminatory impact of state communication on groups. Violations of the neutrality of media are hard to identify. These violations, as has been shown, nevertheless have severe effects on the democratic, respectful, civil discourse and thus on the acceptance and health of democracy. Therefore, informational misconduct needs procedural systems to move beyond the traditional comprehension of status in order to restrict the power of those in office and in charge of state action.

In addition to procedural problems, clear sanctions must be spelled out on both the institutional and individual levels. If in a conflict between the office and the

person the person prevails despite all the other legal requirements, then not only the office but also the person has to be held responsible for any wrongdoing. Damages and sanctions must be regulated accordingly, including in special situations where information incites third parties. This will help us to understand and establish that information is not per se less infringing or that it typically has little power. The opposite is true: information is surprisingly powerful, and one of the reasons is that the power of information is hard to establish beforehand. What messages the public may assimilate from state communication and what it may not is often unpredictable. This unpredictability demands particularly careful and cautious acts on the part of the state authorities, and particular self-restraint from all those in a political or public office. Only thus can democratic values survive, one of the most important of which seeks to enable the fair representation of all opinions regardless of whether or not they are stated by those with access to power.