Germany's New Militant Democracy Regime: *National Democratic Party II* and the German Federal Constitutional Court's 'Potentiality' Criterion for Party Bans

Bundesverfassungsgericht, Judgment of 17 January 2017, 2 BvB 1/13, National Democratic Party II

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INTRODUCTION

After earlier proceedings in 2003 stranded on procedural grounds,[1] the German *Bundesverfassungsgericht* (Federal Constitutional Court, FCC), on 17 January 2017 delivered a verdict on the content and character of the Nationaldemokratische Partei Deutschlands (National Democratic Party of Germany, NPD). In these new proceedings, the Court decided that the extreme-right party would not be banned. The Court concluded that the NPD is anti-constitutional (*verfassungsfeindlich*), since it aims to create an 'an der ethnischen "Volksgemeinschaft" ausgerichteten autoritären "Nationalstaat"'.[2]

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[1] BVerfG 18 March 2003, 2 BVB 1/01 *National Democratic Party I*, para. 52; T. Rensmann, 'Procedural Fairness in a Militant Democracy: The "Uprising of the Decent" Fails Before the Federal Constitutional Court', 4(11) *German Law Journal* (2003) p. 1117.

[2] BVerfG 17 January 2017, 2 BvB 1/13, *National Democratic Party II*, para. 844.

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But, at the same time, the Court held that the NPD was too insignificant to constitute a serious threat to German democracy, and therefore is not unconstitutional (*verfassungswidrig*).[3] The NPD is said to have around 6,000 members, 338 local representatives and one Member of the European Parliament, but no representatives at the federal level.[4]

The reasoning of the FCC in this second case involving the NPD was particularly interesting. Given the so-called 'party privilege' (*Parteienprivileg*) in Article 21(1) of the German Basic Law (Grundgesetz), political parties are afforded special protection, and in contrast to regular associations, can only be banned by the FCC.[5] In addition, the grounds for banning a party are stricter than when it comes to regular associations,[6] and can be found in Article 21(2) Grundgesetz:

> 'Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality'.[7]

After the Second World War, and up until the first case involving the NPD, the FCC was asked to rule on the unconstitutionality of merely two parties: the Sozialistische Reichspartei (Socialist Reich Party, SRP) and the Kommunistische Partei Deutschlands (Communist Party of Germany, KPD).[8] With the former the Court had no particular difficulties: the SRP closely resembled the NSDAP in its institutional structure, members and political ideas.[9] But it took the FCC four years to ban the KPD. Although the case was filed

[3] *NPD II*, *supra* n. 2, para. 1009, *see also* paras. 846 and 856.

[4] B. Knight, 'Germany's Constitutional Court rules against banning far-right NPD party', *Deutsche Welle (online)*, 17 January 2017.

[5] *See*, on 'party privilege', K. Doehring, 'The Special Character of the Constitution of the Federal Republic of Germany as a Free Democratic Basic Order', in U. Karpen (ed.), *The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law* (Nomos Verlagsgesellschaft 1988) p. 25; and D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edn (Duke University Press 1997) p. 218 and 222.

[6] *See* C.J. Schneider, 'Political Parties and the German Basic Law of 1949', 10(3) *The Western Political Quarterly* (1957) p. 527 at p. 529-530 and E. Klein and T. Giegerich, 'The Parliamentary Democracy', in Karpen, *supra* n. 5, p. 141 at p. 162.

[7] The English translations of the German Constitution here and elsewhere in this article are from the translation of C. Tomuschat, D.P. Currie and Donald Kommers, available at <www.gesetze-im-internet.de/englisch_gg/index.html>, visited 19 April 2018.

[8] Kommers, *supra* n. 5, p. 222.

[9] D.P. Currie, *The Constitution of the Federal Republic of Germany* (University of Chicago Press 1994) p. 216; BVerfG 23 October 1952, E 2,1, *Sozialistische Reichspartei* p. 10-11 (Mohr Siebeck edition).

in the same year as the SRP banning request (in 1951), doubt was cast on the need for a ban as the (electoral) strength of the KPD plummeted.[10] Nevertheless, the Court banned the party in 1956 – in a verdict of extraordinary length.[11]

The Court used the *KPD* case to clarify some aspects of the German militant democracy regime (*wehrhafte* or *streitbare demokratie*).[12] First, it stated that, for a ban, the use of violence, or other crimes, is not necessary.[13] Second, it contended that a party does not have to pose a concrete danger to German democracy.[14]

The FCC thus interpreted '*darauf ausgehen*' ('seek to', in the English translation above)[15] in Article 21(2) Grundgesetz as only requiring a *substantive* test: the unconstitutionality of a party is given with its unconstitutional aims, regardless of its size and potential. It used to be a characteristic aspect of Germany's militant democracy that parties which oppose the German 'free democratic basic order' could be banned *solely* on the basis of their political aims. This did *not* mean that discussing forms of government that contradicted the 'free democratic basic order' was prohibited – i.e. ideas *as such* are not banned,[16] but when these ideas are translated into a 'political programme' that is 'fundamentally and enduringly focused on combatting the free democratic basic order', the threshold for a ban is met.[17] As a consequence, also a party that has 'no prospect of achieving its

[10] Kommers, *supra* n. 5, p. 222; T. Kingreen, 'Auf halbem Weg on Weimar nach Staßburg: Das Urteil des Bundesverfassungsgericht im NPD-verbotsverfahren', 5 *Juristische Ausbildung* (2017) p. 499 at p. 499-500.

[11] Kommers, *supra* n. 5, p. 222; Kingreen, *supra* n. 10, p. 500.

[12] In the Court's own English translation of *NPD II*, para. 418, the German concept of '*Streitbare Demokratie*' is translated as 'militant democracy'; while the German '*Wehrhafte*', which amounts to the same principle, is translated as 'fortified democracy'. The translation is available at the Court's website, <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2bvb000113en.html>, visited 18 April 2018.

[13] BVerfG 17 August 1957, E 5, 85, *Kommunistische Partei Deutschlands*, p. 141-142; Kommers, *supra* n. 5, p. 223.

[14] *KPD*, *supra* n. 13, p. 141-142.

[15] In its own English translation of the *NPD II* decision, the '*darauf ausgehen*' criterion is translated as the 'criterion of "seeking"', *see* the cited paragraph below.

[16] Currie, *supra* n. 9, p. 220; P.P.T. Bovend'Eert and M.C. Burkens, 'De Bondsrepubliek Duitsland', in L.F.M. Besselink et al., *Staatsrecht van landen van de Europese Unie* [*Constitutional Law of the Countries of the European Union*] (Kluwer 2012) p. 61 at p. 91.

[17] *KPD*, *supra* n. 13, p. 142: '(…) der politische Kurs der Partei [muß] durch eine Absicht bestimmt sein, die grundsätzlich und dauernd tendenziell auf die Bekämpfung der freiheitlichen demokratischen Grundordnung gerichtet ist'; B. Pieroth, 'Art. 21 GG', in H.D. Jarass and B. Pieroth (eds.), *Grundgesetz fur die Bundesrepublik Deutschland (Kommentar)* (C.H. Beck 2007) p. 518 at p. 530-531: 'Entscheidend ist, ob die Ziele gegenwartig bestehen, nicht wann sie voraussichtlich realisiert werden'; Kommers, *supra* n. 5, p. 223; Currie, *supra* n. 9, p. 220-221; Bovend'Eert and Burkens, *supra* n. 16, p. 91.

unconstitutional aims in the near future' qualifies for a ban.[18] This leaves no room for risk calculation, i.e. is the ban actually needed to protect democracy?

This all changed with the verdict in *NPD II*. The FCC explicitly abandons its earlier approach, and *reinterprets* 'seeking' ('*darauf ausgehen*') as follows:

> 'In accordance with the exceptional character of the prohibition of a political party as the preventive prohibition of an organisation and not a mere prohibition of views or of an ideology, there can, however, be a presumption that the criterion of "seeking" has been met only if there are specific weighty indications suggesting that it is at least possible that a political party's actions directed against the goods protected under Article 21(2) GG may succeed (potentiality).
> Conversely, if it is entirely unlikely that a party's actions will successfully contribute to achieving the party's anti-constitutional aims, there is no need for preventive protection of the Constitution by using the instrument of the prohibition of the political party, which is the sharpest weapon, albeit a double-edged one, a democratic state under the rule of law has against its organised enemies [*cf* 107, 339 <369>]. On the contrary, the prohibition of a political party may be considered only if the political party has sufficient means to exert influence due to which it does not appear to be entirely unlikely that the party will succeed in achieving its anti-constitutional aims, and if it actually makes use of its means to exert influence. If this is not the case, then the requirement of "seeking" within the meaning of Art. 21(2) GG is not met. The Senate does not concur with the [opinion] set out in the judgment in the case of the Communist Party of Germany (Kommunistische Partei Deutschlands …) which held that the lack of any prospect, as far as humanly measurable, that the political party will be able to realise its unconstitutional aims at any time in the foreseeable future does not bar a prohibition of the party [*cf* 5, 85 <143>].'[19]

The Court first explicitly reaffirms its earlier stance that a party ban does not constitute the prohibition of ideas *as such*. But more importantly, in sharp contrast to its earlier decisions in the *SRP* and *KPD* cases, for a party to be banned, having a thought-out 'political programme' aimed at 'combatting the free democratic basic order' is no longer enough. The Court introduces a new criterion, that of 'potentiality' (*Potentialität*): it must at least be *possible* that the party under review can threaten the 'free democratic basic order' when it actually *acts* upon its potential. According to the Court, whether the 'potentiality' criterion is fulfilled

[18] *KPD*, *supra* n. 13, p. 143 (translation by the authors), the full quote in German reads: 'Eine Partei kann nach dem Gesagten auch dann verfassungswidrig im Sinne des Art. 21 Abs. 2 GG sein, wenn nach menschlichem Ermessen keine Aussicht darauf besteht, daß sie ihre verfassungswidrige Absicht in absehbarer Zukunft werde verwirklichen können'.

[19] *NPD II*, *supra* n. 2, paras. 585-586. All English translations of *NPD II* in this article are from the *FCC* itself, unless stated otherwise. In the Court's own translation, the term 'deviating opinion' is used. This is an unfortunate translation of the original German text, since it suggests that there was some kind of dissenting opinion in *KPD* (which there was not). Therefore, we adjusted the translation in the fragment quoted above.

has to be established 'on the basis of an overall assessment', concerning: (1) 'the situation of the political party' when it comes to 'membership numbers', finances, and such; (2) the 'impact' it has on society, in terms of 'election results, publications, alliances and supporter structures'; (3) 'its representation in public offices and representative bodies'; (4) 'the means, strategies and measures it deploys'; and (5) 'all other facts and circumstances' that might indicate if the party can achieve its aims.[20] The Court decided that, on the basis of such an overall assessment, this potentiality was lacking regarding the NPD. In the new approach of the Court, a party ban is now *also* a matter of timing.

In the following, we will first discuss two related, but distinct, rationales for a 'risk calculation' test when it comes to party bans. Then we will focus on the interaction between the case law of the European Court of Human Rights (ECtHR) and the jurisprudence of the FCC. Subsequently, we will discuss the constitutional amendment that resulted from this case, and introduced a new instrument to the German militant democracy arsenal: ending state funding for a political party. In the final section, we conclude with some brief remarks on the political-philosophical tenability of the new German militant democracy regime.

Two rationales for a 'risk calculation' test

The decision *not* to ban an extreme-right party with meagre support could be interpreted as a sign of democratic maturity.[21] After all, one should not forget that post-war Germany was, besides war-torn, a country with no substantial democratic tradition, apart from the traumatic, short-lived Weimar-democracy. Put more rhetorically, it is the only country, next to Japan, where the United States actually succeeded in 'bringing democracy'.[22] In any case, a democratic tradition still had to take root after the Second World War. In the early stages of the West German democracy, a stricter patrolling of the limits of democracy might have been understandable.[23] However, a more developed and stable democracy can allow for more political freedom; a development that is already noticeable in other cases from the FCC concerning political freedoms.[24]

[20] *NPD II*, *supra* n. 2, para. 587.

[21] Kingreen, *supra* n. 10, p. 500, 503; Currie, *supra* n. 9, p. 221; Kommers, *supra* n. 5, p. 238.

[22] A.B. Downes and J. Monten, 'Forced to Be Free? Why Foreign-Imposed Regime Change Rarely Leads to Democratization', 37(4) *International Security* (2013) p. 90 at p. 91.

[23] *See*, in general, on tighter restrictions on political freedom in developing democracies: A. Etzioni, 'Democracy is not a suicide pact', *The National Interest* (online), 7 January 2007, of which the introduction was published in 90 *The National Interest* (2007) p. 13. Kingreen adds that the West-German post-war approach was based on the combination of a *specific* reading of the breakdown of Weimar democracy and the fear of Communism in the 1950s, *see* Kingreen, *supra* n. 10, p. 503 and 504.

[24] Kommers, *supra* n. 5, p. 224, 227; Currie, *supra* n. 9, p. 221; Bovend'Eert and Burkens, *supra* n. 16, p. 91.

The new, less restrictive approach of the FCC to the right of political association in *NPD II* fits into this pattern and is the result of incorporating a 'risk calculation' test. Such a test can be operationalised by using two closely related, but distinct, rationales. First, there is a 'risk to democracy' rationale, as explicitly used by the ECtHR,[25] i.e. banning the party is not *yet* needed for the protection of democracy, since it is unlikely that the party could actually inflict any serious damage. This is the rationale that also informed the FCC's 'risk calculation' test in *NPD II*. However, there is also what one might call a 'negative effects' rationale, i.e. the expectation that a ban would have negative effects that outweigh the benefits of removing a party from the democratic arena, e.g. it could contribute to the radicalisation of its supporters, pushing them underground and/or into the use of violence.[26]

Both rationales tie into each other when it comes to 'late' party bans. Waiting *too* long, until, for instance, the party even participates in government, is discouraged by both rationales, since it increases the risk to democracy in an institutional sense (the 'risk to democracy' rationale), but it could also increase the adverse effects of the ban, or even render a ban unfeasible (the 'negative effects' rationale).[27] But both rationales point in different directions when it comes to 'relatively early' bans. While a 'risk to democracy' rationale – of course, subject to the specific national context – might suggest a 'wait and see' approach regarding an antidemocratic political party that has, say, 15 of the 100 available seats in parliament and no real prospect of joining a coalition government, as there is no real (electoral) threat to democracy yet; a 'negative effects' rationale might consider a ban already too late at that stage, since the party has already amassed a large base of followers that might actively resist the ban, suggesting intervention at a much earlier point in time.[28]

[25] ECtHR *Refah Partisi* v *Turkey*, 13 February 2003, 41340/98, 41342/98 and 41344/98, para. 104.

[26] *See*, for a discussion and nuancing of those concerns, T. Bale, 'Are Bans on Political Parties Bound to Turn Out Badly?', 5 *Comparative European Politics* (2007) p. 141; B. Rijpkema, *Weerbare democratie: de grenzen van democratische tolerantie* [*Militant Democracy: the Limits of Democratic Tolerance*] (Nieuw Amsterdam 2015) p. 116–126.

[27] *NPD II*, *supra* n. 2, para. 583: 'Müsste der Eintritt einer konkreten Gefahr abgewartet werden, könnte ein Parteiverbot möglicherweise erst zu einem Zeitpunkt in Betracht kommen, zu dem die betroffene Partei bereits eine so starke Stellung erlangt hat, dass das Verbot nicht mehr durchgesetzt werden kann (…)', *see also* Kingreen, *supra* n. 10, p. 503.

[28] In discussing the dilemma of timing, Brems points to possible 'public outrage' as a negative effect of a relatively 'late' ban: *see* E. Brems, 'State regulation of xenophobia versus individual freedoms: the European view', 1(4) *Journal of Human Rights* (2002) p. 481 at p. 482-483; *see also* J. Ipsen, 'Das Ausschlussverfahren nach Art. 21 Abs. 3 GG – ein mittelbares Parteienverbot?', 72 *Juristenzeitung* (2017) p. 933 at p. 935, who, in short, argues that if one bans a party relatively 'late', when it already has seats in parliament, it will likely be said that the applicants are trying to eliminate 'missliebige politische Konkurrenz'. *See*, on timing in general, the discussion in D.J. Elzinga, *De Politieke Partij en het Constitutionele Recht* (Ars Aequi Libri 1982) p. 143-147.

Interaction of the German Court and the European Court of Human Rights

In addition to democratic maturity; the *legal* perspective offers an important explanation for the *NPD II* case. The shift from a purely substantive approach to a combination of a substantive and a ('risk to democracy') risk calculation test has to be seen in the context of interaction with international legal standards on militant democracy.[29] Germany, as a signatory to the European Convention on Human Rights (ECHR), has to adhere to the human rights standards that are laid down in this treaty, and – in the final instance – also has to abide by the interpretation the ECtHR gives to the treaty.[30]

The general European Court of Human Rights framework on party bans

The ECtHR has developed an extensive jurisprudence on the banning of political parties and associations. To assess whether there has been a violation of the right to association (Article 11(1) ECHR) the ECtHR determines whether the specific ban was 'necessary in a democratic society' (Article 11(2) ECHR). Given the severity of the infringement that a party ban constitutes, 'the margin of appreciation' (i.e. the room for interpretation by an individual state) is therefore strict.[31] It is a measure that cannot be taken lightly. In the words of the ECtHR in its landmark case concerning the ban of the Turkish *Refah* party:

> 'Drastic measures, such as the dissolution of an entire political party and a disability barring its leaders from carrying on any similar activity for a specified period, may be taken only in the most serious cases.'[32]

Therefore, the ECtHR sets the bar high. There must be:

> 'plausible evidence that the risk to democracy, supposing it had been proved to exist, was *sufficiently imminent*.'[33]

[29] *See* C. Walter, 'Interactions between International and National Norms: Towards an Internationalized Concept of Militant Democracy', in Ellian and Rijpkema (forthcoming 2018).

[30] *See also* Kingreen, *supra* n. 10, p. 505. To be clear, within the German legal system, the German Constitution is of a higher status than the Convention (and other international treaties). However, the FCC leaves no doubt that German Courts have to abide by the Convention *and* the case law of the ECtHR, unless rights granted by the German Constitution are violated, *see*G. Lübbe-Wolff, 'ECtHR and national jurisdiction – The Görgülü case', 12 *Humboldt Recht Forum* (2006) p. 138 at p. 145-146.

[31] ECtHR 20 June 2009, Case Nos. 25803/04 and 25817/04, *Herri Batasuna and Batasuna* v *Spain*, paras. 77-78; ECtHR 30 January 1998, Case No. 133/1996/752/951, *United Communist Party of Turkey* v *Turkey*, para. 46. *See also* A. Legg, *The Margin of Appreciation in Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) p. 93.

[32] *See Refah Partisi, supra* n. 25, para. 100, *see also Batasuna*, *supra* n. 31, para. 77.

[33] *Refah Partisi*, *supra* n. 25, para. 104 (italics added), formulated slightly differently, later, in *Batasuna*, *supra* n. 31, para. 83.

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In applying this standard to *Refah*, part of a coalition government at the time of its dissolution, the ECtHR concurred with the risk assessment made by the Turkish Constitutional Court:

> 'While it can be considered, in the present case, that Refah's policies were dangerous for the rights and freedoms guaranteed by the Convention, the real chances that Refah would implement its programme after gaining power made that danger more tangible and more immediate. That being the case, the Court cannot criticise the national courts for not acting earlier, at the risk of intervening prematurely and before the danger concerned had taken shape and become real. Nor can it criticise them for not waiting, at the risk of putting the political regime and civil peace in jeopardy, for Refah to seize power and swing into action, for example by tabling bills in Parliament, in order to implement its plans'.[34]

Two elements are important in the Court's reasoning. First, as said, a risk calculation test, based on a 'risk to democracy' rationale, with a high threshold ('sufficiently imminent'), is an integral part of the ECtHR's treatment of party bans.[35] Second, the ECtHR seems to suggest that this threshold is met when there is a reasonable risk that an antidemocratic party could seize power and start executing its program[36] – but not much earlier.

It is not hard to see why, when taken at face value, the 1950s German militant democracy regime is difficult to reconcile with the ECtHR's stance in this respect. The FCC's stance in the *KPD* case – a political party without any electoral potential can also be banned – was quite far removed from the ECtHR interpretation of 'sufficiently imminent'. With the *NPD II* verdict the FCC has brought its jurisprudence closer to the standards of the ECtHR by incorporating a risk calculation test[37] – the question is, however, *how* close, exactly?

It is important to note at this point that the difference is not so much in substance. On the question of *what* makes a party antidemocratic, the German Federal Constitutional Court's 'free democratic basic order' corresponds quite well with the European Court of Human Rights' 'concept of a democratic society', as

[34] *Refah Partisi*, *supra* n. 25, para. 110.

[35] *See also Batasuna*, *supra* n. 31, para. 83.

[36] In further explaining 'seizing of power', the Court puts special emphasis on being able to rule without the restrictions of coalition government, *see Refah Partisi*, *supra* n. 25, para. 108: 'The Court accordingly considers that at the time of its dissolution Refah had the real potential to seize political power without being restricted by the compromises inherent in a coalition. If Refah had proposed a programme contrary to democratic principles, its monopoly of political power would have enabled it to establish the model of society envisaged in that programme'.

[37] *See inter alia* M. Steinbeis, 'Die eventuell, aber nicht potenziell verfassungswidrige NPD', *VerfBlog*, 17 January 2017; Kingreen, *supra* n. 10, p. 505-506.

both adhere to a substantive, rather than a procedural, conception of democracy.[38] Therefore, it is a matter of timing: *when* is a ban allowed, according to the ECtHR and according to the FCC?

The European Court of Human Rights on timing

Regarding timing, the ECtHR *does* provide some leeway on the strict margin of appreciation in Article 11 ECHR by recognising that: (1) national authorities are better placed to assess threats to democracy in their own country;[39] and (2) the historical context and constitutional specifics of a country have to be taken into account,[40] as for instance, the protection of secularism in Turkey.[41]

In addition to Article 11, there is Article 17 ECHR. When the *KPD* case reached Strasbourg in 1957, it was actually decided under this article.[42] Article 17 ECHR, the so-called 'abuse clause', bars applicants from invoking their ECHR rights when they evidently aim to misuse them *against* Convention rights. Consequently, there is no substantive treatment of the case. In these cases, there is no need to see whether the infringement was proportional. To put it bluntly: since the applicants 'lost' their Convention rights, there are no rights to violate in the first place. Such applicants are therefore not protected by the Convention, and there is no need to assess whether the infringement is justified by the *actual threat* a party poses.[43] Although it is hard to discern a clear rule for when Article 17 applies, it is used in cases when holocaust denial, racism, 'religious hate speech' or 'totalitarian ideologies' are concerned.[44]

[38] *See* in detail Rijpkema, *supra* n. 26, p. 159-175. *See NPD II*, *supra* n. 2, paras. 538-547, in particular para. 542: 'The principle of democracy is a constitutive element of the free democratic basic order. Democracy is the form of rule of the free and equal. It is based on the idea of free self-determination of all citizens. Insofar the Basic Law is based on the assumption of the intrinsic value and dignity of the human being who is enabled to be free; at the same time it guarantees the human rights which are the core of the principle of democracy by means of the right of citizens to determine in freedom and equality, by means of elections and other votes, the public authority which affects them in personal and objective terms […]'. For the classic formulation of the German Federal Constitutional Court's substantive concept of democracy, *see SRP*, *supra* n. 9, p. 12-13.

[39] *Refah Partisi*, *supra* n. 25, para. 100; ECtHR 16 March 2006, Case No. 58278/00, *Zdanoka* v *Latvia*, para. 134 (concerning the revoking of voting rights).

[40] *Refah Partisi*, *supra* n. 25, paras. 105, 124; in *NPD II*, *supra* n. 2, the FCC also points to the following cases in this context (*see NPD II*, para. 614): *United Communist Party of Turkey*, *supra* n. 31, para. 59; ECtHR 3 February 2005, Case No. 46626/99, *Partidul Comunistilor and Ungureanu* v *Romania*, para. 58; ECtHR 14 December 2010, Case No. 28003/03, *HADEP and Demir* v *Turkey*, para. 69 ff; ECtHR 12 April 2011, Case No. 1297/07, *Republican Party of Russia* v *Russia*, para. 127.

[41] *Refah Partisi*, *supra* n. 25, para. 105.

[42] European Commission of Human Rights 20 July 1957, Case No. 250/57, *KPD* v *Germany*.

[43] This does not affect the protection by rights enshrined in, for instance, the German constitution – if those rights afford *more* protection than the Convention rights, the former have priority, *see* Art. 53 ECHR.

[44] C. Burbano Herrera, 'Art. 17 EVRM', in J.H. Gerards et al. (eds.), *SDU Commentaar EVRM* (Sdu 2013) p. 1250 at p. 1253-1256.

While the historical context of Weimar Germany remains relevant for the assessment under Article 11 ECHR, it does seem unlikely that this context would today still justify banning a party regardless of its potential.[45] Regarding Article 17 ECHR, the category of 'totalitarian ideologies' *could* be relevant, given the fact that the FCC sees a commitment in the NPD to 'the National Socialist violence and terror regime that was characterized by contempt for human beings and totalitarian animosity against democracy'.[46] However, the FCC does not seem to consider the article relevant to the *NPD II* case and only discusses it briefly in outlining the ECtHR framework.[47] Perhaps the FCC did not see the NPD as falling into one of the categories of cases in which Article 17 ECHR is applied by the Strasbourg Court.[48] With Article 17 not called upon or applied, the ECtHR would probably, under Article 11, render a – hypothetical – ban of the NPD premature.

The German Federal Constitutional Court on timing

If the NPD had met the FCC's potentiality criterion, and was banned, the ECtHR might have come to rule on this new criterion. However, as this did not happen, it remains to be seen how the ECtHR would evaluate the FCC's use of 'potentiality' in the 'risk calculation' test. Therefore, it is interesting to note that, in *NPD II*, the FCC did give something of 'a shot across the bows' on what it considers the appropriate timing for a ban. The FCC suggests that it is not prepared to set the bar for banning a party as high as the ECtHR is sometimes interpreted to do in

[45] *See* Kingreen's criticism of 'Weimar' as an argument in constitutional discussions, Kingreen, *supra* n. 10, p. 504 (*see also* n. 52 below).

[46] *NPD II*, *supra* n. 2, para 843 (translation by the authors), the full German quote reads: 'Damit bestätigt sich zugleich die Missachtung der freiheitlichen demokratischen Grundordnung durch die Antragsgegnerin. Das nationalsozialistische Gewalt- und Terrorregime war geprägt durch Menschenverachtung und totalitäre Demokratiefeindlichkeit. Demgemäß zieht die bei der Antragsgegnerin feststellbare Verbundenheit mit dem Nationalsozialismus deren Anerkennung der Menschenwürde und des Demokratieprinzips in Zweifel. Auch wenn dies für die Annahme, dass sie gegen die freiheitliche demokratische Grundordnung gerichtete Ziele verfolgt, allein nicht ausreicht, führt die Wesensverwandtschaft mit dem Nationalsozialismus zumindest zu einer Bestätigung des aus dem "Volksgemeinschafts- und Nationalstaatskonzepts" der Antragsgegnerin folgenden Befundes, dass sie politische Ziele verfolgt, die mit der Menschenwürdegarantie und dem Demokratieprinzip des Grundgesetzes nicht vereinbar sind'.

[47] *NPD II*, *supra* n. 2, para. 608.

[48] It could indeed be argued that an invocation of Art. 17 ECHR, as in the *KPD* case, would not succeed today: *see* R. de Lange, et al., *Risico's voor de democratie: een juridische verkenning van het gevaar-criterium in het democratisch verdedigingsrepertoire in vijf landen: Duitsland, Frankrijk, Spanje, het Verenigd Koninkrijk en de Verenigde Staten* (Erasmus University Rotterdam 2016), Report for the Dutch Ministery of the Interior and Kingdom Relations (presented to the House of Representatives on 29 March 2017) p. 50-51.

the German literature.[49] The FCC argues that the ECtHR's 'sufficiently imminent' criterion is not to be read as strictly as one might think solely on the basis of *Refah*, and therefore:

> 'cannot be taken to mean that, from the point of view of the [European Court of Human Rights], the prohibition of a political party is only in compliance with the Convention if a specific threat to the free democratic order has already emerged and the success of the anti-constitutional endeavours of the political party is immediately imminent.'[50]

To substantiate this claim, the FCC first points to other cases of the ECtHR in which it allowed party bans on the basis of its 'sufficiently imminent' criterion *without* problematising the (relatively small) size or significance of the prohibited political parties and/or the threats posed by them to the constitutional order. In these cases, the ECtHR regarded their stances on, or links to, terrorism sufficient grounds for prohibition, such as in *Batasuna*.[51]

More importantly, the FCC argues that, in general, *if* it were to ban a party on the basis of its new 'potentiality' criterion, this *would* indeed be covered by the margin of appreciation which the ECtHR leaves to states in applying the 'sufficiently imminent' criterion. The ECtHR conducts an 'overall examination of the circumstances' with special regard to specific national experiences and developments. Applied to Article 21 (2) Grundgesetz and the German situation, this would mean that it must be taken into account that this provision is a response to the historical experience of the Nazi party's 'quasi-legal' rise to power and reflects the efforts to prevent such in the future by a relatively early intervention.[52] In other words, when applied in Germany, the 'sufficiently imminent' criterion leads to an earlier moment of intervention. Therefore, against this background, the notion that the banning of a political party is only allowed when it has become so strong that undermining or abolishing the 'free democratic order'

[49] *NPD II*, *supra* n. 2, para. 619, the FCC refers to the following literature: 'Emek/Meier, RuP 2013, S. 74 <77>; Morlok, Jura 2013, S. 317 <323 f.>; Bröhmer, in: Dörr/Grote/Marauhn, EMRK/GG, 2. Aufl. 2013, Kap. 19 Rn. 103 ff.; wohl auch Grimm, in: Meier, Das Verbot der NPD – ein deutsches Staatstheater in zwei Akten, 2015, S. 367 <368>' (only in the German text).

[50] *NPD II*, *supra* n. 2, para. 619.

[51] *NPD II*, *supra* n. 2, para. 620; *Herri Batasuna and Batasuna* v *Spain*, *supra* n. 31

[52] *NPD II*, *supra* n. 2, para. 621. On the quasi-legal rise to power of the National Socialist German Workers' Party, and the integral part the misuse of democratic rights played in its strategy, *see* J.W. Bendersky, *A Concise History of Nazi Germany* (Rowman & Littlefield 2014) p. 84 and 46. *See also* Kingreen, *supra* n. 10, p. 504, who criticises the FCC for *uncritically* using the 'Weimar' argument in this context. If one wants to use the historical context as an argument, one needs to use more recent results of historical research into Weimar, in which the 'legality thesis' (roughly: the view that Weimar democracy was dismantled legally) is criticised, the misuse of party bans by the Nazis is studied and in which the emphasis is (much more) on the lack of a democratic spirit (attitude) in the Weimar of the 1930s.

does not merely seem *possible*, but is in fact *probable*, must be rejected in the German situation according to the FCC.[53] It leads the FCC to conclude that, as cited above, a party can be banned when it 'is at least possible that a political party's actions directed against the goods protected under Article 21(2) GG may succeed (potentiality)'.[54]

To summarise: the FCC argues that this 'potentiality' criterion adheres to the 'sufficiently imminent' threshold the ECtHR sets for party bans; it is 'simply' the result of applying the ECtHR's criterion to the specific German circumstances. In Germany, the 'sufficiently imminent criterion means 'potentiality': a party can be banned, within the confines of Article 11 ECHR, when there is the *possibility* of the 'free democratic basic order' being undermined or abolished; it does not have to be probable.[55]

New complications? The constitutional amendment to Article 21 Grundgesetz

The introduction of the 'potentiality' criterion in *National Democratic Party II* created a new 'category' of parties.[56] From now on, there are two types of party that strive against the free democratic basic order. First, there is the (full-blown) unconstitutional party ('*verfassungswidrig*'), as meant in Article 21(2) Grundgesetz: a party that not only actively opposes the free democratic order,

[53] *NPD II*, *supra* n. 2, para. 621. *Contra*, Kingreen argues that the new interpretation actually means that a concrete danger is necessary before a party can be banned: 'Den indem es "konkrete Anhaltspunkte von Gewicht" für die Realisierung der verfassungsfeindlichten Ziele einer Partei fordert, etabliert das Bundesverfassungsgericht nichts anderes als die Voraussetzung einer auf eine individuelle Partei und deren spezifische Verhaltensweisen bezogenen konkreten Gefahr' (*see* Kingreen, *supra* n. 10, p. 506).

[54] *NPD II*, *supra* n. 2, para. 585.

[55] Interestingly, Kingreen, *supra* n. 10, argues that the FCC did not go far enough in its use and interpretation of the Strasbourg case law. The FCC could have incorporated the ECtHR's 'sufficiently imminent' criterion, and thereby retreat from its former stance in *Kommunistische Partei Deutschlands*, as both the FCC and the ECtHR share the opinion that a risk calculation should play a role in assessing party bans (*see* p. 505-506). *Contra* Kingreen, one could argue, however, that though it is true that the FCC, in its new interpretation of Art. 21(2) Grundgesetz, wants to incorporate a 'risk calculation', the FCC (rightfully or not) also, as demonstrated above, wants to add a 'national' (German) flavour to the 'risk calculation' test by accepting the 'sufficiently imminent'-criterion *in abstract terms*, but translating this to a *specific* 'potentiality' criterion when used in Germany (roughly to be understood as: the party's success should be *possible*, not probable). Ipsen, on the other hand, contends that the FCC too easily submitted to (its interpretation of) the case law of the ECtHR, since the present threats to democracy and rule of law in several ECHR Member States would make a more lenient approach of the Strasbourg Court to the German militant democracy regime likely, *see* Ipsen, *supra* n. 28, p. 936.

[56] Steinbeis, *supra* n. 37; S. Jürgensen, 'Das Parteiverbot ist tot, es lebe der Entzug staatlicher Parteienfinanzierung', *VerfBlog*, 30 May 2017; Kingreen, *supra* n. 10, p. 502-504.

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but *also*, given the new interpretation of 'seeking' ('*daraus aufgehen*'), has the potential to actually threaten this order. Second, there is the anti-constitutional party ('*verfassungfeindlich*'), which actively opposes the free democratic basic order, without the potential to actually threaten it (the National Democratic Party, for instance). Only the former category can be banned, pursuant to Article 21(2) Grundgesetz. Naturally, the question arises what can or should be done with regard to parties in the latter category. When declared anti-constitutional ('*verfassungsfeindlich*'), but not unconstitutional ('*verfassungswidrig*'), the party lives on and enjoys the full protection of the earlier mentioned 'party privilege', which means that, for instance, it may not be refused the use of 'municipal facilities', such as a city hall, for party purposes.[57] And, more importantly, from that moment on, via the funding of political parties, the state is 'officially' subsidising an anti-constitutional party.[58]

In its *NPD II* decision the FCC already hinted at linking 'verfassungsfeindlichkeit' to party funding in a new constitutional provision.[59] The German lawmaker has followed up on this suggestion and 'codified' the new category.[60] The second paragraph of Article 21 Grundgesetz remained the same (as cited above), but by constitutional amendment two paragraphs were added, effective from 28 July 2017.[61] Article 21(3) and (4) now read as follows:

> '(3) Parteien, die nach ihren Zielen oder dem Verhalten ihrer Anhänger darauf ausgerichtet sind, die freiheitliche demokratische Grundordnung zu beeinträchtigen oder zu beseitigen oder den Bestand der Bundesrepublik Deutschland zu gefährden, sind von staatlicher Finanzierung ausgeschlossen. Wird der Ausschluss festgestellt, so entfällt auch eine steuerliche Begünstigung dieser Parteien und von Zuwendungen an diese Parteien.
>
> (4) Über die Frage der Verfassungswidrigkeit nach Absatz 2 sowie über den Ausschluss von staatlicher Finanzierung nach Absatz 3 entscheidet das Bundesverfassungsgericht.' [62]

In the new Article 21 Grundgesetz the crucial 'railroad switch' is in the difference between 'seeking' ('*darauf ausgehen*') (in Article 21(2)) and '*darauf ausgerichtet*' (in Article 21(3) and (4)).[63] To qualify as 'seeking' ('*darauf ausgehen*') a party must have,

[57] Kingreen, *supra* n. 10, p. 507; Steinbeis, *supra* n. 37; Jürgensen, *supra* n. 56, *see also* Ipsen, *supra* n. 28, p. 935.

[58] Steinbeis, *supra* n. 37; Ipsen, *supra* n. 28, p. 935.

[59] *NPD II*, *supra* n. 2, para. 527, with another 'hint' in the discussion of the Strasbourg case law in paras. 624-625; Kingreen, *supra* n. 10, p. 509; Steinbeis, *supra* n. 37.

[60] *See*, in detail, Ipsen, *supra* n. 28, p. 933.

[61] Ipsen, *supra* n. 28, p. 933.

[62] An official English translation is not yet available.

[63] Ipsen, *supra* n. 28, p. 933-934.

given the *NPD II* interpretation of '*darauf ausgehen*', a certain potential to reach its goals. Those parties are unconstitutional ('*verfassungswidrig*') and can be banned. To qualify as '*darauf ausgerichtet*', however, parties do not have to have such potential; their striving against the free democratic basic order suffices. These parties can be said to be anti-constitutional ('*verfassungsfeindlich*'),[64] although the new article does not use this term, and can be excluded from state funding, both in a 'direct' (subsidies, '*staatlicher Finanzierung*') and an 'indirect' sense (tax benefits, '*steuerliche Begünstigung*').[65] The exclusion applies for a period of six years, subject to renewal.[66]

The *NPD II* decision makes it clear that the NPD did not qualify for the first, but given the substance of its political program, would most certainly qualify for the new, second category in Article 21(3) Grundgesetz.[67] If successful, such an Article 21(3) procedure could deal a critical blow to the party, which has been faced with dwindling membership and financial troubles.[68] Out of around 160 million in funds earmarked for political parties, the NPD received €1.3 million in state funding in 2015.[69]

Of course, arguments can be made in favour of the new amendment. Why would a democracy finance a party that aims to threaten its very existence and the rights of others, protected by the 'free democratic basic order'?[70] Especially while, for instance, Germany simultaneously spends €104.5 million a year to combat these views.[71] A second argument can be found in 'proportionality': reserving the party ban for the most serious threats to democracy, but using less intrusive instruments (such as ending party funding) to deal with less serious threats.[72] The FCC mentioned this 'proportionality' argument in *NPD II*, pointing out that under the former Article 21 Grundgesetz no less far-reaching measure than a party ban was available, while the ECtHR case law does leave open the possibility of using less intrusive measures for lesser threats to democracy.[73]

[64] Kingreen, *supra* n. 10, p. 507-508.

[65] Ipsen, *supra* n. 28, p. 934; *see also* Kingreen, *supra* n. 10 on both forms of party finance, before the amendment: p. 507-508.

[66] Ipsen, *supra* n. 28, p. 934-935, who sees several difficulties regarding *temporary* exclusion (p. 935-396).

[67] *See* the reasoning of the FCC on the substance of the party's program in *NPD II*, *supra* n. 2, para. 844.

[68] J. Chase, 'Bundestag cancels German government funding of non-democratic parties', Deutsche Welle *(online)*, 22 June 2017.

[69] Kingreen, *supra* n. 10, p. 508.

[70] Kingreen, *supra* n. 10, p. 507, citing Linck, who sees financing such parties as a 'Pervertierung der wehrhaften Demokratie'.

[71] Chase, *supra* n. 68.

[72] *Contra*, Jürgensen, *supra* n. 56.

[73] *NPD II*, *supra* n. 2, paras. 624-625.

Nonetheless, one must take into account how essential state funding is to political parties. While ending party funding is presented as a less intrusive measure, one could question how realistic this is when parties (such as the NPD) are highly dependent on state funding.[74] Ipsen and Kingreen argue that cutting party financing could function as a '*de facto* party ban'. That it could even replace the (actual) party ban of Article 21(2) Grundgesetz, thereby effectively lowering the threshold that was raised by the FCC in *NPD II*.[75]

It is likely that we will see the new instrument in action soon; it is thought that an Article 21(3) Grundgesetz procedure against the NPD will be started in the near future.[76] Only after the FCC's decision in such a procedure we will be able to fully assess the import of Germany's newest addition to its militant democracy arsenal.

Conclusion

The *NPD II* decision adds a new element to German constitutional law: the *timing* of party bans. The FCC no longer deems it sufficient that a party actively aims to abolish or undermine the free democratic basic order: the Court requires a certain 'potential'. For a ban, it must be at least possible that the political party could successfully threaten the free democratic basic order. The combination of a substantive test (does the party oppose the free democratic basic order?) and a 'risk calculation' test, based on a 'risk to democracy' rationale (is there a possibility that it will achieve its goal?), is justifiable as a choice to refrain from intervening in the democratic process *as long as possible*.[77] In doing so, the FCC created a new category of parties, namely: those that *do* engage in a struggle against the free democratic basic order, but lack the potential to realise their aims. The German legislator seized this opportunity to create the option to deny such parties state financing (in an amendment to Article 21 Grundgesetz). This, however, leads to new complications; cutting party financing could function as a de facto party ban, as has been remarked upon in the first commentaries on these developments in the German literature.

By departing from its 'substantive test'-only approach established in its decision in *KPD* (1956) the FCC has moved closer to the ECtHR case law on party bans. However, in something of a shot across the bows, the FCC contends that the

[74] Kingreen, *supra* n. 10, p. 509.

[75] Ipsen, *supra* n. 28, p. 935, who nevertheless argues that this measure can never fully replace the party ban, since the *other* rights a party in parliament still enjoys, even after cutting its state financing, make sure a party can continue its 'extremist agitation in the centre of political decision-making'; Kingreen, *supra* n. 10, p. 509-510 (discussing ending party financing *before* the Art. 21(3) Grundgesetz amendment was adopted); Jürgensen, *supra* n. 56, speaks of the 'so-called "small party ban"' (translation by the authors).

[76] Ipsen, *supra* n. 28, p. 935.

[77] Rijpkema, *supra* n. 26, p. 71, 198-199 and 211.

ECtHR's 'sufficiently imminent' criterion should not be understood as putting the threshold as high as in the landmark *Refah* decision. In addition to nuancing the 'sufficiently imminent' criterion as such, its most important argument is that, under the margin of appreciation, the specific German circumstances would justify an earlier moment of intervention than in *Refah*. Therefore, the new 'potentiality' criterion would adhere to the ECtHR's 'sufficiently imminent' criterion, as it is 'just' the result of applying it in the German context. It remains to be seen whether the ECtHR will concur with the FCC's interpretation of its standards.

The *NPD II* decision also introduces a degree of uncertainty that, up to now, was absent from the German militant democracy regime. All militant democracies that incorporate a 'risk calculation' test are affected by the question: how does one establish whether the danger a party poses to democracy is concrete enough? At which *exact* moment in time, in terms of the FCC, is the 'potentiality' threshold met?[78]

As noted above (*see* Introduction), the FCC provided some general viewpoints, but while these guidelines might help in *selecting* the relevant facts, the issue of the *actual assessment* of these facts, their relative weight and interconnectedness, is not resolved. For instance, how many seats in parliament would tilt the scales towards a ban? And what if a political party does have a substantial number of seats in parliament, but is categorically excluded from coalition-government by (all) other parties?[79] Or, how to assess a party that has no substantial number of seats, but makes a significant impact on society by engaging in public agitation and the like?

Consequently, the timing of a ban in a militant democracy regime that *also* wants to take the actual democracy-damaging potential of a political party into account (next to its party programme) remains an intricate matter. In other words, bringing the 'risk calculation' test into practice is not an easy task. This does not have to be a problem per se, since the new approach offers *more* protection to political parties in comparison with the 'substantive test' only approach of the FCC in the 1950s; the bar for banning a party has been raised. Given this extra protection, the lack of a 'mathematically' exact right moment for the timing of a ban may be pardoned.[80]

[78] *NPD II*, *supra* n. 2, para. 585: 'that the criterion of "seeking" has been met only if there are specific weighty indications suggesting that it is at least possible that a political party's actions directed against the goods protected under Art. 21(2) GG may succeed (potentiality)'. Kingreen criticises the German Court's choice of words in this context: 'Aber wenn keine konkrete Gefahr vorliegen muss, fragt es sich, welche Gefahr das Bundesverfassungsgericht genau meint' (*see* Kingreen, *supra* n. 10, p. 506).

[79] *See* in this context, regarding the NPD: *NPD II*, *supra* n. 2, para. 903.

[80] *See* the discussion in Rijpkema, *supra* n. 26, p. 196-199 and 211, and also Elzinga, *supra* n. 28, p. 143-147.