Mixed Signals of Europeanization: Revisiting the NPD Decision in Light of the European Court of Human Rights' Jurisprudence

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Abstract

The Article revisits the German Federal Constitutional Court's NPD decision and the concept of militant democracy regarding party bans in German constitutional law. It argues that the Court's new definition of the free democratic basic order approximates its jurisprudence to the standards developed by the European Court of Human Rights. The Article also compares the German and European standards for party bans. It assesses the respective required risks for democracy that a party needs to pose in order to justify a party ban. In this respect, it is argued that the German standard—though elevated—still falls short of the threshold under European human rights law. Finally, the NPD's anti-constitutional—but not unconstitutional—character is examined, and a recent constitutional amendment to exclude extremist political parties from party financing is evaluated.

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A. Introduction

In early 2017, the Federal Constitutional Court of Germany rejected a motion for the ban of the National Democratic Party of Germany (NPD).[1] The decision was a landmark case in German constitutional and political party law. At the same time, the case was a vivid example of the Europeanization of German constitutional law. Both the requirements for the dissolution of political parties and the protection of the free democratic basic order—one of the Basic Law's core elements—were modified along the lines predefined by the European Court of Human Rights. This Article revisits the decision and outlines the constitutional framework related to political parties in Germany. It carves out the influence of European human rights law on constitutional interpretation in Germany and assesses the decision's aftermath as well as its consequences for German party law.

B. Militant Democracy in the German Constitution and the Influence of European Human Rights Law

Political parties form the connecting link between the people and the branches of government. In German constitutional doctrine, they are defined as associations of politically like-minded persons who, under competitive conditions and on the basis of a common constitutional consensus, strive to win the voters' sympathy by influencing public opinion in order to gain as many mandates in legislative or executive organs as necessary to realize their political aims within the state.[2] Political parties do not only play a central role for elections, but also recruit personnel for political leadership, articulate political goals, solutions and alternatives, and thereby integrate different opinions into the public discourse.[3]

The German Basic Law of 1949 (*Grundgesetz*) accorded political parties a privileged position and elevated them to the status of constitutional institutions.[4] This was one of the decisive differences from the Weimar Constitution of 1919 that favored a more unified state and exhibited a rather suspicious attitude toward particular interests represented by political parties.[5] Whereas parties in the Weimar Republic were governed merely by the law of

[1] Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Jan. 17, 2017, Neue Juristische Wochenschrift [NJW] 611 [hereinafter *Judgment of Jan. 17, 2017*].

[2] H. Klein, *78th Supplement Art. 21, para. 5, in* Maunz-Dürig Grundgesetz-Kommentar (C.H. Beck ed., 2016).

[3] J. Ipsen, *Art. 21, paras. 24-25, in* Sachs Grundgesetz-Kommentar (C.H. Beck ed., 7th ed. 2014).

[4] *Id.* at para. 5 (mentions that this constitutional incorporation had been proposed already by H. Triepel in his book. H. Triepel, Die Staatsverfassung und die politischen Parteien [The State constitution and the political parties] 8 (Preußische Drucks- und Verlags-Aktiengesellschaft 1927)).

[5] Ipsen, *supra* note 3, at para. 65.

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associations and constitutional provisions protecting the general freedom of association,[6] the Grundgesetz regards political parties as "necessary factors of life under the constitution."[7] The Federal Republic of Germany is a "party state" (*Parteienstaat*) or "party democracy" (*Parteiendemokratie*)[8], emphasizing the important role of political parties for the formation of the people's will, while also rejecting an overly idealized notion of parliamentary representation.[9]

"Political party" is a constitutional term laid down in Article 21 of the Grundgesetz. The term contains constitutional guarantees that cannot be limited by statutory law.[10] In conjunction with the principle of democracy[11] and the general principle of equality[12] (Article 3), Article 21 contains the constitutional principle of "party equality" (*Parteiengleichheit*), meaning that all political parties must have equal chances in elections and electoral campaigns.[13] State authorities may not make any unjustified differences regarding their treatment. Arbitrary privileges or disadvantages are forbidden. For instance, state facilities and infrastructure such as town halls or broadcasting opportunities must be offered to all parties, though differentiations reflecting the size or prior success of a party may be allowed.[14]

Another important aspect and the topic of this Article is the possibility of party bans by stipulating that a party which seeks to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional.[15] Making such a decision is the exclusive competence of the Federal Constitutional Court.

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[6] CHRISTOPH GUSY, DIE LEHRE VOM PARTEIENSTAAT IN DER WEIMARER REPUBLIK [THE TEACHING FROM THE PARTY STATE IN THE WEIMARER REPUBLIC] 35 (Nomos 1993).

[7] *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Oct. 23, 1952, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1407, 73 (225–27) [hereinafter *Judgment of Oct. 23, 1952*]; *See also* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Mar. 18, 2003, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1577, 358 [hereinafter *Judgment of Mar. 18, 2003*].

[8] This term is favored by Ipsen, *supra* note 3, at paras. 14, 23.

[9] W. Kluth, *Art. 21, para. 1, in* EPPING/HILLGRUBER BECK'SCHER ONLINE-KOMMENTAR GRUNDGESETZ (C.H. Beck ed., 31st ed. 2016).

[10] *Id*. at para. 19; Ipsen, *supra* note 3, paras. 15-16.

[11] GRUNDGESETZ [GG] [BASIC LAW] art. 20, para. 1.

[12] GRUNDGESETZ [GG] [BASIC LAW] art. 3, para. 1.

[13] Ipsen, *supra* note 3, paras. 33-34.

[14] *See* PARTEIENGESETZ [PARTY LAW] BUNDESGESETZBLATT [BGBL] NO. 44/1967 at 773, § 5.

[15] GRUNDGESETZ [GG] [BASIC LAW] art. 21, para. 2.

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I. The Concept of Militant Democracy According to the Grundgesetz

The introduction of the possibility and the limitation of party bans was a response by the drafters of the constitution to the developments toward the end of the Weimar Republic. Beginning in 1933, all political power became concentrated in the hands of the National Socialist German Workers' Party (NSDAP) and its leader Adolf Hitler, while, at the same time, political activities of any other party were effectively outlawed.[16] Therefore, Article 21 must be seen as an expression of the concept of "militant democracy" (*wehrhafte Demokratie*)[17] within the framework of the Grundgesetz. It means that the German constitution does not award unconditional liberty to those who want to abolish liberty.[18]

Apparently, there is a certain tension between, on the one hand, the constitutional concept of militant democracy, and, on the other hand, the free exercise of fundamental freedoms—such as freedom of expression and freedom of association.[19] Indeed, a free exchange of political ideas, which is the cornerstone of any democratic system of government, necessitates a legal environment that allows not only critical remarks, but also the introduction of radical thoughts into the political debate. At the same time, however, a free exchange of ideas and deliberation can take place only under the condition that these aforementioned fundamental freedoms are respected, not removed.

Therefore, Article 21 tried to create a synthesis between, on the one hand, the tolerance for all political convictions and, on the other hand, a commitment to basic principles and absolute values of the German state order.[20] It is a "borderline problem" that the constitutional drafters tried to solve against the background of their historical experience which taught them that total state neutrality toward political parties could end in a catastrophe.[21]

Pursuant to the constitutional concept of the Grundgesetz, democracy does not mean that the "people are always right." Rather, a democratic system can only be sustained in an environment where certain basic principles and values cannot be abolished. Within the concept of militant democracy, the limits of democracy are inherent elements of democracy

[16] *See* Klein, *supra* note 2, at paras. 497-498.

[17] Term coined by K. Loewenstein, *Militant Democracy and Fundamental Rights I*, 31 AM. POL. SCI. R. 417–32 (1937).

[18] *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Aug. 17, 1956, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1393, 138 [hereinafter *Judgment of Aug. 17, 1956*].

[19] Thorough discussion by Klein, *supra* note 2, at paras. 486-487.

[20] *Judgment of Jan. 17, 2017* at para. 516.

[21] For more, see *Judgment of Aug. 17, 1956* at 139; Klein, *supra* note 2, at para. 491.

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itself to guarantee its sustainability. With the words of the Constitutional Court: "A temporary majority shall not shut behind itself the door through which it entered."[22]

One may ask, however, whether this protection of democracy is still necessary as the German democratic system has become more and more robust over the years since 1949. Compromises based on the free exchange of ideas usually solve political conflicts. It appears that this established democracy is far less susceptible to being undermined or removed by radical forces. Yet, as Bourne and Bértoa have shown, established democracies are indeed as likely as new democracies to ban political parties.

According to their analysis, while party bans have been relatively frequent in new democracies, an even larger number of them did not ban any party. Meanwhile, established democracies have banned political parties at a rate similar to new democracies; and those included not only countries with historic experiences of authoritarian rule, but also countries that did not have such experiences.[23] Nonetheless, Bourne and Bértoa also found that procedural democracies—which focus mostly on the proper conduction of elections, while not putting formal limits on constitutional changes—are less likely to ban political parties than substantive democracies—which place an emphasis on civil, political, and social rights as the foundation of democracy and put certain limits on constitutional changes.[24]

Bourne and Bértoa also analyzed the rationales for party bans. They found that classic, Weimar-inspired militant democracy has become an almost outdated pattern for the explanation of party bans. According to their analysis, political parties have rarely been dissolved to prevent a wholesale abolition of democracy. Rather, following the findings of Bligh, they observed that parties have been dissolved increasingly to protect only certain elements of the liberal constitutional order such as a non-violent resolution of disputes or the commitment to equality and non-discrimination, while the responsible authorities have not really worried about the existence of the democratic system itself.[25]

Germany under the Grundgesetz is certainly a substantive democracy. Besides Article 21, the manifestation of militant democracy can be found in various provisions throughout the constitution. Article 5 paragraph 3 stipulates that freedom of teaching shall not release any person from allegiance to the constitution. According to Article 9 paragraph 2, associations

[22] *Judgment of Jan. 17, 2017* at para. 517.

[23] Angela K. Bourne & Fernando Casal Bértoa, *Mapping Militant Democracy: Variation in Party Ban Practices in European Democracies (1945-2015)*, 221 EUR. CONST. LAW R. 234 (2017).

[24] *Id*. at 14.

[25] *Id*. at 23 (citing G. Bligh, *Defending Democracy, A New Understanding of the Party-Banning Phenomenon*, 46 VAND. J. TRANSNAT'L L. 1321, 1354 (2013)).

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whose aims or activities are directed against the constitutional order shall be prohibited.[26] Article 18 empowers the Federal Constitutional Court to declare the forfeiture of certain rights if the respective person abused these rights in order to combat the free democratic basic order.[27] Moreover, Article 20 paragraph 4 accords all Germans the right to resist anybody seeking to abolish the constitutional order if no other remedy is available.[28]

The German Constitutional Court, in its latest NPD decision, still refers to Weimar and the historic experiences to justify the use of Article 21 paragraph 2. The Court describes the protection of democracy as a constant task, rejecting a mere transitory character of the provision. According to the decision, the possibility of shutting down a political party remains valid constitutional law, even though anti-democratic voices should also be confronted in public debates. The Grundgesetz accorded political parties a central role in the formation of the state's will. In return, the Court demands that they must continue to respect the most basic rules.[29]

As the dissolution of a political party constitutes a severe restriction of the freedom to form a political will, however, the constitution drafters set narrow conditions, which are interpreted rather restrictively by the Constitutional Court. Thus, freedom should be the rule; a party ban the exception.[30] Since 1949, only two parties have been declared unconstitutional: The Communist Party of Germany (KPD) in 1952 and the Socialist Reich

[26] GRUNDGESETZ [GG] [BASIC LAW] art. 9, para. 2 provides: "Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited."

[27] GRUNDGESETZ [GG] [BASIC LAW] art. 18 provides:

> Whoever abuses the freedom of expression, in particular the freedom of the press (paragraph (1) of Article 5), the freedom of teaching (paragraph (3) of Article 5), the freedom of assembly (Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court.

[28] Further examples of militant democracy within the Grundgesetz can be found in Article 79 paragraph 3—the "eternity clause"—, Article 87a paragraph 4, and in Article 91.

[29] *Judgment of Jan. 17, 2017* at para. 524.

[30] *Id.*

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Party (SRP) in 1956, both in the early years of the Federal Republic.[31] Any administrative interference with the party's existence is strictly forbidden.[32]

II. The Free Democratic Basic Order as the Constitutional Core

According to Article 21 paragraph 2, a political party is unconstitutional if it seeks to undermine or abolish the free democratic basic order[33] or to endanger the existence of the Federal Republic of Germany.[34] As separatism is currently not a political issue in Germany—different from Turkey,[35] for example—and as also the NPD did not aim to endanger the existence of Germany, we can focus on the first alternative.

The term of the free democratic basic order is a specific constitutional term. In the spirit of liberal constitutionalism and against the background of the Constitutional Court's call to interpret Article 21 restrictively, it can only relate to the constitutional core. It may, therefore, be equated with the fundamental fabric, the basic structure, or the identity of the Grundgesetz. Maybe unsurprisingly, however, the term has been interpreted in various ways, even in the jurisprudence of the Federal Constitutional Court itself.

Elements that have been described as features of the free democratic basic order included the respect for human dignity and human rights as concretized in the Grundgesetz, people's sovereignty, the separation of powers, the accountability of the government, the rule of law, the independence of courts, a multi-party system, equal opportunities for all political

[31] For the ban of the Socialist Reich Party (Sozialistische Reichspartei, "SRP"), see *Judgment of Oct. 23, 1952*; for the ban of the Communist Party of Germany (Kommunistische Partei Deutschlands, "KPD"), see *Judgment of Aug. 17, 1956*.

[32] *Id*. at para. 526; for more, see Klein, *supra* note 2 at paras. 571-572.

[33] In German: "freiheitliche demokratische Grundordnung. "

[34] GRUNDGESETZ [GG] [BASIC LAW] art. 21, para. 2 provides: "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."

[35] *See*, for instance, the European Court of Human Rights decisions: United Communist Party of Turkey v. Turkey, App. No. 19392/92, Eur. Ct. H.R. (1998), http://hudoc.echr.coe.int/; Socialist Party v. Turkey, App. No. 21237/93, Eur. Ct. H.R. (1998), http://hudoc.echr.coe.int/; Dicle v. Turkey, App. No. 25141/94, Eur. Ct. H.R. (2002), http://hudoc.echr.coe.int/; HADEP and Demir v. Turkey, App. No. 28003/03, Eur. Ct. H.R. (2010), http://hudoc.echr.coe.int/; Party for a Democratic Society v. Turkey, App. No. 3840/10, Eur. Ct. H.R. (2016), http://hudoc.echr.coe.int/.

parties,[36] freedom of association, parliamentarianism, free elections,[37] the free and open formation of the people's will and opinion, freedom of the press, freedom of information, and freedom of religion.[38] As can be seen, an increasing number of characteristic features have been attributed to the term. Or, to put it differently, there has been quite some uncertainty about how to define the constitutional core.

The Constitutional Court's NPD decision has—at least for the time being—ended this uncertainty, and I argue that the re-interpretation of the free democratic basic order has aligned German constitutional law with the jurisprudence of the European Court of Human Rights.

In its decision, the Court cut the above-mentioned enumeration down to three elements: First, the guarantee of human dignity; second, the principle of democracy; and third, the *Rechtsstaat* principle, whereas the latter is concretized by certain sub-principles. As already alluded earlier, the Court justifies this restrictive approach by reasoning that it must be permitted to question also fundamental elements of the constitution.

Let us quickly look at the three elements that constitute the free democratic basic order. First, human dignity[39] protects personal individuality, identity and integrity as well as fundamental equality before the law. This right which constitutes the core of all other basic rights and, in effect, the core of the whole German legal system as well, prohibits any degrading treatment by the state. According to the famous object formula by Dürig, the state shall never treat any person like an object.[40] Due to human dignity's egalitarian character, any anti-Semitic or racist discrimination constitutes a violation of this right.

The second element, the principle of democracy, achieves that free and equal citizens, by way of elections and other votes, create and shape public power in self-determination. This element is connected to human dignity as it provides for the opportunity of equal participation for all citizens without discrimination. Although, the exact way these requirements are realized is not fixed. In its decision, the Constitutional Court even states

[36] These eight elements have been enumerated by the FCC in the SRP decision, see *Judgment of Oct. 23, 1952* at 13.

[37] These additional elements stem from the FCC's KPD decision, see *Judgment of Aug. 17, 1956* at 199, 230.

[38] For these additional elements, see Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Jan. 15, 1958, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3064; Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Mar. 2, 1977, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1054, 139; Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Oct. 1, 1987, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 329, 74; Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Oct. 22, 2014, 2 BVR 661/12, 303.

[39] GRUNDGESETZ [GG] [BASIC LAW] art. 1, para. 1.

[40] G. Dürig, *Art. 1 paragraph 1, paras. 28, 34, in* MAUNZ-DÜRIG GRUNDGESETZ-KOMMENTAR (C.H. Beck ed. 1958).

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that the rejection of parliamentarianism and the plan to replace it with a plebiscitary system would not constitute a violation of the free democratic basic order in the sense of Article 21.[41]

The third element is the *Rechtsstaat* principle which establishes the rule of law and aims at the limitation of state power in the interest of individual freedom. Here, the Court states that a few sub-principles are of particular importance when it comes to the definition of the free democratic basic order under Article 21. These are that public power must be bound by law and subject to the control of independent courts. At the same time, the state must hold the monopoly on the use of force.[42]

III. Europeanization of the Core?

The Constitutional Court explicitly differentiates the free democratic basic order from the constitution's "eternal" elements laid down in Article 79 paragraph 3.[43] These elements, which can never be changed in any constitutional way, encompass the principle of federalism, the Länder's participation on principle in the legislative process, human dignity, the republican principle, the *Rechtsstaat* principle, the principle of the social state, and the principle of democracy.

According to the Court, the free democratic basic order must be narrower than that.[44] It is, so to speak, the core of the core of the Grundgesetz. Consequently, a party may seek the removal of eternal principles from the Grundgesetz, even though such removal could not be implemented without violating the eternity clause. This is a stunning result, perhaps not without logical frictions.[45] The only way to bypass the eternity clause could be the adoption of a new constitution by the German people. Article 146 provides for this possibility.[46] In

[41] *Judgment of Jan. 17, 2017* at para. 543.

[42] *Id*. at para. 547.

[43] GRUNDGESETZ [GG] [BASIC LAW] art. 79, para. 3 reads: Amendments to the Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

[44] Different opinion: Ipsen, *supra* note 3, at para. 160 ("identical").

[45] In this direction also M. Sachs, *Kein Verbot der NPD trotz Verfassungsfeindlichkeit mangels jeglicher Erfolgsaussichten ihrer Bestrebungen* [*No NPD ban despite the party's anti-constitutional character due to the lack of potential success*], 377 JURISTISCHE SCHULUNG 378 (2017).

[46] GRUNDGESETZ [GG] [BASIC LAW] art. 146 provides: "This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect."

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that case, however, it appears that any limitation stemming from the (then) old constitution would be without effect anyway.[47]

Leaving the practical consequences aside, the Basic Law's new and narrow constitutional core corresponds, more than before, to the parameters set by the European Court of Human Rights, transforming this core to a nucleus with a partly European identity. Even though the Constitutional Court avoided any reference to European jurisprudence and seemed to recover its definition from the body of the Grundgesetz itself, implicit references may be discernible.

When the Constitutional Court elaborates that the content of the eternity clause is not to be confused with the free democratic basic order within the meaning of Article 21, the Court expressly states that, for instance, the republican principle or the federal principle—two eternal principles—do not form part of the free democratic basic order because "also constitutional monarchies and unitary, centralized states may conform to the model of liberal democracy."[48] Though prior definitions of the free democratic basic order did not incorporate federalism or the republican principle, the clarity and frankness with which the Court points to the possibility for political parties to campaign for transforming Germany to a centralized constitutional monarchy is surprising, and was certainly not warranted by the case at hand.

Possible reasons for the German Court's new restrictive approach might indeed be found in a number of European Court of Human Rights cases. In the *Socialist Party* case of 1998, the European Court ruled:

> In the Court's view, the fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.[49]

[47] When addressing the relationship between Article 21 paragraph 2 and Article 146, the FCC touches upon this issue in passing, without resolving it, see *Judgment of Jan. 17, 2017* at para. 518, with further references.

[48] *Judgment of Jan. 17, 2017* at para. 537.

[49] Socialist Party v. Turkey, *supra* note 35, at para. 47.

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This formula was confirmed, for instance, in the Court's *Freedom and Democracy Party (ÖZDEP)* case,[50] in the *Socialist Party* case of 2003,[51] in the *United Macedonian Organisation Ilinden-Pirin* case[52] as well as in the *Party for a Democratic Society* case.[53] It is one of the corner stones of the European Court of Human Rights jurisprudence on political parties and reflects the Court's concept of liberal democracy as well as the privileged position which political parties assume in the eyes of the European Court.[54]

According to the European Court of Human Rights' jurisprudence, political parties can claim protection under Article 11 of the Convention.[55] The Court established a clear link between human rights and multiparty democracy.[56] It held that "democracy is without doubt a fundamental feature of the European public order," drawing particularly on the Convention's preamble and holding that "the maintenance and further realization of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights."[57] The Court considers political parties "essential to the proper functioning of democracy," making an "irreplaceable contribution to political debate."[58] Therefore, only "convincing and compelling reasons" can justify restrictions. The member states enjoy only a limited margin of appreciation.[59]

Against this background, the newly adopted narrow focus of the German Constitutional Court may indeed be explained with a view to the European Court's strict privilege for political parties, offering them wide freedom to campaign for goals that are "incompatible with the current principles and structures" of the state. It appears that the German Court drew the conclusion not to insist on the Basic Law's eternal principles anymore, taking the

[50] Freedom and Democracy Party v. Turkey, App. No. 23885/94, para. 41 (1999), http://hudoc.echr.coe.int/.

[51] Parti Socialiste de Turquie v. Turquie, App. No. 26482/95, para. 43 (2003), http://hudoc.echr.coe.int/.

[52] United Macedonian Organisation Ilinden-Pirin v. Bulgaria, App. No. 59489/00, para. 61 (Oct. 20, 2005), http://hudoc.echr.coe.int/.

[53] Party for a Democratic Society, *supra* note 35, at para. 78.

[54] Critical (demanding further privileges also for persons exercising freedom of expression), S. Sottiaux & S. Rummens, *Concentric Democracy: Resolving the Incoherence in the European Court of Human Rights' case law on freedom of expression and freedom of association*, 10 INT'L J. CON. L. 106, 113 (2012).

[55] *See* United Communist Party, *supra* note 35, at paras. 24.

[56] J. Vidmar, *Multiparty Democracy: International and European Human Rights Law Perspectives*, 23 LEIDEN J. INT'L L. 209, 244 (2010).

[57] *See* United Communist Party, *supra* note 35, at para. 45.

[58] *Id*. at paras. 25, 43.

[59] *Id*. at para. 46.

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rare chance that the NPD case offered, and reduced the scope of the free democratic basic order to a narrowed core consisting of human dignity, democracy, and the rule of law. In doing this, the judges went far beyond what was necessary for this particular case. Therefore, part of the reasons for this reconfiguration may indeed be found in European human rights law.

In sum, it may be a bold endeavor to exactly pin-point the origins of the Constitutional Court's "European turn." Even though the European Convention on Human Rights ranks below the constitution, the Constitutional Court generally pays respect to Germany's obligations under European human rights law and, based on Articles 25 and 59 of the Grundgesetz, interprets the German constitution in a way that is "open" or "friendly" toward international law.[60]

In any event, the new interpretation of the free democratic basic order certainly brings the German constitutional law pertaining to political parties very much in line with European human rights law. As we will see, it is not the only evidence of "European harmonization" identifiable in the NPD decision. Rather, it appears that the German Court thoroughly consulted the European Court of Human Rights' jurisprudence for this case.

C. The Risk Level that Justifies Party Dissolution

Article 21 paragraph 2 defines as unconstitutional any political party that seeks, by reason of its aims or the behavior of its adherents, to undermine or abolish the free democratic basic order. Thus, when the Federal Constitutional Court is called to rule on a party's (un)constitutionality, the Court is limited to assessing the party's aims and the behavior of its adherents. Other sources are not permitted.

Regarding a party's aims, the Court assesses the real aims, not those the party may pretend to pursue, though the party program remains an important source. The behavior of party members and other adherents is attributed to the party if the party endorsed, approved, or tolerated their actions. Criminal offenses committed by individual adherents may only be attributed to the party if they reflect the party's will. A party's mere contribution to a certain political climate, however, cannot be the basis for the attribution of individual criminal behavior.

[60] *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Oct. 26, 2004, 2 BvR 955/00, 25.

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I. "Seeking" to Undermine or Abolish the Free Democratic Basic Order

If a party's aims are indeed "hostile to the constitution,"[61] the Constitutional Court still needs to decide whether the party seeks to undermine or abolish the free democratic basic order. As it is not the aim of Article 21 paragraph 2 to stipulate a ban on convictions, worldviews, or ideologies,[62] the term "seeking"[63] is interpreted restrictively, referring to an actively militant and aggressive attitude toward the existing order,[64] manifested by planned actions that constitute qualified preparatory steps toward undermining or abolishing the free democratic basic order.[65] This, however, must not be misunderstood in a way that a party can be unconstitutional only if it pursues its "hostile" aims in illegal ways, or with violence.[66] Rather, due to the preventive nature of Article 21 paragraph 2, the state does not have to wait for criminal offenses to be committed in the pursuit of these aims. Legal and non-violent behavior may indeed be considered hostile in the sense of Article 21.[67]

The interpretation of the term "seeking" entails still another aspect, which brings us to the decision's second innovation. Whereas, in prior decisions, the Court considered that a political party could be unconstitutional even though it appeared impossible that the party could realize its unconstitutional aims any time in the foreseeable future,[68] the Court now demands "concrete and weighty evidence" that the party's actions against the free democratic basic order could, at least possibly, be successful ("potentiality"[69]). The Court explicitly[70] abandons its prior interpretation in the KPD decision of 1956 and considers that the tool of the party ban, this "sharpest and double-edged sword," shall not be used if the party's actions are a hopeless endeavor. In other words, if democracy can easily withstand such challenge, there is no need for a crackdown.

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[61] In German: "verfassungsfeindlich."

[62] Klein, *supra* note 2, at para. 486.

[63] In German: "darauf ausgehen."

[64] *Judgment of Jan. 17, 2017* at para. 574, with reference to *Judgment of Aug. 17, 1956* at 141: "aktiv kämpferische, aggressive Haltung."

[65] *Judgment of Jan. 17, 2017* at para. 570.

[66] K.H. SEIFERT, DIE POLITISCHEN PARTEIEN IM RECHT DER BUNDESREPUBLIK DEUTSCHLAND [THE POLITICAL PARTIES IN THE LAW OF THE FEDERAL REPUBLIC OF GERMANY] 466 (Heymanns ed. 1975).

[67] *Judgment of Jan. 17, 2017* at para. 579.

[68] *See* the Court's KPD decision, *Judgment of Aug. 17, 1956* at 142.

[69] *Judgment of Jan. 17, 2017* at para. 570, 585-586 (in German: "Potentialität"); justifying the old approach, Klein, *supra* note 2, at para. 527.

[70] *Judgment of Jan. 17, 2017* at para. 586.

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II. European Determination of National Risk Assessment

By lifting the risk level for a party ban to "concrete and weighty evidence of a certain possibility" that the party might actually undermine or abolish the free democratic basic order, the Constitutional Court has, in effect, approximated its opinion to the European Court of Human Rights' jurisprudence.[71] In particular, it is the European Court's *Refah* case[72] that defined the risk level in a strict way; a way that is, by the way, similar to the U.S. Supreme Court's "clear and present danger" test.[73] The European Court embedded the *Refah* test into its Article 11 assessment, which shall therefore be outlined shortly.

When examining whether the dissolution of a political party was "necessary in a democratic society"[74], the European Court of Human Rights assesses the goals and activities of the respective party. In *Yazar*, it established a two-step approach that has become the framework of the Court's adjudication of party ban cases:

> The Court considers that a political party may campaign for a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must in every respect be legal and democratic, and secondly, the change proposed must itself be compatible with fundamental democratic principles.[75]

Within this framework, the Court asks further whether a "pressing social need" can justify the party ban. In *Refah*, the Court developed a test setting out when the condition of a pressing social need is satisfied:

> The Court's overall examination of the question whether the dissolution of a political party on account of a risk of democratic principles being undermined met a "pressing social need" must concentrate on the following points:

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[71] *See* C. Gusy, *Verfassungswidrig, aber nicht verboten!* [*Unconstitutional, but not banned!*], NEUE JURISTISCHE WOCHENSCHRIFT 601, 602 (2017); C. Hillgruber, *NPD–verfassungsfeindlich, aber nicht verfassungswidrig* [*NPD–anti-constitutional, but not unconstitutional*], JURISTISCHE AUSBILDUNG 398, 399 (2017); H.W. Laubinger, *Entscheidung durch den Bundestagspräsidenten?* [*Decision by the President of the Bundestag?*], ZEITSCHRIFT FÜR RECHTSPOLITIK 55, 56 (2017); Sachs, *supra* note 45, at 379.

[72] Refah Partisi v. Turkey, App. No. 41340/98, Eur. Ct. H.R. (2003), http://hudoc.echr.coe.int/.

[73] Schenck v. U.S., 249 U.S. 47, 52 (1919); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[74] Article 11 paragraph 2 of the Convention.

[75] Yazar v. Turkey, App. Nos. 22723/93, 22724/93, 22725/93, para. 49, Eur. Ct. H.R. (2002), http://hudoc.echr.coe.int/.

> (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a "democratic society."[76]

The *Refah* test, which has been confirmed in subsequent decisions,[77] demands an imminent risk to democracy, already indicating that small parties may rarely meet this threshold due to their lack of political power and the related low probability that they might ever realize their political aims. For instance, in *Refah*, the European Court of Human Rights affirmed the existence of an imminent risk due to the fact that *Refah* had obtained about 22% of the votes in the general election, 35% in local elections, held 158 seats in the national parliament, was part of a coalition government, and, according to an opinion poll, could have obtained 67% of the votes in the next general election.[78] In the history of European Court of Human Rights jurisprudence, *Refah* was the only party ever considered an imminent risk to democracy based on its political power.

The German Federal Constitutional Court's NPD decision approximated German doctrine to European human rights standards. This approximation has been foreseen by some scholars.[79] The German Court, however, presents its new interpretation of the term "seeking" as a genuine interpretation based on the body of the Grundgesetz itself. The Court merely validates the results by stating that its findings also conform with the jurisprudence of the European Court of Human Rights.[80]

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[76] Refah Partisi and Others v. Turkey, *supra* note 72, at para. 104.

[77] *See*, for instance, Partidul Comunistilor v. Romania, App. No. 46626/99, para. 48, Eur. Ct. H.R. (2005), http://hudoc.echr.coe.int/; Herri Batasuna v. Spain, App. No. 25803/04, para. 83, Eur. Ct. H.R. (2009), http://hudoc.echr.coe.int/.

[78] Refah Partisi v. Turkey, *supra* note 72, at para. 11.

[79] S. Emek & H. Meier, *Über die Zukunft des Parteiverbots* [*On the future of the party ban*], *in* VERBOT DER NPD–EIN DEUTSCHES STAATSTHEATER IN ZWEI AKTEN [BAN OF THE NPD–A GERMAN STATE PLAY IN TWO ACTS] 309, 314 (H. Meier ed., Berliner Wissenschafts-Verlag 2015); *compare* K. Pabel, *Parteiverbote auf dem europäischen Prüfstand* [*Party bans under European scrutiny*], 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 921, 932 (2003).

[80] *Judgment of Jan. 17, 2017* at para. 607.

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The Constitutional Court apparently saw the necessity to defend its "potentiality" approach against claims that the European Court might demand a stricter standard. For instance, the German Court reasoned that a "concrete danger" for democracy would not be required. These arguments shall be assessed below.

III. Potentiality or Imminence?

When validating its findings against the background of the European Court of Human Rights' jurisprudence, the German Constitutional Court argues that preventive actions against political parties are generally permitted under European human rights law. In this regard, the Court cites the *Refah* and *Herri Batasuna* cases, where the European Court of Human Rights held:

> The Court considers that a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent.[81]

From these cases, the Constitutional Court concludes that the contracting states enjoy a certain margin of appreciation when determining the proper point in time for dissolving a party.[82] The Court also claims that the European Court's requirement of an imminent threat for democracy may not be construed to mean that a party may only be dissolved if the free democratic basic order is in "concrete danger" in the sense that the success of anti-constitutional endeavors is "imminent."[83] In support of this point, the Constitutional Court cites the European Court's general preventive approach (see *Refah*/*Herri Batasuna* quoted above). Moreover, the judges refer to the two Spanish cases of *Herri Batasuna* and *Eusko Abertzale Ekintza* in which the European Court approved party bans on the "mere" basis that the respective political parties condoned acts of terrorism, regardless of the party's size or importance.[84] Finally, the German Court justifies its standpoint with reference to Germany's historic experience, reasoning that the constitution drafters aimed at the creation of an

[81] Refah Partisi, *supra* note 72, at para. 102; Herri Batasuna, *supra* note 77, at para. 81.

[82] *Judgment of Jan. 17, 2017* at para. 613.

[83] *Id*. at para. 619.

[84] *Id*. at para. 620, with reference to Herri Batasuna, *supra* note 77, at paras. 85; Eusko Abertzale Ekintza—Acción Nacionalista Vasca v. Espagne, App. No. 40959/09, paras. 67, Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/.

early-intervention mechanism, where party bans must be possible before there is a concrete danger for democracy.[85]

The arguments which the Court employs in defense of its approach are not convincing. First, the Court's claim that the term "imminent risk for democracy" should not be misunderstood as referring to a situation in which the success of a party's anti-constitutional endeavors is "imminent," is not comprehensible.

Second, the German Court's reference to the *Herri Batasuna* and *Eusko Abertzale Ekintza* cases is based on a misinterpretation of the European Court's doctrine. According to the European Court's two-step approach laid down in *Yazar*, first, the means used by a political party to change the law or the legal and constitutional structures of the state must in every respect be legal and democratic; and second, the change proposed must itself be compatible with fundamental democratic principles.[86] In *Herri Batasuna* and *Eusko Abertzale Ekintza*, the European Court of Human Rights held that the means used by the respective parties were neither legal nor democratic due to their close links to E.T.A. Therefore, the party bans were justified based on the first step already, making any further remarks regarding the second step—compatibility with fundamental democratic principles—dispensable. A political party employing violent or terroristic means may be banned on this ground already as the two-step approach demands parties to satisfy both elements cumulatively. If one condition is not met, the party may be banned. In other words, the criterion of non-violence is a functional equivalent to the imminent risk standard. The latter needs to be addressed only in cases where political parties pursue possibly anti-democratic aims in a peaceful and legal manner, as can be seen in *Refah*. Therefore, it is inaccurate to cite *Herri Batasuna* and *Eusko Abertzale Ekintza* to suggest that the European Court itself was not living up to its standards.

Finally, the Constitutional Court referred to Germany's historic experience and Weimar. Indeed, the European Court of Human Rights takes into account the historical-political context in which a party ban takes place.[87] Particularly, in *Partidul Comunistilor and Ungureanu*, the Court was "prepared to take into account the historical background to cases before it, in this instance Romania's experience of totalitarian communism prior to 1989." It also observed, however, that the "context cannot by itself justify the need for the interference, especially as communist parties adhering to Marxist ideology exist in a number of countries that are signatories to the Convention."[88] Moreover, it appears reasonable to

[85] *Judgment of Jan. 17, 2017* at para. 621.

[86] Yazar, *supra* note 75, at para. 49.

[87] Refah Partisi, *supra* note 72, at para. 105; Parti pour une société démocratique v. Turquie, *supra* note 35, at para. 105.

[88] For both citations, see Partidul Comunistilor & Ungureanu v. Romania, *supra* note 77, at para. 58.

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suggest that historic arguments become less forceful the more time has passed since the end of a totalitarian era, which substantially reduces the significance of the German Court's reference to Weimar.

In conclusion, the Constitutional Court's claim for a certain margin of appreciation is hardly reconcilable with the European Court of Human Rights' strict approach, offering the states "only a limited margin of appreciation."[89] When the European Court considers that a state cannot be required to wait "until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy," it reaffirms in the same sentence that the danger of that policy for democracy must, in any event, be "sufficiently established and imminent."[90] In other words, even if there remains a limited margin of appreciation, the imminent risk test is certainly not up to the discretion of the contracting states.

Consequently, the potentiality approach appears to be in contradiction with European human rights law. In the next section, I will nonetheless examine the facts and the merits of the NPD case to see the approach in operation.

D. The Case of the National Democratic Party of Germany

The National Democratic Party of Germany (NPD) was founded in 1964 in West Germany. It is a far-right-wing party with a party program based on ethnic nationalism. During the early years of its existence, it managed to establish party branches throughout the whole of West Germany and won enough votes to enter the regional parliaments of seven of the ten federal states (*Länder*). Between 1968 and 2004, though, the party did not win any parliamentary seats, neither in the federal parliament (*Bundestag*) nor in regional parliaments. Until today, the NPD never entered the Bundestag.

In 1990, after the fall of the Berlin wall, East and West Germany were reunited in the Federal Republic of Germany with the Grundgesetz as the common constitution. In 2004 and 2006, the NPD won parliamentary seats in the Eastern German regional parliaments of Sachsen (9.2%) and Mecklenburg-Vorpommern (7.3%). In 2009 and 2011, it managed to renew these mandates (with 5.6% and 6.0% respectively).[91]

Currently, the NPD neither holds any mandate in any of the regional parliaments nor in the Bundestag. On the municipal level, it holds roughly 350 mandates in different parts of

[89] *See* United Communist Party, *supra* note 35, at para. 46.

[90] Refah Partisi, *supra* note 72, para. 102; Herri Batasuna, *supra* note 77, at para. 81.

[91] *Judgment of Jan. 17, 2017* at para. 3.

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Germany, but mostly in Eastern German states. Moreover, the party is represented in the European Parliament with one seat.

The party has roughly 5,000 party members.[92] It has its own youth organization, the Young National Democrats (*Junge Nationaldemokraten*), which counts about 350 members. Further sub-organizations include an advocacy group for municipal representatives and a group of "national women" (about 100 members). Moreover, the party runs a publishing company that publishes the magazine "German Voice" (*Deutsche Stimme*) which, in 2012, had a circulation of about 25,000 issues. In addition, the NPD publishes content via Facebook, Twitter and YouTube.

I. The Motion for a Party Ban – in Two Acts

In 2001, the Federal Government (*Bundesregierung*), the Federal Parliament ("Bundestag") and the Federal Council (*Bundesrat*) jointly submitted a motion to the Federal Constitutional Court to declare the NPD unconstitutional. This motion failed. It was rejected by the Court in 2003.[93]

At that time, the NPD was infiltrated by undercover agents and informants working for the federal and regional Offices for the Protection of the Constitution (*Verfassungsschutz*), the German internal intelligence service. As also positions in the party leadership had been targeted by such operations, three Constitutional Court judges[94] considered that it was virtually impossible to discern where the party formed its own will and in which areas the formulation of the party program was influenced by undercover agents—i.e. representatives of the state. Due to the extensive and wide-ranging scale of secret operations, they believed that even the party's defense strategies regarding the constitutional trial might be subject to investigations by intelligence services. Therefore, the three judges concluded that a fair trial against the NPD was impossible.[95] Even though the four remaining judges did not share these concerns, the Court had to close the proceedings as it would have necessitated a two-thirds majority to continue the trial.[96]

In November 2011, a new public debate about the possibilities of a party ban arose in the margins of the so called NSU scandal. News broke that a neo-Nazi terrorist trio referring to

[92] In comparison, Germany has a population of about 81 million.

[93] *Judgment of Mar. 18, 2003*.

[94] The judges were Hassemer, Broß, and Osterloh.

[95] *See Judgment of Mar. 18, 2003* at para. 64-65; Kluth, *supra* note 9, at para. 210.

[96] *See* Bundesverfassungsgerichtsgesetz [BVERFGG] [LAW ON THE FEDERAL CONSTITUTIONAL COURT] Mar. 12, 1951, BGBL I at 1473, § 15, para. 4.

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itself as the National Socialist Underground (*Nationalsozialistischer Untergrund*, or NSU) had, between 1999 and 2007, committed a number of murderous attacks on migrants, policemen, and other persons in Germany. Surprisingly, for years, the German police and intelligence services were unable or unwilling to stop the killing.[97]

Infuriated by the disclosure of neo-Nazi terrorist attacks committed in Germany, the public debate shifted toward the demand for a second motion to ban the NPD. The Federal Government as well as the Bundestag, however, declined to support such motion, referring to the high legal barriers that the Constitutional Court had erected in its 2003 decision.[98] Nevertheless, the Federal Council brought the motion on its own.[99]

As a side note, it shall be mentioned that the decision to initiate proceedings for a party ban is, indeed, also a discretional political decision.[100] Whereas the (legal) verdict about a party's (un)constitutionality is reserved for the Federal Constitutional Court, the launch of such proceedings lies in the hands of the legislative and the political arm of the executive, enabling more than mere legal considerations.[101]

Faced with the new motion and before moving on to the material question of (un)constitutionality, the Constitutional Court had to consider whether, this time, a fair trial was possible. After assessing the evidence submitted by the Federal Council, the Court concluded that the state's surveillance targeting the NPD had been cut back significantly. A high number of agents and informants, particularly those situated in the party leadership, had been "switched off."[102] Therefore, the proceedings under Article 21 paragraph 2 of the Grundgesetz could be pursued in compliance with the fundamental guarantees of legal certainty, transparency, predictability and reliability.[103] Moreover, the requirement of strict "freedom from the state" (*Staatsfreiheit*) was satisfied, enabling the party to lead the proceedings in a self-determined, autonomous way, without state control.

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[97] Between May 2013 and July 2018, one NSU member, Ms. Beate Zschäpe, and four potential assistants were standing criminal trial in Munich. They were convicted on Jul., 11, 2018.

[98] *See* Hillgruber, *supra* note 71, at 399.

[99] According to Sec. 43 para. 1 BVerfGG, the Federal Government, the Federal Parliament, or the Federal Council are authorized to file a motion for a party ban. Bundesverfassungsgerichtsgesetz [BVerfGG] [Law on the Federal Constitutional Court] Mar. 12, 1951, BGBL I at 1473, § 43, para. 1.

[100] *See Judgment of Aug. 17, 1956* at 113, 129.

[101] Klein, *supra* note 2, at para. 546: an unsuccessful motion may result in a political triumph for the targeted political party; similarly, Ipsen, *supra* note 3, para. 177, however assuming the Federal Government's duty to bring a motion if sufficient evidence has been gathered.

[102] *Judgment of Jan. 17, 2017*, paras. 400-401, particularly 427-428.

[103] *Id.* at para. 405.

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II. The Judgment: The NPD is Hostile to the Constitution, but Not Unconstitutional

The Federal Constitutional Court declined to declare the NPD unconstitutional. The judges considered that the party's aims and the behavior of its adherents indeed strived for the abolition of the free democratic basic order. The party, however, did not "seek" to realize this goal as the Court could not find concrete and weighty evidence that the party's actions against the free democratic basic order could, at least possibly, be successful. In short, the Court held that the NPD is anti-constitutional but not unconstitutional.

1. The Party's Hostile Aims and the Behavior of Its Adherents

The Court considers that the NPD's aim is the abolition of the free democratic basic order. In this regard, the Court thoroughly cites extensive evidence from the NPD party program as well as from slogans and statements by party members and adherents. This Article is not the place to recount all the evidence, so we satisfy ourselves with addressing a few snapshots.

In the first place, the Court holds that the party's political concept of an ethnically defined national community (*Volksgemeinschaft*) contradicts the guarantee of human dignity under the Grundgesetz. The party's program, its publications and a number of statements by the party leadership promoted discrimination, denigration, and slandering against foreigners, migrants, Muslims, Jews and other groups in society.[104] The Court determines that the party's political concept is based on a strict societal and legal exclusion of all ethnically "non-Germans," regarding, for instance, social welfare, schools, and employment.[105]

Among other vast evidence, the Court refers to statements such as "Germans of African origin exist just as little as there are pregnant virgins"[106]; "Europe is the land of the white race"[107]; "white is not only a shirt's color—for a true German national team"[108]; "German

[104] *Id.* at paras. 635-636.

[105] *Id.* at paras. 640-641.

[106] *Id.* at para. 654 ("Deutsche afrikanischer Herkunft oder Afro-Deutsche kann es sowenig geben wie schwangere Jungfrauen").

[107] *Id.* at para. 679 ("Europa ist das Land der weißen Rasse").

[108] *Id.* at para. 671 ("Weiß ist nicht nur eine Trikotfarbe – für eine echte deutsche Nationalmannschaft").

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women and girls, don't engage with Negros!"[109]; asylum-seekers are "degenerated humans"[110]; "fight against Islam!"[111]; or "all Jews are bastards."[112]

Second, the Court finds that the NPD disregards the principle of democracy as protected by the free democratic basic order. The party aims to replace parliamentarianism with a "Volksgemeinschaft," without substantiating how state power would be exercised in a legitimate way.[113] Its objective is the establishment of a discriminatory political system in which certain groups in society would not be able to participate. According to an article of a party representative, "we cannot grant a guarantee of eternal existence to a system based on majority decisions."[114] Another representative of the party leadership declared, "we do not want to change this state, we want to abolish it, we want the revolution, bring this system down."[115] At the same time, the party describes the current system as a "rule of the inferior."[116] Representatives of the old system should be punished "without mercy." Finally, the new system should be created in resemblance to the German "Reich": "the Reich is our goal, the NPD our path."[117]

It is apparent that numerous elements of the party's program, statements, and slogans resemble the policies pursued by Nazi-Germany under the reign of the "Third Reich." Indeed, also the Court notes this similarity in character (*Wesensverwandtschaft*). It mentions references by adherents or in party publications to Hitler's "Mein Kampf," to statements by Joseph Goebbels and other National Socialists, to Nazi poems, songs, emblems and symbols.[118] The Court acknowledges this additional evidence as manifestations of the party's anti-constitutional aims. In conclusion, the Court holds that the NPD aims at the abolition of the free democratic basic order.

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[109] *Id.* at para. 702 ("Deutsche Frauen und Mädchen, lasst euch nicht mit Negern ein!").

[110] *Id.* at para. 711 ("entartete Menschen").

[111] *Id.* at para. 730 ("Kampf gegen den Islam").

[112] *Id.* at para. 747.

[113] *Id.* at paras. 758-759.

[114] *Id.* at para. 777 ("Einem System, das sich auf Mehrheitsentscheidungen stützt, kann demnach auch keine Ewigkeitsgarantie ausgesprochen werden").

[115] *Id.* at para. 789 ("Wir wollen diesen Staat nicht ändern, wir wollen ihn abschaffen, wir wollen die Revolution, bringt dieses System endlich zu Fall").

[116] *Id.* at para. 772 ("Herrschaft der Minderwertigen").

[117] *Id.* at para. 799 ("Das Reich ist unser Ziel, die NPD unser Weg").

[118] *Id.* at paras. 805-806, including slogans such as "the people rise, a storm breaks forth" ("Das Volk steht auf, der Sturm bricht los"), "with our flags is victory" ("Mit unseren Fahnen ist der Sieg"), and symbols such as the swastika, SS signs and pictures of Adolf Hitler.

2. The Lack of Potentiality

The Constitutional Court eventually determined, however, that the NPD was not unconstitutional. The judges did not see enough concrete and weighty evidence that the party's actions against the free democratic basic order could, at least possibly, be successful. In other words, the NPD currently lacks the potential to realize its aims.[119]

On the one hand, the Court acknowledges the party's organizational structure throughout the whole country, with regional branches in all federal states. It takes note of the fact that the party currently has a little more than 5,000 members and mentions the party's publications and activities in social media. Moreover, the Court is aware of the party's strategy to enter sports clubs, tenant associations, fire brigades, or parents' councils in order to present itself as an institution that looks after the people's interests, thereby pursuing the goal of creating "national liberated zones" (*national befreite Zonen*). The Court also notes the fact that National Socialist music is distributed to school kids free of charge, or that the party pursues a strategy to disturb and interrupt activities of their opponents (*Wortergreifungsstrategie*). Finally, it also considers the, at least partly, rapprochement between the NPD and the PEGIDA[120] movement.

On the other hand, however, the Court finds that such organizational structure is not (yet) pervasive enough to successfully implement the party's anti-constitutional goals. In its analysis, the Court examines the party's parliamentary and extra-parliamentary chances.[121]

Regarding the NPD's parliamentary presence, the Court notes that it is neither represented in the federal parliament nor in any of the regional parliaments. It holds one seat in the European Parliament, and about 350 mandates on the municipal level.[122] Moreover, the party's results in elections nationwide have been shrinking for the last about five years, ranging between 0.2% and 4.9%.[123] Therefore, the party is currently unable to shape federal or regional politics from inside the parliamentary arena. Also, on the municipal level, the NPD cannot realize its aims in any meaningful way as no other party wants to form a coalition with them.[124]

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[119] *Id.* at paras. 845-846.

[120] The "Patriotic Europeans Against the Islamization of the Occident ("Patriotische Europäer gegen die Islamisierung des Abendlandes")—PEGIDA—is a nationalist, anti-Islam, far-right political movement founded in Dresden in 2014, with mimics in other German cities.

[121] *Judgment of Jan. 17, 2017* at paras. 896-897.

[122] The total number of available municipal mandates nationwide is 200,000, *id*. at para. 904.

[123] *Judgment of Jan. 17, 2017* at paras. 900–02.

[124] *Id*. at para. 905.

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The lack of success in recent years might be explained by the fact that a new right-wing conservative political party has been emerging in Germany, the "Alternative for Germany" (*Alternative für Deutschland*, or AfD), that was able to attract a significant number of voters with its anti-immigration agenda, largely fueled by the European refugee crisis.

Whatever the reasons for the NPD's decline, the Court held that the party does not pose a threat for the free democratic basic order from within the German parliaments.

With regard to its extra-parliamentary activities, the judges also did not see any realistic chance that the party could realize its goals.[125] With a little over 5,000 members nationwide, the party's operating range is substantially limited. The Young National Democrats have attracted only 350 members. Internal disputes, unresolved strategic issues, and financial problems contribute to an increasingly paralyzing situation. The party's visibility is built upon a few number of faces. Events organized by the party are attended by usually less than 100 people. The party's strategy to attract middle-class voters has largely failed. Rather, it is less and less entrenched in society. The infiltration of sports clubs and similar associations did not yield any leverage. There are no "national liberated zones" in Germany.

Where violent criminal offenses have been committed by NPD adherents, they were small in number (twenty over the course of ten years). Moreover, the party did not condone them, so that these offenses could not be attributed to the party. Finally, the party's call for "Revolution!" does, in itself, not constitute an incitement to commit crimes.

In sum, the Constitutional Court found itself unable to see the party's potential to realize its goals. According to the judgment, there was no concrete and weighty evidence that the party's actions against the free democratic basic order could, at least possibly, be successful.[126]

E. Conclusion and Outlook

The NPD is not unconstitutional, but it is a party on the edge of unconstitutionality. Its aims and the behavior of its adherents clearly satisfy major requirements of unconstitutionality under Article 21. It also exhibits an actively militant and aggressive attitude toward the existing order. In the past, that would have been enough to ban the party. Now, however, there was a lack of potentiality. We have seen earlier that this standard approximates German constitutional doctrine to the jurisprudence of the European Court of Human Rights. It may indeed be safe to say that, without the influence of European human rights law on the German legal system, the NPD would now be dead. The European Court of Human Rights saved its life.

[125] *Id.* at paras. 910-911.

[126] *Id*. at para. 896.

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To this date, the NPD continues to exist as a political party, but with a sword of Damocles hanging over it. If the party became more successful in the future, if it held representation in parliaments, and if its membership increased, then there might be enough concrete and weighty evidence for another, probably successful, motion for unconstitutionality in the Constitutional Court. It appears that the NPD now has two choices: Either the party opts for mere survival, which would mean remaining an insignificant political actor and continuing to spread their anti-constitutional agenda. Or it adjusts its program to be in conformity with Article 21, permitting further growth in the future. The second option, however, would clearly betray and disappoint their hard-core members and effectively re-brand the party. Therefore, for the time being, it appears that the NPD is doomed to continue as a half-dead party.[127]

This relates back to the fundamental dilemma which is, at the same time, the natural consequence of the German Court's "potentiality" approach as well as of the European Court's "imminent risk" standard. As Vidmar stated in response to the European Court's *Refah* decision: "In other words, the "pressing social need" existed, *inter alia*, because a threat to a "democratic society" was imminent, while imminence, *inter alia*, stemmed from the will of the people."[128]

The more the will of the people shifts toward anti-constitutional positions, the more potential or imminent the threat for democracy may become. At the same time, the people's will is the primary embodiment of democratic ideals and legitimacy. This dilemma challenges particularly substantive democracies, whereas procedural democracies would usually, but not always,[129] bow to the people's will. While Germany is certainly a case of a substantive democracy, the European Court of Human Rights adheres to a thick, inclusive conception of democracy.[130] The European Court's imminent risk standard, however, provides more freedom also for extremist political parties. The German standard falls short of that and therefore appears to be in contradiction to European human rights law.

Moreover, I argued that the Constitutional Court's redefinition of the free democratic basic order amounts to a reconfiguration of the constitutional core. This reconfiguration took place along the lines of the European Court of Human Rights' jurisprudence. The Court,

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[127] *See also* M. Steinbeis, *Die eventuell, aber nicht potenziell verfassungswidrige NPD* [*The possibly, but not potentially, unconstitutional NPD*], VERFASSUNGSBLOG (Jan. 17, 2017), http://verfassungsblog.de/die-eventuell-aber-nicht-potenziell-verfassungswidrige-npd/.

[128] Vidmar, *supra* note 56, at 231.

[129] Bourne & Bértoa, *supra* note 23, at 15–16.

[130] H.-M. ten Napel, *The European Court of Human Rights and Political Rights, The Need for More Guidance*, 5 EUR. CONST. L. R. 464, 467 (2009).

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however, effectively Europeanized the gravitational center of the Grundgesetz without any apparent need. This finding entails fundamental questions concerning a constitution's identity and basic structure that merit further investigation.

European constitutional scholarship therefore may, once again, need to turn its attention to the relationship between national and European constitutional concepts, their compatibility and reciprocal influence. Particular attention needs to be given to the question whether there really is, or can be, a Europeanized definition of liberal democracy for the purposes of human rights protection. Vidmar already investigated the European Court of Human Rights' understanding of democracy and demonstrated that the Court has established a link between human rights law and multiparty elections.[131] Macklem assessed the relationships between militant democracy and legal pluralism from a European perspective.[132] Still, it appears that the repercussions of a Europeanization that goes to the core of constitutional systems poses a variety of questions related to national and European identities, universal democratic values, and the European dimension of liberal constitutionalism. These issues would need to be treated with the understanding that the term "European" in the context of the Council of Europe encompasses forty-seven countries, from Portugal to Russia, from Norway to Turkey.

Finally, the prospects for the National Democratic Party of Germany shall quickly be addressed. On the one hand, the NPD is still a political party and enjoys the full protection and privileges that come with Article 21, including partial funding by the state—i.e. by the tax-payers. In Germany, political parties receive financial assistance (*Parteienfinanzierung*) from the state in terms of a minimum funding that ensures the parties' ability to fulfil their functions.[133] The concrete amount of financial assistance is calculated based on the respective party's success in European, federal, and regional elections, the amount of membership and mandate holders' fees as well as the amount of donations it received.[134] For 2016, the NPD received about 1.14 million Euro from the state.[135]

[131] Vidmar, *supra* note 56, at 223-224.

[132] P. Macklem, *Militant democracy, legal pluralism, and the paradox of self-determination*, 4 INT'L J. CONST. L. 488 (2006).

[133] Kluth, *supra* note 9, at para. 187.

[134] *See* PARTEIENGESETZ [PARTY LAW], *supra* note 14, at § 18, para. 1.

[135] In comparison, the Social Democratic Party (SPD) received 50.79 million Euro, the Christian Democratic Union (CDU) 49.5 million Euro, the Greens (Grüne) 15.85 million Euro, the Christian Social Union (CSU) 12.1 million Euro and the Left Party (Linke) 11.52 million Euro. *See* Deutscher Bundestag, *Festsetzung der staatlichen Mittel für das Jahr 2016* [*Allocation of state funds for the year 2016*], https://www.bundestag.de/blob/503226/eb02070236090c98b3ca24ce9dfc57fa/finanz_16-data.pdf.

On the other hand, the Constitutional Court's ruling has sparked a vivid debate: How can it be that a state funds its enemies? Soon, it was asked whether there is any legal way to exclude the NPD from the state's financial assistance.[136] The President of the Federal Constitutional Court, when pronouncing the verdict in the NPD case, indeed alluded to the possibility of introducing such a measure into the Grundgesetz.[137] Two weeks after the decision, the state of Niedersachsen filed a draft bill with the Federal Council, aiming to amend the Grundgesetz to exclude anti-constitutional parties from state funding.[138]

Subsequently, the ruling coalition of Christian Democrats and Social Democrats introduced two bills in the Bundestag superseding Niedersachsen's proposal: One bill to amend the Grundgesetz and another bill to change other related laws.[139] In a matter of weeks, these bills were enacted by two-thirds majorities in the Bundestag and the Bundesrat, and entered into force by the end of July 2017.

The first bill introduced a new paragraph 3 into Article 21. According to the new paragraph, political parties which "pursue the aim"[140] (note: not "seek") to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany are excluded from party financing. Moreover, any tax advantages for the party or for the party's donors are cancelled. The Federal Constitutional Court holds the exclusive competence to hold whether a particular party satisfies the requirements of this provision.

The second bill inserted accompanying changes into the Act on the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz, BVerfGG), the Party Law, and several taxation laws. According to paragraph 46a BVerfGG, the exclusion of a party from party financing lasts for six years. This term can be renewed without a limitation on the number of renewals. Moreover, the exclusion covers substitute parties.

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[136] *See*, for instance, S. Leutheusser-Schnarrenberger, *Nach der Entscheidung des Bundesverfassungsgerichts im NPD-Verbotsverfahren–Kein Geld mehr für Verfassungsfeinde!?* [*After the decision of the Federal Constitutional Court in the NPD party ban proceedings–No more money for enemies of the constitution!?*], VERFASSUNGSBLOG (Jan. 21, 2017), http://verfassungsblog.de/nach-der-entscheidung-des-bundesverfassungsgerichts-im-npd-verbotsverfahren-kein-geld-mehr-fuer-verfassungsfeinde/.

[137] *See* Morlok, *Kein Geld für verfassungsfeindliche Parteien?* [*No money for anti-constitutional parties?*], ZEITSCHRIFT FÜR RECHTSPOLITIK 66 (2017).

[138] Entwurf eines Gesetzes zur Änderung des Grundgesetzes und weiterer Gesetze zum Zweck des Ausschlusses extremistischer Parteien von der Parteienfinanzierung [Draft bill of a law to change the Grundgesetz and other laws for the purpose of excluding extremist parties from party financing], BUNDESRAT DRUCKSACHEN [BR] 113/17.

[139] Entwurf eines Gesetzes zur Änderung des Grundgesetzes (Artikel 21) [Draft bill of a law to change the Grundgesetz (Article 21)], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 18/12357; Entwurf eines Gesetzes zum Ausschluss verfassungsfeindlicher Parteien von der Parteienfinanzierung [Draft bill of a law to exclude anti-constitutional parties from party financing], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 18/12358.

[140] In German: "ausgerichtet sind."

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These sudden amendments deserve some critical remarks. Before the changes were made, there was no doubt that Article 21 demanded an equal treatment of all parties.[141] Now, though, the constitutional concept of party equality (*Parteiengleichheit*) has been significantly modified. Within German legal doctrine, there are mixed opinions about this step. Whereas some comfort themselves that any possible dangers are averted by giving the Federal Constitutional Court an exclusive competence to strip parties off their financial support,[142] others consider that such step altogether violates party equality and, for that matter, creates "unconstitutional constitutional law."[143]

Indeed, there are very good arguments that the principle of democracy enshrined in Article 20 paragraph 1, which is immune against any changes (via the eternity clause of Article 79 paragraph 3), prevents such level of unequal treatment. On the one hand, justified differentiations between existing parties are allowed.[144] On the other hand, differentiations of a magnitude that may well result in the eradication of a particular party would circumvent the strict requirements for party bans, developed by the European Court of Human Rights and partly adopted by the Federal Constitutional Court. No party can exist without proper financing. Therefore, it appears likely that the already half-dead NPD will soon be cut off from life support.

[141] Gusy, *supra* note 71, at 603; Laubinger, *supra* note 71, at 56.

[142] Hillgruber, *supra* note 71, at 400; Laubinger, *supra* note 71, at 57.

[143] M. Morlok, *supra* note 137, at 68; undecided: Gusy, *supra* note 71, at 603.

[144] *See* the regulations of the PARTEIENGESETZ [PARTY LAW], *supra* note 14.

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