

## Bans on political parties – The limitation of free political competition by the German Federal Constitutional Court

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The prohibition of political parties is back on the agenda in Germany ever since in November 2011 German police discovered by chance that an up to then unsolved series of murders was in fact attributable to a group of three right-wing extremists calling themselves “National Socialist Underground” (NSU).<sup>1)</sup> Between September 2000 and April 2007 nine men of Turkish or Greek origin and one police woman had felt victim to this long time inscrutable series of crimes.<sup>2)</sup> The detection of the political background in 2011 raised new concerns about the degree of danger emanating from the German right wing extremist political scene and subculture.<sup>3)</sup> It led many voices to argue in favor of a more determined suppression of its activities.

Some of these voices called for a prohibition of the “National Democratic Party of Germany” (“*Nationaldemokratische Partei Deutschlands –NPD*”) because the biggest right wing extremist party in Germany acts as a joining element of the scene.<sup>4)</sup> Others remained more skeptical about the legal possibility of such a prohibition and its usefulness. Notably, the critics pointed out that a first lawsuit against the NPD in 2003 already was dismissed by the Federal Constitutional Court for procedural reasons and that a second failure would be disastrous.<sup>5)</sup> In the end the Federal Government (“*Bundesregierung*”) and the First Chamber of Parliament (“*Bundestag*”) refrained from taking actions against the NPD. The Second

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1) Report of the Special Committee of the Bundestag, BT-Drs. 17/14600, p. 1-2.

2) Report of the Special Committee of the Bundestag, BT-Drs. 17/14600, p. 71-74.

3) E. g. MP Sebastian Edathy, Transcript of the Plenary Debate in the Bundestag 17/252, p. 32581; MP Armin Schuster, Transcript of the Plenary Debate in the Bundestag 17/252, p. 32596.

4) C. Möllers / C. Waldhoff on behalf of the Bundesrat, Application according to Art. 21 sect. 2 Basic Law, p. 6, available at: [http://www.bundesrat.de/cln\\_319/nn\\_38758/SharedDocs/Downloads/DE/themen/20140124-npd-antragsschrift,templateId=raw,property=publicationFile.pdf/20140124-npd-antragsschrift.pdf](http://www.bundesrat.de/cln_319/nn_38758/SharedDocs/Downloads/DE/themen/20140124-npd-antragsschrift,templateId=raw,property=publicationFile.pdf/20140124-npd-antragsschrift.pdf); A. Nahles, General Secretary of the Social Democratic Party of Germany, Pro & Contra, Neues NPD-Verbotsverfahren?, ZRP 2012 p. 31; B Pistorius, Minister of the Interior of Lower Saxony, in: Neue Osnabrücker Zeitung, 23.11.2013.

5) H. P. Friedrich, Federal Minister of the Interior, in DER SPIEGEL 2012, p. 26; B Rhein, Minister of the Interior of Hesse, Pro & Contra: Neues NPD-Verbotsverfahren?, ZRP 2012, p. 31.

Chamber (“*Bundesrat*”), however, filed a new lawsuit against the NPD before the Federal Constitutional Court asking for its prohibition on 3-December 2013.<sup>6)</sup>

This new lawsuit raises difficult legal questions about the substantial requirements for the prohibition of political parties.<sup>7)</sup> However, treating all these legal questions thoroughly would exceed the scope of the debate at hand which deals with the *role* of Constitutional Courts and Supreme Courts, i. e. their operating mode as institutions. Rather, it seems appropriate to limit this presentation to a more theoretical question dealing with the role of Constitutional Courts in general and the special role of the Federal Constitutional Court in the proceeding against the NPD.

In fact the proceeding against the NPD puts forward a very special procedural role of the Federal Constitutional Court.<sup>8)</sup> According to Art. 21 sect. 2 phrase 2 Basic Law the Federal Constitutional Court shall rule on the question of unconstitutionality of the party, i. e. the Constitutional Court has the immediate jurisdiction for the pronouncement of the prohibition order. Contrary to other restrictive measures, like the ban of ordinary associations<sup>9)</sup> or assemblies<sup>10)</sup>, the administrative bodies cannot issue the prohibition order against the political party on their own.<sup>11)</sup> The Federal Constitutional Court is not limited to a retroactive control of such a prohibition order. Rather, Executive and Legislative have to file an action against the political party before the Court and the Court issues the prohibition order directly by judgment.

This exceptional procedural role of the Federal Constitutional Court role gives room for two different, but connected assumptions.

On the one hand the Court’s immediate jurisdiction may have an influence on the way it deals with the aforementioned substantial questions. The more obscure legal rules are the more important becomes the deciding body and the procedural setting. Therefore, it seems possible that the Court’s immediate jurisdiction influences it to be either more lenient or more restrictive towards the concerned party. Thus, the procedural setting may also have an effect on the outcome of the ongoing proceeding against the NPD.

On the other hand the Court’s immediate jurisdiction in proceedings against political parties may conflict with its normal task of retroactive control of governmental acts and, thus, have an unwanted impact on its self-conception and its image in the legal community and the broader public. And indeed, the Court seems to have such apprehensions. It shows a certain reluctance and uncertainty with regard to its role as supervisor of political parties. It

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6) Bundesrat, Decision of 14. December 2012, BR-Drs. 770/12; Press Release 253/2013.

7) *M Morlok*, Fragen des Rechts und der politischen Klugheit – Zur aktuellen NPD Parteiverbotsdebatte, ZRP 2013, p. 69 - 71; *C. Hufen*, Neues Parteiverbotsverfahren gegen die NPD?, ZRP 2012, 202 – 205.

8) *R. Streinz*, in: Mangoldt/Klein/Starke, Das Bonner Grundgesetz (6<sup>th</sup> ed. 2010), Art. 21 GG MN 250; *Morlok* (FN 7), p- 2935 – 2936.

9) § 3 sect. 1 phrase 1 Associations Act (“Vereinsgesetz”).

10) § 15 sect. 1 Assemblies Act (“Versammlungsgesetz”).

11) BVerfGE 2, p. 1 (11 – 12) - *SRP*.

has not given any judgment on the merits of an application against a political party since the prohibition of the Communist Party of Germany (“*Kommunistische Partei Deutschlands - KPD*”) in 1956. Already this judgment it delivered only after a very long time of deliberation. Seemingly it hoped that the government would withdraw the application.<sup>12)</sup> In the following it has dismissed three other applications against political parties for procedural reasons.<sup>13)</sup> All of these decisions were not inevitable.<sup>14)</sup> This is shown notably by the serious dispute inside the Court about the dismissal of the first application against the NPD in 2003.<sup>15)</sup>

To elaborate on these two assumptions it is at first necessary to take a closer look on the immediate jurisdiction of the Federal Constitutional Court and to explain why it is an anomaly (I). This brings the question up whether the unusual procedural role of the Court acts as a safeguard for the respondent party against an abusive prohibition and, hence, can easily be reconciled with the Court’s other functions, or whether it disadvantages the respondent party and, hence, conflicts with it (II). At last, the dispute in the Court during the first proceeding against the NPD (III) and the chances of success of the current proceeding against the NPD (IV) can be examined more closely in the light of the preceding considerations.

## **I. Ban on political parties by constitutional courts as anomaly**

The immediate jurisdiction of the Federal Constitutional Court for the prohibition of political parties was a new invention of the German Basic Law in 1949. It is an anomaly both from the perspective of comparative law and a functionalist approach.

### ***1. Comparative law***

Traditionally liberal-democratic states do not make any differences between political parties and other private associations. Consequently, in many older and well established democracies like e. g. the United Kingdom, France or Ireland the prohibition of political parties can be based on the administrative law of associations and the competence for the prohibition lies with an administrative body.<sup>16)</sup> In some of these countries, like the

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12) *M. Morlok*, Parteiverbot als Verfassungsschutz, NJW 2001, p. 2931 (2934).

13) BVerfGE 91, p. 262 - *Nationale Liste*; 91, p. 276 – *FAP*, 107, 339 - *NPD*.

14) Concerning the dismissal of the applications against *Nationale Liste* und *FAP*: *W. Wietschel*, Unzulässige Parteiverbotsanträge wegen Nichtvorliegens der Parteieigenschaft; ZRP 1996, p. 208–2011; *R. C. van Ooyen*, „Vereinsverbote“ gegen „Scheiparteien“, *Recht und Politik* 2004, p. 172-178.

15) On the one hand: BVerfGE 107, p. 339 (360 – 378) – *NPD*; on the other hand: 107 p. 339 (378 – 395) – *NPD dissenting opinion*.

16) *United Kingdom*: Prevention of Terrorism (Temporary Provisions) Act 1974, c. 56, sect. 1; Northern Ireland Act (Emergency Provisions Act) 1991, c. 24, sect. 28 (2); Terrorism Act 2000, c. 11, sect. 3; Terrorism Act 2006, c. 11, sect. 21; *France*: Law of 10<sup>th</sup> January 1936 (J.O. 12<sup>th</sup> Jan. 1936 p. 522); *Ireland*: Offences against the State Act 1939, No. 13, Art. 18ff.

Netherlands or France, the dissolution of associations including political parties can also be based on the civil law of associations and, thus, be pronounced by an ordinary court on an application of the public prosecutor<sup>17)</sup> or any interested person.<sup>18)</sup> In the United States of America the Communist Party has been prohibited in 1954 directly by an act of Congress.<sup>19)</sup> Aside from this provision the U.S. law does not know any possibility to ban a political party or any other association as a whole in one final and definite act. But the criminal law punishes the mere membership in an association which “teaches, advocates, or encourages the overthrow or destruction of the government by force or violence”<sup>20)</sup>. Therefore, local public prosecutors can de facto dissolve associations including political parties by prosecuting its members before the ordinary courts.

Although the aforementioned older and well established democracies do not foresee any special procedure for the prohibition of political parties, the idea of the Basic Law gained some popularity among younger democracies emerging from dictatorial regimes. Both the Turkish Constitutions of 1961 and of 1982 invested the Constitutional Court with the exclusive right to pronounce bans of political parties.<sup>21)</sup> After the end of the cold war the Polish and the Bulgarian Constitution adopted similar solutions.<sup>22)</sup> In East Asia the new democratic constitutions of Taiwan and of the Republic of Korea also followed the example of the Basic Law.<sup>23)</sup>

However, not all newly established democracies have chosen this way. Notably, Spain navigated a middle course at the end of the Franco era. On the one hand, it distinguished between political parties and normal associations, recognized the need for a special procedure for the prohibition of political parties, and favored a competence of the judiciary.<sup>24)</sup> On the other hand, it did not invest the Constitutional Court (“*Tribunal Constitucional*”) but the Supreme Court (“*Tribunal Supremo*”) as highest ordinary court with the right to pronounce the prohibition.<sup>25)</sup> The Constitutional Court may only exercise a constitutional review of the

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17) *Netherlands*: Civil Code (“*Burgerlijk Wetboek*”), Book 2, Art. 20.

18) *France*: Law of 1<sup>st</sup> July 1901 (J.O. 2<sup>nd</sup> July 1901 p. 4025 – 4027), Art. 3. However, this provision never has been applied. *G. H. Fox/G. Nolte*, *Intolerant Democracies*, in: *Harvard International Law Review* 1995, p. 1 (27-28); *V. Enseleit*, *Die Vereinigungsfreiheit in Deutschland und Frankreich*, 2007, p. 179 – 180.

19) 50 USC § 841 - Proscription of Communist Party, its successors, and subsidiary organizations.

20) 18 USC § 2385 - Advocating overthrow of Government.

21) Constitution of the Turkish Republic (1961), Art. 57 sect. 5; Constitution of the Turkish Republic (1982), Art. 69 sect. 6.

22) Constitution of the Republic of Poland (1997), Art. 188 No. 4; Constitution of the Republic of Bulgaria (1991), Art. 149 No. 5.

23) Constitution of the Republic of Korea (1987), Art. 8 sect. 4; Constitution of the Republic of China, Additional Articles, Art. 5 sect. 4.

24) *C. Voscherau*, *Parteiverbote in der Bundesrepublik Deutschland und im Königreich Spanien* (2009), p. 82 - 83.

25) *Voscherau* (FN 24), p. 83, 126.

Supreme Court's decision.<sup>26)</sup> As well, in the Czech Republic the Constitutional Court only reviews prohibition orders which are issued by the Supreme Administrative Court.<sup>27)</sup>

All in all, the concept of the Basic law which gives the Constitutional Court the immediate jurisdiction for pronouncing the prohibition order has spread a bit among newly established democracies, but it still remains an exception on the global scale.

## 2. *Functionalist approach*

In almost all proceedings before the German Federal Constitutional Court the matter in dispute has to be an act of public authority. Notably the Court judges the constitutionality of acts of the legislative when it is submitted by a competent supreme federal body (Art. 93 sect. 1 No. 2 Basic Law) or any ordinary court (Art. 100 Basic Law). It reviews acts of supreme federal bodies on the application of another supreme federal body (Art. 93 sect. 1 No. 1 Basic Law), acts of the Federation on the application of one of the Länder, and acts of a Land on the application of the Federation (Art. 93 sect 1 No. 3 Basic Law). In proceedings about constitutional complaints it can review acts of any public authority, i. e. executive, legislative and judicial bodies, on an application by any individual (Art. 93 sect. 1 No. 4a Basic Law).

Consequently, the typical task of the Federal Constitutional Court as of constitutional courts in general is constitutional review, i. e. the control of governmental acts on the basis of the constitution.<sup>28)</sup> This means that it has to control in particular the political authorities currently in power.<sup>29)</sup> This corresponds with the content of the substantial clauses of the constitution which shall bind in particular these political authorities. Neither the power of the parliament nor the power of any other political body shall be unlimited, but they are all subjected to the constitution as higher law.<sup>30)</sup> Thus, when the Court protects the constitution it does not just protect a neutral law. It protects the opposition and individuals against the political authorities currently in power.<sup>31)</sup> So the Court can be described not only as “guardian of the constitution”<sup>32)</sup> but more precisely as a guardian of the opposition and of the individuals against the political authorities currently in power.

Proceedings against political parties do not fit in this pattern. A minority party is not a “political authority currently in power”, but it is part of the opposition respectively a private association. Nevertheless, in such a proceeding the activities of the minority party are the

26) Art. 6 Spanish Constitution; Art. 10 sect. 5 Code of Political Parties (“Ley Orgánica de Partidos Políticos”), Art. 61 Courts Constitution Act (“Ley Orgánica del Poder Judicial”); *Voscherau* (FN 24), p. 157.

27) Constitution of the Czech Republic (1992), Art. 87 lit. j; Act on Political Parties and Political Movements, No. 424/1991 Coll., § 15 sect. 1.

28) *T. Ginsburg/Z Elkins*, Ancillary Powers of Constitutional Courts, 87 *Texas L Rev* 1431, p. 1431.

29) *T. Ginsburg/Z Elkins* (FN 28), p. 1434-1435.

30) Already: US Supreme Court, *Marbury v. Madison*, 5 US 137 (1803), p. 176.

31) *T. Ginsburg/Z Elkins* (FN 28), p. 1434-1435.

32) BVerfGE 1, p. 184 (195); critical: *B Pieroth*, Jarass/Pieroth, Grundgesetz (12<sup>th</sup> ed. 2012), Art. 93 MN 3.

subject matter which the Court has to review. It is the public authority in power who asks the Court for protection against a private association. A positive decision of the Constitutional Court would not protect the legal position of the private association, but instead interfere with its rights and deteriorate its legal position.

Technically, the Court does not act as a guardian of the opposition and the individual. The immediate jurisdiction for the pronouncement of the prohibition turns it into a guardian of the political authorities currently in power. Therefore, it plays an unusual role from a functionalist perspective.

## II. A safeguard against abusive prohibitions?

The unusual technical role of the Federal Constitutional Court as a guardian of the political authorities would be of minor importance, if it improves the protection of the respondent party against abusive prohibitions in substance. Indeed, the procedural construct provides some advantages for the respondent party. However, a second look reveals that these advantages for the respondent party are not that important. The unusual procedural role of the Court even entails some potential disadvantages for it.

### 1. *Advantages for the respondent party*

The immediate jurisdiction of the Federal Constitutional Court is often justified with its advantages for the concerned party.<sup>33)</sup> Indeed one may argue that Art. 21 sect. 2 phrase 2 Basic Law just replaces the normal retroactive control by a preemptive control and that this makes it more effective.<sup>34)</sup>

As long as there has been no judgment of the Federal Constitutional Court which establishes the “unconstitutionality” of the party, it is in a very privileged legal position. No act of any public authority may interfere with its rights. No other public authority may undertake any steps leading to its dissolution. Thus, the immediate jurisdiction of the Federal Constitutional Court prevents that any executive or judicial body can act on its own and makes the prohibition a *fait accompli* before the Federal Constitutional Court is able to exercise a retroactive control. Furthermore, § 15 sect. 4 Code of Constitutional procedure requires a 2/3 majority in the Court for any decision against the political party and thereby further strengthens its position.

What is more, the political party is also protected against any other discrimination because of its political objectives. No public authority has the right to claim the

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33) See e. g. the statement of the representative of the Federal Republic of German, in: Summary Record of the 96<sup>th</sup> Meeting of the UN Human Rights Committee, 28. July 1978, CCPR/C/SR.96, para. 11.

34) *H Maurer*, Das Verbot politischer Parteien, AöR 96 (1971), p. 203 (227); *M. Morlok*, Parteiverbot als Verfassungsschutz, NJW 2001, p. 2931 (2937).

unconstitutionality of the political party in any legal context.<sup>35)</sup> Extremist parties have the same rights to access town halls or other facilities for public meetings<sup>36)</sup>, to organize assemblies<sup>37)</sup>, and to public funding<sup>38)</sup> as all other parties. Consequently the minority party is protected against any creeping deterioration of its legal status.

## ***2. Limited importance of these advantages***

However, the advantages of a preemptive control for the minority parties are less important than it seems to be at first sight.

At first, there is no real danger that the government could create a *fait accompli* and circumvent a retroactive control of the Federal Constitutional Court. According to § 32 Code of Constitutional Procedure the Court may issue provisional measures by itself. Consequently it has the power to act fast even in proceedings where it exercises only a retroactive control. In particular, the Court's rich case law on prohibitions of assemblies shows that it is able to make use of this competence effectively.<sup>39)</sup>

Furthermore, the immediate jurisdiction of the Federal Constitutional Court does not only exclude other governmental bodies to issue prohibition orders but also to interfere in any other way with parties' rights. This applies e. g. to a cut of public funding, an interdiction of campaign advertising on television or a timely suspension from the elections.<sup>40)</sup> However, it is difficult to say whether this legal situation really prevents the aforementioned lighter interferences or if it rather tends to subject the party to the worst interference of all, the prohibition. The competent bodies have only the "all-or-nothing" choice.<sup>41)</sup> Either they let the party completely free to do whatever it wants to do or they ask the Federal Constitutional Court to prohibit it completely. Maybe this dilemma induces them to ask more easily for the prohibition of a party.

## ***3. Disadvantages for the respondent party***

The limited importance of the advantages of a preemptive control puts forward the disadvantages which are connected with the procedural role of the Federal Constitutional Court as a guardian of the political authorities currently in power.

At first, the Court can be activated by multiple political authorities. Not only the Federal Government but also the First and Second Chamber of Parliament may initiate the

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35) BVerfGE 12, p. 296 (304-305); *B. Pieroth, Jarass/Pieroth, Grundgesetz* (12<sup>th</sup> ed. 2012), Art. 21 MN 37.

36) BVerfGE 57, p. 1 (6).

37) BVerfG, NJW 2001, p. 2077.

38) BVerfGE 111, p. 382 (410).

39) Elementary: BVerfGE 110, p. 77 (87). Overview at: *J.-P. Schneider*, in: Epping/Hillgruber, BeckOK GG (as 1<sup>st</sup> Nov. 2013), Art. 8 MN 68 – 69.

40) *U. Volkmann*, Einstellung des NPD Verbotsverfahren – Anmerkung, DVBl. 2003, p. 593 (609).

41) *R. C. van Ooyen*, Kein zweites Verbotsverfahren gegen die NPD – Streichung der staatlichen Parteifinanzierung als „flexible response“, *Recht und Politik* 2013, p. 84 (85).

proceeding, Art. 43 Code of Constitutional Procedure. So when the Federal Government is not convinced of the usefulness of a prohibition and refrains from taking any measure against the political party, the other institutions may still apply to the Federal Constitutional Court. Consequently, even if the usefulness of a prohibition is doubtful, there will probably be at least one institution which files the application. In this respect, the situation of political parties is clearly inferior to the situation of ordinary associations. The latter can only be prohibited by one competent governmental body.<sup>42)</sup> The current discussion about the NPD shows that this difference really matters. The Federal Government and the First Chamber expressively refused to file an application for a prohibition of the NPD. However, the Second Chamber decided otherwise.<sup>43)</sup>

Secondly, the Federal Constitutional Court is allowed to take evidence about all relevant facts, § 26 Code of Constitutional Procedure. Thus, it may investigate to the detriment of the respondent party just as a criminal court of first instance may investigate to the detriment of the accused.<sup>44)</sup> Although this provision applies to all types of proceedings before the Constitutional Court, it has an eminent effect only in proceedings against political parties.<sup>45)</sup>

In the normal proceedings about constitutional complaints or disputes of competence the Court controls the constitutionality of a governmental act. A governmental act already violates constitutional rights of the complainant, if the competent administrative or judicative body did not observe procedural rules or did not base the act on sufficient grounds. Consequently, the Court will just establish whether the competent administrative or judicial body gave sufficient grounds for the interference.<sup>46)</sup> There is no reason for the Court to investigate itself whether there are other reasons which the competent body did not consider but could justify the interference.<sup>47)</sup>

In proceedings against political parties it seems possible on the contrary, that the Court really uses its power to take evidence and to investigate. It is not confined to controlling the constitutionality of the prohibition order of an administrative or judicial body. Rather, it can establish on its own whether the respondent party fulfills the requirements of Art. 21 sect. 2 phrase 1 Basic Law.<sup>48)</sup> Consequently, the government does not have to present a prohibition order which complies with procedural and substantial constitutional law. It is enough that the Court itself is able to establish facts which fulfill the substantial requirements for a prohibition.

Furthermore, when taking evidence, the Court can rely on the Code of Criminal

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42) § 3 sect. 2 Associations Act ("Vereinsgesetz").

43) See FN 6.

44) Dissenting opinion of Sommer, Jentsch, Di Fabio and Mellinghof in BVerfGE 107, p. 339 (378) - NPD.

45) *S. Brink*, *Tatsachengrundlagen verfassungsgerichtlicher Judikate*, in: Rensen/Brink, *Linien der Rechtsprechung des Bundesverfassungsgerichts erörtert von den wissenschaftlichen Mitarbeitern* (2009), p. 11.

46) E. g. BVerfGE 108, p. 282 (306); *Brink* (FN 45), p. 20 – 21.

47) *Ibid.*

48) Dissenting opinion of Sommer, Jentsch, Di Fabio and Mellinghof in BVerfGE 107, p. 339 (378) - NPD.

Procedure and not only on the Code of Civil procedure, § 28 sect. 1 Code of Constitutional Procedure. Notably, it can and has issued search and sequestration orders for the premises of political parties, § 47 in connection with § 38 Code of Constitutional Procedure.<sup>49)</sup>

And as a third disadvantage for the minority party there is the loss of a second instance. One may argue that this loss is not so important because the Federal Constitutional Court itself is the first instance. Consequently, the court of first instance is already the most skilled and trustworthy court in the German legal system.<sup>50)</sup> However, it can make a difference if this trustworthy Court only controls other public authorities' interferences with minority parties' rights or if it has to order the interference by itself. In the first case, the Court looks at the case from a certain distance and focuses completely on the constitutional rights in question. In the latter case the Court itself is involved in the application of the ordinary law. So it has to take the evidence and thereby apply the whole body of procedural rules by itself. All this may induce the Court to pay less attention to the constitutional rights of the party and more attention to the efficiency of the proceeding. In this respect the preemptive control by a constitutional court also differs from a preemptive control by an ordinary court as it applies e. g. in proceedings on pre-trial detention. The preemptive control by an ordinary court does not exclude a later retroactive control by another court which focuses on the constitutional rights.

### III. The Federal Constitutional Court's decision of 2003

Art. 21 sect. 2 phrase 2 Basic Law puts the Federal Constitutional Court technically into the role of a guardian of the political authorities currently in power. Furthermore, the procedural construct also comprehends some elements which potentially disadvantage the respondent party in substance. This can create problematic situations for the Court where it has to choose between its normal roles as guardian of the opposition and the individual and its special role as supervisor of political parties. Notably, this problem appeared during the first proceeding against the NPD in 2003 when the Court discovered procedural misconduct of the Federal Government and the intelligence services.

The German intelligence services had observed the activities of the NPD for a long time. Thereby, they used several leading members of the NPD as secret informers. The Court criticized at first that the intelligence services continued cooperation with one of their secret informers during the proceedings.<sup>51)</sup> Secondly it denounced that the Government attributed public statements of its secret informers to the NPD and used them as a proof for NPD's hostility towards the constitutional order.<sup>52)</sup> The whole Court agreed that a violation of

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49) BVerfGE 2, p. 1 (7) - *SRP*; BVerfGE 5, p. 85 (107) - *KPD*.

50) *Morlok* (FN 34), p. 2937.

51) BVerfGE 107, p. 339 (353) - *NPD*.

52) BVerfGE 107, p. 339 (346 - 349) - *NPD*.

principles of procedural fairness was at least possible.<sup>53)</sup> However, there was a serious dispute inside the Court about the consequences of such a potential violation. While a majority of 4 judges wanted to continue with the proceeding,<sup>54)</sup> a blocking minority of 3 judges considered it necessary to dismiss the action at once.<sup>55)</sup>

According to the majority, the Court should only take the procedural mistakes into account during the evaluation of the proofs. It should examine the amount of influence exercised by the secret informers on the NPD and in the following decide whether a sufficient amount of unconstitutional activities could still be attributed to the NPD.<sup>56)</sup> It believed that it was still possible and, hence, necessary to issue in the ongoing proceeding an appropriate substantial judgment. The blocking minority, however, argued that a fair proceeding against the NPD was not possible anymore and that this constituted an absolute impediment to the continuation of the proceeding.<sup>57)</sup>

If you just look at the procedural rules in Art. 21 sect. 2 phrase 2 Basic Law and §§ 41 et. seq. Code of Constitutional Procedure, the opinion of the majority indeed seems to be much more convincing. § 26 Code of Constitutional Procedure asks the Court to operate like a criminal court of first instance and to establish the truth, if it is necessary, on its own.

According to Art. 21 sect. 2 phrase 2 Basic Law the Government merely makes an application. The Court does not have to evaluate the constitutionality of the Governments application and its connected conduct. Once the proceeding has been started, the Court shall rather investigate *ex officio* against the political party.<sup>58)</sup> It does not matter anymore, what evidence the Government presents and on what reasons the Government would base a prohibition.<sup>59)</sup>

Also, the idea of procedural fairness does not lead necessarily to the assumption of an absolute impediment to the continuation of the proceeding.

This construct conflicts with the constitutional duty of courts to guarantee access to justice. The Federal Constitutional Court, like every court, has to decide the substantial questions of any dispute referred to him. Only in exceptional courses, when a fair trial is absolutely impossible, it is allowed to refuse a decision on the substantial question.<sup>60)</sup>

For this reason, it is very rare in German law that a prior wrongdoing of the applicant can cause an impediment to the proceeding. Up to then, the Constitutional Court never had recognized an absolute impediment in any constitutional proceeding. It is only known in

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53) BVerfGE 107, p. 339 (372) – *NPD*. dissenting opinion of Sommer, Jentsch, Di Fabio and Mellinshof, p. 384.

54) Dissenting opinion of Sommer, Jentsch, Di Fabio, Mellinshof in BVerfGE 107. p. 339 (378 – 395) – *NPD*.

55) BVerfGE 107, p. 339 (360 – 378) – *NPD*.

56) BVerfGE 107, p. 339 (388) – *NPD dissenting opinion*.

57) BVerfGE 107, p. 339 (360 – 378) – *NPD*.

58) BVerfGE 107, p. 339 (388 – 390) – *NPD dissenting opinion*.

59) *Ibid*.

60) BVerfGE 107, p. 339 (379) – *NPD dissenting opinion*.

criminal proceedings and even there only in exceptional cases. An example would be a criminal proceeding which exceeded all reasonable time limits.<sup>61)</sup> However, the criminal courts and the Constitutional Court consider that there is no impediment to a criminal prosecution, when the offender has been provoked by a secret agent of the police.<sup>62)</sup> The criminal court shall take such a mistake into account when it determines the sentence but it shall not stop the proceeding completely.<sup>63)</sup> Besides, the court may be obliged to exclude improperly obtained evidence from the proceeding.<sup>64)</sup>

The violations of the NPD procedural rights surely do not amount to such an extraordinary situation in which a fair proceeding has become absolutely impossible.<sup>65)</sup>

Furthermore, it is not convincing to deduce an absolute impediment from the procedural misconduct of one applicant in a proceeding with multiple applicants.<sup>66)</sup> § 43 sect. 1 Code of Constitutional Procedure gives the right to apply expressively to three different governmental bodies. This decision would be bypassed, if one makes one body responsible for the misconduct of the other bodies and, by that way, deny it a real chance to apply on its own.

However, in support of the blocking minority, one has to take into account the ambiguous role of the Federal Constitutional Court in proceedings against political parties.

The reasoning of the majority exploits exactly the disadvantages which the special procedural construct in Art. 21 sect. 2 phrase 2 Basic Law entails for the political party. It has for consequence that the Court acts not only technically but also substantially as a guardian of the political authorities. For, when an administrative body issues a prohibition-order against a normal association and commits procedural mistakes in doing so, the Court would not examine, whether a prohibition can be justified in substance. Rather, it would declare the prohibition order to be unconstitutional and send the case back to the ordinary courts or the administrative body.

The blocking minority was aware of this conflict. It made sure that the outcome which would be reached in a normal proceeding also prevails in proceedings against political parties. The blocking minority's reasoning may deviate from the normal understanding of procedural fairness and absolute impediments in German procedural law. But it can be justified with the need to promote the role of the Federal Constitutional Court as guardian of the opposition and the individual. It prevents the impression that the Court makes itself an assistant-worker of the Government repairing its mistakes.

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61) BVerfG NJW 1984, p. 967; 1993, p. 3254 (3255); BGHSt 46, p. 159 (171).

62) BGHSt 45, p. 321 (325 et. seq.); critical: *F. Herzog*, Infiltrativ-provokatorische Ermittlungsoperationen als Verfahrenshindernis - Bemerkungen aus Anlaß der Einstellung des NPD-Verbotsverfahrens, StV 2003, p. 410 (412).

63) BGHSt 45, p. 321 (325).

64) *L. Senge*, *Karlsruher Kommentar zur Strafprozessordnung* (7<sup>th</sup> ed. 2013), Vor § 48, MN 49.

65) *U. Volkmann*, Einstellung des NPD Verbotverfahren – Anmerkung, DVBl. 2003, p. 593 (607).

66) BVerfGE 107, p. 339 (393) – *NPD dissenting opinion*.

#### IV. Conclusions with regard to the current action against the NPD

In the first proceeding against the NPD in 2003, the blocking minority decided to foster the Federal Constitutional Court's reputation as a guardian of the opposition and the individual. However, the role of the Court in proceedings against political parties remains ambiguous. There is always the potential for a conflict between the procedural construct of Art. 21 sect. 2 phrase 2 Basic Law and the Courts primary role as guardian of the opposition and the individual.

After the critical reception of the 2003 decision, members of the blocking minority seemed to have a tendency to pay more attention to the Courts responsibility for the protection of the constitutional order. One of them gave an interview in which he discussed possible ways for a second, this time successful proceeding against the NPD.<sup>67)</sup> This amounted almost to an invitation for the government.<sup>68)</sup> On the same time, other former members of the Court underlined that the administrative bodies were responsible for the procedural accuracy of the application.<sup>69)</sup>

Therefore, besides the difficult legal questions, the ambiguous role of the Court remains to be a factor of uncertainty in the proceeding against the NPD which makes it so difficult to foresee its outcome.

With regard to constitutional drafting it is doubtful whether an immediate jurisdiction of a Constitutional Court for the prohibition of political parties is an advisable solution. Rather, the Spanish model which invests an ordinary court with the jurisdiction seems to be more functional.

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67) *W. Hassemer*, DER SPIEGEL, 31. Jan. 2005, p. 24.

68) Critical: *W. Hoppe*, "An ihren Urteilen soll man die Gerichte messen, nicht an Interviews", DVBl 2005, p. 619 (619).

69) *H. J. Papier*, quoted at: Nachrichten der beck-aktuell Redaktion, becklink 1017624, available at [www.beck-online.beck.de](http://www.beck-online.beck.de).