Procedural Fairness in a Militant Democracy: The "Uprising of the Decent" Fails Before the Federal Constitutional Court

By Thilo Rensmann[*]

A. Introduction

"If there be any among us who wish to dissolve this union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[1] The framers of the German *Grundgesetz* (Basic Law or Constitution) of 1949 [2] had lost Thomas Jefferson's optimistic faith that the self-healing powers of reason would render a democratic polity immune to totalitarian temptation. The Weimar Republic had proved defenceless against the rise of a totalitarian movement, which availed itself of the democratic process as a Trojan horse in its effort to establish a brutal dictatorship.

As a response, the framers of the German Constitution embraced a value-oriented, substantive vision of democracy, which contrasted sharply with the procedural, relativist approach prevailing during the Weimar Republic.[3] The fathers and mothers of the German constitution identified a core of foundational values, which was placed outside the reach of the democratic process.[4] This substantive core of democracy was, however, not only exempted from interference by the legislator.[5]

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[1] Thomas Jefferson, First Draft of the Inaugural Address (4 March 1801), *in* THE WRITINGS OF THOMAS JEFFERSON, Vol. VIII, 1, 3 (Paul Leicester Ford ed., 1897).

[2] Official English translation available at http://www.bundesregierung.de/static/pdf/GG_engl_Stand_26_07_02.pdf.

[3] For a classical statement, *see*, HANS KELSEN, VOM WESEN UND WERT DER DEMOKRATIE 98-104 (2nd ed. 1929).

[4] *See*, in particular, Article 79 para. 3 GG.

[5] Article 1 para. 3, 19 para. 2, 79 para. 3 GG.

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Under the *Grundgesetz* the protection of the basic constitutional values extends far into the societal sphere. Any political party,[6] association[7] or individual[8] who sets out to undermine the *freiheitliche demokratische Grundordnung* (basic tenets of a liberal and democratic constitutional order or free democratic basic order), [9] faces the risk of being banned from the political process. Substantive democracy turns "militant."

The concept of *streitbare* or *wehrhafte Demokratie* ("militant democracy") as such, was not new in 1949. In his seminal study on "Militant Democracy and Fundamental Rights,"[10] first published in 1937, Karl Loewenstein provided ample evidence for the observation that the legislation of many European democracies had already introduced measures to meet the new threats posed by totalitarian movements.[11] The German *Grundgesetz*, however, added a novel feature to the evolution of the idea of "militant democracy" by elevating its weapons arsenal to the constitutional level.[12]

While acting in the spirit of St. Just's maxim "*Pas de liberté pour les ennemis de la liberté*" the framers of the German Constitution remained conscious of the fact that unfettered "militancy" might well prepare the ground for a Jacobin-style reign of terror.[13] In particular the experience of the *Gleichschaltung* (standardisation) of political parties during the Nazi dictatorship served as a vivid reminder of the danger of abuse inherent in giving the government the licence to ban its opponents from

[6] Article 21 para. 2 GG.

[7] Article 9 para. 2 GG.

[8] Article 18 GG.

[9] *See*, Article 18, 21 para. 2 GG.

[10] Karl Loewenstein, *Militant Democracy and Fundamental Rights*, 31 AMERICAN POLITICAL SCIENCE REVIEW 417, 638 (1937).

[11] *Id.*, at 644-656 (with reference to legislation in France, Belgium, the Netherlands, England, the Irish Free State, Sweden, Norway, Denmark, Finland, Switzerland and Czechoslowakia).

[12] As to the evolution of the idea of "militant democracy" under the *Grundgesetz*, *see*, Hans-Jürgen Papier/Wolfgang Durner, *Streitbare Demokratie*, 128 ARCHIV FÜR ÖFFENTLICHES RECHT 340 (2003).

[13] *See*, in particular, the discussions on subsequent drafts of Article 18 clause 2 GG and Article 21 para. 2 GG in the committees of the *Parlamentarischer Rat* (Parliamentary Council or Constitutional Convention), summarized in 1 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART (NEUE FOLGE) 174 *et seq.*, 207-210 (1951).

the political process.[14] Against the ambivalent backdrop of Germany's recent past the German *pouvoir constitutant* attempted to strike a balance between the risk of inaction in the face of totalitarian threats and the danger of the instruments of "militant democracy" being turned against democracy itself.[15]

The result of this balancing process, as we find it today in the German Constitution, is an unequivocal commitment to act decisively against the "enemies of liberty" while at the same time taking the sharpest weapons of Germany's "militant democracy," the expulsion of an individual or a political party from the "marketplace of ideas," out of the hands of the political organs and entrusting them rather to the *Bundesverfassungsgericht* (BVerfG – Federal Constitutional Court.[16] As a result, individuals and political parties accused of seeking to undermine the basic values of the Constitution remain, in principle, entitled to the full protection of the political and human rights guaranteed by the *Grundgesetz* until the Federal Constitutional Court pronounces them banned from political life.

However, the Constitutional Court may not act *ex offico*. The initial assessment as to whether an application to ban a political party or an individual from political life appears to be justified remains with the political organs.[17] But as soon as the application reaches the Federal Constitutional Court the political question of how to deal with the "enemies of liberty" becomes a judicial question subject to the rule of law and the strictures of procedural fairness.
The recent[18] attempt to outlaw the neo-Nazi *Nationaldemokratische Partei Deutschlands* (NPD – National Democratic Party of Germany) which eventually failed before the Second Senate of the Federal Constitutional Court[19] highlights the many

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[14] On the process of *Gleichschaltung* of political parties during the Nazi dictatorship, *see*, Hans H. Klein, Article 21, *in* KOMMENTAR ZUM GRUNDGESETZ, para. 78 et seq. (Theodor Maunz/Günter Dürig, eds., 38th instalment 2001).

[15] *See*, *supra,* note 13.

[16] Article 18 clause 2, 21 para. 2 GG.

[17] Section 36 and 43 *Bundesverfassungsgerichtsgesetz* (BVerfGG – Federal Constitutional Court Act), English translation available at http://www.goethe.de/in/d/presse/e/gesetze-e-f.html.

[18] For earlier attempts to outlaw political parties, *see*, 2 *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE, Decisions of the Federal Constitutional Court) 1 (*SRP*), 5 BVerfGE 85 (*KPD*), 91 BVerfGE 262 (*NL*), 91 BVerfGE 276 (*FAP*). *Cf.* also Martin Morlok, *Parteiverbot als Verfassungsschutz – Ein unauflösbarer Widerspruch?*, 2001 NEUE JURISTISCHE WOCHENSCHRIFT 2931, 2933-2935; Thilo Rensmann, Die Demokratie zeigt sich wehrhaft – Parteiverbotsverfahren von dem BVerfG, *in* VERFASSUNGSRECHTSPRECHUNG 56 (Jörg Menzel, ed., 2000).

[19] *Bundesverfassungsgericht* (BVerfG), decision of 18 March 2003, 2 BVB1/01, 2/01, 3/01, available at http://www.bverfg.de/entscheidungen/bs20030318_2bvb000101.html.

contradictions inherent in the concept of "militant democracy" and the difficulty of redeeming the promise to fight the "enemies of liberty" effectively while upholding the rule of law and procedural fairness.

B. The "Uprising of the Decent" Before the Federal Constitutional Court[20]

In 2000 a number of racially motivated attacks on foreigners attributed to neo-Nazi groups rocked the Federal Republic of Germany.[21] This series of "hate crimes" culminated in a bomb explosion in Düsseldorf in July 2000, which injured 10 people, six of them Jewish immigrants.[22] The xenophobic and anti-Semitic attacks provoked a wave of demonstrations against racism in Germany with as many as 200,000 people gathering at a rally in Berlin in November 2000 on the anniversary of the Nazi pogrom against the Jews in 1938.[23] In the wake of what was at the time dubbed the "*Aufstand der Anständigen*"[24] ("uprising of the decent") a political initiative to outlaw the NPD, the oldest neo-Nazi party in Germany, gained support from all the major political parties. In an unprecedented move the *Bundesregierung* (Federal Government), the *Bundestag* (Federal Parliament) and the *Bundesrat* (Federal Council of States) jointly filed applications requesting the Federal Constitutional Court to declare the NPD unconstitutional and to order its dissolution. The application was based on Article 21 para. 2 of the Basic Law, which reads:
"Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order … shall be unconstitutional."

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[20] For previous coverage of the proceedings in the GERMAN LAW JOURNAL, *see*, *Government Commits to Seeking a Ban of the Extreme Right-Wing National Democratic Party of Germany (NPD)*, 1 GERMAN LAW JOURNAL No. 2 (1 November 2000) <www.germanlawjournal.com>; *Federal Constitutional Court Issues Temporary Injunction in the NPD Party Ban Case*, 2 GERMAN LAW JOURNAL No. 13 (1 August 2001) <www.germanlawjournal.com>; Felix Hanschmann, *Federal Constitutional Court to Review NPD Party Ban Motion*, 2 GERMAN LAW JOURNAL No. 17 (1 November 2001) <www.germanlawjournal.com>; Alexander Hanebeck, *FCC Suspends Hearing in NPD Party Ban Case*, 3 GERMAN LAW JOURNAL No. 2 (1 February 2002) <www.germanlawjournal.com>; Felix Hanschmann, *Another Test in Proceduralizing Democracy: The Oral Proceedings in the NPD Party Ban Case Before the Federal Constitutional Court*, 3 GERMAN LAW JOURNAL No. 11 (1 November 2002) <www.germanlawjournal.com>.

[21] As to the facts, *see*, BVerfG, *supra* note 19, at §§ 2-51. *See, also*, Ingo v. Münch, *Der "Aufstand der Anständigen,"* 2001 NEUE JURISTISCHE WOCHENSCHRIFT 728.

[22] BBC News, *Germany moves to ban far-right party*, 26 October 2000, available at http://news.bbc.co.uk/1/hi/world/europe/992558.stm.

[23] BBC News, *German Senate backs neo-Nazi ban,* 10 November 2000, available at http://news.bbc.co.uk/1/hi/world/europe/1016364.stm.

[24] The expression was first couched by Heribert Prantl, political journalist of the *Süddeutsche Zeitung*, and was later adopted by Chancellor Gerhard Schröder, *see*, v. Münch (note 20), at 731.

The applicants argued in their applications that the NPD's overall profile displayed national-socialist, anti-Semitic, xenophobic and antidemocratic characteristics. In addition it was contended that the NPD found growing support amongst young people and served increasingly as an organisational platform for other neo-Nazi groups.[25]

After having already scheduled oral hearings,[26] the Court learned through a telephone call from an official of the Federal Interior Ministry that one of the party officials on whose statements the applications relied had acted as an informer for one of the domestic intelligence services of the *Länder* (Federal States).[27] The Court, taken completely by surprise by this revelation, consequently cancelled the scheduled hearings arguing that there was not enough time left beforehand to clarify the new developments.[28] It gradually transpired that a number of party officials had cooperated with the intelligence services before and after the applications were filed. The applicants refused to disclose the identity of all informers connected to the proceedings invoking the need to protect intelligence sources. They indicated, however, that between 1997 and 2002 "no more than 15%" of the members of the party leadership at the Federal and *Länder* level worked as informers for the intelligence services.[29]

In a number of briefs filed with the Court the respondents expressed the view that the proceedings should be discontinued due to the presence of the informers in the respondent's party leadership.[30]

C. The opinion of the Federal Constitutional Court

The Court thus had to decide whether the proceedings could be continued despite the revelation that a considerable number of members of the NPD acted as informers for the intelligence services before and during the proceedings.

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[25] BVerfG, *supra* note 19, at § 8 et seq.

[26] BVerfGE 104, 63. As to the significance of this procedural step, see, *infra*, text accompanying notes 37-39.

[27] *See*, BVerfGE 104, 370, 372.

[28] *Id.*

[29] BVerfG, *supra* note 19, at § 33.

[30] BVerfG, *supra* note 19, at § 39, 41.

The Second Senate was deeply divided on this question. Whereas three judges held that the presence of informers in the NPD constituted an irreparable impediment to further proceedings, the other four members of the Senate favoured the continuation of the proceedings.[31]

I. The Extraordinary Power of the Court's Minority

The effect of this division of opinion within the Second Senate hinged on a preliminary procedural question. In proceedings to prohibit and dissolve a political party any "decision with negative consequences for the respondent" requires, pursuant to the *Bundesverfassungsgerichtsgesetz* (BVerfGG – Federal Constitutional Court Act) , a two-thirds majority of the members of the Senate seized with the application.[32] This "enhanced" majority requirement is the procedural counterpart to the special status and protection extended to political parties in the Constitution. It constitutes a procedural safeguard against the abuse of the power to exclude political enemies from the political process and affords an eventual prohibition and dissolution of a political party by the Court with additional legitimacy.

The Court (apparently unanimously) assumed that the denial of the "implicit" application of the NPD to discontinue the proceedings constituted such a "decision with negative consequences for the respondent."[33] On the basis of this assumption the Court drew the somewhat surprising conclusion that the proceedings could not be continued because the denial of the NPD's application had not found the necessary majority of six of the eight judges[34] normally sitting as a Senate.[35]

Neither the premise nor the conclusion of the Court's line of reasoning are entirely convincing. Firstly, it seems doubtful whether the denial of the application to discontinue the proceedings affected the NPD in such a way as to trigger the qualified majority requirement.[36] The Court defines "a decision with negative consequences" as any decision, which deteriorates or in any other way negatively affects the legal

[31] BVerfG, *supra* note 19, at §§ 52, 64-116, 117-154.

[32] Section 15 (4) Clause 1 BVerfGG.

[33] BVerfG, *supra* note 19, at §§ 52-63.

[34] In the case at issue the Second Senate was reduced to seven judges because the term of office of Jutta Limbach, the former President of the Court, had ended during the proceedings.

[35] BVerfG, *supra* note 19, at § 52.

[36] In a similar vein, Jörn Ipsen, *Das Ende des NPD –Verbotsverfahrens*, 2003 JURISTENZEITUNG 485, 486 et seq.; Uwe Volkmann, *Case Note*, 2003 DEUTSCHES VERWALTUNGSBLATT 605, 606 et seq.

position of the respondent.[37] Hence what is required in order to ascertain whether a decision of the Court has negative implications for the respondent is a comparison of the respondent's legal status before and after the decision in question.

In proceedings to ban a political party the Court is required to make an initial assessment of the application before entering into the full examination of the alleged unconstitutionality of the respondent.[38] The proceedings may only be continued if the Court comes to the conclusion that the application is admissible and sufficiently founded on the basis of the reasons put forward in the written application and in the light of any written response filed by the respondent within a certain time-limit.[39] This *Vorverfahren* (preliminary proceedings) is designed to protect political parties from being arbitrarily subjected to prolonged proceedings before the Constitutional Court. In view of the negative consequences that continuation of such proceedings, and in particular the compulsory oral hearings, would have on a respondent's public image, there is a general consensus that the formal decision of the Federal Constitutional Court to enter into the full examination of an application requires a two thirds majority.[40]

Following the preliminary examination of the applications to prohibit and dissolve the NPD the Court held in October 2001 that the proceedings should go ahead.[41] It was on the basis of *this* decision that the respondent had to endure the negative consequences of the continuing proceedings. Contrary to the Court's view, the later denial of the application to discontinue the proceedings would have therefore left the respondent's previous legal position unchanged and would thus not have required a two-thirds majority.

The second objection to the Court's reasoning concerns the legal effects of the qualified majority requirement on the proceedings. Even assuming that the denial of the respondent's application was subject to the enhanced majority requirement, the Senate's minority would only have been endowed with a veto position.[42] In the case at issue the reasoning of the Court seems to suggest, however, that by virtue of the qualified majority requirement the minority was not only vested with the power to

[37] BVerfG, *supra* note 19, at § 54.

[38] Section 45 BVerfGG.

[39] *Id.*

[40] *See, e.g.,* Ipsen, *supra* note 35, at 486.

[41] BVerfGE 104, 63-65.

[42] Ipsen, *supra* note 35, at 486; Volkmann, *supra* note 35, at 606.

prevent the respondent's application from being denied but also had the capacity to order the proceedings to be discontinued. According to the Federal Constitutional Court Act such a (positive) decision granting the respondent's application required the assent of at least a (simple) majority within the Senate.[43]

It seems hard to imagine that these logical flaws could have escaped the Second Senate's attention. This observation raises, however, the question as to why the Court chose this particular line of reasoning despite its obvious weaknesses. It appears as if the Court attempted to create an enormous smokescreen in order to hide the fact that the (formal) decision to discontinue the proceedings had to be, and was in fact, supported by a majority within the Court. The reasoning with regard to the procedural consequences of the division of opinion within the Senate must have been endorsed, if not dictated, by the majority. As questions of statutory interpretation are certainly not covered by a qualified majority requirement,[44] the peculiar reading of the Federal Constitutional Court Act in the present proceedings could not have been forced upon the majority. It was apparently in the majority's interest to create the impression, also in formal terms, that the failure of the proceedings was solely attributable to the minority.

However, a short paragraph at the end of the Second Senate's argument discussing the legal consequences of the difference of opinion that divided the Senate hints at a more elegant and convincing way of explaining the legal case for terminating the proceedings:
"Pursuant to Section 15 (4) clause 1 BVerfGG the fact that a minority of three judges is of the opinion that … an irreparable impediment to the continuation of the proceedings exists, affects the examination of and decision on the procedural requirements for which the Court is responsible *ex officio* at all stages of the proceedings. Consequently it is established that the applications to outlaw the respondent cannot be successful. A continuation of the proceedings would therefore not be justifiable under the *Rechtsstaat* principle and would burden the respondent disproportionately."[45]

The provisions governing the proceedings to prohibit and dissolve political parties, in particular the requirement of screening the application in "preliminary proceedings," are designed to protect political parties from being subjected to prolonged proceedings which do not have a reasonable chance of establishing their unconsti-

[43] Section 15 (4) clause 2 BVerfGG.

[44] Ipsen, *supra* note 35, at 487.

[45] BVerfG, *supra* note 19, at § 62.

tutionality. The object and purpose of these provisions requires the Court at any stage of the proceedings to ascertain *ex officio* whether there is any permanent *de facto* or *de iure* impediment to the eventual success of the application, and if so, discontinue the proceedings.[46]

In the case at issue it was clearly established that in view of the revealed presence of informers within the NPD the minority would under no circumstances have supported the eventual prohibition and dissolution of the NPD, which undoubtedly requires a two thirds majority. The Court was accordingly under a legal obligation to discontinue the proceedings *ex officio*. The respondent's "implicit application" was in legal terms immaterial.[47] Despite its vigorous substantive argument in favour of continuing the proceedings, the Senate majority was thus obliged to give its assent to the formal decision to discontinue the proceedings.

II. The minority opinion

Despite the deep rift running through the Second Senate with regard to the substantive question of how the presence of informers in the NPD affected the proceedings before the Court, the members of the Second Senate agreed on the fundamental principles governing the issue. Drawing on an analogy to its case law concerning the consequences of violations of fair trial guarantees in criminal proceedings, both the majority and the minority held that in proceedings to ban political parties a serious and irreparable disregard of procedural fairness could constitute an absolute impediment to continuation of proceedings if the seriousness of the violation outweighed the public interest in being effectively protected against potential "enemies of liberty."[48]

The minority held, on the basis of this test, that the presence of informers in the party leadership and the reliance in the applications to ban the NPD on statements of party members acting as informers for the domestic intelligence services amounted to an absolute impediment to continuation of the proceedings.[49]

The Court's minority assumed that due to the special constitutional status granted to political parties under the Basic Law a particularly strict standard of procedural

[46] For a slightly different line of reasoning, *see*, Ipsen, *supra* note 35, at 487.

[47] *See*, Volkmann, *supra* note 35, at 606.

[48] BVerfG, *supra* note 19, at §§ 73-76, 119 et seq., 123.

[49] BVerfG, *supra* note 19, at §§ 64-116.

fairness applied in proceedings to outlaw political parties.[50] The minority opinion translated the liberties extended to political parties in Article 21 para. 1 of the Basic Law into a procedural right to portray itself in a free and self-determined manner before the Constitutional Court.[51] In view of the fact that its very existence was at stake, the political party had to be given the chance to defend itself by portraying itself, free from any government interference, as an organisation respecting the basic values of the Constitution.[52] During the proceedings before the Constitutional Court the political party therefore enjoyed *strikte Staatsfreiheit* (strict freedom from State interference), which in principle foreclosed all forms of undercover intelligence surveillance.[53] The ban of a political party being the "sharpest weapon of a constitutional democracy" the proceedings before the Court required the "highest possible degree" of procedural transparency and predictability, which could only be guaranteed if all undercover intelligence surveillance of the respondent were excluded.[54]

Against this backdrop the minority opinion considered the mere presence of informers in the party leadership to be a grave infringement of procedural fairness irrespective of whether the party's defence strategy had actually been weakened by information being passed on to the applicants.[55] The minority deemed it inevitable that, as a result of the informers' conflicting loyalties, the cooperation of leading party members with the intelligence services as such would lead to government agencies exerting influence on the political party's decision-making process and activities.[56]

According to the minority the considerable reliance by the applicants on statements made by party members acting or having acted as informers was also incompatible with the standard of procedural fairness applicable in proceedings to prohibit and dissolve a political party.[57] The "reliability and transparency" of the proceedings was considered to be seriously compromised by the fact that the applicants pre-

[50] BVerfG, *supra* note 19, at §§ 83-86.

[51] BVerfG, *supra* note 19, at § 83.

[52] BVerfG, *supra* note 19, at § 84.

[53] BVerfG, *supra* note 19, at § 86.

[54] BVerfG, *supra* note 19, at § 86.

[55] BVerfG, *supra* note 19, at §§ 83-88.

[56] BVerfG, *supra* note 19, at §§ 81, 84.

[57] BVerfG, *supra* note 19, at § 90.

sented statements made by informers to the Court as part of the "image of an unconstitutional party" without disclosing the cooperation of these party members with the intelligence services. During the course of the proceedings not only the political party but also the image of the political party conveyed in the applications had to be "strictly free of state interference."[58]

The minority argued that the applicants bore "a particular procedural responsibility" to ensure that the conditions for the fair conduct of proceedings before the Constitutional Court were met.[59] By virtue of this procedural responsibility the applicants would have had to instruct the intelligence agencies to "deactivate" all informers in the respondent's leadership and to abstain from any further contact at the latest as of the moment at which the intention to file the application was made public.[60]

In addition, in preparing their applications the applicants would have had to avoid any reference to statements made by informers.[61] The minority opinion recognised that this requirement would make it extremely difficult for applicants to sufficiently substantiate the application if a considerable number of leading party members acted as informers. However, in the eyes of the minority this risk should have already been taken into account when recruiting leading party officials as informers and therefore did not allow the standards of procedural fairness to be lowered.[62]

The minority left undecided the question as to whether the damage caused to procedural fairness by the reliance on statements of informers in the applications could somehow be remedied during the further course of the proceedings.[63] The combined effect of the reliance on statements made by informers and the "massive presence"[64] of informers within the NPD's leadership shortly before and during the proceedings was, however, considered to have caused irreparable damage to the fairness of those proceedings.[65] In the eyes of the minority, even if it had been *de iure* and *de facto* possible to conduct the remainder of the proceedings in accordance

[58] BVerfG, *supra* note 19, at § 93.

[59] BVerfG, *supra* note 19, at §§ 87, 91, 113.

[60] BVerfG, *supra* note 19, at § 87.

[61] BVerfG, *supra* note 19, at § 91, 113.

[62] BVerfG, *supra* note 19, at § 113.

[63] BVerfG, *supra* note 19, at § 115.

[64] BVerfG, *supra* note 19, at § 111.

[65] BVerfG, *supra* note 19, at § 115.

with the standard of "strict freedom from State interference," this could not compensate for the damage already inflicted on the fairness of the proceedings before the Court.[66]

The minority assumed that such irreparable damage to procedural fairness as a general rule required the proceedings to be discontinued.[67] Unlike criminal proceedings in which the discontinuation of proceedings constitutes a definite waiver of the State's right to punish a defendant if found guilty,[68] applicants in preventive proceedings to ban a political party would be free to file a new application based on an identical set of facts if the proceedings were discontinued without a decision on the admissibility and the merits.[69] Only in situations of extraordinary danger to the values protected in Article 21 para. 2 of the Basic Law would the public interest in protecting these values prevail and justify the continuation of such proceedings.[70] In the case at issue the minority did not find any indications for such exceptional circumstances.[71]

III. The Majority's "Dissent"

The majority held in its "dissenting opinion" that the surveillance of the respondent by the domestic intelligence agencies before and during the proceedings could not be considered an impediment to continuation of the proceedings.[72]

As the proceedings stood, the majority did not find any basis for the assumption that the respondent's right to procedural fairness had been violated by the presence of informers in the party leadership and argued that even if such a violation were assumed the public interest in the further conduct of the proceedings would prevail.

In the majority's view the freedom of political parties guaranteed in Article 21 para. 1 of the Basic Law did not heighten the generally applicable constitutional standards of procedural fairness. The freedom granted in Article 21 para. 1 of the Basic

[66] BVerfG, *supra* note 19, at § 115.

[67] BVerfG, *supra* note 19, at § 94.

[68] *See,* BVerfGE 54, 324, 343 et seq.

[69] BVerfG, *supra* note 19, at § 95.

[70] BVerfG, *supra* note 19, at § 94.

[71] BVerfG, *supra* note 19, at § 116.

[72] BVerfG, *supra* note 19, at § 117-154.

Law would only have been of relevance to the present proceedings if the intensity of the intelligence surveillance had led to the government actually exercising control over the respondent's decision-making process.[73] Such government control would have deprived the respondent of the degree of autonomy necessary to be qualified as a political party. Under such circumstances the Court would have had to render a substantive decision rejecting the admissibility of the application rather than simply discontinuing the proceedings.[74] The majority made it clear, however, that despite the presence of informers in the party leadership there was not "the slightest indication" of any substantial governmental influence on the respondent's decision-making process.[75]

Equally, the cooperation of party members with the intelligence services was not considered to amount to a violation of generally applicable standards of procedural fairness,[76] in particular the right to defend oneself effectively on the basis of a freely chosen procedural strategy.[77] The majority considered the mere "abstract danger" posed by the presence of informers in the party leadership to be insufficient to establish an infringement of the respondent's right to procedural fairness.[78] The four dissenting judges held that as the proceedings stood, there were no indications either of the applicants having attempted to obtain information on the respondent's procedural strategy or of the defence strategy having in any other way been affected by the intelligence surveillance.[79]

The reliance on statements made by informers in the applications to underpin the allegation of the respondent's unconstitutionality as such was also not deemed to constitute a bar to continuation of the proceedings. Rather the majority considered it the Court's duty to establish in each individual case the immutability of the relevant statements to the respondent. If necessary, the Court would have to gather further evidence *ex officio* using all procedural means at its disposal.[80]

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[73] BVerfG, *supra* note 19, at § 125.

[74] BVerfG, *supra* note 19, at § 126.

[75] BVerfG, *supra* note 19, at § 126.

[76] A general right to procedural fairness is not explicitly laid down in the German constitution but is read into the *Rechtsstaat* principle (Article 20 para. 1 GG) and Article 2 para. 1 GG.

[77] BVerfG, *supra* note 19, at § 131.

[78] BVerfG, *supra* note 19, at § 133.

[79] BVerfG, *supra* note 19, at § 134.

[80] BVerfG, *supra* note 19, at § 127 et seq.

With regard to the process of balancing the relative weight of an assumed violation of procedural fairness on the one hand and the preventive purpose of the proceedings to outlaw political parties on the other, the majority argued, in stark contrast to the minority opinion that a strong presumption existed in favour of continuing the proceedings.[81] The majority based this presumption principally on the fact that, in view of the Constitutional Court being the only organ entrusted with the power to decide on applications to outlaw political parties, the Court had to meet a special *Justizgewährungspflicht* (constitutional duty to provide a judicial remedy).[82]

The majority held that by virtue of this special duty the Court was under an obligation to establish *ex officio* all the facts relevant to the balancing process.[83] Only during the "preliminary proceedings" was the Court permitted to content itself with relying exclusively on the facts presented by the parties. The duty to gather all necessary evidence *ex officio* could not be simply shifted to the applicants by invoking their "special procedural responsibility."[84] The proceedings would therefore have to be continued at least until the Court had gathered and reviewed all the evidence necessary to balance the respective interests of procedural fairness and effective protection of the "free democratic basic order."

Consequently, the line of argument taken by the minority that the possibility of filing the applications anew could justify a presumption in favour of discontinuing the proceedings was rejected.[85] Even if all informers within the leadership were deactivated and the new applications avoided all references to informers, the Court would still, *ex officio*, have to take notice of statements made by former informers and determine their evidential value.[86]

Article 21 para. 2 of the Basic Law is intended to protect the German constitutional system against the "abstract" danger of parties seeking "to undermine or abolish the free democratic basic order." The abolishment of a party *before* it poses any *konkrete Gefahr* (actual or clear and present danger) to the basic values enshrined in the Constitution is intended to avoid the rise of any anti-democratic movement that

[81] BVerfG, *supra* note 19, at § 136 et seq.

[82] BVerfG, *supra* note 19, at §§ 121, 137.

[83] BVerfG, *supra* note 19, at § 140.

[84] BVerfG, *supra* note 19, at § 145.

[85] BVerfG, *supra* note 19, at § 153.

[86] BVerfG, *supra* note 19, at § 153.

might then no longer be containable by constitutional means. The majority opinion put special emphasis on the fact that in judging the weight of the preventive public interest in continuing the proceedings it was necessary to take into account not only the "abstract" danger required to hold a political party unconstitutional but also any actual danger posed by the respondent to the "free democratic basic order."[87] The Court, being the only organ empowered to outlaw political parties, had a specific preventive mandate to counter any actual danger to the basic tenets of the Constitution caused by political parties.[88]

In the case of an actual threat to the dignity, life and physical integrity of individuals the protective dimension of human dignity[89] and the fundamental rights guaranteed in the Basic Law[90] would impose an additional legal obligation on the Federal Constitutional Court to provide adequate protection against such threats.[91] In this context the majority emphasised that Article 21 para. 2 was not only designed to prevent dangers to the existence of the "free democratic basic order" as such but also to foreclose attacks on human dignity by means of the specific organisational structure of a political party.[92]

If the Court after establishing all necessary facts came to the conclusion that an actual danger to the "free democratic basic order" existed, the majority considered the Court to be under a legal obligation to continue the proceedings. Violations of procedural fairness would then have to be taken into account by other procedural means during the further course of the proceedings (*e.g.* the exclusion of certain evidence). [93]

Only if the political party were so "ineffective and insignificant" that it did not pose any "actual" danger could the balancing process (under exceptional circumstances)

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[87] BVerfG, *supra* note 19, at § 136.

[88] BVerfG, *supra* note 19, at § 137.

[89] *See*, Article 1 para. 1 clause 2 GG.

[90] On the protective dimension of the fundamental rights of the Basic Law, *see*, K. Graßhof, The Duty to Protect and to Ensure Human Rights Under the Basic Law of the Federal Republic of Germany, *in* THE DUTY TO PROTECT AND TO ENSURE HUMAN RIGHTS 33 (Eckart Klein, ed. 2000).

[91] BVerfG, *supra* note 19, at § 142.

[92] BVerfG, *supra* note 19, at § 141.

[93] BVerfG, *supra* note 19, at § 141.

lead to discontinuation of the proceedings.[94] The majority emphasised, however, that the Court would be obliged to exhaust all possible means of taking violations of procedural fairness into account before resorting to discontinuation of the proceedings. If necessary, the Court would have to develop the law accordingly.[95]

The majority considered the consequences of the continued existence of a political party to be another important factor in ascertaining the weight of the public interest in continuation of the proceedings.[96] Due to the special constitutional status enjoyed by political parties under the *Grundgesetz*, in particular the principle of *Chancengleichheit* (equal opportunities for all political parties), the government would not only be under an obligation to abstain from interference, but also to promote and finance[97] the activities of the political party, if the political party were not declared unconstitutional by the Court.[98]

Finally, the dissenters emphasised that the legitimate interests of other organs charged with the preventive protection of the constitution, in particular the domestic intelligence services, had to be accorded adequate weight in the balancing process.[99]

The majority held that in principle the constitutional duty of other government organs to investigate and, if necessary, take action with respect to the activities of a political party threatening the basic values of the Constitution was not affected by pending proceedings before the Constitutional Court to outlaw such a political

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[94] BVerfG, *supra* note 19, at § 141. Note that the NPD had only 6500 members in 2001 and received only 0.4 percent of the ballot in the elections to the Federal Parliament in 2002, *cf.* BVerfG, *supra* note 19, at § 3.

[95] BVerfG, *supra* note 19, at § 154.

[96] BVerfG, *supra* note 19, at § 143.

[97] Note, for example, that the NPD received 800,000 DM in government funds in 2000, *see*, Münch, *supra* note 20, at 729.

[98] The European Commission's proposal for a regulation on "the statute and financing of European political parties", COM (2003) 77 final, 19 February 2003, would, however, allow *the European Parliament* to qualify a European political party as ineligible for financial support from the community budget if the party's statute and activities failed to respect "the basic purposes of the Union with regard to freedom, democracy, human rights, fundamental freedoms and the rule of law", *see* Article 3 para. 2 and Article 4 of the proposed regulation. From the perspective of German constitutional law this poses a fundamental challenge to the *Parteienprivileg* (the privileged status of political parties) which makes any interference with a political party's legal status based on the political contents of its program or activities contingent on a prior decision by the Federal Constitutional Court. On the notion of the *Parteienprivileg*, *see*, BVerfG, *supra* note 19, at § 69.

[99] BVerfG, *supra* note 19, at § 146 et seq.

party.[100] According to the dissenting judges continuing surveillance could be justified on two grounds. Firstly, the majority pointed to the need to assist in the preparation and conduct of the proceedings before the Constitutional Court.[101] In view of the considerable time that could elapse between the filing of the application and the decision of the Court after the conclusion of the oral hearings, the applicants and the Court were dependent on the continuing support of the intelligence services in order to obtain updated information on the respondent. Such information could not be restricted to public statements made by party officials but would have to include information gleaned by means of informers since as soon as the application to outlaw the political party were filed with the Court, the respondent would attempt to portray itself as an organisation acting in conformity with the constitution.[102]

Secondly, the surveillance of political parties during the pending proceedings could be justified and possibly required on the basis of the protective dimension of the fundamental rights enshrined in the Constitution.[103] In view of the anti-semitic and xenophobic party programme of the defendant the majority felt the need to emphasise that the dignity, life, and physical integrity of individuals may not be sacrificed on the altar of procedural fairness: "The principles of the *Rechtsstaat* do not demand toleration of dangers to other legally protected interests, in particular the interests of innocent third parties during the proceedings."[104]

D. The Consequences of the Failed "Uprising"

Thomas Jefferson might have characterised the decision of the Federal Constitutional Court as a "monument of the insecurity" with which the constitutional instruments of militant democracy in Germany are still fraught. He might, however, have also felt that it was the "cunning of reason" which eventually returned the battle against the NPD from the Constitutional Court to its proper place in the political arena.

It seems as if the failure of the "uprising of the decent" before the Federal Constitutional Court was greeted with a sense of relief by all parties concerned. The political organs had bowed to the dynamics of the "uprising of the decent" without having fully supported the idea of trying to ban the NPD. Many feared that a successful

[100] Article 73 No. 10 *lit.* b; Article 87 para. 1 clause 2 GG. *See*, BVerfG, *supra* note 19, at § 146.

[101] BVerfG, *supra* note 19, at § 148, 151.

[102] BVerfG, *supra* note 19, at § 151.

[103] BVerfG, *supra* note 19, at § 147.

[104] BVerfG, *supra* note 19, at § 147.

ban of the NPD would give their members martyr status and lead to them becoming even more radical.[105] On the other hand, a failure of the application on substantive grounds would have provided the NPD with a clean bill of health. The decision of the Federal Constitutional Court to leave the substantive issue undecided seemed to provide an elegant resolution of this dilemma.

The greatest sigh of relief was probably heard within the domestic intelligence community. The "uprising of the decent" had gradually put the "decency of the uprising" in doubt.[106] The decision of the Federal Constitutional Court to discontinue the proceedings spared the intelligence services from further embarrassing revelations concerning their degree of cooperation with the NPD as well as the unsatisfactory lack of cooperation between Federal and State intelligence services. At the same time the merely procedural nature of the decision avoided any authoritative pronouncement on the constitutional limits of the surveillance of political parties.

Maybe only the NPD will have been slightly disappointed at being removed so suddenly from the limelight of the proceedings in Karlsruhe and relegated to political insignificance.
The real victim of the decision, however, is the normative authority of Article 21 para. 2 of the Basic Law.[107] At least as long as the minority judges remain in office and wield their veto power, the possibility of a successful application to ban a political party in Germany is for all intents and purposes excluded, save in exceptional cases of clear and present danger to the "free democratic basic order."[108] Normativity is largely reduced to virtuality and symbolism. According to the minority a single informer in the party leadership is sufficient to thwart any attempt to dissolve a political party. On the other hand the minority opinion imposes a considerable burden on the applicants to substantiate the claim of unconstitutionality with sufficient evidence. Such evidence cannot, however, be obtained without the help of informers.

Whilst the chances of dissolving a political party before the Constitutional Court become more remote, the fight against the "enemies of liberty" will increasingly be forced to rely on executive means. The particular irony is that the minority in its

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[105] *See*, *e.g.*, the references in Münch (note 20), at 728.

[106] As to this word pun, *see*, Lars Oliver Michaelis, *Einstellung des NPD-Verbotsverfahrens*, 2003 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 943.

[107] In a similar vein, Volkmann (note 35), 609.

[108] *Contra* Michaelis, *supra* note 105, at 947.

effort to rein in the powers of the intelligence services, is in effect likely to be responsible for an increase in the extent to which parties are subjected to (more sophisticated and coordinated) surveillance in the future.[109]

The further development of militant democracy in Germany will, however, be decisively influenced by the European context. Only a few weeks before the decision of the Federal Constitutional Court was rendered, the Grand Chamber of the European Court of Human Rights handed down a judgement endorsing the ban of the Welfare Party in Turkey.[110] This decision will not only have to be studied carefully in order to ascertain the limits which the European Convention on Human Rights imposes on banning political parties in Germany;[111] in the present context it might be of even more importance that the Strasbourg Court also draws attention to the interaction between the protective dimension of human rights and the duty of the State to offer effective protection against anti-democratic parties.[112]

Finally, militant democracy has also gained an important foothold in the constitutional law of the European Union.[113] Article 7 of the Treaty on European Union provides a monitoring and sanctions procedure against Member States in which the Union's "free and democratic basic order" is endangered.[114] The uprising of the

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[109] Ipsen, *supra* note 35, at 489, Volkmann, *supra* note 35, at 608.

[110] European Court of Human Rights, *Case of Refah Partisi (The Welfare Party) v. Turkey,* judgement of 13 February 2003, available at www.echr.coe.int.

[111] *See*, the reference to this judgement in the majority opinion of the Court, BVerfG (note 19), at § 154. *See*, *also*, Thorsten Koch, *Parteiverbote, Verhältnismäßigkeitsprinzip und EMRK,* 2002 DEUTSCHES VERWALTUNGSBLATT 1388.

[112] European Court of Human Rights, *supra* note 109, at para. 103.

[113] *See*, however, the decision of the Federal Constitutional Court of 22 November 2001, BVerfGE 104, 214, denying the application of the NPD to refer the case at issue to the European Court of Justice. The Court held that the member States of the European Union had the power to extend the effect of a national party ban to the elections to the European Parliament so long as the electoral procedure was still governed by member States' national laws, *see,* BVerfGE 104, 214, 219-220. This view was recently confirmed by the European Court of First Instance in Case T-353/00, *Le Pen v. European Parliament*, judgement of 10 April 2003, available at http://curia.eu.int/en/content/juris/index.htm. *Cf.* also Franz C. Mayer, *Das Bundesverfassungsgericht und die Verpflichtung zur Vorlage an den Europäischen Gerichtshof*, 2002 EUROPARECHT 239; Papier/Durner, *supra* note 12, at 369.

[114] Treaty of European Union, 7 February 1992, as amended by the Treaty of Nice, O. J. 2002 C 325/5. *See, also*, Art. I-58 Draft Treaty establishing a Constitution for Europe, adopted by the European Convention on 13 June and 10 July 2003, O. J. 2003 C 169/1. On the principle of "militant democracy" in the European Union's draft constitution, *see*, Thilo Rensmann, Grundwerte im Prozeß der europäischen Konstitutionalisierung, *in* DIE EUROPÄISCHE UNION ALS WERTEGEMEINSCHAFT (Dieter Blumenwitz, Gilbert H. Gornig, Dietrich Murswiek, eds. forthcoming).

"XIV against Austria" on the occasion of the far-right FPÖ becoming part of a government coalition in Austria (despite all its legal shortcomings and doubtful political expediency[115]) demonstrated that the last line of defence in the legal battle against the "enemies of liberty" is today found at the European level.[116]

[115] *See*, the detailed analysis in FRANK SCHORKOPF, DIE MAßNAHMEN DER XIV EU-MITGLIEDSTAATEN GEGEN ÖSTERREICH 119 et seq. (2002).

[116] *See, also*, the European Commission's proposal for a regulation on the statute and financing of European political parties, *supra* note 97.

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