

Another Test in Proceduralizing Democracy: The Oral Proceedings in the NPD Party Ban Case before the Federal Constitutional Court

By Felix Hanschmann

Suggested Citation: 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 (2002), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=204>

[1] After recognizing that the motions in the party-ban proceedings against the "National Democratic Party of Germany" were partly based on evidence provided by so-called V-Männer informants (members of the party who were supervised and paid by the secret-services) (1) and after suspending the decision to hold the substantive hearing because of this information, the *Bundesverfassungsgericht* (BVerfG -- Federal Constitutional Court) last Tuesday, 8 October 2002, resumed the party-ban proceedings with an extraordinary and – in the history of the Court – unique session. (2)

[2] At the beginning, after dimming the light in the court room, Winfried Hassemer, vice-president of the BVerfG and presiding judge of the Second Senate, stated that the session would be exclusively devoted to the problem of the role and the significance of state-sponsored informants in the case built against the NPD by the Government institutions and to clarify the circumstances of collaboration between state agencies like the State Offices for the Protection of the Constitution and any person that provided evidence being used by the applicants to support the motions seeking a ban of the party. Furthermore, Justice Hassemer clarified that the substantive question of the unconstitutionality of the NPD would not be discussed in this session. Before answering the legal question of constitutionality or unconstitutionality the Court felt compelled to clarify the conclusiveness of the evidence used by the applicants in their motions.

[3] Interested in additional information and disclosing in detail the particular influence state agencies might have had on the NPD, the Court set out to address four questions. First the justices wanted to know, on the one hand, to what extent the NPD was influenced and controlled by state informants. Connected with this problem was the second question concerning the reliability of the information or evidence upon which a decision regarding the unconstitutionality of the NPD would be based. In other words, how could the Court assess the conclusiveness of the material used by the applicants in their motions. This question indicated to the applicants that the justices were not satisfied with the scant information submitted by the applicants, and the manner in which that information was presented. Prof. Löwer, representing the *Bundestag* (Federal Parliament) in the NPD party-ban proceedings explained that 15 % of the members of the NPD Executive Council, including the federal executive council and the 16 executive councils of the states, were supervised and paid by Federal or State Offices for the Protection of the Constitution. But this information was obviously neither enough for the judges nor for the representatives of the Party and their lawyers. Justice Hassemer invited the applicants to make concrete statements about the allocation of the so-called V-Männer informants across the NPD's leadership structure. Answering this question Prof. Sellner, legal counsel to the *Bundesrat* (Federal Council of the States) informed the Court that there were usually one to two, at most three, contact persons or informants in each executive council. This answer brought on the most problematic situation in the whole session: Udo Voigt, the chairman of the NPD went to the microphone and requested that it be determined whether and how he could be sure that none of the members of the Federal Executive Council or of the two lawyers of the Party are contact persons. Indeed, with regard to the constitutional principle of a fair trial it would probably be the end of the party-ban proceedings if contact persons were to inform the Government institutions bringing the applications for a ban about the trial strategy of the NPD. There was trouble in the air of the courtroom; a flurry of excitement on the side of the applicants. Justice Hassemer asked legal counsel for the applicants to answer the question raised by the defendant but they could merely offer the good-faith assurance that there are no contact persons supervised or paid by the Federal State Office for the Protection of the Constitution serving as legal counsel for the NPD and that the applicants had never gained any information or insight in the defense strategy of the NPD. Finally they offered the assurance that there exists no instruction to deliver information about the trial strategy of the Party to the Government institutions bringing the applications for a ban. Only a few days after the oral proceedings the applicants were able to inform the Court that none of the State Offices for the Protection of the Constitution had an informer in the Federal Executive Council of the NPD.

[4] After this unpleasant situation for the applicants the Court confronted the parties with the third question: to what extent would it be legally to credit as evidence in the party-ban proceedings utterances or actions of persons who are members of the party while also working for the various state and federal secret service agencies. Then the discussion led to the most important point of the strategy of the two lawyers of the NPD, Horst Mahler and Günther Eisenecker. They had argued from the beginning of the party-ban proceedings that all obnoxious activity attributed to the NPD and cited in the party-ban proceedings as the basis of the unconstitutionality of the NPD are generally imported into the Party by state-agencies. This led to a heated discussion between the representatives of the NPD and the legal counsel of the applicants over the possibility that the so called V-Männer had not only provided

information about the policy and inner-workings of the Party but also guided the obnoxious activities upon which the motions to ban were based. Günther Beckstein, Bavarian (State) Interior Minister, explained that, for the State Offices for the Protection of the Constitution, it is legally prohibited to influence the subjects being investigated in any way. According to the legal regime governing the actions of informants they are, Beckstein explained, only allowed to gain information and not to motivate or instigate the investigative subject to any illegal activities. Seizing this opportunity with both hands Horst Mahler, representing the NPD, gave a short survey of some of the cases in the history of the Federal Republic of Germany (not related to the party-ban proceedings against the NPD) in which state-agencies were identified as the motivating forces behind agents provocateurs. As an example of these illegal activities Mahler named the involvement of the Berlin State Office for the Protection of the Constitution in the assassination of the secret agent Ulrich Schmücker in 1974 by the "Bewegung 2. Juni," a group of extreme left-wing terrorists. Schmücker had been for many years an informant for the Secret Service in Berlin and ten years later the politicians in Berlin had to confess that the pistol that was used in the crime was procured and preserved by employees of the Secret Service. It was not very difficult for Mahler to enumerate other examples of illegal actions of German state-agencies because Mahler, himself a former attorney for terrorists and extreme left-wing activist, was often personally involved in these cases. Even the justices of the Court reminded the applicants warily that there "could be" a difference between the content of the legal norms and the reality and that it is unacceptable to "go from *is* to *ought*." (3)

[5] The representatives of the Party could not, however, argue that all secret agents had actively imposed an outside influence on the policy and function of the NPD. In fact, they had to admit that the NPD had not noticed any agents provocateurs or "un-NPD activity" as long as the informers still acted under cover. The liable functionaries of the NPD had never dissociated themselves from informers until they were uncovered. This suggested that, as the applicants had argued, the informers were "flesh from the flesh of the NPD."

[6] The last question addressed by the Court was a little bit self-pleasing and involved the justices asking how the Court could come to the truth. This question, however, provided the applicants with the opportunity to suggest that no further proof of the unconstitutionality of the NPD was needed and that no *in-camera* proceeding was called for. This kind of proceeding, which shall be confidential and not open to the public, would require the disclosure of the secret files regarding the actual work of the State Offices for the Protection of the Constitution to the judges of the Second Senate. The legal counsel for the applicants suggested that it would be better to avoid an *in-camera* procedure because of the complicated legal problems it entails. (4) In the jurisprudence of the BVerfG there was only one case in which the Court has approved an *in-camera* proceeding (5) and this case was, in many respects, very different from the a party-ban proceeding. Not surprisingly Horst Mahler reminded the Court and the applicants that a party-ban proceeding triggered a lot of controversies within legal and democratic theory. With regard to the fact that restrictions on political association and expression are always problematic from a democratic point of view, and in consideration of the principle of a fair trial, it might not even be possible to pursue the review of the secret materials *in-camera*. It is worth noting, at this point, the cynicism involved in Horst Mahler making appeals to democratic theory in light of the fact that in almost every article he has written he has railed against western liberalism and encouraged the undermining of the parliamentary democratic system. (6) Legal counsel for the applicants suggested that any such a proceeding involving secret information should only be considered in case that the Court came to the conclusion that the available evidence was not sufficient and that secret sources had to be tapped.

[7] Summarizing the impressions of the day, the justices of the Second Senate intimated that it was necessary for the applicants to disclose more information about the activities of the secret agents. It is still an open question if the Court will continue or suspend the proceeding.

(1) Alexander Hanebeck, *FCC suspends hearing in NPD Party Ban Case*, 3 German Law Journal 2 (01 February 2002) <http://www.germanlawjournal.com>; Peter Niesen, *Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties - Part I*, 3 German Law Journal 7 (01 July 2002) <<http://www.germanlawjournal.com>>.

(2) For further information about the proceeding, see, *Government Commits to Seeking a Ban of the Extreme Right-Wing National Democratic Party of Germany (NPD)*, 1 German Law Journal 2 (01 November 2000) <<http://www.germanlawjournal.com>>.

(3) David Hume, *Treatise Concerning Human Nature, Book III, Part I, Section I*.

(4) For further details about the problematic of a Party Ban Proceeding, see, Peter Niesen, *Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties - Part I*, 3 German Law Journal 7 (01 July 2002) <<http://www.germanlawjournal.com>>.

(5) 1 BvR 385/90 (27. October 1999) .

(6) Numerous articles are available on the Homepage of the "Deutschem Kolleg," www.deutsches-kolleg.org.