

Federal Constitutional Court To Review NPD Party Ban Motion

By Felix Hanschmann

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I. Introduction

[1] As already reported by *German Law Journal*, the German Government, the *Bundestag* (Federal Parliament) as well as the *Bundesrat* (Federal Legislative Chamber of the *Länder*) filed motions with the *Bundesverfassungsgericht* (FCC; Federal Constitutional Court) seeking a constitutional ban of the extreme right-wing National Democratic Party of Germany (NPD).⁽¹⁾ Now, some eight, respectively six months, after filing the motions for a constitutional order of the NPD's dissolution,⁽²⁾ the banning of all of party activities and the confiscation of the party's property, the FCC decided on October 1st, 2001, that the motions were admissible. The following annotation discusses the meaning of the Court's decision to admit the motions, providing a brief account of what the decision says and what – just as interesting – it does not say. It will also report on the course of events and developments that have taken place during the stretch of time between the filing of the applications and the Court's ruling of October 1. Finally this report will provide, leaving aside speculations as to possible results of the process, a short survey of the legal possibilities that are open to the NPD, once the FCC in Karlsruhe grants the motions and declares the party unconstitutional.

II. Legal meaning, effects and consequences of the ruling

[2] Pursuant to Article 45 *Bundesverfassungsgerichtsgesetz* (BVerfGG: Constitutional Court Law) the FCC ruled, that the three motions are not inadmissible and not evidently unfounded. Without fixing a date, the Court decided that oral proceedings will take place.⁽³⁾ After these proceedings, the Second Senate of the Court will decide on the merits of the motions, *i.e.*, the FCC will nothing less than to either ban the NPD or affirm its constitutionality. Herefore, according to Art. 15 (2) Sentence 2 BVerfGG, a two-thirds majority is necessary. With the declaration of the ban, the party would not only be dissolved but there would also be a prohibition of any alternative manifestations of the party. Furthermore, there would be a ban of all present and future activities by the party and the party's property could be confiscated. Finally all members of parliaments, who are members of the NPD, no matter at what government level, would lose their mandates. ⁽⁴⁾

[3] In light of these possible outcomes of the proceedings set in motion by the applications to the FCC, it is even more important to keep in mind the fact that the recently handed down decision regarding the motions'/applications' admissibility does imply neither opinion nor insinuations in relation to the chances of the motions. Rather, the decision of the Court stands - no more and no less – for the closing of the obligatory preliminary proceeding. Likewise, it is inappropriate to draw any conclusions as to the eventual outcome or the duration of the main proceedings from the short period of time between the filing of the applications to the dissolution of the NPD and the decision on their admissibility. This can easily be seen in the two former cases, in which the FCC declared a party to be unconstitutional pursuant to Art. 21 (2) *Grundgesetz* (German Basic Law).⁽⁵⁾ In both cases, there were no more than two months between the filing of the motions and the decision ending the preliminary proceeding. Nevertheless, the Court in the *Communist Party of Germany Case*, then took almost six years to reach a final decision.⁽⁶⁾

[4] Thus, every statement regarding the duration of the party-ban proceedings would - at this point - be speculation. There are only two indications for the assumption that the FCC might be interested in a short duration of the whole process. On the one hand, the present proceedings bring a truly extraordinary burden of additional work which is likely to occupy the Justices working on the case. The second indication results from the rule, that the period of office of a judge on the FCC ends on the age of 68 years. On reaching this retirement age the judge must in principle leave from his/her office. In the present case, this rule might become relevant to FCC President Jutta Limbach, also member of the Court's Second Senate, in March 2002. In light of additional possible difficulties resulting from a new member joining the bench shortly before a decision of such intricacy and weight is handed down, there is a possibility that the Court will fix a date of trial in the near future.

III. Chronology of Events

[5] In the period between filing the motions for a ban on the NPD with the FCC and the aforesaid decision from October 1, the NPD replied to all three motions. While the briefs regarding the motions of the Federal Government and the *Bundestag* were written by NPD lead counsel, attorney Horst Mahler⁽⁷⁾, the answer to the motion of the *Bundesrat* was prepared by attorney, Dr. Hans Günter Eisenecker. Eisenecker is a member of the board and also vice-chairman of the NPD, furthermore chairman of the board of the local branch of the NPD in the German *Land* of Mecklenburg-Vorpommern. In 1998, Eisenecker was the leading candidate of the party for the elections to the *Bundestag*. In addition, he is well-known for taking on cases of extreme-right defendants in criminal proceedings. It is not obvious what reason motivated the party to change its attorney during the filing of the responses to the motions.

[6] As noted in the August 1 issue of *German Law Journal*, the Berlin public prosecutor's department ordered a search of Horst Mahler's apartment and offices both in his law firm and in the headquarter of the NPD, seizing his

computer equipment and data on June 11st, 2001, because of a criminal investigation of Mahler, who was thought to have violated Germany's hate speech law (*Volksverhetzung*, StGB (Criminal Code) § 130).(8) The NPD sought a temporary injunction against the seizure, which was brought before the FCC by Horst Mahler and was granted by the Court's Second Senate. The Court ordered the immediate return of Mahler's seized computer equipment and computer data, after it had been copied by an independent agent and left under seal with the Berlin Magistrate's Court.(9) However, the Court overruled the motion seeking the dismissal of the party-ban proceeding.

III. Party-ban proceeding before the European Court of Human Rights

[7] If the NPD were to be stamped "unconstitutional" by the Justices in Karlsruhe, there would be the possibility of appealing to the European Court of Human Rights (ECtHR) in Strasbourg. It thus seems useful to take a short look at the legal background of a party-ban proceeding before the ECtHR and the differences to the FCC proceeding. This is all the more so in view of the fact, that the Court in Strasbourg has been appointed several times in the past to exercise a legal control on national party-bans. In this context it is specially interesting to check the competence of the ECtHR to control a party-ban pronounced by a national Constitutional Court, the legal basis and the possible legal consequences of a party-ban granted by the ECtMR.

[8] In the past the ECtHR has seen itself to be competent in several cases to review a party-ban enacted by a national Constitutional Court under the European Convention of Human Rights (*ECHR*). In three instances the Court was confronted with party-bans that had been granted by the Turkish Constitutional Court. In every case the ECtHR determined that every Member State is obliged to ensure that the fundamental rights as codified in the ECHR are observed even by the courts of the Member State. The Court in Strasbourg has held that it was indispensable for the individual rights of the complainants to be respected by the Constitutional Court throughout the respective national proceedings. Although the previous cases concerned other kinds of legal proceedings, there is no doubt that the ECtHR will review a party-ban granted by the FCC pursuant to Art. 21 (2) German Basic Law (GG) and thus exercise judicial review as to its compatibility with the European Convention of Human Rights.

[9] Pursuant to Art. 34 ECHR, the "Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocol thereto". According to this provision, the Court's review only encompasses the question whether or not the national court's judgement – here it would be that of the FCC – violated the human rights and fundamental freedoms as guaranteed by the Convention. In the case of a party-ban the following rights are relevant: freedom of thought (Art. 9), freedom of expression (Art. 10), freedom of assembly and association (Art. 11), the prohibition of discrimination (Art. 14), the prohibition of abuse of rights (Art. 17), protection of property (Art. 1 of the protocol) as well as the right to free elections (Art. 3 of the protocol). These legal standards, which are different from those of the FCC, result from the different perspective taken by the ECtHR: it must be underlined that during the proceedings before the FCC, the individual point of view of the complainant and his individual rights are vital. In contrast, the FCC examines according to Art. 21 (2) GG if a party "by reason of [its] aims or the behavior of [its] adherents, seek[s] to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany".(11)

[10] Difficult legal and factual problems arise in the case where the ECtHR comes to a different decision than the FCC. In principal, according to Art. 46 of the Convention, the concerned Member State is legally obliged to reparate and to stop the ascertained but perpetual violation of the Convention. But only the compensation for tangible loss appears to be easy to answer. In the case the Courts confirms a violation, the confiscated property or money has to be refunded. All other consequences are extremely contentious. It seems, in consideration of the fact that the legal effect of the party-ban judgement by the FCC can not be undone by a contradictory decision by the ECtHR, that the only remaining possibility consists in a new foundation of the afore prohibited NPD. By all means a contradictory decision by the ECtHR represents no reason to resume the party-ban proceeding before the FCC.(12) However, it is not possible to reconstitute the unseated mandates of the Members of Parliament of the party. Finally it should be noted that the enforcement of the judgement of the ECtHR is controlled by the Committee of Ministers of the Council of Europe (Art. 46 (2) ECHR) which consists of the foreign ministers of the 43 Member States. This may lead to further difficulties especially with respect to the political bias and formation of the above-mentioned panel. The powers of this Committee of Ministers are actually quite limited. In general, it is possible to withdraw the right of representation and eventually to exclude a Member State from the community of justice and common beliefs (*Rechts- und Wertegemeinschaft*) established by the European Council. Moreover, it is known from experience that the Committee is often not in favour to take concrete measures against a Member State that has breached its obligations under the ECHR. Despite these problems, however, there is no direct effect of the judgements of the ECtHR.

IV. Conclusion

Whether the Court grants the applications in its final judgement or not it will have fundamental impact on the legal system as well as on the political and social culture of the Federal Republic of Germany. In particular, the decision

will contain some clues how – in the view of the Court - a modern consolidated and stabilised democratic state has to and is allowed to react to parties or other associations seeking to undermine the established power.

(1) *Government Commits to Seeking a Ban of the Extreme Right-Wing National Democratic Party of Germany*, 1 German L. J. 2 (1 November 2000) and *Federal Constitutional Court Issues Temporary Injunction in the NPD Party Ban Case*, 2 German L. J. 13 (1 August 2001), available at <http://www.germanlawjournal.com> search: NPD.

(2) The Federal Government's motion dates from 30 January, 2001; those from the *Bundestag* and the *Bundesrat* from 30 March, 2001.

(3) See BVerfG, Decision of 1 October 2001, reg. No. 2 BvB 1/01, <http://www.bverfg.de>

(4) See BVerfGE 2, 1, 73f., 76f. and also Art. 46 I Nr. 5 BWahlG.

(5) See BVerfGE 2, 1ff. (*Sozialistische Reichspartei (SRP)*); BVerfGE 5, 85 ff. (*Communist Party of Germany (KPD)*)

(6) The FCC came to its final judgement on August 17th 1956.

(7) For details about the – peculiar - biography of Horst Mahler, see 2 German L. J. 13 (1 August 2001), available at http://www.germanlawjournal.com/past_issues.php?id=74

(8) 2 German L. J. 13 (1 August 2001), http://www.germanlawjournal.com/past_issues.php?id=74

(9) For a widespread information to the Courts judgement, see: 2 German L. J. 13 (1 August 2001), http://www.germanlawjournal.com/past_issues.php?id=74. The judgement is published on the homepage of the FCC: BVerfG, 2 BvB 1/01 of 3 July 2001, paragraphs 1 - 28, <http://www.bverfg.de/>.

(10) For the whole text, see: <http://www.echr.coe.int>.

(11) The FCC will not reference straightly to the European Convention of Human Rights, because the norms of this Convention are not classified as constitutional law. For the perspective of the FCC and its legal standards in a party-ban proceeding – mainly outlined in the two previous party-ban proceedings - , see: *Government Commits to Seeking a Ban of the Extreme Right-Wing National Democratic Party of Germany*, 1 German L. J. 2 (1 November 2000).

(12) Namely, § 61 BVerfGG provides the possibility to resume the proceeding, but this rule applies only in the case of an impeachment of a judge.