

Articles

The Party Prohibition Procedure in Germany: A Viable Approach to Protect the Constitution?

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This paper explores the use of Germany's party prohibition procedure as a way to defend its democratic system from political threats. With the recent rise of the far-right Alternative für Deutschland (AfD), there is growing debate over whether some political parties in Germany are undermining the democratic order.

This article reviews the legal basis, key requirements, and past examples of party bans, as set out in Article 21 of the German Basic Law. Historical cases, like those of the Socialist Reich Party and the Communist Party of Germany, show that Germany has used this tool successfully in the past. However, more recent attempts, such as the failed 2017 ban on the National Democratic Party (NPD), highlight the challenges of the procedure.

The paper also considers alternatives, such as excluding parties from state funding or using non-legal strategies to counter anti-democratic movements. Finally, it argues that, while the party prohibition procedure is a powerful tool to protect democracy, it needs to be used carefully and strategically to avoid potential backlash and misuse.

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A. Introduction

Political parties assume a pivotal function in any modern democracy. They contribute to the formation of the political will of the people (Art. 21 Para. 1 of the German Constitution) and thereby constitute an important intermediary between state and society.¹ But it is precisely the significance of those parties and their indispensable function that poses a viable and persistent threat to this form of rule. In view of the significance and the inherent risks, it is hardly surprising what strong reactions election results trigger in the electorate and general society, especially when a new shift in the poll results can be observed.

Not least, the results of the last European elections to elect members of the European Parliament in June of this year fueled considerable public attention and fuelled wider debate regarding the matter at both national and international level. In Germany, the party "Alternative für Deutschland" (AfD) in particular caused quite vocal reactions, emerging as the second strongest party in Germany (with a total of 15.90% of the votes) in this year's elections and thus building on its electoral success in the last general national election as a comparatively young party.² There they were able to achieve 10.4 % of the validly cast second votes cast and 10.2 % of the first votes, enabling them to win 83

¹ Christoph Gröpl, *Staatsrecht I: Staatsgrundlage, Staatsorganisation, Verfassungsprozess* (15th edn, C.H. Beck 2023) para 378.

² European Parliament, 'European Elections 2024: Election Results, Official Results Germany 2024, Results by National Party' (European Elections 2024: Election Results) <<https://results.elections.europa.eu/de/deutschland/>> accessed 27 July 2024.

of the 735 seats in the German “Bundestag”, the national parliament.³ However, it is not only the relatively short existence of the party, which was founded in 2013 and joined the national parliament in 2017, but rather its political orientation and the regular controversies surrounding both the party and its members that have raised public scrutiny.⁴ It joined the ranks of the Western European Populist Radical Right Parties (PRRPs) and became by far the most successful far right-wing party after World War II in the Federal Republic of Germany.⁵ Despite their presence and success in Western Europe, these parties remained comparatively unsuccessful in Germany before the 2017 general election.⁶

In addition to the indisputable success in Germany since 2017, this new dynamic has also become apparent at European level, where a clear rightward shift in the EU Parliament became noticeable, not least in the European elections.⁷ In France, corresponding election results even led to the dissolution of the National Assembly (“*Assemblée Nationale*”) and the announcement of new elections by the French President Emmanuel Macron.⁸ At national, international and at European level, a noticeable shift can be observed, which is met with concern by some voices. At all of these levels, the election results are being severely criticised, some to such an extent that a section of the electorate vocally raises concerns regarding the constitutionality of individual winning parties. But what legal instruments are available if these concerns have substance? How should non-constitutional parties be dealt with legally and how can they be countered?

On the occasion of current debates at national level in Germany, one constitutional instrument in particular is being mentioned as a possible countering method: a party ban by means of a party prohibition procedure. Aside from addressing the question of what a party ban is and what general legal foundation underlies it, this article will also consider whether it is a viable approach to protect the constitution. Political views of parties, their

³ Die Bundeswahlleiterin, ‘Bundestag election 2021, Results, Germany, Distribution of Seats’ (*Bundestag Election 2021, Results*) <<https://www.bundeswahlleiterin.de/bundestagswahlen/2021/ergebnisse/bund-99.html#sitze2>> accessed 10 June 2024.

⁴ Frank Decker, ‘Parteien in Deutschland: Etappen der Parteigeschichte der AfD’ (*bpb.de*, 13 December 2022) <<https://www.bpb.de/themen/parteien/parteien-in-deutschland/afd/273130/etappen-der-partiegeschichte-der-afd/>> accessed 13 June 2024.

⁵ Matthias Diermeier, ‘The AfD’s Winning Formula – No Need for Economic Strategy Blurring in Germany’ (*Intereconomics*, Vol. 55, 2020, No. 1) <<https://www.intereconomics.eu/contents/year/2020/number/1/article/the-afd-s-winning-formula-no-need-for-economic-strategy-blurring-in-germany.html>> accessed 5 June 2024; Carl C. Berning, ‘Alternative für Deutschland (AfD) – Germany’s New Radical Right-wing Populist Party’ (*Publikationen | ifo Institut*, 4/2017), 16 <<https://www.ifo.de/publikationen/2017/aufsatz-zeitschrift/alternative-fuer-deutschland-afd-germanys-new-radical-right>> accessed 8 June 2024.

⁶ Berning (n 5).

⁷ MDR Aktuell, ‘Europawahl - Rechtsruck im EU-Parlament: So haben die anderen 26 EU-Länder gewählt’ (*MDR*, 10 June 2024) <<https://www.mdr.de/nachrichten/welt/politik/europawahl-eu-laender-ergebnisse-europa-rechtsruck-100.html>> accessed 13 June 2024.

⁸ Legal Tribune Online, ‘Neuwahlen in Frankreich: Ein Präsident ohne Macht’ (*Legal Tribune Online (LTO)*, 10 June 2024) <https://www.lto.de/persistent/a_id/54732> accessed 13 June 2024.

members or voters will not be assessed or scrutinized in any detail on this occasion.⁹

Thereby, the main section of the general legal foundation will be preceded by a current contextualisation of the national debate and its relevance, as well as the historical context of party prohibitions in Germany, and will then be complemented by a brief presentation of alternatives and a final conclusion.

B. Current relevance and triggering cause

The legal issue of party prohibition proceedings is currently experiencing an extensive and persistent relevance in politics and society, making it of interest on a national and international level. At national level, in particular the electoral success of the AfD party in the wake of persistent social and political criticism of the party and a multitude of concluded legal proceedings on various topics have contributed to the emerging relevance of the topic and the sustained interest in it. While no respective proceedings have yet been initiated against them, the issue has been petitioned by some members of society, or raised by individual members of parliament.¹⁰

The party can generally be categorized as right-wing populist, with a profile that is now especially critical with respect to immigration, among other aspects, although it was focused in particular on criticism of the Euro in its early days.¹¹ Not only a shifting profile, but also a strengthening of far-right forces and power-strategic isolation in the party system have become increasingly noticeable.¹²

It is now progressively being mentioned in the context of racism, fascism and even

⁹ The formation of an informed political opinion should remain the sole prerogative of the reader. Regular information on the parties in this regard is also recommended outside the election periods.

¹⁰ A corresponding petition 'Prüft ein AfD-Verbot!' has already found over 800,000 supporters to date (21 June 2024) <<https://innn.it/afdverbot>> accessed 21 June 2024; A respective interest is also represented by individual members of parliament: Sebastian Friedrich, Nils Schniederjann, 'CDU-Abgeordneter Wanderwitz will AfD-Verbot beantragen' (*Tagesschau.de*, 5 October 2023) <<https://www.tagesschau.de/inland/innenpolitik/afd-verbot-cdu-wanderwitz-100.html>> accessed 20 June 2024; Open Petition Region Germany, 'Antrag AfD Parteiverbot im Bundestag' (*Open Petition*, January 2024) <<https://www.open-petition.de/petition/online/antrag-afd-partieverbot-im-bundestag>> accessed 27 June 2024; Deutsche Presse-Agentur (dpa), 'Diskussion um AfD-Verbotsverfahren hält an' (*Süddeutsche.de*, 4 January 2024) <<https://www.sueddeutsche.de/politik/parteien-diskussion-um-afd-verbotsverfahren-haelt-an-dpa.urn-newsml-dpa-com-20090101-240104-99-487330>> accessed 12 June 2024; Andre Kartschall, 'Vorwurf der Verfassungsfeindlichkeit: Bündnis setzt sich für schnelles AfD-Verbot ein' (*Tagesschau.de*, 22 June 2024) <<https://www.tagesschau.de/inland/afd-verbot-100.html>> accessed 23 June 2024.

¹¹ Simon Franzmann, '(Die) AfD' (*bpb.de*, 3 August 2022) <<https://www.bpb.de/kurz-knapp/lexika/handwoerterbuch-politisches-system/511455/die-afd/>> accessed 17 June 2024; Decker (n 4); cf. Berning (n 5) 17.

¹² Decker (n 4); cf. Florian, Stefanie Gäbler, Björn Kauder, Manuela Krause, Luisa Lorenz, Niklas Potrafke, Alexander van Roessel, 'Demokratische Vielfalt in Deutschland – unterscheiden sich die Volksparteien noch?' (2017) Vol. 70 / Iss. 20, ifo Schnelldienst, 28, 31.

antisemitism by critical voices.¹³ Particular public outrage and debate was triggered not least by the meeting in a villa in Potsdam on the 25th November 2023, where high-ranking AfD politicians and Neo-Nazis were among those, discussing the deportation of millions of people from Germany.¹⁴ People inside and outside politics regularly dispute the party's programme and the tendencies it upholds, as well as the behaviour of its members, even beyond specific occasions.

The party remains a particular area of interest for the Constitutional and Administrative Courts beyond politics and society.¹⁵ Recent cases concern, for instance, a desired access to the event hall "Grugahalle" by the city of Essen for the hosting of the party's national conference, or the urgent motion by several media companies to grant access to an AfD election party in Thuringia.¹⁶

Of particular relevance in this regard is the categorisation of the party and its state divisions by constitution protection authorities and the associated court proceedings. Several state associations of the AfD have already been assessed by constitution protection authorities as suspected cases of investigation, or even as confirmed extremist activity.¹⁷ Alongside this, five of the party's youth organizations have already been

¹³ cf Marcel Fratzscher, 'AfD wählen – und verlieren' (*Zeit Online*, 24 January 2024) <<https://www.zeit.de/wirtschaft/2024-01/rechtsextremismus-afd-wirtschaft-demokratie>> accessed 21 May 2024; Der Spiegel, 'Analyse im Auftrag jüdischer NGO: Antisemitismus gehört laut Studie zum »programmatischen Kern« der AfD', (*Der Spiegel*, 17 December 2021) <<https://www.spiegel.de/politik/deutschland/afd-antisemitismus-gehört-laut-studie-zum-programmatischen-kern-der-partei-a-ee57381b-a3c2-4910-a69e-d68e0bac8f73>> accessed 5 June 2024; Deutsches Institut für Menschenrechte, 'Rassistisch und rechtsextrem: Klare Abgrenzung von der AfD geboten', (*Institut für Menschenrechte*, Press Release 07 June 2021) <<https://www.institut-fuer-menschenrechte.de/aktuelles/detail/rassistisch-und-rechtsextrem-klare-abgrenzung-von-der-afd-geboten>> accessed 24 July 2024.

¹⁴ cf Deutscher Bundestag (ed.), 'Potsdamer Treffen zur massenhaften Abschiebung' (*Parlamentsnachrichten*, 20 March 2024) <<https://www.bundestag.de/presse/hib/kurzmeldungen-994810>> accessed 5 June 2024; Marcus Bensmann, Justus von Daniels, Anette Dowideit, Jean Peters, Gabriela Keller, 'Neue Rechte: Geheimplan Gegen Deutschland' (*Correctiv.Org*, 10 January 2024) <<https://correctiv.org/aktuelles/neue-rechte/2024/01/10/geheimplan-remigration-vertreibung-afd-rechtsextreme-november-treffen/>> accessed 25 May 2024.

¹⁵ A detailed overview can be found here: Bertold Huber, 'Die AfD – Facetten aktueller Rechtsprechung', (2024) 43 *NwZ* 119.

¹⁶ Administrative Court Gelsenkirchen, 'Stadt Essen muss der AfD die Grugahalle für Parteitag zur Verfügung stellen' (*VG Gelsenkirchen*, Press Release 14 June 2024) <https://www.vg-gelsenkirchen.nrw.de/behoerde/presse/pressemitteilungen/09_240614/index.php> accessed 24 June 2024; Tanja Podolski, 'VG Gelsenkirchen entscheidet im Eilverfahren - AfD darf Stadthalle in Essen für Bundesparteitag nutzen' (*Legal Tribune Online (LTO)*, 14 June 2024) <https://www.lto.de/recht/hintergruende/h/vg-gelsenkirchen-151888-24-afd-stadthalle-grugahalle-essen-bundesparteitag/?utm_source=Eloqua&utm_content=WKDE_LEG_NSL_LTO_Daily_EM&utm_campaign=wkde_leg_mp_lto_daily_ab13.05.2019&utm_econtactid=CWOLT000036935294&utm_medium=email_newsletter&utm_crmid=>> accessed 24 June 2024; Legal Tribune Online, 'LG Erfurt erlässt einstweilige Verfügung: AfD muss Journalisten zur Wahlparty zulassen' (*Legal Tribune Online (LTO)*, 22 August 2024) <https://www.lto.de/recht/nachrichten/n/einstweilige-verfuegung-lg-erfurt-9o94124-afd-thueringen-muss-journalisten-zur-wahlparty-zulassen?utm_source=Eloqua&utm_content=WKDE_LEG_NSL_LTO_Daily_EM&utm_campaign=wkde_leg_mp_lto_daily_ab13.05.2019&utm_econtactid=CWOLT000036935294&utm_medium=email_newsletter&utm_crmid=>> accessed 24 August 2024.

¹⁷ A statistic concerning the status of assessments of state associations of the AfD by constitution protection authorities can be found here: Philipp Heinrich, 'Status der Landesverbände der AfD zur Prüfung durch die Behörden des Verfassungsschutzes der Länder bis 2023' (*Statista*, 12 June 2024) <<https://de.statista.com/statistik/daten/studie/1428143/umfrage/status-der-landesverbaende-der-afd-zur-pruefung-durch-den-verfassungsschutz/>> accessed 26 June 2024.

classified as secured right-wing extremist, as well as the nationwide state association of the youth organization.¹⁸ The party itself was categorized as an investigation case for the first time in 2019 and upgraded to a “suspected right-wing extremist case” (“rechtsextremistischer Verdachtsfall”) in 2021, enabling the use of intelligence service resources, and causing the party to file a complaint against the categorization.¹⁹ These findings were confirmed in the first instance by the Administrative Court of Cologne and also motions filed with the same court for the issuance of a temporary injunction against, among other things, the categorization as a confirmed extremist activity and a corresponding public announcement remained unsuccessful.²⁰ The Higher Administrative Court of North Rhine-Westphalia recently ruled on the appeal lodged against the former to the disadvantage of the party and has upheld the confirmation that the constitution protection authorities are allowed to monitor the party and its youth organization as a suspected case and to inform the public about it.²¹ It is stated that “the Senate is convinced that there are sufficient factual indications that the AfD is pursuing endeavours that are directed against the human dignity of certain groups of people and against the principle of democracy”.²² The party has already announced its intention to take the legal dispute to the next higher court.²³

Proceedings to ban the party have not yet been initiated. The German Institute for Human Rights (DIMR) has concluded in its analysis ‘Why the AfD could be banned, recommendations for the state and politicians’ that the corresponding requirements for a

¹⁸ Patricia Haensel, ‘Wo AfD und Junge Alternative gesichert rechtsextrem sind’, (*Redaktionelles Netzwerk Deutschland (RND)*, 23.05.2024) <<https://www.rnd.de/politik/wo-gelten-afd-und-junge-alternative-als-gesichert-rechtsextrem-und-was-bedeutet-das-BEOYLLR67FCABBNQ6ESSRUZJWM.html>> accessed 25 June 2024; Higher Administrative court North Rhine-Westphalia, ‘Bundesamt für Verfassungsschutz darf AfD und JA als Verdachtsfall beobachten’ (*OVG NRW*, Press Release 13 May 2024) <https://www.ovg.nrw.de/behoerde/presse/pressemitteilungen/23_240513/index.php> accessed 24 June 2024.

¹⁹ Tagesschau, ‘Oberverwaltungsgericht Münster, AfD-Einstufung als Verdachtsfall ist rechters’ (*Tagesschau.de*, 13 May 2024) <<https://www.tagesschau.de/inland/innenpolitik/afd-ovg-verdachtsfall-100.html#:~:text=Nach%20einer%20erstmaligen%20Einstufung%20der,im%20M%C3%A4rz%202022%20als%20rechtm%C3%A4%C3%9Fig.>>> accessed 23 June 2024; cf. OVG NRW (n 18).

²⁰ VG Köln openJur 2022, 9341 (Administrative court of Cologne); Bundesamt für Verfassungsschutz, ‘Bundesamt für Verfassungsschutz obsiegt vor Verwaltungsgericht Köln gegen die AfD’ (*Bundesamt für Verfassungsschutz*, Press Release 2022) <<https://www.verfassungsschutz.de/SharedDocs/pressemitteilungen/DE/2022/pressemitteilung-2022-1-afd.html>> accessed 20 June 2024; VG Köln openJur 2024, 1377 (Administrative court of Cologne).

²¹ OVG NRW (n 18).

²² OVG NRW (n 18).

²³ Further information on the proceeding in the next instance: Tagesschau.de, 13 May 2024 (n 19); Markus Ogorek cited by Denise Dahmen, ‘OVG-Urteil bringt AfD-Verbotsdebatte zurück’, (*Beck Aktuell*, 13 May 2024) <<https://rsw.beck.de/aktuell/daily/meldung/detail/ovg-muenster-urteil-afd-verdachtsfall-verbotsdebatte>> accessed 12 June 2024.

ban, however, have already been met.²⁴ It is assumed there that “the AfD is characterized in its programme by racist and right-wing extremist positions that oppose the guarantees enshrined in Article 1 para 1 GG and thus the absolute core of the constitution as part of the free democratic fundamental order within the meaning of Article 21 GG”.²⁵ It is deemed that concrete evidence is given to such extent that the realization of its anti-constitutional aims seems possible.²⁶ Sufficient potentiality, which was considered to be lacked in the NPD prohibition procedure, is presumed to be sufficiently evident here and it is assumed that “the danger posed by the AfD to the free democratic fundamental order is therefore considerable.”²⁷

To date, however, there has been no unanimous consensus in general society or politics as to whether the necessary requirements have already been met and can be adequately demonstrated.²⁸

While it remains uncertain whether a prohibition procedure will ultimately be initiated and whether it will be successful, it is certain that this debate will contribute to the ongoing relevance of the legal framework for a party ban and the respective court proceeding.

C. Historical context of party prohibitions in Germany

The legal possibility of a party prohibition has already been applied at court. The German Federal Constitutional Court (“*Bundesverfassungsgericht*”) thereby successfully prohibited the “*Sozialistische Reichspartei*” (SRP) in 1952 and the “*Kommunistische Partei Deutschlands*” (KPD) in 1956.²⁹ In terms of historical contextualisation, it should be noted that the Federal Republic of Germany was still very young and therefore fragile at that time.³⁰

Other court proceedings concerned the “*Nationaldemokratische Partei Deutschlands*” (NPD). Following the suspension of the first prohibition proceeding in 2003 for procedural reasons, the Federal Constitutional Court ruled again in 2017 on the

²⁴ Dietrich Karl Mäurer, ‘Analyse zu rechtlichen Voraussetzungen: Menschenrechtsinstitut hält AfD-Verbot für möglich’ (Tagesschau.de, 7 June 2023) <<https://www.tagesschau.de/inland/innenpolitik/afd-verbot-menschenrechtsinstitut-100.html>> accessed 15 June 2024; Hendrik Cremer, *Warum die AfD verboten werden könnte: Empfehlungen an Staat und Politik* (1st edn, Deutsches Institut für Menschenrechte 2023) 60.

²⁵ Cremer (n 24) 23, cf Cremer (n 24) 27 ff.

²⁶ Cremer (n 24) 48 ff.

²⁷ Cremer (n 24) 59.

²⁸ Ogorek on the effects of a potential future change in categorisation and the impact on the prospects of success of a potential proceeding: Ogorek cited by Dahmen (n 23).

²⁹ BVerfGE 2, 1; BVerfGE 5, 85.

³⁰ Martin Morlok and Lothar Michael, *Staatsorganisationsrecht* (6th edn, Nomos 2023) para 295.

possibility of a prohibition of the party.³¹ While it was determined that the party's goals and behaviour were aimed at eliminating the free democratic fundamental order, a prohibition failed due to the lack of potential to achieve these goals.³² However, despite the lack of successful prohibition in court, the proceedings have markedly impacted and expanded the constitutional dealing with parties with anti-constitutional aspirations. At the suggestion of the Federal Constitutional Court in the second prohibition proceeding in 2017, the possibility of the exclusion from state funding, standardized in Article 21 para 3 of the German constitution, was stipulated.³³ This led to the first process of its kind and resulted in the eventual defeat of the NPD at court in January 2024, where they were ordered to be excluded from state funding for the period of six years.³⁴

The above-mentioned cases not only show the de facto possibility and judicial application of party prohibition, but also the reaction and findings of alternatives by the legislature.

D. General legal foundation and alternatives

The German constitution provides for various ways of dealing with parties that pose a threat to the fundamental democratic order or the existence of the Federal Republic, such as by means of a prohibition of the party. In the following, the general legal foundation enshrined in the constitution, including their *raison d'être* and other alternative approaches, such as the exclusion from government funding, for dealing with (potentially) anti-constitutional parties will be elaborated on.

I. The *raison d'être* in a militant democracy

Political parties are of outstanding importance in the German democracy.³⁵ They are given a constitutional status under Article 21 GG and assume a distinct standing in terms of their importance for democracy as a cornerstone of the building of the political will of the people and thus also of the fundamental components of the German democratic state (see Article 21 para 3 GG).³⁶ Yet their outstanding importance in state and society can be reversed from a cornerstone of a democracy to an imminent threat to it. With regard to this danger, Article 21 para 2 and 3 GG provides for appropriate reactions to parties

³¹ BVerfGE 107, 339; BVerfGE 144, 20.

³² BVerfGE 144, 20.

³³ BVerfGE 144, 20, paras 1-1010, 527; Jörn Ipsen and Thorsten Koch, 'Article 21' in Michael Sachs (ed) *Grundgesetz Kommentar* (9th edn, C.H. Beck 2021) para 212; Rudolf Streinz, 'Article 21' in Michael Huber, Andreas Voßkuhle (eds), *Grundgesetz Kommentar, Band 2* (8th edn, C.H. Beck 2024) para 6a.

³⁴ BVerfG, NJW 2024, 645; cf. Guy, Beaucamp, 'Eine Demokratie, die sich wehren kann', (2021) 53 JA 1, 2.

³⁵ A simple legal definition of the term "party" can be found in Section 2 para 1 sentence 1 PartG; cf. also Ipsen, Koch, 'Article 21' (n 33) para 7.

³⁶ Cf. Streinz, 'Article 21' (n 33) para 1 et seq.; cf. Hans D. Jarass, 'Article 21' in Hans D. Jarass, Bodo Pieroth (eds), *Grundgesetz für die Bundesrepublik Deutschland: GG, Kommentar*, (18th edn, C.H. Beck 2024) para 1.

which, according to their objectives or behaviour of their supporters, aim to impair or eliminate the free democratic fundamental order, or to endanger the continuance of the Federal Republic of Germany. Article 21 paras 2 to 4 GG constitute an immediate constitutional barrier to the freedom of political parties and are an expression of the militant democracy.³⁷

Such inherent defence-oriented elements can be found in the German constitution as a reaction to the Weimar Republic, which in contrast lacked such and was oriented towards value neutrality.³⁸ They are intended to prevent enemies of democracy from eliminating or endangering it by its own means, the freedoms and fundamental rights protected in the constitution, and thus to ensure the continued self-preservation of the state and the persistent protection of this form of rule.³⁹ As a result, the possibility of a prohibition of political parties vests its *raison d'être* in the German legal system, despite or precisely because of their outstanding importance for this system.

II. Party prohibition proceedings

The effects of a party prohibition are severe and therefore entail high hurdles in the prohibition proceeding, particularly in view of the mentioned outstanding importance of political parties in a democracy and the dangers associated with their prohibition. There is an inherent risk of abuse in the possibility of a party ban, given its potential to be utilised to combat unfavourable political opponents and opposing views.⁴⁰

In the following, the prerequisites of the legal proceedings and the substantive legal requirements as well as the grave legal consequences of a positive finding of unconstitutionality and the imposition of a party prohibition will be outlined.

1. Procedural requirements

In accordance with Article 21 para 4 GG, Section 13 number 2 and section 43 of the Federal Constitutional Court Act ("*Bundesverfassungsgerichtsgesetz*" / "*BVerfGG*"), the Federal Constitutional Court decides on the unconstitutionality of a party and is the only court that can make such a determination. The procedure is regulated under Article 21 para 2 GG and Sections 43 et seq. BVerfGG. Pursuant to Section 43 BVerfGG, only the German "*Bundestag*", the "*Bundesrat*", the Federal Government or, pursuant to Section 43

³⁷ Jarass, 'Article 21' (n 36) para 46; Martin Morlok, 'Article 21' in Horst Dreier (ed), *Grundgesetz-Kommentar*, Band 2 (3rd edn, Mohr Siebeck 2015) paras 143 ff.

³⁸ Tristan Barczak, '§ 4 Geschichtliche Grundlagen deutscher Verfassungsstaatlichkeit' in Klaus Stern, Helge Sodan and Markus Möstl (eds), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund*, Band 1 (2nd edn, C.H. Beck 2022) para 192; Daniel Volp, 'Parteiverbot und wehrhafte Demokratie', (2016) 69 NJW, 459, 460 ff.

³⁹ Volp, 'Parteiverbot und wehrhafte Demokratie' (n 38) 462 ff.

⁴⁰ Morlok (n 30) para 295.

para 2 BVerfGG for a state party, the state government are authorized to file a motion.

It is disputed whether the aforementioned authorized bodies have a discretion or an obligation regarding the filing of such motion.⁴¹ The subject matter is the determination of the unconstitutionality of a political party. A statutory definition of the latter term can be found in Section 2 para 1 sentence 1 Party Act ("*Parteiengesetz*" / "*PartG*"). The legal representation of a party is regulated by Section 44 BVerfGG. In preparation for the motion, all available sources of information regarding the activities of the party and the attributable activities of its members, including those obtained by the use of intelligence services, must be analysed in order to justify it.⁴² The court can only make a decision on the merits after a preliminary proceeding (Section 45 BVerfGG), where the party's authorized representative has to be given the opportunity to make a pleading within a period to be determined and where it is then decided whether the application will be rejected as inadmissible or insufficiently substantiated, or whether the hearing will be held. Inadmissibility can be assumed, for instance, if the court has already ruled on the merits of an application against the same defendant and no new facts have been submitted (Section 47 in conjunction with Section 41 BVerfGG).⁴³

Pursuant to Section 38 in conjunction with Section 47 BVerfGG, the court can order the usage of criminal investigation instruments, namely a seizure or search, in the preliminary and further proceedings in accordance with the provisions of the Code of Criminal Procedure ("*Strafprozessordnung*" / "*StPO*").⁴⁴ The form requirements are stipulated in Section 23 para 1 BVerfGG, according to which the application must be submitted to the court in writing, the reasons for the application must be stated and the necessary evidence must be provided. A provisional regulation can be made by means of a temporary injunction, if it is urgently required to avert serious disadvantages, to prevent imminent violence, or for another important reason in the public interest (Section 32 para 1 BVerfGG), whereby the party concerned can be banned from further political activity within the meaning of Article 21 para 2 GG.⁴⁵ This option was utilized in the proceedings against the SRP by banning the party from engaging in political activity by means of a temporary injunction until the deliverance of the judgement after the conclusion of the oral hearing.⁴⁶

⁴¹ More detailed consideration in the following: Ipsen and Koch, 'Article 21' (n 33) para 175 ff.

⁴² Ipsen and Koch, 'Article 21' (n 33) para 184.

⁴³ Ipsen and Koch, 'Article 21' (n 33) para 185; Sebastian Kluckert, '§ 52 Verfassungsgerichtsbarkeit' in Klaus Stern, Helge Sodan and Markus Möstl (eds.), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund*, Band 2 (2nd edn, C.H. Beck 2022) para 215.

⁴⁴ Ipsen and Koch, 'Article 21' (n 33) para 187; Kluckert, '§ 52 Verfassungsgerichtsbarkeit' (n 43) para 215.

⁴⁵ Ipsen and Koch, 'Article 21' (n 33) para 189.

⁴⁶ Ipsen and Koch, 'Article 21' (n 33) para 189; BVerfGE 1, 349-351.

2. Substantive legal requirements

According to Article 21 para 2 GG, parties are unconstitutional if their aims or the behaviour of their adherents are such as to impair or eliminate the free democratic fundamental order, or to endanger the preservation of the Federal Republic of Germany. This results in several constituent elements that must be met and that will be examined in the following.

a. Political Parties

Article 21 para 2 GG refers to political parties. A definition cannot be found in the constitution, but in ordinary law (*“einfachgesetzlich”*) in Section 2 para 1 sentence 1 PartG.⁴⁷ Accordingly, parties are defined as “associations of citizens who wish to influence the formation of political will on a permanent or long-term basis in the domain of the Federation or a state and to participate in the representation of the people in the German Bundestag or a state parliament if, according to the overall picture of the actual circumstances, in particular the scope and strength of their organization, the number of their members and their public profile, they offer a sufficient guarantee of the seriousness of such objective”. The definition is applicable insofar as it is compatible with the constitutional concept of a party.⁴⁸ A corresponding compatibility is assumed by the Federal Constitutional Court.⁴⁹ It assumes a constitutional concretisation by the legislator in its established case law and determines that the definition in ordinary law must be interpreted and applied in the light of Art. 21 Para. 1 of the constitution.⁵⁰

Parties must be distinguished from other auxiliary and subsidiary organizations, where executive intervention, as well as in relation to political associations that cannot be considered parties, is ruled by Article 9 para. 2 GG, Sections 3 et seq. Associations Act (*“Vereinsgesetz” / “VereinsG”*).⁵¹

Relevant endeavours may arise from the objectives of the party itself or from the attributable behaviour of its members.⁵² Issues can emerge with regard to the imputability of such behaviour. A general responsibility of the party has to be rejected, the party’s supporters must instead act as such and the party’s responsibility can only exist within the scope of its influence.⁵³ The unconstitutional endeavours within the party must

⁴⁷ Gröpl (n 1) para 371 ff.

⁴⁸ Streinz, ‘Article 21’ (n 33) para 221.

⁴⁹ Gröpl (n 1) para 372.

⁵⁰ BVerfGE 91, 262 para 22; BVerfGE 89, 266 para 14.

⁵¹ Streinz, ‘Article 21’ (n 33) para 221; Hans H. Klein, ‘Article 21’ in Günter Dürig, Roman Herzog, Rupert Scholz and Hans H. Klein (eds), *Grundgesetz Kommentar* (103rd Ergänzungslieferung, C.H. Beck January 2024) para 518.

⁵² Further elaborations in this regard will ensue in the following.

⁵³ Streinz, ‘Article 21’ (n 33) para 236.

be dominant and need to have such an influence on the party itself and its basic tendencies that corresponding political action arises, which must then be proven.⁵⁴ The objectives of the party as a whole and the behaviour of its members are in an interactive relationship, whereby in general both manifest themselves in the other and can allow conclusions to be drawn about each other.⁵⁵

b. Objects of protection and constituent offences

The statute mentions two different objects of protection: The free democratic fundamental order and the preservation of the Federal Republic of Germany. These alternatives are in a “relationship of genuine alternative offences” (*“Verhältnis echter Tatbestandsalternativität”*).⁵⁶ The protected interests are listed conclusively, and the terms are to be interpreted narrowly in view of the extreme severity of the impending interference by a party prohibition.⁵⁷

i. Impairment or elimination of the free democratic fundamental order

The first alternative is the free democratic fundamental order as an object of protection. It encompasses the fundamental substance of the constitution.⁵⁸ According to the jurisdiction of the Federal Constitutional Court, this is to be understood as an order “which, to the exclusion of any rule of force and arbitrariness, presents an order of rule under the rule of law on the basis of the self-determination of the people according to the will of the respective majority and of freedom and equality. The fundamental principles of this order include at least the following: respect for the human rights concretized in the constitution, above all the right of the individual to life and free development, the sovereignty of the people, the separation of powers, the accountability of the government, the legality of the administration, the independence of the courts, the multi-party principle and equal opportunities for all political parties with the right to form and exercise an opposition in accordance with the constitution.”⁵⁹

The statute requires the impairment or elimination of this object of protection. The court has differentiated between these constituent elements in its jurisdiction and grants them an independent regulatory content.⁶⁰ Elimination refers to “the elimination of at least one of the essential elements of the free democratic fundamental order or its substitution by

⁵⁴ Streinz, ‘Article 21’ (n 33) para 238.

⁵⁵ Streinz, ‘Article 21’ (n 33) para 238.

⁵⁶ Klein, ‘Article 21’ (n 51) para 524; Morlok, ‘Article 21’ (n 37) para 149.

⁵⁷ Streinz, ‘Article 21’ (n 33) para 223.

⁵⁸ Ipsen and Koch, ‘Article 21’ (n 33) para 160.

⁵⁹ Ipsen and Koch, ‘Article 21’ (n 33) para 161; Streinz, ‘Article 21’ (n 33) para 225; BVerfGE 2, 1 para 12.

⁶⁰ Streinz, ‘Article 21’ (n 33) para 228a; BVerfGE 144, 20 para 551.

another constitutional order or another system of government”.⁶¹ An impairment, on the other hand, is to be assumed “if a party, according to its political concept, causes a noticeable threat to the free democratic fundamental order with sufficient intensity.” A party is therefore already deemed to have “impaired” the free democratic fundamental order if, even if it does not yet indicate which constitutional order should replace the existing constitutional order, it is engaged in a qualified attempt to override the existing constitutional order. It is sufficient that it opposes one of the essential elements of the free democratic fundamental order (human dignity, democracy, rule of law), as these are intertwined and mutually dependent”.⁶² It also states that “however, not every unconstitutional demand is sufficient in itself to be able to assume the objective of impairing the free democratic fundamental order. Rather, the decisive factor is that a party specifically opposes those fundamental principles that are indispensable for free and democratic coexistence, as this alone ensures that a party prohibition procedure can only be used for the purposes of preventive protection of the constitution and not also to eliminate unwelcome political competition”.⁶³

ii. Endangerment of the preservation of the Federal Republic of Germany

The second named object of protection is the preservation of the Federal Republic of Germany. This includes the territorial integrity of the state and its ability to act in foreign political matters or its political independence.⁶⁴ The territory consists of the states listed in the Preamble to the Constitution.⁶⁵ Additionally, pursuant to Section 92 para 1 of the German Criminal Code (“*Strafgesetzbuch*” / “*StGB*”), the existence of the Federal Republic of Germany includes not only its territory, but also its freedom from foreign domination and its state unity.⁶⁶ The freedom from foreign domination refers in this regard to the preservation of German statehood, including the characteristic of external sovereignty.⁶⁷

The constituent offence in this case is the endangerment of this protected good. Compared to the impairment or elimination required for the alternative object of protection, the severity of the interference requirement is lessened.⁶⁸ A corresponding endangerment to the preservation of the Federal Republic only has to be intended, not realized.⁶⁹ With regard to territorial integrity, this is not already the case if the division into the existing

⁶¹ BVerfGE 144, 20 para 550.

⁶² BVerfGE 144, 20 para 556.

⁶³ BVerfGE 144, 20 para 556.

⁶⁴ Klein, ‘Article 21’ (n 51) para 520; cf Ipsen and Koch, ‘Article 21’ (n 33) para 165 ff.; Streinz, ‘Article 21’ (n 33) para 229 ff.

⁶⁵ Klein, ‘Article 21’ (n 51) para 520; cf Ipsen and Koch, ‘Article 21’ (n 33) para 165.

⁶⁶ Klein, ‘Article 21’ (n 51) para 521.

⁶⁷ Klein, ‘Article 21’ (n 51) para 521.

⁶⁸ cf Streinz, ‘Article 21’ (n 33) para 229.

⁶⁹ Ipsen, Koch, ‘Article 21’ (n 33) para 168; Streinz, ‘Article 21’ (n 33) para 230.

federal states is questioned, or if consensual border changes are made on the basis of international law.⁷⁰ Rather, separationist endeavours are required that aim, for instance, to separate individual states from the Federal Republic of Germany, even if this does not impair the free democratic fundamental order.⁷¹ The aim of separatist endeavours is to separate part of the territory of a country or a region that touches the territories of several countries in order to create a new, independent state or to establish a new state within the borders of an already existing state.⁷²

With regard to external sovereignty, a critical limit is in any case reached if, for instance, the state existence of the members is to be relinquished by means of the merging of states.⁷³ This is not the case if a party's objective is a European federal state, as the commitment to a united Europe is enshrined in the Constitution in Article 23 para 1 sentence 1 GG and the Preamble of the GG and the state quality of the Federal Republic would remain preserved in a European federal state.⁷⁴

c. Objectives

Whereas a party prohibition pursuant to Article 21 para 2 GG requires an "aim" ("*darauf ausgehen*"), the exclusion from government funding pursuant to para 3 sentence 1 merely mandates a corresponding orientation ("*darauf ausgerichtet sind*"). This element includes specific conduct, its intention and intensity, the attribution of actions and the evidence relevant to the prohibition proceedings, and moreover the "potentiality" of achieving such objective.⁷⁵ The principle of proportionality, however, does not apply as an unwritten element.⁷⁶ The party's objectives require a certain "actively combative, aggressive attitude".⁷⁷

To determine the objective, the party's programme can be referenced, amongst other factors, whereby this is not limited to the written published party programme, but also includes for example other official party statements or speeches by leading functionaries.⁷⁸ Furthermore, the attributable behaviour of the party's adherents can be

⁷⁰ Klein, 'Article 21' (n 51) para 520; Streinz, 'Article 21' (n 33) para 230.

⁷¹ Streinz, 'Article 21' (n 33) para 230; Ipsen and Koch, 'Article 21' (n 33) para 166.

⁷² Definition of the Federal Office for the Protection of the Constitution, see Bundesamt für Verfassungsschutz, 'Separatistische Bestrebungen' (Bundesamt für Verfassungsschutz, Glossar 2022) <<https://www.verfassungsschutz.de/SharedDocs/glossareintraege/DE/S/separatistische-bestrebungen.html>> accessed 15 June 2024.

⁷³ Klein, 'Article 21' (n 51) para 522 ff.

⁷⁴ Ipsen and Koch, 'Article 21' (n 33) para 167.

⁷⁵ Streinz, 'Article 21' (n 33) para 231.

⁷⁶ Klein, 'Article 21' (n 51) para 540a; cf Ipsen and Koch, 'Article 21' (n 33) paras 171 ff.; BVerfGE 144, 20 paras 599 ff.

⁷⁷ Streinz, 'Article 21' (n 33) para 232; cf Klein, 'Article 21' (n 51) paras 533 ff.; BVerfGE 5, 85 para 141.

⁷⁸ Streinz, 'Article 21' (n 33) para 234.

taken into account.⁷⁹ In this respect, it should be noted that unconstitutional objectives are not usually proclaimed openly, but that a corresponding overall tendency is to be determined by the political means used or the style of the party's actions.⁸⁰

Since the NPD judgement in 2017, the criterion of potentiality must be considered additionally, which can be assumed as given "if there are concrete indications of weight that make it appear at least possible that the actions of a party directed against the protected interests of Article 21 para 2 GG may be successful".⁸¹ The party must therefore have sufficient opportunities for action that do not make it appear completely futile to achieve the anti-constitutional goals it is pursuing and must also make use of these opportunities.⁸² The existence of sufficient potentiality must be determined as part of an overall assessment, taking into account "the party's situation (membership and membership development, organizational structure, degree of mobilization, ability to campaign, financial situation), its impact on society (election results, publications, alliances, support structures), its representation in offices and mandates, the means, strategies and measures it uses and all other circumstances" that "may provide information as to whether it appears possible to implement the objectives pursued by the party".⁸³ A prohibition of the NPD failed in 2017 due to a corresponding lack of potentiality.⁸⁴

Relevant information can be obtained, for instance, by the federal and state constitution protection authorities by means of surveillance using intelligence services (c.f. Section 3 and 8 of the Federal Constitution Protection Act ("*Bundesverfassungsschutzgesetz*" / "*BVerfSchG*").⁸⁵ The acquisition of information, in particular if no open surveillance is carried out on the basis of publicly accessible sources, but rather intelligence services such as confidential counsellors are utilized, constitutes an interference with the parties' freedom of activity under Article 21 para 1 GG.⁸⁶ The requirements for the justification of such an infringement are based on its severity.⁸⁷ The use of these means to prepare an application for a prohibition order is generally considered permissible, if there is a concrete suspicion regarding the pursuance of anti-constitutional endeavours and a corresponding verification only appears possible using these means.⁸⁸ The observations, however, must be discontinued if it is determined that the party is not pursuing such

⁷⁹ See also the problem of imputation mentioned above; Streinz, 'Article 21' (n 33) para 235.

⁸⁰ Streinz, 'Article 21' (n 33) para 234; cf Morlok, 'Article 21' (n 37) 151.

⁸¹ Streinz, 'Article 21' (n 33) para 233a; BVerfGE 144, 20 para 585.

⁸² BVerfGE 144, 20 para 586.

⁸³ BVerfGE 144, 20 para 587.

⁸⁴ BVerfGE 144, 20.

⁸⁵ cf Klein, 'Article 21' (n 51) para 577.

⁸⁶ Klein, 'Article 21' (n 51) para 577 ff.

⁸⁷ Klein, 'Article 21' (n 51) para 579.

⁸⁸ Klein, 'Article 21' (n 51) para 579.

endeavours.⁸⁹

There are varying levels for monitoring. A party can be categorized as an “investigation case” (“*Prüffall*”), for instance, and thus information from open, i.e. freely accessible, information can be viewed and evaluated.⁹⁰ A more advanced level is the qualification as a “suspected case” (“*Verdachtsfall*”), where the use of intelligence service means is also possible or at least not ruled out from the outset in compliance with the principle of proportionality.⁹¹ If an organization or individual behaviour is previously assessed as a “confirmed extremist activity” (“*gesichert extremistische Bestrebung*”), the threshold for intervention is lowered accordingly and “a consolidation of suspicions to the point of certainty” is sufficient with regard to the required degree of suspicion.⁹² A confirmed extremist activity differs from a suspected case in particular in this degree of consolidation of the actual circumstances of suspicion and not primarily with regard to the legal assessment of the qualification of the endeavour as extremist or not.⁹³ To qualify as a confirmed extremist activity, the investigative phase must therefore exceed that of a mere investigation case and the observation during this investigation phase must show that the actual indications that triggered the investigation case have intensified to such an extent “that there is a belief that these are indeed extremist activities”.⁹⁴

3. Legal consequences

If an admissible application for a ban has been filed and all of the factual requirements have been met, the Federal Constitutional Court must determine that the party in question is unconstitutional.⁹⁵ The prohibition of an unconstitutional party by the court entails substantive legal consequences. It results in the loss of party status, the prohibition of substitute organizations in accordance with Section 33 para 1 PartG and Section 46 para 3 BVerfGG and a (not uncontroversial) loss of mandate of their delegates.⁹⁶ Pursuant to Section 46 para 3 sentence 2 BVerfGG, the court may also instruct the confiscation of party assets in favour of the federal government, the state or for charitable purposes.⁹⁷

⁸⁹ Klein, ‘Article 21’ (n 51) para 580.

⁹⁰ Bertold Huber, ‘Die AfD – Facetten aktueller Rechtsprechung’, (2024) 43 NvwZ 119; BVerwGE 137, 275, para 14 ff.

⁹¹ Huber (n 90).

⁹² Huber (n 90); VG Köln BeckRS 2022, 3818 para 357 (Administrative court of Cologne).

⁹³ VG Köln BeckRS 2022, 3818 para 358 (Administrative court of Cologne).

⁹⁴ VG Köln BeckRS 2022, 3818 para 359 (Administrative court of Cologne).

⁹⁵ Markus Heintzen, ‘§ 32 Die politischen Parteien’ in Klaus Stern, Helge Sodan, Markus Möstl (eds), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund, Band 2* (2nd edn, C.H. Beck 2022) fn 89; Streinz, ‘Article 21’ (n 33) fn 239.

⁹⁶ Winfried Kluth, ‘Article 21’ in Volker Epping and Christian Hillgruber (eds), *BeckOK Grundgesetz*, (57th edn, C.H. Beck 2024) para 211; Klaus Schlaich and Stefan Koriöth, *Das Bundesverfassungsgericht: Stellung Verfahren, Entscheidungen* (12th edn, C.H. Beck 2021) para 341.

⁹⁷ cf Schlaich and Koriöth (n 96) para 341.

The prerequisites for the unconstitutionality of a party are presumed by law, but the consequences may only arise after the unconstitutionality has been ascertained by the Federal Constitutional Court.⁹⁸ As a manifestation of party privilege, a party may not be assumed to be unconstitutional in other proceedings and no one must legally assert the unconstitutionality of the party, as long as it has not been prohibited.⁹⁹ The decision by the court therefore has a pivotal effect.

A party ban should not constitute a ban on ideology or beliefs and prevent the dissemination of merely unfavourable ideas. Rather, in view of its serious impact, it has an absolutely exceptional character as a preventive prohibition of organization.¹⁰⁰ It is “the sharpest sword” available.¹⁰¹

4. Advisability and expediency of initiating a prohibition procedure

The extensive legal consequences of prohibiting an unconstitutional party constitute an effective measure to preserve the constitution and the democratic legal order. Nevertheless, it also entails equally substantial risks, which must be taken into account when assessing the advisability and expediency of initiating proceedings. This does not only refer to the general potential abuse of a prohibition to combat unfavourable political opponents and opposing views, but also to the specific dangers that may arise when initiating a procedure in the respective individual cases.¹⁰² The mere initiation of a prohibition procedure, or its failure, can be strategically utilised by a party, for instance, to establish itself in a ‘martyr role’.¹⁰³ Thus, the general initiation and the concrete timing thereof must be considered wisely. Particularly considering that the collection of further information by intelligence services is getting significantly complicated upon initiation, as, for example, confidants from the party would have to be deactivated.¹⁰⁴ There is a fine line between a tactical wait-and-see approach to maximize the likelihood of success and

⁹⁸ Heintzen, ‘§ 32 Die politischen Parteien’ (n 95) para 89; Streinz, ‘Article 21’ (n 33) para 239.

⁹⁹ Kluth, ‘Article 21’ (n 96) para 211; cf Streinz, ‘Article 21’ (n 33) para 240.

¹⁰⁰ BVerfGE 144, 20, para 585.

¹⁰¹ Quotation from Nancy Faeser in an analysis of Kilian Pfeffer, ‘Debatte über Parteiverbot: Das AfD-Dilemma’ (*Tagesschau.de*, 17 January 2024) <<https://www.tagesschau.de/inland/innenpolitik/afd-verbot-debatte-100.html>> accessed 12 June 2024.

¹⁰² cf Morlok (n 30) para 295.

¹⁰³ Friedrich Merz on a potential AfD ban proceeding: Agence France-Presse (AFP), ‘Merz warnt vor “Martyrrolle” der AfD bei Parteiverbotsverfahren’ (*Stern.de*, 13 January 2024) <<https://www.stern.de/news/merz-warnt-vor--maertyrerrolle--der-afd-bei-partieverbotsverfahren-34363186.html>> accessed 25 June 2024; Kerstin Rottmann, Deutsche Presse-Agentur (dpa), ‘„Halte ich für falsch“: Ex-Verfassungsgerichtspräsident Papier rät von AfD-Verbotsantrag ab’ (*Die Welt*, 13 January 2024) <<https://www.welt.de/politik/deutschland/article249509572/Halte-ich-fuer-falsch-Ex-Verfassungsgerichtspraesident-Papier-raet-von-AfD-Verbotsantrag-ab.html>> accessed 26 June 2024.

¹⁰⁴ Christian Rath, ‘Demokratie und BVerfG, Der richtige Zeitpunkt für ein AfD-Verbotsverfahren’ (*Legal Tribune Online (LTO)*, 11 March 2024) <<https://www.lto.de/recht/hintergruende/h/afd-verbot-zeitpunkt-partieverbotsverfahren-rechtextremismus-politik/>> accessed 19 June 2024; cf Pia Lorenz, ‘Erster Tag im NPD-Verbotsverfahren: Von V-Leuten und anderen Verfahrenshindernissen’ (*Legal Tribune Online (LTO)*, 1 March 2016) <<https://www.lto.de/recht/nachrichten/n/bverfg-mpd-verbotsverfahren-mpd-bezweifelt-abschaltung-von-v-leuten/>> accessed 20 June 2024; cf OVG NRW (n 18).

the use of the mildest possible means to safeguard the legal order and a belated reaction that could be precisely what threatens it. The fact that the German constitution has now been in existence for 75 years by no means guarantees its eternal durability. Unconstitutional endeavours can endanger its existence and the defensive elements that the constitution offers against them therefore must not run hollow. However, in order to effectively constitute a viable approach for a sustained safeguarding of the constitution, certain strategic considerations need to be taken into account when initiating the procedure in order to minimise the risks in case of failure and maximise them in case of a positive outcome.

The question of the expediency of filing a motion, however, would not even arise if a respective obligation to do so is to be assumed. Pursuant to Section 43 BVerfGG, only the German "*Bundestag*", the "*Bundesrat*", the Federal Government, the "*Bundesregierung*" are authorized to file a motion regarding the examination of the unconstitutionality of a federal party. The wording does not unanimously allow for discretion in this regard. While Section 43 BVerfGG standardizes that a corresponding motion can be made by the bodies mentioned ("*kann*"), Article 21 para 2 GG is formulated categorically ("*are unconstitutional*" / "*sind verfassungswidrig*").¹⁰⁵ Similarly, the rulings of the Federal Constitutional Court do not allow a clear conclusion to be drawn. On the one hand, it is assumed that the German government has an "obligatory discretion" ("*pflichtmäßiges Ermessen*") with regard to the application, while in some cases this is seen as a "question of political judgement" ("*Frage des politischen Ermessens*") and it is also argued, "that unconstitutional parties must be excluded from the political decision-making process of the people".¹⁰⁶ In any case, discretion must be reduced to zero if there are no serious doubts as to the unconstitutionality of the party and efforts to combat the party politically within a reasonable period of time could not reduce it to sheer insignificance.¹⁰⁷ Consequently, evaluating the benefits and risks by initiating a prohibition procedure remains viable.

III. Exclusion from government funding

A prohibition is not the sole juridical mean of defence against parties with anti-constitutional aims. In the following one alternative in particular will be outlined, which is also standardized in Article 12 GG and resembles the wording of the conditions for a prohibition of political parties: The exclusion from government funding.

¹⁰⁵ Affirmative: Klein, 'Article 21' (n 51) para 545.

¹⁰⁶ Klein, 'Article 21' (n 51) para 545; BVerfGE 39, 334 paras 69, 154; BVerfGE 40, 287 para 17; BVerfGE 5, 85, paras 184, 1484; cf Andreas Fischer-Lescano, 'AfD-Verbotsverfahren als demokratische Pflicht' (*Verfassungsblog on Matters Constitutional (VerfBlog)*, 18 January 2024) <<https://verfassungsblog.de/afd-verbotsverfahren-als-demokratische-pflicht/>> accessed 20 June 2024.

¹⁰⁷ Klein, 'Article 21' (n 51) para 547.

In accordance with their constitutive relevance for the democratic fundamental order and in order to carry out their essential tasks, political parties receive financial resources from the state in accordance with Section 18 PartG.¹⁰⁸ The possibility of partial funding was recognized by the German Constitutional Court in the decision “Party Funding II”.¹⁰⁹ Previously, the court had considered the state funding of the total political activity of political parties to be incompatible with the free and transparent formation of the opinion and will building process.¹¹⁰ The granting of funding is based on the valid votes achieved in the respective elections (Section 18 para 4 PartG), which also determines the amount of funding granted (Section 18 para 2 and 3 PartG). In order to counter the potential dilemmas associated with state funding, financing is not granted without limitations but is subject to an upper limit and other constitutional requirements, such as an obligation to account for the origin and use of their party’s funds (Article 21 para 1 sentence 4 GG) and the guarantee of state freedom and equal chances of political parties.¹¹¹ In addition to this direct funding through government grants, funding is further provided in the form of tax privileges for party donations and contributions.¹¹²

Parties can also be excluded from this government party funding. Pursuant to Article 21 para 3 sentence 1 GG, parties which, according to their objectives or behaviour of their supporters, are orientated to impair or eliminate the free democratic fundamental order, or to endanger the preservation of the Federal Republic of Germany, are exempted from state funding. Sentence 2 extends this by stating that if an exclusion is determined, the tax benefits of the parties and contributions to such are forfeited. The procedural standards of the party prohibition proceedings are also to be applied to the exclusion from party funding pursuant to Article 21 para 3 GG in conjunction with Article 93 para 1 number 5 GG, Sections 13 number 2a, 43a et seq. BVerfGG.¹¹³

Likewise, the factual requirements resemble the material requirements of a party ban regarding the wording used by the constitutional legislator. The crucial discrepancy lies in the requirement that a party ban stipulates that parties, in terms of their objectives or the behaviour of their supporters, aim to impair or eliminate the free democratic fundamental order, or to endanger the continuance of the Federal Republic of Germany (“*darauf ausgehen*”), whereas an exclusion from party funding merely requires a corresponding orientation (“*darauf ausgerichtet sind*”). Such a corresponding orientation presupposes a qualified and planned endeavour to eliminate or impair the free democratic fundamental

¹⁰⁸ cf Streinz, ‘Article 21’ (n 33) para 197; Klein, ‘Article 21’ (n 51) para 405.

¹⁰⁹ BVerfGE 85, 264.

¹¹⁰ BVerfGE 20, 56 para 144; further elaboration on the problem of state funding: Klein, ‘Article 21’ (n 51) para 424 ff.

¹¹¹ Klein, ‘Article 21’ (n 51) para 429 ff.; cf BVerfG, NVwZ 2023, 407.

¹¹² Ipsen, Koch, ‘Article 21’ (n 33) para 137 ff.

¹¹³ BVerfG, NJW 2024, 645 para 155.

order, without the requirement of potentiality (*“Potentialität”*).¹¹⁴ This differentiation corresponds to the intention of the legislator amending the constitution, who deliberately made the anti-constitutional orientation the sole prerequisite for the exclusion of political parties from state funding, without taking into account the probability of success of such aim.¹¹⁵

Consequently, parties with respective aspirations, which cannot be banned due to a lack of potentiality, and which are therefore anti-constitutional (*“verfassungsfeindlich”*) but not declared unconstitutional (*“verfassungswidrig”*), can be effectively defended against and countered by means of this constitutional provision. Pursuant to Section 43 para 1 sentence 2 BVerfGG, the motion for a ruling on the exclusion from state funding may be filed as an auxiliary motion to a motion for a ruling on the unconstitutionality of a party.

IV. Other alternatives

There are also numerous non-judicial approaches to combat anti-constitutional parties, including by means of political methods. This could be achieved for instance through substantive debates or the strengthening of constitutional moderate mainstream parties, by addressing the current problems of the people and thus assuming a stronger and more accurate representation of the electorate and thereby achieving a strengthened mediating role between citizens and political leaders.¹¹⁶ The prior utilisation of suitable non-legal strategies can prove to be a successful exhaustion of milder means.

Threats to the constitution, however, are multi-faceted and do not only originate from political parties. The constitution recognises this and incorporates manifestations of militant democracy directed at individuals, for instance regarding the forfeiture of fundamental rights pursuant to Article 18 GG. According to the provision, an abuse of the freedom of expression, especially the freedom of the press, the freedom to teach, the freedom of assembly, the freedom of association, the secrecy of correspondence, post and telecommunications, property or the right of asylum to combat the free democratic fundamental order can result in a forfeiture of these fundamental rights. A corresponding forfeiture is currently being contemplated by some voices in society regarding the AfD politician Höcke with a related petition already attaining 1.7 million signatures.¹¹⁷

¹¹⁴ BVerfG, NJW 2024, 645 paras 277, 286.

¹¹⁵ BVerfG, NJW 2024, 645 para 288.

¹¹⁶ cf statements on a possible AfD ban procedure: Agence France-Presse (AFP) (n 103); Kerstin Rottmann, Deutsche Presse-Agentur (dpa) (n 103); Deutsche Presse-Agentur (dpa) (n 10); Heike Jahberg, ‘Update / Debatte über AfD-Verbot : Ex-Verfassungsrichter Papier rät von Antrag ab – auch Steinmeier ist skeptisch’ (*Tagesspiegel Online*, 13 January 2024) <<https://www.tagesspiegel.de/politik/diskussion-uber-afd-verbot-ex-verfassungsgerichtsprasident-papier-rat-ab-11043922.html>> accessed 25 June 2024.

¹¹⁷ Indra Ghosh, ‘WeAct-Petition: Wehrhafte Demokratie: Höcke stoppen!’ (*Compact*) <<https://aktion.compact.de/weact/hocke-stoppen/teilnehmen>>; Critical assessment: Christian von Coelln, ‘Keine Grundrechtsverwirkung statt Parteiverbot’ (*Verfassungsblog*, 22 January 2024) <<https://verfassungsblog.de/keine-grundrechtsverwirkung-statt-parteeiverbot/>> accessed 26 June 2024.

Also other potential sources of danger are recognised by the constitution and defended against accordingly, such as against associations (“*Vereine*”). Section 2 Associations Act defines associations as “any association, irrespective of its legal form, to which a majority of natural or legal persons have voluntarily joined together for a longer period of time for a common purpose and have subjected themselves to an organised decision-making process”. According to Article 9 para 2 of the Constitution those “whose purposes or whose activities are in conflict with criminal law or which are directed against the constitutional order or against the idea of an amicable international understanding” are prohibited.¹¹⁸ They may be treated as prohibited if the aforementioned requirements have been established by order of the prohibition authority.¹¹⁹ More recently, the possible ban on associations has attracted particular attention due to the ban imposed on the Compact-magazine, which is classified as right-wing extremist.¹²⁰ Following the decision of the Federal Administrative Court (“*Bundesverwaltungsgericht*” / “*BVerwG*”), however, the immediate enforcement of the ban was provisionally suspended with the main proceedings being scheduled for February 2025.¹²¹

Numerous alternative types of proceedings thus exist and also valuable alternative non-judicial approaches. The prohibition of political parties is one possible remedy for safeguarding the constitution, but by no means the only one.

E. Conclusion

At present, the option of prohibiting a political party is garnering a remarkable amount of attention in both politics and society. It comes to no surprise given the noticeable shift in election results at national and international level. Given their outstanding position in a democracy, the elected parties are, after all, of central importance, so that a potential anti-constitutional stance poses a serious threat to the basic democratic fundamental order. The German constitution recognises and counters this danger through therein contained defensive elements, such as the possibility of a prohibition of anti-constitutional parties. In this regard, however, high demands are placed on the procedural and substantive legal

¹¹⁸ Detailed elaboration on the legal framework and the distinction to the prohibition of political parties: Christian Baudewin, ‘Das Vereinsverbot’, (2021) 40 NVwZ 1021.

¹¹⁹ Bundesministerium des Innern und für Heimat (BMI), ‘Vereinsverbote’ (BMI, 26 July 2024) <<https://www.bmi.bund.de/DE/themen/sicherheit/extremismus/vereinsverbote/vereinsverbote-artikel.html>> accessed 22 August 2024.

¹²⁰ Bundesministerium des Innern und für Heimat (BMI) (n 119); Felix W. Zimmermann, Markus Sehl, Max Kolter, ‘So begründet das BMI das Compact-Verbot’ (*Legal Tribune Online (LTO)*, 18 July 2024) <<https://www.lto.de/recht/hintergruende/h/compact-verbot-bmi-begrueundung-medium-elsaesser-vereinsverbot-pressefreiheit>> accessed 15 August 2024.

¹²¹ Bundesministerium des Innern und für Heimat (BMI) (n 119); Beck-Aktuell, ‘“Compact“-Verbot: Entscheidung im Hauptverfahren im Februar’ (*Beck-Aktuell*, 23 August 2024) <<https://rsw.beck.de/aktuell/daily/meldung/detail/compact--verbot-entscheidung-hauptverfahren-februar>> accessed 25 August 2024; BVerwG, Beschluss vom 14.08.2024 - 6 VR 1.24, BeckRS 2024, 20294 = DÖV 2024, 1024.

requirements. Previous procedures have already resulted in successful party prohibitions and a legislative development in the handling of anti-constitutional parties through the introduction of an exclusion from state funding. The resulting legal consequences are of the highest intensity for the parties involved. The procedure harbours a grave risk of abuse, as it could be exploited to combat disagreeable political opponents and opposing views. This risk is, nonetheless, mitigated by the aforementioned high requirements. In specific individual cases, however, a procedure may still be devoid of expediency. Regardless of the prospects of success, those affected could use the mere initiation as a political strategy and thus gain greater power and influence.

Consideration must also be given to the increased difficulty of the collection of information after initiation. Although the approach of party prohibition proceedings is in essence a viable approach to protect the constitution, alternative judiciary or even non-judicial approaches may prove to be preferable in individual cases. It is not foreseeable that the topic will cease in relevance in the near future. On the contrary: the party prohibition procedure is experiencing an upswing in politics and society and its possible further application by the Federal Constitutional Court remains to be anticipated.