THE BAN OF POLITICAL PARTIES – AN ANALYSIS OF THE CRITERIA DEVELOPED BY THE GERMAN FEDERAL CONSTITUTIONAL COURT AND THE EUROPEAN COURT OF HUMAN RIGHTS AND THEIR INTERCONNECTION

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It is possible to ban political parties in many modern democracies. However ideologically extreme they may be, their ban constitutes a violent interference in the political sphere and should therefore only be applied in particularly justified cases. The article analyses the relevant case law of the German Federal Constitutional Court and the European Court of Human Rights. It comes to the conclusion that the jurisprudence of the two courts is closely linked and builds on each other. Moreover, by today's standards, it is not possible to ban a political party that has an unconstitutional programme, even if it tries to implement it aggressively and violently, as long as it is not in a position to actually implement it, i.e. it does not have the necessary political power.

Key words: ban of a political party; European Court of Human Rights; German Federal Constitutional Court; potentiality; pressing social need

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1. INTRODUCTION, STRUCTURE, AND METHODOLOGY1

One of the most important tasks of a democratic state is to create the conditions for the free functioning of political parties. However, some political parties hold extremist views and pose a threat to the same democracy that enables their activities. Therefore, a number of democratic states allows the ban of such political parties[2] in order to avoid what Joseph Goebbles called the best joke of democracy, namely that "democratic regimes give their enemies the means to get rid of democracy."[3] According to Karl Loewenstein, "democratic states can only resist fascism's skilful exploitation of democratic rights, to undermine democracy from within, if they abandon what he sees as an outdated conception of liberal democracy, according to which all voices should be allowed free expression and participation, and fight fire with fire."[4] The ability of democratic regimes to take active action against threats to their existence is the main feature of militant democracy,[5] the typical expression of which is the ability to ban political parties. However, it cannot be denied that the ban of a political party, however extremist it may be, constitutes a violent (judicial) intrusion into the political sphere and may therefore only be applied in particularly justified cases. The objective of this paper is to analyse the ban

[1] The article is based on the main conclusions of the master's thesis "Prepoved politične stranke" (*Prohibition of a Political Party*), written under the supervision of zasl. prof. dr. Ciril Ribičič, which the author defended in October 2019.

[2] For a more detailed analysis of the institute of the ban of a political party see: Bligh, G., *Defending Democracy: A New Understanding of the Party-Banning Phenomenon*, Vanderbilt Journal of Transnational Law, *vol.* 46, no. 5, 2013, pp. 1321 – 1379.

[3] Bracher, K. D.; Funke, M.; Jacobsen, H. A., *Nationalsozialistische Diktatur 1933–1945: Eine Bilanz*, Bundeszentrale polit. Bild., Berlin, 1983, p. 16.

[4] Capoccia, G., *Militant Democracy: The Institutional Bases of Democratic Self-Preservation*, Annual Review of Law and Social Science, *vol.* 9, no. 1, 2013, p. 208.

[5] The term "militant democracy" refers to a type of democracy that is prepared to use violence to protect its democratic values and institutions. This approach prioritises the preservation of the democratic system over individual rights and freedoms in some cases, such as when these rights are used to undermine the democratic process. It is often seen as a response to threats from anti-democratic forces, such as extremist groups or individuals who want to undermine the democratic system. The use of force by the state in a militant democracy is usually limited and subject to strict legal control. For more information on militant democracy, see: Cavanaugh, K., *Militant Democracy: Lowenstein Revisited*, Journal of Human Rights, *vol.* 15, no. 2, 2021, pp. 117 – 124.

of political parties in the legal order of the Council of Europe and in Germany,[6] with the aim of answering the research question: "How have the criteria for a justified ban of a political party developed and can a marginal political party be banned according to today's standards?"

The article analyses the relevant rulings of the German Federal Constitutional Court (Bundesverfassungsgericht, hereinafter: BVG) and the European Court of Human Rights (hereinafter: ECtHR), as their jurisprudence is closely interwoven and builds on each other.[7] This contribution utilizes several research methods. The normative-dogmatic method is used to analyse the currently applicable *(de lega lata)* criteria for a justified ban of a political party. However, the paper goes beyond their mere description and analyses them critically using the axiological method. The comparative method is also important, as a comparison is made between the criteria and institutes developed by the BVG and the ECtHR. In addition, the historical method is used to examine the development of the conditions for a justified ban of a political party. Within the above four core methods of research, a number of instrumental methods are also used, namely the methods of collecting and analysing information and discarding irrelevant information, the methods of description, classification and abstraction, as well as logical and analytical reasoning and the methods of induction and deduction.

The scholarly originality of this contribution lies in the systematic analysis of the genesis of the institute of the ban of a political party in the jurisprudence of the BVG and the ECtHR and their interconnectedness. An overview of the relevant literature shows that the few contributions dealing with questions on the ban of political parties in the member states of the Council of Europe focus exclusively on the analysis of individual cases.[8] A systematic and holistic

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[6] The term "Germany" refers to the Federal Republic of Germany, as the ban of political parties in National Socialist Germany and the German Democratic Republic (GDR) is not the subject of this work, since neither regime was democratic.

[7] The criteria for a justified ban of political parties, as formulated by the ECtHR, build on the BVG's findings in the SRD and KPD judgments. Furthermore, the BVG adopted the ECtHR's line of reasoning in its NPD judgment.

[8] See for example: Cram, I., *Constitutional Responses to Extremist Political Associations – ETA, Batasuna and Democratic Norms*, Legal Studies, *vol.* 28, no. 1, 2008, pp. 68 – 95; Ayres, T., *Batasuna Banned: The Dissolution of Political Parties under the European Convention of Human Rights*, Boston College International and Comparative Law Review, *vol.* 27, no. 1, 2004, pp. 99 – 114; Sawyer, K. A., *Rejection of Weimarian Politics or Betrayal of Democracy: Spain's Proscription of Batasuna under the European Convention on Human Rights*, American University Law Review, *vol.* 52, no. 6, 2003, pp. 1531 – 1582; Turano, L., *Spain: Banning Political Parties as a Response to Basque Terrorism*, International Journal of Constitutional Law, *vol.* 1, no. 4, 2004, pp. 730 – 740;

analysis of the possibilities for banning political parties in these countries has therefore not yet been carried out.

The article first analyses the ban of political parties in the German legal system. To this end, it first examines the relevant legal provisions and then analyses the three cases in which the BVG has ruled *(in meritum)* on the ban of political parties,[9] noting that the requirements for a justified ban have become stricter with each subsequent ruling. In addition, the paper also critically examines the institute of potentiality *(potentialität)* as developed in the NPD ruling of 2017. Second, the paper examines two cases before the ECtHR in which the ban of a political party by national authorities was found to be justified and thus not a violation of conventional rights. Finally, it establishes the link between the case law of the BVG and the ECtHR. It is shown that the institute of potentiality, as developed by the BVG, is the transplant of the institute of pressing social need, used by the ECtHR, into the German legal order. Furthermore, it is established that the ban of a political party is not a purely preventive measure, since a political party must in some way constitute a qualified danger to democracy in order for its ban to be justified. Finally, the results of the paper are summarised and thus the research question is answered.

2. BAN OF POLITICAL PARTIES IN GERMANY

The case law of the ECtHR on the ban of political parties is closely connected with the case law of the BVG and builds on its conclusions. Moreover, in its recent NPD judgeent, the BVG has also considered the standards developed by the ECtHR. A thorough analysis of the case law of the BVG is therefore conducted, as it can show the development of the criteria required for a justified ban of a political party.

Spada, P., *Laicismo Contra Fundamentalismo: El Caso del Partido Refah en Turqia*, Revista Derecho del Estado, *vol.* 11, 2001, pp. 133 – 174; Ihtiyaroglu, U., *The Approach of the ECtHR to the Closure of Political Parties and Freedom of Thought and Faith in Specialty of the Decision to Close the Refah Party,* Selcuk Universitesi Hukuk Fakultesi Dergisi, *vol.* 29, no. 1, 2021, pp. 329 – 362; Muller, J. H.; Nolscher, P., NPD – *Anti-Constitutional but Not Unconstitutional*, Zeitschrift für Öffentliches Recht, *vol.* 72, no. 2, 2017, pp. 293 – 316.

[9] The BVG has issued two judgments on the ban of the political party NPD. Only the second judgment will be analysed, as the BVG did not rule *in meritum* in the first judgment, for the reasons stated in the text.

2.1. Legal Basis for the Ban of Political Parties in Germany

The ban of political parties in Germany is the subject of Article 21 of the Basic Law[10] and Article 43 of the Federal Constitutional Court Act.[11] Article 21 of the Basic Law enumerates the conditions that a political party must fulfil in order to be unconstitutional. Accordingly, a political party is unconstitutional (and can consequently be banned) if, through its aims or the conduct of its adherents *(Anhänger)*,[12] it seeks to eliminate the basic democratic order *(Freiheitliche demokratische Grundordnung)*[13] or poses a threat to the existence of Germany. According to Art. 43 of the Federal Constitutional Court Act, an application for a declaration of unconstitutionality of a political party before the BVG[14] can only

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[10] Grundgesetz für die Bundesrepublik Deutschland vom 23.05.1949 [Basic Law of the Federal Republic of Germany], Bundesgesetzblatt [German Official Gazette] S. 1, last changed with the act of 19 December 2022, Bundesgesetzblatt [German Official Gazette] I S. 2478.
Germany does not have a "constitution" but rather the Basic Law. When the Basic Law was adopted in the territories occupied by the Western Allies after the Second World War, it was intended to be a provisional law, replaced by a constitution after reunification. After German reunification in 1990, however, the Basic Law remained in force as the "constitution" of the reunified Germany.

[11] Bundesverfassungsgerichtsgesetz [Act on the German Federal Constitutional Court], Bundesgesetzblatt [German Official Gazette], I S. 1473, last changed with the act of 20 November 2019, Bundesgesetzblatt [German Official Gazette], I S. 1724.

[12] The term *"Anhänger"* indicates that persons whose behaviour is aimed at abolishing the basic democratic order or at endangering the existence of Germany do not have to be members of the political party in question, but merely have a certain affinity with its programme and actions.

[13] The principle of the basic democratic order refers to the core constitutional values and is not subject to interpretation by the Legislature. It is formed primarily by the principles of human dignity, the rule of law and the democratic political order. For a more in-depth analysis of the legal and philosophical aspects of the basic democratic order. See: Nichelmann, R., *Die Freiheitliche Demokratische Grundordnung und der Schutz der Funktional Differenzierten Gesellschaft*, Rechtstheorie, *vol*. 46, no. 4, 2015, pp. 505 – 540; Bruning, C., *Das Grundrecht der Versammlungsfreiheit in der Streitbaren Demokratie. Rechtsextremistische Demonstranten im Streit der Gerich*, Der Staat, *vol*. 41, no. 2, 2002, pp. 213 – 244.

[14] Political parties are given a special status because of their importance for the existence and development of parliamentary democracy and can therefore only be declared unconstitutional (and thus banned) by the BVG. As long as such a decision has not been issued, there is a presumption that a political party is not unconstitutional. This is referred to as the "political party privilege" (*Parteienprivilege*). See

be filed by the *Bundestag*, the *Bundesrat* or the Federal Government. However,[15] if a political party is active in one or more federal states *(Länder)* and not in the entire federal territory, an application for the declaration of unconstitutionality can also be filed by the government of the federal state.[16, 17]

judgments of the BVG 6C 29. 08 Rz.20 from 30 September 2009 and 2BvR 27/60 from 21 March 1961.

[15] The German Parliament consists of two chambers, the *Bundestag* and the *Bundesrat*, with the latter representing the 16 German federal states.

[16] This could well be the case, as the far-right movements are far more prevalent in the eastern part of Germany. See; Neurer, D., *Bundesregierung nimmt 'völkische Siedler' in den Blick*, Handelsblat, 2016, https://www. handelsblatt.com/politik/deutschland/rechtsextremismus-in-ostdeutschland-bundesregierung-nimmt-voelkische-siedler-in-den-blick/14745490.html (12 November 2023).

[17] In addition to the ban procedure, the German legal system also provides for the possibility of excluding unconstitutional political parties from state funding. This possibility was included in the Basic Law following the failure to ban the NPD in 2017. Thus, paragraph 3 of article 21 of the Basic Law states: "Parties that, by reason of their aims or the behaviour of their adherents, are oriented towards an undermining or abolition of the free democratic basic order or an endangerment of the existence of the Federal Republic of Germany shall be excluded from state financing. If such exclusion is determined, any favourable fiscal treatment of these parties and of payments made to those parties shall cease." The possibility of excluding state party funding comes into consideration in particular if the political party in question is unconstitutional but does not reach the threshold of potentiality required for a ban under paragraph 2 of article 21 of the Basic Law. As it is unlikely that political parties will survive without some form of state funding, the withdrawal of state funding can have the same result as the banning of a political party (its dissolution) – albeit in a longer time frame. In other words, the process of withdrawing state funding from a political party can be seen as a de facto ban of that party. For more information, see: Ipsen, J., *Das Ausschlussverfahren nach Art. 21 Abs.3 GG – ein mittelbares Parteienverbot?*, JuristenZeitung, *vol.* 72, no. 19, 2017, pp. 133 – 936.
On January 23, 2024, the BVG published its decision to revoke the state funding of the Heimat party, the legal successor to the NPD (BVG judgement 2 BvB 1/19 of January 23 2024). The ruling came at a time of massive protests against far-right parties in Germany, sparked by the publication of the report of a meeting between individuals with links to far-right groups (including several high-ranking members of the AfD parliamentary party) at which they discussed the possibilities of a de facto ethnic cleansing of Germany, which could be achieved, inter alia, by deporting undesirable individuals and/or ethnic groups to North Africa.

2.2. Applications for the Ban of Political Parties in Germany

The following section analyses the two cases where political parties were banned by the BVG, as well as the second attempt to ban the *Nationaldemokratische Partei Deutschlands* (hereinafter: NPD). As such, it provides an overview of the characteristics of the relevant political parties and their actions as well as the BVG's legal reasoning.

2.2.1. Sozialistische Reichspartei Deutschlands (SRD)

The SRD was an openly neo-Nazi political party founded after the Second World War by the former Major General of the *Panzergrenadier Division Großdeutschland* Otto Ernst Remer and the ultra-nationalist writer Fritz Dorls. The SRD believed that the Third Reich still existed, with the legitimate rule of the last *Führer*, Karl Dönitz,[18] being obstructed by the occupation authorities,[19] and that hostile elements within the *Wehrmacht* had sabotaged the German war effort, which was aimed at producing miracle weapons[20] that could have won the war. It was, according to the SRD, the duty of every German to resist such injustices. In this context, the SRD sought both to abolish democracy and to establish an authoritarian political regime based on the idea of the "racial superiority of ethnic Germans and the need to establish a '*Volksgemeinschaft,*' which is the only entity whose existence is justified."[21]

In 1951, the Federal Government applied for the SRD to be banned after its success in the state elections in Lower Saxony and an anti-Semitic speech by one of its MPs in the *Bundestag*. The BVG stated, *inter alia*, that political parties as communities of political action are the main actors of a democratic political order and

[18] After Adolf Hitler's suicide, the former chief of the U-boat fleet of the *Kriegsmarine* and later commander-in-chief of the *Kriegsmarine*, Admiral Karl Dönitz, led the Flensburg Government for twenty days as the last *Führer*.

[19] Deutsches Institut für Zeitgeschischte, *Die Westdeutschen Parteien*, Dietz Verlag, Berlin, 1965, p. 493.

[20] The Nazi Propaganda Ministry used the term *"Wunderwaffe"* to describe advanced weapons that were capable of turning the tide of war. Although they were technically advanced and some even formed the basis for technological breakthroughs after the war (such as the jet engine and NASA's heavy-lift Saturn rocket), most remained prototypes and had no significant impact on the outcome of the war.

[21] Duve, F., *Die Restauration entlässt ihre Kinder oder Der Erfolg der Rechten in der Bundesrepublik*, Rowohlt, Hamburg, 1968, p. 31.

are, as such, granted additional protection by the legislator.[22] However, this protection can be denied to political parties that do not subscribe to the basic principles of democracy and use its formal means to undermine the basic democratic order.[23] The BVG considered that a significant number of leadership roles within the SRD were occupied by individuals who had previously been involved with the Nazi regime, and this same group of individuals also comprised the majority of party members.[24] Moreover, according to the BVG, the political programme of the SRD denied the basic principles of democracy and was deliberately vague. However, in conjunction with the actions and statements of the party members, the true face of the SRD was revealed as an openly neo-Nazi political party whose actions, combined with the denial of the legitimacy of democratic institutions which, in the SRD's view, betrayed the vital interests of Germany, linked the SRD so closely to the NSDAP that it was probably prepared to use the same or similar means to achieve its political goals.[25]

The BVG's ruling helped shape the concept of militant democracy, with the BVG itself according it an "unprecedented significance,"[26] describing it as proof "that the young German democracy is filled with a living spirit and is not merely an empty phrase that can be arbitrarily abused and ultimately crushed."[27] The BVG did not assess whether the SRD represented a clear and present danger to the basic democratic order and whether it acted aggressively and combatively against it, but limited itself to stating that opposition to the basic democratic order was sufficient grounds for banning a political party.[28] In other words: A basic anti-constitutional orientation of the SRD was sufficient to ban it.

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22 Judgment of the BVG Az. 1BvB V51 from 23 October 1952, para. 33.

23 *Ibid.*, para. 34.

24 *Ibid.*, para. 254.

25 *Ibid.*, para. 140.

26 BVG, *Verlautbarung der Pressestelle des Bundesverfassungsgerichtes Nr. 59/1952 from 23 October 1952*, 1952, https://www.bundesverfassungsgericht.de/ Shared Docs /Presse mitteilungen/DE/1952/bvg52-059.html (16 December 2023).

27 *Ibid.*

28 This does not mean, however, that the SRD did not pose a serious threat to the basic democratic order. In fact, due to its considerable political strength and willingness to implement its programme by force, I believe it was.

2.2.2. Komunistische Partei Deutschland (KPD)

The BVG banned the KPD[29] in 1956, five years after the Federal Government's application.[30] Immediately after the Second World War, the KPD was one of the most important political parties in Germany, a formidable political force, represented in several federal state governments, with some 350,000 members and 15 seats in the *Bundestag*. However, with increasing tensions between the former allies in the West and East, its power began to wane and by the 1950s it had lost most of its membership and political influence. In order to re-establish itself, the KPD issued a series of increasingly militant documents and forged close ties with the Communist Party of the GDR (SED), from which it received most of its funding.[31]

In the application to ban the KPD, the Federal Government claimed that the party was closely linked to the SED and that its political goals were in contradiction with the new political orientation of Germany. In its ruling, the BVG emphasised that one of the main objectives of the Basic Law was to prevent the re-establishment of totalitarian rule.[32] Moreover, for a political party to be unconstitutional it was not sufficient for it to "deny the highest values of the constitutional order and the fundamental principles of the basic democratic order,"[33] as the party also had to "adopt an actively aggressive and combative

[29] It is important to distinguish the KPD from the SED, the former being the West German communist party and the latter the East German communist party. The KPD was the legal successor to the interwar communist party, which, along with all other German political parties except the NSDAP, was banned by the 1933 Law Against the Re-formation of Political Parties, and re-established in 1945.

[30] According to some historians, the main reasons for the unusually long deliberation period were the expectation of some judges that the Federal Government would soften its stance on the KPD, and the strong opposition to the ban by the president of the BVG, Hermann Hoepker-Aschoff. After his death, he was succeeded by Josef Wintrich, who was less reluctant to ban the KPD. See: Pfeiffer, G.; Stricher, H. G., *KPD Prozess*, C. F. Müller, Heidelberg, 1956, pp. 580 – 585.

[31] The Adenauer government played an important role in radicalising the KPD by issuing the Adenauer Decree *(Adenauer Erlaß)*, a legal act that excluded members of the KPD from positions in the public administration. More on the position of the KPD after the Second World War. See: Klussmann, U., *Die 'Aktion Holzwurm' nagte an den West-Kommunisten*, Der Spiegel, 2021, https://www.spiegel.de/geschichte/kpd-verbot-1956-die-aktion-holzwurm-nagte-an-den-west-kommunisten-a-6fa7b9f8-8778-4b64-9f50 093e69 75c 2 24 (11 November 2023).

[32] Judgment of the BVG Az. 1BvB 2/51 from 16 August 1956, para. 245.

[33] *Ibid*., para. 252.

stance against the existing democratic order and systematically act against it with the aim of eliminating it."[34] Furthermore, a party can also be classified as unconstitutional and thus banned if it is currently and in the foreseeable future unable to realise its unconstitutional programme or if it temporarily shelves its unconstitutional objectives.[35] The BVG concluded that the political goal of the KPD, namely the establishment of a socialist political order, could not be democratically and peacefully implemented[36] and that the KPD was thus a "Marxist-Leninist militant political party, which denied the principles and institutions fundamental to the functioning of the basic democratic order."[37] Thus, the conditions for banning the KPD were stricter than those for banning the SRD, since mere rejection of the basic democratic order was not sufficient. In addition, the KPD had to adopt an aggressive and combative attitude towards the basic democratic order.[38]

2.2.3. Nationaldemokratische Partei Deutschlands (NPD)

The NPD is an openly neo-Nazi political party founded in 1964 (as the successor to the German Reich Party),[39] which has never succeeded in gaining significant political influence. It was represented in several state parliaments in the eastern federal states but was unable to hold any of its seats after 2016. However, the party has an extremist programme and has been described by

[34] *Ibid*.

[35] *Ibid*., para. 256.

[36] *Ibid*., para. 370.

[37] *Ibid*., para. 603.
Moreover, and perhaps problematically, the BVG equated opposition to the Adenauer government with opposition to a democratically elected government in general. See: *Ibid*., para. 1008.

[38] As far as procedural guarantees are concerned, the proceedings against the KPD were problematic to say the least. For example, the proceedings were delayed before the *Bundestag* elections – some historians argue that if the KPD was banned, a large part of its electorate would migrate to the Social Democrats (SDP), the main opponent of the ruling CDU. In addition, historical research revealed that BVG officials provided secret procedural documents to officials of the Ministry of the Interior. See: Wiegrefe, K., *Die Wahrheit über das KPD-Verbot*, Der Spiegel, 2017, https://www.spiegel.de/spiegel/historiker-kritisiert-das-kpd-verbot-desbundesverfassun gsgerichts-a-1172072.html (17 November 2023).

[39] For more one the *NPD* see: Gordon, R. H., *The Second Attempt at a Third Successful Ban of an Established German Political Party*, Rutgers Journal of Law and Religion, *vol*. 17, no. 3, 2016, pp. 527 – 543.

some as the most important neo-Nazi party in Europe after the Second World War.[40] The first attempt to ban the NPD failed due to the infiltration of several agents of the BfV[41] into its ranks, of whom one wrote an anti-Semitic tractate that was one of the reasons for the ban application.[42] The second application to ban the NPD, which was rejected by the BVG in 2017, was filed by the Federal Government and the *Bundesrat* in 2013. The BVG concluded that the NPD, through its political programme and the actions of its adherents, actually aims to overthrow the basic democratic order and replace it with a political rule based on ethnic origin *(Volksgemeinschaft)*, which excludes migrants, foreigners and other minorities and deprives them of their basic rights and freedoms.[43] Moreover, the NPD's understanding of the state as an inseparable entity of ethnic Germans and state institutions does not correspond to the principles and ideals of democracy.[44] However, the pursuit of unconstitutional goals is not sufficient to ban a political party because "its ban cannot be based on ideological opposition to its goals, as it is the strongest weapon of democracy, which must be used restrictively in view of the importance of political parties for its functioning."[45]

In addition to the requirements of an anti-constitutional programme and an actively aggressive and combative attitude towards the basic democratic order, the BVG also required the possibility that "the party's actions directed against the basic democratic order could be successful (institute of potentiality; *potentialität*)."[46] Moreover, it emphasized that the ban of a political party was "a preventive measure, the aim of which is not to combat concrete dangers, but to prevent (still abstract) dangers in the future."[47] The NPD did not realistically

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[40] Davies, P.; Lynch, D., *The Routlege Companion to Fascism and the Far Right*, Taylor and Francis, Abingdon-on-Thames, 2002, pp. 310–318.
The BVG found that the denial of the democratic basic order and its rhetoric, symbolism and historical understanding showed parallels between the NPD and the NSDAP.

[41] The *Bundesamt für Verfassungsschutz* [Federal Office for the Protection of the Constitutional Order] is Germany's internal intelligence agency.

[42] See: Hooper, J., *German Court Rejects Attempt to Ban neo-Nazi Party*, The Guardian, 2017, https://www.theguardian.com/world/2003/mar/19/thefarright.germany (7 October 2023).

[43] Judgment of the BVG 2 BvB 1/13 from 17 January 2017, para. 766.

[44] *Ibid*., para. 639.

[45] *Ibid*., para. 405.

[46] *Ibid*., paras. 575, 619.

[47] Deutscher Bundestag, *Das NPD-Urteil des Bundesverfassungsgerichtes vom 17. Januar 2017*, 2017, https:// www.bundestag.de/blob/489892/58fc1170ce5f16e12ced106f01a-

pose a threat to German democracy not only because it only had a very small number of members and supporters but also because it has problems with funding and other logistical difficulties that prevent it from influencing public opinion and political dialogue.[48]

The addition of the requirement of potentiality thus means that a political party cannot be banned as long as it does not realistically pose a threat to the basic democratic order, regardless of how extreme its programme and/or the actions of its adherents are.[49]

2.2.4. Analysis of the BVG's Criteria for the Ban of Political Parties

The analysis of the relevant BVG case law shows that the requirements for banning a political party became increasingly strict in each subsequent ruling. Thus, an openly neo-Nazi political orientation was sufficient for the SRD to be banned. Of course, this does not mean that the party did not pose an active threat to the German democratic constitutional order. In my opinion it did, because it was able to influence political life and public opinion in Germany, which was reflected, *inter alia*, in its election results.[50] Moreover, its close links with the NSDAP, both in terms of party programme and membership, left little doubt that it was prepared to use violence to implement its programme. Therefore, in my opinion, the SRD could also be banned according to today's stricter standards. For the ban of the KPD, an anti-constitutional orientation was not enough, as the BVG also required the party to have an aggressive and combative attitude towards the basic democratic order. In my opinion, the ban of the KPD was not legally justified since the party lacked the aggressive and combative attitude towards the basic democratic order that the BVG claimed it had. Equating opposition to the Adenauer government with opposition to the basic democratic order is legally problematic at best. This is proven by the fact that the KPD was re-established as the DKP (German Communist Party) in

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faef4/das-npd-urteil-desbundesverfassungsgerichts-vom-17--januar-2017-data.pdf (23 October 2023).

[48] *Ibid*.

[49] In my opinion, the BVG has contradicted itself by claiming that the political party in question must at least pose a potential threat to the basic democratic order, while at the same time calling for preventive measures against extremist political parties in para. 621.

[50] The SRD was not a significant political force, but it was present in both regional *(Landtage)* and national *(Bundestag)* representative bodies.

1968 with the approval of the then Minister of Justice Gustav Heinemann.[51] Moreover, no other Western European democracy at that time had a national communist party banned, although they all had similar programmes.

The strictest requirements for banning a political party were demanded in the NPD ruling. Thus, according to the BVG, a party must not only have an anti-constitutional orientation and an aggressive and combative attitude towards the basic democratic order, but must also be able to implement the radical points of its programme (potentiality) in order for its ban to be justified.[52] This means that the ban of a political party that is politically small and insignificant is not possible, regardless of how radical its programme is and how aggressive and combative the party is towards the basic democratic order. Accordingly, such political parties have *carte blanche* to continue their activities, unmolested by the authorities, as long as they do not exceed the as yet undefined threshold of political relevance. On the one hand, this can be problematic, as most extremist political movements began as small, marginal, formations whose influence grew exponentially when the relevant historical circumstances arose. On the other hand, a banned political party would probably not cease to operate, but would shift its activities to the political underground, which is far easier in today's information society than it was a few decades ago. In my opinion, the effectiveness of the ban of a political party is therefore questionable.Vrh obrazca Moreover, the usually lengthy and high-profile ban procedures give extremist political parties a free media presence that they would otherwise not be able to achieve, thus expanding their sphere of influence. For example, the NPD achieved its greatest success, a five percent share of the vote in the state elections in Saxony, during the second ban procedure.[53]

[51] See: Klussmann, U., *op. cit.* (fn. 31).

[52] In my opinion, the reasons for the significantly higher threshold for banning a political party in the NPD ruling compared to the SRD and KPD rulings lie in two points. Firstly, the criterion of potentiality is clearly based on the case law of the ECtHR, which was not yet relevant at the time of the SRD and KPD judgments. If the BVG had not applied the latter criterion, there would have been a realistic possibility that the ban on the NPD would have been classified by the ECtHR as a violation of conventional rights. Secondly, the political milieu and society in Germany were very sensitive to extremist political ideologies after the end of the Second World War, and were quite prepared to sacrifice the fundamental rights of some political groups in order to prevent the resurgence of such ideologies.

[53] For more on the connection between NPD's ban procedure and its electoral success in Saxony see: Hipp, D., *Narrenfreiheit für die Extremisten*, Der Spiegel, 2017, http://www.spiegel.de/politik/ deutschland/npd-urteil-narrenfreiheit-fuer-die-extremistenkommentar-a-1130 423.html (18 November 2023).

3. BAN OF POLITICAL PARTIES IN THE CASE LAW OF THE ECTHR

The ECtHR does not have the power to ban political parties, but it can decide whether the ban of a political party by national authorities of one of its members constitutes a violation of the European Convention on Human Rights (hereinafter: the Convention). Banning a political party most likely infringes either the right to the freedom of expression (Art. 10 of the Convention) or/and the right to the freedom of assembly and association (Art. 11 of the Convention). None of the above rights is an absolute right, which means that their restriction is possible under strict conditions.[54]

The European Commission for Democracy through Law (hereinafter: Venice Commission)[55] indicated that the mere peaceful aspiration of a political party to change the political or constitutional system of a state, or opposition to that system, is not a sufficient basis for its ban.[56] In other words, banning a political party must be "necessary in a democratic society and there must be concrete evidence that a party is engaged in activities that threaten democracy and fundamental freedoms."[57] Thus, a political party cannot be banned merely because its activities are considered by the national authorities to undermine the constitutional structures of the state. The ECtHR has issued several judgments on bans of political parties by national authorities of its members. However, it only found that the ban violated conventional rights in the Refah Partisi v Turkey[58] and Batasuna v Spain[59] judgments.[60]

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[54] For more see: Andrade, F., *Tolerance, Prohibition of Political Parties and the ECtCR*, Journal for Legal, Political and Social Theory and Philosophy, *vol*. 7, no. 1, pp. 5 – 20; Fuentes, A., *The Democratic Dilemma: Dissolution of Political Parties in the Jurisprudence of the European Court of Human Rights*, Faculty of Law of the University of Lund, Graduate Thesis, Lund, 2014.

[55] The Venice Commission is an advisory body of the Council of Europe formed in 1990 with the aim of promoting democratic transition and fundamental rights in the states of the former eastern Bloc, its members being constitutional Law experts.

[56] Venice Commission, *Guidelines on Ban and Dissolution of Political Parties and Analogous Measures, CDL-INF (2000) 1*, 1999, https://www.venice.coe.int/webforms/documents /default.aspx ?pdffile=CDL-INF(2000)001-e (6 December 2023).

[57] *Ibid*., p. 8.

[58] *Refah Partisi and Others v Turkey,* applications nos. 41340/98, 41342/98, 41343/98 and 41344/98 of 31 July 2001.

[59] *Herri Batasuna and Batasuna v Spain*, applications nos. 25803/04 and 25817/04 of 30 June 2009.

[60] The ECtHR's decision in The Committee for the Organisation and Registration of the Romanian Communist Party v Romania of 30 November 2021, in which the

3.1. Refah Partisi v Turkey

Refah Partisi (Welfare Party) was a Turkish Islamist political party that won 16.88 percent of the vote in the 1991 parliamentary elections and 22 percent of the vote in the 1995 parliamentary elections, becoming the largest parliamentary party in Turkey at the time. Its leader Necmettin Erbakan became prime minister after forging a coalition with the centre-right Doğru Yol Partisi (True Path Party). Refah Partisi was banned by the Turkish Constitutional Court in 1998, following which four visible members of the party appealed to the ECtHR. In July 2001, the ECtHR Chamber ruled by a vote of four to three that Refah Partisi's ban did not constitute a violation of the applicants' right to the freedom of assembly and association. The Grand Chamber unanimously upheld the ruling in February 2003.[61] [62]

Refah Partisi advocated, *inter alia*, the establishment of a separate legal system[63] and of theocracy, described itself as engaged in jihad and called for the (physical) elimination of its opponents.[64]

Several conditions must be met for an interference in a conventional right not to constitute a violation of the Convention, i.e. for such an interference to be justified. First, the interference must be prescribed by law; second, the interference must pursue a legitimate aim; and third, the interference must be necessary in a democratic society, i.e. it must be justified by a pressing social need. The ban of Rehaf Partisi, the ECtHR concluded, was prescribed by law, as the ban of a political party was a constitutional instrument. Moreover, the party had access

ECtHR ruled that the refusal to register a communist party that has not distanced itself from the acts of Nicolae Ceaușescu does not constitute a violation of conventional rights, will not be analysed further as it concerns the refusal to register a political party and not its ban and is thus beyond the scope of this paper.

61 For a more detailed overview of the procedure see: *Refah Partisi and Others v Turkey,* Human Rights Case Digest, *vol*. 14, 2003, pp. 127 – 132.
Moreover, the positions of the ECtHR, as analysed, are the positions of its Grand Chamber.

62 Also see: Esen, S., *How Influental are the Standards of the European Court of Human Rights on the Turkish Constitutional System in Banning Political Parties*, Ankara Law Review, *vol*. 9, no. 2, pp. 135 – 156.

63 A legal system in which different legal norms apply to different parts of the population. In the present case, Islamic law (Sharia) would apply to the Islamic part of the population, while legal rules of a secular nature would apply to the non-Islamic part of the population.

64 *Refah Partisi and Others v Turkey,* applications nos. 41340/98, 41342/98, 41343/98 and 41344/98 of 13 February 2003.

to a number of constitutional law experts and could foresee the possibility of its ban. Ahead, the ban pursued legitimate aims within the meaning of Art. 11 of the Convention, namely the protection of national security and public safety and the protection of the rights and freedoms of others.[65] Finally, there was a pressing social need for the ban of the party. In this context, the ECtHR pointed out that political parties are crucial to democracy and therefore any interference with their free functioning automatically constitutes an attack on democracy itself.[66] Furthermore, the Convention protects not only the free expression of opinions that are perceived as positive by society, but especially those that shock and disturb. The actions of Refah Partisi,[67] however, endangered the constitutional order and democracy to such an extent that there was a pressing social need for its ban, as there was a clear and present danger that Refah Partisi would obtain an absolute majority of votes in the next parliamentary elections and could thus (mis)use its political monopoly to reinvent Turkish society according to its political positions.[68] These positions (i.e., the radicalism of the party) did not change over the years, but the political power of Refah Partisi did. In other words, the party only became so dangerous to democracy that its ban was justified when it acquired the necessary political power to seriously influence Turkey's political system.[69] Since Refah Partisi was not yet acting in accordance with its radical political positions, its ban was a preventive measure based on the fact that it was realistically capable of doing so.[70] In its judgment, the ECtHR recognised a wide

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[65] *Ibid*., para. 67.

[66] As was also pointed out in: *United Communist Party of Turkey and Others v Turkey*, application no. 133/1996/752/951 of 30 January 1998, para. 25.

[67] See: *Handyside v the Unted Kingdom*, application no. 5493/72 of 7 December 1976, para. 49; *Observer and Guardian v the United Kingdom*, application no. 13585/88 of 26 November 1991.

[68] *Refah Partisi and Others v Turkey,* applications nos. 41340/98, 41342/98, 41343/98 and 41344/98 of 13 February 2003.

[69] The danger of Refah Partisi to the secular model of Turkish society became clear only after a certain period of time and was the sum of all its actions, the speeches of its members, the party programme and its accumulated political power. What the ECtHR, following the position of the Turkish Constitutional Court, found particularly problematic was Refah Partisi's intention to introduce Islamic law as part of a separate legal system and its willingness to use physical violence to achieve its political goals.

[70] The ECtHR also drew parallels with political parties of political Islam in other countries (Iran), which implemented their political programme by force as soon as they were given the opportunity. Furthermore, the ECtHR noted that the Turkish

margin of appreciation[71] for national authorities in deciding when a political party is sufficiently dangerous to the constitutional order for its ban to be justified. In doing so, it confirmed the positive obligation of the state to take preventive measures to protect the rights and freedoms of persons under its jurisdiction.[72] With the Refah Partisi judgment, the ECtHR changed its position from the United Communist Party of Turkey v Turkey judgment, in which it pointed out that states have only a limited margin of appreciation in deciding whether the necessity from para. 2 of Art. 11 of the Convention exists.[73] [74]

3.2. Batasuna v Spain

Batasuna was a Basque separatist political party in Spain. In the 1980s and 1990s it regularly received between ten and 20 percent of the vote in regional elections and had deputies in the Parliament of Navarre, the European Parliament and the Spanish Parliament *(Cortes Generales).*[75] In 2002, the Spanish Parliament amended the Act on Political Parties *(Ley Orgainica de Partidos Politicos),*

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people themselves had decided to replace the theocratic regime of the Ottoman dynasty with a secular model of society.

71 The margin of appreciation is a principle used by the ECtHR to determine the extent to which national authorities are allowed to regulate human rights issues within their own countries. It allows for a degree of flexibility in interpreting the Convention and takes into account the cultural, historical and political differences between the countries of the Council of Europe. The ECtHR will generally defer to the judgment of national authorities in such matters, but will intervene if it believes that the national authorities have overstepped the margin of appreciation or violated the Convention.

72 *Refah Partisi and Others v Turkey,* applications nos. 41340/98, 41342/98, 41343/98 and 41344/98 of 13 February 2003, paras. 305, 306.

73 *United Communist Party of Turkey and Others v Turkey,* application no. 133/1996/752/951 of 30 January 1998, para. 46.

74 In the Chamber's judgment, three of the seven judges issued a dissenting opinion, pointing out that the pressing social need required to ban the party did in fact not exist. This would only be the case if Refah Partisi were on the verge of implementing the radical points of its programme. It should be noted that the Grand Chamber avoided taking a clear position on the question of whether Refah Partisi was indeed actually endangering democracy, secularism, the rule of law and fundamental rights in Turkey. See: Akbulu, O., *Criteria Developed by the ECtHR on the Dissolution of Political Parties,* Fordham International Law Journal, *vol.* 34, no. 1, 2010, p. 56.

75 See: *Spanish election results,* http://electionresources.org/es/congress.php?election=1979&community=14 (13 December 2023).

adding a provision that a political party can be declared illegal (and banned) if its activity "endangers democratic principles,"[76] following which it applied to the Supreme Court to ban Batasuna.[77] The Supreme Court unanimously did so in March 2002, with the Spanish Constitutional Court upholding the ban in January 2004.[78]

There have been strong indications that Batasuna was linked to the terrorist organisation ETA,[79] as some party members were themselves its members. Moreover, Batasuna failed to condemn the actions of ETA and even referred to its members as "Basque soldiers." In its judgment, the ECtHR pointed out that the ban of Batasuna was prescribed by law and furthermore pursued legitimate aims, namely the protection of national security and public safety, the rights and freedoms of others and the prevention of disorder.[80] In assessing the existence of a pressing social need for the ban of Batasuna, the ECtHR found that "the exceptions in Article 11 must be interpreted narrowly, as only convincing and compelling reasons can justify a restriction of the freedom of association."[81] Moreover, the ECtHR concluded that national authorities have only a limited margin of appreciation in assessing whether the ban of a political party is necessary in a democratic society.[82] This reasoning is inconsistent with the Refah Partisi judgment, which found that member states have a wide margin of appreciation in deciding whether a political party can be banned.

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[76] Ley Organica de Partidos Politicos [Act on Political Parties], Boletín Oficial del Estado [Spanish Official Gazette], no. 154 de 28/06/2002, art. 9.

[77] The application to the ECtHR was made by both Batasuna and Harri Batasuna (Batasuna's legal predecessor). As both parties are essentially the same legal entity, this paper refers to them with the umbrella term "Batasuna."

[78] For more on the activities of Batasuna and the ban procedure see: Ayres, T., *op. cit.* (fn. 8), pp. 99 – 102.

[79] ETA was a terrorist organisation whose aim was to achieve the independence of the Basque Country from Spain. It was involved in kidnappings, assassinations and bombings on Spanish territory. ETA declared its dissolution in 2018, but only after claiming an estimated 829 lives. See: Ministerio del Interior, *Lista de víctimas mortales*, https://web.archive.org/web/20100915224606/, http://www.mir.es/DGRIS/Terrorismo_de_ETA/ultimas_victimas/p12b-esp.htm (20 November 2023); Binnie, I., *Basque separatist group ETA says it has completely dissolved*, Reuters, 2018, https://www.reuters.com/article/us-spain-eta/basque-group-eta-says-has-completely-dissolved-el-diario-website-idUSKBN1I31TP (10 November 2023).

[80] *Herri Batasuna and Batasuna v Spain*, applications nos. 25803/04 and 25817/04 of 30 June 2009, paras. 62 – 64.

[81] *Ibid.*, para. 77.

[82] *Ibid.* Also see: *United Communist Party of Turkey and Others v Turkey*, application no. 133/1996/752/951 of 30 January 1998, para. 40.

However, the ECtHR followed its reasoning from the Refah Partisi judgment by concluding that a political party may seek to change the constitutional order as long as its actions are not violent and contrary to democratic principles.[83] Moreover, the ECtHR again applied the principle of preventive intervention, obliging member states to take positive measures with the aim of preventing violations of fundamental rights and freedoms and attacks on the democratic structure that might take place in the future.[84] Batasuna was, according to the ECtHR, only a tool in the hands of ETA, with the totality of its actions and the actions and opinions of its members showing that its aim was the destruction of the democratic principles protected by the Spanish Constitution, which was reason enough to justify its ban.

The reason for the Batasuna ban was its association with ETA, its passive support conducted by not condemning ETA's terrorist activities and thereby reinforcing and promoting the effects of ETA's terrorist actions and the fear they generated, thus limiting the possibilities for political pluralism and democracy.[85] An important difference between Refah Partisi and Batasuna lies in the relative political weakness of the latter. While Refah Partisi had the means to significantly influence Turkish political life,[86] this was not the case with Batasuna, whose political influence was limited. Thus, the ECtHR allowed the ban of a political party that had not itself committed any acts of violence and, moreover, was politically incapable of seriously influencing Spanish political life.[87]

3.3. Analysis of the ECtHR's Criteria for the Ban of Political Parties

For the ban of a political party not to constitute a violation of the right to the freedom of assembly and association,[88] it must be prescribed by law, pursue

[83] *Herri Batasuna and Batasuna v Spain*, applications nos. 25803/04 and 25817/04 of 30 June 2009, para. 79.

[84] *Ibid.*, para 82.

[85] Tuerkes-Kilic, S., *Political Party Closures in European Democratic Order: Comparing justifications in the DPT and Batasuna Decisions*, Journal of European Public Policy, *vol.* 23, no. 4, 2015, p. 503.

[86] In other words, implementing the radical points of their political programmes was a realistic possibility.

[87] Significantly, Batasuna was only banned after failing to comply with several requests from the authorities to condemn the actions of ETA, which were undoubtedly terrorist in nature.

[88] In the cases analysed above, the ECtHR ruled only on whether the ban of political parties was a violation of the right to the freedom of assembly and association, but

one of the legitimate aims referred to in para. 2 of Art. 11 of the Convention, and be necessary in a democratic society, which means that there must be a pressing social need for its ban while at the same time the ban must be proportionate. According to the ECtHR, a pressing social need exists if there is a realistic possibility that the political party will realise the radical points of its programme. However, the ECtHR's position on whether member states have a wide margin of appreciation in deciding whether this is the case is unclear. For example, in the Batasuna judgment, it recognised that member states have only a narrow margin of appreciation,[89] which contradicts its position in the Refah Partisi judgment, where it explicitly indicated that the member states' margin of appreciation is wide. What is clear, however, is that there is no pressing social need if the political party in question seeks to change the constitutional order in a peaceful manner. In other words, as long as the political party does not seek to change the existing constitutional order by force, its ban by national authorities would constitute a violation of its (and/or its members') conventional rights, regardless of how radical the political party's programme is. However, this does not mean that the ECtHR considers the ban of a political party to be justified only if it has resorted to actual (physical) violence or has started to implement the radical points of its programme. Neither Refah Partisi nor Batasuna have resorted to physical violence, and neither political party has implemented or even started to implement the radical points of their programmes. Accordingly, the ECtHR interprets the aggressive and combative attitude towards the existing constitutional order broadly, so as to include threats that could realistically be carried out and even passive support for terrorist groups. In my view, therefore, the aggressive and combative attitude can take various forms as long as it constitutes a real threat to the existing constitutional order, taking into account the political party's programme, its actions (and the actions of its members and/or adherents) and its political strength.

4. THE RELATIONSHIP BETWEEN THE BVG'S AND THE ECTHR'S CASE LAW ON THE BAN OF POLITICAL PARTIES

Analysing the criteria required to ban political parties, the arguments used and the time frame in which the individual judgments were handed down, I am

not of other conventional rights. This does not mean that such a ban cannot also constitute a violation of other conventional rights such as the right to the freedom of speech and the right to private property (if the political party's assets are seized).

[89] This was also the position of the ECtHR in United Communist Party of Turkey v Turkey.

of the opinion that the jurisprudence of the BVG and the ECtHR have strongly influenced each other. The BVG rulings in the SRD and KPD cases formed the basis on which the ECtHR developed its criteria for justifying political party bans. This is only natural, as the BVG was the only national constitutional court of a democratic country in Europe to ban a political party before the fall of the Iron Curtain (and after the Second World War).[90] However, the ECtHR has not only adopted the criteria of the BVG, but developed them further, so that the existence of a pressing social need is also required for a justified ban of a political party. The BVG adopted this requirement in its NPD ruling of 2017, naming it potentiality *(potentialität)*.[91] Both the institute of pressing social need and that of potentiality require a reasonable expectation that the political party in question is capable of actually implementing the unconstitutional points of its programme. If this threshold is not reached, a political party cannot be banned, i.e. the authorities cannot restrict the activity of completely marginal political parties.[92] To ban such parties the authorities would have to wait until they have gained at least some political influence. The statements of the BVG and the ECtHR that the ban of a political party is a purely preventive instrument are therefore, in my opinion, not entirely correct, since the political party in question must pose a qualified threat to the existing democratic order through its aggressive and combative actions.[93] However, the ban is preventive in that

[90] Other judgments on the ban of political parties in Council of Europe member states were: the ban of the separatist party Ilinden-Pirin in Bolgaria in 1999, which the ECtHR found to be a violation of Art. 11 of the Convention; the ban of the neo-Nazi Workers' Party (Dělnická strana) in the Czech Republic in 2010; the ban of the Communist Party in Latvia, Lithuania and Estonia in 1991; the ban of the far-right Centre Party 1986 (Centrumpartij '86) in the Netherlands in 1998; the ban of the Basque communist party in 2008 and the ban of the separatist Sortu party in Spain in 2011; and several bans of neo-Nazi, communist and separatist parties in the Russian Federation and Turkey.

[91] As explained above, the criterion of potentiality is fulfilled if the political party in question has the potential to actually implement the radical points of its programme that endanger the German basic democratic order.

[92] Both Refah Partisi and Batasuna, whose ban the ECtHR found justified, had at least some degree of political influence, with Refah Partisi being the largest political party in Turkey and Batasuna holding an albeit small number of seats in various representative bodies. The NPD, on the other hand, was politically powerless, as it had very little support, no significant financial resources, and faced logistical difficulties. Therefore, it was unable to shape or even influence political life and public opinion in Germany.

[93] As mentioned above, this does not mean that the actions of the political party or its members must be physically violent.

it does not require that the radical and unconstitutional points of the party's programme have actually been implemented.

5. CONCLUSION

The BVG was the first court in democratic Europe to ban a political party after the Second World War, thus establishing the basic criteria on which the later jurisprudence of the ECtHR was based. Ahead, in its 2017 NPD ruling, the BVG applied the standards of the ECtHR as developed in the Refah Partisi and Batasuna judgments.

The first political party to be banned by the BVG was the neo-Nazi SRD, whose programme was a copy of the NSDAP programme and whose members were mostly former NSDAP members. Although the SRD was relatively influential in the political life of Germany at the time and thus represented a clear and present danger to the German democratic constitutional order, its ban was justified "merely" on the grounds that its (neo-Nazi) political programme and activities were unconstitutional. Next, the BVG ruled on the ban of the KPD. The mere unconstitutionality of its programme and activities was no longer sufficient for its ban, as the BVG additionally required that the KPD attempted to overthrow the basic democratic order in an aggressive and combative manner. The BVG determined this was the case by stating that it was not possible to establish a socialist political order by peaceful means. Furthermore, the BVG equated opposition to the Adenauer Government with opposition to the basic democratic order as such. The next *in meritum* ruling of the BVG regarding the ban of a political party came more than half a century later, in 2017. The political party in question, the NPD, is a neo-Nazi formation with no significant (if any) influence on political life and public opinion in Germany. The BVG refused to ban it because it found that although it had an unconstitutional programme and also attempted to implement it aggressively and combatively, it lacked the influence, the potential, to pose a realistic threat to the German basic democratic order. In view of the restrictive application of the institute of political party ban, the lack of this potential (the BVG used the term potentiality) is reason enough not to ban a political party. In the present case, this means that the NPD can continue to operate, even if it carries out its programme in an aggressive and combative manner, as long as it is not politically so strong that it could influence political life and public opinion in Germany, i.e. endanger the basic democratic order.

The ECtHR has issued several judgments on the ban of a political party by national authorities of its member states. In two of these cases, Refah Partisi

and Batasuna, it found that the ban by the respective national authorities was justified. Accordingly, it concluded that there was a pressing social need for the ban of both political parties. The pressing social need for banning Refah Partisi arose both from the radical points of its programme, the actions of its members, and from its political power, which enabled it to influence Turkish political life and society. Significantly, however, the party has not yet implemented or even started to implement the radical points of its programme, although it had the capacity to do so. In the case of Batasuna, the pressing social need was based on the party's passive support for ETA's terrorist activities and on its ability to influence political life and public opinion in Spain to a certain, albeit quite small, extent.

In my opinion, the above analysis of the case law of the ECtHR, as well as the ruling of the BVG in the NPD case, lead to the conclusion that a pressing social need (in the words of the BVG: potentiality) does not exist if the political party in question is so politically insignificant that it is not in a position to exert a certain degree of social influence. The institute of the pressing social need on the one hand and that of potentiality on the other are thus two sides of the same coin. In summary, the mere fact that a political party is ideologically extreme is not sufficient to ban it under the currently applicable standards of the ECtHR. Moreover, even if the political party seeks to implement its programme in an aggressive and combative manner, its ban is not justified *per se*. For a ban to be justified, the political party would realistically have to be able to implement its programme, i.e. it would have to be politically strong enough. If this is not the case, a political party cannot be banned, which gives marginal political parties, however ideologically radical and aggressive they may be, *carte blanche* to operate freely as long as they remain below the threshold of political significance. Although at first glance it may seem that such strict criteria for banning a political party would encourage the functioning of radical political parties, this is not the case in my opinion. Historically, the ban of a political party does not mean the end of its activity, but rather relegates it to the political underground, which is even more true in today's information society where a plethora of opportunities to disseminate radical agenda points are only a mouse click away. Moreover, the high-profile legal proceedings related to the ban expose the party in question to media coverage it could not otherwise obtain, thus increasing its influence. In my view, this leads to the conclusion that it is not unlikely that banning a marginal political party would only encourage its activities.

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Sažetak

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ZABRANA POLITIČKIH STRANAKA – ANALIZA KRITERIJA RAZVIJENIH OD STRANE SAVEZNOG USTAVNOG SUDA NJEMAČKE I EUROPSKOG SUDA ZA LJUDSKA PRAVA I NJIHOVA MEĐUSOBNA POVEZANOST

U mnogim modernim demokracijama moguće je zabraniti političke stranke. Bez obzira na to koliko bile ideološki ekstremne, njihova zabrana predstavlja nasilan upad u političku sferu i stoga bi se trebala primjenjivati samo opravdanim slučajevima. Ovaj članak analizira relevantnu sudsku praksu Saveznog ustavnog suda Njemačke i Europskog suda za ljudska prava. Dolazi do zaključka da je pravna praksa tih dvaju sudova usko povezana i da se nadograđuje jedna na drugu. Nadalje, prema današnjim standardima, nije moguće zabraniti političku stranku koja ima neustavan program, čak i ako pokušava provesti svoje ciljeve agresivno i nasilno, sve dok nema stvarnu mogućnost da ga provede, odnosno nema potrebnu političku moć.

Ključne riječi: zabrana političke stranke, Europski sud za ljudska prava, Savezni ustavni sud Njemačke, potencijalnost, hitna društvena potreba

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