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**Banning Parties in Germany:
Lessons from Europe?**

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Zusammenfassung

Vor dem Hintergrund des gescheiterten NPD-Verbotsverfahren untersucht der vorliegende Beitrag die unterstellte „Krise der wehrhaften Demokratie“ in Deutschland. Dabei stellt sich heraus, dass weniger das Paradigma der wehrhaften Demokratie im Ganzen, als speziell die Institution des Parteiverbots auf dem Hintergrund einer „anti-extremistischen“ Konzeption der Verfassung zur Diskussion steht. Diese These wird illustriert anhand der internationalen Rechtsentwicklung sowie der Rechtsprechung des Europäischen Gerichtshof für Menschenrechte. Die Rechtsprechung zum Verbot der türkischen Refah-Partei und die Arbeit der sogenannten „Venedig-Kommission“ des Europarates haben ein differenzierteres Verständnis zum Ausdruck gebracht. In einem weiteren Schritt wird untersucht, inwiefern eine „negativ republikanische“ Konzeption von Parteiverboten, ursprünglich als „Rückwärtssperre“ junger Demokratien gedacht, auch in konsolidierten Demokratien nutzbar gemacht werden kann. Die Umstellung, die dieses Paradigma von der institutionellen Ebene der Gefährdung des demokratischen Staates auf die individuelle Ebene der Gefährdung konkreter Personen vornimmt, scheint seine Anwendung auch auf einen Fall wie den der NPD, von der keine unmittelbare Gefahr für die Reproduktion des politischen Systems ausgeht, zu ermöglichen.

Abstract

The recent failed attempt to have the NPD („Nationaldemokratische Partei Deutschlands“) banned has raised the question whether “militant democracy” in Germany is undergoing a crisis. I argue that it is a particular reading of militant democracy, its “anti-extremist” interpretation, that is being challenged today. This claim is illustrated by contrasting the traditional German understanding with recent developments in international law and the jurisprudence of the European Court of Human Rights. Its verdict on the ban of the Turkish Refah Party and the guidelines published by the European Council’s “Venice Commission” have elaborated a more differentiated picture. Further, I examine the question of whether a “negative republican” conception of party bans, originally developed as a kind of “backward barrier” in nascent democracies, is plausible for consolidated democratic states as well. The answer is that this is plausible only under a revised conception of the harms that result from a party’s activities. Refocussing our attention from organisations’ threats to institutions to threats to concrete individuals lets us see what kinds of harm could be averted by banning parties like the NPD in constellations like ours, without presuming the party could overthrow the democratic system as such.

Inhalt

1. Introduction	1
2. Banning Parties in Germany: The contemporary discussion	2
3. Towards a new paradigm?	10
References	17

1. Introduction

In this working paper, I aim to bring together three strands of argument that have been developed independently of each other for a long time. The first strand concerns the alleged crisis that militant democracy is facing in Germany today, a diagnosis which has been underlined by the debate surrounding the recent failed attempt to have the NPD ("Nationaldemokratische Partei Deutschlands") banned. The second strand concerns efforts at homogenization of national traditions on the prohibition of political parties within the Council of Europe. The third strand concerns a renewed awareness of questions of historical and transitional justice, the continuing legacy of a democratic regime's criminal or unjust predecessor systems.

If we look at the various manifestations of militant democracy, especially bans on associations and assemblies, at first glance the paradigm of militant democracy appears very much alive. However, it is militant democracy's flagship provision, the ban on political parties, which is facing a crisis today. The reason is that in consolidated republics, it is implausible to defend it as a means to averting danger from democratic institutions. Although the traditional German "anti-extremist" understanding of the party ban does not require that such a danger be present in order to justify a party ban, the jurisdiction of the European Court of Human Rights is more restrictive. In the case of the Refah partisi, the Turkish Welfare party, it insisted that a party ban must address a "pressing social need". The pressing social need in banning a theocratic party is then explained with reference to Turkish history, to the overcoming of Islamic theocracy by the Turkish republic.

This leads us to a second paradigm of militant democracy, one that is focussed on the non-restoration of a regime of injustice, a focus which is manifest in many past and present processes of transition to democracy. Such "negative republican" reasoning appears to fit the case of reconstituted National Socialist parties in Germany because it can explain what is worrying about their development. It can also be shown to have roots in German constitutional history. However, it has not been made sufficiently clear how plausible this paradigm is in consolidated democracies, in the absence of existential dangers to democratic institutions. I argue that it is most plausibly understood as countering dangers to equal chances to political participation. I conclude by reviewing whether other pressing tasks of militant democracy could be covered by the "negative republican" successor paradigm.

2. Banning Parties in Germany: The contemporary discussion

When in January and March, 2001, motions for the ban of the National Democratic Party of Germany (NPD) were submitted to the Federal Constitutional Court, some legal observers saw this as an attempt towards a "re-animation of militant democracy" (Groh 2000: 500). In order to undergo re-animation, it appears that a patient would have to be dead. However, if we look at the manifestations of militant democracy in various areas, at first glance this appears to be one of the cases in which reports of a death are greatly exaggerated. I want to mention three areas.

(1) Bans on anti-constitutional associations below the level of parties have regularly and frequently been imposed. Although it would be misleading to give an absolute number for associations banned, as usually targeting one group requires multiple bans, of various aliases and in various regions, a number of substantial, at least high-profile associations, mostly right wing extremist or outright Neo-Nazi, have been banned by Federal and State ministers of the interior in the 1980s and 90s up to the present.¹ There is considerable debate as to the motives and effects of such bans, but a consensus exists that they make organized agitation more complicated for right wing extremists (Jaschke 2000; Schubarth/Stöss 2000).

(2) For some years now, there has existed a lively debate on the law of assembly, provoked by demonstrations and attempts to demonstrate, by far right and Neo-Nazi organisations, on sensitive dates in sensitive areas: on Hitler's birthday, on Holocaust memorial day, before the Brandenburg gate, in the old Jewish quarters, or on the site of the Holocaust Memorial in Berlin. Besides associations, political assemblies are another central concern of militant democracy, as they can be restricted for reasons of non-conformity with the "constitutional order" (Art. 9 *Basic Law*). While most city administrations and some higher courts take a very restrictive view, the Federal Constitutional Court steers a more liberal course.² The Federal

¹ Among the right wing extremist organisations banned (by Federal or State governments) in the 1980s were Wehrsportgruppe Hoffmann, Volksozialistische Bewegung Deutschlands/Partei der Arbeit, Aktionsfront Nationaler Sozialisten, Nationale Sammlung. In the 1990s, the ministries of the Interior banned Wiking-Jugend (1994), Nationale Liste (1995), FAP (Freiheitliche Deutsche Arbeiterpartei, 1995), Kameradschaft "Hamburger Sturm" (1999), Blood and Honour (incl. youth organization White Youth) (12/2000). Another ban on a Neo-Nazi organisation was issued against the Skinheads Sächsische Schweiz (and their supporting "Aufbauorganisation" SSS-AO) in Saxonia on April 5, 2001. Another focus of organization bans concerns extremist associations of non-citizens ("Ausländervereine"), which is less important for our topic as bans can, but usually do not, depend on the justifications of militant democracy.

² Cf. OVG Münster, NJW 2001, 2111ff. vs. BVerfG, NJW 2001, 2076ff.

government was acutely aware of the foreign policy dimension as pictures are being tele-vised abroad.³ It contemplated a change in law that would be backed by the opposition, but has not acted on this. The government commissioned an expert opinion on the constitution-ality of such a change by Dieter Grimm, a former judge at the Constitutional Court,⁴ which was handed in to the Federal Government in 2001, but has not been published.

(3) Finally, a recent change in the law of association has made it possible to impose associa-tion bans on religious communities on the basis of, among others, anti-constitutional activi-ties. The map of the classical militant democracy or "anti-extremist" paradigm has thereby been redrawn to include radical Islamist organizations. The first and most significant case in Germany has been the ban on the Islamist "Califate State", which allegedly aims at "an Is-lamic order on the basis of the Sharia, the final end being the world domination of Islam".⁵ European courts have since as easily adapted to the vocabulary of "jihad" and "sharia" as they used to adapt to the vocabulary of "world revolution" and "dictatorship of the proletar-iat".⁶

In the light of successful bans and lively debates, why would observers think that militant democracy should have to be re-activated? One reason is that its flagship provision, the pro-hibition on anti-constitutional parties, is facing a crisis. In the recent debate on the motions to ban the NPD, some evidence was given that Art. 21 (2) *Basic Law*, is indeed comatose.

(1) Although in the early history of the Federal Republic, two parties had been banned by the Federal Constitutional Court, the provision has not been applied since the ban of the KPD in 1956 (i.e., for more than 50 years). In 1994 the Court rejected two motions because the associations in question, the Neo-Nazi organisations FAP and NL, appeared too insignificant to enjoy the party privilege of a trial for unconstitutionality (Thiel 2003). They were subse-quently banned as anti-constitutional associations, but constitutional lawyers had begun to doubt whether the provision against unconstitutional parties can still be considered good constitutional law.⁷ The problem with this is that the institution of the party ban has defined

³ "The reputation of the state is at stake", said former Secretary of the Interior Otto Schily in an Interview with *Deutsche Richterzeitung* 9, 2001, 371. Cf. the critical comments in Grimm (2001: 181).

⁴ "Verfassungsrechtliche Zulässigkeit einer Änderung des Versammlungsrechts zur Verhinderung von Versamm-lungen, die gegen Grundlagen der menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit gerichtet sind, insbesondere Gewalt- und Willkürherrschaft verherrlichen und verharmlosen".

⁵ BVerwG, decision of 27. 11. 2002, quoting the original decision of the Administrative Court of Dec. 8, 2001.

⁶ See the decision of the European Court of Human Rights on the dissolution of the Turkish Refah Partisi (Welfare Party), discussed below and in Kontopodi (2007: 100-104).

⁷ Hasso Hofmann doubts "whether Art. 21, 2, after a long period of restraint, in spite of manifest challenges, still constitutes valid, i.e. coercive constitutional law", see Hofmann (1986: 258). Likewise Groh (2000); Pestalozza

the tasks of militant democracy from its inception. Other restrictions have followed the interpretation of the constitutional order which the Court had produced in its party trials, and administrative and judicial branches, as well as research on extremism in political science, have tailored their categories to suit (Niesen 2003: 249-286). If the cornerstone of the enterprise collapsed, it might bring the house down.

(2) Secondly, the public perception of the NPD ban motion was marked by a strange dissonance. On the one hand, there was a broad display of consensus between the Executive and the two houses of the Legislative, supported by all parties (Social and Christian Democrats, Greens, Post-Communists), with the exception of the FDP (liberal democrats).⁸ For the first time in the history of the FRG, the Federal government (*Bundesregierung*), *Bundestag* and *Bundesrat*, that is, all constitutional organs entitled to do so, had handed in their own motions to have the party banned. Still, their impressive harmony appeared unconvincing, as it had come about by a quick and surprising change of heart by some of its protagonists (Seils 2002: 44-46). Although a lot of arguments for an eventual ban of the party have been put forward, the sudden change of strategy has not been accounted for publicly.

(3) Most importantly, there was widespread criticism from legal and political observers on the *proportionality* of the ban motion. Even commentators not in principle opposed to militant democracy put forward considerable doubts on the wisdom of such a move against a clearly marginal party that would not amount to a danger to the consolidated democratic institutions of the Federal Republic (Morlok 2001: 2941f.; Grimm 2001: 181). Horst Meier, a leading critic of militant democracy, summarized the problem in a quotation from the *Bundesrat* motion which had argued that "it is irrelevant whether the NPD's activity can realistically hope to succeed at present, or whether a concrete danger exists for the free democratic basic order" (Meier 2002; cf. Groh 2000). If a plausible case of probable harm, of a non-negligible danger to political institutions, need not be made and perhaps cannot be made, then we might ask whether banning parties in Germany is still a question of "Defending Democracy" – at least if the field is understood to be concerned with "survival or breakdown of democracies" (Capoccia 2002: 737).

(1991: 76f.). The conservative pundit Friedrich Karl Fromme (1999) considers the instrument of the party ban "spent".

⁸ The position of the FDP on association and party bans is a topic for a larger piece of research. In the early 1950s, the party initially opted against an SRP ban, but in favor of a KPD ban (Frei 1999: 340-351). In 1997, it campaigned to have the Scientology Church banned, while it opted against a ban on the NPD out of a concern for political liberty in 2001.

As originally conceived by the framers of the constitution, the logic of the party ban provision was simple. It was based on the view, first articulated by Carl Schmitt in his pre-NS writings, that an antidemocratic party, once in power, would "close the door of legality through which it had entered", i.e. abolish a political system in which competition for political power is organized in a pluralist and majoritarian way.⁹ The conception of democracy behind this is that every organisation should have an equal chance of gaining political power, and the main concern is that a party illoyal to the rules of the game might cancel the chances of *future* majorities to gain power and mold society according to their plans. Insofar as the instrument of a party ban contributes to solving this problem, it may indeed be said to do away with the "self-paradoxation" tendencies of the practice of democracy (Morlok 2001: 2932).

Militant democracy was thus invented to protect the seat of lawmaking power from unreliable competitors. However, the view that the party ban was *exclusively* directed against the danger of a hostile takeover of state institutions did not survive the SRP and KPD trials. In the SRP trial, the Court added a catalogue of further elements of the free democratic basic order. It enumerated certain fundamental political tenets or rules, the negation of which could then serve to define the conception of extremism within political science.¹⁰ The KPD trial then went one step further. It established that an "aggressive-combative stance" against such tenets could be persecuted independently of the presence of a credible threat to democratic institutions. As the Court stated in the KPD opinion, it need not be "probable, by human standards, that there be the chance of its realizing its unconstitutional goals in the foreseeable future" (BVerfGE 5: 143). I label this the *anti-extremist paradigm* for banning parties, in that it allows to target associations by their anti-constitutional ideology and activity *before* they resort to violence *or* present a danger for the stability of the democratic system as a whole.

If we look at the recent motions against the NPD, it is obvious that they, even more so than those against the KPD, had to depend on this understanding. Although the NPD has since won seats in two State parliaments, it has reached only between 0.3 and 1.6 % of the vote in the three most recent federal elections (Meier 2003: 491). No participant to the debate considers the Federal Republic a democracy in transition or a "difficult" democracy, on the contrary. The view that we live under "conditions of constitutional democracy solidly entrenched in the mind of the general public" is a premise that the party ban motions agreed

⁹ Schmitt (1993: 33f.). See the impressive parallel reading of the Constitutional Court's KPD opinion and Schmitt's *Legalität und Legitimität* in Meier (1999: 87).

upon (Frankenberg/Löwer 2001: 36). Empirical assessments gravitate towards the understanding that right wing extremist associations will remain a permanent, but clearly marginal feature of the Federal Republic (Schubarth/Stöss 2000). This does not entail that in the Federal Republic today, there exist no serious problems with neo-Nazi violence, attacks on foreigners, or hate propaganda. But those appear not to be the problems that militancy against parties was designed to solve at the outset. The diagnosis shared by many observers is therefore that today, "a party ban is an instrument against a type of danger the Federal Republic is currently not exposed to" (Preuß 2002: 111). If the danger to be averted was the takeover of state institutions, this would seem implausible in the case of the NPD. If directed at a marginal party in a consolidated democracy, the anti-extremist paradigm displays a form of preemptive logic, draped in a rhetoric of self-defense.

Another way to bring out the tensions in this paradigm is to reflect on it from an international level. It has often been pointed out in anecdotal ways, though rarely systematically, that international politics influences the way in which states go about defending democracy. One can be "realist" about such influences, as when it is suggested that bans against right wing extremists serve the function of securing the reputation of the Federal Republic with a view to foreign capital investors.¹¹ However, I believe that the crucial dimension of the border-crossing aspects of provisions for the defense of democracy lies in international legal orders, for example the Human Rights regimes of the UN and the Council of Europe.

Three approaches have been developed so far.

(1) Gregory Fox and Georg Nolte have prepared the way towards a globalisation of the project they call "Intolerant Democracy" by insisting on two factors: a) that there is a near-universal "rough consensus at a general level on the need for some form of self-protection" of democratic societies, and b) that international human rights obligations make it possible and even necessary that provisions against enemies of democracy can be enforced everywhere.¹² Fox and Nolte's diet of examples draws heavily on collapsing near-democracies or would-be democracies like Algeria or Mozambique.

¹⁰ BVerfGE 2: 12f.. I elaborate on this in Niesen (2003). See Backes and Jesse (2000: 14f.), and Backes (1989).

¹¹ Jaschke (2000). Dieter Grimm (2001: 181) suggests that making a favorable impression abroad was one of the main motives behind the NPD ban motion.

¹² Fox & Nolte (1995: 37, 64). An abbreviated, more moderate version is to be found in Fox and Roth (eds.) (2000: 389-435), Cf. Fox (1992: 48-90), Koskenniemi (2000: 436-440), Roth (2000: 441-444), Fox & Nolte (2000). Other, more traditional comparative studies come to the opposite conclusion: that it is still the German version of militant democracy which is anomalous. See Morlok (2001: 2932f.).

(2) The European Commission for Democracy through Law or "Venice Commission", an expert panel instated by the Council of Europe, appears to be pursuing the opposite agenda. One of its recent "Guidelines on prohibition and dissolution of political parties and analogous measures" reads: "No State can impose limitations [on political parties] based only on its internal legislation, ignoring its international obligations. This rule should be applied in normal times as well as in cases of public emergencies."¹³ Their diet of examples sparks the opposite intuitions. The Commission has encountered authoritarian party prohibitions in transition processes, to name just one: the suspension of the Christian Democratic Party in Moldova for staging an assembly at which slogans like "Better dead than Communist" were chanted.¹⁴ The Venice Commission accordingly takes a more skeptical line on party bans. The guidelines make it clear that such bans "shall be deemed as of an exceptional nature and governed by the principle of proportionality" (Guideline 6).

(3) Finally, the activist jurisdiction of the European Court of Human Rights can perhaps best be characterized as steering a middle course. The jurisdiction of the European Court of Human Rights on party bans has always displayed a commitment to militant democracy.¹⁵ In its 2001 decision on the Turkish Refah Partisi (confirmed by the Grand Chamber on Feb 13, 2003), the Court repeats its conviction that "a political party may campaign for a change in the law or the legal and constitutional basis of the State ... [on the condition that] the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders ... propose a policy which does not comply with one or more of the rules of democracy or is aimed at the destruction of democracy and infringement of the rights and freedoms afforded under democracy cannot lay claim to the protection of the Convention against penalties imposed for those reasons".¹⁶ This militancy the Court reads out of provision 17 of the European Convention on Human Rights which confirms that "abuse of rights" is not protected under the Convention (Frowein 2003).

¹³ Guideline 7, adopted Venice, December 10/11, 1999. Accessed at [http://venice.coe.int/docs/2000/CDL-INF\(2000\)001-e.html](http://venice.coe.int/docs/2000/CDL-INF(2000)001-e.html) on April 6, 2003.

¹⁴ "Notes sur la suspension des activités du Parti Populaire démocrate et chrétien par le ministre de la justice de Moldova", CDL (2002) 51, Venice Commission, April 18, 2002.

¹⁵ See Eiffler 2003. I focus on the Council of Europe and ignore European Union policies, since the EU institutions, its courts and nascent constitution, have so far steered clear of questions of militant democracy.

¹⁶ No. 47, Case of Refah Parisi and Others v. Turkey, Strasbourg 31 July, 2001. Accessed June 30, 2003, at <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=623105747>. This claim is probably inconsistent with the claim by the Venice Commission, in its Guidelines, that a "prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution." (Guideline 3, emphasis PN). An exclusive focus on advocacy of

Still, the Convention on Human Rights contains a human right to political association in Art. 11. In order to secure it against facile abrogation, it requires a restriction to be "necessary in a democratic society", thereby demonstrating, in the words of the Court, "a pressing social need".¹⁷ To establish whether the ban on the Refah party did indeed answer to a pressing social need, the Court makes an interesting move. It enters a discussion of Turkish history, because it agrees that the threat emanating from the Refah party needs to be evaluated before the background "of the history of Turkish law". The Turkish Constitutional Court had pointed out that "Turkish society had undergone the experience of a theocratic political regime during the Ottoman Empire and that it had founded the secular republican regime in Turkey by putting an end to theocracy." The European Court concludes from this "that the establishment of a theocratic regime" - which it considers to be a main aim of Refah - "is not completely inconceivable in Turkey, account being taken, firstly, of its relatively recent history and, secondly, of the fact that the great majority of its population are Muslims." (No. 28f.) The Court further agrees "that Refah's political aims were neither theoretical nor illusory, but achievable, for two reasons." First, Refah had nearly a third of the seats in the Turkish parliament, and secondly, "in the past political movements based on religious fundamentalism have been able to seize political power and have had the opportunity to set up the societal model which they advocated. (...) The Court therefore considers that the real chance Refah had to implement its political plans undeniably made the danger of those plans for public order more tangible and more immediate."¹⁸

In the second part of my paper, I want to draw on analogies and disanalogies of the Court's opinion with the debate on the NPD in Germany. In order to compare the two cases, let me assume what I will argue for only later, namely that the problem of the NPD ban was perceived on the background of Germany's National Socialist past. The Court suggests that the historically specific situation of Turkey contributes to an understanding of the legitimacy of a ban on the Refah party, because the Turkish Republic is the successor to a theocratic predecessor regime. In an earlier period, discussions of party bans in Germany had likewise fo-

violence will not allow to target a party which, though illoyal to the democratic system, is steering a course of "tactical legality". The latter possibility, of course, is the defining criterion of militant democracy.

¹⁷ No. 65ff. The formula "necessary in a democratic society" is from Article 11, 2 of the European Convention on Human Rights which "restricts restrictions" on the rights of assembly and associations. Cf. also Article 22, 2 of the UN Political Covenant, on freedom of association, which contains a similar clause. "Necessary" in this context is glossed by the Court as implying the existence of a "pressing social need" (No. 53).

¹⁸ No. 77. The dissenting opinion explicitly joins in this part of the reasoning (p. 43). Eiffler (2003: 223) claims that the relation between the intensity of the application of the party ban and the degree of danger for the democratic society in question is of little importance in the Court's argumentation. The above quotations point into the opposite direction.

cused on the Federal Republic being a successor to the National Socialist regime, and the party ban functioning as a kind of "backward barrier" (Preuß 1973: 163f.; Leggewie/Meier 1995: 317f.; Frankenberg/Löwer 2001: 86). The avoidance of a relapse into Nazism in Germany, and into theocracy in Turkey, plays a role in the plausibility of the respective provisions on party bans. But this is where the analogy comes to an end. There is really no comparison between Refah and NPD in terms of their mass basis and electoral success. It is precisely the anticipation of the NPD's lack of success in implementing its political plans that makes its trial for unconstitutionality questionable. It would therefore be implausible to claim, as the Court does for Islamism, that the fact that National Socialism was the dominant and governing ideology in Germany makes its contemporary resurgence more likely, and therefore makes a ban of a Neo-National Socialist party more pressing than elsewhere. If it construed "pressing social need" along the lines of the Refah case, the European Court of Human Rights could not have made a *parallel* argument to show that a ban on the NPD was necessary in a democratic society. It therefore appears doubtful whether the European Court of Human Rights, on the basis of its understanding of a militant democracy committed to a notion of proportionality would have upheld a ban on the NPD by the Federal Constitutional Court.

3. Towards a new paradigm?

Or could there be another "pressing social need" addressed by a contemporary party ban? In order to discuss this question, I first want to follow the Court's suggestion that party ban provisions have to be understood and evaluated in the light of a nation's history. If predecessor regimes and their overcoming play a central role in arguments about party bans in successor democracies, we should focus on the function of party bans as a means of a democratic society relating to its own past. Of course, this is a more obvious focus in transitional or "difficult" periods, but in order to address the question whether such relations hold also in consolidated periods, we will need some background.

There is a rich tradition of role models for this idea, as similar institutes of party prohibition have long been established in Austria (where the renewed activity of a National Socialist party is prohibited) and Italy (where the reconstitution of the National Fascist Party, PNF, is banned).¹⁹ The Portuguese constitution begins with the claim that the Republic resulted from overthrowing the fascist regime and provides that "organizations which adopt fascist ideology" are not permitted.²⁰ In contrast to the abstract anti-extremist understanding of a party ban, those legal cultures ban the reconstitution of specific, historically-defined national socialist or fascist associations. One other, more recent and complex model is Poland, which is unique in banning Communist *and* National Socialist associations, combined with a provision banning the denial of Communist or National Socialist crimes, thereby basing its militancy on a twofold history under regimes of injustice. Unlike the Austrian and Italian provision, the Polish party ban was not an ad-hoc regulation drawn up in the midst of a transition process, but has been implemented at a relatively late stage in the process of its democratic consolidation.²¹

¹⁹ Compare the Austrian "Verbotsgesetz" of 1947 with Art. XII, Transitory and Final Dispositions of the 1948 Italian Constitution.

²⁰ Constitution of 1976, Preamble and Art. 46, 4.

²¹ Article 13, Constitution of 1997. The law against the denial of Communist and National Socialist atrocities is included in the 1998 Law establishing the Institute for National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation.

I suggest understanding party bans that arise out of a concrete historical negation as "negative republican" instruments. "Negative Republicanism" allows us to tap two bodies of literature which have not been extensively consulted by researchers on the defense of democracy. The first is that of studies on transition to democracy (1). The other is the genre on transitional justice and *Vergangenheitspolitik* (2). Let me give one example for each.

(1) The appeal of democracy in processes of transition, Claus Offe (2000: 3) has suggested, stems first and foremost from its utility as a means "to rid societies of unjust and oppressive forms of political rule." Stability for such societies result from their effective demarcation from past regimes. Thus, regimes have to draw up "an antithetical relationship toward the old 'bad' regime with its perpetrators, victims and resistance fighters, its atrocities and failures, and to entrench this antithesis in the collective consciousness of the population", so that people "know about the kind of setbacks to beware of and about the better principles to be held up" (Offe 2000: 5). This backward-looking demarcation appears all the more important as there is very little *contemporary* competition between systems. After the end of the Cold War, "'counter-realities' seem to be in the process of fading away".²² The delimitation from a past regime of injustice then seems to provide an uncontroversial and vivid option for a society's self-understanding. Along those lines, we can include the unilinear party ban provisions of Austria, Italy and Portugal, and the bilinear provision of Poland, among the attempts of young democracies to define their republican project by the explicit rejection of their criminal predecessor regime.

(2) In contrast to other studies on transitional justice, Norbert Frei's *Vergangenheitspolitik. The beginnings of the Federal Republic and the National Socialist past*, is not exclusively focussed on questions of criminal justice and restitution, nor on questions of coping with the past (*Vergangenheitsbewältigung*) (Smith/Margalit 1997; Offe 1994; Barahona de Brito 2001). Criminal justice and restitution both have individualizing goals. They aim to ascribe guilt or correct wrongs for perpetrators and victims. *Vergangenheitsbewältigung*, on the other hand, aims at a non-defective psychological state. *Vergangenheitspolitik* in Frei's sense refers to all legislation concerned with the National Socialist past.²³ It covers policies directed towards amnesty or apology, towards instilling a sense of moral progress, towards fulfilling obligations of responsibility or liability, or attempts at identity-formation. It contains collective measures to insure that the past order - "the old Nazi adventure", in the words of John

²² Offe (2000: 5). Note the possible exception of political Islam.

McCloy, the American High Commissioner, in the SRP debates - cannot be restored. Frei's discussion of the SRP ban is, to my knowledge, the only attempt to relate a party ban to such concerns. A similarly thick description of *vergangenheits*-political features of the NPD trial would be desirable, although I will not be able to offer more than a brief sketch in this paper.

Let me come back to the three questions concerning the NPD ban motion and militant democracy, though in a different order. 1. The first question is: Why did the authorities go forward with a motion to ban the NPD, all of a sudden, in 2001? 2. The second question is: Is the party ban provision still valid constitutional law? 3. And finally, and most importantly: what kind of danger is it meant to avert?

(1) Since its inception in 1964, by the lights of the Bureaus for the Protection of the Constitution (Verfassungsschutz) and of political scientists committed to research into "extremism", the NPD had probably always satisfied the criteria of anti-constitutionality, but had never faced a ban motion (Thiel 2003; cf. Bracher 2002: 150). One intriguing suggestion that I will not pursue here is that the main development in the 1990s lies in the party's shift towards promoting a socialist economy (Pfahl-Traughber 2002: 36f.), so that its anti-capitalist positioning, and the success this positioning had in East Germany, may have been a factor in the increased intensity of its persecution. This would be in line with an earlier anti-communist orientation of the party ban provision in German constitutional history. Already in the trial of the SRP the anti-capitalist orientation of the party had played a role in the persecution of right wing extremism.²⁴

The likely explanation in the case of the NPD lies in the view that the party had undergone a radicalization process from a traditional extreme nationalist towards a National Socialist orientation. In the 1990s, NPD manifestations had regularly included speeches by prominent Neo-Nazis and Holocaust revisionists. Some leading NPD-figures had been sentenced for denial of the Holocaust.²⁵ Perhaps the most important factor in this development were the frequent bans on Neo-Nazi organisations in the 1980s and 1990s, especially between 1992 and

²³ Frei (1999: 13f.). However, the term cannot be defined to refer exclusively to "anti-national socialist legislation" if Frei means to include amnesty, integration and apology among its central tenets.

²⁴ Frei (1999: 333f.). In the preparatory stages of the SRP party ban motion, the Adenauer government put some emphasis on the SRP's idiosyncratic "socialist" component and alleged connections with the ruling Socialist Party in East Germany.

²⁵ Including leading functionaries like Günter Deckert (who had presented Fred Leuchter and David Irving to NPD-assemblies, AG Weinheim, 21.6.1995), and Manfred Roeder (AG Grevesmühlen, cf. Tagesspiegel, 3.12.99).

1996,²⁶ which led many leading Neo-Nazi activists to join or collaborate with the NPD, which in turn kept the party open to skinhead and Neo-Nazi networks.²⁷ The youth organization JN, which was also included in the ban motion, played a central role in this transformation. In short, the NPD could be understood as having shifted, from a diffuse neo-nationalist outlook, towards a national socialist strategy. Although some proponents of the ban motion have used this argument in its public defense (Wiefelspütz 2000), it is easy to see that putting more weight on this strategy would have damaged the prevailing anti-extremist understanding of the party ban. Under the older paradigm, a party need not shift towards an NS strategy in order to qualify for a trial for unconstitutionality.

(2) Insofar as an NPD ban motion was not targeting an unspecific right wing extremist, but a National Socialist organization, this opened up a different perspective on the question of whether the party ban is still valid constitutional law. In their motion authorized by the *Bundestag*, Günter Frankenberg and Wolfgang Löwer refer to a less well-known source in arguing for the unconstitutional character of the NPD. In the 1952 SRP trial, the court had introduced the concept of an "essential affinity" ("*Wesensverwandtschaft*") to the National Socialist party, NSDAP (BVerfGE 2: 70). The Court states that without a doubt the NSDAP is the paradigm for a party unconstitutional according to Art. 21 (2), and that therefore any party relevantly - "essentially" - like the NSDAP must be presumed to be unconstitutional under the Basic Law.²⁸ Since the SRP judgement, the "essential affinity" criterion has frequently been invoked in the review of organization bans by the courts for administrative law.²⁹ In the bulk of their argument, Frankenberg and Löwer dissected the NPD for affinities to the NSDAP as regards its political programme, its strategic and tactical mode of operation, its rhetoric and political language, and, finally, its explicit references to National Socialism (e.g. the apology of NS crimes). The central feature was seen in the political programme itself, which is argued to contain, among other features, ethnic collectivism, social darwinism and biological

²⁶ This explanation has been given for instance by the Federal Ministry of the Interior in a dossier on the unconstitutionality of the NPD (cf. Busch 2002: 59).

²⁷ Pfahl-Traughber (2002: 32f.) characterizes this as the "most remarkable development inside the (NPD) organization" in the second half of the 1990s. According to the Federal government, 12 Neo-Nazis who had been activists in banned organisations have assumed positions on Federal or State boards of the party (see Meier 2002: 25).

²⁸ "There is no doubt that the former NSDAP, in a retrospective grasp of its development, would, as a currently existing party, be unconstitutional according to Art. 21 (2); as it is the experiences with this party which gave rise to the establishment of Art. 21.2" (BverfGE 2: 70).

²⁹ For example, the Administrative Court for the State of Hamburg threw out the complaint by the NL ("Nationale Liste") because "the association is essentially affine to National Socialism in its program, worldview and style." Cf. BVerwG NJW 1995, 2505 ff.; NVwZ 1997, 66 ff.; NVwZ-RR 2000, 70 ff. See also BVerwGE 61, 194 (197) and Frankenberg/Löwer (2001: 98).

cal racism, and various motives and dimensions of racist, economic and political anti-Semitic libel.

The remaining question is whether *Vergangenheitspolitik* in consolidated, non-transitional periods can give a more plausible basis to a party ban than its competitor paradigm. It is the same question as the one we asked earlier: what kind of danger is it that anti-constitutional parties pose in consolidated democracies? What is the pressing social need addressed by a party ban? In transitional periods, where party bans serve as "backward barriers" which effectively block a resurgence of regimes of injustice, such bans appear well-grounded. However, this justification does not translate to consolidated republics. Of course, because such a relapse would be a very great evil, one could argue that its very slight probability would still amount to a great danger.³⁰ This, however, is not our usual way of calculating risks in politics (see Luhmann 1993: 141ff.), so we ought to rule out this argument on epistemological grounds.

It would be a mistake, however, to take this to entail that NS-affine organisations can present no serious danger in the Federal Republic. But the harms likely to be caused by a National Socialist party in its political activity itself, aside from the possibility of a destabilization of the democratic system, let alone a victorious election or putsch, are frequently neglected. Here, I want to focus on harms to individuals.³¹ Political parties like the NPD serve as logistical, financial, organizational and legal bases for a variety of activities, for dissemination of propaganda, for demonstrations, etc. It has been argued that in areas where the party's supporters have achieved a hegemonic position within the political culture, they have been able to create "a climate of fear".³² The clearest exemplification of this is perhaps the case of assemblies. Among the characteristic features of demonstrations of NS-affine organisations is the display of their capacity for organized violence (Rühl 1995: 564), with its calculated threats against clearly defined groups. Such intimidation is obviously intended in the display of weapons, but also of uniforms and National Socialist insignia like swastikas.³³ This lets us draw a contrasting line to the activities of other groups that an audience might disagree

³⁰ See an argument along those lines in Frankenberg/Löwer (2001: 72).

³¹ Another category of direct harms emanating from NS successor parties would be that of harms to the symbolic integrity of the republic. There are significant liberal objections to considering such harms even in principle, but I cannot pursue the matter here. For an illuminating related discussion of the symbolic functions of hate speech law see Post (1994).

³² Cem Özdemir MdB (Green Party), in the parliamentary debate on the NPD ban motion of Dec. 8, 2000, quoted in Frankenberg/Löwer (2001: 73).

³³ In the German Penal Code, the display of Nazi symbols is outlawed by a concrete reference to National Socialism in the text of StGB 86a (1). One advantage of the negative republican paradigm is that it seems to make constitutional sense of this provision.

with: the difference ought to be thought of as one of intensity, as openly National Socialist activity in Germany is apt to call up a history of traumatization that historically unrelated threats might not evoke. The point is that intimidation best succeeds on the background of past experience of violence (Rühl 1995: 564). At this juncture, the contextual specificity of the category of "a pressing social need" which the European Court of Human Rights had insisted upon, can be reintroduced into our argument. While there may be dissent as to what exactly a historically induced special sensitivity entails, there can be little doubt that the reactions on organized Neo-Nazi activity not only of survivors of the Holocaust, but of all members of groups targeted by National Socialist persecution, are entitled to special consideration.

There is no consensus on how best to describe violations of the interests of individuals through threats, intimidation and aggressively displayed preparedness to violence. One possibility is to refer to violations of dignity, honour, or respect. Others attempt to capture such phenomena as human rights violations (Frankenberg/Löwer 2001: 74f.; Nolte/Fox 1995: 60). A more narrow view is that intimidation by a display of power and resources could make the bystanders unfree in the process of the formation of their political preferences (Pace 1988: 365), or hinder the expression of their political preferences. Insofar as NS-affine parties exert a hegemonic influence, one central harm addressed by a "negative republican" party ban seems to be the politically chilling or even silencing effect the activities of the party may have. Where people withdraw from public political activity out of fear of pressure and sanctions, a democratic basic order, whatever else this notion entails, cannot be said to be comprehensively upheld. If we look at the harms and dangers emanating from a party like the NPD in this way, it allows us to conceive of party bans as a means to "defending democracy", but under a richer, and possibly more controversial understanding of what democracy entails. It would have to include the claim that, for an order to be fully democratic, everybody would have to be able to speak out and participate in political activity without fear. The legitimacy of restricting the political activity of NS-affine organisations then would follow from the fact that such activity does not allow everybody's enjoyment of equal political liberty.

Finally, let me come back to the other main issues of militant democracy today, the issues surrounding that of the party ban which I listed above. How does the "negative republican" paradigm perform in regard to contemporary challenges?

(1) First, it seems that it gives clear directions to the Bureaus for the Protection of the Constitution, although more narrowly circumscribed than before. Insofar as their work has cen-

tered on supervision and control of Neo-Nazi organisations and parties in recent decades, their focus would not have to be redirected.

(2) Secondly, as to the feasibility of organization bans, there would be few differences in output under the new paradigm. As I have mentioned above, most bans on extremist organizations on anti-constitutional grounds in the past decades have also been based on the criterion of an essential affinity with National Socialism.

(3) Thirdly, I have mentioned the debate on place- and time-restrictions on Neo-Nazi demonstrations and assemblies. This is usually being discussed as the question of "how the reunified republic ought to cope with the shadows of its past" (Battis/Grigoleit 2001: 121; Brüning 2001). The frame of interpretation is already that of a negative republicanism, it is just not clear what this entails. In my view, the advantage of the new paradigm is that it helps to a clearer understanding of when and why NS-affine manifestations are problematic, in the absence of any probability of damaging our democratic institutions: insofar as they induce a "climate of fear" and traumatize members of the groups targetted by the NS regime in a way that their public political participation appears restricted.

(4) Briefly, what about Islamist fundamentalist organisations of a clearly extremist orientation? It must be admitted that in contrast to the older, anti-extremist understanding of the party ban, the new paradigm is not an all-purpose weapon easily adaptable to new challenges. The older, anti-extremist paradigm had been able to adapt to such challenges, as we saw in the case of the "Califate State". However, on the basis of the new law of association, which allowed to apply militant democracy to religious associations, anti-constitutionality is just one reason for an association ban. The others are offences against the criminal law or against the idea of an understanding or reconciliation between peoples (*Völkerverständigung*). In the case of the Califate State, both of these reasons figure prominently in the Court's opinion, so it may be inferred that the Califate State could have been banned without relying on the justifications of militant democracy.³⁴ In such cases, which are clearly not covered by the new understanding of party and association bans within militant democracy, often alternative justifications are at hand.

³⁴ In the case of the Al-Aqsa organization, which had collected donations for the Palestinian organization Hamas, the administration did exactly that: it banned the group on the grounds of obstruction of reconciliation between peoples. For criticism of the ban by the Association of Democratic Jurists, VDJ, see tageszeitung (taz) of August 6, 2002.

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