**Headnotes**

**to the Judgment of the Second Senate of 17 January 2017**

- 2 BvB 1/13 -

**1. The prohibition of a political party under Art. 21(2) of the Basic Law (*Grundgesetz* - GG) is the sharpest weapon, albeit a double-edged one, a democratic state under the rule of law has against an organised enemy. Its aim is to counter risks emanating from the existence of a political party with a fundamentally anti-constitutional tendency and from the typical ways in which it can exercise influence as an association.**

**2. The requirement that political parties be free from interference by the state (*Gebot der Staatsfreiheit*) and the principle of a fair trial are indispensable when it comes to carrying out proceedings for the prohibition of a political party.**

**a) The use of police informants and undercover investigators at the executive level of a political party during ongoing proceedings to prohibit the political party is incompatible with the requirement that there be no informants at the party's executive level.**

**b) The same applies to the extent that an application for the prohibition of a political party is essentially supported by materials and facts that informants or undercover investigators have played a crucial role in authoring.**

**c) Under the principle of a fair trial, observation of a political party may not serve the objective of spying out the party's procedural strategy; thus obtained information relating to the party's procedural strategy may not be used during the proceedings in a way which is detrimental to the political party's defence.**

**d) An obstacle resulting in discontinuation of proceedings is the *ultima ratio* of possible legal consequences of violations of the Constitution. In order to establish whether there is an irremediable procedural obstacle to proceedings for the prohibition of a political party, procedural requirements under the rule of law, on the one hand, need to be balanced against the preventive purpose of these proceedings, on the other hand.**

**3. The concept of the free democratic basic order within the meaning of Art. 21(2) GG only covers those central fundamental principles which are absolutely indispensable for the free constitutional state.**

**a) The free democratic basic order is rooted primarily in human dignity (Art. 1(1) GG). The guarantee of human dignity covers in particular the safeguarding of personal individuality, identity and integrity and elementary equality before the law.**

**b) Furthermore, the principle of democracy is a constitutive element of the free democratic basic order. The possibility of equal participation by all citizens in the process of forming the political will as well as accountability to the people for the exercise of state authority (Art. 20(1) and (2) GG) are indispensable for a democratic system.**

**c) Finally, the concept of the free democratic basic order is further determined by the principle that organs of the state be bound by the law (Art. 20(3) GG) - a principle which is rooted in the principle of the rule of law, and by independent courts' oversight in that regard. At the same time, protection of the freedom of individuals requires that the use of physical force is reserved for the organs of the state which are bound by the law and subject to judicial oversight.**

**4. The concept of "abolishing" (*beseitigen*) the free democratic basic order describes the abolishment of at least one of the constituent elements of the free democratic basic order or its replacement with another constitutional order or another system of government. The criterion "undermining" can be assumed to be met once a political party, according to its political concept, noticeably threatens the free democratic basic order with sufficient intensity.**

**5. The fact that a political party is seeking to abolish or undermine the free democratic basic order must be clear from its aims or from the behaviour of its adherents.**

**a) The aims of a political party are the embodiment of what a party intends to achieve politically.**

**b) Adherents in this sense are all persons who support a party's cause and profess their commitment to the party, even if they are not members of the political party.**

**c) Activities of a political party's organs, specifically the party's executive committee and its leading functionaries, can generally be attributed to the political party. Statements or actions by ordinary members can only be attributed to the political party if they are undertaken in a political context and the political party has approved or condoned them. In the case of adherents who are not members of the political party, influence or approval, in whatever form, of their behaviour by the political party is generally a necessary condition for attributing such behaviour to the party. There can be no blanket attribution of criminal offences and acts of violence if there is no specific link for such an attribution. No differing assessment may be inferred from the principle of indemnity.**

**6. In order to prohibit a political party, it is not sufficient that its aims are directed against the free democratic basic order. Instead, the party must "seek" to undermine or abolish the free democratic basic order.**

**a) The notion of "seeking" requires active behaviour in that respect. The prohibition of a political party does not constitute a prohibition of views or ideology. In order to prohibit a political party, it is necessary that a party's actions amount to a fight against the free democratic basic order.**

**b) It requires systematic action of the political party that amounts to a qualified preparation for undermining or abolishing the free democratic basic order or aims at endangering the existence of the Federal Republic of Germany.**

**c) It is not necessary that this results in a specific risk to the goods protected under Art. 21(2) GG. Yet it requires specific and weighty indications which suggest that it is at least possible that the political party's actions directed against the free democratic basic order of the Federal Republic of Germany or against its existence could be successful.**

**d) The use of force is in itself a weighty indication justifying the assumption that action against the goods protected under Art. 21(2) GG is successful. The same applies if a political party creates, in regionally restricted areas, an "atmosphere of fear" which is likely to undermine in the long term the free and equal participation of all in the process of forming the political will.**

**7. Art. 21(2) GG leaves no room for assuming that there are other (unwritten) criteria.**

**a) A party's similarity in nature to National Socialism alone does not justify prohibiting it. A party's similarity in nature to National Socialism does, however, provide an indication that this political party is pursuing anti-constitutional aims.**

**b) A separate application of the principle of proportionality is not required.**

**8. The mentioned requirements which need to be met to establish that a political party is unconstitutional are fully compatible with the requirements for a prohibition of political parties that the European Court of Human Rights has derived from the European Convention on Human Rights (ECHR).**

**9. Measured against these standards, the application for prohibition is unfounded:**

**a) The respondent seeks, by reason of its aims and the behaviour of its adherents, to abolish the free democratic basic order. The respondent intends to replace the existing constitutional system with an authoritarian national state that adheres to the idea of an ethnically defined "people's community" (*Volksgemeinschaft*). This political concept disregards the human dignity of all those who do not belong to its ethnically-defined *Volksgemeinschaft* and is thus incompatible with the principle of democracy as set out in the Basic Law.**

**b) The respondent advocates aims which are directed against the free democratic basic order and systematically acts towards achieving those aims in a qualified manner.**

**c) However, there are no specific and weighty indications suggesting even at least the possibility that these endeavours might be successful.**

FEDERAL CONSTITUTIONAL COURT

- 2 BvB 1/13 -

Pronounced
on 17 January 2017
Fischböck
*Amtsinspektorin*
as Registrar
of the Court Registry

**IN THE NAME OF THE PEOPLE**

**In the proceedings
on the applications**

to declare that

1. The National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands* – NPD) including its sub-organisations the Young National Democrats (*Junge Nationaldemokraten* – JN), the National Women's Ring (*Ring Nationaler Frauen* – RNF) and Municipal Political Union (*Kommunalpolitische Vereinigung* – KPV) is unconstitutional.

2. The National Democratic Party of Germany including its sub-organisations the Young National Democrats, the National Women's Ring and Municipal Political Union is dissolved.

3. It is prohibited to create substitute organisations for the National Democratic Party of Germany including its sub-organisations the Young National Democrats, the National Women's Ring and Municipal Political Union or to continue existing organisations as substitute organisations.

4. The assets of the National Democratic Party of Germany including its sub-organisations the Young National Democrats, the National Women's Ring and Municipal Political Union are confiscated for the benefit of the Federal Republic of Germany for charitable purposes.

Applicant: *Bundesrat*,
represented by the President of the *Bundesrat*,
Leipziger Straße 3-4, 10117 Berlin,

- authorised representatives:

1. Prof. Dr. Christoph Möllers,
c/o Bundesrat, Leipziger Straße 3-4, 10117 Berlin,

2. Prof. Dr. Christian Waldhoff,
c/o Bundesrat, Leipziger Straße 3-4, 10117 Berlin,

3. Rechtsanwalt Prof. Dr. Alexander Ignor,
c/o Bundesrat, Leipziger Straße 3-4, 10117 Berlin –

Respondent: National Democratic Party of Germany (NPD),
represented by its Federal Chairman Frank Franz,
Seelenbinderstraße 42, 12555 Berlin,

- authorised representatives:

1. Rechtsanwalt Peter Richter, LL.M.,
Birkenstraße 5, 66121 Saarbrücken,

2. Rechtsanwalt Michael Andrejewski,
Pasewalker Straße 36, 17389 Hansestadt Anklam -

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski

held on the basis of the oral hearing of 1, 2 and 3 March 2016

**Judgment**

**1. The application of the respondent to discontinue the proceedings due to the existence of irremediable procedural obstacles, or, alternatively, to suspend the proceedings until the Committee of Inquiry established by the German *Bundestag* on 20 March 2014 to investigate the NSA wiretapping affair has submitted its report, is rejected.**

**2. The applications of the applicant are rejected as unfounded.**

**3. The application of the respondent for reimbursement of its necessary expenses is rejected.**

**R e a s o n s :**

**A.**

The subject of the proceedings is the application by the *Bundesrat* to establish the unconstitutionality of the National Democratic Party of Germany (NPD) and to dissolve it pursuant to Art. 21(2) of the Basic Law (*Grundgesetz* – GG), Art. 93(1) no. 5 GG, § 13 no. 2 and §§ 43 et seq. of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). 1

[*Excerpt from press release no. 4/2017 of 17January 2017*]

The National Democratic Party of Germany (NPD) advocates a concept aimed at abolishing the existing free democratic basic order. The NPD intends to replace the existing constitutional system with an authoritarian national state that adheres to the idea of an ethnically defined “people’s community” (*Volksgemeinschaft*). Its political concept disrespects human dignity and is incompatible with the principle of democracy. Furthermore, the NPD acts in a systematic manner and with sufficient intensity towards achieving its aims that are directed against the free democratic basic order. However, (currently) there is a lack of specific and weighty indications suggesting that this endeavour will be successful; for that reason, the Second Senate of the Federal Constitutional Court, in its judgment pronounced today, unanimously rejected as unfounded the *Bundesrat*’s admissible application to establish the unconstitutionality of the NPD and its sub-organisations (Art. 21(2) of the Basic Law, *Grundgesetz* – GG).

[*End of excerpt*]

**I.**

1. The respondent was founded on 28 November 1964 as a collective movement of national democratic forces. By as early as September 1965 its political party organisation covered almost the whole of the Federal Republic of Germany and, with election results of between 5.8% and 9.8% of the valid votes cast and a total of 61 members of parliament it gained seats in the federal state parliaments(*Landtage*) of Baden-Wuerttemberg, Bavaria, Bremen, Hesse, Lower Saxony, Rhineland-Palatinate and Schleswig-Holstein. In 1969, with a proportion of 4.3% of second votes, it failed to reach the five-percent hurdle in the *Bundestag* election. In the follow- 2

ing 35 years, the respondent was unable to gain any seats in federal state parliament(*Landtag*) or *Bundestag* elections.

It was not until 2004 that it was again able to gain representation in a federal state parliament; in the *Landtag* election in Saxony, it gained 9.2% of the valid votes cast. In 2006 it was also able to do so in Mecklenburg-Western Pomerania with 7.3% of the valid votes cast. Despite losing votes in the subsequent *Landtag* elections in these two federal states, it managed to retain a presence in both federal state parliaments (with election results in Saxony in 2009 of 5.6% of the valid votes cast and of 6.0% in Mecklenburg-Western Pomerania in 2011). Due to the abolished electoral threshold for European Parliament elections, the respondent gained representation in the European Parliament in 2014 with its MEP Udo Voigt with 1.0% of the valid votes cast. 3

Currently, the respondent is not represented in any parliament at federal or *Land* level. It achieved a 1.3% share of second votes in the *Bundestag* election in 2013. With 4.9% of valid votes cast, it narrowly failed to retain its representation in the *Landtag* election in Saxony in 2014, and in the *Landtag* election in Mecklenburg-Western Pomerania in 2016 with a 3.0% share of second votes. In the most recent *Landtag* elections in the former West German federal states it achieved between 0.2% (Bremen) and 1.2% (Saarland), and between 1.9% (Saxony-Anhalt) and 4.9% (Saxony) in the former East German federal states. 4

Since the 2014 local government elections (cf. regarding the election results para. 904 et seq.), the respondent has, according to the uncontested information provided by the applicant, 367 seats at municipal level, most of which are in the former East German federal states. 5

2. The respondent's membership numbers reached a peak of 28,000 in 1969 and sank steadily in subsequent years; by its own information it had merely 3,240 members in 1996. Following the election of Udo Voigt as the party's chairman in 1996, its membership increased once more, reaching a (new) peak of 7,014 members in 2007, after which it declined again to 5,048 by 31 December 2013. At the party's national convention (*Bundesparteitag*) in Weinheim in November 2015, its chairman Frank Franz declared, however, that there had been a growth in membership numbers again for the first time in years. He provided specific details of this in the oral hearing, citing a rate of increase of 8% over the previous year. 6

3. The respondent is organised into (sixteen) federal state associations as well as regional and district associations. Under § 6(1) first and second sentences of its party statute (in the latest version of 21/22 November 2015), the national convention is the "supreme organ of the NPD. It determines the setting of political objectives and convenes for an ordinary convention at least every other calendar year." Under § 7(1) first sentence of the NPD statute, the party's executive committee (*Parteivorstand*) is responsible for the "political and organisational leadership of the NPD". 7

4. The respondent has its own youth organisation, the "Young National Democrats" 8

(*Junge Nationaldemokraten* – JN), founded in 1969, which had roughly 350 members in 2012. The "National Democratic University Union" (*Nationaldemokratischer Hochschulbund e.V.* – NHB) was founded as a sub-organisation of the respondent as early as 1966, but no longer has a presence in university politics. In 2003, the "Municipal Political Union of the NPD" (*Kommunalpolitische Vereinigung der NPD* – KPV) was founded to represent the interests of municipal representatives nationally, and in 2006 the "National Women's Ring" (*Ring Nationaler Frauen* – RNF) was founded, which sees itself as the "mouthpiece and point of contact for all national women whether party member or not" and had around 100 members in 2012. Under § 7(3) first sentence of the NPD party statute (in the version of 21/22 November 2015), the (federal) chairpersons of these associations are members of the NPD executive committee by virtue of their office "if they are members of the NPD".

5. The financial report for 2013 shows membership subscriptions for 2013 of EUR 488,859.96 (2014: EUR 459,157.77) and just under EUR 804,000 (2014: EUR 866,000) in donations; together these make up approximately 43.4% (2014: 43.6%) of the party's total income (cf. *Bundestag* document (*Bundestagsdrucksache* – BTDrucks) 18/4301, p. 109; BTDrucks 18/8475, p. 109). 9

6. The company *Deutsche Stimme Verlags GmbH*, founded by the respondent, publishes the party newspaper *Deutsche Stimme* (German Voice). According to the respondent, this had a circulation in mid-2012 of 25,000 copies. The company has its own video channel, DS-TV. Beyond this, the respondent is also responsible for various regional publications and makes intensive use of the Internet. It has a presence on Facebook, Twitter and, with video channels, on YouTube (cf. also paras. 852 and 853). 10

**II.**

Proceedings instigated in 2001 by applications initiated by the Federal Government, the German *Bundestag* and the applicant in the present proceedings to establish the unconstitutionality of the respondent and to have it dissolved were discontinued by order of the Second Senate of 18 March 2003 (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 107, 339). 11

**III.**

In a brief of 1 December 2013 the applicant applied, on the basis of its decision of 14 December 2012 (*Bundesrat* document, *Bundesratsdrucksache* BRDrucks 770/12), for the unconstitutionality of the respondent and its sub-organisations to be established and for its party organisation and that of its sub-organisations to be dissolved, for the prohibition of creating or continuing substitute organisations, and for its assets and those of its sub-organisations to be confiscated. It based this application on the first alternative in Art. 21(2) first sentence GG. 12

[...] 13-74

## IV.

1. In a brief of 30 December 2013 the respondent filed an application for a preliminary injunction, requesting that the President of the German *Bundestag* be obliged to make payments to it by instalment from the state funds available for financing political parties, without offsetting this with a claim for payment established against it under § 31a(3) second sentence of the Political Parties Act (*Gesetz über die politischen Parteien* – PartG), alternatively to suspend the proceedings until the federal legislature replaces the arrangements for lawyers' remuneration in respect of the party prohibition proceedings with arrangements in conformity with the Constitution. 75

The respondent claimed that this was necessary because it was not able to raise the funds to finance legal representation for the proceedings. This, it claimed, ruled out a proper legal defence in the party prohibition proceedings in accordance with the principle of the right to a fair trial. 76

2. By order of 28 January 2014 (BVerfGE 135, 234) the Senate rejected the application for a preliminary injunction and the alternative application for suspension of the proceedings. In its reasoning, it noted that legal recourse should be sought primarily before the administrative courts. It added that a proper defence could be secured by way of legal aid upon corresponding application or by analogous application of the provisions concerning necessary defence in criminal proceedings (§§ 140 et seq. of the Code of Criminal Procedure, *Strafprozessordnung* – StPO). 77

## V.

In a brief of 25 March 2014 the respondent replied to the application brief and made application 78

> that the application for prohibition made by the applicant be dismissed,
>
> alternatively, that the proceedings to prohibit the political party be discontinued due to the existence of irremediable procedural obstacles,
>
> as a further alternative that the proceedings be suspended until the Committee of Inquiry established by the German *Bundestag* on 20 March 2014 to investigate the NSA wiretapping affair has submitted its report.

[...] 79-108

## VI.

In a brief of 14 May 2014 the applicant applied for a rejection of the respondent's applications [...]. 109

[...] 110-130

**VII.**

[...] 131-132

**VIII.**

[…] 133-154

**IX.**

The respondent replied to this in its brief of 31 August 2015. […] 155-164

**X.**

[…]. 165-255

**XI.**

1. By order of 2 December 2015 the Senate ordered in accordance with § 45 BVerfGG that an oral hearing should be conducted (BVerfGE 140, 316) and, by separate written document, drew attention to the fact that the 'Overview and Statistics concerning Criminal Convictions of Members of Federal and *Land* Executive Committees of the NPD' (*Übersicht und Statistik über strafrechtliche Verurteilungen von Bundes- und Landesvorstandsmitgliedern der NPD*) which was submitted with the application brief in anonymised form could not be used as evidence. The applicant […] then submitted an overview in de-anonymised form and added to it an update of the opinion by the Institute of Contemporary History (*Institut für Zeitgeschichte*) on the question of the similarity in nature of the NPD to historical National Socialism and an expert opinion 'Legal Issues for a Prohibition of the NPD in the light of the European Convention on Human Rights (ECHR)' (*Rechtsfragen eines Verbots der NPD am Maßstab der EMRK*) by Professors Dr. Grabenwarter and Dr. Walter of 5 February 2016. It also submitted other evidentiary materials […]. 256

[…] 257-258

**XII.**

In the oral hearing the respondent submitted a brief of 2 March 2016 in which it essentially replied to the application's reasoning and the applicant's brief of 27 August 2015. 259

1. The respondent claims that the application for prohibition is inadmissible not only because of the lack of due and proper procedural power of attorney but also because there is no basis in law for prohibiting a party. 260

a) The respondent claims that, in procedural terms, Art. 21(2) GG is exclusively aimed at a finding, i.e. a declarative statement. Furthermore, the respondent argues that the provision is not formulated like a prohibition provision, unlike, for example, the prohibition of associations under Art. 9(2) GG. […] 261

b) The respondent also claims that Art. 21(2) GG is not a suitable basis for the prohibition of a political party because the provision's constituent element of "undermining" ("*beeinträchtigen*") the free democratic basic order, on which the application is exclusively based, is not valid constitutional law, since it involves an editorial error by the legislature of the Basic Law (*Grundgesetzgeber*). 262

c) The respondent claims that the application is also inadmissible by virtue of the inadequate arrangements regarding entitlement to file an application for the prohibition of a political party. It claims that § 43 BVerfGG is unconstitutional because it restricts the group of those entitled to file such an application, since the provision does not take sufficient account of the equality of opportunity of the parties as constitutive elements of the constitutional order. According to the respondent, equality of opportunity of the parties is only fulfilled if a political party - which, like the respondent, is unable to "hide" behind one of the organs of state which are entitled to file an application - were also able to file an application for the establishment of the unconstitutionality of political parties. Accordingly, the respondent claims, the present proceedings must be suspended until this legal loophole has been closed. 263

2. In addition, the respondent claims that the application is unfounded. 264

a) The respondent argues that the current concept of a prohibition of political parties needs to be revised fundamentally. 265

[...] 266-348

**XIII.**

1. Immediately prior to the beginning of the oral hearing, the respondent filed several applications in its brief of 1 March 2016 expressing its apprehension of bias and complaining about the composition of the Senate. In its reasoning, it referred to statements made by individual members of the Senate before their appointment as Justices of the Federal Constitutional Court, to § 15(3) first sentence BVerfGG and to appeal proceedings which (allegedly) violated Art. 94(1) second sentence GG. On the same day, all applications were rejected as unfounded or were dismissed, and, upon the respective complaints, the Senate established its proper composition. [...] 349

2. In the oral hearing of 1, 2 and 3 March 2016, the parties expanded on and added to their submissions. Pursuant to § 27a BVerfGG, Prof. Dr. Dierk Borstel, Prof. em. Dr. Eckhard Jesse, PD Dr. habil. Steffen Kailitz, Andrea Röpke and the respondent's functionaries Jürgen Gansel and Udo Voigt and its former chairman Holger Apfel were heard. The president of the *Landtag* (state parliament) and the Minister for Internal Affairs and Sport of the *Land* of Mecklenburg-Western Pomerania and the State Minister of the Interior, for Building and for Transport of the Free State of Bavaria submitted statements. 350

[...] 351-355

**XIV.**

1. In its brief of 22 March 2016 the applicant submitted the supporting documents it referred to that originated from the two expert opinions by the Institute of Contemporary History (*Institut für Zeitgeschichte*). 356

2. In its brief of 11 April 2016 the respondent submitted a statement regarding the oral hearing. 357

[...] 358-361

3. In its brief of 27 April 2016 the applicant replied to the briefs of the respondent of 2 March and 11 April 2016. 362

[...] 363-390

4. In its brief of 9 May 2016 the respondent stated in response to the supporting documents from the Institute of Contemporary History (*Institut für Zeitgeschichte*) submitted with the brief of 22 March that the evidence with regard to P. and H. cannot be attributed to it, since neither of these two persons were members of the respondent. 391

5. In its brief of 23 May 2016 the respondent replied to the applicant's brief of 27 April 2016, asserting that it expressly acknowledged that the legislature was bound by the principle of human dignity. The respondent also claimed that the assertion by the applicant, that it denied the applicability of fundamental rights (those that apply to everyone - *Jedermanngrundrechte*) to foreigners, was erroneous. Nor, it claims, did it seek expatriation, but rather demanded restricting the excessive practice of naturalisation by changing the citizenship law *ex nunc*. 392

[...] 393-394

6. In its brief of 28 June 2016 the respondent complained that by participation of Justice Landau the Senate was not properly constituted. It claimed that his term of office had expired. The respondent claimed that the applicant was attempting, by deliberately not electing a successor, to enhance the prospects of success of its application for prohibition. 395

**XV.**

With regard to the 57 criminal convictions listed by the applicant in the application brief and the de-anonymised overview, the Senate was able to request the files of the relevant proceedings in 54 cases. 396

**B.**

The applications are admissible. 397

The proper composition of the Senate does not raise concerns (I.). Nor are there any irremediable procedural obstacles (II.). The application filed as an alternative by the respondent for the suspension of the proceedings until the Committee of Inquiry established by the German *Bundestag* on 20 March 2014 to investigate the NSA 398

wiretapping affair has submitted its report must be rejected (III.). The other admissibility obstacles asserted by the respondent do not exist. There is neither a lack of an orderly power of attorney for the applicant's authorised representative (IV.1.), nor does the application's inadmissibility follow from an unconstitutional design of the entitlement to file applications in proceedings to prohibit political parties under § 43 BVerfGG (IV.2.). The view that Art. 21(2) GG does not constitute an appropriate legal basis for the prohibition of a political party does not preclude the proceedings' admissibility either (IV.3.).

**I.**

[...] 399

**II.**

There is no scope for discontinuing the proceedings on the ground that there are irremediable procedural obstacles. 400

1. An obstacle resulting in discontinuation of proceedings is the *ultima ratio* of possible legal consequences of violations of the Constitution (a). In proceedings to prohibit a political party in accordance with Art. 21(2) GG this requires a violation of the Constitution of considerable weight (b). This may in particular be considered to exist if the requirement following from Art. 21(1) and (2) in conjunction with Art. 20(3) GG for the formation of the free and self-determined will of the political party and its self-portrayal before the Federal Constitutional Court is violated (c). The use of police informants and undercover investigators at the executive level of a political party during ongoing proceedings to prohibit the political party is incompatible with the rule-of-law requirement that there be no informants at the party's executive level (*Staatsfreiheit*) (d). The same applies to the extent that an application for the prohibition of a political party is essentially supported by materials and facts that state sources have played a crucial role in authoring (e). In addition, the principle of a fair trial is accorded particular importance. Spying out the procedural strategy using intelligence service means runs counter to the resulting right of a party in the proceedings to be able to effectively influence the proceedings through its chosen strategy. (f). If these requirements are not satisfied, proceedings to prohibit the political party can generally not be continued. Exceptionally, this may not apply if, considering the threat posed by a political party to the free democratic basic order, the preventive purpose of the proceedings to prohibit the political party clearly outweighs the impairment of the rule-of-law requirements placed upon the proceedings to prohibit the political party (g). 401

[...] 402-403

b) Accordingly, an affirmation that an irremediable procedural obstacle exists requires a violation of the Constitution of considerable weight (cf. BVerfGE 107, 339 <365>). Conversely, if procedural deficiencies are less weighty or can be compensated in another way, this forbids discontinuation of the proceedings. Such deficiencies may be compensated through legal consequences which do not terminate the entire 404

proceedings immediately, such as enhanced requirements being placed upon the assessment of evidence, or prohibitions to use the evidence (cf. BVerfGE 107, 339 <379> Senate majority with reference to BVerfGE 44, 353 <383>; 57, 250 <292 and 293>; 101, 106 <126>).

c) With respect to the question whether there is a weighty violation of the Constitution, especially the requirements of the rule of law deriving specifically from the nature of proceedings to prohibit a political party under Art. 21(1) and (2) in conjunction with Art. 20(3) GG must be complied with; the prohibition of a political party by the Federal Constitutional Court is the sharpest weapon, albeit a double-edged one, a democratic state under the rule of law has against an organised enemy. The highest degree of legal certainty, transparency, predictability and reliability is therefore required in proceedings to prohibit a political party (cf. BVerfGE 107, 339 <369> Senate minority). The political party in question is given its possibly final opportunity before the Federal Constitutional Court to counter the submission by the applicant or applicants which consider prohibition of the political party to be necessary with the image of a loyal, constitutional institution whose continued participation in the formation of the [political] will of the people and of the state is necessary and legitimate, precisely in the interest of a free democratic basic order. Freedom from interference by the state and self-determination are particularly significant in this situation (cf. BVerfGE 107, 339 <368> Senate minority). It must be guaranteed that the political party is able to present its position freely, without being monitored and in a self-determined way. In addition to the requirements of reliability and transparency, the requirement of strict freedom from interference by the state in the sense of unmonitored and self-determined formation of will and self-portrayal before the Federal Constitutional Court (cf. BVerfGE 107, 339 <369> Senate minority) is indispensable. 405

d) The activity of police informants and undercover investigators at the executive level of a political party during ongoing prohibition proceedings is incompatible with the requirement of strict freedom from interference by the state. 406

aa) If a political party which is classified as anti-constitutional is under observation by police informants or undercover investigators who are active in the federal executive committee or a *Land* executive committee of that political party or in the executive committees of its sub-organisations, the free and self-determined formation of its will and its self-portrayal is not guaranteed. Police informants necessarily operate as a means of exercising state influence. Their activities are characterised by conflicting loyalty obligations as party members on the one hand and as informants for state agencies – who will normally get paid for their activities – on the other hand, whose mission it may be to procure material for possible proceedings to prohibit the party (cf. BVerfGE 107, 339 <367> Senate minority). State presence at the executive level of the political party makes it unavoidable that the formation of the party's will and its activities will be influenced (cf. BVerfGE 107, 339 <366> Senate minority). Generally it will not be possible to trace back whether and to what extent the individual person has in fact exerted influence; therefore this question is not decisive. 407

bb) State agencies must have deactivated their sources (police informants) in the executive committees of a political party in good time before the Federal Constitutional Court receives the application to prohibit the party, at the latest when the intention to file such an application is publicly announced, and may not carry on any "aftercare" to circumvent the "deactivation"; any persons infiltrated into the party (undercover investigators) must be withdrawn (cf. BVerfGE 107, 339 <369>). In this connection, the obligation to "deactivate" police informants and withdraw undercover investigators is limited to the federal executive committee and the *Land* executive committees of the party and its sub-organisations since these are the very bodies which exert decisive influence on the formation of the party's will and its self-portrayal during ongoing proceedings to prohibit the party. In contrast, party convention delegates, deputies or parliamentary group workers do not exert any comparable influence. 408

cc) [...] 409

e) It is not compatible with the requirement of strict freedom from interference by the state either if an application to prohibit a political party is based on evidentiary materials, the source of which is, at least in part, the result of the action of police informants or undercover investigators (cf. BVerfGE 107, 339 <370> Senate minority; no use of material generated by informants – *Quellenfreiheit*). 410

aa) An examination as to whether the constituent elements of Art. 21(2) GG are met may only be based on manifestations of the political party's aims and the behaviour of the party's adherents if they can be attributed to the political party and if the formation of the will of the party is truly independent and free from influence. As a rule, this is not the case if situations are provoked or influenced by a state agency (cf. BVerfGE 107, 339 <382> Senate majority). [...] 411

Conversely, statements made or behaviour displayed before or after the involvement of police informants are not necessarily, i.e. at least not under all circumstances, inadmissible as evidence. As a rule, attributing such behaviour to the political party in question does not raise concerns if there is a sufficient temporal distance to the involvement of the police informant to ensure that conflicts of loyalty have not influenced the behaviour. 412

bb) In an application to prohibit a political party, the respective applicant must demonstrate that the supporting evidence does not consist of material generated by informants (cf. BVerfGE 107, 339 <370> Senate minority). If, after exhausting all investigative possibilities within an *ex officio* examination, doubts remain as to whether the evidentiary material consists of material generated by informants, such material may not be attributed to the political party and may not be used as evidence. 413

cc) Such a prohibition of use as evidence, restricted to the infected evidentiary material, does not, however, always entail a procedural defect that cannot be compensated. If only part of the evidentiary material is affected, discontinuing the proceed- 414

ings as a procedural legal consequence is out of the question if the remainder of the factual basis permits continuation of the proceedings (cf. BVerfGE 107, 339 <379> Senate majority).

f) In proceedings to prohibit a political party, the principle of a fair trial takes on particular significance, not least in view of the fact that the legal consequence of the proceedings may be the dissolution of the political party in question. The principle of a fair trial guarantees protection against measures which impede free contact between the political party and its authorised representative and prevents the use of information about the political party's procedural strategy which has been collected by intelligence service means. 415

[...] 416

aa) [The] right [to a fair trial] covers in particular the right of a party to the proceedings to be able to influence the proceedings within the scope of its chosen strategy in order to safeguard its rights (cf. BVerfGE 38, 105 <111>; 63, 380 <390 and 391>; 65, 171 <174 and 175>; 66, 313 <318>; 107, 339 <383 and 384> Senate majority), and must also be respected in proceedings to prohibit a political party (cf. BVerfGE 104, 42 <50>; 107, 339 <367, 383>). In the case of Art. 21(2) GG, the principle of a fair trial will be violated in particular if the strategy of the political party affected by the prohibition proceedings is deliberately spied out in such a way that a proper legal defence is rendered impossible (cf. BVerfGE 107, 339 <384> Senate majority) or made significantly more difficult. The same can apply if not publicly available information about the procedural strategy of the political party concerned is incidentally obtained through the use of intelligence means during ongoing prohibition proceedings and is used in a way which is detrimental to the effectiveness of the political party's defence. 417

bb) The right to a fair trial does not, however, amount to a prohibition of observing a political party and its political representatives with intelligence service means while proceedings to prohibit the political party are ongoing (cf. already para. 409). The possibility of observation of anti-constitutional endeavours by intelligence agencies derives from the principle of "militant" ("*streitbare*") or "fortified" ("*wehrhafte*") democracy, which is established in constitutional law in particular in Art. 9(2), Art. 18 and Art. 21(2) GG and is intended to guarantee that enemies of the Constitution cannot invoke the freedoms guaranteed by the Basic Law and their protection to endanger, undermine or destroy the constitutional order or the existence of the state (cf. BVerfGE 2, 1 <11 et seq.>; 5, 85 <138 and 139>; 28, 36 <48>; 30, 1 <18 and 19>; 40, 287 <292>; 134, 141 <179 et seq. para. 109-117>). During ongoing prohibition proceedings, observation – including observation realised with the help of secret collection of information pursuant to § 8(2) of the Federal Act on the Protection of the Constitution (*Bundesverfassungsschutzgesetz* – BVerfSchG) is thus generally admissible as a matter of principle if it is supported on a legal basis, is carried out for the protection of the free democratic basic order and takes account of the principle of proportionality (cf. BVerfGE 107, 339 <365> Senate minority; 134, 141 <179 et seq. para. 109-117>; 418

Decisions of the Federal Administrative Court , *Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE 110, 126 <130 et seq.>) and does not disregard the requirements of the rule of law for freedom from interference by the state and for a fair trial.

[...] 419-422

dd) It is a matter for the applicant in proceedings for the prohibition of a political party to demonstrate what precautions it has taken to prevent that the procedural strategy of the respondent is spied out or that information obtained incidentally are used against it. If it has done this in a credible and transparent way, the abstract danger of being spied out is not sufficient to permit the assumption that the right to a fair trial as is guaranteed by the rule of law has been violated (cf. BVerfGE 107, 339 <384> Senate majority). 423

g) Violation of the requirement of strict freedom from interference by the state and of the right to a fair trial amounts to a serious interference with rule of law requirements under Art. 21(2) in conjunction with Art. 20(3) GG which proceedings for the prohibition of a political party need to meet. Resorting to informants or undercover investigators at the executive levels of a political party during ongoing prohibition proceedings constitutes a significant violation of the Constitution; in addition, basing an application for the prohibition of a political party to a significant extent on evidentiary material infected by state sources or exploiting knowledge of the respondent's procedural strategy acquired using intelligence service means constitute significant violations of the Constitution, too. The violations' weight is further increased by virtue of the fact not only that proceedings for the prohibition of a political party can have the legal consequence that the political party in question is dissolved but also that the assessment of its unconstitutionality expressed by the very fact that a prohibition is applied for represents a serious interference with the right to equal participation in political competition deriving from the freedom of political parties (*Parteienfreiheit*). 424

In answering the question whether this results in the proceedings being ended without a decision in the matter, however, the decision of the Basic Law in favour of a "militant democracy" should be considered, as well as the freedom of political parties guaranteed in Art. 21(1) GG. The trio of the provisions Art. 9(2), Art. 18 and Art. 21(2) GG belongs to the core elements of preventive protection of the Constitution (cf. BVerfGE 107, 339 <386> Senate majority). The fundamental concern of a Constitution not to be undermined by abuse of those very freedoms it guarantees would be missed if it lacked effective instruments to protect the free democratic basic order (cf. BVerfGE 107, 339 <387> Senate majority). Therefore, in deciding whether irremediable procedural obstacles exist in proceedings for the prohibition of a political party, the result of which would be the discontinuation of the proceedings, both the preventive purpose of proceedings for the prohibition of a political party and the rule of law requirements which such proceedings need to meet must be considered and weighed up against each other. 425

Thus it cannot be assumed that a violation of the rule of law requirements which the performance of proceedings for the prohibition of a political party need to meet automatically precludes continuation of the proceedings (cf. BVerfGE 107, 339 <371> Senate minority). To be sure, a violation of the rule of law requirements of strict freedom from interference by the state and of a fair trial will normally constitute an irremediable deficiency in terms of the rule of law; generally, this will result in a procedural obstacle and in discontinuation of the proceedings. However, this is not the case if the interference with procedural requirements under the rule of law faces a serious impairment of the preventive purpose of the prohibition proceedings. Even if there is a significant violation of the Constitution, discontinuation of the proceedings is subject to the condition that its continuation would be unacceptable in terms of the rule of law, even when balancing it against the state's interest in effective protection against the dangers emanating from a political party, the actions of which may be unconstitutional (cf. BVerfGE 107, 339 <365> Senate minority; <380> Senate majority). Continuation of the proceedings for the prohibition of the political party may be compatible with rule of law principles if the proceedings' preventive purpose clearly prevails (cf. BVerfGE 107, 339 <385> Senate minority). In order to establish whether there is a procedural obstacle to proceedings for the prohibition of a political party, procedural requirements under the rule of law, on the one hand, thus need to be balanced against the preventive purpose of these proceedings, on the other hand. 426

2. By these standards there is no procedural obstacle in the present proceedings which would lead to a discontinuation of the proceedings for the prohibition of the political party. It can be assumed from the applicant's attestations and provided evidence that there have not been any police informants or undercover investigators at the executive levels of the respondent since at least 6 December 2012 (a), that the significant parts of the relevant evidentiary material are not based on statements of and behaviour by party members who have contacts with state agencies (b), and that account has been taken of the special status of the respondent's authorised representative no. 1 and that knowledge of the respondent's procedural strategy has not been obtained using intelligence service means (c); for that reason it is already clear that a significant violation of the fundamental principles of the rule of law is lacking (first stage of examination). Therefore there is no need to balance such a violation against the preventive purpose of the prohibition proceedings (second stage of examination). 427

a) […] The applicant has demonstrated credibly – and without the respondent being able to shatter this in a manner which may require clarification – that all police informants at the respondent's executive levels have been "deactivated" in good time (aa) and not given after-care for the purpose of gaining information (bb), and that no undercover investigators have been or are being deployed against the respondent (cc). 428

aa) The applicant has provided sufficient evidence by means of the attestations and other documents which it has submitted that all police informants at the respondent's executive levels have been "deactivated" (1). The respondent's submission does not 429

raise any serious doubts in that regard (2); thus it was not necessary to take further evidence (3).

[...] 430-431

In terms of evidentiary law, the attestations are written statements made by witnesses. With regard to their value as evidence, it should be taken into consideration that these statements were made by the persons providing the attestations in their respective official capacities. Even if it were to be implied that the Ministers and Senators of the Interior have an interest in the outcome of the proceedings, they are, after all, not applicants themselves. This is all the more so in the case of the other persons providing attestations, so that the significance of the attestations goes further than the quality of a simple party submission. Moreover, providing false attestations, with the associated risk of being responsible for the possibility of the prohibition proceedings' failure, would involve considerable personal and political risk for the persons providing such attestations. This suggests that the attestations which have been submitted were not provided recklessly. Unless their credibility is shattered by the respondent's evidence-based, or circumstantial evidence-based submission of facts or in any other way, they generally constitute suitable evidence of the fact that police informants at the respondent's executive levels have been "deactivated". 432

(b) The applicant has furthermore demonstrated and provided evidence of the completion of the "deactivation" of the police informants at the respondent's executive levels in response to the request to do so in para. III.1 of the guidance order (*Hinweisbeschluss*) of 19 March 2015 (cf. para. 131). In doing so it has reinforced the credibility of the submitted attestations. 433

[...] 434-435

(2) Conversely, the respondent has not submitted arguments suggesting that there are circumstances, which can cast serious doubt as to the correctness of the statements and evidence of the "deactivation" of the police informants at the respondent's executive levels; such circumstances are not in any way discernible either. 436

[...] 437-447

(ee) Insofar as the respondent objects to using the submitted documents as evidence because some parts thereof are blackened, the Senate cannot concur. The respondent fails to take into consideration the fact that these redactions have been comprehensibly justified with reference to the state's duty of care towards the lives and physical well-being of the persons concerned and the need to uphold the effectiveness of the security agencies. There is no reason to assume that the redactions go beyond what is necessary. They do not significantly reduce the comprehensibility of the submitted statements. 448

[...] 449-473

c) The principle of a fair trial has not been violated since it is established to the satis- 474

faction of the Senate that the procedural strategy of the respondent has not been spied out using intelligence service means, that account has been taken of the special status of authorised representative no. 1, and that no knowledge about the procedural strategy obtained incidentally through the use intelligence service means has been used in the ongoing prohibition proceedings to the detriment of the respondent.

[...] 475-480

(3) The submitted documents are sufficient to convince the Senate that [the applicant] refrained from receiving intelligence on the respondent's procedural strategy. The applicant has fully documented the relevant instructions by the Federation and the *Laender*. It has reported on implemented "G 10 measures" [*translator's note: measures which have been implemented under the Law concerning the Restriction of the Privacy of Correspondence, Posts and Telecommunications, or 'Article 10 Law' (Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses, Artikel 10-Gesetz)*] and demonstrated that no information regarding the prohibition proceedings was obtained in this regard either, or that the use of such information has been stopped. No circumstances can be discerned which could raise serious doubt as to the correctness of this submission. 481

[...] 482-493

(c) Finally, the submission by the respondent in the oral hearing that two executive committee members of the respondent's regional association of the *Land* of North Rhine-Westphalia were the subjects of police surveillance and data gathering from 10 July 2015 to 9 August 2015 cannot undermine the correctness of the applicant's submission that the respondent's procedural strategy was not spied out. 494

According to the credible information, upon which the respondent has not cast any doubt, provided by the head of the *Land* criminal division, Mr S., the two members of the regional association of the *Land* were not the subjects of surveillance but rather a so-called *Gefährder* [*translator's note: a person considered to pose a threat*] from the extreme right-wing scene who was about to be released from custody and whose residency was supposed to be ascertained. The two members of the regional association of the *Land* were, according to the information provided, indirectly affected by this measure merely because they had picked up the person concerned upon his release from custody. Once that person had taken up his residence the measure was discontinued immediately. The aim of the measure was therefore in no way, as the respondent had speculated, to spy on a further member of the regional association of the *Land*. Furthermore, the measure was not aimed at obtaining information about the respondent's procedural strategy and the measure did not produce any such intelligence either. 495

[...] 496

**III.**

[...] 497-498

**IV.**

[...] 499-509

**C.**

The standard for establishing the unconstitutionality of a political party in accordance with Art. 21(2) GG must take into account both the continuing claim to validity of the norm and its exceptional nature (I.). If these two factors are complied with by a determination of the constituent elements that need to be met to prohibit a political party (II.) such a determination is, pursuant to the case law of the European Court of Human Rights (ECtHR), compatible with the stipulations of the European Convention on Human Rights (ECHR) (III.). The law of the European Union is not decisive in respect of the conditions under which a political party […] may be prohibited (IV.). 510

**I.**

[…] 511

1. a) Art. 21 GG accorded political parties their own constitutional status for the first time. Unlike the Weimar Constitution (*Weimarer Reichsverfassung* - WRV), which refrained from giving political parties a constitutional classification, the Basic Law accords them a special status, which is elevated in comparison to that of associations within the meaning of Art. 9(1) GG (cf. BVerfGE 107, 339 <358>). They are elevated by Art. 21 GG to the rank of constitutional institutions (cf. BVerfGE 1, 208 <225>; 2, 1 <73>; 20, 56 <100>; 73, 40 <85>; 107, 339 <358>) and acknowledged as being necessary “factors of constitutional life” (BVerfGE 1, 208 <227>). The prerequisite for their carrying-out of the constitutional task assigned to them of participating in the formation of the political will of the people is their freedom of foundation and activities which is guaranteed in Art. 21(1) GG. 512

b) [...] 513

c) Establishing the framework for prohibiting political parties in Art. 21(2) GG was an expression of the aspiration of the constitutional legislature (*Verfassungsgeber*) to create the structural conditions for preventing a repetition of the catastrophe of National Socialism and of developments in the system of political parties such as occurred in the final phase of the Weimar Republic (cf. BVerfGE 107, 339 <362>). The aim of Art. 21(2) GG is to counter risks emanating from the existence of a political party with a fundamentally anti-constitutional tendency and from the typical ways in which it can exercise influence as an association (cf. BVerfGE 25, 44 <56>). In accordance with the claim “No absolute freedom for the enemies of freedom” (cf. BVerfGE 5, 85 <138>), such a political party should not be given the opportunity to abuse the freedom of political parties enjoyed under Art. 21(1) GG to fight against the free de- 514

mocratic basic order.

2. This concept of protecting freedom by restricting freedom does not contradict the Constitution's fundamental decision in Art. 20(2) GG in favour of a process that is free from interference by the state of politically free and in favour of an open formation of opinion and will by the people in relation to the organs of the state (cf. BVerfGE 20, 56 <100>; 107, 339 <361>). In order to permanently establish a free democratic order, it is not the intention of the Basic Law to guarantee also the freedom to abolish the conditions for freedom and democracy and to abuse the guaranteed freedom for the purpose of abolishing that very order. Therefore, the aim of Art. 21(2) GG is to protect those underlying fundamental values which are indispensable for the peaceful and democratic co-existence of the citizens. 515

Against this background, the Basic Law selects, from the pluralism of aims and values which have taken shape in the political parties, certain fundamental principles for structuring the state. These principles, once democratically approved, should be acknowledged as absolute values and therefore resolutely defended against any attack. The aim is to create a synthesis between the principle of tolerance towards all political opinions and the commitment to certain inviolable fundamental values of the state order. Accordingly, Art. 21(2) GG expresses the deliberate constitutional will for the solution of a problem of boundaries in the free democratic state order, enshrining the experience of a constitutional legislature (*Verfassungsgeber*) who in a certain historical situation no longer believed in being able to realise, in a pure form, the principle of the neutrality of the state vis-à-vis the political parties, and a commitment to a – in this sense – militant democracy (cf. with regard to the whole matter BVerfGE 5, 85 <139>). 516

The respondent is therefore wrong to object that the prohibition of a political party which would result in the elimination of an entire political tendency violates the democratic principle of the sovereignty of the people ("The people are always right"). […] 517

3. The possibility provided by Art. 146 GG for the creation of a genuinely new Constitution does not run counter to the applicability of Art. 21(2) GG. Irrespective of whether Art. 146 GG is applicable merely in the case of a complete constitutional novation, having regard to the principles of Art. 79(3) GG, or also covers a complete rewriting of the Basic Law […], the Basic Law remains fully in force until a new Constitution freely adopted by the German people enters into force (cf. BVerfGE 5, 85 <128>). Even if Art. 146 GG were to give the constitutional legislature (*Verfassungsgeber*) the opportunity to create a completely new Constitution, this would not legitimise actions by any political party actively aimed at undermining or abolishing the free democratic basic order while the Basic law is applicable. […] 518

4. Nor can inapplicability of Art. 21(2) GG be substantiated by the assertion that the provision is merely of a transitional nature in that it aims for structuring the transition from National Socialism to the free democratic order and that the norm has now lost its claim to validity […]. 519

The provision could at best be deemed to have lost its claim to validity if it had been designed as a mere transitional arrangement. There is nothing in the wording of the provision to suggest that this is the case. Moreover, the protective purpose of Art. 21(2) GG, which has the aim of averting threats to the free democratic basic order arising from strengthened anti-democratic political parties by prohibiting them, is not restricted to the phase during which the free democracy under the Basic Law is constituted. […] 520

5. Finally, the respondent's opinion is incorrect […] that prohibition of a political party [can] only be regarded as legitimate if the political party is involved in violent subversive movements. 521

[…] For a political party to be prohibited it is sufficient that the political party in question "seeks" (*darauf ausgehen*) to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany. Accordingly, Art. 21(2) GG is not a provision that aims at averting specific threats. Rather, it aims to prevent, by way of preventive protection of the Constitution (cf. BVerfGE 5, 85 <142>; 9, 162 <165>; 107, 339 <386>; regarding Art. 9(2) GG: BVerfGE 80, 244 <253> […]), specific threats to the free democratic basic order from arising in the first place. Thus, a re-definition of the concept of the prohibition of political parties in Art. 21(2) GG following the Constitution's emergency regulations can be ruled out. […] 522

6. In interpreting Art. 21(2) GG, due regard must be given to the fundamental constitutional decisions in favour of openness of the process of formation of political will, of freedom of expression (Art. 5(1) GG) and freedom of political parties from interference by the state (Art. 21(1) GG), as well as of the provision's exceptional nature as a consequence of the above. 523

a) The Basic Law proceeds from the assumption that the only way to forming the will of the state is to have a constant intellectual exchange between social forces and interests and between political ideas and thus also between the political parties propagating them (cf. BVerfGE 5, 85 <135>). It relies on the power of this engagement as the most effective weapon against the spread of totalitarian and inhuman ideologies (cf. BVerfGE 124, 300 <320>). In Art. 21(1) GG it assigns a special role to the political parties as necessary instruments for the formation of the political will of the people (cf. BVerfGE 107, 339 <361>). Accordingly, prohibition of a political party is a serious interference with the freedom of formation of the political will and the freedom of political parties under Art. 21(1) GG, which can only be justified under particular conditions. Art. 21(2) GG, as an "exceptional norm which curtails democracy", must be applied with restraint (cf. Meier, loc. cit., p. 263). For this reason, a restrictive interpretation of the provision's individual constituent elements is required which takes account of the rule-and-exception relationship between the freedom of political parties enshrined in Art. 21(1) GG and the prohibition of political parties under Art. 21(2) GG. There is at the same time no scope for assuming the existence of unwritten con- 524

stituent elements which would extend the provision's scope of application […].

b) The restrictive interpretation of the constituent elements under Art. 21(2) GG furthermore takes account of the fact that the peremptory legal consequence of the prohibition of a political party that follows from the establishment of its unconstitutionality is its dissolution. 525

Any administrative intervention against the existence of a political party is ruled out until the Federal Constitutional Court has established its unconstitutionality, however hostile its behaviour may be towards the free democratic basic order (cf. BVerfGE 40, 287 <291>; 47, 198 <228>; 107, 339 <362>). […] In its present form, the Basic Law tolerates the threat linked to activities of a political party for the sake of political freedom, until its unconstitutionality has been established (cf. BVerfGE 12, 296 <306>; 47, 198 <228>; 107, 339 <362>). 526

If, on the other hand, the Federal Constitutional Court's review results in the finding that the constituent elements of Art. 21(2) GG are met, the unconstitutionality of the political party must be established and it must be dissolved. The respondent is wrong in assuming that Art. 21(2) GG merely provides the possibility for establishing the unconstitutionality of a political party but leaves it to the "responsible citizen" to "execute" such a finding of constitutional law by not voting for a political party which has been found to be unconstitutional; therefore, in the respondent's opinion, the dissolution of a political party as envisaged in § 46(3) first sentence BVerfGG oversteps the boundary of what is constitutionally permissible. This opinion is not compatible with the concept of the provision of Art. 21GG. […] 527

**II.**

The application for prohibition by the applicant concerns the legally protected good of the "free democratic basic order" (1.), which a political party must "seek" (4.) to "undermine or abolish" (2.) "by reason of its aims or the behaviour of its adherents" (3.). There are no other unwritten constituent elements for the prohibition of a political party (5.). 528

1. The term "free democratic basic order" has been fleshed out in the case-law of the Federal Constitutional Court (a). Its regulatory content cannot be defined by means of general recourse to Art. 79(3) GG but is limited to those principles which are absolutely indispensable for the free democratic constitutional state (b). In that respect, the principle of human dignity (Art. 1(1) GG), which is specified in greater detail by the principles of democracy (d) and the rule of law (e), is at the forefront (c). 529

a) aa) [...] 530-534

b) aa) The concept of the free democratic basic order within the meaning of Art. 21(2) GG requires concentration on a few central fundamental principles which are absolutely indispensable for the free constitutional state. This limited approach seems to be required not least because of the exceptional nature of the prohibition of 535

political parties. The fundamental decision by the Constitution in favour of an open process of formation of political will means that it must also be possible to critically challenge individual elements of the Constitution without causing the prohibition of the political party. Exclusion from the process of forming the political will can only be considered when what is being questioned and rejected is what is absolutely indispensable for guaranteeing free democratic co-existence and is thus not negotiable.

bb) Such a focus on the central fundamental principles which are indispensable for democracy cannot be achieved by having recourse to the inalterable core of the Constitution as defined in Art. 79(3) GG. Unlike Art. 108 of the Draft Constitution drawn up by the Herrenchiemsee Convention (*Verfassungsentwurf des Verfassungskonvent auf Herrenchiemsee* – HerrenChE), the version of Art. 79(3) GG as adopted by the Parliamentary Council (*Parlamentarischer Rat*) does not only prohibit amendments of the Basic Law which would result in abolishing the free and democratic basic order […]. 536

The regulatory content of Art. 79(3) GG goes beyond the minimum content of what is indispensable for a free democratic constitutional state. In particular, the free democratic basic order does not include the principles of the republic and of federalism as covered by Art. 79(3) GG, since constitutional monarchies and centralised states can also be in accordance with the guiding principle of a free democracy […]. 537

c) The free democratic basic order is rooted primarily in human dignity (Art. 1(1) GG). This is recognised in the case-law of the Federal Constitutional Court as the highest value of the Basic Law (cf. BVerfGE 5, 85 <204>; 12, 45 <53>; 27, 1 <6>; 35, 202 <225>; 45, 187 <227>; 87, 209 <228>; 96, 375 <399>). Human dignity is not subject to disposition. The state must respect and protect it in all its forms (cf. BVerfGE 45, 187 <227>). This deprives the state and its legal system of any absoluteness and any “natural” precedence. 538

aa) The guarantee of human dignity covers in particular the safeguarding of personal individuality, identity and integrity and elementary equality before the law […]. This understanding is based on a conception of human beings as persons who can make free and self-determined decisions and shape their destiny independently (cf. BVerfGE 45, 187 <227>; 49, 286 <298>). The subjective quality of human beings is linked to an entitlement to social worthiness and to respect which forbids degrading people to “mere objects” of state action (cf. BVerfGE 122, 248 <271>). 539

Even though it may be so that the effectiveness of this “object formula” is limited […], it is at any rate appropriate for identifying violations of human dignity wherever the quality of the human being as a subject and the resulting entitlement to respect is fundamentally called into question […]. This is especially the case if a perception supports a genuine and thus absolute precedence of a collective over the individual human being. Human dignity only remains inviolable if the individual is treated as fundamentally free, if albeit bound into society, and not the other way round as fundamentally unfree and subjugated to a superior instance. The absolute subjuga- 540

tion of a person to a collective, an ideology or a religion amounts to a violation of the value accorded to all human beings for their own sake simply by virtue of their being persons (BVerfGE 115, 118 <153>). It violates the individual's quality as a subject and constitutes an interference with the guarantee of human dignity which fundamentally violates the free democratic basic order.

bb) Human dignity is egalitarian; it is founded exclusively in the fact that a person belongs to the human race, regardless of features such as origin, race, age or gender […]. Inherent in the individual's entitlement to respect as a person is the recognition of the individual as an equal member of the legally-constituted community […]. Thus, a legally devalued status or degrading inequality of treatment is incompatible with human dignity […]. This is in particular the case if such inequalities of treatment violate the prohibitions of discrimination under Art. 3(3) GG, which flesh out human dignity, regardless of the fundamental question of the human dignity content of the fundamental rights (cf. in this regard BVerfGE 107, 275 <284>). Anti-Semitic concepts or concepts aimed at racist discrimination are therefore incompatible with human dignity and violate the free democratic basic order. 541

d) The principle of democracy is a constitutive element of the free democratic basic order. Democracy is the form of rule of the free and equal. It is based on the idea of free self-determination of all citizens (cf. BVerfGE 44, 125 <142>). Insofar the Basic Law is based on the assumption of the intrinsic value and dignity of the human being who is enabled to be free; at the same time it guarantees the human rights which are the core of the principle of democracy by means of the right of citizens to determine in freedom and equality, by means of elections and other votes, the public authority which affects them in personal and objective terms […]. 542

aa) The possibility of equal participation by all citizens in the process of forming the political will as well as accountability to the people for the exercise of state authority (Art. 20(1) and (2) GG) are indispensable for a democratic system. How these requirements are complied with is not decisive for the question of compatibility of a political concept with the free democratic basic order. Thus, a rejection of parliamentarianism, if it is accompanied by the demand for replacing it with a plebiscite system, cannot justify the accusation that this violates the free democratic basic order. It is a different case, however, if the aim of disparaging parliament is to establish a one-party system. 543

In democracy, the formation of the political will takes its way from the people to the organs of the state and not vice versa (cf. BVerfGE 44, 125 <140>; 69, 315 <346>; 107, 339 <361>). The democratic principles of freedom and equality require equal opportunities for participation for all citizens. Only then the requirement of an open process of formation of the political will is complied with. Concepts involving the permanent or temporary arbitrary exclusion of individuals from this process are therefore not compatible with this requirement. […]. 544

bb) [...] 545

cc) The Basic Law has opted for a representative parliamentary democracy, which is why the election of parliament is particularly significant when it comes to creating the necessary relationship of accountability between the people and the government (cf. BVerfGE 83, 60 <72>). Accordingly, anyone who disparages parliamentarianism without demonstrating in what other way due regard can be given to the principle of sovereignty of the people and how the openness of the process of forming the political will can be guaranteed, departs from the framework of the free democratic basic order. 546

e) Finally, the principle of the rule of law is an indispensable part of the free democratic basic order within the meaning of Art. 21(2) first sentence GG. […].The principle that the public authority is bound by the law (Article 20(3) GG) and oversight in that respect by independent courts are determinative for the concept of the free democratic basic order. At the same time, the protection of the freedom of the individual requires that the use of physical force is reserved for the organs of the state which are bound by the law and subject to judicial oversight. Thus the state's monopoly on the use of force […] must likewise be regarded as part of the free democratic basic order within the meaning of Art. 21(2) first sentence GG. 547

2. The second requirement for establishing the unconstitutionality of a political party in accordance with Art. 21(2) first sentence GG is that it should be seeking to "undermine" or "abolish" the free democratic basic order in the sense described above. 548

a) [...] 549

b) Considered in a differentiated way, the concept of "abolishing" (*beseitigen*) describes the abolishment of at least one of the constituent elements of the free democratic basic order or its replacement with another constitutional order or another system of government […]. 550

c) The term "undermine" (*beeinträchtigen*) has, in contrast to the term "abolish", an independent regulatory content which extends the area of application of Art. 21(2) first sentence GG. 551

aa) Contrary to the respondent's view, the constituent element of "undermining" is not merely an insignificant editorial error on the part of the constitutional legislature (*Verfassungsgeber*). 552

(1) [...] 553-554

(2) [...] 555

bb) On this basis, the criterion "undermining" can be assumed to be met once a political party, according to its political concept, noticeably threatens the free democratic basic order. Such an "undermining" can therefore already be deemed to take place if a political party is working in a qualified manner to bring about the suspension of the existing constitutional order, even without being clear about what constitutional order is supposed to replace the existing one. It is sufficient for it to be attacking one of the 556

constituent elements of the free democratic basic order (human dignity, democracy and the rule of law), since these are interlocked and mutually dependent […]. A political party which rejects and fights against one of the central principles of the free democratic basic order cannot avoid prohibition by professing allegiance to the other principles […]. The decisive factor is […] whether a political party deliberately attacks those fundamental principles which are indispensable for free and democratic co-existence […].

3. The fact that a political party is seeking to abolish or undermine the free democratic basic order must […] be clear from its "aims" or from the "behaviour of its adherents". Its "aims" and the "behaviour of its adherents" are accordingly the only sources of information for establishing the unconstitutionality of a political party. 557

a) The aims of a political party are the embodiment of what a party intends to achieve politically, irrespective of whether these are intermediate or final aims, short-term or long-term aims or main or ancillary aims (cf. BVerfGE 5, 85 <143 et seq.> […]). They normally result from the party's programme and other official party statements, from the writings of authors recognised by the political party as authoritative about the political ideology of the party, from speeches given by its leading functionaries, from training and propaganda materials used in the party and from newspapers and magazines published or influenced by it (cf. BVerfGE 5, 85 <144>). 558

It is the political party's real aims not its purported ones which are decisive. It is not required that a political party openly professes its anti-constitutional objectives. (cf. BVerfGE 2, 1 <20>; 5, 85 <144> […]. Thus it is not necessary to limit the determination of the aims pursued by a political party to its programme or official statements […], even though, as a rule, the programme is an essential source of information for establishing what the political party's objectives are. 559

b) As well as in themes addressed in its programme, the intentions of the political party can be reflected in the behaviour of its adherents (cf. BVerfGE 2, 1 <22>). Adherents in this sense are all persons who support a party's cause and profess their commitment to the party, even if they are not members of the political party (cf. BVerfGE 2, 1 <22>; see also BVerfGE 47, 130 <139>). […] 560

However, not all behaviour by adherents can be attributed to a political party. Attributing certain behaviour to a party may be problematic in particular if the political party has no possibility of influencing such behaviour. The determining factor is therefore whether the political will of the political party in question is recognisably being expressed in the respective adherent's behaviour. This will normally be taken to be the case if the behaviour reflects a fundamental tendency existing in the political party or if the political party explicitly espouses such behaviour. […] 561

aa) Activities of a political party's organs, specifically the party's executive committee and its leading functionaries, can generally be attributed to the political party […]. Activities of the political party's publication organs and the behaviour of leading func- 562

tionaries of sub-organisations are also automatically attributable to it.

bb) Statements or actions by ordinary members can only be attributed to the political party if they are undertaken in a political context and the political party has approved or condoned them. Attribution appears likely if the statement or action has a direct link to a party event or other party activities, especially if the party does not distance itself from it. If an organisational link to party activities is lacking, the political party has to be aware of the political statement or action by the member at issue and nonetheless condone or even support the statement or action, even though counter-measures (exclusion from the party or disciplinary measures) would be possible and could reasonably have been expected. 563

cc) In the case of adherents who are not members of the political party, influence or approval, in whatever form, of their behaviour by the political party is generally a necessary condition for attributing such behaviour to the party. As a rule, activities by the political party itself which influence or justify the behaviour of its adherents would be required. […] Specific facts must exist, however, which justify regarding the adherents' behaviour as an expression of the political party's will. Merely voicing approval in retrospect will only be sufficient for attributing the adherents' behaviour to the party […] if the political party thus recognisably espouses this as part of its own anti-constitutional endeavours. 564

dd) If members of a political party commit criminal offences, this is only relevant in proceedings to prohibit the political party if such offences are connected with the legally protected goods set out in Art. 21(2) first sentence 565

ee) There can be no blanket attribution of criminal offences and acts of violence if there is no link for such an attribution. In particular, and contrary to the opinion stated by the applicant, the creation of or support for a certain political climate does not on its own permit attributing criminal actions committed in that political climate to a political party. It must rather be specifically determined whether the criminal action should be regarded as part of the anti-constitutional endeavours of the political party. Within the framework of Art. 21(2) first sentence GG, criminal acts committed by third parties, for example, may be attributed to a political party only if the political party has rendered material or organisational assistance, if personal links exist between the political party and the group committing the act or if members of the political party were involved in the act in question. 566

ff) Parliamentary statements may be attributed to a political party in proceedings to prohibit that political party. Contrary to the view of the respondent, no differing assessment may be inferred here from the principle of indemnity […]. 567

Under Art. 46(1) first sentence GG, a member of parliament may not be subjected to court proceedings or disciplinary action or otherwise called to account for any utterance made in the *Bundestag*. […] For this reason, the fact that the loss of a mandate, in the event of the prohibition of a political party based on parliamentary utterances, is 568

merely an indirect consequence of parliamentary action does not generally rule out the applicability of Art. 46(1) first sentence GG.

In interpreting Art. 46(1) first sentence GG, however […], the fundamental decision of the Constitution in favour of a "militant democracy" must be taken into consideration (cf. insofar with regard to Art. 10 GG: BVerfGE 30, 1 <19>) and a balance must be struck in accordance with the principle of practical concordance between protection of indemnity under Art. 46 GG and protection of the free democratic basic order under Art. 21(2) first sentence GG. […] Protection of indemnity may indeed be taken into consideration in any decision on the loss of mandate resulting from the prohibition of a political party. […] 569

4. […] 570

a) In interpreting the criterion of "seeking" (*darauf ausgehen*) account must be taken of the decision on values in the Constitution in favour of openness of the process of forming the political will (Art. 20(1) and (2) first sentence GG), freedom of political expression (Art. 5(1) GG) and the freedom of political parties (Art. 21(1) GG). An interference with these constitutional goods which a prohibition of a political party involves is only permitted to the extent required by the protective purpose of Art. 21(2) GG. It is therefore required that a political party actively espouses its aims and thus works towards undermining or abolishing the free democratic basic order or endangering the existence of the Federal Republic of Germany. 571

[...] 572

Art. 21(2) GG does not place sanctions on ideas or convictions. The provision does not involve the prohibition of views or ideology, but the prohibition of an organisation […]. Intervention under Art. 21(2) GG only comes into question once a political party takes its anti-constitutional aims into the public sphere and acts against the free democratic basic order or the existence of the state. Thus, beyond a mere "professing" of its own anti-constitutional aims, the political party must exceed the threshold of actually "combating" the free democratic basic order or the existence of the state […]. Only an understanding of "seeking" which takes the precondition of exceeding this threshold into account satisfies the requirement of interpreting Art. 21(2) GG restrictively. 573

b) [...] 574

c) The criterion of "seeking" presumes systematic action in the sense of qualified preparation for undermining or abolishing the free democratic basic order or endangering the existence of the Federal Republic of Germany. 575

aa) For the presumption of systematic action by the political party it is necessary for it to be continually working towards the realisation of a political concept that is contrary to the free democratic basic order. This can only be assumed if the individual action is an expression of a fundamental tendency that is attributable to the political par- 576

ty (cf. BVerfGE 5, 85 <143>). Efforts by individual party adherents cannot be taken to establish that the political party is unconstitutional if the attitude of the political party is otherwise loyal to the goods protected under Art. 21(2) first sentence GG (cf. BVerfGE 5, 85 <143>). […]

bb) Moreover, the systematic action of the political party must amount to a qualified preparation with regard to achieving its aims directed against the goods protected under Art. 21(2) GG. Insofar there must be a target-oriented connection between the political party's own actions and abolishing or undermining the free democratic basic order. 577

Art. 21(2) GG does not, conversely, require action which is punishable under criminal law. […] 578

[...] 579

Accordingly, if the prohibition of a political party does not require the use of illegal or criminally relevant means or methods, these can nonetheless provide important indications both that the aims of this political party violate the free democratic basic order and that the political party is seeking to realise these aims within the meaning of Art. 21(2) GG. If, for example, it can be established that adherents of a political party use force in a manner which can be attributed to the party for achieving its political aims, it may be inferred from this that the political party does not recognise the state's monopoly of the use of force which is rooted in the principle of the rule of law and that it is pursuing insofar aims directed at undermining the free democratic basic order. […] 580

d) It is not required that the actions of the political party in themselves pose a specific threat to the goods protected under Art. 21(2) first sentence GG. This is clear from the wording, the provision's history and its purpose. 581

aa) [...] 582

bb) [...] 583

cc) […] By their very nature, proceedings to prohibit a political party have the character of a preventive measure (cf. BVerfGE 5, 85 <142>; 9, 162 <165>; 107, 339 <386>; […]). They are not aimed at defending against already existing threats to the free democratic basic order but at preventing such threats from possibly emerging in the future. 584

e) In accordance with the exceptional character of the prohibition of a political party as the preventive prohibition of an organisation and not a mere prohibition of views or of an ideology, there can, however, be a presumption that the criterion of "seeking" has been met only if there are specific weighty indications suggesting that it is at least possible that a political party's actions directed against the goods protected under Art. 21(2) GG may succeed (potentiality). 585

Conversely, if it is entirely unlikely that a party's actions will successfully contribute to achieving the party's anti-constitutional aims, there is no need for preventive protection of the Constitution by using the instrument of the prohibition of the political party, which is the sharpest weapon, albeit a double-edged one, a democratic state under the rule of law has against its organised enemies (cf. BVerfGE 107, 339 <369>). On the contrary, the prohibition of a political party may be considered only if the political party has sufficient means to exert influence due to which it does not appear to be entirely unlikely that the party will succeed in achieving its anti-constitutional aims, and if it actually makes use of its means to exert influence. If this is not the case, then the requirement of "seeking" within the meaning of Art. 21(2) GG is not met. The Senate does not concur with the deviating opinion set out in the judgment in the case of the Communist Party of Germany (*Kommunistische Partei Deutschlands* – KPD) which held that the lack of any prospect, as far as humanly measurable, that the political party will be able to realise its unconstitutional aims at any time in the foreseeable future does not bar a prohibition of the party (cf. BVerfGE 5, 85 <143>). 586

Whether there exists a sufficient degree of potentiality in terms of whether a party will achieve its aims must be determined on the basis of an overall assessment. This would take into account the situation of the political party (membership numbers and whether they are rising or falling, organisational structure, degree of mobilisation, campaigning capability and financial situation), its impact in society (election results, publications, alliances and supporter structures), its representation in public offices and representative bodies, the means, strategies and measures it deploys and all other facts and circumstances from which it can be inferred whether it appears possible that the aims pursued by the political party will be realised. This requires that there are sufficient specific and weighty indications suggesting that the actions of the political party against the goods protected under Art. 21(2) first sentence GG may succeed. This must take account both of the prospects for the political party's success in merely participating in the struggle of political opinions and also of the possibility that the party's political aims will be successfully achieved by other means. 587

As a rule, the criterion of "seeking" will be met if a political party tries to achieve its unconstitutional aims through the use of force or by committing crimes. Not only does the use of force imply disregard of the state's monopoly on the use of force, but it also involves a serious interference with the principle of free and equal participation in the formation of the political will. It also indicates a certain potentiality in terms of whether a party will achieve its aims. The use of force is in itself a weighty indication that action against the goods protected under Art. 21(2) first sentence GG may be successful. The same applies if a political party acts below the threshold of conduct punishable under criminal law in a manner which restricts the freedom of the process of forming the political will. This is the case, for example, if a political party creates an "atmosphere of fear" or threat which is likely to undermine in the long term the free and equal participation of all in the process of forming the political will. In that respect 588

it is sufficient if such impairments are brought about in regionally restricted areas. It does, however, require that the party's actions are likely, seen objectively, to curtail the freedom of the formation of the political will. Insofar, purely subjective feelings of threat are not sufficient.

Contrary to the applicant's view, it is not sufficient for meeting the criterion of "seeking" that the political party's statements are designed to be realised politically and that they can lead to actions; all statements made by political parties meet this requirement. On the contrary, specific weighty indications are required, suggesting that the call for action involved in the dissemination of the political party's unconstitutional ideology might be successful. 589

5. Art. 21(2) GG leaves no room for assuming that there are other (unwritten) criteria besides the prerequisites for the prohibition of a political party that have been set out above. Neither can a party's similarity in nature to National Socialism provide a substitute for the criteria set out in Art. 21(2) GG (a), nor can the principle of proportionality be applied in proceedings regarding the prohibition of political parties (b). 590

[...] 591-597

ee) A party's similarity in nature to National Socialism must, however, be taken into account in any examination of the individual criteria under Art. 21(2) first sentence GG. Conclusions may thus be drawn from the glorification of the NSDAP or the trivialisation of the crimes committed by the National Socialists as to the real aims being pursued by the political party, which may possibly not be completely clear from its programmatic materials. The central principles of National Socialism ("*Führer*" principle, ethnic definition of the "people" (*Volk*), racism and anti-Semitism) violate human dignity and at the same time violate the requirements of equal participation by all citizens in the process of forming the political will of the people and, due to the "*Führer*" principle, the principle of the sovereignty of the people. Thus a party's similarity in nature to National Socialism is an indication that this political party is pursuing aims which are detrimental to the free democratic basic order. […] 598

b) [...] 599

The fact, however, that the constitutional legislature (*Verfassungsgeber*) adopted an exhaustive provision in Art. 21(2) first sentence GG which leaves no room for a separate examination of proportionality bars the applicability of the principle of proportionality in proceedings for the prohibition of a political party. […] In Art. 21(2) first sentence GG, the constitutional legislature (*Verfassungsgeber*) has provided for the mandatory establishment of the unconstitutionality of the political party if the constituent elements are met. There is no scope for decision-making within which the principle of proportionality could be applied […]. 600

[...] 601-606

**III.**

The mentioned requirements that result from the standards set out above and which need to be met to establish that a political party is unconstitutional are fully compatible (2) with the case-law of the European Court of Human Rights (ECtHR) on prohibitions of political parties, which it derived from the European Convention on Human Rights (ECHR) (1) and which the Federal Constitutional Court takes into consideration as an aid to interpretation (cf. BVerfGE 128, 326 <366 et seq.>). 607

1. Since the ECHR does not specifically regulate the rights of political parties, the standard for conformity of prohibitions of political parties with the Convention is Art. 11 ECHR in particular (cf. ECtHR <Grand Chamber – GC>, United Communist Party of Turkey and Others v. Turkey, Judgment of 30 January 1998, no. 133/1996/752/951, §§ 24 et seq.; ECtHR <GC>, Socialist Party and Others v. Turkey, Judgment of 25 May 1998, no. 20/1997/804/1007, § 29; ECtHR, Yazar and Others v. Turkey, Judgment of 9 April 2002, no. 2723/93 et al., §§ 30 et seq.; ECtHR, Parti de la Democratie <DEP> c. Turquie, Judgment of 10 December 2002, no. 25141/94, §§ 28 et seq.). At the level of justification, the ECtHR's examination additionally considers the question of inapplicability of rights under the Convention due to Art. 17 ECHR (cf. ECtHR <GC>, United Communist Party of Turkey and Others v. Turkey, Judgment of 30 January 1998, no. 133/1996/752/951, § 60; ECtHR <GC>, Socialist Party and Others v. Turkey, Judgment of 25 May 1998, no. 20/1997/804/1007, §§ 29 and 53; ECtHR <GC>, Freedom and Democracy Party <ÖZDEP> v. Turkey, Judgment of 8 December 1999, no. 23885/94, § 47). 608

a) Here, the ECtHR explicitly recognises the possibility of prohibiting a political party in order to protect democracy. This must, however, satisfy the requirements of Art. 11(2) first sentence ECHR, which means that it must be provided for by law and must be necessary in a democratic society (cf. ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 103; ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., § 82). 609

b) According to the ECtHR the necessity of prohibiting a political party in a democratic society requires, firstly, that this pursues a legitimate aim. The legitimate aims in this regard are exhaustively set out in Art. 11(2) first sentence EHRC (cf. ECtHR <GC>, United Communist Party of Turkey and Others v. Turkey, Judgment of 30 January 1998, no. 133/1996/752/951, §§ 40 and 41; ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 67; ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., § 64; ECtHR, HADEP and Demir v. Turkey, Judgment of 14 December 2010, no. 28003/03, § 44; ECtHR, Eusko Abertzale Ekintza – Acción Nacionalista Vasca <EAE-ANV> c. Espagne, Judgment of 15 January 2013, no. 40959/09, § 54). 610

c) A prohibition of a political party further requires a "pressing social need" to that end (cf. ECtHR <GC>, Socialist Party and Others v. Turkey, Judgment of 25 May 611

1998, no. 20/1997/804/1007, § 49; ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 104).

aa) According to the ECtHR, whether such a need exists is a matter for decision in each individual case. In view of the far-reaching interference associated with prohibition for the political party and for democracy as such, prohibition only comes into question either if the political party is pursuing aims which are incompatible with the fundamental principles of democracy and the protection of human rights or if the means used by the political party are not lawful and democratic, in particular if it incites to violence or advocates the use of force […]. While it is true that a political party may promote a change in the law or the legal and constitutional structures of the state, it must use lawful and democratic means to do so and the proposed changes must for their part also be compatible with fundamental democratic principles (cf. ECtHR, Yazar and Others v. Turkey, Judgment of 9 April 2002, no. 22723/93 et al., § 49; ECtHR < GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 98; ECtHR, Parti de la Democratie <DEP> c. Turquie, Judgment of 10 December 2002, no. 25141/94, § 46; ECtHR, Parti Socialiste de Turquie <STP> et autres c. Turquie, Judgment of 12 November 2003, no. 26482/95, § 38; ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., § 79; ECtHR, HADEP and Demir v. Turkey, Judgment of 14 December 2010, no. 28003/03, § 61). 612

bb) With regard to the timing of an order to prohibit a political party, the ECtHR explicitly recognises the admissibility of preventive intervention. It is the opinion of the ECtHR that a state cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with democracy, even though the danger of that policy for democracy is sufficiently established and imminent. A state must reasonably be able to prevent the realisation of a political programme which contradicts the Convention (cf. ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., §§ 102 and 103; ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., §§ 81 and 82). This grants the Convention's contracting states at least a certain margin of appreciation in determining the right timing for prohibiting a political party […]. 613

cc) Whether the prohibition of a political party corresponds to a pressing social need is determined by the ECtHR on the basis of an overall examination of the specific circumstances (cf. ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., §§ 104 and 105; ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., § 83). The ECtHR finds in this regard that the historical experiences and developments in the Convention's contracting state in question should also be taken into consideration (cf. ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 124; ECtHR, Partidul Comunistilor and Ungureanu v. Romania, Judgment of 3 February 2005, no. 46626/99, § 58; ECtHR, HADEP and Demir v. 614

Turkey, Judgment of 14 December 2010, no. 28003/03, §§ 69 et seq.; ECtHR, Republican Party of Russia v. Russia, Judgment of 12 April 2011, no. 12976/07, § 127).

d) Finally, in the opinion of the ECtHR the prohibition of a political party must be proportionate to the aims pursued with the prohibition. In this regard, however, the ECtHR limits the test of "proportionality" (*Angemessenheit*) to the legal implications side of the scales and determines whether the consequences of the prohibition of the political party arising from national law are out of proportion to the seriousness of the threat to democracy established with regard to a pressing social need. As a rule, if a pressing need exists it finds that the prohibition is proportionate (cf. ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., §§ 133 and 134 ; ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., § 93; ECtHR, Eusko Abertzale Ekintza – Acción Nacionalista Vasca <EAE-ANV> c. Espagne, Judgment of 15 January 2013, no. 40959/09, § 81). 615

In just two cases where the use of force by individual party members was endorsed on a few occasions, the court found, irrespective of the existence of a pressing social need, that prohibition of the political party based on this conduct would be disproportionate (cf. ECtHR, Parti de la Democratie <DEP> c. Turquie, Judgment of 10 December 2002, no. 25141/94, §§ 61 et seq. and 64 et seq.; ECtHR, Parti pour une société démocratique <DTP> et autres c. Turquie, Judgment of 12 January 2016, no. 3840/10 et al., §§ 101 et seq.). In the case of the Turkish DTP, it explicitly drew attention to the fact that, in contrast to individual utterances by its members, the political party as a whole had stated its commitment to peaceful and democratic solutions and that it was not to be assumed that these individual statements could have any impact on national security or public safety (cf. ECtHR, Parti pour une société démocratique <DTP> et autres c. Turquie, Judgment of 12 January 2016, no. 3840/10 et al., §§ 85 et seq., § 98). 616

2. The standard set out for establishing the unconstitutionality of a political party in accordance with Art. 21(2) GG is no less stringent than the requirements derived by the ECtHR from Art. 11(2) ECHR for the prohibition of a political party. 617

a) Art. 21(2) first sentence GG plainly takes account of the requirement that the prohibition must be provided for by law. Furthermore, the protection of the free democratic basic order and of the existence of the state constitutes a legitimate aim within the meaning of Art. 11(2) ECHR. In this regard the ECtHR and the Federal Constitutional Court concur in proceeding from the assumption that a political party has to oppose not only individual provisions of the Constitution but also fundamental principles of the free constitutional state. 618

b) If the criteria under Art. 21(2) first sentence GG are met, it can also be presumed that a pressing social need exists for prohibiting a political party. If a political party acts in a systematic manner in the sense of qualified preparation for undermining or abolishing the free democratic basic order and if there are specific and weighty indi- 619

cations suggesting the possibility that this action may succeed, this satisfies the requirements which the ECtHR has established in terms of the necessity for prohibiting the political party to protect democratic society in accordance with Art. 11(2) first sentence ECHR. Nothing else may be inferred from the reference by the ECtHR to the need for a sufficiently established and imminent threat (cf. ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 102). Contrary to one opinion voiced in the literature […], this cannot be taken to mean that, from the point of view of the ECtHR, the prohibition of a political party is only in compliance with the Convention if a specific threat to the free democratic order has already emerged and the success of the anti-constitutional endeavours of the political party is immediately imminent.

620 Such a presumption is already contradicted by the fact that the ECtHR has in individual cases regarded approval of acts of terrorism as being sufficient for the prohibition of a political party without basing this on the size or significance of the prohibited regional political parties and the threats posed by them to the constitutional order (cf. ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., §§ 85 et seq.; ECtHR, Eusko Abertzale Ekintza – Acción Nacionalista Vasca <EAE-ANV> c. Espagne, Judgment of 15 January 2013, no. 40959/09, §§ 67 et seq.). The ECtHR moreover explicitly acknowledges the preventive character of the prohibition of political parties and grants states a margin of appreciation in determining the timing of prohibitions. In cases where it has found that imposed prohibitions of political parties are not in compliance with the Convention, it has also (additionally) drawn attention to the fact that the political parties concerned in these cases had no real chance of bringing about political change (cf. ECtHR, Yazar and Others v. Turkey, Judgment of 9 April 2002, no. 22723/93 et al., § 58; ECtHR, Parti de la Democratie <DEP> c. Turquie, Judgment of 10 December 2002, no. 25141/94, § 55; ECtHR, The United Macedonian Organisation Ilinden-Pirin and Others v. Bulgaria, Judgment of 20 October 2005, no. 59489/00, § 61). Accordingly, it cannot be inferred that the existence of a specific threat to the democratic constitutional state is a necessary criterion for the prohibition of a political party […].

621 Indeed, as the ECtHR explicitly states, the existence of a pressing social need to prohibit a political party must be established on the basis of an overall examination of the circumstances in the specific individual case and must take into account specific national features (cf. ECtHR <GC>, United Communist Party of Turkey and Others v. Turkey, Judgment of 30 January 1998, no. 133/1996/752/951, § 59; ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 124; ECtHR, Partidul Comunistilor and Ungureanu v. Romania, Judgment of 3 February 2005, no. 46626/99, § 58; ECtHR, HADEP and Demir v. Turkey, Judgment of 14 December 2010, no. 28003/03, §§ 69 et seq.; ECtHR, Republican Party of Russia v. Russia, Judgment of 12 April 2011, no. 12976/07, § 127). Therefore, in relation to Art. 21(2) GG, it must be taken into account that the provision is, above all, based on the historical experience of the rise of the Nazi party in the Weimar Republic

and efforts to prevent recurrence of such incidents by means of early intervention against totalitarian political parties. Against that background, the notion that the prohibition of a political party should only be considered when a political party has become so strong that, if events are allowed to take their course, undermining or abolition of the free democratic basic order does not merely seem possible but is in fact probable, is incompatible with such efforts. In that respect, the determination in Art. 21(2) first sentence GG of an early timing for the prohibition of a political party that does not require waiting for a specific threat to the free democratic basic order to emerge is the result of the specific historical experience of the establishment of the tyrannical and despotic rule of the National Socialists. Against this background, a pressing social need to prohibit a political party in accordance with the case-law of the ECtHR may be presumed to exist if the requirements under Art. 21(2) first sentence GG are met, namely if there are specific and weighty indications which suggest that it is at least possible that the political party's actions directed against the free democratic basic order could be successful.

c) The considerations of the ECtHR regarding the requirement of proportionality of the prohibition of a political party do not raise any concerns about the standard applicable under Art. 21(2) GG and its conformity with the Convention either. 622

aa) The ECtHR generally considers the existence of a pressing social need to be sufficient to affirm the proportionality of the prohibition of a political party (cf. ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 133). Insofar as the court nevertheless exceptionally found that a prohibition would be disproportionate, this concerned two isolated cases of approval of acts of violence by individual functionaries of the political party in question (cf. ECtHR, Parti de la Democratie <DEP> c. Turquie, Judgment of 10 December 2002, no. 25141/94, §§ 61 et seq. and 64 et seq.; ECtHR, Parti pour une société démocratique <DTP> et autres c. Turquie, Judgment of 12 January 2016, no. 3840/10 et al., §§ 101 et seq.). Under circumstances like these, there would not have been room for establishing the unconstitutionality of a political party under the framework of Art. 21(2) first sentence GG either. There would be a lack of a fundamental tendency attributable to the political party to use force as a means of political debate (cf. para. 576). Moreover, mere utterances by individual party members against the free democratic basic order would probably not meet the requirement of being potentially suitable for achieving the pursued anti-constitutional aims, a requirement called for in the context of the criterion of "seeking". Accordingly, the ECtHR's recourse to the requirement of proportionality does not amount to a tightening in relation to the criteria which have to be met within the framework of Art. 21(2) first sentence GG for the prohibition of a political party. 623

bb) Likewise, the conformity of Art. 21(2) first sentence GG with the Convention is not called into question to the extent that the ECtHR, in its decision concerning the prohibition of the DTP, refers, with regard to proportionality, to the possibility under Turkish law of cutting the funds paid to a political party by the state rather than pro- 624

hibiting it (cf. ECtHR, Parti pour une société démocratique <DTP> et autres c. Turquie, Judgment of 12 January 2016, no. 3840/10 et al., §§ 101 et seq.). It is a matter for the respective national law, having due regard for the requirements of the ECHR, to prescribe whether and to what extent sanctions may be imposed on political parties which pursue anti-constitutional aims. In this regard, the national legislature is at liberty to waive sanctions altogether, to create possibilities for graduated sanctions or to restrict itself to the sanction of prohibition of the political party.

Therefore, the legislative concept of Art. 21(2) first sentence GG, which dispenses with differentiated possibilities for applying sanctions, is compatible with the Convention. The only possible legal consequence prescribed by this provision if its criteria are met is the establishment of unconstitutionality. The constitutional situation as it currently applies excludes sanctions below the level of prohibition of the political party, which would include a reduction or cessation of state funding. Contrary to the respondent's view, there is thus no room within the framework of Art. 21(2) GG for the application of the principle of proportionality (cf. para. 599 et seq.), unless the legislature amends the Constitution and introduces a different approach. This raises no concerns in terms of the Convention as long as the order to prohibit a political party complies with the criteria for the proportionality of a prohibition which are derived from the case-law of the ECtHR with regard to Art. 11(2) first sentence ECHR. This is the case if the criteria of Art. 21(2) first sentence GG are met. 625

d) To the extent that the respondent derives from the 'Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures' of the Venice Commission of the Council of Europe of 10/11 December 1999 (CDL-INF<2000>001; cf. European Commission for Democracy through Law <Venice Commission>, Compilation of Venice Commission Opinions and Reports concerning Political Parties, CDL<2013>045, p. 38) the opinion that the prerequisite for a prohibition of a political party under the Convention is that the political party must be pursuing its political aims with the use of force and that this must be taken into consideration within the framework of Art. 21(2) GG, it is ignoring the fact that the Venice Commission's Guidelines are non-binding recommendations which the ECtHR has not adopted with regard to the requirements for a prohibition of a political party. Instead, it examines whether there is a pressing social need for prohibition both on the basis of the means employed by the political party and the aims it is pursuing (cf. ECtHR, Yazar and Others v. Turkey, Judgment of 9 April 2002, no. 22723/93 et al., § 51 et seq.; ECtHR <GC>, Refah Partisi and Others v. Turkey, Judgment of 13 February 2003, no. 41340/98 et al., § 98; ECtHR, Herri Batasuna and Batasuna v. Spain, Judgment of 30 June 2009, no. 25803/04 et al., § 79; ECtHR, HADEP and Demir v. Turkey, Judgment of 14 December 2010, no. 28003/03, § 61). It may, therefore, be the case that the use or endorsement of force is sufficient as a condition for prohibiting a political party according to the standards of the ECtHR. It is not, however, an indispensable prerequisite for prohibiting a political party in accordance with the requirements of Art. 11(2) first sentence ECHR. 626

**IV.**

The proposal by the respondent to suspend the proceedings and refer the questions raised by it in this connection to the Court of Justice of the European Union in accordance with Art. 267(1)(a) of the Treaty on the Functioning of the European Union (TFEU) for a preliminary ruling lacks any objective basis. 627

1. [...] 628

2. a) The Second Senate of the Federal Constitutional Court has already found, in its order of 22 November 2001 (BVerfGE 104, 214), that the European Union has no jurisdiction under the currently applicable treaties for ruling on the law relating to political parties. While it is the case that Art. 191 of the Treaty establishing the European Community (EC Treaty) acknowledged the function of political parties at European level in the process of European integration and was insofar the basis for the formation of joint parliamentary groups in the European Parliament, this does not mean that EU law contains any statement regarding whether and under what conditions a political party may be prohibited by a Member State of the European Union. Nor do general principles of EU law such as the rule of law, democracy and the protection of fundamental rights give rise to a question capable of being referred (cf. BVerfGE 104, 214 <218 and 219>). 629

b) This is also upheld following the entry into force of the Treaty of Lisbon. […] 630

c) No different conclusion can be drawn from Regulation (EC) No. 2004/2003 on the regulations governing political parties and rules regarding their funding at European level. This was issued on the basis of Art. 191 EC Treaty and does not establish any jurisdiction of the European Union beyond the regulatory content thereof. 631

Thus, the prohibition of national political parties remains an exclusive matter of national law. […] 632

**D.**

Measured against these standards, the application for prohibition is unfounded. It is true that the respondent seeks, by reason of its aims and the behaviour of its adherents, to abolish the free democratic basic order (I.). Since, however, there are no specific and weighty indications suggesting that the achievement of the aims pursued by the respondent can possibly succeed, the criterion of “seeking” within the meaning of Art. 21(2) first sentence GG is not met (II.). 633

**I.**

The respondent disrespects the fundamental principles which are indispensable for the free democratic constitutional state. Its aims and the behaviour of its adherents disrespect human dignity (1.) and the core of the principle of democracy (2.) and display elements that are similar in nature to the historical National Socialism (3.). The respondent’s political concept advocates abolishing the free democratic basic order 634

(4.).

1. The respondent's political concept is incompatible with the guarantee of human dignity within the meaning of Art. 1(1) GG. […] The concept of the "*Volk*" it advocates is a negation of the personal right to respect deriving from the principle of human dignity and leads to the denial of fundamental equality before the law for all persons who do not belong to this ethnic *Volksgemeinschaft*. […] 635

[…] 636

a) The respondent's party programme violates the right of the person to be valued and respected which derives from the intrinsic value of human life and the dignity of human beings […] (aa).[…] 637

aa) [...] 638

(1) In line with its concept of the primacy of the *Volksgemeinschaft*, the respondent demands that the highest aim of German politics should be the preservation of the German *Volk*, defined by descent, language, historical experience and values. It demands the endeavour for the "unity of *Volk* and state" and the prevention of "foreign infiltration (*Überfremdung*) of Germany with or without naturalisation" […]. As a matter of principle foreigners should not, it claims, have the right to stay in Germany, but only the duty to return to their home countries […]. 639

(2) On this basis, the respondent has developed a political concept which is mainly aimed at a strict exclusion […] of all ethnic non-Germans. […] 640

(a) According to the respondent, fundamental rights explicitly apply to all Germans and the application of the principle of solidarity is limited to the community of all Germans […]. Accordingly, the respondent claims, measures by the state to promote the family should only promote German families. Ownership of German land may only be acquired by Germans […]. 641

(b) In Chapter 10 of its party programme [the respondent demands] legislation to repatriate foreigners living here […]. Integration, it claims, amounts to genocide. The building of foreign religious buildings should be stopped; the fundamental right to asylum under Art. 16a GG should be abolished […]. 642

(c) In Chapter 16, 'Education and Culture', the respondent objects to German and foreign schoolchildren being taught together […]. 643

(d) In Chapter 17, 'Reform of the Legal System', the respondent demands a referendum on the reintroduction of the death penalty and full enforcement of life sentences. […] Moreover, […] a category of 'naturalised foreigners' […] should be added to police statistics […]. 644

(3) The very aims set out in the respondent's party programme are incompatible with the guarantee of human dignity. […] 645

In particular, […] the party's programme advocates a devalued legal status practically amounting to full deprivation of rights of all those who do not belong […] to its ethnically-defined *Volksgemeinschaft* […]. 646

bb) The respondent must accept this programme being held against it. […] 647

(1) [...] 648-650

(2) [...] 649

(a) [...] 650

(b) At any rate, attribution […] is established […] by virtue of the confirmation of the programme's content by the relevant persons in the respondent's leadership. […] In its written submissions in the present proceedings the respondent has repeatedly made reference to this programme and nowhere has it distanced itself from it. In the oral hearing, Mr Franz, the party chairman, explicitly confirmed the applicability of the programme and the fact that it coincides with the respondent's convictions. […] 651

[...] 652

b) The incompatibility of the aims pursued by the respondent with the guarantee of human dignity […] is proven by virtue of its attributable publications and confirmed by statements made by its leading functionaries. […] 653

aa) (1) The concept of the "*Volk*" advocated […] by the respondent is described as follows in the brochure 'Wortgewandt […]' published in its 2nd edition by the party's executive committee in April 2012: 654

> A German is anyone who is of German origin and was thus born into the ethnic and cultural community of the German people. [...] An African, an Asian or an Oriental can never become a German because the award of a piece of printed paper […] can in no way change biological heredity, […] and members of other races remain […] foreign bodies, however long they may have lived in Germany. […]

[...] 655-658

(a) The regional association of the *Land* of Bavaria made the following comment on Facebook in February 2015 about the arrival of African refugees: 659

> To be German means to belong to the German *Volk*, not because of a deed of naturalisation but by birth and descent. One is German by virtue of one's blood and nothing else!
>
> So be proud and thankful, German women and German men, that you were born with the blessing of a German birth. [...]

bb) The supremacy of the *Volksgemeinschaft* over the individual, and its racial foundation [...] are made especially clear in statements by the Young National Democrats 660

(JN) (1) [...].

(1) (a) D., the federal training director of the JN puts it thus [...]: 661

> The community is supreme here. […] Our ideology places the *Volk* at the heart of all being. [...]

(b) [...] 662

(c) In its "Guidelines – Political Concepts" (*Leitfaden – Politische Grundbegriffe*) published [...] by the federal executive committee of the JN in January 2013 it is stated that: 663

> Freedom is the pursuit of the meaning of life, which is the preservation of the species. [...]

[...] 664-665

The intermixing of peoples leads, it claims, to the loss of the "best and noblest virtues" and to the destruction of the respective *Volk*: 666

> [...] The intermixing of different cultures has never led to a multicultural society as is so often claimed to exist today. All that ever came out of it was a mish-mash that led to destruction. [...]

[...] 667

These statements culminate in a discussion of the concept of race, which is regarded by the JN as a "law of nature" and a fundamental element of its view of the world [...]. 668

(d) These statements by the JN can be attributed to the respondent. [...] 669

[...] 670-680

cc) The consequence of the ethic definition [...] of the "German *Volksgemeinschaft* is the devaluation of the legal status of all persons who do not belong to this community. […] [S]tatements and activities attributable to the respondent prove the fact that this also applies to naturalised German citizens with an immigration background […]. 681

(1) In the *Bundestag* election campaign in 2009 the respondent's regional association for Berlin sent a letter purporting to be an "unofficial announcement" to 22 politicians with an immigration background. Under the heading "Information provided by your repatriation of foreigners officer", its addressees […] were told to make preparations for their "journey home" […]. 682

In the 2013 *Bundestag* election campaign, the respondent's regional association for Berlin once again sent a similar circular to candidates with an immigration background [...]. 683

(2) [This accords with] a television interview by a German journalist with an immigration background with the respondent's deputy chairman, Ronny Zasowk. Asked what 684

he would do with people like her [...], he replied that they would be given a deportation order and would have to leave Germany. They would be able to take movable goods with them and would receive compensation for the rest.

[...] 685

(3) In the 2009 *Landtag* election campaign in Thuringia, W., the then *Land* managing director of the respondent, said, regarding the candidature of S., a local politician of colour, 686

> Thuringia must stay German. We thank S. for his help as a guest worker [...]. But he is no longer needed today [...].

[...] 687

c) [...] 688-696

(3) Against this background, the conclusion drawn by the expert witness Prof. Kailitz and submitted in the oral hearing, namely that the respondent, on the basis of its world view, advocates the expulsion of millions of people from Germany, is understandable. At any rate, it denies those whom it defines as “non-Germans” the right to remain in Germany [...]. 697

d) The disrespect for human dignity which can be inferred from [its] notion of an ethnically-defined *Volksgemeinschaft* is attested by numerous statements which are attributable to the respondent regarding attitudes towards foreigners (aa), immigrants (bb) and minorities (cc). 698

aa) [...] 699

(1) [...] 700

(2) Jürgen Rieger, as the respondent’s deputy federal chairman , imputed [...] a lower level of intelligence to all dark-skinned people: 701

> Negroes have an intelligence quotient between that of a retarded German and that of a normal German.

(3) In a Facebook post in May 2015 the respondent’s regional association for Bavaria warned German women against relationships with men of colour: 702

> [...] In the cities there is already the situation that you can’t help meeting black Africans (Negroes) in the streets wherever you go. [...]
>
> They have been brought here to finally destroy our *Volk*, our ethnic community! German women and girls, don’t get involved with Negroes! Otherwise you will be committing a serious crime against your *Volk*!

The respondent’s argument […] that the author of this post simply wished to draw at- 703

tention to the exploding number of asylum seekers is contradicted by the objective declaratory content of the statement and glosses over the wording which deliberately parallels that of National Socialist slogans regarding dealings with Jews [...].

[...] 704-706

bb) It is in particular asylum seekers and immigrants who are at the centre of inhuman statements [...]. 707

(1) This is proven by the respondent's parliamentary activities. 708

(a) (aa) In the *Landtag* of Saxony [...] Mr Apfel, the former leader of the NPD parliamentary group [...], said: 709

> [...] Give your consent, close the gateway for Moslem bombers, Gypsy criminal gangs and social parasites from all over the world.
>
> (Plenary proceeding reports (*Plenarprotokoll*) 5/27 of 17 December 2010, p. 2657)

(bb) A brief enquiry by Member of Parliament Apfel of 4 February 2013 [...] included the question as to how many children were born with disabilities in Saxony in marriages between relatives […] entered into by immigrants. 710

(cc) In the *Landtag* of Mecklenburg-Western Pomerania, Udo Pastörs used the term "degenerated people" [...] in relation to asylum seekers. In the same debate, Member of Parliament Tino Müller had previously spoken of "nine-headed gang of Negroes" […]. 711

(b) [...] 712

(2) Asylum seekers and immigrants [...] have also been regularly disparaged [...] in extra-parliamentary activities. 713

(a) (aa) For example, Jürgen Gansel advocated on his Facebook page on 21 April 2015 the rapid deportation of "asylum fraudsters, Moslem extremists and criminal foreigners". 714

(bb) [...] 715

(cc) The respondent's regional association of the *Land* of Bavaria warns in a Facebook post [...]: "Take care! Don't get too close to the 'refugees'! You'll be risking your health! [...] And scabies, a skin infection with parasites, is the least harmful thing you can catch from them!" 716

(dd) Maria Frank, the *Land* chairwoman of the Berlin National Women's Ring (RNF), speaking at a demonstration [...] in July 2013, described Moslems and black Africans generally as rapists, drug dealers and filthy: [...]. 717

(ee) [...] 718-719

(ff) [...] 720

(b) (aa) All these utterances are aimed at depriving asylum seekers and immigrants of their human dignity. [...] The utterances also exceed [...] the limits of general criticism of immigration policy [...]. 721

(bb) Each of these utterances is attributable to the respondent and its content is unmistakeable. 722

[...] 723-725

cc) In addition to asylum seekers and immigrants, the respondent also attacks religious and social minorities in a similar way, thus setting itself in opposition to human dignity. 726

[...] 727-734

In his 2009 Ash Wednesday speech given in the Saarland, Pastörs described citizens of Turkish origin as “sperm guns” and was as a result sentenced [...] to a term of imprisonment […] by the Saarbrücken Regional Court (*Landgericht*) [...] for incitement to hatred and violence. 735

[...] 736-739

(bb) High-ranking party functionaries of the respondent have also taken anti-Semitic stances in public utterances. 740

(α) [...] 741

[...] 742

(β) Karl Richter stated on 8 January 2015: 743

> [...] There have been Jews in the Occident for at least 1500 years only as traders, usurers, Christ-murderers and in the ghetto. [...]
>
> To put it briefly and bluntly: MY Occident is Christian and in at least the same part Germanic. I do not need the “Jewish” in my Occident, and – if I may be so bold – I set no great store by it.

(γ) [...] 744

[...] 745

(δ) The […] chairman of the respondent’s regional association of the *Land* of Berlin, Sebastian Schmidtke, [was] convicted of slander for wearing a black t-shirt with the slogan “All Jews are Bastards”. 746-747

(ε) [...] 748

(ζ) [...] 749

(b) [...] 750

[...] 751

(3) The respondent's disrespect for human dignity is not limited to the […] mentioned groups. It is clear from statements of its opinions regarding other groups that it does not respect insofar the right to personal respect deriving from human dignity. 752

[...] 753-757

2. The respondent also disrespects the free democratic basic order with a view to the principle of democracy. It is true that this attitude cannot be inferred with the requisite unambiguousness from the NPD party programme (a). But its rejection of the fundamental design of free democracy is clear if other publications and utterances by leading functionaries attributable to the respondent are considered, too (b). [...] 758

a) [...] 759-761

aa) The political concept of the respondent is incompatible with the right of all citizens of a state to equal participation in the formation of the political will of the state. 762

(1) (a) If the "rule of the *Volk*" (*Volksherrschaft*) presupposes the *Volksgemeinschaft,* as the respondent advocates [...], this necessarily results in an exclusion from the democratic process of those people who, by reason of their ethnicity, do not belong to the *Volksgemeinschaft*.[...] Rather, the excluding nature of the *Volksgemeinschaft* involves a limitation, on grounds of ethnicity, of the right to equal participation in the formation of the political will which is incompatible with Art. 20(2) first sentence GG. 763

(b) When asked about this in the oral hearing, Jürgen Gansel confirmed this finding. He drew an explicit distinction between rule by the *Volk* (*Volksherrschaft*) and rule by the population (*Bevölkerungsherrschaft*) and stated that *Volksherrschaft* was linked to the ethnic *Volk* of the state and therefore only existed in the Federal Republic of Germany to a limited degree. [...] [This] documents the fact that, in the view of the respondent, the right to democratic participation should be limited to members of the ethnically homogenous *Volksgemeinschaft*. 764

[...] 765

(2) (a) [...] 766-767

bb) In addition, the respondent's anti-democratic stance is clear from its negation of the principle of parliamentary democracy. [...] 768

(1) (a) The fundamental rejection of the existing representative parliamentary system [...] is made clear in an interview with Holger Apfel in *Deutsche Stimme* ("German Voice", issue 12/2008, p. 3): 769

> [...] Parliament degenerated into a cheap caricature of real rule by the *Volk* a long time ago.

(b) Similarly, the former chairman of the respondent's regional association of the 770

*Land* of Saxony Anhalt, Matthias Heyder, said at the 2010 Bamberg programme party convention:

> What's out there is a cold, concreted-over, anti-social system that is hostile to the *Volk* and it doesn't need to be changed, it needs to be abolished.

[...] 771-773

(2) At the same time, the respondent sets the idea of the *Volksgemeinschaft* against the principle of democracy, thus relativising the latter's claim to validity. 774

(a) This becomes clear when W., the former deputy president of the regional association of the *Land* of Bavaria, writes: 775

Rule by the *Volk* is put into practice more if a *Volk* is led in all areas of life by its most capable and most competent members than if it allows itself to be managed by a mere majority or by corrupt parliamentarians. [...]

(b) [...] 776

(c) In the journal *Der Aktivist* […], D. fundamentally challenges the claim of democracy and the majority principle to validity: 777

> Democracy seems to have become a kind of religion for the people currently in power. [...] However, the constant mantra-like repetition of the assertion that it is in fact the "best form of society" is just not tenable. [...] There is no formula for the perfect form of the state; there is only the inner balance of the *Volk* with the state.

(d) Udo Pastörs emphasised at the NPD Swabian Day (*Schwabentag*) in Günzburg in 2011: 778

> What lies ahead of us is the last stretch of a corrupt system that has to be abolished because it endangers the preservation of the *Volk*, dear friends.

(3) [...] 779-796

(δ) Karl Richter writes in *hier & jetzt* ("here and now", issue 15/2010, p. 4 et seq. <7>) under the headline 'What did you mean, Mr Homer? Ithaka in Bottrop – Why the 'Odyssey' should in fact be banned' (*Wie meinten Sie das, Herr Homer? Ithaka in Bottrop – warum die 'Odyssee' eigentlich verboten gehört*): 797

> Anyone who got into bed with foreign rule must go, with no messing about; scum that has to be cleaned out, we want to prevent it rising up again – as the myth knows.

(c) The respondent, as its party programme makes clear, advocates replacing the existing political system with the "national state" as "[t]he political organisational form of a *Volk*" […]. In this connection, according to the information submitted by the re- 798

spondent's former party chairman and MEP Voigt in the oral hearing, there should be a return to the concept of the German Reich. This coincides with other statements which are attributable to the respondent.

(aa) Following Udo Voigt, Claus Cremer wrote in an online post on the homepage of the regional association of the *Land* of North Rhine-Westphalia in June 2011: 799

> The Reich is our goal, the NPD our way.

(bb) Similarly, in 2011 Karl Richter and Eckart Bräuniger called for the (re)vival of a German Reich in *Deutsche Stimme* ("German Voice", issue 2/2011, p. 22) […]: 800

> Let us integrate the idea of the Reich into the themes and challenges of the present to secure the continued existence of what remains of the body of our *Volk* […]. Yes to Germany – yes to the Reich!

(cc) H., a former elected municipal council deputy from Lower Saxony called in the journal *Volk in Bewegung – Der Reichsbote* ("People in motion – Herald of the Reich") not only for the re-establishment of the German Reichbut also for the reinstatement of the constitution and laws […] which were in force on 23 May 1945. […]: 801

[...] 802-804

3. The respondent is similar in nature to National Socialism. Its concept of the *Volksgemeinschaft*, its fundamentally anti-Semitic stance and its disparaging of the existing democratic order reveal clear parallels to National Socialism (a). In addition, its proclaimed identification with leading personalities of the NSDAP, the use of selected National Socialist vocabulary, texts, songs and symbols as well as revisionist statements with regard to history demonstrate an affinity of at least relevant parts of the respondent with the mind-set of National Socialism (b). […] Taken together, this confirms the respondent's disrespect for the free democratic basic order (c). 805

a) aa) The term and the concept of the *Volksgemeinschaft* are a central feature which the political concepts of the respondent and the NSDAP have in common. […] Point 4 of the 25-point programme of the NSDAP read: "Only those who are members of the *Volk* (*Volksgenossen*) can be citizens of the state. Only those who are of German blood, regardless of religion, can be *Volksgenossen*. Therefore, no Jew can be a *Volksgenosse*." Apart from the specific emphasis on the exclusion of Jewish people, this definition corresponds exactly to the respondent's ideas. 806

[...] 807

bb) Clearly, the respondent and the NSDAP also share a fundamentally anti-Semitic stance. […] 808

cc) Finally, the rejection and disparaging of parliamentary democracy is a further feature shared by the respondent and National Socialism. […] 809

b) Affinity with National Socialism is also expressed in various ways in the actions of the respondent: 810

aa) These include […] references by leading representatives of the respondent glorifying protagonists of the Nazi regime: 811

(1) As Thomas Wulff, former deputy chairman of the regional association of the *Land* of Hamburg, put it in a statement on the website www.altermedia-deutschland.info on Hitler's birthday, 20 April 2013: 812

> May this party conference on the weekend of 20 April remind one or two delegates like a flash of lightning what the greatest son of our *Volk* […] was able to do. He was able to do it because, committing his whole person and acting completely selflessly, incorruptible and prepared to make every personal sacrifice, he became the embodiment of the hope of millions! […]

[...] 813-817

bb) The link with the National Socialist past is also clear from the use of National Socialist vocabulary, texts, songs and symbols. 818

(1) [...] 819

(2) Jürgen Gansel entitled his Facebook post on 12 January 2015 'People, rise up!', words used by Goebbels in his […] *Sportpalast* speech on 18 February 1943. The Brandenburg JN, too, in their Facebook post on 28 November 2014 used the wording "*Das Volk steht auf, der Sturm bricht los*" (The people rise, the storm breaks loose), which originally came from the poem 'Männer und Buben' (Men and Boys) by Theodor Körner. 820

(3) [...] 821-830

cc) Furthermore, it is clear that leading representatives of the respondent are endeavouring to glorify National Socialism and to relativise its crimes. 831

[...] 832-834

(4) In a press statement by the respondent dated 18 January 2010, Karl Richter stated that the national opposition would not "accept" the [...] 65th anniversary of the liberation of Auschwitz as a "ritual permanent stigmatisation of the German as a people of perpetrators (*Tätervolk*)": 835

> For the Holocaust has many facets and includes those burned to death and murdered in Dresden and Hiroshima [...]. [...]

(5) [...] In the *Landtag* of Saxony, Jürgen Gansel diagnosed "historical pornography in the shape of Holocaust memorial rituals and other forms of national masochism" [...]. Udo Pastörs spoke in the *Landtag* of Mecklenburg-Western Pomerania of a "one-sided cult of guilt" and "Auschwitz projections" [...]. In the same place Tino Müller stat- 836

ed:

> You are lying to our young people by hiding the fact that it was not the German Reich that declared war on Great Britain and France, but the British and French who declared war on us. [...]

Holger Apfel stated in the *Landtag* of Saxony: 837

> 66 years after the end of the Second World War there must finally be an end to our *Volk* being beaten into servitude with the club of Auschwitz. 66 years after the end of the Second World War it is finally time to take off the sinner's hair shirt and the dunce's cap. The desk for tickets to Canossa, [...] should be closed once and for all. [...]

The then members of the respondent's parliamentary group in the *Landtag* of Mecklenburg-Western Pomerania demonstratively absented themselves from a minute of silence to commemorate the victims of National Socialism on 30 January 2013. 838

c) The [...] evidence [...] documents to a sufficient degree – without there being any need for recourse to the expert opinion by the Institute of Contemporary History (*Institut für Zeitgeschichte*) submitted by the applicant – the links in terms of content between relevant parts of the respondent and historical National Socialism. 839

The former federal chairman of the respondent, Holger Apfel, also confirmed this in the oral hearing and drew attention to the fact that "at least some party members still find themselves in many points in the world of the political ideas of the Third Reich". The former Hamburg *Land* chairman Wulff, he said, openly professes to be a National Socialist. According to Mr Apfel, proceedings to exclude Mr Wulff from the party failed. 840

It may be presumed from all of this that a similarity in nature exists between the respondent and National Socialism. [...] 841

[...] 842

At the same time, this confirms the disparaging by the respondent of the free democratic basic order. [...] 843

4. [...] 844

**II.**

What precludes a prohibition of the respondent, however, is the fact that the criterion of "seeking" (*darauf ausgehen*) within the meaning of Art. 21(2) first sentence GG is not met. While the respondent does indeed advocate aims which are directed against the free democratic basic order and although it systematically acts […] towards achieving those aims [...] (1.), there are no specific and weighty indications suggest- 845

ing even at least the possibility that these endeavours [...] might be successful (2.).

1. The respondent works [...] in a systematic manner towards the realisation of its anti-constitutional aims (c). 846

a) aa) The respondent has a nationwide organisational structure. [...] 847

The respondent's financial report for 2013 shows that the respondent had 5,048 members [...] as of 31 December 2013. 848

The respondent attempts to prepare its adherents for the political struggle by means of training courses and similar measures. [...] 849

bb) The respondent is represented in the European Parliament by one member. It has no members in the *Bundestag* or in any federal state parliament. Some 350 members of local representative bodies […] are members of the respondent. [...] 850

cc) The respondent's public relations work uses the entire spectrum of media opportunities. [...] 851

[...] 852-854

b) The basis of the respondent's political work is a self-contained strategic concept, which it describes as its "four pillar strategy" […]. 855

c) The respondent systematically attempts to put these strategic goals into practice [...]. 856

aa) (1) Within the framework of the first pillar of this strategy ("Fight for Hearts and Minds"), it endeavours to enhance its public acceptance by means of "national-revolutionary grass-roots work" [...]. The political message is not the primary factor here. [...] 857

[...] 858-860

bb) The aim of the "Fight for the Street" is the dissemination and implementation of the respondent's ideology. For this, it uses its media opportunities, election campaigns and – where it has one – its parliamentary presence. Beyond this, the respondent attempts to influence the formation of political opinion with [...] high-profile public activities [...]. 861

(1) The respondent endeavours to address potential voters and sympathisers at an early age by using materials specifically aimed at young people [...]. 862

[...] 863-866

(2) The main focus of the respondent's publicity activities is on the topic of asylum. [...] 867

(a) (aa) According to the applicant's submission, which remained uncontested, the respondent held a total of 192 events in 2015 which were directly attributable to it with more than 20 people attending each event and 23,000 people attending in total. In the 868

view of the applicant, a further 95 events must be added to this, with a total of 20,000 people attending, since in particular rallies by MVGIDA and THÜGIDA [*translator's note: two regionally active anti-Islam organisations, both of which are offshoots of PEGIDA – Patriotische Europäer gegen die Islamisierung des Abendlandes, Patriotic Europeans against the Islamisation of the Occident*] are heavily influenced by the respondent.

[...] 869-871

(4) The attempt to disseminate the respondent's political ideology takes place on the basis of what is known as the "strategy of taking the floor" (*Wortergreifungsstrategie*) […] in direct confrontation with political competitors. [...] 872

cc) The respondent also uses the "Fight for the Parliaments" to strive for its anti-constitutional aims and work towards their realisation in election campaigns and parliamentary work. […] 873

[...] 874-876

dd) The respondent's "Fight for the Organised Will" involves striving, on the basis of existing personal interconnections (1), to form a "comprehensive national opposition movement" under its own leadership (2). This uses co-operations with various different regional constellations of the extreme right-wing scene which is not affiliated with the NPD and preparedness to integrate members of this scene into the respondent who wish to join it (3). At the same time it seeks to collaborate with and influence the movements directed against an alleged "Islamisation of the Occident" (4). 877

(1) A considerable number of persons at the respondent's executive levels used to be members of banned extreme right-wing organisations. […] 878

[...] 879-895

2. Even though all this shows that the respondent is committed to its anti-constitutional aims and is systematically working towards achieving them, its actions do not amount to a fight against the free democratic basic order in the sense of "seeking" (Art. 21(2) first sentence GG). There are no sufficiently weighty indications suggesting that it will succeed in achieving its anti-constitutional aims. […] 896

a) [...] 897

aa) Currently, parliamentary majorities enabling the respondent to impose its political concept are achievable neither through elections nor by means of forming coalitions. 898

(1) At a supra-regional level, it has just one MEP in the European Parliament. […] 899

Election results in European Parliament and *Bundestag* elections are stagnating at a very low level. In the last *Bundestag* election in 2013 the respondent […] gained 1.3 % of the valid second votes cast. […] In the 2014 European Parliament election it gained 1 % of the valid votes cast […]. 900

In the former West German federal states, the respondent's election results varied at the last *Landtag* elections between 1.2 % (Saarland) and 0.2 % (Bremen) of the valid votes cast. Although the level was already low, it suffered further losses of votes in the *Landtag* elections in 2016 […]. 901

There has also been a decline in the respondent's election results, albeit from a higher starting level, in *Landtag* elections in the former East German federal states. […] In Mecklenburg-Western Pomerania the respondent gained 7.3 % of the valid votes cast in the 2006 *Landtag* election, 6.0 % in the 2011 *Landtag* election and just 3.0 % in the 2016 *Landtag* election. 902

In the more than five decades of its existence, the respondent has not been able to gain representation in any federal state parliament on a permanent basis. There are no indications that this development will change in the future. In addition, the other political parties represented in the parliaments […] have hitherto not been prepared to enter into coalitions or even *ad hoc* co-operations with the respondent. […] 903

(2) Nor is the situation different at municipal level. Even though the respondent has more than 350 seats in local representative bodies throughout Germany […], it is very far from having the ability to influence the shaping of relevant policy. This is confirmed by the fact that the respondent's seats amount to around just one-thousandth of the estimated total number of more than 200,000 seats at municipal level. 904

Nor does a consideration on a case-by-case basis yield any different assessment […]. 905

[…] This is the case even when considering the municipalities upon which the applicant has laid particular emphasis, and in which the respondent gained a disproportionately high share of up to 27.2 % of the valid votes cast […] in the 2014 local government elections […]. 906

The vast majority of the municipalities cited has a small number, in four digits, some even in just three digits […], of inhabitants which means that the high results in these individual cases were not sufficient even for one seat for the respondent in the respective municipal councils. […] At the relevant district level, the respondent did not gain more than 7 % of the votes in 2014 anywhere. […] 907

[...] 908

Thus, the respondent has no policy-shaping majorities of its own in the municipal parliaments of the former East German federal states. […] Moreover, it has just as few coalition options there as in the former West German federal states. […] 909

bb) There are likewise no specific and weighty indications suggesting that the respondent will succeed in achieving its aim of abolishing the free democratic basic order by democratic means outside the parliamentary level. […] 910

(1) Compared with its highest level of 28,000 in 1969, the respondent's membership numbers have clearly declined. […] Neither the respondent's merger with the German 911

People's Union (DVU) nor opening itself up to the neo-Nazi scene and the formation of its own regional associations in the former East German federal states have been able to put a permanent halt to the decline in membership. […] With a total of fewer than 6,000 members, the respondent's possibilities for action are limited significantly.

(2) [...] 912

(a) The Federation's Annual Report on the Protection of the Constitution (*Verfassungsschutzbericht*) for 2014 shows the respondent to be in a state of sustained crisis. Although it is still the most effective extreme right-wing political party, the report finds that it is suffering from internal strife, declining membership numbers, unsolved strategic issues, financial problems and the pending prohibition proceedings […]. 913

[...] 914-916

(aa) In this connection, the expert witness Prof. Jesse submitted his opinion in the oral hearing that the respondent is an isolated, ostracised political party whose campaign capability, such as it is, has declined in recent years. The expert witness Prof. Kailitz, too, stated in the oral hearing that the respondent is at present unable to reach the centre of society. [...] In the oral hearing the former party chairman of the respondent, Holger Apfel, said that the respondent has always been accorded an importance in public perception which has not matched the reality. He said that taboo-breaking had been deliberately staged in the parliaments in order […] to give the impression of an effective and professional organisation. 917

(bb) The finding of a low level of effectiveness in society [...] is confirmed by reports of the constitutional protection authorities of the Federation and the federal states. All annual reports on the protection of the Constitution by the former West German federal states consistently show that attendance figures for the respondent's events are following a downward trend with numbers below three digits, while the number of counter-demonstrators has often been very much higher [...]. In the former East German federal states, it is also found that, apart from the respondent's anti-asylum campaigns (cf. para. 924 et seq.), the respondent's members frequently have only themselves for company at their events [...]. 918

[...] 919

(3) Nor is the respondent able to compensate in other ways for its structural deficits and low level of effectiveness in society. [...] 920

[...] 921-923

(c) This is also the case [...] to the extent that the respondent concentrates on activities directed against asylum seekers and minorities as part of its 'Fight for the Street'. [...] 924

[...] While the respondent does indeed try to instrumentalise the refugee and asylum problems for its own purposes, it frequently acts not in its own name but under the umbrella of apparently neutral organisations [...]. When, on the other hand, it be- 925

comes evident that it is the respondent that is responsible for the event, attendance significantly declines. The applicant has itself submitted that the attendance figures at MVGIDA events declined from around 600 to 120 […] once the dominance of the respondent became evident. It was similar with the 'Schneeberger Lichtelläufen' event series directed against a local home for asylum seekers. While more than 1,500 people attended the first three events [...] only some 250 participants, most of them belonging to the respondent and its entourage, could be mobilised for the fourth event on 25 January 2014, for which the respondent took a more prominent, offensive stance as an organiser [...]. This documents the fact that the anti-asylum initiatives by the respondent have in individual cases been very successful in mobilising attendees. It is, [however], not discernible that this means that its social acceptance is increasing and that it will be able to assert its anti-constitutional aims through the process of forming the political will by democratic means. [...]

(d) Finally, it does not seem likely that the respondent will be able to strengthen its impact by co-operating with forces which are not affiliated with it. [...] 926

(aa) [...] 927

[...] On the contrary, the respondent has been unable to achieve a "concentration of all national-minded forces" under its leadership. Its co-operation with unaffiliated forces takes place on an *ad hoc* basis without any firm organisational foundation. The respondent is not accorded a leading role. [...] 928

[...] In the expert report by Prof. Borstel submitted by the applicant, co-operative ventures with extreme right-wing movements have been assessed as being existential for the respondent. Prof. Borstel reports, however, that these co-operations are temporary and on a regional basis, and that any permanent integration of the neo-Nazi groups and 'free' networks would run counter to the self-perception of these groups as extra-parliamentary resistance groups [...]. 929

[...] 930-932

b) [Finally, there are] no specific and weighty indications suggesting that the respondent exceeds [...] the boundaries of admissible political struggle of opinions in a manner that would satisfy the constituent element of "seeking". [...] 933

aa) It is not discernible that the respondent is capable of asserting to a relevant degree its claims for territorial dominance in a manner which excludes equal participation in the formation of the political will. There are no "national liberated zones" (1). [...] 934

(1) Contrary to its original assertion, the applicant admitted [this] in its brief of 27 August 2015 [...]. 935

(2) In this connection, the tiny village of Jamel constitutes a special case, which cannot be generalised. [...] 936

[...] 937

The gaining of a majority in the village by right-wing extremists is reflected in the village-scape. [...] 938

[...] 939

There is no doubt that Jamel is a village permeated with extreme right-wing ideas. This is, however, a singular [case] that is limited to a few persons. As the expert witness Prof. Jesse has confirmed in the oral hearing, this situation cannot be transferred to other places, particularly not larger villages or towns. […] 940

(3) Other examples of successful implementation of the respondent's claims for territorial dominance were not identified. 941

(a) Contrary to the applicant's opinion, it cannot be assumed that the Hanseatic city of Anklam [...] is a zone of cultural hegemony of the respondent. [...] 942

(aa) The applicant's reference in this context to a […] property which, as a "nationalist meeting centre" […] serves as a venue for right-wing extremists across the country […] cannot be taken as evidence of the assertion of claims to dominance. [...] 943

(bb) Nor is the carrying out of a demonstration on 31 July 2010 under the title of "*Gegen kinderfeindliche Bonzen* [...]" (Against Child-Hating Bigwigs) called jointly by the respondent and the organisations *Nationale Sozialisten Mecklenburg* (Mecklenburg National Socialists) and *Freies Pommern* (Free Pomerania) evidence of the respondent's dominance in Anklam. [...] 944

[...] 945

(cc) Furthermore, the suggestion that the respondent has a dominant position in Anklam is also refuted by the fact that in the 2014 municipal council election the respondent won merely 9.3 % of the valid votes cast and accordingly took only two of the 25 municipal council seats there. There are, moreover, several active anti-right-wing extremism initiatives in Anklam. [...] 946

(b) The same holds for Lübtheen, which the applicant has portrayed as a further example of a zone of domination [...]. The fact that several leading functionaries of the respondent [...] live and are active in Lübtheen, and possibly moved there deliberately, is not sufficient for the presumption of a situation of dominance. The same applies to the extent that the respondent uses a property prominently located in the town centre and that its representatives are present at events, even ones directed against right-wing extremism. 947

[...] 948

[...] Here, too, the fact that the respondent won 10.7 % of the valid votes cast in the 2014 municipal election and accordingly took only two of the 17 seats in the municipal council is evidence against the respondent's dominance. Apart from that, the applicant itself admits that the respondent would not be able to realise fully its claim to 949

dominance, not least due to the citizens' initiative against right-wing extremism initiated by the mayoress. [...]

(c) [...] 950

bb) Nor are there sufficient indications that there is a fundamental tendency of the respondent to assert its anti-constitutional aims by violent means or by committing criminal offences. [...] 951

(1) While the applicant refers [...] to the fact that the number of attacks on homes for asylum seekers peaked in 2015 with 1,031 criminal offences (177 of them crimes of violence) being committed, this cannot be attributed to the respondent. [...] It is not sufficient in this regard for the respondent to be involved in creating a climate of hostility to foreigners with its inhuman agitation. [...] This cannot be simply taken on its own to prove that it regards attacks on refugee homes as a means likely to aid the achieving of its ends or that it approves of them in any other way. [...] 952

(2) Contrary to the applicant's view, it cannot be inferred from the general lack of law-abiding behaviour on the part of its adherents that the respondent is prepared to use force or commit crimes to achieve its […] aims. [...] 953

(a) In this connection, the anonymised statistics by the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*) submitted by the applicant regarding delinquency of the respondent's executive committee members cannot be used to support the applicant's view [...]. 954

(b) This is not altered by the fact that the applicant has reacted to the notice as to inadmissibility as evidence and submitted a list of 57 criminal convictions of the respondent's functionaries in total. A large number of these convictions had [...] no political background [...]. A political background is at least doubtful in the case of a number of other criminal offences. [...] Moreover, the convictions cover a period of 25 years, largely concern purely propaganda offences and predominantly involve petty crime, with some being for offences committed as juveniles. The number, subject and severity of the criminal offences on the list committed by individual members of the respondent are not sufficient […] to accuse it of having the intention of asserting its political aims by using force or by committing crimes. 955

(3) Nor are the events and facts set out in detail by the applicant sufficient for an inference that the respondent is prepared to use force or fails to obey the law such that the constituent element of "seeking" within the meaning of Art. 21(2) first sentence GG is met. [...] 956

[...] 957-958

(b) The violent assaults and other criminal offences described by the applicant cannot be unreservedly attributed to the respondent. 959

(aa) Since the perpetrators who caused the arson attacks on the barn in Jamel and on a sports hall in Nauen planned as emergency accommodation for asylum 960-961

seekers have not yet been identified [...], these occurrences cannot be taken into consideration. The same applies to the damaging and removal of posters in the run-up to the demonstration in Anklam on 31 July 2010 [and the damage to property and threatening of the director of a socio-cultural meeting place in Güstrow].

Nor can any involvement by the respondent be established in the spraying […] in Demmin on 19 August 2010 and in Ueckermünde on 20 August 2010 of so-called "Stolpersteine" [*translator's note: "stumbling blocks" - small, square plaques set into pavements*] which had been placed to commemorate Jewish fellow citizens. The posters simultaneously pasted up in Ueckermünde suggest rather that this was an act carried out by an extreme right-wing movement […]. 962

Similarly, the riots in Leipzig-Connewitz on 11 January 2016 cannot be attributed to the respondent. 963

(bb) The riots in Dresden on 24 July 2015 and Heidenau on 21 August 2015 following demonstrations by the respondent cannot be attributed to the respondent. 964

(α) The demonstration […] organised in Dresden […] was notified to the authorities by a member of the respondent and advertised as an event of the party. […] Violent clashes took place following this demonstration […]. 965

[…] There is, however, nothing to show that the respondent incited these clashes or contributed to them in any other way. […] 966

(β) The same applies to the riot which took place following the respondent's protest rally in Heidenau on 21 August 2015 […]. 967

(cc) Attacks on constituency offices of other political parties in Mecklenburg-Western Pomerania cannot be attributed to the respondent, either. Since the perpetrators of these attacks have not been identified, members or adherents of the respondent cannot be accused of being involved in carrying out these attacks. Nor can it be established that the respondent supported these attacks or took credit for them. 968

[...] 969

(c) Therefore, what remains is merely a small number of acts of violence involving members and adherents of the respondent (aa), which are not, however, sufficient to prove that it has a fundamental tendency to assert its anti-constitutional intentions by violent means or by committing criminal offences (bb). 970

(aa) (α) These include the assault by JN functionaries on a rally by the German Association of Trade Unions (*Deutsche Gewerkschaftsbund* – DGB) in Weimar on 1 May 2015. […] 971

[...] 972

(β) Moreover, a total of twelve convictions have been handed down to members and adherents of the respondent for policy-related violent offences. […] 973

(γ) The applicant also refers to […] two assaults on counter-demonstrators at events held by the respondent in Lingen and Aschaffenburg in 2013. In the oral hearing, the third-party expert Röpke also reported on further acts of violence by security staff. […] 974

[...] 975

(bb) […] Including the events described by the applicant and the third-party witness Röpke, this involves a total of 20 independent offences over a period of more than ten years. The vast majority of these cases does not involve the planned and deliberate use of force to assert political aims, but rather incidental scuffles at the margin of or leading up to political events […] A fundamental tendency of the respondent to assert its political aims by violent means or by committing criminal offences cannot (yet) be inferred from the individual cases which have been described. 976

cc) Nor can it be established that the respondent's actions lead to an atmosphere of fear that is likely to undermine the right to free and equal participation in the formation of the political will. […] 977

(1) (a) The list submitted by the applicant with freely-given information on threat experiences (*Liste mit freien Angaben zu Bedrohungserfahrungen*) drawn up by the psychologist Anette Hiemisch cannot be referred to as evidence establishing the creation of an atmosphere of fear by the respondent. […] This list […] does not show which organisations are the source of the threats in question, nor are dates, places or involved persons specified in detail. […] 978

(b) The Senate cannot concur with the applicant's opinion that threats and intimidations by members of comradeships and other neo-Nazi groups can generally be attributed to the respondent. […] Comradeships and other neo-Nazi groups act autonomously and do not represent themselves as an "extended arm" of the respondent. […] 979

(c) [...] 980

(d) Nor can the events following a demonstration organised in October 2013 by the citizens' initiative *Schneeberg wehrt sich* (Schneeberg defends itself) be attributed to the respondent. […] After this demonstration, 30 to 50 attendees at the event carrying lit torches drew up outside the mayor's private house. […] There is no indication that the respondent instigated these events or supported them in any other way. […] 981

(e) [...] 982

(2) [...]

(a) Mere participation by the respondent in the battle of political opinions must […] remain outside the scope of consideration. As long as it does not exceed the boundaries of what is permissible in democratic discourse, this does not result in any limiting of third parties in the exercise of their democratic rights, regardless of any other motives the respondent may have and the subjective feelings of individuals con- 984

cerned.

(aa) [...] 985-986

(bb) With regard to the resignation of the mayor of Tröglitz, it appears doubtful whether the boundaries of the permissible battle of political opinions [...] were exceeded. [...] 987

Even though the mayor of Tröglitz may have subjectively felt the planned march of the demonstration announced by the NPD district council member T. past his house to be a threat to himself and his family, merely marching as announced along an approved route [...] does not yet in itself constitute an interference with the process of free and equal participation in the formation of the political will. 988

(cc) [T]he protests against the use of the *Spreehotel* in Bautzen do not yet exceed the permissible boundaries of the battle of political opinions. [...] 989

(dd) The same applies to the protest and call for a demonstration against the mosque in Leipzig-Gohlis with the motto *Maria statt Scharia!* (Mary, not sharia!) [...]". 990

(b) It may be the case that other activities by the respondent have exceeded the permissible boundaries of the battle of political opinions […]. Nevertheless, it cannot be inferred from individual cases that they are objectively likely to bring about an […] atmosphere of fear which stands in the way of the exercise of democratic rights. 991

[This is the case with regard to individual election campaign activities by the respondent and visits to refugee homes and the rally directed by the respondent's Berlin-Pankow district association against the Pankow borough mayor K. and the occurrences between 2007 and 2009 in Schöneiche near Berlin described by the applicant.] 992-1000

(d) Finally, the respondent's activities with regard to forming militias and undertaking patrols are not objectively sufficient to amount to a creation of an atmosphere of fear, since, as far as is evident, lawful limits have not been exceeded and there has been no impermissible interference with the rights of third parties. [...] 1001

(3) Moreover, to the extent that individual situations remain in which a potential threat exists or at least cannot be ruled out which may undermine the freedom of formation of the political will (a), this is not sufficient to infer that the respondent has a fundamental tendency to pursue its political aims by creating an atmosphere of fear (b). 1002

[...] 1003-1006

(b) [...] Like crimes which have been committed, the action of individual members of the respondent against the director of the multi-cultural meeting centre in Güstrow and against the mayor of Lalendorf are individual occurrences which cannot in a generalised way be laid at the door of the respondent. The same also holds for the references to the conduct of the respondent's security staff. The factual situations which 1007

have been described are not yet enough to justify the ordering of the prohibition of the party. [...]

dd) The Senate is not overlooking the fact that affected persons may feel that their constitutionally-guaranteed freedom of expression and action are seriously and sustainably undermined by behaviour of members or adherents of the respondent which is intimidating and deliberately provocative or crosses the boundary to criminality. The evidence presented in the oral hearing does not, however, show that the extent, intensity and density of such occurrences reaches the threshold for the prohibition of a political party determined by Art. 21(2) GG [...], which is high for the reasons set out above (cf. para. 523 et seq.). Intimidation and threats, as well as the building-up of potentials for violence, must be countered thoroughly and in due time with the means of preventive police law and repressive criminal law in order to effectively protect the freedom of formation of the political will as well as individuals affected by the respondent's behaviour. 1008

**E.**

The decision not to allow reimbursement of necessary expenses to the respondent is based on § 34a(3) BVerfGG. [...] While the proceedings have not resulted in the unconstitutionality of the respondent being established, there were, contrary to the respondent's opinion, neither insurmountable procedural obstacles nor any other admissibility requirements standing in the way of the proceedings. The substantive facts in the proceedings showed that the respondent acts in a systematic manner to abolish the free democratic basic order and that all that is lacking to qualify its actions as "seeking" within the meaning of Art. 21(2) first sentence GG is the lack of potentiality. For this reason, reimbursement of costs is not appropriate, despite the ultimate lack of success of the application to prohibit it. 1009

**F.**

The decision is unanimous. 1010

| | | |
|---|---|---|
| Voßkuhle | Huber | Hermanns |
| Müller | Kessal-Wulf | König |
| | Maidowski | |

**Bundesverfassungsgericht, Urteil des Zweiten Senats vom 17. Januar 2017 - 2 BvB 1/13**

**Zitiervorschlag** BVerfG, Urteil des Zweiten Senats vom 17. Januar 2017 - 2 BvB 1/13 - Rn. (1 - 1010), http://www.bverfg.de/e/bs20170117_2bvb000113en.html

**ECLI** ECLI:DE:BVerfG:2017:bs20170117.2bvb000113