

Federal Constitutional Court Issues Temporary Injunction in the NPD Party Ban Case

Suggested Citation: *Federal Constitutional Court Issues Temporary Injunction in the NPD Party Ban Case*, 2 German Law Journal (2001), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=74>

I. Introduction

[1] German Law Journal reported last November on the German Government's plans to take the extraordinary move of seeking a constitutional ban of the extreme right-wing National Democratic Party of Germany. (1) At the end of January, 2001, the Federal Government filed its motion for a ban of the NPD with the Federal Constitutional Court in Karlsruhe. At the end of March, 2001, the *Bundestag* (Federal Parliament) and the *Bundesrat* (Federal Legislative Chamber of the States) followed with separate motions. The Federal Constitutional Court now has before it three separate actions, raising distinct claims and presenting distinct evidence, seeking the constitutional excommunication of the NPD. The motions present a unified front from every political sector of the German constitutional order: the executive, the legislature and the *Länder* (federal states). This lock-step approach to the effort to ban the NPD was part of the master-scheme of Federal Interior Minister Otto Schily, who pressed hard to gain support for the move to seek a ban from all mainstream political parties and all the *Länder*, at least in part to limit the political fall-out in the case that the Constitutional Court finds against the motions. (2)

[2] Justice Hans-Joachim Jentsch of the Constitutional Court's Second Senate will serve as the *Berichterstaater* (Reporting Judge – Case Manager).

[3] As noted in the previous *GLJ* report, the coalition building effort of Interior Minister Schily of the *SPD* (Social Democratic Party of Germany) had already required him to reconcile himself to a political alliance with the Bavarian Interior Minister Günther Beckstein of the opposition's Bavarian sister party, the *CSU* (Christian Social Union). (3) Now, with the motions pending before the Federal Constitutional Court, Schily finds himself confronted with the task of reconciling his past. Representing the NPD in the proceedings will be Berlin attorney Horst Mahler, a former left-wing comrade and client of Otto Schily. The personal histories of Schily and Mahler are dramatically symbolic of the tumultuous generation that came into its own in the 1970s, known in Germany as the "68ers." The party-ban proceedings, representing, as they necessarily do, an epic, self-conscious struggle for the modern identity of Germany, take on even greater historical resonance when the Schily-Mahler confrontation is added to the mix. The party-ban proceedings will serve as a definitive moment for post-war Germany; addressing at one time the meaning for modern Germany of the stubborn sub-text of Germany's Nazi history and the scars left behind by the riots and terrorism of the 1970s and 1980s.

[4] Recent events are suggestive of the edginess one would expect from such a high-stakes drama. While girding itself to consider the motions seeking a ban of the NPD, the Federal Constitutional Court was recently asked by the attorney representing the NPD to issue a temporary injunction pursuant to Article 32 of the *BVerfGG* (Federal Constitutional Court Act) following the confiscation by the Berlin Prosecuting Attorney's Office of all of his computer equipment and computer data-files (from his home, personal office and his office at the headquarters of the NPD).

II. Horst Mahler: A Radical Biography (4)

[5] Horst Mahler's strongly held and controversial beliefs have kept him at odds with the Berlin Prosecuting Attorney's Office for the length of his career. However, the most recent clash, which led to the confiscation of his computer equipment on July 11, 2001, represents the first such confrontation since his dramatic conversion from a leader of Germany's radical left-wing movement in the 1970s to a leader of Germany's radical right-wing movement today.

[6] Few had such solid radical left-wing credentials as Horst Mahler. He emerged as a central figure in the revolutionary movement in 1968, when he took part in the violent demonstrations against the Springer Publishing House in response to the assassination of Rudi Dutschke. Convicted and sentenced to a short jail term for his participation in the demonstrations, Mahler fled Germany with other members of the *Rote-Armee-Fraktion* (RAF) for revolutionary training in Jordan. Upon his return to Germany, Mahler was arrested and charged with planning and participating in the violent escape from prison of his RAF comrade Andreas Baader. *Otto Schily* represented Mahler in the criminal trial on these charges and won Mahler an acquittal. In 1973, Mahler was convicted of aggravated robbery and sentenced to 12 years in prison for his role in RAF-backed bank robberies. When all other charges against Mahler were finally settled, he faced a total of 14 years in prison. In 1974 his license to practice law was revoked.

[7] Evidence of the shift taking place in Mahler's ideology came in 1977, in a commentary he wrote from prison in which he described "that he was being internally freed from the dogmatic revolutionary theory of Marxism-Leninism."

In spite of his changing world view, Mahler continued to receive support from young German leftists, including his attorney throughout this period, *Gerhard Schroeder*. Mahler was released on parole after 10 years in prison. In 1988, his motion for reinstatement to the practice of law was rejected by the local authorities but that decision was reversed on appeal by the Bundesgerichtshof (Federal Court of Justice), which noted a sincere change in Mahler. It was not until late in the 1990s, however, that the extreme and improbable nature of Mahler's change began to earn him public attention. In an interview with the weekly newspaper *Die Zeit*, Mahler explained that the roots of his ideological shift lie in the disillusioning extremism of his experience in Jordan in 1970. Since the late-1990s Mahler has published extensively, especially in the internet, in support of xenophobic and nationalistic ideology. During this period, Mahler also came to be associated with the extreme right-wing National Democratic Party of Germany (NPD), eventually assuming the role of the party's lead counsel in the party-ban proceedings before the Federal Constitutional Court. Of his writings, the essays "Flugschrift an die Deutschen" and more recently "Deutschen Kollegs," were ethnically inflammatory. In "Deutschen Kollegs" and a number of other publications Mahler expressed extreme hostility for Jews and joined the call for a ban on the Jewish community in Germany. Mahler's writings led to the seizures of his computer equipment and data in early July, 2001, as part of the Berlin Prosecuting Attorney's criminal investigation of Mahler for violation of Germany's hate-speech law (*Volksverhetzung*, StGB § 130). (5)

III. The Motion for a Temporary Injunction and the Court's Judgement

[8] Mahler brought his Article 32 BVerfGG (Federal Constitutional Court Act) motion seeking a temporary injunction against the seizure (on June 11, 2001) of his computer equipment and data within the framework of the on-going NPD party-ban process before the Court. (7) In this sense, the motions concern him in his capacity as lead counsel for the NPD in the party-ban proceedings and not in his capacity as an alleged violator of Germany's hate-speech law. Mahler asserted the following urgent needs to avert "serious detriment" in his motions: (a) that the seizure made it impossible for Mahler and the team representing the NPD in the party-ban proceedings to meet the June 19, 2001, deadline for filing the responsive pleadings to the party-ban motion sponsored by the *Bundesrat* and to otherwise proceed with their preparations; (b) that the seizure was conducted under the pretext of the long out-standing hate-speech investigation but was truly aimed at discovering the NPD's party-ban strategy, especially in light of the fact that Mahler had acceded his responsibility for the articles at issue in the criminal allegations; and (c) that the warrants, pursuant to which the seizure was carried out, contained flaws that amounted to a possible constitutional violation and/or human rights violation.

[9] With little analysis, the Court's Second Senate unanimously granted the motion for a temporary injunction, ordering the immediate return of Mahler's computer equipment and the immediate return of the seized computer data, after it has been copied by an independent agent and left under seal with the Berlin Magistrate's Court. (8) The Second Senate concluded that a threat to the integrity of the underlying party-ban proceedings appeared possible in these circumstances, such as to qualify for protection against the kind of imminent detriment with which Article 32 is concerned. The Senate especially expressed concern for a possible violation of the right to a fair process:

Also in party-ban proceedings, the concerned party has the right to a fair process. This right can be impaired through the confiscation of data and work resources, as well as through the exposure of the trial strategy of one of the parties. (9)

[10] The Senate resolved the conflict in the case between the Prosecuting authority's obligation to develop a criminal investigation and the NPD's rights to a fair process in the party-ban proceedings in favor of the fairness of the party-ban proceedings. The Senate explained that, in such circumstances, "a weighing in favor of the undisturbed preparation of the [party-ban] proceeding" is required. (10)

(1) *Government Commits to Seeking a Ban of the Extreme Right-Wing National Democratic Party of Germany*, 1 GERM. L. J. 2 (November 1, 2000) <http://www.germanlawjournal.com>

(2) Only the Free Democratic Party (FDP or Liberals) refused to throw its support behind the motions seeking a ban.

(3) *Government Commits to Seeking a Ban of the Extreme Right-Wing National Democratic Party of Germany*, 1 GERM. L. J. 2, Para. 1 (November 1, 2000) <http://www.germanlawjournal.com>

(4) Information about Mahler, expressing both support and criticism, is in abundance in the Internet (in German). The short biographical-sketch presented here was drawn exclusively from information on the web-sites of: (a) the *Deutsches Historisches Museum* (German Historical Museum),

<http://www.dhm.de/lemo/html/biografien/MahlerHorst/>; and (b) *Informationsdienst gegen Rechtsextremismus* (Information Service Against Right-Wing Extremism), <http://www.idgr.de/lexicon/bio/m/mahler-horst/mahler.html>.

(5) For a discussion of the German hate-speech law, see *Federal Court of Justice (BGH) Convicts Foreigner for Internet Posted Incitement to Racial Hatred*, 2 GERM. L. J. 8 (May 1, 2001) <http://www.germanlawjournal.com>;

Federal Constitutional Court Reverses the Hate-Speech Conviction of Journalist Who, For an Article About a Local Political Candidate, Penned the Headline: "Culture: A Jew?", 1 GERM. L. J. 3 (November 15, 2000)
<http://www.germanlawjournal.com>.

(6) For a brief introduction to this procedural device, see the article *The Federal Constitutional Court's Emergency Power to Intervene: Provisional Measures Pursuant to Article 32 of the Federal Constitutional Court Act*, also in this issue, under Public Sector.

(7) Thus fulfilling the requirement that such motions for an injunction arise out of proceedings before the Court: Article 32(1) states "In a dispute . . ." This has been interpreted to mean a dispute over which the Federal Constitutional Court would have jurisdiction. See BVerfGG Kommentar, Berkemann, p. 578-579.

(8) NPD Parteiverbot Verfahren, 2 BvB 1/01 vom 3.7.2001, <http://www.bverfg.de/>.

(9) *Id.* at Paragraph 25.

(10) *Id.*.