Articles

Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties

*By Peter Niesen**

Abstract

Restrictions on the formation and activity of political parties are hard to square with democratic principles. This article delineates three historical and systematic paradigms for the justification of bans on political parties in democratic polities. They all presuppose different characteristic background understandings of democracy. I first discuss the post-World War II West German constitutional practice, which was to immunize the democratic process symmetrically against takeovers by extreme Left or extreme Right parties. One Communist and one neo-National Socialist party were banned in the 1950s. I call this paradigm 'anti-extremism' since it is designed to ward off challenges to political centrism. In a next step, I discuss the historical opposition of the post-World War II Italian constitution to Italy's past regime of injustice, leading to a narrow ban on any attempted new formation of the abolished National Fascist Party. I show that the new Italian democracy conceived of itself predominantly as the negation of its predecessor regime, and therefore restricted the democratic process by a single, historically defined exception. I call this paradigm 'negative republicanism'. I argue that it has advantages as a strategy of transitional justice and the politics of memory, but risks becoming outdated as new challenges arise. Recently, the contours of a third paradigm have emerged in attempting to base bans on political parties on their aggressive denial of mutual recognition to some (groups of) co-citizens, for example racist parties. I call this paradigm 'civic society' because it understands democracy as a horizontal practice of interaction as equals.

Keywords: Militant Democracy, Constitutionalism, Extremism, Party Ban, Politics of Memory, Transitional Justice.

* University of Frankfurt/M. This paper was written for the conference on "Europe's Century of Discontent: Reflections on the Legacy of Fascism, Nazism and Communism", Hebrew University, Institute of European Studies, Jerusalem, March 2002. I wish to thank the organizers, Shlomo Avineri and Zeev Sternhell, for providing an inspiring discursive environment; and Leonardo Ceppa, Alessandro Somma, and especially Jörg Luther for invaluable help on Italian constitutional law.

A. Introduction

Restrictions on political association and expression are problematic from a democratic point of view. The default assumption seems to be that democracy minimally entails that all citizens have claims to participate in the legislative programming of society, which, given the size and complexity of democratic societies, they have to realize to a significant degree as participants in the debates of a political public sphere or through their membership in and support for political organizations such as parties. If they lack such chances, political decisions will lack democratic legitimacy. Where the law prohibits such options, "it cuts off the possibility of participating in the open ended future required by democracy. Precisely to the extent the law imposes a version of what the future can or cannot be … [people] are reduced to heteronomous subjects, instead of autonomous citizens."[1] It follows that the burden of justification for future-constraining regulations on freedom of association and expression is on those who propose and favor them.

Most democracies, Germany and Italy among them, do provide potentially future-constraining regulations of political expression and association. Sometimes, such restrictions are explained in completely general terms – for example, when a ban on incitement against democracy is based on the conditions of sustainability of democratic politics.[2] In this case, the type of reasoning invoked to discharge the burden of justification is obvious; it draws on what is instrumental for the continued existence of a democratic system of governance. But in many cases the reasoning brought forward in support of such regulations involves reference to injustice committed in the past in those societies, whether such reference is made in parliament or constitutional assemblies, in the political public sphere, in constitutional commentary or in the constitutional texts themselves. Insofar as legal restrictions on political association and repression of speech reflect historical failure and catastrophe, they tend to disclose a new republic's understanding of the paradigmatic wrongs of the old regime and, at the same time, specify the new regime's normative orientation toward the future. These features are not abstract requirements of constitutional reproduction, but relate to the concrete historical problem-solving function of the constitution in question. Although the motivations for historically specific restrictions, in this sense, seem equally obvious, they rely on exceptions to the default understanding of democracy that stand in need of articulation and justification.

In this paper, I draw on the examples of constitutional provisions outlawing political parties in Germany and Italy, which I will in some instances illustrate with restrictions on political expression. While the legal culture of the Federal Republic of Germany includes a variety of

[1] Robert Post, Dignity, Autonomy, and Democracy, Inaugural Richard Daub Lecture at J.W. Goethe Universität Frankfurt/M., November 1999, quoted from the MS.

[2] This is the approach pursued in FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY (D. Kretzmer & F. Kershman Hazan eds., The Hague 2000).

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press

legal instruments against anti-system activity, the restrictions introduced by the Italian republic were more parsimonious, with the central exception of a party ban. As both National Socialism and Fascism had based their success on an innovative development of the apparatus of a modern mass party, and as their successor regimes constituted themselves as party democracies, the constitutional admissibility of parties became a central issue for the emerging democracies. While some restrictions on political expression, for example in the penal provisions against denial of the Holocaust in Germany, appear to draw on related motivations, they are of a less direct significance. Still, such provisions can, in our context, throw some light on the understanding of party bans because, firstly, the denials in question directly concern the criminal character of the superseded regime. Moreover, outlawed speech is typically being used as evidence in trials in which the outlawing of a party is at issue; and conversely the outlawing of parties constrains their members in their expressive liberties.

The history of the Federal Republic displays several attempts at demarcation from the past by means of a party ban. In the immediate aftermath of the Second World War, under some pressure from the Allied Forces getting entangled in the Cold War, a constitutional ban on political parties was formulated in a general and abstract way, aimed against "whoever attempts to impair or destroy the free democratic basic order". At the time, it was already obvious what the Federal Constitutional Court later only confirmed: that this provision, article 21 (2) of the Basic Law, was the two-edged sword of a "militant democracy" directed as much against recently defeated National Socialism as against really-existing state Socialism. The Federal Republic outlawed, in two famous cases, a successor organization to the NSDAP, SRP, and the Communist Party of Germany, KPD. However, in the aftermath of the KPD trial and its ideological successor, the 1970s campaign of *Berufsverbote* against radicals in the civil service, the anti-totalitarian or, as I prefer to say, "anti-extremist" consensus proved less and less convincing.[3] Especially since 1989, the concept of militant democracy has not played much of a role,[4] until very recently, when motions for the ban of the radical right wing *Nationaldemokratische Partei Deutschlands*, NPD, were submitted to the Constitutional Court in January 2001.

Italy, in 1943 and 1946/7, had reacted differently to the Fascist catastrophe. The Italian people had, in Art. XII of the Transitory and Final Dispositions of its constitution, ruled out the reorganization of the PNF, the National Fascist Party. They had not extended this ban to anti-system parties in general. I will argue that a second phase in the Federal Republic's understanding of its restraints on political liberties, a phase that culminates in one of the motions in the recent trial against the NPD at the Federal Constitutional Court, can be

[3] Anti-extremism is the broader, more inclusive notion directed against organizational as well as individual behavior, cf. infra note 28.

[4] Ulrich K. Preuß, *Notstand und Parteienverbot. Über die Geltungsbedingungen der 'Normalverfassung'*, 32, KRITISCHE JUSTIZ 263 (1999).

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press

described in the categories of the Italian model, which I label "negative republicanism". Negative republicanism carries an indexical reference to a society's past and expresses the concrete negation of historical wrongs in the name of democracy. However, the differences between the Italian conception and its belated German uptake will be worthwhile to record. Authors in Italy and Germany draw on dissimilar categorizations of the phenomena rejected, and therefore on different models of democratic vindication of those restrictions. In developing my understanding of what seems to be the most defensible version of negative republicanism for Germany, I draw on arguments brought forward in the recent trial of the NPD, fortified by considerations of democratic theory.

However, attempts to isolate a republic's democratic politics against its historical nemesis require the identification of a narrowly circumscribed opponent, and this appears to pull negative republicanism into two opposing directions. The more specific and historically "thick" its antagonism is formulated, the more difficult will its scrupulous application to current phenomena become. And while broader, more sweeping formulations may be apt to cover current democratic pathologies, they are constantly at risk of anachronistically diagnosing those contemporary phenomena. This dilemma has provoked attempts towards a new abstraction. In the third part of my paper, I will therefore speculate on whether we are right now witnessing the beginnings of a third paradigm, resting on a moral encoding of democratic activity within civil society, which has yet different implications for constraining political association. I call this paradigm "civic society" to highlight two of its features: its focus on democratic processes within society (as opposed to within the political system), and the demanding normative conception of citizenship entailed by this. I argue for the conclusion that, despite its modernizing features, this paradigm is still saddled with too many problems to be considered a pure blessing for democracy.

B. Anti-extremism

The Federal Republic's Basic Law does not owe its existence to a widespread resistance against the Nazi dictatorship, nor is it the fruit of a struggle of self-liberation of the German people. What little resistance against National Socialism there was had not consistently been motivated by the principles expressed in the Basic Law. And, at least from the perspective of the Adenauer government, the legitimacy of the resistance put up against the NS system was so controversial that publicly acknowledging and crediting it seemed risky or downright unwise. The main influence on the structure and provisions of the emerging Basic Law was the Allied administration in West Germany, in a geopolitical situation already structured by the emerging confrontation of the Cold War. The impact of this situation is obvious from many passages of the Basic Law, but especially from Art. 21 (2), which allows the Constitutional Court to declare unconstitutional, and thereby ban, political parties aiming at impairment or destruction of the "free democratic basic order".[5]

[5] The article in question reads "Art. 21, 2: Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press

From the deliberations of the constitutional convention of the Parliamentary Council, it is clear that Art. 21 (2) was oriented against the contemporary East as much as against the immediate German past. The Parliamentary Council debated the ban on political parties in 1948/49, during the Berlin crisis and blockade, and it can be shown from the transcripts that Adenauer's CDU was envisaging not only the threat of a renewed NSDAP, but also of its "totalitarian pendant", a German communist party.[6] This is relevant for the understanding of the peculiar concept of a free democratic basic order. The representative of the CDU, v. Mangoldt, distinguished between "a democratic order which is less than free, namely that of the peoples' democracies, and one which is free", namely that of the Federal Republic.[7] As a leading commentator of the Basic Law later formulated, Art. 21 (2) was directed against "a political order we knew from the past and the East and attempted to rule out at all cost".[8] Although some scholars have argued that the basic order as conceived by the Basic Law from its inception had an "unequivocally anti-fascist and anti-militarist orientation",[9] it seems much more plausible to assume that the idea of constitutional scrutiny of political parties is an expression of an anti-communist as well as anti-National Socialist consensus among the delegates.

Within three days in November 1951, the Federal government submitted two motions to the Constitutional Court. It asked the Court to recognise as unconstitutional and thereby ban the *Sozialistische Reichspartei* (SRP), an association of National Socialist veterans with significant support in the northern *Bundesländer*, and the *Kommunistische Partei Deutschlands* (KPD). The court declared both parties unconstitutional. It did so, at first glance, with the same arguments, although this impression would have to be modified later.[10] Of course, when preparing the first opinion, the court knew it was going to have to use the same categories again, so it presented their application as a two-step learning process. In the first instance, the court recognized an alleged helplessness or impotency of the Weimar Republic to fight the National Socialist takeover by legal-constitutional means.

Republic of Germany are unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality." The author is responsible for all translations from the German and from the Italian in this paper.

[6] CLAUS LEGGEWIE & HORST MEIER, REPUBLIKSCHUTZ. MAßSTÄBE FÜR DIE VERTEIDIGUNG DER DEMOKRATIE 65 (1995).

[7] Proceedings of the Parliamentary Council in 1 Jahrbuch des öffentlichen Rechts, NF, 73, here quoted from HORST MEIER, PARTEIVERBOTE UND DEMOKRATISCHE REPUBLIK, ZUR INTERPRETATION UND KRITIK VON ART. 21. ABS. 2 DES GRUNDGESETZES 338 (1993).

[8] Günter Dürig, *Art. 18*, in GRUNDGESETZ-KOMMENTAR para. 48 (Th. Maunz & G. Dürig eds., 1991); cf. Meier, *supra* note 7, at 299.

[9] GERHARD STUBY, *Das Grundgesetz – Seine Entstehung, seine Veränderungen und seine Perspektiven, in* DAS GRUNDGESETZ. VERFASSUNGSENTWICKLUNG UND DEMOKRATISCHE BEWEGUNG IN DER BRD 18 (Vereinigung Demokratischer Juristen eds., 1974); cf. MARTIN KUTSCHA, VERFASSUNG UND "STREITBARE DEMOKRATIE" 65 (1979).

[10] See *infra*, pt. C, text at note 68.

In a second step it extended the application of the general categories in which the argument against SRP had been framed from a right-wing to a left-wing context, as the hostile takeover of the republic by left- or right-wing extremists appeared as the evil to be averted. The learning process exhibited involved little public commitment to what the politics of National Socialism had been, to what its aims and activities involved, or to what should be regarded as its essential problematic features, but concentrated on the technical-instrumental level of political engineering, on how "anti-system" associations in general could be combatted.[11]

Earlier comparative work on SRP and KPD has sometimes interpreted this two-step sequence in the sense that banning SRP was a test run for the Constitutional Court, the main aim being to establish a precedent that could serve as a "figleaf" for the later, considerably more significant ban on KPD. However, recent research has emphasized that the success of the right wing party had indeed led to a serious domestic crisis because it threatened to sabotage Adenauer's strategy of silent integration of former National Socialists into West German society and political parties.[12] Still, already in the preparatory stages of the SRP party ban motion, what the Federal government publicly and in negotiations with the Allied High Commission concentrated upon was the SRP's idiosyncratic "socialist" component and alleged connections with the ruling Socialist Party in East Germany.[13] Adenauer's right wing coalition partners in the cabinet almost sabotaged the motion against the SRP, and could only be pacified by the simultaneous decision to hand in a motion against KPD.[14] The precarious legitimacy of fighting National Socialism in the early Federal Republic was stabilized by the perception that, even while fighting Nazism, one was simultaneously fighting Communism.

The SRP opinion contained two tracks of reasoning, a general and a more specific one. I will come back to the relatively neglected specific argument, which addressed SRP's National Socialist character, in the second part of my paper, and look at the general considerations first. In the trial of SRP, the Court faced the question of which principles and institutions the free democratic basic order (fdGO) protected by Art. 21 (2) was made of. It gave a twofold definition. Negatively, fdGO is characterized by the absence of violent or arbitrary government. Positively, it is characterized by the following necessary conditions: "respect for human rights as laid down in the Basic Law – especially every person's right to life and free development, – respect for popular sovereignty, separation of powers, responsible government, an administration governed by the rule of law, independent courts, multiple

[11] Cf. GIOVANNI SARTORI, COMPARATIVE CONSTITUTIONAL ENGINEERING (1994).

[12] NORBERT FREI, VERGANGENHEITSPOLITIK. DIE ANFÄNGE DER BUNDESREPUBLIK UND DIE NS- VERGANGENHEIT 342 (note 64), 343 (note 69) (1999).

[13] *Id.* at 333–338.

[14] *Id.* at 340–345.

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press

and equal political parties, including the constitutional right to the establishment and operation of an opposition."[15] The KPD opinion repeats these criteria without major modification, slightly specifying some elements. Its lasting dogmatic contribution consists in the clarification of an intensity threshold to warrant constitutional intervention against political activity hostile to the fdGO. It makes clear that purely contemplative opposition against the basic order is not sufficient for a party to be considered unconstitutional, but that an aggressive and purposive struggle is required.[16]

In sheer quantitative terms, the KPD trial was very much unlike the short and swift SRP process. The trial had lasted for almost five years, when, under legal pressure from the government, the opinion was handed down on 17 August 1956. It was more than three hundred pages long. From this it may be inferred that the court did not assume the unconstitutionality of the KPD was in any way obvious, and its arguments certainly did not end the discussion. In a move characteristic of the more reflective proponents of the anti-extremist paradigm, the Court worries about consistency problems for democracy and states a "certain tension", an at least "theoretical self-contradiction" inherent in limiting political liberty in order to save political liberty.[17] This is not surprising. Suspicions of democratic contradictions, dilemmas, paradoxes and antinomies have accompanied militant democracy since its inception in Karl Loewenstein's 1937 article, which boldly suggested violating democratic principles in order to rescue democratic practices.[18] The perception that there is some element of paradox, contradiction, antinomy or dilemma has since been formulated in several ways,[19] for example in the empirical prognosis of a "chilling effect" that a ban on parties can have on democratic activity.[20] The Court, of course, focuses on whether there is a paradox inherent in the text of the Basic Law. Seen together with the constitutional protection of free expression and association, Art. 21 (2) appears at first sight as a flagrantly unconstitutional (*verfassungswidrig*) provision of the

[15] BVerfGE 1953, 2 (12).

[16] BVerfGE 1956, 5 (141).

[17] *Id.* at 134–135.

[18] Karl Loewenstein, *Militant Democracy and Fundamental Rights, pt. I*, 31 AM. POL. SCIENCE REV. 417, 432 (1937).

[19] Cf. Jürgen Becker, *§ 167. Die wehrhafte Demokratie des Grundgesetzes, in* VII HANDBUCH DES STAATSRECHTS DER BRD 310 (J. Isensee & P. Kirchhof eds., 1992), who lists its self-contradictory character as part of a "specifically German imprint" the constitution bears.

[20] "If the state abstains from intervention, it could leave political space to extremism and thereby weaken democracy. However, if it actualizes its entire repressive potential, the consequence could be the silent weakening of democratic rights by the state." Hans-Gerd Jaschke, *Rechtsstaat und Rechtsextremismus, in* RECHTSEXTREMISMUS IN DER BUNDESREPUBLIK DEUTSCHLAND 314 (Wilfried Schubarth & Richard Stöss eds., 2000). Jaschke therefore calls this a "permanent dilemma", 315. Kathrin Groh, *Der NPD-Verbotsantrag – eine Reanimation der streitbaren Demokratie?*, 33 ZEITSCHRIFT FÜR RECHTSPOLITIK 500, 504, (2000), sees an "antinomy" between abridging democratic freedoms and sustaining a free democratic polity.

constitution itself.[21] The point which the judges believe dissolves the contradiction is the diagnosis that the KPD would, once in power, refuse the equality of chances for all political parties. This is the central argument on which the case turned. As Ernst-Wolfgang Böckenförde later put it: "The ban was essentially based on the incompatibility of the KPD's aims and activities with the democratic principles of freedom and equality, because [the party] allegedly conceives of its political opponent as the enemy to be stripped of his rights as soon as is opportune."[22] The Court presumed the KPD, once in power, to be insufficiently committed to a fair pluralism of political parties, and therefore as incompatible with the fdGO. So on the one hand, granting an "equal chance of gaining political power" to all political parties can be taken to be the cornerstone of the conception of democracy the KPD opinion relies on. On the other, this does not yield equal chances for all parties, as the Court distinguishes between those which would respect others' equal chances and those which would not.[23]

While this constraint on the constitutionality of political parties can hardly count as a necessary implication of the concept of democracy, it seems at least not obvious that it should render the conception employed by the Court inconsistent. However, the Court made another important move apt to undermine its argument. The KPD opinion ruled that no actual danger to the existence of the democratic constitutional state need emanate from a party to warrant its exclusion. For a party to be banned, it need not be "probable, by human standards, that there be the chance of its realizing its unconstitutional goals in the foreseeable future".[24] The Court thus did not respond to an empirical danger emanating from a party unwilling to grant its competitors an equal chance, but to the logical possibility of a real danger, as it were: to a logical danger. After KPD, the Basic Law's provision against unconstitutional parties is no longer an instrument of averting empirical danger (*Gefahrenabwehr*), but guards the internal consistency of a democratic system as regards the intentions of its participants.

The interpretive shift from a system's democratic sustainability to the democratic intentions of its participants changed the character of the party ban. Whereas in the immediate post-war period, it might have been considered an instrument designed, and limited, to protect the conditions of reproduction of a non-consolidated democracy, it was now clear that ideological challenges to the democratic basic order of a certain intensity, in

[21] 5 BVerfGE at 137.

[22] E.-W. Böckenförde, *Demokratie als Verfassungsprinzip, in* STAAT, VERFASSUNG, DEMOKRATIE, STUDIEN ZUR VERFASSUNGSTHEORIE UND ZUM VERFASSUNGSRECHT 289 (1991).

[23] A criterion proposed in pre-NS writings by Carl Schmitt. Cf. the close and entirely convincing parallel reading of the Court's KPD opinion and Schmitt's Legalität und Legitimität by Horst Meier, Parteiverbote, *supra* note 7, at 87. See CARL SCHMITT, LEGALITÄT UND LEGITIMITÄT 32 (1993 (1932)).

[24] 5 BVerfGE at 142f.

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press

the absence of a danger for the republic, would provide sufficient conditions for its application. But under an empirical prognosis of democratic stability, which the Court, as we saw, at least arguendo relied on in KPD, the reasons for outlawing a political party deserve more scrutiny. Because under anti-extremism, bans on political parties involve content-based restrictions on expressive, associative and participatory freedoms, repercussions on the political liberty interests of individuals must be addressed. It appears that the Court thus did not dissolve the question of self-contradiction, even under its own description. Even if we grant that it is not self-contradictory for a constitution to enforce the "democratic loyalty" of political parties in order to protect that constitution, it seems more difficult to make this case in the absence of a prognosis of danger for the constitution and in view of the political liberty interests of citizens which the court had referred to in order to frame the self- contradiction hypothesis in the first place. Also, while the setup of parties is an artefact of that constitution and therefore arguably can be bound to its aims and purposes, the people, under the principle of popular sovereignty recognized by the Basic Law, are not creatures but the creators of the constitution. They do not relinquish that position once a constitution is in power, and articulate it through their expressive, associative and participatory liberties. Therefore, insofar as political parties in a democratic system serve as necessary vehicles of the political expression and participation of its citizens, as the default conception of democracy referred to in the introduction holds, the KPD reasoning did not do away with the self-contradictory appearance of Art. 21(2).

As we saw, SRP does not deal exclusively with the conditions of reproduction of the democratic constitutional state. It requires not only intentional democratic consistency but allegiance to the multifarious conditions mentioned in the list constitutive of fdGO.[25] The collection of elements has sometimes been said to be "non-theoretic",[26] which is true, but not a problem for the Court, as it takes the elements on its list to be expressive of a "value-based order".[27] Unlike a position based on principles, a normative stand based on values is not liable to justification or even coherence, as it expresses the contingent fundamentals of an, anachronistically put, communitarian self-understanding. Thus, however deep-seated these values may be – the Court refers to a Christian *Menschenbild*, – they provide a voluntaristic demarcation from competing value systems which the Court sees espoused by "totalitarian" parties and "the total state".[28] Between those who do and those who do

[25] See *supra* note 15.

[26] Cf. the discussion in Meier, *supra* note 7, at 291.

[27] 2 BVerfGE at 12.

[28] 2 BverfGE at 12. The reason I do not speak of an anti-totalitarian but of an anti-extremist paradigm is that the concept of extremism is not only broader but has an individualizing tendency (which makes it more useful in the context of a political qualification for civil service, the so-called *Berufsverbote*). Individual citizens cannot coherently be labelled "totalitarian", but "extremist". While a "totalitarian" danger is always that of the possible takeover of state institutions, an "extremist" danger can exist where there is no chance to prevail in a political

not share those values, the court draws a distinction which is political in the Carl Schmittian sense of the term: it is exclusive, neither liable to nor capable of justification, constitutive of the identity of the included and allegedly non-discriminatory towards the excluded.[29] As a fundamental identity-conferring political stance, it betrays a basic non-cognitivist self-understanding of political community and thereby constrains legitimate political conflict to dissent among positions firmly rooted in a shared basis of values.

Politically, the Court's long criterial list of what fdGO demands of political actors proved a seminal influence on the history of the Federal Republic. It served as the working basis for the Federal and State Bureaus for the Protection of the Constitution, established from 1950 onwards. The concept of fdGO was revived and applied in the so-called "radicals decree" of 28 January 1972, again in a superficially left-right-symmetrical way, in order to restrict "extremists" from entering the civil service. Political scientists created ambitious research projects on extremism, based on the haphazard formula from the SRP opinion, which they used as a strictly systematic definition. "Extremism" thus was defined as opposition to "fundamental values, centrally: the idea of human rights, and procedural rules (especially the rule of law, control of government powers, political pluralism) in democratic constitutional states".[30] Though concept-formation based on strong forensic desires has a long and respectable tradition,[31] this endeavour to pick up a bunch of broad and heterogeneous criteria and assign it a correspondent phenomenon in the social world has certainly been heroic, and rewarded by grants and subsidies from Federal and State governments.[32] On the background of such collaboration between juridical interpretation, social scientific research and administrative purposes, it is only consistent that two of

---

struggle for power. Extremism therefore is a more flexible concept which captures the decentralization and fragmentation of society, and which might well be able to survive the demise of totalitarian regimes.

[29] Carl Schmitt, *supra* note 23, at 26. Cf. the exact parallel in the case of "Berufsverbote" under the so-called radicals decree, where the centrist lawyer E.W. Böckenförde speaks of "innerstaatliche Feinderklärung". E.W. Böckenförde, *Rechtsstaatliche politische Selbstverteidigung als Problem, in* EXTREMISTEN UND ÖFFENTLICHER DIENST: RECHTSLAGE UND PRAXIS DES ZUGANGS ZUM UND DIE ENTLASSUNG AUS DEM ÖFFENTLICHEN DIENST IN WESTEUROPA, USA, JUGOSLAWIEN UND DER EG 10 (E.W. Böckenförde et al. eds., 1981).

[30] Uwe Backes & Eckhard Jesse, *Antiextremistischer Konsens – Prinzipien und Praxis*, 12 JAHRBUCH EXTREMISMUS UND DEMOKRATIE, 13 14 (2000): cf. UWE BACKES, POLITISCHER EXTREMISMUS IN DEMOKRATISCHEN VERFASSUNGSSTAATEN (1989).

[31] Cf. on the basis of the concept of personal identity, JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING , vol. ii, chap. XXVII (1690).

[32] For a critique of the research program on "extremism" based on the view that there is no single phenomenon to investigate see C. Kopke & L. Rensmann, *Die Extremismus-Formel*, 45 BLÄTTER FÜR DEUTSCHE UND INTERNATIONALE POLITIK, 1451 (2000). For the related criticism that "anti-extremism" thrives on the assumption of a "symmetry of danger" which is out of proportion, and that it assimilates the fundamentally distinct motivations of "anti-capitalist" left-wing and "anti-democratic" right-wing extremism to each other, see G. Neugebauer, *Extremismus – Rechtsextremismus – Linksextremismus: Einige Anmerkungen zu Begriffen, Forschungskonzepten, Forschungsfragen und Forschungsergebnissen, in* RECHTSEXTREMISMUS IN DER BUNDESREPUBLIK DEUTSCHLAND (Wilfried Schubarth & Richard Stöss eds., 2000).

"anti- extremism's" most vociferous advocates had been asked to serve as expert witnesses in the recent NPD trial.[33]

The constitutional paradigm of anti-extremism can be evaluated from various perspectives. While some authors credit its conception of the party ban with some success as a causal influence on the democratic consolidation of the Federal Republic,[34] others insist that factors like post-war economic success had a more significant impact.[35] What seems clear is that, as a strategy of *Vergangenheitspolitik*, of reflecting Germany's National Socialist past, anti-extremism has failed. To start with a minor semantic point, the very concept of extremism indicates that the troubling feature of the overcome National Socialist system had been the non-centrist positioning of its underlying values. More importantly, what SRP and KPD signalled was that National Socialism and Communism were, constitutionally speaking, on a par. In the language of extremism research: they were positions "equidistant" (E. Jesse) from the point of view of the democratic constitutional state. Few references were made to crimes and atrocities of either National Socialist or Communist regimes, although given the de facto amnesty for Nazi criminals in the immediate post-war period coexisting with an intensive penal prosecution of Communists in West Germany,[36] this was perhaps not unfortunate. The presumptive constitutional left-right symmetry led to a situation in which for those with an anti-extremist socialisation, exclusively anti-National Socialist legislation appeared anomalous. To mention just one example, from the related context of the legal regulation of hate speech: In the early 1980s, following a renewed wave of anti-Semitic activity in Germany, the Social Democratic Party had attempted a reform of the Penal Code's provision on incitement by Holocaust denial. The reform, however, was delayed and Helmut Kohl's CDU government took up the matter again in 1984. Their revised proposal suggested criminalizing not only the denial or apology of National Socialist crimes, but also "the denial of crimes committed against Germans under tyrannical government". The idea was to accompany the regulation of the prevalent Holocaust denial with the regulation of a non-existent, but certainly possible, expulsion denial or *Vertreibungslüge*.[37] The left-right equidistance expressed by militant democracy thus buttressed an equal valuation of crimes committed by and against the German

[33] Heribert Prantl, *Karlsruhe macht den Bock zum Gärtner*, SÜDDEUTSCHE ZEITUNG, Feb. 5, 2002 (against playing down the dangers of right wing extremism); Christian Semler, NPD-EXPERTEN ALS SOZIALISTENFRESSER, TAZ, Feb. 7, 2002 (criticizing an identification of right- and left-wing extremism).

[34] Cf. G. Sartori, *supra* note 11.

[35] Dieter Oberndörfer, *Germany's Militant Democracy, in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 242 (D. Kretzmer & F. Kershman Hazan eds., 2000).

[36] Meier, *supra* note 7, at 121.

[37] S. Cobler, *Das Gesetz gegen die 'Auschwitzlüge' – Anmerkungen zu einem rechtspolitischen Ablaßhandel*, 18 KRITISCHE JUSTIZ 159, 169 (1985).

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press

people. This disposition culminated when, in the 1980s, historians set out to redescribe German National Socialist crimes as preventive responses to Communist atrocities.[38]

The concept of a "singularity" of National Socialist crimes, to which I will come back in the second part of my argument, was introduced into the discussion and served as shorthand for the rejection of this syndrome.[39] Long before the motions to outlaw the NPD were submitted to the Federal Constitutional Court, it had become clear that a new, historically more specific approach concentrating on the nature of a particular past that ought not to resurge and on its specific characteristics was needed. This situation was not altered by reunification. The spectre of world communism had evaporated with the late 1980s, and the concept of militant democracy has rarely been invoked in its aftermath. The Bureaus for the Protection of the Constitution – as well as anti-extremist scholars – "have been looking for new tasks that would look convincing to the public".[40] So, ironically, at a historical juncture where, as anti-extremists quote with satisfaction, a genuine, that is, non-instrumental "anti-totalitarian consensus" seemed possible for the first time,[41] the development in the Federal Republic points toward an exclusively anti-National Socialist bias in the application of the instrument of the party ban. However, before I address this head-on, I want to take a step back and look at the history of the Italian example.

C. Negative Republicanism

Although the military significance of the Italian resistance in the process of liberation and pacification ought not to be overrated, as it was the war and occupation by Allied forces that caused the breakdown of Fascism, its political significance is said to lie in the fact that Italy's transition to democracy was "essentially the work of domestic forces".[42] This is enshrined in the allusion to the spirit of the Resistenza in the preamble of the Constitution. Even before the Constitutional Assembly had met for the first time, a general ban on the Fascist party had several times been pronounced and confirmed in legislative decrees by the King's governor and by military government, and it was also renewed later in the peace treaty with the Allied states. However, this ban took on a specific meaning when in the

[38] Ernst Nolte, *Between Myth and Revisionism: The Third Reich in the Perspective of the 1980s, in* ASPECTS OF THE THIRD REICH 16 (H.W. Koch ed., 1985).

[39] C.f. Jürgen Habermas, *Apologetische Tendenzen, in* EINE ART SCHADENSABWICKLUNG 131 (Jürgen Habermas ed., 1987).

[40] U.K. Preuß, *supra* note 4, at 270.

[41] Jürgen Habermas, *Antworten auf Fragen einer Enquete-Kommission, in* DIE NEUE NORMALITÄT EINER BERLINER REPUBLIK 52 (Jürgen Habermas ed., 1995).

[42] Gianfranco Pasquino, *The demise of the First Fascist Regime and Italy's Transition to Democracy, 1943–48, in* TRANSITIONS FROM AUTHORITARIAN RULE: SOUTHERN EUROPE 66 (G. O'Donnell et al. eds., 1986).

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press

Constituent Assembly, while debating the constitutional recognition of political parties on November 19 and 20 1946, Palmiro Togliatti, the leader of the Italian Communist Party (PCI) suggested that the reorganisation of the Fascist party in any form ought to be banned "because one has to exclude from democracy those who have manifested to be its enemy."[43] Lelio Basso, the Socialist delegate, seconded this and added that the constitution ought to include a concrete statement to the effect that in the emerging democracy "all that has been fascistic is rejected (*condannato*)".[44] Whereas Basso's more far-reaching proposal was not to be taken up again, Togliatti's suggestion, with a slight modification, became Art. XII of the Italian Constitution's Transitory and Final Dispositions: "È vietata la riorganizzazione, sotto qualsiasi forma, del disciolto partito fascista." Though the symbolic impact of this provision can hardly be overstated, it has only once in Italy's post-war legal history led to a ban on an association, on a minor radical fascist association in 1974.[45] As is well known, the provision did not hinder the emergence and existence of the neo-fascist MSI.

The basic distinction between the Italian and the classical German model reappears in the respective constitutions at several junctures. I have already mentioned the reference to the resistance movement in the preamble of the Italian constitution, which is lacking in the German case. Whereas Basic Law Art. 79 (3) protects a substantive interpretation of constitutional democracy against amendment, the Italian Constitution simply states that amendments cannot change the republican form of government (Art. 138). While the Basic Law, as we saw, binds political parties to substantive democratic aims, the corresponding Art. 49 of the Italian constitution only constrains political parties not to violate the "democratic method", with the one exception of the PNF. These provisions confirm that the Italian constitution is not directed impartially against substantively extremist or anti-system parties in general, but protects outward democratic behaviour, adding a "historically embedded and therefore sharply delineated exception which cannot be generalized".[46] Whereas anti-extremism attempts to sustain a democratic self-contradiction, negative republicanism states a democratic exception.[47]

---

[43] "perché si deve escludere dalla democrazia chi ha manifestato di essere il suo nemico", Atti A.C., vol. I, 703, quoted from FULVIO FENNUCI, I PARTITI POLITICI NEL DIBATTO ALL'ASSEMBLEA COSTITUENTE, CONVIVENZA NELLA LIBERTÀ, vol. 1, 513–26, 514 (1999).

[44] *Id.* at 514.

[45] For details on the case against "Ordine Nuovo" cf. VEZIO CRISAFULLI & LIVIO PALADIN, COMMENTARIO BREVE ALLA COSTITUZIONE 824 (Padova 1990).

[46] FULCO LANCHESTER, DIE INSTITUTION DER POLITISCHEN PARTEI IN ITALIEN, IN PARTEIENRECHT IM EUROPÄISCHEN VERGLEICH 417 (D. Th. Tsatsos et al. eds., 1990). Cf. also Crisafulli & Paladin, *supra* note 45, at 824: Art. XII "makes reference to Fascism as a phenomenon liable to historical individuation and determination."

[47] In order to explain historically the Italian-German asymmetry, one would also have to refer to quantitative differences. Whereas Communism had a mass basis in Italy, although not as massive as Togliatti had thought it to be, it was not sufficiently popular in West Germany in order to withdraw, after its exclusion, significant support

Seen against the backdrop of the German situation, the Italian provision against the reconstitution of the Fascist party has three remarkable features: the Communist presence and exclusive anti-Fascist consensus in the *arco costituzionale*, the exclusive, indexical focus on the overcome Fascist regime (as opposed to, for example a wider, more general focus that would also include National Socialism), and, finally, the argument from democracy in the ban of Fascism. Because the republican self-understanding transmitted by the Italian constitution arises from its concrete negation of the anti-republican elements of the old regime, it exemplifies a form of negative republicanism. Whereas anti-extremism displays left-right symmetry, identifies an abstract enemy of its militancy, which then entails a substantive understanding of its basic democratic order, the Italian version of negative republicanism relies on an anti-Fascist particularism, an historically specific identification of its opponent, and takes its understanding of what democracy means from this confrontation.

The link between democracy and anti-Fascism for the Italian founding fathers has been explored by Norberto Bobbio. According to Bobbio, anti-Fascism provided the different political and ideological groups at the *Costituente* with a common basis. "This shared idea was democracy, understood as a system of principles, rules and institutions which would permit the widest possible participation of citizens in the republic and the widest possible control of state powers … As it has been put several times, the ideology of Fascism was a negative ideology: the negation of democracy, anti-democracy. Against the principle of equality, Fascism put hierachy; as against power from below it put power from above; against liberty it put authority; against critical spirit, it put blind faith; against the principle of individual responsibility … the conformity of the masses."[48] The position opposing Fascism in the clearest possible way Bobbio finds expressed in the slogan "democratic revolution" of the short-lived Action party, which, in contrast to the other parties present in the *Costituente*, had come into existence only during the reign of Fascism and could therefore be seen as expressing a "pure" opposition to Fascism, the necessary and sufficient condition of which was that the people should be the subject, not the object of a democratic revolution.

---

from the constitution. As against earlier work on the KPD in the constitutional history of the Federal Republic (Kutscha, *supra* note 9) it seems also plausible to give a contractualist explanation. In Germany the KPD had not been part of the *arco costituzionale*, as the KPD delegates (like, by the way, the Bavarian delegation), had rejected the Basic Law, ostensibly for the reason that it was going to make German unification more difficult (Meier, *supra* note 7 at 50). Still, the question remains whether in retrospect, the Italian Communists in their constitutional acquiescence may have acted against their best interest. Whether one should interpret their loyalty, in a Luhmannian phrase, as a case of "legitimation by procedure", or, in the less flattering diagnosis of Jon Elster, of the "civilizing force of hypocrisy" in constituent assemblies, is an open question.

[48] NORBERTO BOBBIO, ORIGINE E CARATTERI DELLA COSTITUZIONE, IN BOBBIO, DAL FASCISMO ALLA DEMOCRAZIA 167 (Milano 1997).

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press

In his attempt at spelling out the democratic principles that Fascism had surpressed and inverted, Bobbio is not very specific. Of course, the two Fascist decades had reversed what tenuous developments of liberalisation, parlamentarization and democratization had occurred until 1922, and therefore, as a matter of historical constellation, can count as the paradigmatic "frontal opposition against democracy".[49] But the elements of democracy listed by Bobbio – participation, equality, liberty, individual responsibility, democratic revolution – are rejected by many, not least by monarchist associations. It is counterintuitive to assume that an anti-Fascist party ban is legitimate to the extent that an anti-monarchist party ban would be legitimate.[50] However, the Italian version of negative republicanism exhibits a formal conception of democracy on the basis of a relatively thin account of its Fascist predecessor regime, abstracting away from the particular character of Fascist ideology and history under Fascism, a move it shares with anti-extremism, which, as we saw, defines extremism exclusively as the rejection of certain liberal and democratic values and procedures.[51] As polemics are being levelled against Art. XII, based on an attempted rehabilitation of certain "modernizing" achievements of Fascist administration,[52] negative republicans, in the absence of a consensus on the substantive evils of Fascism, rely on the position that democracy is preferable even to the "best of despotisms".[53] Consistent though this strategy is, the question is whether, in limiting the phenomenology of Fascism to that of despotic rule, it articulates the strongest reasons in favour of its lasting exclusion.

The thin conception of Fascism corresponds to the conviction that a ban of the Fascist party iterates two negative strategies – the first negating democracy, the other negating this negation.[54] In this, the Italian version of negative republicanism shares a common root

[49] Norberto Bobbio, *Dialogue with Renzo de Felice, in* ITALIANI, AMICI NEMICI 11 (N. Bobbio, R. de Felice, G.E. Rusconi ed., 1996); cf. Bobbio, *supra* note 48, at 37.

[50] But see the striking parallelism between banning the reconstitution of the Fascist party in Art. XII and banning the members of the monarchic dynasty of the Savoyans from Italian territory in Art. XIII of the Constitution's Final Dispositions.

[51] There is one exception to this diagnosis, namely that "dissemination of racist propaganda" has subsequently been identified as one instrument of reorganizing the Fascist party (§ 1 of the "Scelba" statute, n. 645 of 20.6.1952), which means that at least one substantive criterion has been introduced into the conception of the anti-democratic character of Italian fascism.

[52] As stated by Renzo de Felice in an interview with Giuliano Ferrara, CORRIERE DELLA SERA, Dec. 27, 1987, repr. in 37 SOCIETÀ É CRITICA 74 (1989).

[53] Norberto Bobbio, *Preferite questa democrazia o la migliore delle dittature?*, CORRIERE DELLA SERA, Dec. 29, 1987, reprinted in 37 SOCIETA E CRITICA 78 (1989).

[54] E.g. Michelangelo Bovero, *Fascismo e Democrazia nel Pensiero di Norberto Bobbio, in* DAL FASCISMO ALLA DEMOCRAZIA 22 (Norberto Bobbio ed., 1997).

with anti-extremism, as developed in the conception of "militant democracy" by Karl Loewenstein. Loewenstein, in 1937, like many of his contemporaries, had conceived of fascism, including National Socialism, as an ideologically empty, purely negative phenomenon.[55] That fascism (in the generic sense of the term) did not contain a single political idea was the very reason he thought it could not only legitimately, but successfully be fought by legal-constitutional means. In Loewenstein's view, the same is not true for communism. While he does not in principle rule out the legitimacy of symmetrically suppressing communist associations, the important distinction is that in his view, insofar as they are based on a "genuine political idea", it will not be possible thereby to stop them.[56]

What is the conception of danger expressed by the Italian party ban? Lacking precedents, constitutional jurisprudence is less developed, but there are indicators to the effect that the function of Art. XII is not limited to the stabilization of a democratic system of governance. In a 1952 statute ("Scelba") designed to supplement Art. XII with clear-cut provisions of the penal law, actions apt to contribute to the reconstitution of the PNF, i.e. to its sheer existence, have been penalized regardless of whether they succeed in gathering any significant following. The constitutionality of the offences of "apology of Fascism" or "Fascist manifestations" has repeatedly been upheld by the Italian Constitutional Court, with reference to the interest of the constitution in averting the danger of the reconstitution of the Fascist party.[57] Preventive activity is addressed to the reorganization of the party itself, which constitutes not a logical danger but an empirical one, but is still not identical to the danger of a takeover of the democratic regime. This is underlined by what has become common ground among constitutional lawyers, namely that Art. XII is not a transitory but a final disposition of the constitution in the sense that its validity remains intact even after anti-Fascist consolidation has successfully been completed.[58] In a parallel to the KPD decision, the outlawing of a party in Italy is not conditional on the likelihood that the party realize its unconstitutional aims in the foreseeable future. As a consequence, some historico-political debates about the legitimacy of the continued inclusion of Art. XII in the constitution appear to miss the point. It is neither valid to infer from the democratic maturity of the Italian people or the consolidation of the system that Art. XII ought to be abolished, nor is it necessary to argue the opposite point by supposing a lasting susceptibility to Fascism that could destabilize

[55] Loewenstein, *supra* note 18, at 432.

[56] *Id.* Loewenstein does rule out the legitimacy of suppressing only communism and not fascism, but not the reverse.

[57] See the Court's *Pronuncie* 0254, 1974, No. 7468, and 0015, 1973, No. 6569.

[58] Paolo Barile & Ugo De Siervo, *Sanzioni contro il Fascismo ed il Neofascismo, in* XVI NOVISSIMO DIGESTO ITALIANO 562 (1969); Alessandro Pizzorusso, *Art. XII, in*COMMENTARIO DELLA COSTITUZIONE 198 (Pizzorusso & Branca eds., 1995); BARILE, LIBERTÀ DI MANIFESTAZIONE DEL PENSIERO 93. (Milano 1975).

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press

the republic.[59] On the contrary, or so I will argue in turning back to the German case, the legitimacy of a negative republican exception is in fact less problematic where it serves no such purposes.

From the perspective of a highly developed anti-extremist jurisdiction in 1960s Germany, the Italian model appeared crude. German constitutional lawyers advised their Italian colleagues that an exclusive ban of the Fascist party violated the principle of equality – that it contradicted the "equality of chances of all political directions and views", and recommended adopting the German model.[60] Some Italian lawyers went even further and argued that the constitution already contained German-style anti-extremist provisions, and to a certain extent this view was successfully executed in administrative practice.[61] In recent years, however, the direction of influence has been reversed. The Italian model has inspired innovative German suggestions to reconceptualize or modify Art. 21 (2) Basic Law. In 1993 and again in 1995 with his co-author Claus Leggewie, well before the recent motions against the NPD were prepared, Horst Meier, a leading critic of militant democracy, argued for a complete revision of the restrictions on political association and expression based on the notion of a free democratic basic order. However, after having criticized KPD-style jurisprudence for its authoritarian implications, Meier does not opt for a libertarian embrace of all kinds of political associations, but for an Italian-style exception. He advocates institutionalizing an exclusive ban on the reorganization of the National Socialist party, based on a shared civic understanding that the "ideological protectiveness of the free democratic basic order" should be replaced by an "anti-Nazi basic order".[62] The implementation of this by way of constitutional amendment would, in Meier's view, amount to a retrospective founding act ("nachholende Staatsgründung") that would compensate the Federal Republic for its historical lack of a self-determined, revolutionary founding process. It would provide the republic with a purposive focus that could justify an admittedly one-sided exclusion.

This suggestion obviously amounts to a variant of negative republicanism. The exclusion of a National Socialist party is conceived not as a democratic contradiction but as an exception, based on a "case-specific historical justification" and vindicated by its constitutive role in understanding the point or purpose of democratic life. Still, creating an

[59] Cf e.g NICOLA TRANFAGLIA, UN PASSATO SCOMODO. FASCISMO E POSTFASCISMO 97 (Bari 1999).

[60] Theodor Ritterspach (Judge at the Federal Constitutional Court), *Die Stellung der politischen Partein in der Verfassung, in* Verhandlungen des 2. Deutsch-Italienischen Juristenkongresses vom 26.-28.9.1968 in Berlin 27, 30 (Karlsruhe 1969).

[61] Giovanni Cassandro (former Judge at the Italian Constitutional Court), *Stellung der politischen Parteien, in* Verhandlungen des 2. Deutsch-Italienischen Juristenkongresses vom 26.-28.9.1968 in Berlin 47, 53 (Karlsruhe 1969); cf. Lanchester, *supra* note 46, at 416.

[62] Leggewie & Meier, *supra* note 6, at 308. The passages referred to condense the views expressed in Meier, *supra* note 7, at 396.

anti-National Socialist basic order in the 1990s is not analogous to creating an anti-Fascist order in the 1940s. One possible disadvantage, to which I will come later, is a risk of anachronism. One possible advantage, however, is a "thick" conception of the relevant characteristics of the targeted political phenomenon. In Meier's words, "one, if not the characteristic feature of National Socialism is its specific form of anti-Semitism, which resulted in the racist annihilation of the European Jewry by the modern technical and bureaucratic means at the disposal of synchronized (gleichgeschaltete) state power." While Bobbio's juxtaposition of democracy and Fascism justifies the exclusion of the latter as a rejected political alternative, the identification of National Socialism as a racist genocidal regime focuses on its criminal character. Its criminal features identify the NS system as "singular" and distinguish it from other unjust regimes: "The 'final solution' is still beyond comprehension, and it is worlds apart from, for example, the political murders of Italian Fascism, or the government crimes of the SED dictatorship in East Germany, or the [contemporary] excesses of xenophobic assassins." In the perspective of the Holocaust, "premodern forms of anti-judaism as well as other, comparatively harmless antidemocratic aims of the National Socialist 'Führerpartei' move into the background." As Meier sums up, "[f]or Germany, only the theory and practice of the murder of the Jews could historically justify an anti- National Socialist breach of the principle of formal legality".[63] The distinction between a conventional anti-extremist jurisprudence and the historically particularized reference to crimes of an incommensurable magnitude, nature and significance could hardly be formulated in clearer terms. While Meier's account of the normative motivation for a post-anti-extremist basic order seems largely convincing, there is one significant dimension not explicitly addressed, namely the purposively and intrinsically humiliative character of National Socialist practice, especially, but not exclusively, of its violent practice, a dimension that is perhaps not entailed by the reference to racist genocide. The concentration on extent and means of NS murders referred to by the concept of singularity tends to obscure that their specific horror lies in the expressive qualities of those crimes as articulations of contempt and disdain for their victims. What makes NS crimes stand out from other genocidal forms of state criminality, as has been persuasively argued, is their specific combination of persecution and humiliation.[64]

Building on Meier's suggestion, there seem to be two main problems with his argument. First, the project of a re-foundation of the republic, of supplying it with a new normative origin is phrased in the language of voluntaristic decision. While this may be appropriate for situations of constitutional choice, faced with the prospect of significant ongoing support for the programmatic of the defeated regime, like in the Italian case in 1947, it does not reflect the historical situation of this project within the consolidated Federal

[63] All quotations from Leggewie & Meier, *supra* note 6, at 313–17.

[64] Avishai Margalit & Gabriel Motzkin, *The Uniqueness of the Holocaust*, 25 PHILOSOPHY AND PUB. AFFAIRS 1, 65 (1996).

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press

Republic. If a general presumption that the negative heritage of National Socialism shapes both purpose and historical obligation of the second German democracy was not already deeply entrenched in society, one could not attempt to constitute it through a declarative act; yet if one did, this would not reflect a decision, but rather the public ascertainment of a process of moral development spanning more than five decades. Although the normative basis of Meier's proposal is entirely dissimilar, its voluntaristic framing tends to reproduce the exclusionary mechanism familiar from the friend-enemy constellations of militant democracy, and may run into similar legitimation problems. I will later try to sketch an alternative and more plausible account of the legitimacy of a "late" negative republican party ban, based on the distinctions between periods of transition vs. of consolidation, of voluntarism vs. moral development. Second, the scope of the argument is unclear. Meier insufficiently distinguishes two separate questions: firstly, what could conceivably justify an exceptional ban on a political party at all, and secondly, what could justify it in Germany. He insists, as a good negative republican would, on historical particularity in the demarcation from National Socialism. This is significant in that an anti-Nazi basic order ought not be a multi-purpose weapon designed to outlaw any right-wing extremist, fascist, ultranationalist or xenophobic association, but would be constrained by the defining features of the phenomenon addressed, National Socialism. In this, it is entirely parallel to the Italian case. When justifiying the exclusion of National Socialism, however, Meier's appeal to the singularity of National Socialist crimes in one sense of the term, as crimes which by method and sheer magnitude are of a different order from, for example, those of Italian Fascism, leads to a contradiction. If such singularity was a necessary condition of the justification of a negative republican ban on political parties, it would at the same time de-legitimise the Italian example that had inspired the suggestion in the first place. Italy would not be justified in outlawing a reorganization of the Fascist party, but perhaps in banning a National Socialist one. This is counterintuitive and leaves us with conceptual and historical issues. Conceptually, the task is to disentangle several different elements of a negative republican party ban for Germany, namely (a) the outstanding criminal seriousness of its non-democratic predecessor regime, (b) the expressive significance of those crimes, which in the case of National Socialism lies in their intent to humiliate, (c) the reference to National Socialism as a historically embedded phenomenon, as part of the history of "our" society, and finally (d) the reference to the continuing relevance of National Socialism for the self-understanding of the democratic polity. All four criteria: serious criminal injustice under an undemocratic regime, the expressive intention conveyed by those crimes, the indexical reference by means of the possessive pronoun, and, finally, the continued significance as normative orientation, seem to have an impact on justification. Outstanding criminal seriousness seems to operate as a threshold principle, as an indication that the general presumption against restricting political liberty can be overridden only with regard to parties committed to re-establishing an outright criminal regime. In the same sense, a reference to their expressive meaning identifies those crimes as crimes of a particularly evil and lasting nature, as the perpetrators' intentions convey a social meaning that can be retroactively actualized by successor parties, even in the absence of a chance that such crimes may be repeated, and thereby harm those historically affected by those crimes.

Historical indexicality involves that the phenomenon in question is a factor in people's experiences. It acts as proof that, as it were, "it could happen here", and as an indicator of special vulnerability on the part of the survivors of its persecutions. Finally, the particular significance or relevance depends on questions of guilt, shame, responsibility or liability, which will be influenced by whether a society comprises perpetrators and/or victims, and whether it has been coping with its past by means of denial, rage, silence or remorse. In the absence of a full account of these four features for a given society, the legitimacy of a negative republican ban on political parties in a given society can hardly be assessed.

Note that the four criteria listed above correspond to some of the senses in which the concept of singularity has been used, though none stipulates an "absolute" singularity of NS crimes, in a sense that would situate historical processes outside the spectrum of possible moral-political comparison. In identifying the lasting impact of National Socialism, my suggestion is in effect to substitute this one "absolute" sense by four "relative" senses of singularity. The first criterion relates to the sense of singularity that addresses the dimensions and methodical execution of the Holocaust. The second criterion, humiliative intent, takes its cue from "qualitative" accounts of singularity, specifying the characteristic evil of National Socialism as regards its social meaning in analytical and comparative historical terms. For the third criterion, indexicality, singularity is cheap. It results automatically from identifying a society historically involved by the use of the possessive pronoun: "our" society, history, and so on. Still, this criterion is essential as it rules out the applicability of the argument to "bystander" societies. The fourth insists on another kind of "relative" singularity, which may or may not emanate from the third one: it allocates a liability that cannot be delegated (Unvertretbarkeit), in that the moral consequences of past crimes and injustice must be addressed by "this" society.[65] If these conceptual conditions seem plausible, one would have to check whether they hold in a given society. For example one would have to check the assumption that "political murders" (Meier) were the essence of the criminal history of Italian Fascism. More recent research seems to point in a different direction, suggesting that Italian Fascism was to a comparable degree permeated by different kinds of aggressive racism and anti-Semitism.[66] As the criterion of indexicality is of course satisfied in the Italian case, it remains to be seen whether the opposition to Fascism is still taken to be of lasting significance for the normative self-understanding of the Italian republic. As the 1947 "contractors" to Art. XII, the parties constitutive of the Italian "first republic", no longer exist, and the ban on the PNF can perhaps no longer rely on its genetic justification, on the role it may have played in the consolidation of the republic, it could seem to stand in need of a renewed public

[65] On singularity as liability ("Unvertretbarkeit der uns zugemuteten Haftung") see Jürgen Habermas, *Vom öffentlichen Gebrauch der Historie, in* Habermas, *supra* note 39, at 144.

[66] See Enzo Collotti, *Die Historiker und die Rassengesetze in Italien, in* FASCHISMUS UND FASCHISMEN IM VERGLEICH (C. Dipper et al. eds., Köln 1998); Wolfgang Wippermann, *Hat es Faschismus überhaupt gegeben? Der generische Faschismusbegriff zwischen Kritik und Antikritik*, 11 ETHIK UND SOZIALWISSENSCHAFTEN 289, 292 (2000).

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press

justification. Whether justifications that center on the criminal history of Fascism, the significance of its racism and its ongoing moral legacy will prevail against the challenges against Art. XII mounted by De Felice and others, is, as the intense ongoing debate on "rimozioni, revisioni, negazioni"[67] suggests, an open question.

Returning to the German case, the most advanced formulation of a version of negative republicanism, which at the same time contains the first steps toward transcending this paradigm, has been seen at work in the aborted trial of the NPD. In their motion authorized by the Bundestag, the German federal parliament, constitutional lawyers Günter Frankenberg and Wolfgang Löwer followed a subversive strategy. In order not to alienate the constitutional court judges still reared in the anti-extremist tradition, the authors pay lip service to the merits of militant democracy, claiming the concept "has not faded in juridical significance even under current conditions of constitutional democracy solidly entrenched in the mind of the general public".[68] At the same time, however, they canvas an alternative argument similar to Meier's, which however does not rely on a prospective constitutional amendment but is reconstructed entirely from arguments already established in constitutional jurisprudence. It should be pointed out that the trial of SRP, despite its problematic legacy, has always enjoyed a less controversial standing within legal and political culture than that of KPD.[69] Besides its specification of the free democratic basic order, the SRP decision had introduced another, little-publicized criterion to declare political parties unconstitutional, the concept of "essential affinity" ("Wesensverwandtschaft") to the National Socialist party, NSDAP.[70] In SRP, the Court states that without a doubt the NSDAP is the paradigm for a party unconstitutional according to Art. 21 (2), and that therefore any party relevantly – "essentially" – like the NSDAP must be presumed to be unconstitutional under the Basic Law.[71] If there is no

[67] Thus the subtitle of the influential volume FASCISMO E ANTIFASCISMO (E. Collotti ed., Roma 2000). For De Felice's contributions cf. *supra* note 49 and the literature mentioned in that volume.

[68] I quote from the manuscript of the party ban motion (Verbotsantrag) authorized by the German Bundestag, on file with its authors, Frankfurt/M. and Bonn 2001, 36. The case against the NPD was thrown out by the Federal Constitutional Court on procedural grounds on March 18, 2003. See Thilo Reusmann, *Procedural Fairness in a Militant Democracy*, 4 GERMAN LAW JOURNAL 11, 2003.

[69] Even Meier concedes that its result is acceptable not only politically, but "as a matter of constitutional law". Parteiverbote, *supra* note 7, 409. However, it must be conceded that there exists a long list of abortive attempts to justify anti-NS "Sonderrecht" from the Basic Law. Historically, the most prominent line of thought relies on the "transitory disposition" of Art. 139 (postulating the continuing validity of immediate post-war de-Nazification statutes). The final nail into the coffin of such attempts is Gertrud Lübbe-Wolff, *Zur Bedeutung des Art. 139 GG für die Auseinandersetzung mit neonazistischen Gruppen*, NEUE JURISTISCHE WOCHENSCHRIFT 1289 (1988).

[70] 2 BVerfGE at 65–68.

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

doubt about the NSDAP, one does not have to rely on a sophisticated dogmatic apparatus in order to ban a party which is essentially alike. The concept of "essential affinity" therefore counts as a freestanding alternative to other sufficient reasons to outlaw a political party; it does not depend on the criterial development of the concept of fdGO or the background justifications of militant democracy.[72] A comparison with the Italian situation may be illuminating here. Recall the puzzling fact that the MSI, though obviously a party with Fascist personnel, symbolism and programmatic,[73] was never subjected to constitutional scrutiny. To some observers, including Giulio Andreotti, it seemed that the reason was that it was not identical with the defunct PNF the reorganisation of which was ruled out by Art. XII.[74] "Essential affinity" introduces a less demanding criterion. Two organisations need not be, as it were, metaphysically continuous, but qualitative identity must hold in relevant respects. Of course there are difficult conceptual and empirical issues here. For example, it is evident that in today's appraisals of political parties, a continuity of Fascist or National Socialist personnel can be all but ignored. In the bulk of their argument, Frankenberg and Löwer therefore dissect the NPD for affinities to the NSDAP as regards its political programme, its strategic and tactical mode of operation, its rhetoric and political language, and, finally, its explicit references to National Socialism (in, for example, the apology of NS crimes). The central feature is seen in the political programme itself, which is argued to contain, among other features, ethnic (völkischen) collectivism, social Darwinism and biological racism, and various motives and dimensions of racist, economic and political anti-Semitic libel. The empirical merit of these claims was to have been a matter to be evaluated by the judges, but, compared to the the criteriology of fdGO referred to above, they do seem less amorphous.

If we accept these as the criteria of application of a negative republican understanding of a party ban in Germany, we must now address two issues. First, we must consider what is taken to be the damage or danger to be fought by banning essentially NSDAP-like parties. KPD ruled that a party could be banned in the absence of a credible threat to the upholding of democratic institutions. In the same way, a reorganized PNF could be banned in Italy under similar circumstances. However, in the absence of an account of the harm or danger this is supposed to pre-empt, it seems no less questionable in the negative republican paradigm than in the anti-extremist one. The second issue is what is taken to be the democratic vindication of the outlawing of a party identified by the "essential affinity"

[72] Frankenberg & Löwer devote the first and more substantive part of their motion to the demonstration of the NPD's essential affinity to the NSDAP (91–183). In the second part, they argue that also for reasons unrelated to its Nazi-affinity, the NPD should be banned: because of its "violation of the free democratic basic order" (184–278). However, it should be pointed out that "Wesensverwandtschaft" is a sufficient reason to ban a party because it automatically demonstrates a violation of the free democratic basic order.

[73] See the comprehensive study by PIERO IGNAZI, IL POLO ESCLUSO (Bologna 1989).

[74] Leo Valiani, *Il no al fascismo resti nella Costituzione*, CORRIERE DELLA SERA, Jan 21,1988, reprinted in SOCIETÀ É CRITICA 37, 81 (1988).

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press

criterion. In order to do better than the anti-extremist paradigm, one would have to show that the negative republican exception does not entail as serious a violation of democratic principles. On the face of it, however, there is no reason why the negative republicanism exception should be less problematic. On the contrary, as an essentially NSDAP-affine party is individuated, as we saw in the NPD Verbotsantrag, by criteria specific to its ideology, and thereby discriminated against on the basis of viewpoint, it seems to do worse than the "impartial" left-right symmetrical understanding of fdGO.[75] The question is to what extent historical-indexical exceptionalism is compatible with the democratic commitment to free political participation in the process of determining an open future.

As to the danger addressed by a negative republican party ban, it seems that if this danger is sufficiently great, even violations of democratic commitments appear tolerable. This could be taken to entail that as long as a party ban is conceived as a "backward barrier" (Rückwärtssperre)[76] which effectively blocks a resurgence of National Socialism, legitimate demands will not appear all too urgent. However, even if such a provisional justification can be assumed for periods of transition and consolidation, it cannot automatically be extended to the consolidated republic. Of course, one could argue that National Socialist ideology always presents an incomparably intense danger to a democratic polity: "Because the National Socialists organized the Holocaust, the presumption of the political dangerousness of their successors may be taken to be irrefutable."[77] In other words, the probability that an NS-affine party constitutes a serious danger ought always to be taken to be almost certain. However, absent a specification of what its danger consists in, this seems a metaphysical supposition. If the paradigmatic danger is held to lie in an eventual neo-National Socialist takeover of state institutions, the claim is empirically not always plausible. For example, it is implausible as regards the recent NPD trial.[78] Empirical assessments gravitate towards the understanding that Nationalist Socialist associations will remain a permanent, but clearly marginal feature of the Federal Republic.[79] The merit of a negative republican party ban therefore should not be judged exclusively on probabilistic hypotheses on the possibility of a society-wide Nazi relapse, and the argument that a party

[75] On content- and viewpoint-based restrictions of political liberties cf. CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 167 (New York 1993).

[76] The phrase comes from ULRICH K. PREUß, LEGALITÄT UND PLURALISMUS (Frankfurt/M 1973). For Leggewie & Meier's use of the phrase see *supra* note 6, at 317, for Frankenberg & Löwer's see *supra* note 68, at 86.

[77] Leggewie & Meier, *supra* note 6, at 314.

[78] Despite disagreement as to its "essentially affine" character, there is substantial agreement on this point between Ulrich K. Preuß, *Die empfindsame Demokratie*, FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 22, 2000, 51; Frankenberg & Löwer, *supra* note 68, and the recent work by Horst Meier, *Ob eine konkrete Gefahr besteht, ist belanglos. Kritik der Verbotsanträge der NPD, in* VERBOT DER NPD ODER: MIT RECHTSRADIKALEN LEBEN? 18 (Claus Leggewie & Horst Meier eds., Frankfurt/M 2002).

[79] Cf. the contributions in W. Schubarth & R. Stöss, *supra* note 20.

ban serves as a "backward barrier", as decisive as it may be in some contexts, cannot do a lot of work in others. It would be a mistake, however, to take this to entail that NS-affine organisations can present no serious danger in the consolidated Federal Republic. But the harm likely to be caused by a National Socialist party in its political activity itself, unmediated by the probability of a destabilization of the system, let alone a victorious election or putsch, are frequently neglected. Here, I want to focus on harm to individuals.[80]

Political parties serve as logistic, financial, organizational and legal bases for a variety of activities, for dissemination of propaganda, for demonstrations, and so on. For example, in the case of the NPD, there appear to be party supporters involved in attempts at an "ethnic cleansing" of certain local areas in East Germany by means of threats and social pressure.[81] It is significant to consider whether the marauding spare time terrorists or "Feierabendterroristen" (Preuß), who attempt to create "nationally liberated zones" by driving non-whites out of the neighborhoods, can be linked to the party nomenclature. Also, it has been argued that in areas where the party's supporters have achieved a hegemonic position within political culture, they have been able to create "a climate of fear" in which equal freedom for all cannot thrive.[82] The clearest exemplification of this is perhaps the case of demonstrations. Among the characteristic features of demonstrations of NS-affine organisations is the display of their capacity for organised violence,[83] which expresses calculated threats against clearly defined groups. Such intimidation is obviously intended in the case of a display of weapons, but also of uniforms and National Socialist insignia like swastikas.[84]

There is no consensus as to how best to describe violations of the interests of individuals by threats, intimidation and aggressively displayed preparedness to violence. One possibility is to refer to violations of dignity, honour, or respect, a strategy I will come back to in the third part of my paper. Frankenberg and Löwer, by contrast, attempt to capture

[80] Another category of direct harm emanating from NS successor parties would be that of harm to the symbolic integrity of the republic. Although there are significant liberal objections to be considered, I think that legal measures to avert such harm should not be in principle ruled out, but cannot pursue the matter here. For an illuminating related discussion of permissible symbolic functions of hate speech law see Robert Post, *Racist Speech, Democracy, and the First Amendment, in* SPEAKING OF RACE, SPEAKING OF SEX. HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES (Henry Louis Gates et al. eds., New York 1994).

[81] Cf. Verbotsantrag, *supra* note 68, 260–7.

[82] Cem Özdemir (Green Party), in the Bundestag debate on the NPD ban motion of Dec. 8, 2000, quoted in Frankenberg & Löwer, *supra* note 68, at 73.

[83] Ulli F. Rühl*, Versammlungsrechtliche Maßnahmen gegen rechtsradikale Demonstrationen und Aufzüge zur Versammlungsfreiheit*, NEUE JURISTISCHE WOCHENSCHRIFT 561, 564 (1995).

[84] In the German penal code, the display of Nazi symbols is outlawed by a concrete reference to National Socialism in the text of StGB 86a (1). The only way to make constitutional sense of this is to see it in the context of a negative republican paradigm of restrictions of expression, association, and so on.

the more robust exemplifications of such phenomena as human rights violations.[85] A more narrow view might draw on an argument developed in the Italian tradition. The rationale for the ban on wearing Fascist uniforms in demonstrations is said to lie in the fact that successful intimidation by a display of power and resources could strongly influence the bystanders in the process of the formation of their political preferences.[86] While it is perhaps not the free formation of political preferences, but free public political activity itself which is most endangered in those areas where NS-affine parties tend to exert a hegemonic influence, one central harm addressed by a negative republican party ban seems to be the politically chilling or even silencing effect the activities of the party may have. Where people withdraw from public political activity out of fear of neo-Nazi pressure and sanctions, a democratic basic order, whatever else it entails, is not being upheld. The conception of democracy, which could address such harm, does not seem too demanding. It would have to include the claim that everybody should be able to speak out and participate in political activity without fear – which is not a trivial supposition in democratic theory, but does not seem particularly sectarian either. Also, as the conflict is framed as between claims to political liberty on both sides, which cannot "compossibly" be realized, restrictions on the political activity of NS-affine organisations seem acceptable from a democratic point of view.

Of course, intimidating and silencing effects may result not only from the activity of strictly NS-affine parties, but from other kinds of aggressive and discriminatory programs and propaganda. The difference to those other activities which, though related, could not be banned under negative republicanism, ought to be thought of as one of intensity, as openly National Socialist activity is apt to call up a history of traumatization that historically unrelated threats might not evoke. The point is that intimidation best succeeds on the background of past experience of violence,[87] and it is here that the significance of the indexical element of negative republicanism is deeply anchored. While there may be dissent as to what exactly it entails, there can be no doubt that the reactions of first and second generation survivors of National Socialist persecution deserve special consideration. As the danger of a reinforcement of past suffering may be less relevant in other societies, the special, heightened sense of vulnerability, directly entailed by the horrendous intensity of those crimes as a part of lived experience, is one aspect covered by the idea of a singularity of NS-crimes "for us".

Finally, negative republican restrictions have to be checked as to their anti-democratic implications, especially their impact on associative and expressive liberties. Or is there a plausible conception of democratic liberties they could be squared with? Following a hint

[85] Frankenberg & Löwer, *supra* note 68, at 74.

[86] ALESSANDRO PACE, PROBLEMATICA DELLE LIBERTÀ COSTITUZIONALI 365 (Padova 1988).

[87] Cf. again Rühl, *supra* note 83, 564.

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press

by Frankenberg and Löwer, we could understand a negative republican party ban as a "curtailment of democratic experimentalism".[88] If we ask what could possibly justify such a "singular" curtailment, the reference to the monstrous experiment of National Socialism is significant. If we attempt to understand that failure as a permanent benchmark for the democratic evolution of the Federal Republic, the underlying conception of democracy must be a cognitive one. We must understand the democratic process, at least in part, as a process of collective learning. On this reading, which conceives of the people, in a phrase coined by Hauke Brunkhorst, as a "learning sovereign",[89] in the open future of democratic experimentalism in Germany there is one road that is closed off. Democracy, in this understanding, does not entail the political liberty to repeat old mistakes, but only to make new ones. This is why what might at first have seemed an unnecessary restriction of German negative republicanism, namely the exclusive focus on historic National Socialism, its purposeful blindness towards new and creative programs of injustice, hate, and xenophobia is in fact a condition of its legitimacy. However, in this model, the normative appeal of democracy, whether it is based on the equality of chances of gaining political power or the free participation in shaping the open future of a polity, cannot consistently be taken to extend to the attempt to make the future repeat the past.

If the point can be generalized that the legitimacy of negative republican bans on political parties comes as the result of such learning processes within democratic experimentalism, today's anti-Fascist and anti-NS bans must owe what persuasiveness they possess to a bootstrapping phenomenon which at first might appear paradoxical. The voluntaristic exclusion of organized successors to a past regime of injustice (PNF, SRP) can be provisionally justified by the danger to democratic consolidation they attempt to avert. Absent a societal effort to face, understand and reject the principles and policies of that regime, absent the binding force such a learning process comes to exert on democratic conduct, it is of transitory legitimacy. Its function is to help establish a constitutional situation in which a moral-political learning process can take place, which, if successful, can then redeem the legitimacy of the ban on grounds unrelated to system stability.

This point extends to questions of freedom of expression. Although any attempt to give a conclusive justification for viewpoint-based restrictions on speech is bound to fail, as the values underlying expressive liberty transcend purely democratic considerations, a parallel argument restricted to the democratic function of free expression seems available. The pendant of a cognitive model of democratic experimentalism is a Meiklejohnian account of free speech.[90] In this model, freedom of expression is not owed to those who wish to

[88] Frankenberg & Löwer, *supra* note 68, at 86.

[89] HAUKE BRUNKHORST, DEMOKRATIE UND DIFFERENZ 199 (Frankfurt/M 1994).

[90] Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government, in* POLITICAL FREEDOM (Alexander Meiklejohn ed., Westport 1979 (1948)).

present their views. Free speech is valuable because it can serve as the basis of informed decision-making by the citizenry, and the trouble with content-based restrictions lies in the fact that perspectives and arguments citizens might want to rely on in their deliberations are inaccessible. Under this conception, the not unreasonable supposition that an anti-NS party ban involves an unfair discrimination of ideological content can be attenuated by the fact that historic National Socialism has had all chances to present, disseminate and inculcate its views in German society (until 1945), and that, in the post-war period, society has to a large extent used its opportunity to discuss, come to understand, and reject it. If we presume, as seems not implausible, a thorough society-wide confrontation of NS ideology in the Federal Republic in more than fifty years, we arrive at an exceptional justification of the party ban that differs from that of SRP in 1952. In ascribing essential NS-affinity to a political program today, we imply that society knows all there is to know about the merits of the views concerned. The reason a restriction on NS ideology that presupposes its former general dissemination appears less problematic is that we can look at it in analogy to a restriction on expression based on place, time and manner. In Meiklejohn's phrase, "what is essential is … that everything worth saying shall be said",[91] or, in our case: shall have been said, but not by everyone at any time. The democratic value of NS-affine expression and participation on the background of its historic dissemination and dominance and the continued engagement with it is therefore not very great under a Meiklejohnian interpretation, and its restriction less problematic than was first suspected. As a complete vindication of exceptionalist restrictions on speech and association cannot be expected, a Meiklejohnian approach appears to offer the next best thing: an account that suggests why negative republican restrictions on association and expression should seem less problematic than others.

Note also that the legitimacy of a negative republican party ban actually looks better if we do not presume that among its aims there is the attempt to avoid a relapse into National Socialist barbarism. If avoiding the resurgence of an NS system was the main intent, free expression worries would be almost impossible to overcome. The reason is that whatever we take a complete theory of freedom of speech to involve, there seems to be a universal presumption against restricting speech because of the expected damage done by means of persuading other citizens.[92] Only if we presume that neo-Nazi association and expression is not being regulated out of fear that it might be persuasive, such regulations can claim compatibility with the presumption of an epistemic and deliberative autonomy of citizens that a Meiklejohnian conception presupposes.[93] In order to uphold democracy as our

[91] Id. at 26.

[92] See Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHILOSOPHY AND PUB. AFFAIRS 204–26 (1972), a generalized version of a Meiklejohnian account; and David Strauss, *Persuasion, Autonomy, and Expression*, 91 COLUM. L. REV. 334–71 (1991).

[93] I have discussed these issues in more, though not sufficient depth, in Peter Niesen, *Äußerungsfreiheit und kultureller Pluralismus, in* ÜBERSETZUNG ALS MEDIUM DES KULTURVERSTEHENS UND DER SOZIALEN INTEGRATION (J. Renn et al. eds., Frankfurt/M 2002).

central normative ideal, we are constrained to respecting this presumption. If we abandon it, as we would if we attempted to protect people from acquiring National Socialist beliefs through exposure to speech, it becomes unclear what is to be cherished about democracy. In contrast, the restrictions on free participation, association and expression within a refined paradigm of negative republicanism can be squared, to a greater degree, with ascribing deliberative autonomy to the addressees of speech only because the dangers associated with NS-affine party activity do not involve the mobilization of the disadvantaged, the activation of the resentful, the conquering of the labile, or the seduction of the immature. The harm to political liberty identified above are caused independently of whether NS-affine speech is apt to persuade.

D. Civic Society: towards a new abstraction

Judging from contemporary developments, negative republicanism seems not to have been the last word, at least in the German debate. The current situation allows us to identify the beginnings of a new approach which appears more geared towards new emerging dangers, thereby broadening the focus from the one-directional opposition characteristic of negative republicanism to more plural and amorphous challenges, yet without falling back into anti- extremism. This new approach is based on a distinctly moral conception of democracy, and its advances are accompanied by serious difficulties. As the civic societal conception of restrictions on political liberty is still very much in an embryonic state, a sketch of its underlying conception of democracy and the harm addressed by it is all I can offer here.

In contrast to authors in the tradition of militant democracy, who worried that restrictions on freedom of association in democratic societies might constitute a contradiction in terms, we saw that negative republicans interpreted such restrictions as narrow exceptions to the rule. The civic societal view has challenged both views by pointing out that such restrictions may be neither contradictions nor exceptions, but straightforward implications of democracy, which it interprets not as the privilege of a given population but as its moral duty. In this, Frankenberg and Löwer are transcending the negative republican paradigm: "[T]he principle of democracy as understood by the Basic Law not only prescribes to grant to the citizenry at any time a right to political self-determination and self-correction, but at the same time entails the obligation to secure the integrity of the democratic process in order to protect the rights of electorally defeated minorities."[94] Where militant democrats denied that democracy entailed a right to suicide, and negative republicans denied democracy obligated them to entertain a discredited anti-democratic tradition, it is now claimed that democratic self-determination entails a positive self-referential obligation to its lasting reproduction. Such reproduction is not only owed to the protection of current minorities, but also to "later generations", to whom we must not "withhold … the

[94] Frankenberg & Löwer, *supra* note 68, at 49.

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press

possibility of democratic self-correction in order not to violate the principle of democracy."[95] Democracy here appears as an asset we have only borrowed from our children. One difficulty of this conception is that it seems to broaden the focus on dysfunctional political activities. A positive obligation on the side of the state to guarantee the reproduction of democracy by means of regulating political parties could prompt it to rather far-reaching interventionist activity. Monitoring for constitutionality might be broadened and extended, for example, from associations destructive of or intentionally disloyal to the democratic order – for example parties that would, along the lines of KPD, once in power, keep their rivals out, – to associations not sufficiently committed to positively sustaining the democratic order.

Looking at democracy not as itself protected (against extremists or historical foes) but as protective of minorities and later generations, is inspired by theories of civil society. Like the two paradigms treated earlier, such theories do not restrict their attention to the danger of an anti-democratic takeover of state institutions. Rather, they hold that as contemporary democracy is "centered in civic processes"[96] and not in processes of political coordination through electoral campaigns, party competition, and governmental decision-making, it is those civic processes that are most deserving of protection. In horizontal interactions between citizens, the criteria of a democratic process are more demanding. Democracy depends not so much on the equal chance of winning political power, not even on the equal chance of exercising political liberty. It "depends for its success on the recognition of the other as equal, on reciprocity and the capacity for discursity."[97] This entails that what is basic for a democratic order looks very different from traditional interpretations of fdGO. In its moral reading, democracy is vulnerable to organised groups already when they violate basic conditions of a recognition as equal, and thereby harm the reproduction of "a democratic form of life" (Frankenberg) at the grassroots level. It requires that citizens interact on a "level of minimal morality", and the systematic and organized propagation of "Germany to the Germans" or "Foreigners out!" counts as exemplary violation of this condition.[98] Harm to individuals, and to the integrity of this form of life, is therefore largely to be expected from expressive offences, from manifestations of disregard, disdain, superiority or contempt. Accordingly, the central problems of this paradigm lie in its clashes with expressive liberty. As an example, consider the intuition expressed in a draft for constitutional reform from the pre-unification roundtable talks of 4 April 1990. "Parties which in their program systematically and

[95] Id.

[96] Ulrich K. Preuß, *supra* note 78, at 51. This article has proved the most theoretically innovative contribution to the broad German discussion on whether the NPD should be banned. A longer version has appeared in Leggewie & Meier, *supra* note 78, at 104.

[97] Preuß, *supra* note 78.

[98] Preuß, *supra* note 78.

consistently attack human dignity … can be excluded from elections or banned (…)".[99] What makes this an anticipation of today's civic society paradigm is not the reference to the concept of dignity itself, but the propensity to take an attack on the human dignity of a person or group to entail a violation of dignity of this person or the members of this group. While it is uncontroversial, for the Federal Republic, that the basic democratic order ought not to admit violations of human dignity, the proposal's implications are more far-reaching. It entails that associations which systematically deny or dispute the human dignity of persons or the members of a group are thereby violating their dignity. The slippery slope from ideological expression to offence is no longer blocked, either by the need for an empirical prognosis of danger, or by the particularized self-restraint of negative republicanism. It is obvious that this lowers the threshold of restrictions on political activity. In the absence of a principled account of how to uphold traditional expressive liberties within the new paradigm, even civic society theorists, who are clearly aware of the problem,[100] appear to refrain from wholeheartedly endorsing their conception.

The advantage of such a moral reading of democracy is clear. It is informed, but not determined, by the anti-NS stance developed in negative republicanism, in that it is particularly sensitive to problems of racism, including racist anti-Semitism. As one motivation for the systematic expression of contempt and disdain and the withholding of equal recognition is racism, its scope will in parts overlap with that of various forms of negative republicanism. The identification of opponents from within the civic society paradigm can perhaps best be understood as a problem-sensitive generalisation from negative republican examples. Although this opens it up to demands of right-left symmetry characteristic of the anti-extremist polarization,[101] its focus on phenomena of racist humiliation seems to rule out a comeback of the forced anti-extremist parallelism. In contrast to negative republicanism, the civic society model is not forced to interpret new phenomena in the framework of historical events. For example, in order to interfere with current forms of aggressive xenophobia in Germany, it need not read them against the back- drop of NS coordinates. In the same way, it is not restricted by the criterion of historical-societal indexicality, which may sharpen its sensorium, for example, for problematic imports from other political cultures. "Bystander" societies, though not historically involved, may or may not adopt anti-Fascist or anti-NS legislation on civic societal premises. As political experience becomes less a matter of socialization in a

[99] Art. 37 (4), emphasis added. Cited in "Anhang" 2, in Meier, Parteiverbote, *supra* note 7, 463. Cf. the similar reference to Art. 1 Basic Law in Art. 21 (4) of the draft constitution of the *Kuratorium für einen demokratisch verfaßten Bund Deutscher Länder* of June 29, 1991. Meier, 465. Both reform plans were aborted.

[100] Preuß, *supra* note 78, at 127, refers to the repressive potential conceptions of democratic virtue mobilize against, for example, pornography or debates on euthanasia.

[101] Karl Heinz Ladeur, *Die Rechten und das Recht: Eine Warnung vor der Zivilgesellschaft, in* Meier & Leggewie, *supra* note 78, at 122.

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press

particular tradition, and more a corollary of the exposure to information and entertainment provided by globalized mass media, the indexical, particularizing reference central to negative republicanism is losing significance for intra-societal conflicts. To mention just one example, even in societies that have an indigenous fascist tradition, as Juan Linz has recently pointed out, young fascists prefer National Socialist rituals and insignia to the home grown variety.[102] In the same way, socio-political learning processes are becoming less and less dependent on conflicts taking place within one particular society, in the course of one particular historical path. Again, the Holocaust is the prime example here. The "cosmopolitanization of memory", though brought about in a shallow fashion by the vehicles of cultural industry, proves that processes of gaining moral knowledge are not restricted to responding to national catastrophe.[103] Developments in supranational political integration, like that of the European Union, entail that we can no longer afford not generalizing from political experiences made within any of the other participating societies. Although there may exist a consensus between the member states as to what the chief organized challenges to democratic practices are, there is no such thing as a shared negative republican tradition in the European Union. Thus the civic society paradigm could supersede the dangers of anachronism and provinciality that, for good normative reasons, have so far constrained the vision of negative republicanism after the fall of the European fascisms. But with its position as to expressive and participatory liberties still culpably underdeveloped, the price to be paid for progressing to the new paradigm seems unacceptably high.

E. Conclusion

In the course of distinguishing three paradigmatic understandings of bans on political parties, it turns out that they differ not only in the identification of their opponents, the conception of democracy they mean to foster and the justifications they offer for limiting political liberty, but also the dangers they attempt to avert. In anti-extremism, the defensive constellation is bilinear, against extremist parties from left and right. Opponents are identified by their rejection of political institutions and values, and claims to democratic contradiction are said not to arise if those opponents attempt to do away with democratic institutions. However, if extremist parties' chances to that effect are slight or inexistent, this argument fails to convince. Negative Republicanism, on the other hand, identifies its opponents based on their identity or essential affinity to those responsible for a past regime of injustice. This makes its defense unilinear, against the harm of an anti-democratic takeover as well as against harm to free and uncoerced political activity emanating from the party in question. As intimidation and fear are likely to result from activities most closely associated with those of a discredited historical predecessor, a negative republican ban can be justified even where no clear and present danger for

[102] Juan Linz, AUTORITÄRE UND TOTALITÄRE STAATEN (Potsdam 1999) (preface to the German edition).

[103] See DANIEL LEVY & NATAN SZNAIDER, ERINNERUNG IM GLOBALEN ZEITALTER: DER HOLOCAUST (Frankfurt/M 2001).

central democratic institutions exists. To avoid arbitrariness in negative republican restrictions, four criteria seem to be in order: a party ban would have to be directed against political programmes with an outstanding criminal record, based on an intent to humiliate, figuring in the history one's of own society, where lasting relations of responsibility hold. While two of these criteria, intent and responsibility, carry moral significance, it is only in the civic society paradigm that the moral requirements of equal recognition are extended to a fully-fledged condition on democratic participation. In contrast, as a historically-based exception to democratic experimentalism, the legitimacy of a negative republican party ban depends on the narrow delineation of its application conditions. Faced however with contemporary developments of supranational political integration and moral-political learning processes which transcend the borders of particular conflictual, even criminal, histories, negative republicanism is under pressure to modernise itself. Whether civic society can offer that modernizing perspective will depend on how it addresses significant worries about the fate of expressive liberties.

However, to end on an even more skeptical note, it must be admitted that while a civic societal reading of party bans seemed to have been the latest development, especially as regards the current trial of the NPD, after 11 September 2001, anti-extremism rears its head again. Islamic fundamentalism has been identified as the kind of extremism currently presenting the greatest risks for the democratic constitutional state, and, in Germany, the first Islamic fundamentalist association, the Cologne-based "Califate State", has already been outlawed by the Minister of the Interior. To jurisprudential doctrine, this comes as no surprise, as the extension of the applicability of restrictions on political associations from politically to culturally extremist groups has already been prepared. "The anti-fundamentalist mechanisms contained in the Basic Law, the instruments of a ban on parties and associations …, are equally valid if the fight against the free democratic basic order is fought by reference to cultural imperatives."[104] If the geopolitical constellation should give anti-extremism a new lease on life, it remains to be seen whether the rationalizing developments introduced in the meantime, by negative republicanism and civic society, can altogether be bypassed.

[104] Dieter Grimm*, Wieviel Toleranz verlangt das Grundgesetz?, in* DIE VERFASSUNG UND DIE POLITIK 122 (Dieter Grimm ed., München 2001).

https://doi.org/10.1017/S2071832200015157 Published online by Cambridge University Press