Federal Constitutional Court

In the name of the people

In the proceedings with respect to the motion seeking a temporary injunction

To suspend the order of the *Oberverwaltungsgericht* (Higher Administrative Court) for the *Land* North Rhine-Westphalia (30 April 2001 – 5B 585/01) and thereby restoring the suspensory effect of the objection to the order of the Essen Police Authority (3 April 2001), which banned an assembly.

Applicant: National Democratic Party of Germany
North Rhine Westphalia Land Association

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the First Chamber of the First Senate of the Federal Constitutional Court, through

Vice-President Papier
and Judges Steiner,
Hoffmann-Riem,

pursuant to § 32(1) in conjunction with § 93 (d) (2) of the *Bundesverfassungsgerichtsgesetz* [BVerfGG, Federal Constitutional Court Act], as promulgated on 11 August 1993 (*Bundesgesetzblatt* [BGBl, Federal Law Gazette] I, p. 1473), unanimously decided on 1 May 2001:

1. The suspensory effect of the applicant's objection to the order of the Essen Police Authority (3 April 2001) is hereby restored, in accordance with the wording of No. 1 of the decision of the Gelsenkirchen Administrative Court (30 April 2001 – 14 L 830/01).
2. The Land of North Rhine-Westphalia shall reimburse the applicant for its necessary expenses.

Grounds:

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The motion for a temporary injunction concerns a ban on an assembly, which had been declared immediately enforceable. The Chamber has, pursuant to Article 32(5) in conjunction with Article 93d.2 of the BVerfGG, published its reasons in writing after the announcement of the decision.

I.

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1.a) In March of this year the applicant notified the responsible administrative authority of its intent to stage a demonstration under the motto „Against Social Dumping and Mass Unemployment“ on 1 May 2001. The outdoor assembly is to take place in the Essen city centre. Around 500 participants are expected.

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b) With an order issued pursuant to Section 15.1 of the *Versammlungsgesetz* (VersG, German Assembly Act) and issued on 3 April 2001, the administrative authority ordered a ban on the registered assembly and on all similar additional gatherings in the area of the city of Essen. At the same time the administrative authority ordered the immediate enforcement of its order. In the event the order banning the registered assembly should be suspended as a result of a judicial temporary injunction decision, the administrative authority imposed a number of conditions on the registered assembly and declared these to be immediately enforceable as well.

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In support of its order banning the registered assembly, the administrative authority explained that going through with the registered assembly would pose a threat to public order. The administrative authority held that the first of May has an unambiguous meaning for society with a weighty symbolic force associated with it. Its character is based on the historical commitment of the socialist-oriented labour movement. With its recognition as a legal holiday the parliament acknowledged the labour movement’s contribution to the establishment of a free democracy. An NPD demonstration utilising the symbolic character of May Day would inevitably evoke associations with the National Socialist regime’s perversion and instrumentalisation of the labour movement’s holiday. The administrative authority reasoned that it would thus simultaneously recall the defeat and oppression of the labour movement in the Third Reich. This is particularly true for the city of Essen, which had been among the chief targets of the National Socialist’s repression of trade unions. The administrative authority concluded that there is a striking resemblance between the thought and rhetoric as well as the political platform of the NPD on the one hand and National Socialism of the Third Reich on the other. According to a recent assessment by the Federal Government the NPD and the NSDAP are of a similar character. An NPD demonstration in Essen on the first of May would, therefore, be likely to injure the feelings of many people who had been involved in the labour movement. Such an assembly would be perceived as a provocation and thus amount to a deliberate breach of public order.

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c) The applicant lodged an objection to the order with the responsible administrative authority and filed an appeal to the *Verwaltungsgericht* (Administrative Court) seeking to restore the suspensory effect of the objection. The Administrative Court granted the appeal with respect to the order banning the assembly and, to a degree, with respect to the conditions imposed upon the event. The Court concluded that, in the consciousness of the people of Essen, the first of May does not have the symbolic effect attributed to it by the administrative authority and necessary to justify the administrative authority's assessment that, in light of the events of the National Socialist regime, holding an NPD demonstration that would generally be felt as a deliberate provocation breaching public order. Accordingly, no threat to the public order justifying the ban on the announced assembly exists.

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d) On an application by the administrative authority, the Higher Administrative Court granted the appeal against the decision of the Administrative Court, amended the Administrative Court's decision, and rejected the motion for a temporary injunction that had been filed by the applicant. The Higher Administrative Court concluded that the assembly poses an immediate threat to public order. In its judgement, the Higher Administrative Court explicitly criticised the case law of the First Chamber of the First Senate of the *Bundesverfassungsgericht* (BVerfG -- Federal Constitutional Court), especially the judgements of the First Chamber from 24 March 2001 (1 BvQ 13/01) and 12 April 2001 (1 BvQ 19/01 and 1 BvQ 20/01). The Higher Administrative Court held to the legal view, embodied in previous decisions, that the public appearance of Neo-Nazi groups and the dissemination of National Socialist ideas in public assemblies and parades, even in cases when such activities do not cross the threshold of criminality, can be prohibited on any day of the year. The Higher Administrative Court reasoned that the exclusion of Neo-Nazi ideas from the democratic opinion-forming process is a constitutional principle that can be deduced from the historically-conscious value system of the Basic Law, which permits the restriction of the freedom to express one's opinion with respect to these ideas, even beyond the terms of a constitutional party ban and the forfeiture of constitutional rights anticipated by Articles 21.2 and 18.2 of the Basic Law. The Higher Administrative Court reasoned that, in view of the nearly insurmountable standards the Federal Constitutional Court has established with respect to the measures provided by Articles 21.2 and 18.2 of the Basic Law, their protective effect would, in reality, only rarely be invoked. The Higher Administrative Court held that a complete ban on the registered assembly is justified. The Senate of the Higher Administrative Court deciding the case noted that it is following the opinion shared by the *Bundestag*, *Bundesrat* and Federal Government, all of which believe that the applicant has an actively belligerent, aggressive attitude aimed at overturning the free democratic basic order of the Basic Law. The Higher Administrative Court concluded that the registered assembly will be marked by this attitude as well.

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2. The applicant moves for the issuance of a temporary injunction seeking the reinstatement of the suspensory effect of its objection to the administrative authority's order banning the registered assembly. The applicant asserts that it has not professed a belief in National Socialism. The applicant argues that the assumptions of the Higher

Administrative Court are not compatible with fundamental rights or the party privileges of Article 21 of the Basic Law.

II.

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The admissible motion for a temporary injunction is granted.

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1. Pursuant to Article 32 (1) of the BVerfGG the Federal Constitutional Court may, in a dispute, deal with a matter provisionally by means of a temporary injunction if this is urgently needed to avert serious detriment. When – as here – the outcome of a possible constitutional complaint proceeding is open, the Federal Constitutional Court must weigh (1) the consequences that would arise in the event that a temporary injunction is not issued but the underlying constitutional complaint were eventually granted against (2) the negative effects that would arise if the requested temporary injunction is granted but the underlying constitutional complaint were later unsuccessful (cf. BVerfGE 71, p. 158 <at p. 161>; 88, p. 185 <at p 186>; 91, p. 252 <at pp. 257-258>; 94, p. 166 <at pp. 217>; 96, p. 120 <at pp. 128-129>; consistent case law).

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2. In the present case this weighing of consequences leads to a predominance of reasons which speak for the issuance of a temporary injunction.

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a) Were the immediate enforceability of the ban on the registered assembly to remain in place, and a constitutional complaint were later to have success, then the applicant would be deprived of the possibility to which it is entitled of making use of, in the desired fashion, the fundamental right to freely assemble and to freely express opinions. Were the registered assembly to proceed as planned but an underlying constitutional complaint later prove to be unfounded, then the assembly would have been held although, in the assessment of the administrative authority, considerable threats to public order were associated with the registered assembly.

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b) In the course of a weighing the consequences of a possible decision it is, as a rule in proceedings of the present kind, out of the question that the Federal Constitutional Court engage in an independent investigation and evaluation of the factual circumstances underlying the motion for a temporary injunction. In cases of this type the Federal Constitutional Court has, as a general rule, taken the findings and assessment of the facts in the challenged court decisions as the basis for its weighing analysis (cf. *e.g.*, BVerfGE 34, p. 211 <at p. 216>; 36, p. 37 <at p. 40>; BVerfG, First Chamber of the First Senate, NJW 2000, p. 3051 <at p. 3052>). In view of the fact that most assemblies are associated with specific dates, fundamental rights protection must be provided by temporary injunction proceedings (cf. BVerfGE 69, p. 315 <at pp. 340,

364>). The Court cannot, therefore, rely on the challenged court decision alone, if it is apparent that the assessment of facts is not viable with a view to the scope of protection provided by the relevant fundamental rights provision. In particular, a temporary injunction is to be granted (1) when the predicted threat is supported by circumstances that are in clear contradiction with the scope of protection provided by Article 8 of the Basic Law or (2) when the protected interest which is invoked to justify a restriction of the right to assemble and the applied norms, from a legal perspective, clearly do not justify a restriction of the right to assemble (cf. *e.g.*, BVerfG, First Chamber of the First Senate, DVBl 2001, p. 558 <at pp. 558-559>, and order of 26 March 2001 – 1 BvQ 15/01 --).

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3. The conclusions of the administrative authority and the Higher Administrative Court are, given the standard of review applied in temporary injunction proceedings, from a legal perspective, clearly not justifiable.

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a) The Higher Administrative Court misjudges the ban permitted by Article 21 (2) (2) of the Basic Law. Pursuant to this provision the unconstitutionality of a party is to be decided upon by the Federal Constitutional Court. At issue is not merely a question of establishing a competence but also, in conjunction with Article 21 (1) of the Basic Law, the privileged status of the political parties as compared with other associations and organisations (cf. *e.g.*, BVerfGE 2, p. 1 <at p. 13>; 47, p. 198 <at p. 228>). The Federal Constitutional Court's monopoly with respect to this decision absolutely precludes administrative action against the existence of a political party, however inimical to the free democratic basic order it may be (cf. *e.g.*, BVerfGE 40, p. 287 <at p. 291>; 47, p. 198 <at p. 228>). While the party may be combated on a political level, it is to be free, in its political activity, of any judicial obstruction, as long as it employs generally acceptable methods (cf. *e.g.*, BVerfGE 12, p. 296 <at pp. 305 *et seq.*>; 39, p. 334 <at p. 357>; 40, p. 287 <at p. 291>; 47, p. 130 <at p. 139>; 47, p. 198 <at p. 228>; consistent case law). For the sake of political freedom, the Basic Law accommodates the danger that exists in the activity of a political party until it is found to be unconstitutional (cf. *e.g.*, BVerfGE 12, p. 296 <at pp. 304-305>; 39, p. 334 <at p. 357>; 40, p. 287 <at p. 291>). Consequently, it is impossible that the NPD should be prevented from exercising its fundamental rights solely on the basis (1) that positions it advocates have been found to be unconstitutional by the *Bundestag*, *Bundesrat*, Federal Government, or an administrative authority or court, or (2) that party-ban proceedings are pending before the Federal Constitutional Court. A ban on an assembly cannot be based, therefore, on the assumption that the positions typically advocated by the NPD contradict the free democratic basic order. It is, however, exclusively on such assumption that the Higher Administrative Court bases its judgement. Neither the order of the administrative authority nor the decision of the Higher Administrative Court is based on predictions about farther-reaching illegal conduct by the applicant, its functionaries, members or supporters in relation to going through with the registered assembly.

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b) The conclusions of the Higher Administrative Court regarding the immediate threat to public order posed by the expected content of the assembly, offered as further support for the ban on the registered assembly, are in contradiction with the decisions of the Senate of 14 May 1985 and 13 April 1994 (BVerfGE 69, p. 315; 90, p. 241) and with the decisions of the First Chamber of the First Senate, which are based on those Senate judgements (cf. *e.g.*, the orders of 24 March 2001 – 1BvQ 13/01 – and of 12 April 2001 – 1 BvQ 19/01 and 1 BvQ 20/01 --).

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The Higher Administrative Court's criticisms of the Chamber's remarks do not provide an occasion for changing the existing constitutional case law. The Higher Administrative Court misjudges the guarantee of the fundamental rights to freely express an opinion and to assemble. It is not the task of courts to evaluate the content of expressions of opinion, unless the application of the general laws calls for an assessment in accordance with their definitions of offences. The Basic Law as well as the other parts of the legal system forbid expressions of opinion only upon the fulfilment of a narrow set of preconditions. Where these are not present, the principle of freedom of speech applies. The strength of a State based on the principle of the rule of law is also demonstrated by the fact that it subjects its dealings with its opponents to the generally valid principles associated with the rule of law. The Basic Law establishes formal and substantive limitations with respect to a ban on a party or the forfeiture by a particular person of the protection of fundamental rights, provided by Articles 18 and 21 of the Basic Law, which cannot be ignored because a Higher Administrative Court regards the protective effect of Articles 18 and 21 of the Basic Law to be inadequate. Nor are constitutional guarantees to be voided by denying, in principle, particular political parties or persons the protection of a fundamental right like that established by Article 8 of the Basic Law. This fundamental right guarantees possibilities of expression, even for minorities, and subjects the determination of the limits of this guarantee to statutes.

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The rejection of National Socialism has been expressed by the Basic Law in many provisions, such as Article 139 of the Basic Law, but the rejection of National Socialism also finds its expression in the structure of the protections that attend the principle of the rule of law, the absence of which had characterised the cynical National Socialist regime. Respect for constitutional guarantees is seen by the Basic Law as an important assurance against the re-emergence of a State founded on injustice.

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Freedom of assembly is among the guarantees that attend the principle of the rule of law, including the limits on that freedom listed in Article 8 (2) of the Basic Law. In accordance with the Federal Constitutional Court's case law, bans on assemblies should only be considered in order to protect elementary legal interests; a mere threat to public order is not enough (cf. *e.g.*, BVerfGE 69, p 315 <at p. 353>). To ward off dangers to public order, however, conditions may be imposed. The challenge brought against the decisions of the administrative authority and the Higher Administrative Court does not, however, concern the imposition of conditions on the registered assembly but on the

outright ban of the registered assembly. Accordingly, it exceeds the scope of these proceedings for the Higher Administrative Court to deal critically, in support of its judgement, with the Chamber's order of 26 January 2001 – 1 BvQ 9/01 --, which concerned the imposition of conditions in order to protect public order. Moreover, the Higher Administrative Court incorrectly concludes that this decision (First Chamber, 26 January 2001) did away with the need for a concrete prediction of a threat.

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4. The suspensory effect of the objection is restored, in accordance with the wording of the injunction of 30 April 2001 of the Gelsenkirchen Administrative Court.

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Determining conditions pursuant to §15 VersG is, in principle, a matter for the administrative authority, which is best able to evaluate which conditions are suitable, requisite and appropriate because of its closeness to the facts and the place. Verifying their lawfulness is for the administrative courts. At present the administrative authority has imposed conditions for the registered assembly in the event of the judicial restoration of the suspensory effect of an objection to its order banning the registered assembly. These conditions have largely been confirmed by the Administrative Court, closest to the events. The evaluation of the efficacy of the conditions imposed in order to minimise dangers lies in the weighing of consequences to be undertaken pursuant to Article 32 BVerfGG.

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5. The decision as to reimbursement of the applicant's necessary expenses is based on Article 34a.3 BVerfGG.

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This decision is not appealable.