

Between Legal Deficiencies and Political Restraint

The Prohibition of Political Parties in France

Augustin Berthout¹

Traditionally, it is Germany, not France, which is presented as the model example of militant democracy. Among the various provisions of the German Basic Law, Article 21 (2), setting out the procedure for banning political parties, is perhaps one of the clearest expressions of the basic constitutional decision in favour of a *streitbare Demokratie*². Nevertheless, setting concepts aside and examining empirical data, it is interesting to note that Germany has banned fewer political parties than France since the end of the Second World War. Indeed, while Germany only banned the *Sozialistische Reichspartei* and the *Kommunistische Partei Deutschlands* respectively in 1952 and 1956, no fewer than seven parties have been dissolved in France since the beginning of the 5th Republic in 1958.

A prohibition mainly used for small parties

Soon after the attempted coup in May 1958, the *Parti nationaliste* was dissolved in 1959 as a violent anti-republican party and as the successor of the organisation *Jeune Nation*, which was forbidden shortly after the failed coup attempt.³ While it was preparing to discuss the question of independence for French Polynesia, the *Rassemblement démocratique des populations tahitiennes* was dissolved in November 1963.⁴ A few years later, following the riots of May 1968, several far-left parties were also dissolved. These included the Trotskyist *Parti communiste internationaliste* and the Maoist *Parti communiste marxiste-léniniste de France*, both dissolved in June 1968.⁵ Similarly, the successor of the *Parti communiste internationaliste*, known under the name of the *Ligue communiste* was dissolved in 1973 because of a violent demonstration against the far-right organisation

¹ Augustin Berthout is Doctor of Public Law from the University of Montpellier and works particularly on the notion of militant democracy.

² BVerfGE 5, 85 (139) – KPD-Verbot. More recently, see also BVerfG, Urteil vom 17.01.2017, 2 BvB 1/13, https://www.bverfg.de/e/bs20170117_2bvb000113.html (last visited Apr 25, 2024) = BVerfGE 144, 20 (164) – NPD-Verbotsverfahren; BVerfG, Beschluss vom 13.07.2018, 1 BvR 1474/12, https://www.bverfg.de/e/rs20180713_1bvr147412.html (last visited Apr 25, 2024) = BVerfGE 149, 160 (194) – Vereinsverbote; BVerfG, Urteil vom 23.01.2024, 2 BvB 1/19, https://www.bverfg.de/e/bs20240123_2bvb000119.html (last visited Apr 25, 2024).

³ Decree of 13 February 1959, Journal Officiel of 15 February 1959, p. 2023.

⁴ Decree of 5 November 1963, Journal Officiel of 6 November 1963, p. 9887.

⁵ Decree of 12 June 1968, Journal Officiel of 13 June 1968, p. 5625.

Ordre Nouveau, which was dissolved on the same day.⁶ In 1987, the *Mouvement corse pour l'autodétermination* which was a party with an electoral activity, was also forbidden due to its independentist agenda.⁷ For a long time, it was the last political party to have been dissolved in France. However, on 4 October 2023, the small fundamentalist Catholic party *Civitas* was dissolved for racism and appeal to violence against the Republic.⁸ This latest ban occurs in the context of a significant increase⁹ in the number of dissolutions of ordinary associations since 2016. However, it differs from these previous dissolutions in that it targeted a political party, which had achieved an insignificant electoral score in the 2017 legislative elections.¹⁰

Despite these precedents, there are no public opinion movements in France calling for the banning of a political party, as currently in Germany¹¹ against the *Alternative für Deutschland*. At the turn of the 2000s, some intellectuals contemplated the dissolution of the *Front National* and legal scholars, without saying that this solution was necessarily *politically desirable*, pointed out that it was, in any case, *legally possible*¹². However, in today's political debate, there is no discussion about the legality of what are usually considered to be France's main far-right parties, such as the *Rassemblement national* or *Reconquête!*¹³. It follows

⁶ Decree of 28 June 1973, Journal Officiel of 29 June 1973, p. 6957.

⁷ Decree of 22 January 1987, Journal Officiel of 24 January 1987, p. 861.

⁸ Decree of 4 October 2023, Journal Officiel of 5 October 2023.

⁹ Noé Amsallem/William Audureau/Romain Geoffroy, Trente-quatre associations visées par une dissolution sous la présidence Macron, une annulation par le Conseil d'Etat, 2023, *Le Monde*, https://www.lemonde.fr/les-decodeurs/article/2023/11/10/trente-quatre-associations-visees-par-une-dissolution-sous-la-presidence-macron-une-annulation-par-le-conseil-d-etat_6184932_4355771.html (last visited Apr 25, 2024).

¹⁰ See Madeleine Meteyer, Législatives: Alexandre Gabriac, Marie d'Herbais... voici les premiers candidats de Civitas, 2017, *Marianne*, <https://www.marianne.net/politique/legislatives-alexandre-gabriac-marie-d-herbais-voici-les-premiers-candidats-de-civitas> (last visited Apr 25, 2024); Juliette Vienot de Vaublanc, Civitas, à la croisée de l'extrême droite et de l'intégrisme catholique, 2023, *La Croix*, <https://www.la-croix.com/Religion/Civitas-croisee-lextrême-droite-lintegrisme-catholique-2023-08-08-1201278232> (last visited Apr 25, 2024).

¹¹ Kjeld Neubert, Germany Wrestles with Calls to Ban AfD – Again, 2024, *Euractiv*, <https://www.euractiv.com/section/politics/news/germany-wrestles-with-calls-to-ban-afd-again/> (last visited Apr 25, 2024).

¹² Thomas Hochmann, Auflösung des Front National: Eine Anleitung, *Verfassungsblog* vom 16.10.2014, <https://verfassungsblog.de/aufloesung-des-front-national-eine-anleitung/> (last visited Apr 25, 2024); See also, Pierre Esplugas-Labatut, L'interdiction des partis politiques, 1999, *Revue française de droit constitutionnel*, No. 36, p. 675.

¹³ Recently, several politicians from the presidential party and the right-wing party Les Républicains have made calls to ban La France Insoumise, the main-left wing party: Libération, October 11, 2024, Des élus LR et Renaissance souhaitent la dissolution de LFI après le communiqué sur l'attaque du Hamas, https://www.liberation.fr/politique/des-elus-lr-et-renaissance-souhaitent-la-dissolution-de-lfi-apres-le-communique-sur-lattaque-du-hamas-20231011_W2LJRAASJFFY3K22BORD2HMNR4/; Libération, May 14, 2024, Eric Ciotti veut dissoudre La France insoumise, https://www.liberation.fr/politique/eric-ciotti-veut-dissoudre-la-france-insoumise-20240514_SDY4C4SW5NFL3HE56CHWPENTO4/ (both last visited July 16, 2024). However, these calls remain isolated.

from this overview that in France, the ban on political parties has mainly been used against small political parties and never against parties with significant electoral support. This can be explained for three main reasons. First, from a legal point of view, dissolving a political party is easy. This explains the number of small parties dissolved since 1958. Second, from a political point of view, it is a risky decision to take and not necessarily a useful one for the protection of democracy. This is why banning the main political parties with an authoritarian agenda has never really been considered. Third, from a constitutional point of view, it is not entirely certain that the banning mechanism complies with the Constitution. This last reason may also explain why the banning of political parties is rarely envisaged.

A prohibition legally easy to adopt

If so many parties have been dissolved in France since 1958, it is primarily because the banning mechanism is easy to activate. In reality, there are two dissolution mechanisms in France, but only one of the two is easily activated. The first one is the judicial dissolution which is pronounced by the civil Tribunal on the basis of the 1901 law on freedom of association. However, due to the slowness of this procedure, a second mechanism known as the “administrative dissolution” was adopted with the law of 10 January 1936. This law has since been repealed but is reproduced almost entirely in article L. 212-1 of the Internal Security Code¹⁴. It is on this legal basis that all dissolutions of political parties were adopted after 1958. The special feature of the French mechanisms for dissolving political parties is that they are, in fact, the same as the mechanisms for dissolving ordinary associations.¹⁵

From a procedural point of view, administrative dissolution has very few requirements. It must be adopted by a decree of the Council of Ministers (*décret en Conseil des ministres*), which means that it is the President of the Republic and the Prime Minister who decide on the dissolution in light of the information provided by the Minister for the Interior. Since 1979 and 1983, the decree must be justified and be issued after giving the party’s leaders the opportunity to provide their observations. The legality of the decree may then be challenged before the *Conseil d’Etat*, which will judge on the first and last hearing. Therefore, the French procedure is more similar to the German procedure for banning associations than to the judicial procedure for banning political parties. The main difference is only

¹⁴ Code de la sécurité intérieure, Article L212-1, Légifrance, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000043982161 (last visited Apr 25, 2024).

¹⁵ For a more detailed analysis, see Romain Rambaud, La loi du 10 janvier 1936 sur les groupes de combat et milices privées (article L. 212-1 du code de sécurité intérieure: l’arme de dissolution massive, 2015, *Revue des Droits et Libertés Fondamentaux* (RDLF) No. 20.

that in Germany, ban decisions upheld by the *Bundesverwaltungsgericht* can be challenged before the Federal Constitutional Court. In France, there is no such remedy before the *Conseil constitutionnel*.

From a substantial perspective, the number of grounds for dissolution has increased since 1936. Initially, the philosophy underlying the grounds for dissolution differed significantly from that of Article 21 (2) of the German Basic Law. Violent and paramilitary activities could lead to a ban, but not political organisation's ideas *per se*. Thus, it was less about banning anti-republican organizations than those intending to undermine the Republic "by force". The sole exception to this liberal philosophy was the ground of protecting the State's territorial integrity, which targeted independence and anti-colonial movements, including their ideology, regardless of whether they engaged in violent activities. However, this ground has not been invoked since 1987, likely because it conflicts with the European Court of Human Rights' case law on party bans.

After the Second World War, the legislator added new grounds for dissolution. The underlying philosophy shifted from a focus on violent activities to political ideas. Henceforth, organisations promoting France's collaboration with the Third Reich or disseminating racist ideas are subject to bans. Moreover, in 2021, the legislator expanded the grounds for dissolution related to armed street violence by including provocation of violent actions against property, not just against individuals.

The combination of these expanded grounds and a very loose procedure has made it legally easy to ban political parties. However, the issue presents itself differently from a political perspective.

A prohibition politically challenging and potentially ineffective

While banning a political party in France may be relatively easy from a legal perspective, it is a much more complex decision from a political standpoint. Since the executive power is responsible for making such a decision, it is a highly politicized authority, and its decision may always be viewed as biased. Specifically, there is a risk that it will be seen as an authoritarian move to ban a party that opposes the current majority. The political calculation becomes even more complicated because the *Conseil d'Etat* may annul the decree if it deems the measure to be illegal.

In addition to the political difficulty, it is worth noting that banning a political party in France may not be the most effective way to protect democracy. A better and more effective institutional guarantee may be the two-round majority voting system used in presidential and legislative elections. This system can prevent candidates with political agendas that could undermine the liberal and democratic

nature of the regime from being elected. In theory, it allows citizens to vote “against” an anti-democratic candidate by supporting their opponent in the second round of elections. This means that the second round of elections acts as a kind of safety valve for democracy. However, this assumes that a majority of voters will always support liberal democracy. But as it is often said, it is challenging to maintain a democracy without democrats.

The risky nature of the decision, combined with the availability of alternative means to prevent anti-democratic forces from gaining power, likely contributed to the lack of serious consideration given to banning far-right political parties with significant electoral support. This political strategy may be further reinforced by uncertainty surrounding the constitutionality of the legal prohibition mechanism.

A prohibition constitutionally uncertain

An additional reason why banning political parties is not seriously considered in France, particularly for significant parties with an authoritarian agenda, may be the uncertainty surrounding the constitutionality of the banning mechanism. The dissolution instrument mostly dates back to the Third Republic and predates Article 4 of the 1958 Constitution, which guarantees the freedom of activity of political parties. To date, the mechanism has not been reviewed in light of this constitutional provision. In 2014, when the mechanism had regulatory value (*valeur réglementaire*), the *Conseil d’Etat* ruled that it complied with the constitutional principle of freedom of association.¹⁶ Similarly, the *Conseil constitutionnel* has always upheld the constitutionality of the new grounds for dissolution when referred to it.¹⁷ However, firstly, it has never had the opportunity to review the entire dissolution mechanism. And secondly, its reviews have always been conducted in the light of the constitutional principle of freedom of association, and never in the light of Article 4 of the Constitution. While it is certainly possible to restrict political parties’ freedom insofar as Article 4 requires them to respect “*the principles of national sovereignty and democracy*”, it is questionable whether it is consistent with their freedom for the President of the Republic and the Prime Minister to have the authority to ban them.

The recent dissolution of the *Civitas* party highlighted the delicacy of leaving such a decision to an authority as political as the Executive. The three-page justification¹⁸ for banning the micro-party stands in stark contrast to the 349-page

¹⁶ Conseil d’Etat, 30.07.2014, No. 370306, Association “Envie de rêver” et autres.

¹⁷ Conseil constitutionnel, 13.08.2021, No. 2021-823 DC, Loi confortant le respect des principes de la République, §36-40.

¹⁸ Decree of 4 October 2023, supra fn. 7.

decision¹⁹ of the *Bundesverfassungsgericht* explaining why an anti-democratic party like the NPD should not be banned. Furthermore, the reasoning lacks legal consistency, notably in its failure to mention the case law of the European Court of Human Rights on the prohibition of political parties. In this respect, it is possible to wonder whether the dissolution decree is compatible with this case law, which requires States to dissolve political parties only if the risk they pose to democracy is “*sufficiently and reasonably imminent*”²⁰. The party’s insignificant electoral results and the very weak echo it has in the French public opinion cast doubt on this.

Given these conditions, it is possible to conclude that in France, the practice of banning political parties is perhaps not the best way to protect democracy. Yet, as the law currently stands, it could certainly be one of the most effective ways of undermining democracy.

¹⁹ BVerfG, Urteil vom 17.01.2017, 2 BvB 1/13, https://www.bverfg.de/e/bs20170117_2bvb000113.html (last visited Apr 25, 2024) = BVerfGE 144, 20 ff. – NPD-Verbotsverfahren.

²⁰ European Court of Human Rights, 30.6.2009, *Batasuna*, <https://hudoc.echr.coe.int/eng?i=001-93475> (last visited 25 Apr, 2024), § 83.