



Party Law in Modern Europe

The Legal Regulation of Political Parties in Post-War Europe

Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-War Europe

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**Constitutionalizing Party Democracy:
The Constitutive Codification of Political Parties in Post-war Europe¹**

Ingrid van Biezen

Abstract

This paper analyzes the process of party constitutionalization in post-war Europe, arguing that the constitution has become an important source of party law. It explores the temporal patterns of party constitutionalization and reveals their connection with incidents of fundamental institutional restructuring. It furthermore advances different models of party constitutionalization, and addresses the question what these convey about the underlying conceptions of party democracy. It argues that the constitutionalization of the democratic importance of parties enables them to turn to the state for legitimacy and for organizational resources, thereby turning parties into quasi-official public agencies, and suggests that the constitutionalization of parties might reflect an attempt to legitimize their existence in the face of their weakening as agents of democratic representation.

Constitutions and party democracy

In contemporary democracies, political parties are usually regarded as vital political institutions for the organization of the modern democratic polity as well as for the expression and manifestation of political participation and pluralism.² Political parties have come to be seen as desirable and procedurally necessary for the effective functioning of democracy, even amidst increasing concern that their actual functioning is inadequate for a healthy performance of democracy.

The relevance of political parties for modern democracy has also become recognized increasingly in constitutional terms, underlining the relevance of parties as indispensable institutional components of the democratic system. Whilst the constitutions of the established liberal democracies historically have typically refrained from mentioning political parties or prescribing their role in the political system, the period following World War Two has witnessed an ongoing process of party constitutionalization. The constitutive codification of parties in Europe effectively began in the immediate post-war period, with Italy and the Federal Republic of Germany, in 1947 and 1949 respectively, the first countries to attribute a positive role to

political parties in their constitutions adopted after the restoration of democracy. This practice of party constitutionalization has since been followed in constitutional revisions in many other polities,³ to the point that the large majority of European democracies today acknowledge the existence political parties in their constitutions in one form or another. Indeed, in many contemporary democratic constitutions, key democratic principles such as political participation, representation, pluralism and competition have come to be defined increasingly, if not almost exclusively, in terms of party. In many of the more recently established democracies that emerged out of recent waves of democratization in particular, where the very establishment of democratic procedures was often identified with the establishment of free competition between parties, political parties were often attributed a pivotal role and privileged constitutional position as the key instruments for the expression of political pluralism and as vehicles of participation.

Despite the increased relevance of the constitution for the place of political parties in modern democracy, the process of party constitutionalization and its implications have received little systematic scholarly attention from political scientists or constitutional lawyers. Germany, the ‘heartland of party law’ forms a possible exception,⁴ but even in the German case there is a noticeable lack of political science literature on the constitution.⁵ The subject of party law more generally is a neglected aspect of research on political parties, with discussions of party law in the scholarly literature usually limited to passing references and lacking a comparative dimension.⁶ This is all the more surprising given that political parties in contemporary democracies have become increasingly subject to regulations and laws which govern their external and internal behaviour and activities. According to Katz, party structures have now become ‘legitimate objects of state regulation to a degree far exceeding what would normally be acceptable for private associations in a liberal society.’⁷ This relative lack of attention to the legal position of political parties is even more manifest at the level of their formal constitutional codification, as constitutions are not normally considered a source of party law.⁸ As Bogdanor observes, ‘it is perhaps because the law has been so late in recognizing political parties that constitutional lawyers and other writers on the constitution have taken insufficient note of the fact that parties are so central to our constitutional arrangements’.⁹

However, although topics related to the law have traditionally received scarce attention from comparative political scientists, a ‘new constitutionalism’ has swept across Europe which makes it increasingly difficult for scholars to research issues of

government and governance without also running into public law.¹⁰ As Shapiro and Stone Sweet have argued in their essay on the judicialization of politics, the advent of new-institutionalism overlaps in part with the political jurisprudence agenda and a renewed interest in the importance of the law: 'If the rules really matter, then law and courts must really matter.'¹¹ From a new-institutionalist perspective, therefore, the constitutional 'rules of the game' are important as they may influence, determine or constrain what actors do, and may shape their identities and opportunity structures.

This paper aims to address part of the gap in the literature by analyzing the process of constitutionalization of political parties in post-war European democracies from a neo-institutionalist perspective, bringing together approaches and insights from political science, constitutional theory and democratic theory, and using a combination of qualitative and quantitative methods of analysis. It argues that the relevance of the national constitution for our understanding of modern party democracy is at least threefold. First of all, the incorporation of political parties in the country's supreme law implies that constitution acquires prominence as the explicit legal foundation and point of reference for the judicial adjudication of issues about the operation of political parties. This may involve questions about the admissibility of certain forms of party behaviour or ideology with the fundamental principles of democracy and the constitutional order, as is evidenced, for example, by the increasingly prominent role of Constitutional Courts in the outlawing of anti-democratic or insurrectionist parties. It can also be seen from the rulings by Constitutional Courts such as the German *Bundesverfassungsgericht* on the constitutionality of certain forms of party financing. From a legal perspective, therefore, the constitutional codification of parties implies that the constitution has become an important source of party law.

In addition, the constitution is an important source for investigations into the character of modern democracy. At the broadest level, this contention builds on insights in the party literature that have emerged from the study of the 'official story' of party organizations,¹² although in this case the formal documents under investigation are the national country constitutions rather than the internal party statutes. Like the official rules that govern the internal organization of a party, the formal constitution of a national political system offers a fundamental and indispensable guide to the character of a given polity. Constitutions comprise a set of fundamental values, however incomplete and unrealistic, and outline the procedural rules that allow for the exercise of power. As Sartori has argued, it is in the constitution in particular that the

organizational base of the state can be found.¹³ In most liberal democracies, constitutions aim to ‘regulate the allocation of power, functions and duties among the various agencies and officers of government, and to define the relationships between these and the public.’¹⁴ Constitutions thus define the composition and scope of authority of the organs of the state and the institutions in the public sphere, as well as the distribution of power between them. Furthermore, premised on the liberal model of constrained government, they define the relationship between the institutions of the state and the citizen, posing injunctions on public authority and identifying a private sphere that requires protection vis-à-vis the state. From this perspective, the constitutional codification of political parties thus provides an indication of their place within the institutional architecture of the democratic polity, as well as their relationship with the citizens within it.

Thirdly, in addition to defining the formal rules of the game, the constitution is an important source for an investigation into the underlying normative ideas about the place of political parties in modern democracy. As few, if any, institutional preferences are politically neutral, choices about the substance of the rules are themselves not above politics.¹⁵ Decisions on the regulation of party activity, organization and behaviour follow from particular conceptions of party and democracy, and different norms and conceptions of democracy may lead to divergent prescriptions about the appropriate legal regulation of parties.¹⁶ The constitution thus not only reflects a particular vision of what the distribution of power actually is, but also of what it should be. An analysis of the position of political parties within the democratic framework with specific reference to the national constitution, therefore, will shed light on a number of what Issacharoff has called the ‘most vexing questions in the legal regulation of politics’,¹⁷ ranging from inquiries into to how parties should be understood in terms of normative democratic theory, to how they are to be financed.

This paper examines the place of political parties in the contemporary constitutions of European liberal democracies, addressing the question which different dimensions of party constitutionalization can be distinguished, and what the particular modes of party constitutionalization convey about the underlying conceptions of political parties and party democracy. The first section analyzes the temporal sequence of post-war party constitutionalization and demonstrates that this process has been closely connected to waves of democratization and constitution-writing. The second section explores the underlying dimensions of party constitutionalization in European

democracies and examines the variation between countries in terms of the degree and intensity of party constitutionalization, focusing in particular on the differences between the longer established democracies and those newly established or re-established after authoritarian and totalitarian rule. The third section discusses the implications of the patterns that can be observed for our understanding of modern party democracy and for the question how contemporary political parties should be understood in terms of their linkages with society and the state.

The origins of post-war party constitutionalization

Even though there might appear to be a reasonable degree of consensus about what a constitution is, disagreement may exist over the actual form it may take. Most countries have a fundamental law that regulates the most important rules of the game, while others have a set of laws that is collectively referred to as the constitution. In yet other countries unwritten customs and conventions are also seen to form part of the constitution. Written constitutions, moreover, can usually be distinguished from ordinary legislation because they require more stringent amendment procedures, but this need not necessarily be the case. In principle, constitutions can thus be written or unwritten, and may be contained in a single document or be dispersed over a larger set of laws.

For the purpose of this paper, the constitution is taken to be that law which is called or commonly referred to as the constitution or the basic law, and which is codified in a single document.¹⁸ In the absence of such a document, there are no objective instruments to determine where the boundaries are to be drawn, and any assessment of what laws, customs and conventions would constitute the ‘most important’ rules and thus form part of the constitution would be a matter of judgement and therefore involve an element of arbitrariness.¹⁹ The operationalization employed here effectively excludes the UK because it does not possess a written constitution codified in a single text. Furthermore, the constitutions of Sweden and Finland are taken to be the texts that resulted from the integration of the various existing constitutional laws into a single document. This occurred in Sweden in 1974 and in Finland in 1999.

The countries covered in this research include all 32 post-war European democracies with a written constitution,²⁰ including the current member states of the European Union (except the UK), candidate member states Croatia and Serbia, as well as Iceland, Norway, Switzerland, and Ukraine. Recorded for all countries were the year

in which parties were first codified in the democratic constitution, as well as the year, number and type of subsequent amendments and revisions. A content analysis, the details of which are discussed below, was carried out for all constitutional provisions.²¹

Table 1 provides a first overview of the extent of party constitutionalization in post-war Europe, listing for each country the year in which political parties were first incorporated in the national constitution, together with the Freedom House status for the newer democracies. The table demonstrates that the large majority (N=28 or 87.5 per cent) of post-war European democracies now acknowledge political parties in their constitutions. It is only in four countries that parties receive no mention in the constitution (i.e. Belgium, Denmark, Ireland, and the Netherlands). All of these, not coincidentally, belong to the group of longer established liberal democracies.

The first observation to be made is that the earliest constitutionalization of political parties in post-war Europe occurred in Iceland in 1944. Previously under Danish rule, Iceland formally became independent in 1944 following a popular referendum on the questions whether to abolish the union with Denmark and to adopt a new republican constitution, both of which received an overwhelming majority of the votes in favour. The republic of Iceland came into being on 17 June 1944. It instituted its first constitution on the same day, with article 31 stating that:

[...] In allocating seats according to the election results, it shall be ensured to the extent possible that each political party having gained a seat in Althingi receive the number of Members of Althingi which is as closely as possible in accordance with the total number of votes it has obtained.²²

The reference to political parties in the Icelandic constitution appears only incidental, to the point that the allusion to their existence is almost implicit. To be sure, elections rather than parties are the actual subject of constitutional regulation here, as the main purpose of this constitutional provision is to enshrine a principle of proportional representation for national parliamentary elections rather than signalling a positive appreciation of the role of political parties. Nonetheless, even though couched in implicit terms, the Icelandic constitution presented a constitutional novelty at the time, being the first to create an unequivocal association between political parties and elections and thus effectively acknowledging the institutional relevance of parties in the context of a modern representative democracy.

Table 1. Constitutional recognition of political parties in post-war Europe

	Party constitutionalization ^a	FH classification as 'Free' ^b		Party constitutionalization ^a	FH classification as 'Free' ^b
Austria	1945	n/a	Latvia	1991	1991 (1991)
Belgium	--	n/a	Lithuania	1992	1991 (1990)
Bulgaria	1991	1991	Luxembourg	2008	n/a
Croatia	1990	2000 (1990)	Malta	1964	(1964)
Cyprus	1960	(1960)	Netherlands	--	n/a
Czech Rep. ^c	1992	1990 (1993)	Norway	1984	n/a
Denmark	--	n/a	Poland	1992	1990
Estonia	1992	1991 (1991)	Portugal	1976	1976
Finland	1999	n/a	Romania	1991	1996
France	1958	n/a	Serbia ^d	1990	2002
Germany	1949	n/a	Slovakia	1992	1994 (1993)
Greece	1975	1974	Slovenia	1991	1991 (1991)
Hungary	1989	1990	Spain	1978	1977
Iceland	1944	(1944)	Sweden	1974	n/a
Ireland	--	n/a	Switzerland	1999	n/a
Italy	1947	n/a	Ukraine	1996	2006 (1991)

^a Year of approval (rather than promulgation).

^b Freedom House rankings commence in 1973. In some countries, the period with 'Free' status is not uninterrupted: Following the Turkish invasion, Cyprus was classified as Partly Free between 1974 and 1980; Estonia was Partly Free in 1991; Latvia was Partly Free in 1992 and 1993, and Slovakia was Partly Free in 1996 and 1997. In parentheses: year of independence for countries emerging from the break-up of larger states.

^c Czechoslovakia (1990-1992)

^d Yugoslavia (1990-2003), Serbia and Montenegro (2003-06)

n/a = not applicable (independent democratic states throughout the post-war period)

The subsequent case of post-war party constitutionalization is Austria. The Austrian constitution of 1945, adopted in the wake of the restoration of democracy following World War Two, reinstated the pre-war 1929 federal constitution (which had first been adopted in 1920 following the collapse of the Austrian-Hungarian monarchy after World War One), while at the same time rescinding the Austrofascist constitution of 1934. The Austrian constitution has since been revised on numerous occasions, currently containing around 15 provisions referring to political parties, but, as Pelinka points out, it does little to elaborate on the significance of political parties for the democratic decision making process.²³ In fact, it seems to take their existence more or less for granted.²⁴ Moreover, parties are barely recognized or acknowledged as institutions in their own right, as the constitution usually refers to them in their manifestation as parliamentary groups, or in their electoral capacity (*Wahlparteien*). The only reference in the Austrian constitution to political parties per se is a negative one: persons who hold office in a political party cannot be members of the Constitutional Court (art.147.4). The Austrian constitution does illustrate, however, that the constitutionalization of parties is not exclusively a post-war phenomenon, as it incorporates a number of provisions from the earlier pre-war constitution. Moreover, the case of Austria echoes the Weimar constitution of 1919, in which the reference to political parties involved a requirement for the political neutrality of public officials, stipulating that ‘civil servants are servants of the public as a whole, not of a party’ (art. 130).

This provision from the Weimar constitution is indicative of a particular attitude towards political parties in the early days of mass democracy, when the dominant democratic ideology did not allow for intermediaries between the individual and the general will. As a consequence, parties were often seen as a threat to the supposedly neutral and long-term transcendental general interest and the common good.²⁵ As the size of democratic polities expanded with the consolidation of modern large-scale nation-states, however, direct links between the state and the individual became increasingly unfeasible. This, coupled with a shift in the dominant meaning of ‘democracy’, from an historical conception inspired by city-state style direct democracy in favour of representative government in the broader polity of the nation-state, legitimized the status of parties as intermediary institutions between individual citizens and the state. As parties in the post-war era underwent an ideational transformation by which they gradually come to be seen as democratically legitimate as well as

procedurally necessary for democracy, the notion of parties changes also in terms of their constitutional codification.

This is perhaps best illustrated with the example of the Federal Republic of Germany, where article 21 of the 1949 Basic Law regulates issues such as the freedom of political parties, their role in the formation of the political will, intra-party democracy, and the duty of parties to account for their assets. Furthermore, the German constitution does not tolerate political parties with purposes or activities antithetical to the democratic constitutional order, a provision which has subsequently provided the foundation for a constitutional ban on the descendants of Nazi and Communist Parties.²⁶ More specifically, article 21 of the Basic Law, as amended in 1984, states:

- (1) The political parties participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds as well as assets.
- (2) Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or destroy the free democratic basic order or to endanger the existence of the Federal Republic of Germany are unconstitutional. The Federal Constitutional Court decides on the question of unconstitutionality.
- (3) Details are regulated by federal legislation.

Article 21 thus constitutionalizes political parties, and ‘formally acknowledges that they have a genuine and legitimate function to perform in modern democratic government.’²⁷ Together with a similar, but less detailed, article on political parties which had previously appeared in the Italian constitution of 1947,²⁸ the German Basic Law was one of the earliest cases of what could be called the positive constitutional codification of political parties in post-war Europe, attributing to political parties a constructive role in the democratic system. By assigning a key role to parties in the formation of the political will of the people, the German constitution associates one of the key principles of democracy with the institution of the political party and invests parties with the status of institutions under constitutional law. At a time when political parties had been constitutionally codified in only a handful of European democracies, the German Basic Law represented the most comprehensive set of constitutional rules on political parties.²⁹

As Pelizzo notes, the Italian and German constitutions ‘represent a novelty in the history of the formal constitutional texts as they explicitly recognize the constitutional role and relevance of political parties in the functioning of democratic polities.’³⁰ Moreover, and perhaps more importantly, both constitutions establish that the constitutional relevance of political parties is not confined to the role they perform in elections. This in sharp contrast to the earlier cases of party constitutionalization in Iceland and Austria, as well as some later examples such as in Sweden, Norway and Finland, where the constitutional relevance of political parties is essentially linked to their electoral functions.

The practice of party constitutionalization has since been followed in constitutional revisions in many other countries, with many taking their cue from the German model. A strong impulse in the diffusion of the process of party constitutionalization emerged from the third and fourth waves of democratization in Southern Europe in the mid 1970s and Central and Eastern Europe in the early 1990s. The 1978 Spanish constitution, for example, echoes the German Basic Law in enshrining a positive role for political parties in the formation of the popular will, while also recognizing political parties as important vehicles of electoral participation.³¹ Moreover, although the Italian and German constitutions accept political parties in the plural, and thus by implication the existence of a multi-party system,³² Spain is the first post-war European democracy explicitly to identify parties as key instruments for the expression of political pluralism.

In the most recent case of party constitutionalization in Luxembourg, parties are explicitly identified with the realization of fundamental democratic values and principles such popular sovereignty, participation and democratic pluralism. In 2008 it was approved that a new article 32bis was to be added to the Luxembourg constitution, stipulating that:

Political parties contribute to the formation of the popular will and the expression of universal suffrage. They express democratic pluralism.³³

This amendment was motivated by the perceived need to modernize the constitution in line with the political reality of representative democracy and a desire to underscore the importance of political parties for a healthy functioning of the democratic system.³⁴

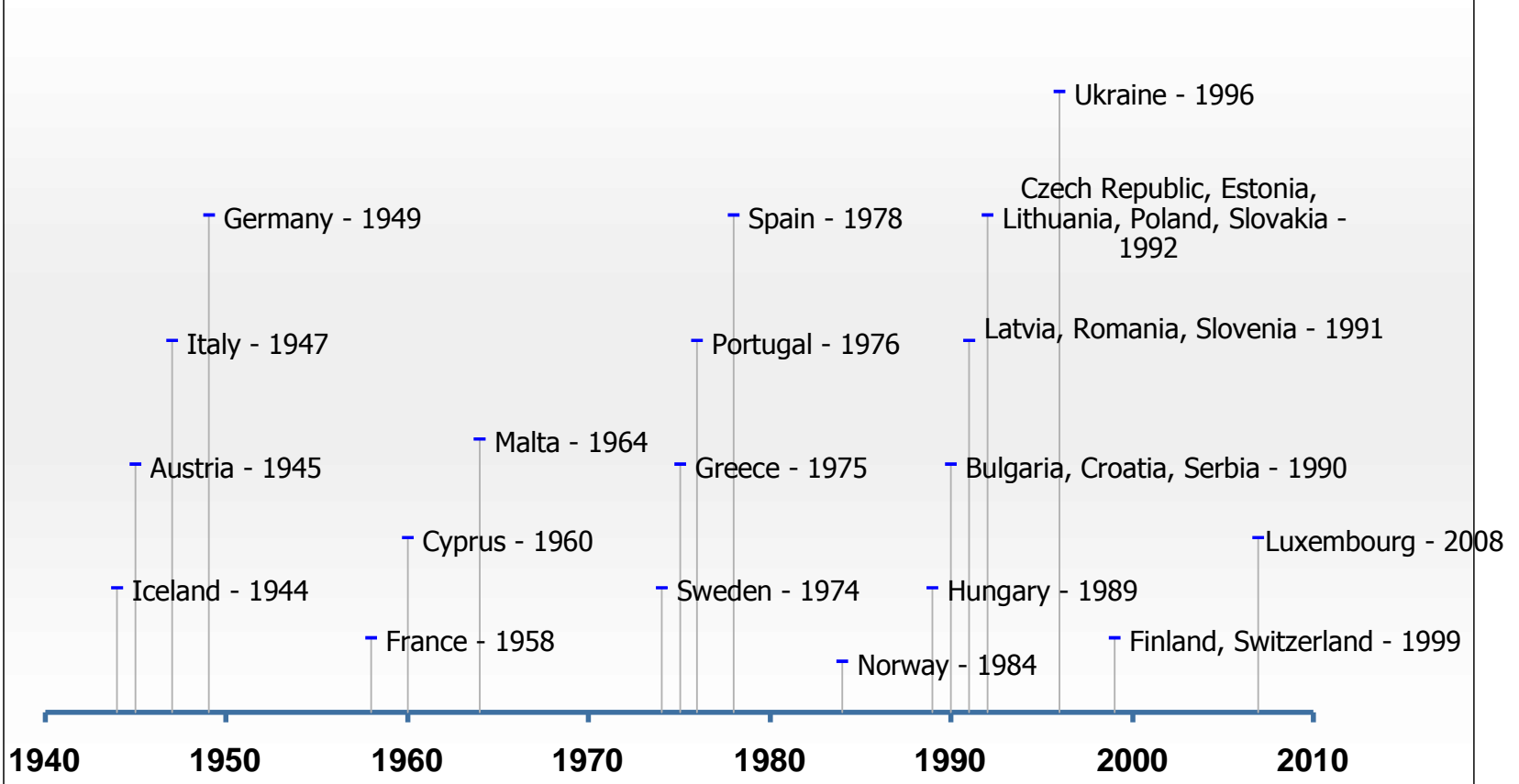
Waves of party constitutionalization

The chronology of party constitutionalization is represented more schematically in Figure 1. One important observation that can be made on the basis of the pattern displayed here is that the process of post-war party constitutionalization was not gradual or linear but appears to have occurred in clusters. These correspond closely to the waves which Huntington has observed for democratization processes and which Elster has identified as waves of constitution-making.³⁵ On this view, Iceland, Austria, Italy and Germany form part of the first wave of post-war party constitutionalization. This coincides with the first wave of post-war constitution-writing, as the end of World War Two witnessed an outburst of written constitutions, symbolizing newly acquired statehood and independence or recasting political power in light of past authoritarian experiences.³⁶ This wave also coincides with Huntington's second wave of democratization and the restoration of democracy in the immediate post-war period. A next wave of post-war constitution-making was connected with the break-up of the French and British colonial empires. Corresponding cases of party constitutionalization are France (the establishment of the Vth Republic in 1958), and Malta and Cyprus (on acquiring independence in 1960 and 1964 respectively). A further wave of constitution-making and party constitutionalization corresponds to the third wave of democratization in Southern Europe (Greece, Portugal and Spain) in the mid 1970s, while a in a fourth wave the post-communist democracies in Central and Eastern adopted new constitutions after the fall of communism in the late 1980s and early 1990s, with Ukraine as a relative latecomer in 1996.³⁷

The waves of democratization correspond closely to processes of constitution-writing, as new constitutions are nearly always related to major social upheavals such as revolutions, wars, regime collapse, or the creation of a new state.³⁸ The constitutionalization of political parties also appears to be connected to both the drafting of the new constitutions and the processes of democratization and state formation. Political parties were thus incorporated in the very first constitutions adopted by the newly established democratic states. This suggests, as Kopecký has observed in the context of the post-communist democracies, that among the designers of the new democratic constitutions a conception of democracy seems to have prevailed in which political parties are the core foundation of a democratic polity.³⁹

Like processes of democratization and constitution-writing, the constitutionalization of political parties is thus also related to moments of institutional

Figure 1. Waves of post-war party constitutionalization



restructuring and regime change. Broadly speaking we can identify 3 such types of institutional restructuring for the post-war European democracies. The first is independence as a result of liberation from colonial rule, as in the cases of Iceland, Cyprus, and Malta. In a second group, encompassing democracies across all post-war waves of democratization, the constitutionalization of political parties can be seen as a product of the establishment or the restoration of democracy. In some of these cases, a new constitution was adopted with the (re-)establishment of the democratic regime (Italy, Germany, Greece, Portugal, Spain, Bulgaria, Romania), the non-democratic constitution was revised to suit the procedural and institutional requirements of democracy (Hungary and Poland), or a previously democratic constitution was reinstated (Austria). In a third group of (post-communist) countries the constitutionalization of political parties followed a dual process of democratization and the (re)establishment of independent nation states, two key dimensions of what Offe has called the 'triple transition'.⁴⁰ This includes the disintegration of Czechoslovakia into the Czech and Slovak Republics, the break-up of Yugoslavia resulting in the establishment of the independent republics of Slovenia, Croatia, and Serbia; and the creation of independent states after the collapse of the Soviet-Union in the Baltic states of Lithuania, Estonia and Latvia, as well as Ukraine. Within the broader category of institutional restructuring, the case of France should probably be seen as *sui generis*. Here, the constitutionalization of political parties followed the establishment of the new institutional framework of the Vth Republic in 1958. This was prompted, however, more by fear of regime collapse rather than actual regime change.

The constitutional codification of political parties, therefore, is usually a product of a constitutive moment in a context of institutional flux. Conventional amendments, on the other hand, are a particularly unusual mode of party constitutionalization. As a result, the established democracies of Sweden (constitutional codification of political parties in 1974), Norway (1984), Finland (1999), Switzerland (1999) and, most recently, Luxembourg (2008) appear seemingly randomly scattered between these waves of party constitutionalization, unrelated to the general patterns of regime instability and institutional restructuring.⁴¹

Dimensions of party constitutionalization

As the various examples cited above section suggest, significant variation exists in the ways in which constitutions have codified the role of political parties. While some

constitutions define political parties essentially in terms of key democratic values and principles, others mainly emphasize the parties' electoral or parliamentary roles. Moreover, constitutions vary enormously in the intensity with which they regulate political parties. This section examines in more detail how the actual substance of constitutional regulations varies across European democracies. It investigates the ways in which political parties are described by the constitutions of the liberal democracies in post-war Europe as well as the underlying dimensions of party constitutionalization. It examines the variation between countries, with a special emphasis on the differences between the older liberal democracies and those that were established more recently following a period of non-democratic experience.

The analytical framework for the content analysis of the constitutional codification of political parties is loosely based on Frankenberg's comparative analysis of constitutions, who argues that the architecture of modern constitutions represents a layered narrative with four main elements:⁴²

1) *Principles and values*: democratic constitutions appeal, often in a preamble, to the fundamental principles and values upon which the polity is based. These may include values such as social justice, human dignity, the rule of law, or indeed democracy. Included within this category ('democratic principles') are constitutional references to political parties which define the democratic system and / or key democratic principles and values, such as participation, popular sovereignty, equality, or pluralism, in terms of political parties.

2) *Rights and duties*: placing the individual as the central and sovereign agent of the body politic, constitutions usually contain a catalogue of liberal rights and freedoms, guaranteeing private and political autonomy to the citizens of the state. Some constitutions complement these with social rights. While this emphasis on rights originally constituted a novelty in the history of constitution-writing, today it has become increasingly common for constitutions to imagine the political subject in terms of positive and negative liberty.⁴³ Within this domain, one category ('rights and freedoms') encompasses constitutional provisions which outline the position of political parties in terms of basic democratic liberties, such as the freedom of association, the freedom of assembly, or the freedom of speech. Two further categories ('activity/behaviour' and 'identity/programme') include the duties of parties to abide by certain rules on permissible forms of party activity and behaviour, on the one hand, or

ideological and programmatic identity, on the other. These typically entail restrictions on the parties' basic democratic rights and freedoms.

3) *Institutional structure*: constitutions also contain regulations concerning the institutional organization of the polity. Broadly speaking, these deal with the rules for the 'establishment, transfer, exercise and control of political power'.⁴⁴ They outline the structure of the political system, sketch out the selection, composition and powers of the various state organs, and describe the various hierarchical vertical and horizontal relationships between them. Hence, this domain encompasses constitutional provisions which position political parties within the broader structure of the political system. Because parties are not monolithic entities but can be disaggregated into various interconnected components or 'faces',⁴⁵ this domain has been broken down into various sub-categories, including constitutional rules that apply to the extra-parliamentary organization, or the political party as a whole ('extra-parliamentary party'), parties in their electoral capacity ('electoral party'), parties as parliamentary groups ('parliamentary party') and the party in public office ('governmental party'). A further category within this wider rubric pertaining to the organizational structure of the political system ('public resources') refers to constitutional provisions which entitle political parties to public resources, such as state funding or time on state-owned broadcasting media.

4) *Meta-rules*: constitutions contain meta-rules, or rules of constitutional interpretation, which deal with 'questions of constitutional validity, amendment and change' and outline the conditions for the revision and interpretation of the constitution.⁴⁶ These may include provisions on the establishment and prerogatives of a constitutional court, for example, or the general procedures for judicial review. Furthermore, these rules often determine the hierarchy within the legal order by defining the constitution as the 'supreme law' vis-à-vis ordinary legislation and by stipulating that the latter be in conformity with the constitution. Within this domain, the category of 'judicial oversight' corresponds to the rules which establish external judicial control on the lawfulness and constitutionality of party activity and identity, while 'secondary legislation' encompasses constitutional provisions which reflect the hierarchical legal order and dictate the enactment of further legislation on political parties.

Table 2 indicates along which dimension(s) political parties are codified by the different national constitutions currently in force, as well as the relative importance of each of the categories per country.⁴⁷

	Principles & values				Rights & duties					Institutional structure					Meta-rules									
	Democratic principles				Rights and freedoms		Activity and behaviour		Identity and programme		Extra-parliamentary party		Electoral party		Parliamentary party		Governmental party		Public resources		Judicial oversight		Secondary legislation	
Austria	-	-	-	-	-	-	-	-	-	3.7	29.6	62.9	3.7	-	-	-	-	-	-	-	-	-	-	
Bulgaria	7.1	-	21.4	14.3	21.4	-	-	-	-	21.4	-	14.3	-	-	-	-	-	-	-	7.1	-	14.3	14.3	
Croatia	14.3	7.1	7.1	7.1	28.6	-	-	-	-	28.6	-	7.1	7.1	-	-	-	-	-	14.3	-	-	7.1	7.1	
Cyprus	-	-	-	-	-	-	-	-	-	-	-	100.0	-	-	-	-	-	-	-	-	-	-	-	
Czech Republic	28.5	14.3	28.5	14.3	-	-	-	-	-	-	-	-	-	-	-	-	-	-	14.3	-	-	-	-	
Estonia	-	-	20.0	20.0	40.0	-	-	-	-	40.0	-	-	-	-	-	-	-	-	10.0	-	-	10.0	10.0	
Finland	-	-	-	-	-	-	-	-	-	-	100.0	-	-	-	-	-	-	-	-	-	-	-	-	
France	16.6	33.3	16.6	16.6	-	-	-	-	-	-	16.6	-	-	-	-	-	-	-	-	-	-	-	-	
Germany	12.5	12.5	12.5	12.5	25.0	-	-	-	-	25.0	-	-	-	-	-	-	-	-	12.5	-	-	12.5	12.5	
Greece	-	2.0	2.0	-	12.2	2.0	67.3	2.0	4.1	12.2	2.0	67.3	2.0	4.1	-	-	-	-	-	-	-	8.2	8.2	
Hungary	10.0	10.0	15.0	5.0	20.0	-	-	-	-	20.0	-	30.0	-	-	-	-	-	-	-	-	-	10.0	10.0	
Iceland	-	-	-	-	-	-	-	-	-	-	100.0	-	-	-	-	-	-	-	-	-	-	-	-	
Italy	-	16.6	16.6	16.6	33.3	-	-	-	-	33.3	-	-	-	-	-	-	-	-	-	-	-	-	16.6	
Latvia	-	100.0	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	
Lithuania	-	20.0	30.0	10.0	30.0	-	-	-	-	30.0	-	-	-	-	-	-	-	-	-	-	-	-	10.0	
Luxembourg	100.0	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	
Malta	-	-	-	-	-	-	-	-	-	-	35.2	58.8	-	-	-	-	-	5.8	-	-	-	-	-	
Norway	-	-	-	-	-	-	-	-	-	-	73.3	20	-	-	-	-	-	-	-	-	-	-	6.6	
Poland	5.8	17.6	5.8	5.8	52.9	5.8	-	-	-	52.9	5.8	-	-	-	-	-	-	5.8	-	-	5.8	-	-	
Portugal	7.7	5.8	1.9	5.8	9.6	7.7	42.3	7.7	5.8	9.6	7.7	42.3	7.7	5.8	-	-	-	3.8	-	-	9.6	9.6		
Romania	6.2	12.5	18.7	12.5	12.5	-	-	-	-	12.5	-	12.5	-	-	-	-	-	6.2	-	-	18.7	18.7		
Serbia	9.1	9.1	18.2	-	9.1	9.1	9.1	9.1	-	9.1	9.1	9.1	-	-	-	-	-	18.2	-	-	18.2	18.2		
Slovakia	-	33.3	-	-	50.0	-	-	-	-	50.0	-	-	-	-	-	-	-	16.7	-	-	-	-	-	
Slovenia	-	-	-	-	80.0	-	-	-	-	80.0	-	-	-	-	-	-	-	20.0	-	-	-	-	-	
Spain	27.2	18.2	18.1	9.1	27.2	-	-	-	-	27.2	-	-	-	-	-	-	-	-	-	-	-	-	-	
Sweden	-	-	-	-	-	-	-	-	-	-	78.6	21.4	-	-	-	-	-	-	-	-	-	-	-	
Switzerland	50.0	-	-	-	50.0	-	-	-	-	50.0	-	-	-	-	-	-	-	-	-	-	-	-	-	
Ukraine	5.5	11.1	16.6	5.5	27.7	11.1	11.1	11.1	-	27.7	11.1	11.1	-	-	-	-	-	-	-	-	-	11.1	11.1	
<i>Total</i>	<i>N=14</i>	<i>N=16</i>	<i>N=16</i>	<i>N=14</i>	<i>N=18</i>	<i>N=12</i>	<i>N=13</i>	<i>N=3</i>	<i>N=3</i>	<i>N=11</i>	<i>N=13</i>													
	<i>(50.0%)</i>	<i>(57.1%)</i>	<i>(57.1%)</i>	<i>(50.0%)</i>	<i>(64.3%)</i>	<i>(42.8%)</i>	<i>(46.4%)</i>	<i>(8.3%)</i>	<i>(8.3%)</i>	<i>(39.3%)</i>	<i>(46.4%)</i>													
<i>Mean</i>	<i>21.5</i>	<i>19.2</i>	<i>15.8</i>	<i>10.4</i>	<i>30.1</i>	<i>39.1</i>	<i>35.4</i>	<i>4.3</i>	<i>5.2</i>	<i>11.7</i>	<i>11.7</i>													

Note: The figures denote the relative importance of the different dimensions of party constitutionalization in a country's current constitution; N = number of countries

One crucial observation that can be made on the basis of the figures presented in Table 2 is that the constitutions of the more recently established democracies (in Southern Europe and Central and Eastern Europe) as well as those re-constituted in the wake of a crisis of the democratic regime (such as Austria, Italy and Germany), tend to regulate parties significantly more extensively than the older liberal democracies on nearly all domains, including democratic principles, rights and duties, the extra-parliamentary organization and judicial oversight. In the older democracies, on the other hand, the constitutional regulation of parties tends to concentrate primarily on their electoral role. This is corroborated by Anova significance tests, which confirm that the differences between old and new democracies are significant (sig. < .05) on all dimensions, with the exception of the parliamentary and governmental domains.

The evidence presented in Table 2 shows that exactly half of the countries identify political parties in terms of essential democratic principles (e.g. participation, pluralism, popular sovereignty). With the exception of the Luxembourg constitution cited earlier, this type of constitutional codification exists primarily in countries with an authoritarian or totalitarian past. This suggests that the immediate non-democratic experience is a powerful driving force behind the identification of basic democratic values with the presence of political parties. The legacy of non-democratic regimes is even more forcefully manifest with regard to the identification of political parties with the freedoms of association, assembly, and speech. This category is almost exclusively made up of newly established or re-established democracies. Hence, in democracies with an authoritarian or totalitarian past, a legacy of the non-democratic experience is reflected in the new constitutions insisting on maintaining a clear separation between parties and the state by underlining the private character of party organization and ideology, and by primarily associating parties with basic democratic liberties.

In part, this may be a consequence of the growing importance that the constitutional bill of rights has now acquired as the essence of democracy.⁴⁸ In addition, it follows from the way in which the constitutional design of the newer democracies, and the post-communist ones in particular, tended to position the state and society vis-à-vis one another in the wake of democratization: the corollary of the liberalization of formerly non-democratic polities was often the constitutional establishment of an explicitly private sphere of social life, guaranteed by a judicially enforceable bill of rights.⁴⁹ The constitutional recognition of political parties in terms of fundamental democratic liberties in the post-nondemocratic regimes can thus be understood, at least

in part, in light of the desire to identify and strengthen a private sphere which is free from state intervention.

At the same time, and seemingly paradoxically, these are also the kinds of regimes which appear most likely to constrain party ideology or behaviour, as is shown by the high incidence of provisions in the ‘activity’ and ‘identity’ categories. Many constitutions in the newly established and re-established democracies prohibit political parties which are adverse to the fundamental values of the democratic constitutional order. In an attempt to safeguard the democratic regime from insurrectionary and separatist parties, these constitutions thus demand that parties respect democratic principles, as well as the national sovereignty and territorial integrity of the state. In doing so, they follow a general pattern whereby post-war constitutions typically reaffirm human rights in general, but also make efforts to restrict these rights in such a way as to make them unavailable to the enemies of constitutional democracy.⁵⁰ This suggests that political parties are only qualified bearers of the democratic freedoms of association and speech: parties retain their rights only ‘to the extent that they are the essential servants of the democratic process.’⁵¹

Banning parties or impeding their activities touches upon the problem of ‘democratic intolerance’, i.e. ‘the intolerance that democratic governments exhibit toward antidemocratic actors in the name of preserving the governments’ fundamental democratic character.’⁵² The idea of ‘intolerant democracies’ appears an increasingly compelling notion, which has also been reiterated at the supra-national level. Article 11 of the European Convention of Human Rights, for example, guarantees basic rights of association and assembly, including the right to form political parties, but also establishes that these can be restricted in the interest of national security or public safety. Thus, democratic rights of tolerance and freedom ‘should not be stretched so far as to allow the overthrow of those institutions that guarantee them’. A threat to the ‘unalterable, substantive core of liberal-democratic values’ may call for the invocation of procedures that might, paradoxically, require these basic democratic rights to be overridden.⁵³ The European Court of Human Rights, in its adjudication on the banning of the Welfare Party in Turkey, has further affirmed ‘the power inherent in democratic states to take preemptive action against threats to pluralistic democratic rule’, without necessarily demanding ‘proof of the imminence of democracy’s demise’.⁵⁴ Although controversial from the perspective of some normative theories democracy, intervention

in the internal affairs and external activities of parties is thus justified with a view to protecting the very survival of the democratic system.

Constitutions not only impose limits and constraints on party activity and behaviour, or their ideological and programmatic profile, they also heavily regulate internal party organizational structures. As can be seen from Table 2, the extra-parliamentary organization appears to be the most crowded category, with nearly two thirds of the countries exhibiting this type of constitutional regulation. Under this rubric, constitutions may introduce particular requirements for party membership, such as in Estonia, where party membership is restricted to national citizens only. One of the most common provisions within this domain relates to the incompatibility of party membership with certain elected or public offices, such as the judiciary, the law enforcement and security services, or the presidency of the republic. Typical of post-communist democracies in particular, the intention here evidently has been to maintain clear boundaries between parties and the institutions of the state. The Slovakian constitution in fact explicitly requires as much, by stipulating that ‘political parties and political movements [...] shall be separate from the State.’ (art. 29.4) By demanding the political neutrality of public officers, such provisions not only echo the sentiments found earlier in the Weimar constitution, but also reflect an attempt to distance the democratic system from the past regime, in which the Communist Parties exercised a more or less complete control rule of the institutions of the state.

Various constitutions demand, furthermore, that the internal structures and organization of political parties are democratic. This requirement was made first explicit in the German Basic Law and has since been adopted in a number of other countries as well. In doing so, these countries take the ‘democratic intolerance’ argument a step further by demanding that the parties themselves must reflect a commitment to democratic principles if together they are to form a democratic polity. On this view, efforts to guarantee that parties will not disrupt or destroy democratic government should not be confined to the constitutional control over their aims and behaviour but also over the party organization itself. Gardner, for example, argues in favour of ‘broadly inclusive internal procedures’ which may counteract the potential of parties to become dominated by a largely unaccountable leadership.⁵⁵ Internal party democracy thus may alleviate concerns which arise from the inevitable predisposition towards oligarchization of large and complex organizations such as parties, as famously described by Michels’ ‘Iron Law’. In the same vein, Mersel argues that political parties

must be held to the core conditions of democracy, both externally in their goals and internally in their organizational structures, and that a lack of internal democracy should be considered sufficient grounds to ban a party because it ‘may be seen as evidence of external nondemocracy.’⁵⁶ This is also the perspective advocated by the German Constitutional Court, arguing in its ruling on the constitutionality of the neo-Nazi *Sozialistische Reichspartei* that a logical relationship exists between the concept of a free democratic order and the democratic principles of party organization.⁵⁷ The rationale for imposing a duty of internal democracy on party organizations thus centres on a substantive rather than procedural conception of democracy, according to which key democratic values such as representation and participation cannot be realized in the absence of internally democratic parties.⁵⁸

From an alternative perspective, however, it can be argued that, because parties are not the state, the need for certain democratic values to be realized within the political system does not necessarily require the same values to be realized within all of the existing parties. It is in fact far from evident that democracy at the system level requires, or is indeed furthered by, parties that are democratic with regard to their internal structures and procedures. As Sartori has famously put it, ‘democracy on a large scale is not the sum of many little democracies’.⁵⁹ While internal democracy may be indispensable from the perspective of certain participatory theories of democracy, there is a significant body of democratic theory that takes an opposite view.⁶⁰ Internal party democracy might produce policy choices that are further removed from preferences of the median voter, for example. Given the continuous decline of party memberships in modern democracies, party members constitute an increasingly unrepresentative group of citizens, socially and professionally if not ideologically.⁶¹ This makes the outcome of internally democratic procedures restricted to party members less and less likely to represent ‘the will of the people’. Furthermore, from a conception of democracy which centres primarily on the maximization of voter choice and political competition, there are no compelling reasons to impose internally democratic structures upon the parties as long as the system guarantees, in Hirschman’s terms, sufficiently meaningful ‘exit’ options (e.g. membership exit or electoral defeat).

From this perspective, it is difficult to identify the interest of the state in so tightly controlling the internal governance of political parties. Such attempts, Issacharoff argues, bring ‘the force of state authority deep into the heart of all political organizations’, and raise serious concerns about the relationship between political

parties and the state. More fundamentally, such impositions threaten to compromise the political integrity of the parties and their organizational independence from the state.

‘Political parties play a key role in providing a mechanism for informed popular participation in a democracy precisely because they are organizationally independent of the state.’⁶² However, as the internal life and the external activities of parties become regulated by public law and as party rules become constitutional or administrative rules, the parties themselves become transformed into semi-state agencies or public service entities, with a corresponding weakening of their own internal organizational autonomy.⁶³ In addition, the primary locus of accountability is shifted from the internal organs of the party towards external state institutions.

This is furthermore suggested by the category of ‘judicial oversight’, comprising countries which establish that the constitutionality and lawfulness of the programmes or activities of parties are to be monitored by the courts. This category reflects one of the significant discernible trends in the post-war European constitution writing, i.e. the gradual erosion of the historical doctrine of parliamentary supremacy. After the war, the idea of making the courts rather than the legislative or executive authorities the guardian of the constitution took hold in continental Europe to an unprecedented extent.⁶⁴ In the restored democracies of Germany and Italy, Constitutional Courts were established as a mechanism of *ex post* judicial review of legislation, while in France a Constitutional Council was set up with the purpose of *ex ante* control of legislative action. The model of judicial review has since been followed by many of the polities established in more recent waves of democratization,⁶⁵ making the courts unique among the democratic organs of government today in having been accorded legitimacy by virtue of the fact that they are not political, and therefore presumably neutral servants of the law.⁶⁶ The judicialization of party politics is reflected in the mechanisms that many of the contemporary – mostly post-authoritarian and post-communist – democracies have established for monitoring party activity and behaviour, by assigning this prerogative, as well as the power to dissolve or ban parties, to the Constitutional Court.

The concerns which may arise about this phenomenon are similar to those emerging from the diffusion of constitutional review and the expansion of opportunities for judicial activism more generally: these processes arguably undermine fundamental principles of democracy by effectively transferring powers from representative to non-representative institutions.⁶⁷ Although the courts might sometimes act as a powerful constraint on the possible undemocratic or anti-competitive behaviour of political

parties, the legal regulation of parties not only evokes anxieties about the state centralization and control of political participation and public life, but also about the democratic legitimacy of transferring the ultimate decision-making authority on their behaviour and organization from the responsible organs of the party to a non-elected body of judges.⁶⁸ This externalizes the channels of accountability from the party leadership to the courts, thereby creating a greater distance with the ordinary party membership in the process.

Private associations vs. public entities

From the perspective of normative democratic theory, the legal regulation of political parties raises serious questions and concerns. The presence of laws specifically targeted at political parties implies that, in comparison to other types of organizations, the law either imposes greater restrictions on political parties or confers special privileges upon them. This raises the question whether parties should in fact be regulated differently from other types of organizations, and whether the special regulation of parties can be reconciled with basic democratic freedoms, such as the freedom of speech and association. Much of the jurisprudence in the United States is in fact concerned with this fundamental question: under which conditions should the organizational autonomy of parties be preserved and in which circumstances do they serve as state actors.⁶⁹ In their capacity as state actors, the parties become legitimate objects of state regulation. This also implies, however, that they more closely resemble public utilities than private associations.⁷⁰ This section explores the existing conceptions about the place of political parties within modern democracy which lie beneath the constitutional codification of political parties, with a special emphasis on the consequences of their position vis-à-vis civil society and the state.

On the basis of the content analysis of the national constitutions it appears possible to distinguish at least three different models – Modern Party Government, Defending Democracy, and Public Utilities – each of which reflects a particular understanding of the place of political parties within the democratic system. These constitutional models are the product of a factor analysis, which yields three underlying components of party constitutionalization. Together these three factors explain almost 70 percent of the variation in the data.⁷¹ The model of Modern Party Government associates parties primarily with their operation as parliamentary groups or governmental actors. While parties in this sense might not necessarily be acknowledged

as institutions in their own right, this model reflects the unequivocal connection between some of the democratic structures fundamental to constitutional democracy (parliament, government, elections) and political parties. On this view, political parties are a functional necessity for the effective functioning of party government. Moreover, in contrast to traditional notions of party government, this model suggests that the reality of modern party democracy now requires that parties are supported by the state. This is reflected in the constitutionally enshrined availability of public resources, prevalent in particular in more recently established democracies such as Portugal and Greece, including state subsidies and broadcasting time on public radio and television. In this light, the parties' constitutionally guaranteed access to public resources can be understood as a reification of the responsibilities of the state to ensure the viability of modern party government.

The second model, Defending Democracy, is prevalent especially in newly established or re-established democracies, and signals a concern with the continued survival of the constitutional democratic order. This model views parties essentially as extra-parliamentary rather than electoral organizations. More importantly, in this model of party constitutionalization, as in Germany, for example, the conduct of political parties is rigorously curtailed in an attempt to safeguard democracy, requiring that their activities, behaviour and organizational structures are not adverse to the fundamental principles of democracy. On this view, the state emerges as the guardian of democracy, with corresponding prerogatives to intrude upon the parties' associational freedoms and their behavioural autonomy.

In the third model, which is prevalent in many of the democracies that emerged out of the third and fourth waves of democratization, political parties are understood primarily as Public Utilities. This model views parties as the unique vehicles for the realization of democratic values and principles, such as participation, representation, and the expression of the popular will, and endows them with special constitutional privileges in terms of democratic liberties. In order that parties perform their unique democratic services effectively, moreover, this model confers a legitimate role upon the state in the regulation and monitoring of their activities and behaviour, through secondary legislation and external judicial oversight by the (constitutional) courts.⁷² The explicit association between political parties and the realization of substantive democratic values implies an especially close relationship between parties and the state, as these values 'reside in a realm beyond the disposition

of the individual and call for their authoritative enforcement from above – usually by the state'.⁷³ The conception of party democracy signalled by this model is one in which parties are quasi-official agencies of the state because of the critical functions they perform in a modern democracy, and in which the democratic importance of political parties justifies a privileged status in public law and the constitution.

More generally, the constitutional codification of political parties has strengthened their material and ideational position within the political system. Their constitutionally enshrined position not only implies that, in comparison to other organizations, greater restrictions are imposed upon parties but also that special privileges have been conferred upon them. The parties' constitutional relevance not only justifies state support, but also effectively gives them an official status as part of the state: by giving them a constitutional status, political parties are granted explicit recognition to the institutional importance of democracy.⁷⁴ Indeed, according to the German constitutional lawyer and former Constitutional Court Justice, Gerhard Leibholz, the constitutional codification of political parties has signalled a revolutionary change, both from an empirical and a normative point of view, which ultimately reflects a fundamental transformation of the nature of democracy itself, from representative liberal democracy to a party state (*Parteienstaat*), which is built on parties as the central institutional mechanisms of political integration. Leibholz argues that the constitutionalization of political parties effectively legitimizes the existence of party democracy and transforms political parties from socio-political organizations into institutions that form part of the official fabric of the state.⁷⁵

This clearly resonates with a more recent argument advanced by Katz and Mair, i.e. that recent processes of party organizational transformation and adaptation reflect not just a weakening of their linkages with society but also a concomitant strengthening of their relationship with the state.⁷⁶ On this view, parties in modern democracies no longer act as the representative agents of civil society, as in the age of the mass party, or as autonomous brokers between civil society and the state, as in the age of the catch-all party, but become instead absorbed by the state and begin to act as semi-state agencies. This has implied the emergence of the cartel party, which is characterized by the interpenetration of parties and the state as well as by a pattern of inter-party collusion rather than competition. In the era of the cartel party, the main parties work together and take advantage of the resources of the state to ensure their collective survival.

In addition to the increasing dependence of parties on public subsidies, which was given a pre-eminent position as a key indicator of cartelization in the original article, van Biezen and Kopecký have argued that the management of party organization, activity and behaviour through public law and the constitution forms an equally important dimension of the party-state relationship.⁷⁷ Indeed, both the public subsidization and regulation of political parties can be interpreted as the two principal forms by which the modern state tends to intervene in contemporary party politics.⁷⁸ Together these processes have contributed to an ideational transformation of political parties from voluntary and private associations, which developed within society, into the equivalent of public utilities, which are justified by appealing to a conception of democracy which sees parties as an essential public good.

Conclusion

The increased intensity of party constitutionalization in post-war European democracies underscores that political parties are considered to be an important political and social reality which are seen to make an essential contribution to the functioning of democracy. Their constitutional importance is no longer limited to the role they play during periods of elections. Instead they have acquired a more permanent relevance as the vehicles per excellence for the expression of political pluralism and as channels of political participation. One of the most significant developments in this regard was the constitutional establishment of political parties as the constituent foundations of democracy following the re-establishment of democracy in the immediate post-war period in Italy and Germany. Constitutional diffusion in subsequent waves of democratization has furthered the process of party constitutionalization, to the point that, constitutionally, modern democracy has to an important extent become defined in terms of parties. This is so at the level of the party system – in terms of inter-party competition – as well as the level of the individual party organization – in terms of intra-party democracy. Furthermore, parties are constitutionally defined both in terms of their representative capacity and as an essential component of the institutional infrastructure of the state. As one of the consequences of their incorporation in the national constitutions, alongside the development of extensive legal frameworks of party regulation, the institutional relevance of political parties has now been firmly anchored within the overall architecture of most modern democratic systems. Indeed, in one of its various rulings on issues of party law, the German Constitutional Court has

declared that political parties are more than mere socio-political organizations; they are also the integral and necessary units of the constitutional order.⁷⁹

Within modern democratic constitutions, we find different, and competing, conceptions of party democracy. Moreover, political parties seem to occupy a somewhat ambiguous space in the political system at the interstices of government and civil society, as constitutions have been unable to develop a coherent framework for defining the relationship between the parties, the state and the individual. On the one hand, parties may be identified as private subjects with corresponding democratic rights and freedoms, while many constitutions also attempt to keep them separate from those state institutions which are meant to be neutral and non-partisan (e.g. bureaucracy, judiciary, head of state). In addition, parties are rarely assigned any influence on functions which fall within the domain of government or executive power.⁸⁰ At the same time, however, their position as autonomous agents of society is clearly compromised by a significant amount of state intervention in their external activities and internal organizational structures. Furthermore, as a result of their constitutional relevance as key components of the political system, accompanied by a uniquely privileged position in terms of state support, political parties have effectively become incorporated into the public realm.

The constitutional codification of political parties has consolidated both the empirical reality of modern party government and the normative belief that parties are indispensable for democracy. Constitutionally, the democratic significance of parties lies primarily in the contribution they are seen to make to the realization of substantive democratic principles such as participation and representation of the popular will. Paradoxically, however, the constitutional prioritization of their representative functions enables parties to turn to the state, both for legitimacy and for organizational resources, thereby turning them into quasi-official public agencies. It is furthermore intriguing that the constitutionalization of the democratic importance of parties has acquired significance in an era in which democratic polities are faced with the weakening of parties as agents of democratic participation and representation. As European democracies are suffering from growing popular disengagement from conventional politics, the linkages between parties and civil society are subsequently becoming progressively weaker. Whereas they once drew their legitimacy from their actual representative capacities, parties now justify themselves by appealing to a shared and constitutionally codified norm which increasingly diverges from political

reality. Indeed, the constitutionalization of the parties' democratic importance might well reflect an attempt to legitimize their own existence in the face of their weakening as agents of democratic representation.

Endnotes

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² Indeed, Schattschneider's oft-cited observation that 'the political parties created democracy and modern democracy is unthinkable save in terms of the political parties' has become a conventional wisdom among party scholars. E.E. Schattschneider, *Party Government*. New York: Holt, Rinehart and Winston, 1942, p. 1.

³ Even including the (not ratified) constitution of the European Union, which places political parties prominently in Part I, among the democratic life of the Union and the principles of representative democracy, stipulating that 'Parties at the European level are important as a factor for integration in the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union.' (art. I-46.4)

⁴ Wolfgang C. Müller and Ulrich Sieberer (2006). 'Party Law', in Richard S. Katz and William Crotty (eds.), *Handbook of Party Politics*. London: Sage, p. 435.

⁵ Andreas Busch (2000). 'The Grundgesetz after 50 Years: Analysing Changes in the German Constitution', *German Politics* 9/1: 41.

⁶ Dan Avnon (1995). 'Parties Laws in Democratic Systems of Government', *Journal of Legislative Studies* 1/2: 286. For a recent exception, see Lauri Karvonen (2007). Legislation on Political Parties: A Global Comparison, *Party Politics* 13/4, pp. 437-55.

⁷ Richard S. Katz (2002). 'The Internal Life of Parties', in Kurt Richard Luther and Ferdinand Müller-Rommel (eds.), *Political Challenges in the New Europe: Political and Analytical Challenges*. Oxford: Oxford University Press, p. 90.

⁸ Kenneth Janda (2005). 'Adopting Party Law', working paper series on *Political Parties and Democracy in Theoretical and Practical Perspectives*. Washington DC: National Democratic Institute for International Affairs.

⁹ Vernon Bogdanor (2004). 'The Constitution and the Party System in the Twentieth Century', *Parliamentary Affairs* 57/4: 718.

¹⁰ Martin Shapiro and Alec Stone (1994). 'The New Constitutional Politics of Europe', *Comparative Political Studies* 26/4: 397-420.

¹¹ Martin Shapiro and Alec Stone Sweet (2002). *On Law, Politics, and Judicialization*. Oxford: Oxford University Press, p. 10.

¹² Richard S. Katz and Peter Mair (1992) (eds.). *Party Organizations: a Data Handbook*. London: Sage.

¹³ Giovanni Sartori (1994). *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*. New York: Macmillan, p. 200.

¹⁴ S.E. Finer, Vernon Bogdanor and Bernard Rudden (1995). *Comparing Constitutions*. Oxford: Clarendon Press, p. 1.

¹⁵ Richard S. Katz (2004). 'Democracy and the Legal Regulation of Political Parties', paper prepared for the USAID conference on 'Change in Political Parties', Washington DC, 1 October.

¹⁶ James A. Gardner (2000). 'Can Party Politics be Virtuous?', *Columbia Law Review* 100/3: 667.

¹⁷ Samuel Issacharoff (2000). 'Introduction: The Structures of Democratic Politics', *Columbia Law Review* 100/3: 597.

¹⁸ Other (organic) laws which might have constitutional status have thus been excluded.

¹⁹ One might, for example, disagree with King's conclusion that the extension of the franchise to women in the UK, desirable and fundamental as the change may have been, was not a *constitutional* change because '[t]he character of the relations between governors and governed [...] remained

substantially unaltered.’ Anthony King (2001). *Does the United Kingdom still have a Constitution?* London: Sweet & Maxwell, p. 2.

²⁰ For the purpose of this research, ‘democracy’ has been operationalized as a country classified as ‘Free’ by the Freedom House at the end of 2007, with the exception of small states with a population under 100,000.

²¹ A catalogue of all cases of post-war European party constitutionalization, including subsequent amendments, is available online in a searchable database at www.partylaw.bham.ac.uk. More detailed information on the coding of the constitutions can be obtained from the author.

²² Unless otherwise noted, all translations are from Gisbert H. Flanz (ed.) (2004). *Constitutions of the Countries of the World*. New York: Oceana Publications.

²³ Anton Pelinka (1971). ‘Parteien und Verbände’, in Anton Pelinka and Manfred Welan (eds.), *Demokratie und Verfassung in Österreich*. Vienna: Europa Verlag, p. 265.

²⁴ This in contrast with the Provisional Constitution (*Vorläufige Verfassung*) adopted on 1 May 1945, where, in line with their leading role in the reconstruction of the Second Republic, parties were given a much more prominent position. This document, however, was suspended when the current constitution was reinstated. See: Hans-Wolfram Wilde (1984). *Die Politischen Parteien im Verfassungssystem Österreichs*. Doctoral dissertation, Kiel.

²⁵ Hans Daalder (2002). ‘Parties: Denied, Dismissed or Redundant? A Critique’, in Richard Gunther, José Ramón Montero and Juan J. Linz (eds.), *Political Parties: Old Concepts and New Challenges*. Oxford: Oxford University Press, p. 41.

²⁶ Donald P. Kommers (1997). *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durham: Duke University Press, 2nd ed, pp. 217-24.

²⁷ Carl J. Schneider (1957). ‘Political Parties and the German Basic Law of 1949’, *Western Political Quarterly* 10/3: 527.

²⁸ Article 49 of the Italian constitution states: ‘All citizens shall have the right to associate freely in political parties in order to contribute by democratic means to the determination of national policy.’

²⁹ Dimitris Th. Tsatsos (ed.) (2002). *30 Jahre Parteiengesetz in Deutschland: Die Parteiinstitutionen im Internationalen Vergleich*. Baden-Baden: Nomos.

³⁰ Riccardo Pelizzo (2004). ‘From Principle to Practice: Constitutional Principles and the Transformation of Party Finance in Germany and Italy’, *Comparative European Politics* 2/2: 130.

³¹ The first sentence of article 6 of the Spanish constitution reads ‘Political parties are the expression of political pluralism, they contribute to the formation and expression of the will of the people and are an essential instrument for political participation.’

³² Schneider, ‘Political Parties and the German Basic Law of 1949’, p. 530.

³³ Patrick Dumont, Raphaël Kies and Philippe Poirier (2008) ‘Luxembourg’, *European Journal of Political Research*, 47/7-8: 1061.

³⁴ For more details, see: ‘Proposition de Revision portant creation d’un article 32bis nouveau de la Constitution’, outlining the official positions of the Government, the Council of State and the Committee for Constitutional Reform, on www.chd.lu/archives/ArchivesPortlet, Chambre des Députés, 22 February 2007; 31 August 2007; 13 November 2007; 29 November 2007.

³⁵ Samuel P. Huntington (1991). *The Third Wave: Democratization in the Late Twentieth Century*. Norman: University of Oklahoma Press; Jon Elster (1995). ‘Forces and Mechanisms in the Constitution-Making Process’, *Duke Law Journal* 45/2: 364-396.

³⁶ Karl Loewenstein (1951). ‘Reflections on the Value of Constitutions in Our Revolutionary Age’, in Arnold Zurcher (ed.), *Constitutions and Constitutional Trends since World War II*. New York: New York University Press, p. 191.

³⁷ Most countries in Central and Eastern Europe enacted new constitutions following the establishment of the new democratic state, although in some cases not before revising the existing constitution to meet the requirements of democracy. Poland first adopted a provisional ‘small constitution’ in 1992, repealing part of the communist constitution, before adopting a new constitution in 1997; Latvia

originally reinstated its pre-World War II constitution in 1991 but adopted a new constitution in 1998; Ukraine initially amended the communist constitution in 1990 before replacing it with a new version in 1996. Only the Hungarian constitution, first revised in 1989, continues to be a heavily amended leftover from the communist period. See: James P. McGregor (1996). 'Constitutional Factors in Politics in Post-Communist Central and Eastern Europe', *Communist and Post-Communist Studies* 29/2: 147-66.

³⁸ Elster, 'Forces and Mechanisms in the Constitution-Making Process', 370-71.

³⁹ Petr Kopecký (1995). 'Developing Party Organizations in East-Central Europe: what Type of Party is likely to emerge?', *Party Politics* 1/4: 516.

⁴⁰ Claus Offe (1992). 'Capitalism by Democratic Design: Democratic Theory Facing the Triple Transition in East-Central Europe', in György Lengyel, Claus Offe and Jochen Tholen (eds.), *Economic Institutions, Actors and Attitudes: East Central Europe in Transition*. Budapest and Bremen, pp. 11-22.

⁴¹ In both Sweden and Switzerland, however, the constitutional codification of political parties was arguably the result of something of a re-constitutive moment, albeit occurring under rather undramatic circumstances, as both constitutions are the product of a comprehensive process of constitutional reform.

⁴² Günter Frankenberg (2006). 'Comparing Constitutions: Ideas, Ideals, and Ideology – Toward a Layered Narrative', *International Journal of Constitutional Law* 4/3: 439-459.

⁴³ *Ibid*, p. 455.

⁴⁴ *Ibid*, p. 456.

⁴⁵ V.O. Jr. Key (1964). *Politics, Parties & Pressure Groups*. New York: Crowell. 5th ed.; Richard S. Katz and Peter Mair (1993). 'The Evolution of Party Organizations in Europe: Three Faces of Party Organization', *American Review of Politics* 14: 593-617.

⁴⁶ *Ibid*, p. 457.

⁴⁷ For a more detailed elaboration on the coding categories and an extended overview of the range and magnitude of party constitutionalization, see: Ingrid van Biezen, and Gabriela Borz (2009). 'The Place of Political Parties in European Constitutions: A General Overview', working paper series on the legal regulation of political parties, no. 1, July, <http://www.partylaw.bham.ac.uk/pdfs/wp0109>.

⁴⁸ Bellamy, Richard (2007). *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press, p. 6.

⁴⁹ Shapiro and Stone, 'The New Constitutional Politics of Europe', p. 402.

⁵⁰ Carl J. Friedrich (1951), 'The Political Theory of the New Democratic Constitutions', in Arnold Zurcher (ed.), *Constitutions and Constitutional Trends since World War II*. New York: New York University Press, p. 18.

⁵¹ Samuel Issacharoff (2001). 'Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition', *Columbia Law Review* 101/2: 313.

⁵² Samuel Issacharoff, (2007). 'Fragile Democracies', *Harvard Law Review* 120: 1407. Issacharoff bases this notion on Gregory H. Fox and Georg Nolte (1995). 'Intolerant Democracies', *Harvard International Law Journal* 36/1. Another often used term is 'militant democracy' (from the German *streitbare Demokratie*).

⁵³ Tim Bale (2007). 'Are Bans on Political Parties Bound to Turn out Badly? A Comparative Investigation of Three 'Intolerant' Democracies: Turkey, Spain, and Belgium', *Comparative European Politics* 5/2: 141-42.

⁵⁴ Issacharoff, 'Fragile Democracies', p. 1445.

⁵⁵ Gardner, 'Can Party Politics be Virtuous?', p. 685.

⁵⁶ Yigal Mersel (2006). 'The Dissolution of Political Parties: The Problem of Internal Democracy', *Internal Journal of Constitutional Law* 4/1: 97.

⁵⁷ Schneider, 'Political Parties and the German Basic Law of 1949', p. 536.

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- ⁵⁸ Mersel, 'The Dissolution of Political Parties: The Problem of Internal Democracy', p. 96.
- ⁵⁹ Giovanni Sartori (1965). *Democratic Theory*. New York: Praeger, p. 124.
- ⁶⁰ Katz, 'Democracy and the Legal Regulation of Political Parties', p. 6.
- ⁶¹ Ingrid van Biezen, Peter Mair and Thomas Poguntke (2009). 'Going, Going, ... Gone? Party Membership in the 21st Century', paper presented at the ECPR Joint Sessions, Lisbon, April.
- ⁶² Issacharoff, 'Fragile Democracies', p. 1460-61.
- ⁶³ Stefano Bartolini and Peter Mair (2001). 'Challenges to Contemporary Political Parties', in Larry Diamond and Richard Gunther (eds.), *Political Parties and Democracy*. Baltimore: Johns Hopkins University Press, pp. 327-43.
- ⁶⁴ Friedrich, 'The Political Theory of the New Democratic Constitutions', p. 20.
- ⁶⁵ See, for example, Georg Brunner (1992). 'Development of a Constitutional Judiciary in Eastern Europe', *Review of Central and East European Law* 18/6: 535-553.
- ⁶⁶ Shapiro and Stone Sweet, *On Law, Politics, and Judicialization*, p. 3.
- ⁶⁷ Ian Shapiro (2003). *The State of Democratic Theory*. Princeton: Princeton University Press, pp. 64-73.
- ⁶⁸ Dan Avnon (1995). 'Parties Laws in Democratic Systems of Government', p. 285.
- ⁶⁹ Samuel Issacharoff (2001). 'Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition'; Nathaniel Persily (2001). 'Toward a Functional Defense of Political Party Autonomy', *New York Law Review* 76: 750-824.
- ⁷⁰ Ingrid van Biezen (2004). 'Political Parties as Public Utilities', *Party Politics* 10/6: 701-22.
- ⁷¹ For more details, see van Biezen and Borz, 'The Place of Political Parties in European Constitutions: A General Overview'.
- ⁷² Cf. Epstein on the notion of political parties as public utilities, i.e. agencies 'performing a service in which the public has a special interest sufficient to justify governmental regulatory control, along with the extension of legal privileges, but not governmental ownership or management of all the agency's activities'. Leon Epstein (1986). *Political Parties in the American Mold*. Madison: University of Wisconsin Press, p. 47. See also van Biezen (2004). 'Political Parties as Public Utilities'.
- ⁷³ Frankenberg, 'Comparing Constitutions: Ideas, Ideals, and Ideology – Toward a Layered Narrative', p. 456.
- ⁷⁴ Dan Avnon (1995). 'Parties Laws in Democratic Systems of Government', p. 298.
- ⁷⁵ Gerhard Leibholz (1958). *Strukturprobleme der Modernen Demokratie*. Karlsruhe: Müller, esp. 78-93.
- ⁷⁶ Richard S. Katz and Peter Mair (1995). 'Changing Models of Party Organization and Party Democracy: the Emergence of the Cartel Party', *Party Politics* 1/1: 5-28.
- ⁷⁷ Ingrid van Biezen and Petr Kopecký (2007). 'The State and the Parties: Public Funding, Public Regulation and Rent-Seeking in Contemporary Democracies', *Party Politics* 13/2: 235-254.
- ⁷⁸ Ingrid van Biezen (2008). 'State Intervention in Party Politics: The Public Funding and Regulation of Political Parties', *European Review* 16/3: 337-353.
- ⁷⁹ Leibholz *Strukturprobleme der Modernen Demokratie*, p.92.
- ⁸⁰ Cf. Hesse, who points out that the role of political parties as defined by the German Basic Law is confined to their contribution to the process of *willensbildung*. Konrad Hesse (1959). *Die Verfassungsrechtliche Stellung der Politischen Parteien im Modernen Staat*. Berlin: de Gruyter.