



## **Contemporary Constitutionalism and the Regulation of Political Parties: A Case Study of Luxembourg**

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The Legal Regulation of Political Parties

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## Abstract

*This article discusses the regulation of political parties by contemporary constitutional practices. It presents a framework for analysis that identifies the types of justifications and actors involved in the process of constitutional regulation of political parties. Empirically it focuses on the special case of Luxembourg, which provides a recent and rare case of amending a constitution for the sole reason of giving parties constitutional status. The analysis suggests that the changing nature of constitutionalism over time, along with the transformation of political parties and the involvement of external actors, have all contributed to the constitutional regulation of political parties.*

## Introduction

This article deals with party constitutional regulation\*, that is the process of ascribing constitutional status to political parties. Scholars have only recently started to look more closely at party regulation in old and new democracies (see Barnedt, 1998; Janda, 2005; Müller and Sieberer, 2006; Reilly, 2006; van Biezen, 2008; Bogaards et al, 2010). This article examines the question of why include political parties in contemporary constitutions? It concentrates on the demand for constitutional regulation of parties by looking at the actors involved in the process. Drawing on insights from the literature on political parties, constitutionalism and on regulation, it explains why parties are included as a constitutional feature in contemporary democracies and what the implications are for the political systems.

The issue of party regulation is dealt with by ordinary legislation and constitutional regulation. Ordinary legislation is more extensive and is likely to cover party finance or party organization and functioning while less extensive, constitutional regulation may be simply role recognition. After the Second World War (WWII), political parties have progressively been regulated by the

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constitutions of European democracies and recognized in constitutional terms as necessary institutional components of the democratic system. Italy and the Federal Republic of Germany were amongst the first countries to mention political parties in their constitutions, in 1947 and 1949 respectively. Their initiative of party constitutionalization has been followed in waves by the large majority of European democracies. These developments portray parties as important parts of the political and social reality which bring an essential contribution to the functioning of democracy (van Biezen, 2011 forthcoming). Little is known however about the demand for party constitutionalization, the actors involved in the process and their justifications. This article aims to address part of the gap in the literature by providing an analytical framework of party constitutional regulation in a democratic system. The expectation is that the outcome and the process of party constitutional regulation reflect the interests of the national and sometimes international actors involved.

The paper discusses the special case of Luxemburg which provides insights into the process of party constitutional regulation. The data are based on interviews with party officials, members of Council of State, parliamentary commissions and Chamber of Deputies' archive documents. The case of Luxembourg provides a rare opportunity for analysis (cf. Eckstein, 1975; Gerring, 2008) for two reasons: firstly, the recent constitutionalization of parties and secondly, the uniqueness of such a targeted constitutional amendment in Europe. The country's constitution was revised in 2008 for the sole reason of introducing a special article on political parties. Until 2008, along with the Netherlands, Belgium, Denmark and Ireland, Luxembourg was one of the few countries in Western Europe which did not mention political parties in their constitution. Party elites recognized that 'it is rather rare that we introduce an additional clause into the text of our Constitution' (Bodry, 2007, p. 2). Furthermore a constitutional amendment is a time consuming and costly procedure which usually requires a qualified majority and the agreement of the actors involved (Rasch and Congleton, 2005; Tsebelis, 2002). The existence of political parties could have been indirectly considered via the right of association embedded in article 26 of the constitution. Moreover, political parties in Luxembourg were already subject to regulation via the 1999 ordinary law on the reimbursement of campaign expenses. The question to be answered therefore is why Luxembourg revised its constitution in 2008 with the sole purpose of including a separate article on political parties? What are the main explanations and motivations behind the revision? What are the wider implications for other political systems?

The article proceeds as follows: first, it discusses the theoretical arguments for a constitutional revision to include political parties using the distinction between old and new constitutionalism. Second, it presents a framework for analysing the constitutional regulation of parties. Third, it introduces the special case of Luxembourg in several steps: (a) the justification for the late constitutional regulation of parties in Luxembourg (b) the forces behind the constitutional revision -- the parliamentary party groups, the national institutions and the external influences-- their interests and justifications. The argument is that the changing views on constitutionalism, the development of parties as a part of the state institutional structure and external international influences, have all contributed to the contemporary constitutional regulation of parties. It concludes by assessing the implications of a contemporary constitutional revision on the importance attributed to political parties in contemporary democracies. From structures of legitimising fundamental rights and freedoms of citizens as principals, constitutions became structures of legitimising parties as the agents which contribute to the exercise of those rights.

## **Modern versus contemporary constitutionalism and the regulation of political parties**

Constitutions are foundational documents for democracies which provide the basic rules of the political game. They have two fundamental functions: first, to prescribe the modes of legitimate governmental operations and second, to protect fundamental rights by limiting the scope of legitimate governmental action (Murphy, 1993). Constitutions can be changed, revised and usually they provide the procedures and scope for amendment. Political parties have been mentioned by constitutions from the very enactment of the post-war democratic constitutions in Europe. Elsewhere, constitutions have been amended in order to acknowledge parties' formal status in the political system. Political parties played a major role in the transition from monarchy to electoral democracy during the first wave of democratisation, they were central actors in the second, third and fourth wave of democratisation (van Biezen, 2011 forthcoming) and they are still central actors in democratic (and non-democratic) political systems. As democracies extended the suffrage, parties became the actors which helped the political integration of enfranchised citizens.

In tackling the question of why parties are included in the constitution of a democratic state, one needs to make the distinction between old and new constitutionalism and to draw attention to how ideas about constitutions and constitutionalism have changed over time. The old liberal and republican doctrines of constitutionalism assign three functions to a modern constitution: constitution of a political entity, establishment of its fundamental institutional structure, and limitations on the exercise of political power (Castiglione, 1996). With time, as individual rights became more and more important, constitutions became structures of political legitimation (see Sartori, 1994; Bartolini, 2010). New constitutionalism aims at emphasizing that 'its foundation should not just be in the traditional concern for limiting the exercise of political power' (Elkin, 1993, p. 21). New constitutionalism goes beyond the aim of protecting individual liberties by limiting the scope and power of government. It also focuses on citizenship as a form of responsible membership in institutions, such as states, corporations, unions or political parties, where membership is regarded as a voluntary association of principals. If citizens are conceived as principals, the practice in contemporary democracies is to delegate the task of representation to political parties. Constitutions now recognize parties as the agents of citizens, the ultimate principals in a democracy.

'Old' constitutionalism with its emphasis on political and civil rights, the balance and separation of powers, may have not considered political parties as major actors in a democratic polity. Parties would imply a reconfiguration of representation and would go beyond the equal participation of citizens in the political body and the expression of the general political will. The school of 'new constitutionalism' however, states that one needs to consider the expansion of the politically active demos, as a result of previous agreed liberal constitutional practices (Elkin and Sołtan, 1993). Furthermore, apart from citizen's membership in political parties, the competition between political parties in elections and in parliament offers a balance of power that creates accountability of the governments to the electorate (see Bellamy, 2007). Consequently representative democracies recognize political parties in their constitutions as institutions which contribute to the balance of interests within society.

Similarly to constitutions and constitutionalism, political parties have undergone various stages of development from cadre and mass parties to catch-all and later cartel parties. Beyond their constitutional status, they have started to become more and more financially dependent on the state (Katz and Mair, 1995). Their constitutional regulation evolved over time and has become progressively more extensive. The models of party constitutional regulation have evolved after WWII. Immediately after the war and from the 1970s until late 1989 the emphasis was on parties in public office (government, parliament and their role in elections). After 1990s, the emphasis changed towards a party constitutional regulation model aimed at defending democracy (van Biezen, 2011 forthcoming; Biezen and Borz, 2009). It is under the last model that the extra-parliamentary party (i.e. conditions and limitations to membership in political parties) are defined together with rights and freedoms expressed by parties (i.e. freedom of association). The question that follows from here is whether the contemporary constitutional regulation of parties is a function of parties' evolution over time, an implication of the contemporary constitutional practices or the result of external actors' influence.

What one has to take into consideration when talking about contemporary constitutionalism is the influence of external actors and their impact on national constitutional practices. International actors can influence national politics in various ways. The creation of a new level of governance, such as European Union has led to 'a more complex cross-cutting network of governance based upon the breakdown between the domestic and foreign affairs, on mutual interference in each other's domestic affairs, on increasing mutual transparency' (Wallace, 1999, p. 519). When international actors get involved in national politics, constitutional independence is ceded and

sovereign equality transformed. The Council of Europe for example, founded in 1949, had as primary aim the creation of a common democratic and legal area in Europe. Its objectives were to protect human rights, pluralist democracy and the rule of law, which are at the basis of any democratic constitution. Its common democratic principles and main influence in European politics are exercised through the European Convention on Human Rights (ECHR) adopted in 1950.<sup>1</sup> Although the ECHR and its judicial mechanisms do not apply to the EU, all member states of the European Union, as parties to the convention have an obligation to respect it when applying EU law. The convention lists, amongst other rights, the right of expression, the right of association and the right to free elections which are all related to the existence and function of political parties and are all incorporated in the European constitutions.

New constitutionalism takes into account both the emerging transnational political arena and the enduring domestic political arena.<sup>2</sup> While in the 19<sup>th</sup> and 20<sup>th</sup> century, old constitutionalism was linked to the creation of nation-states, by the end of the 20<sup>th</sup> century and the 21<sup>st</sup> century, new constitutionalism has already moved beyond the state, like the European Union and the need to address recognition to its structures in a constitutional framework (Wiener, 2007). Contemporary constitutionalism includes references to organizational and cultural practices and their input on the institutions set by the constitution in a particular context. This type of ‘new’ constitutionalism, stipulates that a constitution should consider the policy-making needs of contemporary policies (Elkin, 1993) and recognizes that in contemporary democracies the task of representation is delegated to political parties. From this follows the need to introduce parties in the constitution or have a stipulation about further secondary legislation on party finance or party organization.

In establishing the nexus between contemporary constitutionalism, parties and international structures one finds different expectations and justifications for a constitutional revision aimed at including parties. From a new constitutionalism perspective and its focus on citizens freely and voluntarily associated as principals in organizations, it follows that political parties are conceived as the ‘agents’. The aggregation and representation functions (Almond and Coleman, 1960; Easton, 1965) of the agents contribute to the exercise of various citizens’ rights such as freedom of association and expression. From the perspective of political parties themselves, as they become more and more like ‘public utilities’ and part of the state (van Biezen, 2004; Bolleyer 2009) it became in their interest to be formally acknowledged and therefore protected by the constitution. From an international actors’ perspective, provided they have the authority to advise

or interfere in national politics, the recommendations for a constitutional revision are usually provided in order for the states to meet various international standards.

### **General framework for party constitutional regulation**

From the general question of why include political parties in the constitution, the more specific question addressed by this article is whether the contemporary constitutional regulation of political parties is a reflection of changing parties, changing views on constitutionalism or a reflection of the external actors influence on national politics. In answering the question one needs to look at the actors involved in the process. The demand for a constitutional inclusion of political parties may come from different actors with different interests and justifications attached to it. In order to understand the need for regulation of political parties by constitutions, one can draw on more general theories of regulation. In contrast to ‘public good’ accounts, the economic theory of regulation argues that ‘as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefits’ (Stigler, 1971, p. 3). Similarly, it is to be expected that party constitutional regulation will be acquired and designed primarily for the benefit of parties, especially the incumbents who are the primary actors involved. It is parties that control the process of constitutional revision and no amendment would pass without their agreement.

The general framework for contemporary party constitutional regulation considers the actors involved in the process (parties, national institutions, external actors) and their justifications (see table 1). From the perspective of parties, the benefits and justifications for constitutional regulation are related to: *first*, the importance of parties as agents of citizens in a democracy, hence the need for the acknowledgement of their institutional role. *Second*, their need for direct subsidies. Parties are mutually aware of shared interests as the need for resources from the state. Such stipulations which entitle parties to receive financial support by the state for their electoral and operating expenses are found for example in the Portuguese or Greek constitution. The *third* justification is the gain of control over the entry of other parties into the system and therefore restrict competition, especially from possible anti-system, undemocratic parties. Various constitutions ban certain parties such as the fascist party in Italy or Poland or any possible ethnic party as in the constitution of several African countries (Bogaards et al, 2010). The *fourth* justification is the ‘elimination’ and clear role distinction from possible ‘rivals’ such as other political groups or associations. Political parties want therefore to protect their role of putting forward candidates for election and send the elected representatives to the parliament.

[Table 1 about here]

There are also other actors involved in this regulatory process. Direct or indirect demand for a constitutional regulation of parties can come from other state and non-state actors. Apart from the importance for democracy discussed above, from the perspective of the state institutions or international actors, one can add other justifications for democratic party constitutional regulation. The *fifth* justification is therefore related to the place that political parties have acquired in a political system and the need to prevent any misuse of power via special oversight and restrictions. The aim is to protect the democratic system against corrupt activities. While mainly addressed by state institutions, opposition parties are also expected to resort to this justification. The *sixth* justification for party constitutional regulation is administrative convenience or efficiency gains for all actors involved in according constitutional status when dealing with political parties and their activities.

The justifications can be different depending on the political actors involved in the process of constitutional regulation (see Table 1). The initiative can come from any of the three actors, but the entire process of constitutional regulation can involve all three actors who will react according to the national and international legal practices. An alternative to party constitutional regulation is ordinary party law (Müller and Sieberer, 2006) and most of the motivations and justifications above could apply to ordinary law.

Established political parties with representatives in parliament can resort to any of the justifications (table 1). Partisan institutions such as the Chamber of Deputies and the government are also expected to justify the constitutional legitimation of parties on similar lines as parties themselves, given the entrenchment of parties in the state institutions. Other advisory national bodies involved are expected to present justifications related to democracy and the good functioning of a political system, therefore importance, misuse of power prevention and administrative necessity. The external actors (including press and public pressure) involved in the process are more likely to advance the last two justifications due to their monitoring function and exercised control on national democratic standards.

The type(s) of justification brought forward by actors can impact on the preferred degree of constitutional regulation. The institutional role for democracy can be legitimised via less regulation, while the prevention of misuse of power and the administrative necessity imply further

constitutional stipulations and restrictions on parties organization and activities. In examining the justifications for constitutional regulation of political parties (whether related to the importance, subsidies, competition, rivals, misuse of power or administrative necessity), the analysis and discussion in the next sections illustrates the process using the Luxembourg case.

### **Case study: background**

Luxembourg is a parliamentary system with a constitutional hereditary monarch. It has a government headed by a prime minister and accountable to a unicameral parliament. The 60 members of the Parliament (MPs) are elected every five years by a system of proportional representation which uses closed lists. There is an advisory Council of State, which has 21 members with political affiliation who are appointed for life, and which has mainly a consultative function. The Council of State can suggest adaptations and modifications to bills and proposals for which the advice and position of the Council must be issued and received by the Chamber for the legislative process to continue. The Council is perceived as a substitute for a second chamber and has a veto right (Dumont and De Winter, 2003). All laws are subject to a second constitutional vote, three months after the first vote, in order to allow a period of reflection unless the Chamber and the Council do not see it necessary. By refusing to exempt the Chamber from the second vote, the Council can delay the adoption of bills by at least three months (Dumont and Poirier, 2007). The constitutional revision procedure requires amendments to be adopted by the Chamber of Deputies in two successive votes separated by an interval of at least three months, each with at least two thirds of its MPs (Schmit, 2009).

Luxembourg has a multiparty system elected under a proportional representation party list system. The most important parties are: CSV (The Christian Social People's Party), SWP (The Socialist Workers' Party), DP (Democratic Party), Dei Greng (The Greens), and ADR (Action Committee for Democracy and Social Justice). In the 2004 elections, the CSV (with prime-minister Asselborn) had enhanced its power compared to ADR which lost most of its seats (Dumont & Poirier, 2005). By 2007 however, ADR would change its name to emphasize reform and present itself as an alternative to the CSV located on the centre-right of the political spectrum. Both after the 2004 and 2009 elections respectively, the government was formed by the Socialist and Christian Social People's Party. They were short of two MPs in order to reach the qualified majority needed to pass the constitutional amendment.

The most relevant international actors were the Council of Europe via The Group of States against Corruption (GRECO) and the Venice Commission. GRECO was established only in 1999 and Luxembourg is one of its founding members. The structure is a result of the need to fight corruption conceived at the time to ‘represent[s] a major threat to the rule of law, democracy, human rights, fairness and social justice, hinders democratic development and endangers the stability of democratic institutions and the moral foundations of society’ (GRECO, 1999, p.6). The aim of the Council of Europe was to establish a mechanism for monitoring the application of the guiding principles in the development of domestic legislation and practice. Also part of the Council of Europe, another external actor who commented on Luxembourg’s constitutional revision was the Venice Commission. Its primary task is to give legal advice to countries on laws important for the democratic functioning of institutions. Its influence is rather indirect as it does not impose solutions, but follows a dialog-based approach.

The 2008 constitutional revision and financing of political parties by the state were two issues which went hand in hand. The empirical evidence points towards the latter partly leading to the former. The first proposal of a law related to political parties was about the repayment of campaign expenses and came in 1999. The law of 7 January 1999 has therefore been regarded as the start of legal regulation oriented towards political parties. Since then, the Council of Europe has proposed and emphasized the necessity of regulating the status and finance of political parties which made the parliamentary groups see the necessity of regulating parties at the national level.<sup>3</sup> GRECO’s reports stipulate that the only definition of parties is to be found in the law of 7 January 1999 on the partial reimbursement of the election campaign expenses of parties and political groups taking part in elections to the Chamber of Deputies and the European Parliament. That definition was subsequently incorporated into the electoral law of 18 February 2003. In the latter act, political party or political group means an association of individuals, whether or not with legal personality, which contributes, in accordance with the fundamental principles of democracy, to the expression of universal suffrage and the popular will, as laid down in its constitution or political programme. Apart from the reference to ‘political group’, this definition was repeated in the party finance law which came into force on 1 January 2008 (GRECO, 2008).

## **The 2008 constitutional revision**

Without attracting much media attention, the final text of article 32bis, adopted in December 2007 and entered into force in March 2008, was the expression of a political consensus among the parliamentary parties. The final text of the article reads as follows:

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

The text of the article 32bis is an example of minimal regulation that emphasizes democratic principles, the articulation and aggregation function that parties perform in a democracy, their role in expressing political participation and their contribution to democratic pluralism. Compared to the 1999 law on reimbursement of campaign expenses to parties, article 32bis on parties lays down the fundamental role of political parties in a democracy in a very straightforward manner. The article provides a ‘symbolic’ recognition of parties and does not give them a definition. Furthermore, article 32bis in its current form does not call parties organizations or institutions. It does define their purpose and duties, without being exclusive, in other words it formally lays down their ‘contribution’ to democracy and democratic rights.

What the case of Luxembourg portrays is a shift from old to new constitutional practices, whereby not only citizens democratic rights are recognized but the agents who contribute to the exercise of those rights become legitimised. One can argue therefore that first, the 2008 constitutional revision in Luxembourg corresponds to the contemporary policy needs of the state and second, that the aim of the reform was to reflect the social and political realities and the continuing development of parties both as institutions and organizations. Their legitimization as agents gives the acknowledgement of being part of the power structure and a legal status to the link with the voters and with the deputies elected on the parties’ electoral list. The legitimization of agents does not necessarily imply their definition. The specification of their role and functions comes to justify their existence and to emphasize their centrality for democracy.

The language of the amendment, as adopted, shows as the strongest justification from the perspective of political parties, their self-acknowledged importance for democracy, which implies a commitment to democratic goals. All the other justifications for constitutional regulation

however emerged before the adoption of the final text, during the parliamentary debates on previous proposals.

The final text of the revision came into being after several parliamentary debates, institutional reactions and alternative proposals. In an attempt to follow contemporary practices, the parliamentary Commission scrutinized the other European constitutions and their articles on political parties. Concerning the inspiration taken from other countries in preparing the text of article 32bis, it was not necessarily based on constitutional traditions or history, but based on 'best practices' observed in other countries which have relatively recently changed their constitution.

In its early versions, the constitution of Luxembourg was very similar to the Belgian constitution, which, according to the legal experts, is no longer seen as the main example to be followed. As declared by the party group leaders during the parliamentary debates in 2007, particularly those countries, which have obtained new constitutions during the last 60 years, were regarded as examples. The German, Austrian, Italian, Portuguese, French and Spanish constitutions were amongst the ones considered for inspiration when preparing the text, and most notably the latter two. The argument for taking into account Spain as an example relates to the newness of the constitution when compared to that of other Western democracies and what actually works in practice in contemporary politics.<sup>4</sup> Luxembourg however did not have a dictatorial past and the political class did not have the same incentives when drafting the revision. Its history shares more similarities to that of France, where, parties were included in the constitution in 1958.

The article on political parties from the French constitution links parties to democratic principles, but mainly focuses on rights and freedoms, the activity and behaviour of parties, as well as their identity and programme. The Spanish constitution on the other hand, regulates parties more extensively than France and Luxembourg. Democratic principles and extra-parliamentary party organization are emphasized, while the rights and freedoms, activity and identity of parties are also mentioned. Even if, as declared by the party elites, the inspiration was Spain and France, the constitution of Luxembourg focuses only on one domain when regulating parties - democratic principles. The article is very short, below the mean magnitude and range of party constitutional regulation in post-war Europe. The final text however, was the result of an elite consensus after several meetings and negotiations of parliamentary groups. Different camps, as the following sections will show, pleaded in favour of more or less regulation with various justifications attached to it.

## **Why legitimize parties as institutional agents? Justifying parties' institutional role for democracy**

There is a lengthy history of constitutional change in Luxembourg (Schmit, 2009). It is not surprising that parties were not mentioned in the 19<sup>th</sup> century as they did not exist at the time. Their development came later at the beginning of the 20<sup>th</sup> century as described by politicians themselves during the parliamentary debates of 2007:

‘Political parties were not interested - in any case, not at the beginning of the 20<sup>th</sup> century- in being included in the constitution or any other law because they feared that their own freedom could be limited in many respects through legal regulation. Therefore, one has to ask the question: Has the situation changed today? It has surely changed, because we have a different approach to parties, because today we also recognize the important activities of parties, because we are also prepared to strengthen the parties, which function according to democratic rules within our representative democracy, and also to recognize in the Constitution the role they fulfil in reality’ (Meyers, 2007, p. 3).

Institutional change and the procedure of constitutional revision was always a slow process in Luxembourg. As argued by country constitutional experts, Luxembourg has a tradition of following best practices in constitutional matters.<sup>5</sup> Furthermore, the 150<sup>th</sup> anniversary of the constitution in 2006 was another reason to look at other countries' constitutional rules, and formally discuss the need for a constitutional revision. Although 2008 may appear as a late date for the official recognition of parties in the constitution, several proposals for a special article assigned to parties have been registered since 2001 and discussions had also taken place in the 1980s.

Why the constitutional revision focused only on political parties and not on other aspect of contemporary political and economic developments finds justification in their relationship with democracy and their entrenchment in the institutional structure of the state. The justification for article 32bis given by the majority of the party groups in parliament can be also perceived as the need for an official acknowledgement of their role and activities as political actors which make a major contribution to the stability and continuity of the democratic institutions. Luxembourg MPs declare that pluralism and the activities of political parties are an essential element of representative democracy:

‘...the degree of health of a representative democracy; a form of democracy which in fact could not be conceived without structured organizations such as political parties...Without them a parliamentary democracy cannot function in the long run, but it is also equally clear that a democracy does not function entirely through political parties...Nevertheless, and this differentiates political parties from other organizations, they *do play an important role in our system of institutions* [emphasis added]’ (Bodry, 2007, p. 1).

Luxembourg introduced list proportional representation in 1919 and article 51 of the constitution was revised at the time to meet that purpose. Constitutional law treaties consider the 1919 revision as the one to establish the existence of political parties (even though not formally mentioned in the constitutional text). Consequently, article 32bis is believed to symbolize the ‘institutional legitimation’ of political parties and the establishment of a formal linkage with ‘their’ deputies (Schmit, 2009, p. 176). While the mandate and parliamentary activity of the latter were previously regulated separately by the constitution, from 2008, the constitution has formally linked the two.

During the parliamentary debates, the party actors themselves articulated and justified the constitutional revision based on the importance of political parties for democracy. Parties are the link between the voters and the politicians who get elected. ‘If parties did not exist and there were only candidate lists, this would end up in limiting the link between the voters and the people they voted for, so that they would only put themselves up for election on ‘voting Sunday’ every few years, after which people would be again deprived of their freedom. But that is not the case because there are political structures in which all citizens can be involved’ (Braz, 2007, p. 5). The electoral lists are therefore not enough for exercising the democratic rights of association and expression. Citizens rely on political parties to articulate and aggregate their interests.

### **How agents propose to be legitimized: other justifications for constitutional regulation**

All parliamentary groups agreed on the necessity to include parties in the constitution and the first justification related to their essential role for democracy. The other justifications advanced by political parties were proportional to the preferred degree of regulation and to a certain extent related to their governmental status. While the incumbent Socialists and CSV were in favour of

lighter regulation, the Greens, the ADR and the Democrats were for a more extensive constitutional regulation.

An early proposal to include parties in the constitution, mainly aimed at defining political parties, was put forward in 2001 by MP Asselborn (CSV). The initiator gave the examples of the German, French, Italian, Spanish and Portuguese constitutions all of which regulate political parties. In search of a general text, which could be the basis for further detailed regulation in a secondary law, the 2001 proposal had as inspiration the French constitution and its article 4.<sup>6</sup>

Interest with preventing the misuse of power is reflected in the 2001 proposal which emphasized respect for the constitution, the law and fundamental democratic principles. The revision proposal was similar to the one adopted in 2008, but with an extra sentence on the need for parties to respect the constitution. The text of the 2001 proposal reads as follows: 'Parties or political groups express democratic pluralism. They contribute to the formation of popular will and the expression of universal suffrage. They form and freely exercise their activity under the respect of the Constitution and the law' (Chambre des Deputes, 2001). The proposal had as objective the limitation of the constitutional text to a minimum length. The article on political parties was aimed to follow immediately after article 26, which guarantees the right of association. The proposal raised discussions and the final text addressed to the political groups by the Commission of institutions and constitutional revision was the following: 'The constitution guarantees freedom of parties and political groups. They express democratic pluralism. Respecting the fundamental democratic principles, they contribute to the formation of popular will and to the expression of universal suffrage'. The 2001 proposal raised substantial criticism and most parties demanded revision at that time.

In order to distinguish themselves from possible 'rivals', the Socialist group recommended avoiding the placement of political parties and political groups at the same level of legal importance. In a report addressed to the Commission of institutions and constitutional revision, they suggested the constitutional text to be limited to the term political parties only (Chambre des deputes, 2002b). During the same parliamentary debate, Socialist MP Kieffer pointed out the difference between a political party and a political group. Whilst a political party has a clear organizational structure, a political group does not. As trade unions can also give political declarations, the group has requested their introduction in the constitution according to the Spanish example. On the same line with the socialists, was the ADR group who emphasized the

lack of clarity of the article where one could understand that political groups can develop into political parties and viceversa. Similarly, the Democratic Party considered the 2001 revision proposal as raising important points for discussion, such as the legal status of political parties and political groups, which was still unclear at the time (Chambre des deutes, 2003).

With the aim of preventing any misuse of power and of restricting competition from possible extremist anti-system parties was the ADR parliamentary group. On the side demanding more regulation, they disagreed with the 2001 proposal and came forward with another text, which would replace the third sentence as follows: ‘They must respect the principles of national sovereignty and of democracy’. Similarly protective of their status, the Greens asked the specification of a secondary law on political parties to be mentioned in the constitutional text (Chambre des deutes, 2002a,c).

The positions taken by parliamentary groups on the 2001 text for constitutional revision emphasize parties as being protective of their status, not wanting to be confused with ‘political groups’ or to be threatened by ‘political groups’. They aim to prevent any misuse of power and restrict competition from undemocratic or anti-system parties. Simultaneously they do assign high importance to their freedom of activity. Socialist MP, Alex Bodry, emphasized that a certain control by the Constitutional Court over political parties would have been against the current political practices in Luxembourg. Similar position and protest against constitutional control on the status and activities of political parties came from the Greens (subsequently corroborated by CSV), on grounds that the Constitutional Court exercises a constitutional control only over laws and treaties.

In 2004 however, Democrat MP Rippinger proposed a more extensive constitutional regulation of political parties. The text comprised a long article 26bis (which included separate provisions on the status, organization, activity and finance of parties) and a revised article 95 whereby the Constitutional Court gains the power of checking the conformity of a political party with the constitution. This proposal was aimed at providing an exhaustive regulation of parties but encountered opposition from the other parties on grounds of avoiding restrictions and control. As a consequence, the MP Asselborn (CSV) came forward with another proposal, shorter in length and very much in line with the current text adopted by the constitution: ‘Political parties and political groups express democratic pluralism and contribute to the formation of popular will and to the expression of universal suffrage’ (Chambre des Deutes, 2004).

Restricting competition from anti-system parties emerged as another justification during the February 2004 session of the Commission. The debates went along the lines of avoiding any possible competition or legitimization of extremist parties. It was suggested by the Commission that the text should be free of vague clauses such as the first sentence of the 2001 proposal 'Constitution guarantees the freedom of political parties and political groups'.

The importance of public funding for parties and party finance issue received similar attention. In a context of diminishing donations from members, a series of political scandals caused by the lack of transparency in the process of political financing were issues on the Luxembourgish political arena in late 1980s and 1990s. The Green party in Luxembourg, noted since 2002, that due to the political scandals related especially to party finance, the control of their status and functioning became a necessity (Chambre de Deputes, 2002). These events relate therefore not only to prevention of misuse of power justification but also to an administrative necessity type of justification for party constitutional regulation. While the Socialists pointed out the need for 'light' regulation which gives parties a certain liberty of action, the ADR and the Greens considered important to specify in the constitution that the organization, finance and public funding of political parties are to be regulated by ordinary law. During the same session of 18<sup>th</sup> February 2004, MP Asselborn (CSV) emphasized the need for political parties to start working on a law regarding party finance after the elections of June 2004.

In December 2004, socialist incumbent leader Alex Bodry, had created a working group composed of all party leaders with the aim of arriving at an agreement on the issues of party finance and political parties' inclusion in the constitution. Whilst acknowledging the importance of party finance, the working group conclusions crystallized in a simple and concise text to be included in the constitution as soon as possible and a separate law on party finance. The idea of controlling the activity of parties was excluded and the argument was related to the 1937 historical experience of Luxembourg. At that time, a law on the dissolution of the Communist Party or of any other groups or associations, which, by violence would change the constitution and the laws, was subjected to a referendum and failed to gain popular support. The Socialist Party wanted to avoid such an experience when citizens opposed the political parties initiative, whilst the Green party wanted to use it as an example for further controlling political parties' activity. By 2005, the Commission had agreed that it would be sufficient to mention parties in the constitution and briefly explain their role in the democratic institutional context of Luxembourg (Chambre des Deputes, 2005). That position involved no further stipulation of a party finance law

or any further control by the Constitutional Court. In 2007, Alex Bodry obtained parties' agreement over their interests and put forward the final proposal for a constitutional amendment.

### **National institutional involvement**

Institutional democratic role, distinction from possible rivals, prevention of the misuse of power and administrative necessity were the justifications arising from the positions taken by the national institutions involved in the process of constitutional revision. The government acknowledged parties as being essential elements for the good functioning of Luxembourg's democratic parliamentary regime and favoured the revision (Chambre des Deputes, 2007a). The Council of State on the other hand, did not initially see the necessity of including parties in the constitution (before 2008 their status was associations as per art. 26 of the constitution). Its members however ultimately stress the essential democratic role of political parties as justification for constitutional status.<sup>7</sup> As the agents were already performing functions recognized as essential for democracy, they needed to be credited for their activity.

The reaction of Council of State to take action in defining the status of political parties in the constitution before the adoption of a finance law<sup>8</sup> was in part influenced by GRECO's recommendations. One can argue therefore, that what partly triggered the constitutional revision process was the financing of parties. Further to the response and position taken by the government and the Council of State, both proposals, i.e. that on the constitutional revision and that on the party finance law, were discussed by the Commission of institutions and constitutional revision (Chambre des Deputes 2007c). Discussions were held on both, but the constitutional revision took longer, partly because of the procedure and because there was no general agreement on the text. As a result, the law on party finance was enacted two months before the constitutional revision.

The Council of State position relates to checks on a possible monopoly exercised by parties and towards prevention on any misuse of power by political parties. They recommended a short version of the article without much legal restraint on parties. They further advised caution on the usage of terms such as 'express' vs 'contribute to the expression' so that political parties could not be understood as the sole agents which express democratic pluralism (Chambre des Deputes 2007b). While they are the major agents of democratic pluralism, they are not the only such agents. Trade unions and associations can perform a similar function. However, the suggestions received from the Council of State were not considered as necessary to be implemented.

Ultimately, in its 'avis', on the same line with political parties, Council of State recognized that the constitutional revision articulates the difference between other associations and political parties. The role distinction of parties from possible 'rivals' thus clarifies. Council of State emphasized parties' particular task of selecting and presenting candidates for elections which allows for the expression of the universal suffrage and ultimately the exercise of a mandate in public institutions.

### **External actors and their justifications**

As for the international actors involved, their position towards party constitutional regulation relates more to constraints on the misuse of power and to administrative necessities which imply transparent activities. The government and Chamber of Deputies considered the recommendations of the Council of Europe when the finance law was drafted. The preparatory work for the party finance legal framework were prompted by the Recommendation Rec(2003)4 of the Committee of Ministers of the Council of Europe. Indirectly, GRECO's recommendations have triggered the constitutional revision. Since 2001, the group has prepared extensive evaluation reports on the transparency of political funding in Luxembourg. In these reports, they also tackled the lack of legal definitions of political parties in Luxembourg and acknowledged that the Chamber of Deputies was considering a constitutional revision meant to incorporate political parties (GRECO, 2008). As a full member of GRECO Luxembourg participates without restrictions in mutual evaluation procedures and, at the same time, accepts to be evaluated. Cases of corruption however and political finance scandals existed long before its creation and the Council of Europe adopted the guiding principles against corruption only in 1997. Its establishment in 1999 shows that its influence is relatively recent. As Luxembourg is one of its founding members, the influence was exercised with the agreement of the state.

Through its work and guiding principles, GRECO emphasizes that political corruption is another type of abuse of power and position which can undermine the fundamental civil and political rights enshrined in the ECHR. Concerning constitutionalism, this is another type of limitation on the abuse of power, this time not of the monarch, but of the contemporary political structures. Amongst the rights protected by ECHR are the right of expression, association and the right to free elections, all of which are partly practised through the activity of political parties. It is not surprising therefore that GRECO's activity is paying attention to the issue of transparency in

political financing and to the issue of conflict of interests regarding the elected representatives. By tackling corruption one achieves transparency and ultimately political accountability.

Another external actor, indirectly involved, and which commented on the text of the constitutional revision after the adoption was The Venice Commission. They did welcome the placement of political parties at a constitutional level and also checked whether the provision could be interpreted as a monopoly to political parties. The absence of a clear definition of political parties was however noticed 'Owing to the importance given to political parties by the Constitution, it would be useful to define them in this memorandum with reference to any relevant law(s), if not in the Constitution' (Venice Commission, 2009, p. 5).

## **Conclusion**

This article addressed the question of why regulate parties in contemporary constitutions. It placed the question in the context of changing constitutionalism and it introduced a framework for analysis that consists of actors involved in the process, their interests and justifications. From structures of legitimising fundamental rights and freedoms of citizens as principals, constitutions became structures of legitimising parties as the agents which contribute to the exercise of those rights. While the outcome of party constitutional regulation shows the common interests of the dominant actors, the constitutional revision process underlines all the other intervening justifications. Political parties play an important institutional role for democracy. The constitutional regulation gives parties their own place in the polity. Parties set their own regulation in order to have legitimation. As the theory of regulation suggests they want benefit from regulation. They want to be acknowledged, at the same time they want subsidies, restriction of competition from anti-system parties, role distinction from 'rivals', prevention of misuse of power and may also see their constitutional regulation as an administrative necessity.

Empirically, the article considered the question of why political parties were included in the constitution of Luxembourg in 2008. The Luxembourg case provides a window into the process of constitutional regulation of parties. The empirical evidence illustrates the interplay between political parties, national institutions and international actors and their various justifications for party constitutional regulation. The inclusion of political parties in the constitution of Luxembourg was the result of domestic and external political practices. While a special case in terms of timing and democratic group inclusion, i.e. countries without parties in their constitution

before 2008, it has the potential of becoming prototypical for these countries given the contemporary national and international developments.

The implications of contemporary constitutionalization of parties are firstly related to the increased importance attributed to parties and their recognition as indispensable agents of democracy. As a constitution defines what constitutes a polity (Stone, 1994, p. 444), their official recognition places them as an important element of the polity. Amidst increasing concern about how well parties perform their democratic functions, their constitutionalization suggests they have come to be seen as permanent features of the institutional setting of representative democracy. Secondly, the development of the constitutional revision process in Luxembourg points to the transformation of political parties, to their entrenchment in the state institutions, to the importance of transparent party finance and its legal regulation in contemporary democracies. Thirdly, their constitutionalization was also the result of external influences. GRECO's monitoring reports plus Luxembourg's response, emphasize that to a certain degree, contemporary constitutionalism does indeed go beyond the state, considers the international practices can respond to the necessities of the state, as well as to the necessities of the national and international political actors.

Notes:

1 ECHR operates legally through European Court of Human Rights in Strasbourg, France; EU on the other side, has a separate legal order, the European Court of Justice in Luxembourg.

2 Post-communist countries can also be included in the category of contemporary constitutionalism. Their regulation of political parties is a reflection of the dictatorship past. However, contemporary party constitutionalism in Luxembourg is special as it did happen in a country with a continuous democratic history.

3 Author's interview with CSV government party officials, Luxembourg, February 2010.

4 Author's interview with members of the Commission for the Institutions and Constitutional Revision, Luxembourg, February 2010.

5 Author's interviews with public officials, members of the Commission on constitutional revision, Chamber of Deputies, Luxembourg, February 2010.

6 For further details on the French constitutional regulation of parties, see online database at [www.partylaw.leidenuniv.nl](http://www.partylaw.leidenuniv.nl).

7 As recorded by author's interview with Council of State members, Luxembourg, February 2010.

8 Author's interview with Council of State officials, Luxembourg, February 2010.

**Table 1. General framework of constitutional regulation of political parties**

Actors/ justification	Institutional democratic role	Need for subsidies	Restrict political competition	Eliminate possible 'rivals'	Prevent misuse of power	Administrative necessity
Political parties	Yes	Yes	Yes	Yes	Yes*	Yes
National institutions	Yes	No	No	Yes	Yes	Yes
External actors	Yes	No	No	No	Yes	Yes

\*mainly opposition parties

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