# Chapter 5 Constitutionalisation of Political Parties: International Standards and the Experience of Continental Europe

*Johannes Socher*

## 1. Introduction

This chapter outlines the relevant international standards on the regulation of political parties and analyses the experience of continental Europe in their constitutionalisation, with this experience illustrated via the case of Germany. The discussion is limited in two respects. First, the outline of international standards focuses on state obligations emanating from human rights instruments, and not on obligations of political parties themselves, which have no legal obligations under human rights law.[1] Secondly, the focus is on the entrenchment of the rights and obligations of political parties in constitutions, not on the normative frameworks that regulate parties more broadly.[2]

While international human rights law in relation to political parties has been the subject of extensive research, surprisingly little comparative constitutional scholarship exists on the constitutionalisation of parties.[3] Important exceptions to this relative scarcity are works on the regulation of political parties in continental Europe. In particular, Dimitris Tsatsos published widely in the 1990s on the issue, though mostly in German language, thereby significantly limiting the discourse to a German-speaking

1 But see T Wood, "Reinforcing Participatory Governance Through International Human Rights Obligations of Political Parties" 28 (2015) *Harvard Human Rights Journal*, pp 145–200 for an attempt to construct such obligations.

2 For an overview on the regulation of political parties in Europe in statutory laws, see FC Bértoa, DR Piccio, and ER Rashkova, "Party Laws in Comparative Perspective", in I van Biezen and HM ten Napel (eds.), *Regulating Political Parties: European Democracies in Comparative Perspectives,* Leiden, Leiden University Press (2014), pp 119–148.

3 This may be due at least in part to the dominating influence of American and British constitutional traditions, which tend to have little to say about political parties. See, for example, V Bogdanor (ed.), *The British Constitution in the Twentieth Century,* Oxford, Oxford University Press (2004).

audience.[4] More recently, a group of researchers around Ingrid van Biezen has revitalised the field from a political science perspective.[5]

Revisiting these works, this chapter provides an overview of the different waves of constitutionalising political parties in continental Europe and presents the distinct models that have emerged over time. Following this overview, the continental European experience will be illustrated with the case of Germany, which in many respects can be seen as a pioneer of, and model for, the constitutionalisation of political parties. The conclusion sums up the findings and considers potential lessons for African countries. As will be argued, while some principles developed in Europe could offer inspiration for the further constitutionalisation of political parties in Africa, others might be less suitable and should be considered only with caution.

## 2. International standards

International standards on the regulation of political parties emanate above all from human rights instruments, interpreted by the United Nations (UN) Human Rights Committee and other human rights monitoring bodies. The main relevant treaty is the International Covenant on Civil and Political Rights (ICCPR), in particular the right to participate in public affairs (section 2.1) and the right to freedom of association (section 2.2). Other human rights treaties cover specific aspects of the regulation of political parties, such as non-discrimination against certain persons and groups (section 2.3) and financing and transparency (section 2.4).

4 See, in particular, DT Tsatsos, D Schefold, and HP Schneider (eds.), *Parteienrecht im europäischen Vergleich: Die Parteien in den demokratischen Ordnungen der Staaten der Europäischen Gemeinschaft,* Baden-Baden, Nomos (1990) DT Tsatsos and Z Kedzia (eds.), *Parteienrecht in mittel- und osteuropäischen Staaten: Entstehungsmomente des Parteienrechts in Bulgarien, Litauen, Polen, Russland, der Slowakei, Tschechien und Ungarn*, Baden-Baden, Nomos (1994).

5 See, in particular, I van Biezen and HM ten Napel (eds.), *Regulating Political Parties: European Democracies in Comparative Perspectives,* Leiden, Leiden University Press (2014); FC Bértoa and I van Biezen (eds.), *The Regulation of Post-Communist Party Politics*, London, Routledge (2017).

## 2.1. Right to political participation

A first question is whether the right to political participation as guaranteed in Article 25 of the ICCPR includes any obligations for state parties in relation to political parties, in particular whether the right of every citizen to "genuine elections" necessarily requires multipartyism.[6] While it may be argued that Article 25 of the ICCPR, as originally drafted, does not prohibit one-party states if certain criteria are met,[7] the UN Human Rights Committee has consistently argued in favour of multipartyism as a necessary prerequisite for "genuine" elections in the sense of Article 25 of the ICCPR. In the *Bwalya v Zambia* case, the Committee found that preventing an opposition party leader from participating in a general election in the then one-party state of Zambia constituted an unreasonable restriction of his rights guaranteed in Article 25 of the ICCPR.[8] Building on this finding, the Committee expanded and generalised this view in its General Comment No. 25, in which it states that "political parties and membership in parties play a significant role in the conduct of public affairs and the electoral process".[9] More recently, the Committee has found that free and fair elections require the possibility for political parties "to register, contest elections, field candidates or otherwise participate in the formation of a government".[10]

## 2.2 Freedom of association

Freedom of association, guaranteed in Article 22 of the ICCPR, "enables the very existence of political parties", as a leading commentary on the Covenant highlights, "allowing pluralist expression in a multi-party system,

6 For more on the debate during the drafting of the Covenant, see GH Fox, "The Right to Political Participation in International Law", in GH Fox and BR Roth (eds.), *Democratic Governance and International Law*, Cambridge, Cambridge University Press (2010), pp 48–90, 55–57.

7 Ibid, pp 56–57.

8 UN Human Rights Committee, CCPR/C/48/D/313/1988 (*Bwalya v Zambia*), 14 July 1993, para 6.6.

9 UN Human Rights Committee, General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), 12 July 1996, CCPR/C/21/Rev.1/Add.7, para 26.

10 UN Human Rights Committee, CCPR/C/SWZ/CO/1 (Swaziland), 23 August 2017, para 52.

and offering choice in popular representation".[11] The general restriction clause in the second paragraph of the article allows, however, for limitations of freedom of association if they are "necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the right and freedoms of others".

In regard to political parties, the UN Human Rights Committee has discussed limitations in a number of cases. State parties are obliged to "ensure that any limitations on the establishment of a political party are construed narrowly and that the principles of legality, necessity and proportionality are strictly adhered to".[12] Moreover, state parties should not use regulations concerning the registration of political parties "to victimize groups that are considered as holding contrary political views to the ruling party", resulting in major practical obstacles and delays in the registration of opposition parties.[13] Requirements such as high numbers of founders, geographic diversity, and high registration fees may also constitute restrictive and disproportionate rules.[14] In addition, state parties have not only an obligation to respect the exercise of freedom of association but a duty to protect political parties' freedom of association from interference by non-state actors.[15]

In extreme cases, on the other hand, states may enact regulations that allow even the prohibition of political parties. One explicitly envisaged case in a human rights instrument are racist parties, which state parties to the International Convention on the Elimination of all Forms of Racial

11 PM Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*, Cambridge, Cambridge University Press (2020), p 610.

12 UN Human Rights Committee, CCPR/C/TKM/CO/2 (Turkmenistan), 20 April 2017, para 49.

13 UN Human Rights Committee, CCPR/C/KAZ/CO/1 (Kazakhstan), 19 August 2011, para 27. See also CCPR/CO/73/AZE (Azerbaijan), 12 November 2001, para 23; CCPR/C/UZB/CO/3 (Uzbekistan), 7 April 2010, para 25.

14 See UN Human Rights Committee, CCPR/C/BLR/CO/5 (Belarus), 22 November 2018, para 54. On the Committee's concerns with respect to the extent of territorial representation, see CCPR/CO/75/MDA (Moldova), 5 August 2002, para 16.

15 See UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation on State Parties to the Covenant, 26 M2004, CCPR/C/21/Rev.1/Add.13, para 8; UN Human Rights Committee, General Comment No. 28: Article 3 (The Equality of Rights between Men and Women), 29 March 2000, CCPR/C/21/rev.1/Add.10, para 31.

Discrimination (ICERD) are obliged to declare illegal.[16] More generally, political parties may lack protection under the ICCPR in accordance with the latter's Article 5, which prohibits an interpretation of the Covenant "implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms … or at their limitation to a greater extent than is provided for [in it]". In an early case, the UN Commission on Human Rights argued that the re-establishment of the dissolved fascist party in Italy was removed from the protection of the Covenant in the sense of this article.[17] Beyond this single instance, however, the exact delimitations and substantial and procedural requirements under which states may prohibit political parties in accordance with Article 5 of the ICCPR remain open to interpretation.[18]

### 2.3 Equal treatment of and non-discrimination against specific groups

Another standard for the regulation of political parties is the principle of equal treatment before the law. In line with Article 26 ICCPR, regulations on political parties may not discriminate against individuals or groups "on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Apart from international standards emanating from the ICCPR, a number of human rights instruments provide for state party obligations in regard to non-discrimination against specific groups, obligations which are also relevant for the regulation of political parties.

A first provision in this regard is Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which obliges state parties to take appropriate measures to eliminate discrimination against women in political and public life. In relation to political parties, this includes, first of all, the obligation to ensure to women

16 Article 4(b) of the ICERD. See P Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, Oxford, Oxford University Press (2016), p 363.

17 UN Commission on Human Rights, *MA v Italy,* Communication No. 117/1981, Supp. No. 40 (A/39/40), para 190.

18 See GH Fox and G Nolte, "Intolerant Democracies", in GH Fox and BR Roth (eds.), *Democratic Governance and International Law*, Cambridge, Cambridge University Press (2010), pp 389–435, 421 et seq.

the right to participate in them.[19] This means that political parties should not be allowed to deny women membership or the possibility to run for elections and that restrictions for women to participate in political parties cannot be justified by religious beliefs or cultural traditions.[20] Furthermore, the obligation in Article 7 of CEDAW requires state parties to identify and implement temporary special measures to ensure the equal representation of women in political parties.[21] In essence, this means that state parties have to "ensure that political parties realize equality by increasing the number of female candidates with realistic chances of being elected".[22] Of the various potential measures to achieve this, the CEDAW Committee views the alternation between men and women for the nomination of candidates in political parties as particularly effective.[23]

Another relevant provision in a human rights instrument that imposes obligations in regard to non-discrimination is Article 29 of the Convention on the Rights of Persons with Disabilities (CPRD).[24] In terms of Article 29(b)(i) of the CPRD, state parties commit to "promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs" and to "encourage their participation in public affairs, including … in the activities and administration of political parties". As the CPRD Committee has noted, this includes the obligation to

19 See Committee on the Elimination of all Forms of Discrimination against Women, General Recommendation No. 23: Political and Public Life, 1997, A/52/38, paras 42–43.

20 S Wittkopp, "Article 7", in P Schulz, R Halperin-Kaddari, B Rudolf, and MA Freeman (eds.), *The UN Convention on the Elimination of All Forms of Discrimination against Women and Its Optional Protocol: A Commentary*, 2nd ed, Oxford, Oxford University Press (2022), p 316.

21 See Committee on the Elimination of all Forms of Discrimination against Women, General Recommendation No. 25: Temporary Special Measures, 18 August 2004, paras 18, 23, 29, 32.

22 Wittkopp, *supra* n. 20, p 316, referring to, inter alia, United Nations Development Programme (UNDP) and National Democratic Institute for International Affairs (NDI), *Empowering Women for Stronger Political Parties: A Guidebook to Promote Women's Political Participation,* New York, UNDP (2012), pp 21–28.

23 See Wittkopp, *supra* n. 20, p 316.

24 See generally I Grobbelaar du Plessis and J Njau, "Article 29: Participation in Political and Public Life", in I Bantekas, MA Stein and D Anastasiou (eds.), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford, Oxford University Press (2018), pp 834–862.

ensure that political meetings, as well as materials used and produced by political parties, are accessible.[25]

## 2.4 Financing and transparency

A third set of international standards on the regulation of political parties relates to financing and transparency. In the above-mentioned General Comment No. 25 on Article 25 of the ICCPR, the Human Rights Committee stated that "reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party".[26]

In this spirit, Article 7(3) of the United Nations Convention against Corruption (UNCAC) enjoins state parties to take legislative and administrative measures to enhance transparency in the funding of political parties. While the provision is limited to funding, official UN guidance goes beyond that and addresses other political finance issues, such as limitations on private funding, criteria for public funding, spending limits, and abuse of state resources.[27] Moreover, although the provision does not give detail on how to achieve this, Article 7(3) of the UNCAC may be interpreted to mean that disclosure of information has to be adequate, which entails

> that the information provided should allow knowledge of who is providing the funding, including whether this is public or private, and the amount of that funding. This would require disclosing (i) the identity of those providing funding; (ii) the form, whether the funding is provided through direct monetary contributions or through indirect in-kind contributions, for example loans, tax exemptions, time in media outlets, or logistic support; and (iii) the amounts.[28]

25 CPRD Committee, General Comment No. 2: Article 9: Accessibility, 22 May 2014, CPRD/C/GC/2, para 43.

26 UN Human Rights Committee, *supra* n. 9, para 19.

27 See United Nations Office on Drugs and Crime (UNODC), *Technical Guide to the United Nations Convention Against Corruption*, New York, United Nations (2009).

28 J Bacio Terracino, "Article 7: Public Sector", in C Rose, M Kubiciel, and O Landwehr (eds.), *The United Nations Convention against Corruption*, Oxford, Oxford University Press (2019), pp 65–77, 75.

## 3. The constitutionalisation of political parties in continental Europe

Against the background of the relevant international human rights instruments for the regulation of political parties, this section analyses the experience of their constitutionalisation in continental Europe. Historically, most European constitutions neither mentioned political parties nor said anything about their role in governance.[29] This only changed after World War II with the restoration of democracy in Austria, Germany, and Italy (section 3.1). As will be shown, one can distinguish three distinct models of political-party constitutionalisation that emerged over time (section 3.2). While these three models continue to co-exist, the constitutionalisation of political parties in continental Europe is increasingly shaped by European Court of Human Rights (ECtHR) case law, as well as synthesised and interpreted through guidance issued by the European Commission for Democracy through Law (Venice Commission) and other regional bodies (section 3.3).

### 3.1 Five waves of party constitutionalisation

According to a periodisation developed by Ingrid van Biezen, one may distinguish five waves of political-party constitutionalisation in post-War Europe (see Figure 1).[30] Beginning in Iceland in 1944, the first wave primarily comprises Austria, Germany, and Italy, where the restoration of democracy following Nazi and fascist rule was not only accompanied by the inclusion of political parties in the respective constitutional frameworks but also symbolised by the adoption of entirely new constitutions (except for Austria, where the constitution of 1920 was merely reinstated). In Iceland's constitution, the first case of party constitutionalisation in Europe, political parties appear only in passing in a provision on proportional representation for parliamentary elections. Similarly, while Austria's constitution makes reference to political parties in a number of provisions,

29 See I van Biezen, "Constitutionalising Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe", 42 (2012) *British Journal of Political Science*, pp 187–212, 191–96.

30 I van Biezen, "The Constitutionalisation of Political Parties in Post-War Europe", in I van Biezen and HM ten Napel (eds.), *Regulating Political Parties: European Democracies in Comparative Perspectives,* Leiden, Leiden University Press (2014), pp 93–118, 94–100.

parties are limited in their significance in that they are referred to simply as parliamentary groups and in regard to their capacity to be elected. By contrast, it is in Italy's new constitution of 1947 and, in much more detail, the German Basic Law of 1949, that political parties are, for the first time, explicitly recognised as relevant subjects for the constitutional order over and above their role in elections.[31]

The second wave of constitutionalisation is linked to decolonisation and begins with the establishment of the French Fifth Republic in 1958; additionally, it includes the constitutions of the newly independent states of Cyprus and Malta, as adopted in 1960 and 1964 respectively. According to van Biezen, unlike in Italy or Germany, political parties in these constitutions appear not as democratically desirable subjects but merely as functional necessities.[32] The French Constitution, for instance, assigns parties a role in contributing to "the exercise of suffrage" and requires them to "respect the principles of national sovereignty and democracy", but otherwise has relatively little to say about them.[33]

This is different again for the third wave, which, according to van Biezen, consists mainly of the comparatively young democracies of Southern Europe – that is, Greece, Portugal, and Spain – which all returned to democracy in the 1970s after periods of military rule.[34] Much as in the case of Germany (see section 4 below) and the overwhelming majority of cases in former socialist countries in Central and Eastern Europe that form the fourth wave of the late 1980s and early 1990s, these constitutions usually recognise

31 The constitutionalisation of political parties in the German Basic Law is analysed further in section 4. For analyses of the regulation of political parties in Italy, see F Lanchester, "Die Institution der politischen Partei in Italien", in DT Tsatsos, D Schefold, and HP Schneider (eds.), *Parteienrecht im europäischen Vergleich: Die Parteien in den demokratischen Ordnungen der Staaten der Europäischen Gemeinschaft,* Baden-Baden, Nomos (1990), pp 367–434; DR Piccio, "A Self-Interested Legislator? Party Regulation in Italy", 19 (2014) *South European Society and Politics,* pp 135–152.

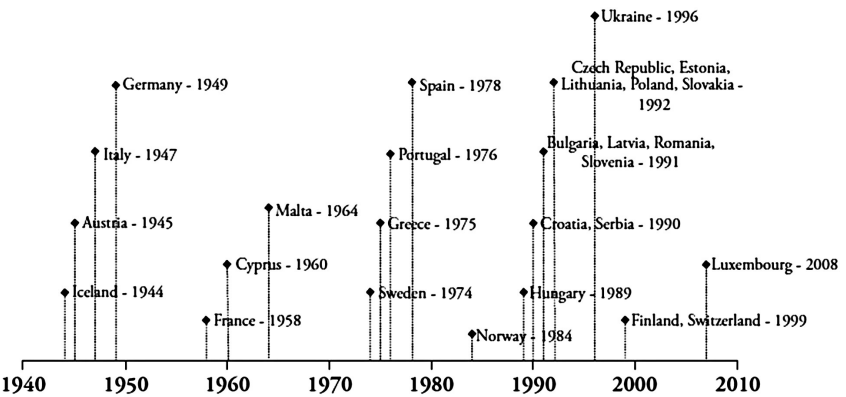
32 Van Biezen, *supra* n. 30, pp 99–100.

33 See M Fromont, "Die Institution der politischen Partei in Frankreich", in DT Tsatsos, D Schefold, and HP Schneider (eds.), *Parteienrecht im europäischen Vergleich: Die Parteien in den demokratischen Ordnungen der Staaten der Europäischen Gemeinschaft,* Baden-Baden, Nomos (1990), pp 219–260.

34 For case studies, see ibid, pp 261–300 (Greece), pp 591–634 (Portugal), and pp 635–694 (Spain). For a comparison of these cases, see I van Biezen and FC Bértoa, "Party Regulation in Post-authoritarian Contexts: Southern Europe in Comparative Perspective", 19 (2014) *South European Society and Politics*, pp 71–87.

parties as direct and desirable subjects.[35] Finally, the fifth wave, starting in the late 1990s, consists of cases, such as Finland and Luxembourg, where the constitutions of older democracies were amended to explicitly regulate political parties for the first time.[36]

*Figure 1: Waves of political-party constitutionalisation in post-war Europe*[37]




A number of aspects of this evolution are noteworthy. First, the different waves of political-party constitutionalisation in continental Europe by and large correspond to the broader waves of democratisation and constitutional change famously identified by Samuel Huntington.[38] Secondly, as a rule, political-party constitutionalisation seems to have occurred when entirely new constitutions were adopted rather than when existing ones underwent amendment.[39] Thirdly, and perhaps of particular note in regard to lessons for the African context, strong constitutionalisation of political parties has been more likely in young democracies where new constitutions

35 Van Biezen, *supra* n. 30, p 100. For analyses of individual countries, see the case studies in Tsatsos and Kedzia, *supra* n. 4 and Bértoa and Biezen, *supra* n. 5.

36 For the interesting case of Luxembourg, see the brief discussion in the conclusion of this chapter.

37 Ibid, p 95.

38 Van Biezen, *supra* n. 30, p 100, referring to SP Huntington, *The Third Wave: Democratisation in the Late Twentieth Century*, Norman, University of Oklahoma Press (1991) and J Elster, "Forces and Mechanisms in the Constitution-making Process", 45 (1995) *Duke Law Journal*, pp 364–396.

39 Van Biezen, *supra* n. 30, p 100.

were adopted after periods of authoritarian rule.[40] In addition to these observations (also highlighted by van Biezen), one should add that these waves relate only to the *initial* constitutionalisation of political parties. As will be shown further below, the extent to which parties are regulated in a constitution, and the level of detail with which this is accomplished, is of course not set in stone at a single stroke; that is to say, it may well evolve in response to changes in the political landscape and/or in constitutional doctrine.

### 3.2 Three models of constitutionalisation

Van Biezen (together with Gabriela Borz) also developed another classification which is valuable in the analysis of political-party constitutionalisation in continental Europe: this one identifies three models of such constitutionalisation that have emerged over time.[41]

In the first model, which van Biezen and Borz call "Parties in Public Office", parties act as electoral agents, parliamentary groups, or governmental actors. According to the authors, this model "is illustrative of a more instrumental view of political parties" and is found mainly in the longer-established and continuous liberal democracies of Northern Europe.[42] In these countries, the constitutionalisation of political parties tends to be only indirect in connection with elections, their role as parliamentary groups or in forming government, and no dedicated constitutional provisions regulating political parties exist. In Finland's Constitution, for instance, political parties are mentioned only in the provisions on parliamentary and

40 Ibid.

41 I van Biezen and G Borz, "Models of Party Democracy: Patterns of Party Regulation in Post-war European Constitutions", 42 (2012) *European Political Science Review*, pp 327–359. By contrast, the Venice Commission distinguishes between two models, the "liberal or free market model" (in which political parties are viewed as private associations that should be free from external regulations to the greatest extent possible) and the "egalitarian-democratic model" (in which political parties have a public function and should therefore respect equality and democracy in their internal organisation). See Venice Commission, *Guidelines on Political Party Regulation*, 2nd ed, 14 December 2020, CDL-AD(2020)032, paras 22–31.

42 Van Biezen and Borz, *supra* n. 41, p 349.

presidential elections, which state that the right to nominate candidates is held by registered political parties.[43]

In the second model, "Parties as Public Utilities", political parties are quasi-official agencies for the realisation of democratic values such as participation and representation. This model, which is exemplified by Portugal's constitution, implies a close relation of political parties to the state, one which in turn serves as a justification for support by public means and the granting of special legal status.[44] For instance, while Article 10 of the Portuguese Constitution assigns parties the responsibility to "assist in bringing about the organisation and expression of the will of the people", Article 40 grants them "the right to broadcasting time on publicly owned radio and television".[45]

Lastly, in the third model, "Defending Democracy", parties are permanent extra-parliamentary organisations and their constitutionalisation serves primarily to safeguard the continued existence of democracy. According to an analysis of more than 30 European constitutions conducted by van Biezen and Borz, this model has become the most common and is particularly widespread among the younger democracies in Central and Eastern Europe that were formerly under socialist one-party rule.[46] As will be illustrated with the case of Germany in section 4 below, in this model political parties are strongly protected and enjoy a broad range of constitutional rights, while at the same time their conduct is restricted by the state, requiring that their activities, ideologies and internal organisation are not contrary to fundamental democratic principles.

43 Articles 25 and 54 of the Constitution of Finland. Van Biezen and Borz additionally list Austria, Cyprus, Greece, Iceland, Malta, Sweden, and Norway as most closely related to that model. See ibid, p 351 (Table 6).

44 Ibid, pp 349–350.

45 Apart from Portugal, Van Biezen and Borz identify only Luxembourg and Switzerland as most closely related to that model. See ibid, p 351 (Table 6).

46 Ibid, pp 348–49. According to Van Biezen and Borz in ibid, p 351 (Table 6), the following European countries fall under this category: Bulgaria, Croatia, Czech Republic, France, Germany, Estonia, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Serbia, Slovakia, Slovenia, Spain, and Ukraine.

### 3.3 Harmonisation at the European level

Although different models of political-party constitutionalisation in continental Europe have emerged seemingly of their own accord, many aspects of their regulation have been increasingly shaped by harmonisation efforts at the regional level. Like the ICCPR, Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) guarantees the right to freedom of association for political parties. Moreover, despite a narrower wording, Article 3 of the First Protocol to the ECHR is interpreted by the European Commission and the ECtHR in a way that it guarantees similar rights to political participation as guaranteed by the ICCPR.[47] The ECHR also allows for limitations by way of a restriction clause.[48] In addition, in extreme cases the rights guaranteed in the ECHR may be withheld by its so-called Abuse Clause.[49] Equal treatment is guaranteed by Article 14 of the ECHR and its Protocol No. 12 and a number of other regional human rights instruments guarantee rights for specific groups that are also relevant for the regulation of political parties.[50]

Apart from these regional human rights instruments, participating states of the Organization of Security and Co-operation in Europe (OSCE) have committed themselves to a number of democratic governance principles relevant for the regulation of political parties, most notably through the so-called Copenhagen Document.[51]

Based on these legal obligations and political commitments, and informed by an extensive review of the relevant case law before the ECtHR, as well as international and regional best practice, the Venice Commission, together with the OSCE, has developed detailed guidelines for the regulation of political parties.[52] First published in 2011 and revised in 2020, they set out the following 11 principles:

47 See Fox, *supra* n. 6, pp 59–63.
48 ECHR, Article 11(2).
49 Ibid, Article 17.
50 For example, Article 7 of the Council of Europe Framework Convention for the Protection of National Minorities explicitly guarantees the right to freedom of association for persons belonging to a national minority.
51 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, www.osce.org/files/f/documents/9/c/14304.pdf (accessed 24 July 2024).
52 Venice Commission (2020), *supra* n. 41.

- The freedom of association of political parties should be granted to the greatest extent possible. This implies a presumption of the lawfulness of parties' establishment, objectives and activities.
- States shall not only respect the exercise of freedom of association of political parties but also actively protect it. In particular, violence and threats of violence are not permissible.
- Political parties shall have the right to freedom of expression and opinion in participating in political and public debate, regardless of whether their views align with government positions.
- States should aim to facilitate political pluralism. Pluralism entails the existence of a genuine choice among political parties.
- Restrictions of any rights in relation to political parties must be in compliance with human rights instruments and be prescribed by precise, certain, and foreseeable laws.
- Restrictions must be necessary in a democratic society, proportionate in nature, and effective in achieving specific purposes.
- States must provide a domestic remedy to enforce rights in relation to political parties. Review of restrictions must be possible before a court, at least in the final instance.
- States shall treat political parties on an equal basis. Regulations on political parties may not discriminate against individuals or specific groups.
- Any differential treatment by and within political parties which is based on personal characteristics or status must be reasonably and objectively justified. At the same time, states may provide for temporary measure aimed at promoting de facto equality within political parties for groups subjected to past discrimination.
- The regulations in relation to political parties shall be implemented by competent and impartial state authorities, including government bodies and courts.
- Privileges such as state funding justify certain obligations on political parties in relation to their accountability, such as reporting requirements and transparency in financing.[53]

In addition to these general guidelines, the Venice Commission has prepared further guidelines and reports addressing specific issues of political-

53 Ibid, paras 32–62.

party regulation, such as the prohibition and dissolution of parties,[54] the method of nomination of candidates,[55] and financing.[56] Furthermore, both the Venice Commission and the OSCE regularly (sometimes jointly) draft opinions on individual countries' laws regulating political parties and assess them against regional standards.[57]

While even a summary of this impressive body of guidance on European minimum standards for the regulation of political parties would go beyond the scope of this chapter, what is noteworthy are the instances in which the level of their regulation of a state's national legal framework is addressed, that is, whether and to what extent constitutionalising political parties is recommended or even required. In this regard, the Venice Commission's general guidelines state only that, apart from freedom of association, other questions, such as the role and functioning of political parties in a democratic system, do not necessarily have to be set out in a country's constitution, even though "the importance of political parties requires that legislation that affects basic rights and obligations of political parties should at least have the status of parliamentary legislation, and not that of regulation issued by an administrative authority".[58]

In its guidelines on the prohibition and dissolution of political parties, the Venice Commission notes that, in their constitutions, most European countries explicitly list the main cases in which restrictions may be placed on political parties.[59] In another report, the Commission argues that the extent to which a state's constitution regulates intra-party democracy has an impact on the possibilities to allow the legislator to establish requirements and proceedings for party candidate nomination:

54 Venice Commission, *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*, 10–11 December 1999, CDL-INF(2000)001.

55 Venice Commission, *Report on the Method of Nomination of Candidates within Political Parties*, Study No. 721/2013, CDL-AD (2015)020.

56 Venice Commission, *Guidelines and Report on the Financing of Political Parties*, 9–10 March 2001, CDL-INF(2001)008.

57 See, for example, Venice Commission, *Opinion on the Draft Amendments to the Law on Political Parties of Bulgaria*, Opinion No. 505/2008, 15 December 2008, CDL-AD(2008)034; Venice Commission, *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, Opinion No. 489/2008, 13 March 2009, CDL-AD (2009) 006; OSCE/ODIHR-Venice Commission, *Joint Opinion on the Draft Act to Regulate the Formation, Inner Structures, Functioning and Financing of Political Parties and their Participation in Elections of Malta*, Opinion No. 780/2014, 14 October 2014, CDL-AD(2014)035.

58 Venice Commission (2020), *supra* n. 41, paras 67, 77.

59 Venice Commission (1999), *supra* n. 54, p 13.

> When the constitution only recognises the freedom of political parties, the legislator must be more respectful of the autonomy of parties and the proportionality principle. … It implies that the requirements for limiting freedom imposed by the proportionality test are more demanding, with the consequence that legislative intervention will, in relative terms, be more difficult to justify.[60]

Alternatively, if a state's constitution makes no reference to political parties at all, the legislator may impose such regulatory requirements and has "greater latitude in this respect than where the constitution explicitly recognises the freedom of political parties".[61] Lastly, in relation to party financing, the Venice Commission notes that in most European countries this area is regulated only by statutory law; while constitutionalising it "offers the advantage of permitting the review of any subsequent law that might have the effect of undermining rights or possibilities granted", it "entails the disadvantage of making it far more difficult to reform the entire body of rules".[62]

## 4. The German party-state

If one wants an impression of what the constitutionalisation of political parties in continental Europe looks like in concrete terms, the German Basic Law of 1949 offers arguably the best-known example. Germany was one of the first European countries to regulate parties, with its Basic Law containing a dedicated provision that regulates a broad range of issues concerning political parties. Article 21 thereof reads as follows:

(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.
(2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional.

60 Venice Commission (2013), *supra* n. 55, para 15.
61 Ibid, para 16.
62 Venice Commission (1999), *supra* n. 54, p 5.

(3) Parties that, by reason of their aims or the behaviour of their adherents, are oriented towards an undermining or abolition of the free democratic basic order or an endangerment of the existence of the Federal Republic of Germany shall be excluded from state financing. If such exclusion is determined, any favourable fiscal treatment of these parties and of payments made to those parties shall cease.
(4) The Federal Constitutional Court shall rule on the question of unconstitutionality within the meaning of paragraph (2) of this Article and on exclusion from state financing within the meaning of paragraph (3).
(5) Details shall be regulated by federal laws.

Before the adoption of the Basic Law in 1949, political parties were absent in German constitutions. Parties were considered extra-constitutional institutions representing diversity, whereas the German state stood for unity.[63] Consequently, the constitutionalisation of parties in the Basic Law was perceived as "fundamental, almost revolutionary" by German constitutional scholars at the time.[64]

Turning the traditional view on its head, the German Constitutional Court has gradually developed a theory of the country as a "party-state" (*Parteienstaat*). In the case of *Schleswig-Holstein Voters' Association* (1952), the Constitutional Court found that the "incorporation of political parties in Article 21 means that parties are not only political-sociological entities; they are also integral parts of our constitutional structure and our constitutionally ordered political life".[65] Moreover, German political parties hold the rank of constitutional organs and may even defend their constitutionally guaranteed rights in proceedings before the Constitutional Court.[66]

Competing views on what the notion of the party-state means in concrete terms were ventilated in a further set of constitutional court cases

63 For example, the Weimar Constitution of 1919 mentioned political parties only in passing in its Article 130, prescribing that state officials serve the community as a whole and not any particular party.
64 See CJ Schneider, "Political Parties and the German Basic Law of 1949", 10 (1957) *The Western Political Quarterly*, pp 527–540, 527.
65 Federal Constitutional Court of Germany, Judgement, 5 April 1952, 2 BvH 1/52, BVerfGE 208, paras 240–241, English quotation cited from the translation in DP Kommers and RA Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany,* Durham, Duke University Press, 3rd edn (2012), p 271.
66 Federal Constitutional Court of Germany, Judgement, 20 July 1954, 1 PBvU 1/54, BVerfGE 4, 27.

on party financing.[67] Ultimately, the notion was confirmed and laid out in the Political Parties Act, passed in 1967, which explicitly confers a public function to parties, describing them as "integral to the free democratic basic order" and detailing their role "in the formation of the people's political will in all fields of public life".[68]

The detailed constitutionalisation of political parties in the Basic Law and the notion of Germany as a party-state mark a clear break with the country's state tradition, and may be explained largely against the background of the experience with Nazi rule. To illustrate this point, two distinct aspects of German party constitutionalisation will be discussed in more depth: the prohibition of anti-democratic parties (section 4.1), and the intra-party democracy requirement (section 4.2).

### 4.1 The prohibition of anti-democratic parties

Coined by the German exile Karl Löwenstein during Nazi rule, the concept of "militant democracy" embodies the idea that "pre-emptive, prima facie illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime" can be justified.[69] After World War II, the concept found its way into the German

67 The first case was Federal Constitutional Court of Germany, Judgement, 19 July 1966, 2 BvF 1/65, BVerfGE 20, 56. For a discussion of the subsequent cases, see Kommers and Miller, *supra* n. 65, pp 278–284.

68 Section 1 of the German Political Parties Act, 24 July 1967, last amended on 27 February 2024, Federal Law Gazette I, p 70. The Act explicitly mentions the following functions of political parties: "exerting an influence on the shaping of public opinion; encouraging and enhancing civic education; promoting citizens' active participation in political life; educating citizens capable of assuming public responsibilities; participating in elections at the federal, Land [state] and local levels by nominating candidates; influencing political developments in parliaments and governments; contributing the political aims they have developed to the public decision making and policy formation process; and ensuring a continuing active interrelationship between the people and the state institutions" (cited from the translation available at https://www.bmi.bund.de/SharedDocs/downloads/DE/gesetzestexte/Parteiengesetz_PartG_engl_042009.html, accessed 7 August 2024).

69 For an overview of the concept, see JW Müller, "Militant Democracy", in M Rosenfeld and A Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press (2012), pp 1253–1269.

Basic Law and manifested itself in a number of constitutional provisions.[70] With a view to defending the new democracy against not only the possible threat of a new Nazi party but a similar danger from a German Communist party,[71] Article 21(2) of the German Basic Law prescribes that parties that "seek to impair or destroy the free democratic basic order or to endanger the existence of the Federal Republic of Germany are unconstitutional". Only the Federal Constitutional Court has the authority to decide on a party's unconstitutionality (the so-called party privilege: see Article 21(4) cited above).

Until to date, there have been only two cases in which the Federal Constitutional Court decided to prohibit an anti-democratic political party, namely that of the Socialist Reich Party in 1952 and the German Communist Party in 1956. While in the first case the decision was based exclusively on the party's programme and internal structures,[72] in the second, a higher standard of proof was applied by the Constitutional Court. This requires that, to be declared unconstitutional, a political party has to have a "fixed purpose constantly and resolutely to combat the free democratic basic order" and that the purpose has to manifest itself in "political action according to a fixed plan of action".[73]

A third, and more recent, case – one which did *not* result in a ban in the end – was that of the National Democratic Party (NPD), which since 2023 has been renamed "The Homeland". Following a failed attempt to ban the NPD in the early 2000s (it failed due to procedural reasons), the Constitutional Court found the party to be unconstitutional in second proceedings that ended in 2017, but decided not to ban it because there were no indications that it would succeed in its anti-constitutional aims – that is, there was no imminent threat to the "free basic democratic order".[74]

---

70 For an overview, see M Thiel, "Germany", in M Thiel (ed.), *The Militant Democracy Principle in Modern Democracies*, Farnham, Ashgate (2009), pp 109–146.

71 See P Niesen, "Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties", 3 (2002) *German Law Journal,* pp 1–32, 5.

72 Federal Constitutional Court of Germany, Judgement, 23 October 1952, 1 BVB 1/51, BVerfGE 2, 1, English translation in Kommers and Miller, *supra* n. 65, pp 286–289.

73 Federal Constitutional Court of Germany, Judgement, 17 August 1956, 1 BvB 2/51, BVerfGE 5, 85, 139, quote cited from the English translation in Kommers and Miller, *supra* n. 65, pp 291.

74 Federal Constitutional Court of Germany, Judgement, 17 January 2017, 2 BvB 1/13, English translation available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2bvb000113en.html (accessed 25

The decision triggered a constitutional amendment to Article 21 of the Basic Law, now allowing, as a less severe restriction than a complete party ban, for state funding to be stripped where it cannot be determined conclusively that a political party "seeks to undermine or abolish" Germany's free democratic basic order but is only "oriented" towards it.[75] On the basis of the new provision, the Constitutional Court stripped the NPD of its state funding in January 2024 for a period of six years.[76] The decision was highly anticipated in a context where another far-right party, Alternative for Germany (AfD), has gained increasing popularity, consequently reviving the debate on how best to respond once more to the threat of anti-democratic parties.[77]

Among European constitutions, the German Basic Law is almost unique in providing explicitly for the possibility of prohibiting anti-democratic parties.[78] Only Croatia's constitution has a near-identical provision, whereas Poland's prohibits parties "whose programs are based upon totalitarian methods and the modes of activity of nazism, fascism and communism".[79] Likewise with an eye to the past, Italy's constitution explicitly prohibits the re-establishment of the dissolved Fascist party.[80] Apart from these examples, no other European constitutions have similarly explicit provisions.

So, while it cannot be said that the prohibition of anti-democratic parties is widely constitutionalised in Europe, the Venice Commission is of the view that the concept is indeed reflected in European human rights law.

---

July 2024). On the potential relevance of the underlying rationale of this decision for ethnic party bans in Africa, see J Socher and CM Fombad, "Prohibitions of Ethnic Political Parties and Constitutionalism in Sub-Saharan Africa", in CM Fombad, N Steytler, and Y Fessha (eds.), *Ethnicity and Constitutionalism in Africa*, Oxford, Oxford University Press, forthcoming.

75 Cf. the wording of the second with that of the third paragraph of Article 21 of the Basic Law, cited above.

76 Federal Constitutional Court of Germany, Judgement, 23 January 2024, 2 BvB 1/19, https://www.bverfg.de/e/bs20240123_2bvb000119.html (accessed 25 July 2024).

77 See, for example, the debate on *Verfassungsblog*, with contributions on party bans in Germany and Europe, https://verfassungsblog.de/category/debates/das-parteiverbot-in-deutschland-und-europa (accessed 13 August 2024).

78 See S Tyulkina, *Militant Democracy: Undemocratic Political Parties and Beyond*, London, Routledge (2015), pp 87–109; AK Bourne and FC Bértoa, "Mapping 'Militant Democracy': Variation in Party Ban Practices in European Democracies (1945–2015)", 13 (2017) *European Constitutional Law Review*, pp 221–247.

79 Article 6(3) of the 1990 Constitution of Croatia; Article 13 of the 1997 Constitution of Poland.

80 Article XII of the 1947 Constitution of Italy.

According to its guidelines on the regulation of political parties, the Abuse Clause in Article 17 of the ECHR, apart from its symbolic value, is a reflection of militant democracy: "The concept as such, that the Convention rights may not be used to destroy democracy and other's Convention rights, forms the backbone of several Court judgements".[81] Taking this view a step further, many commentators even argue that, based on the ECtHR's case law on the prohibition of political parties, militant democracy has become a European constitutional value.[82]

### 4.2 The requirement of intra-party democracy

A second distinctive feature of German party constitutionalisation – one which, in a way, could be seen as an application of the militant democracy concept to the internal organisation of political parties[83] – is the requirement of intra-party democracy found in the third sentence of Article 21(1) of the German Basic Law ("Their internal organisation must conform to democratic principles").

In the *Socialist Reich Party* case mentioned above, the Federal Constitutional Court decided that in essence the requirement means that a party must be structured from the bottom up; that is, members must not be excluded from decision-making processes, and the basic equality of members as well as the freedom to join or to leave the party must be guaranteed.[84]

Building on this decision, German constitutional doctrine interprets the notion "democratic principles" in Article 21(1) of the Basic Law largely in the same way as the democratic principle enshrined in other constitutional provisions in the constitution. The notion translates, as a result, into four

81 Venice Commission (2020), *supra* n. 41, para 121, citing ECHR, *Refah Partisi (the Welfare Party) and Others v Turkey,* nos. 41340/98, 13 February 2003, paras 98-99 and *Ždanoka v Latvia*, no. 58278/00, 16 March 2006, paras 98–101.

82 See, for example, P Macklem, "Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination", 4 (2006) *International Journal of Constitutional Law*, pp 488–516, 507–508; Tyulkina, *supra* n. 78, p 97; CS Botelho and N Garoupa, "Regulating Parties by Constitutional Rules in Democracies", 24 (2023) *German Law Journal*, pp 1648–1676, 1674.

83 On the nexus between the two aspects, see, for example, Y Mersel, "The Dissolution of Political Parties: The Problem of Internal Democracy", 4 (2006) *International Journal of Constitutional Law*, pp 84–113.

84 Federal Constitutional Court of Germany (1952), *supra* n. 65, para 174, cited from the English translation in Kommers and Miller, *supra* n. 65, p 288.

main principles governing a party's internal organisation: (1) political will has to be formed in a "bottom-up" process; (2) minorities within the party must be protected, in particular through the right to intra-party opposition; (3) party offices are temporary and a real chance for change in leadership must exist; and (4) party members' rights to articulate their political will has to be protected within the framework of internal party rules.[85] Details such as the role of party members in the selection of party representatives, the formulation of policies, or the right to dissent are regulated in Germany's Political Parties Act.[86]

Similar explicit constitutional provisions demanding that political parties be internally democratic exist only in a number of other European countries.[87] As with the prohibition of anti-democratic parties, there is only one other instance close to the German model, namely Croatia's constitution, which in its Article 6 provides that the "internal organisation of political parties shall be in accordance with fundamental constitutional democratic principles". In addition, only Portugal and Spain have explicitly constitutionalised the intra-party democracy requirement.[88]

This aspect of party constitutionalisation is therefore the exception rather than the rule in Europe, even though many constitutions proscribe it implicitly by requiring parties to serve or respect democratic principles or methods[89] and in other cases some countries have introduced the intra-party requirement at a statutory level in their party or election laws.[90] Accordingly, the Venice Commission takes a balanced view on the issue, stating in its guidelines on the regulation of political parties that

85 HP Schneider, "Die Institution der politischen Partei in der Bundesrepublik Deutschland", in DT Tsatsos, D Schefold, and HP Schneider (eds.), *Parteienrecht im europäischen Vergleich: Die Parteien in den demokratischen Ordnungen der Staaten der Europäischen Gemeinschaft*, Baden-Baden, Nomos (1990), pp 151–218, 195–200.

86 See R Wolfrum, *Die innerparteiliche demokratische Ordnung nach dem Parteiengesetz*, Berlin, Duncker & Humblot (1974); H Trautmann, *Innerparteiliche Demokratie im Parteienstaat,* Berlin, Duncker & Humblot (1975).

87 See I van Biezen and DR Piccio, "Shaping Intra-Party Democracy: On the Legal Regulation of Internal Party Organisations", in WP Cross and RS Katz (eds.), *The Challenges of Intra-Party Democracy*, Oxford, Oxford University Press (2013), pp 27–48.

88 Article 51(5) of the Constitution of Portugal; Article 6 of the Constitution of Spain.

89 See D Schefold, DT Tsatsos, and M Morlok, "Rechtsvergleichende Ausblicke", in DT Tsatsos, D Schefold, and HP Schneider (eds.), *Parteienrecht im europäischen Vergleich: Die Parteien in den demokratischen Ordnungen der Staaten der Europäischen Gemeinschaft,* Baden-Baden, Nomos (1990), pp 737–853, 809–810.

90 See Van Biezen and Piccio, *supra*, n. 87, p 39 (Table 3.4).

> while some kind of state regulation of the inner workings of political parties may be introduced, it is acceptable, in principle, that state interference is limited to requirements for parties to be transparent in their decision-making and to seek input from their membership when determining party constitutions and candidates.[91]

## 5. Conclusion

International human rights instruments highlight the importance of political parties' engagement in political activity and set binding minimum standards in regard to specific aspects of this activity. As was shown in the first section of this chapter, the ICCPR obliges state parties to allow political parties and to regulate their functioning; at the same time, while guaranteeing freedom of association for political parties, the ICCPR allows for restrictions to be imposed on them under certain conditions. What is more, other international instruments apart from the ICCPR provide for minimum standards in relation to particular aspects of party regulation, such as equal treatment and non-discrimination, as well as financing and transparency. General comments and recommendations, along with communications by international human rights monitoring bodies, provide further guidance on the interpretation of these provisions.

However, as the chapter's second section shows, in spite of increasing regional-level efforts towards harmonisation, Europe's experience with the constitutionalisation of political parties is that many different models in this regard continue to exist. The development of these models came in waves, with the waves by and large corresponding with broader waves of constitution-making and democratisation. Moreover, party constitutionalisation was often a reaction to an authoritarian past, be it to military rule in Southern Europe in the 1970s or to one-party rule in the former socialist countries of Central and Eastern Europe in the late 1980s and early 1990s. This observation is also true of the German party-state, where some of the most distinctive aspects of party constitutionalisation in the Basic Law can be understood (even if not exclusively) as a reaction to Nazi party rule.

Although different models exist, the constitutionalisation of political parties is the norm in Europe, with the most detailed frameworks to be found in the post-War constitutions of Austria, Germany, and Italy, all of which follow (as per van Biezen and Borz) the "Defending Democracy" model.

91 Venice Commission (2020), *supra* n. 41, para 155.

Arguably, this is also the most interesting model to look at when trying to find lessons for the African context, given that the vast majority of African countries have had similar experiences with authoritarian rule prior to democratisation.

Yet, while some of the principles enshrined in these European constitutions could provide inspiration for the further constitutionalisation of political parties in African countries, other concepts may be less suitable, or even prone to abuse. This might be the case especially in regard to the possibility of prohibiting anti-democratic parties. The Venice Commission is, at any event, apt to note in its guidelines on the regulation of political parties that while there is no uniform model on how to regulate the prohibition of parties, "there is a clear European approach as to how these rules are applied in practice: they are not applied".[92]

By contrast, the intra-party democracy requirement may be a more promising aspect of European party constitutionalisation to explore further through comparative research. As has been noted above, more and more European countries follow this approach, if not always explicitly and if not necessarily in their constitutions. However, an important caveat here is that the rules on intra-party democracy as envisaged in Germany, for example, are clearly based on the idea of a mass party.[93] While today's parties in Germany have developed away from that model and it is also arguably the case that democratic theories that justify intra-party democracy should be rethought,[94] they certainly do not fit in with the African context, where political parties may be better described as cartel parties rather than mass parties.[95] Thus, while the general idea of intra-party democracy has grown in popularity and, from the perspective of constitutional theory, has become more justifiable or even desirable, what this would mean in concrete terms is less clear and would need to be carefully considered in the relevant

92 Ibid, para 62.

93 Ibid, pp 44–45.

94 For a discussion of these theories in the German context, see K Detterbeck, "Alte und neue Probleme der innerparteilichen Demokratie", in M Morlok, T Poguntke, and E Sokolov (eds.), *Parteienstaat – Parteiendemokratie*, Baden-Baden, Nomos (2018), pp 123–142.

95 M Boogards, "Political Parties in Sub-Saharan Africa", in N Carter, D Keith, GM Sindre and S Vasilopoulou (eds.), *The Routledge Handbook of Political Parties,* Abingdon, Routledge (2023), pp 392–402.

context.[96] It is in any case important to remember that any requirements as to the internal organisation of political parties are, if adopted, a limitation of the right to freedom of association.

Beyond the two constitutional principles discussed here in more detail for which the German party-state became to be regarded as a pioneer and model, it could be worth analysing in more detail how other aspects of party regulation are dealt with in other European constitutions and how well they have travelled to other contexts. For example, further research could analyse and compare the experiences of other European countries with registration requirements (Latvia), the prohibition of ethnic and religious parties (Bulgaria),[97] or anti-party switching provisions (Portugal).[98]

Lastly, the example of Luxembourg, the most recent example of constitutionalisation of political parties in Europe, highlights the potential role of regional bodies such as the Venice Commission in these processes.[99] In its opinion on the planned reform, the Commission welcomed the constitutionalisation of political parties "in line with modern constitutional developments" and made some concrete recommendations. In particular, it noted the absence of a legal definition of political parties and suggested the development of such a definition.[100] In Africa, equivalent bodies could play a similar role as the Venice Commission in ensuring that international and regional minimum standards for the regulation of political parties are met.

While the case of Luxembourg was an exception and the first constitutionalisation of political parties in Europe was usually accompanied by more fundamental constitutional changes, the example of Germany illustrates that the detail and extent of the regulation of political parties in a constitution is not set in stone and that a changing political landscape and/or evolving constitutional doctrine may trigger adjustments in the constitutional framework. At any rate, it is a truism that different contexts

96 For some of the features proposed as well as the justifications for this, see Mersel, *supra* n. 83, pp 95–98.

97 See Article 11(4) of the 1991 Constitution of Bulgaria: "Political parties on ethnic, racial or religious lines, nor parties which seek the violent seizure of state power may not be formed."

98 See Article 163(3) of the 1976 Constitution of Portugal: "Deputies shall cease to hold office if they … join a different party from the one that nominates them for election."

99 See G Borz, "Justifying the Constitutional Regulation of Political Parties: A Framework for Analysis", 38 (2017) *International Political Science Review*, pp 99–113.

100 Venice Commission, *Interim Opinion on the Draft Constitutional Amendments of Luxembourg*, Opinion No. 544/2009, 14 December 2009, CDL-AD(2009)57, para 22.

require different design choices at different stages of constitutional development – sometimes resulting even in the deconstitutionalisation of certain aspects while introducing others.[101]

*References*

*Books, articles, chapters in books and others*

Bacio Terracino J, "Article 7: Public Sector", in C Rose, M Kubiciel, and O Landwehr (eds.), *The United Nations Convention against Corruption*, Oxford, Oxford University Press (2019), pp 65–77

Bértoa FC and Van Biezen I (eds.), *The Regulation of Post-Communist Party Politics*, London, Routledge (2017)

Bértoa FC, Piccio DR, and Rashkova ER, "Party Laws in Comparative Perspective", in I van Biezen and HM ten Napel (eds.), *Regulating Political Parties: European Democracies in Comparative Perspectives*, Leiden, Leiden University Press (2014), pp 119–148

Bogdanor V (ed.), *The British Constitution in the Twentieth Century,* Oxford, Oxford University Press (2004)

Boogards M, "Political Parties in Sub-Saharan Africa", in N Carter, D Keith, GM Sindre, and S Vasilopoulou (eds.), *The Routledge Handbook of Political Parties,* Abingdon, Routledge (2023), pp 392–402

Borz G, "Justifying the Constitutional Regulation of Political Parties: A Framework for Analysis", 38 (2017) *International Political Science Review*, pp 99–113

Botelho CS and Garoupa N, "Regulating Parties by Constitutional Rules in Democracies", 24 (2023) *German Law Journal*, pp 1648–1676

Bourne AK and Bértoa FC, "Mapping 'Militant Democracy': Variation in Party Ban Practices in European Democracies (1945–2015)", 13 (2017) *European Constitutional Law Review*, pp 221–247

De Sousa MR, "Die Institution der politischen Partei in Portugal", in DT Tsatsos, D Schefold, and HP Schneider (eds.), *Parteienrecht im europäischen Vergleich: Die Parteien in den demokratischen Ordnungen der Staaten der Europäischen Gemeinschaft,* Baden-Baden, Nomos (1990), pp 591–634

Detterbeck K, "Alte und neue Probleme der innerparteilichen Demokratie", in M Morlok, T Poguntke, and E Sokolov (eds.), *Parteienstaat – Parteiendemokratie*, Baden-Baden, Nomos (2018), pp 123–142

101 As happened in Portugal, for example, where several references to political parties were removed by a constitutional amendment in 1982 while simultaneously strengthening their constitutionalisation in other provisions. See MR de Sousa, "Die Institution der politischen Partei in Portugal", in DT Tsatsos, D Schefold, and HP Schneider (eds.), *Parteienrecht im europäischen Vergleich: Die Parteien in den demokratischen Ordnungen der Staaten der Europäischen Gemeinschaft,* Baden-Baden, Nomos (1990), pp 591–634, 603.

Elster J, "Forces and Mechanisms in the Constitution-making Process", 45 (1995) *Duke Law Journal*, pp 364–396

Fox GH and Nolte G, "Intolerant Democracies", in GH Fox and BR Roth (eds.), *Democratic Governance and International Law*, Cambridge, Cambridge University Press (2010), pp 389–435

Fox GH, "The Right to Political Participation in International Law", in GH Fox and BR Roth (eds.), *Democratic Governance and International Law*, Cambridge, Cambridge University Press (2010), pp 48–90

Fromont M, "Die Institution der politischen Partei in Frankreich", in DT Tsatsos, D Schefold, and HP Schneider (eds.), *Parteienrecht im europäischen Vergleich: Die Parteien in den demokratischen Ordnungen der Staaten der Europäischen Gemeinschaft,* Baden-Baden, Nomos (1990), pp 219–260

Grobbelaar du Plessis I and Njau J, "Article 29: Participation in Political and Public Life", in I Bantekas, MA Stein and D Anastasiou (eds.), *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford, Oxford University Press (2018), pp 834–862

Huntington SP, *The Third Wave: Democratisation in the Late Twentieth Century*, Norman, University of Oklahoma Press (1991)

Kommers DP and Miller RA, *The Constitutional Jurisprudence of the Federal Republic of Germany,* Durham, Duke University Press, 3rd edn (2012)

Lanchester F, "Die Institution der politischen Partei in Italien", in DT Tsatsos, D Schefold, and HP Schneider (eds.), *Parteienrecht im europäischen Vergleich: Die Parteien in den demokratischen Ordnungen der Staaten der Europäischen Gemeinschaft,* Baden-Baden, Nomos (1990), pp 367–434

Macklem P, "Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination", 4 (2006) *International Journal of Constitutional Law*, pp 488–516

Mersel Y, "The Dissolution of Political Parties: The Problem of Internal Democracy", 4 (2006) *International Journal of Constitutional Law,* pp 84–113

Müller JW, "Militant Democracy", in M Rosenfeld and A Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press (2012), pp 1253–1269

Niesen P, "Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties", 3 (2002) *German Law Journal,* pp 1–32

Piccio DR, "A Self-Interested Legislator? Party Regulation in Italy", 19 (2014) *South European Society and Politics,* pp 135–152

Schefold D, Tsatsos DT, and Morlok M, "Rechtsvergleichende Ausblicke", in DT Tsatsos, D Schefold, and HP Schneider (eds.), *Parteienrecht im europäischen Vergleich: Die Parteien in den demokratischen Ordnungen der Staaten der Europäischen Gemeinschaft,* Baden-Baden, Nomos (1990), pp 737–853

Schneider CJ, "Political Parties and the German Basic Law of 1949", 10 (1957) *The Western Political Quarterly*, pp 527–540

Schneider HP, "Die Institution der politischen Partei in der Bundesrepublik Deutschland", in DT Tsatsos, D Schefold, and HP Schneider (eds.), *Parteienrecht im europäischen Vergleich: Die Parteien in den demokratischen Ordnungen der Staaten der Europäischen Gemeinschaft,* Baden-Baden, Nomos (1990), pp 151–218

Socher J and Fombad CM, "Prohibitions of Ethnic Political Parties and Constitutionalism in Sub-Saharan Africa", in C Fombad, N Steytler, and Y Fessha (eds.), *Ethnicity and Constitutionalism in Africa*, Oxford, Oxford University Press, forthcoming

Taylor PM, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*, Cambridge, Cambridge University Press (2020)

Thiel M, "Germany", in M Thiel (ed.), *The Militant Democracy Principle in Modern Democracies*, Farnham, Ashgate (2009), pp 109–146

Thornberry P, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, Oxford, Oxford University Press (2016)

Trautmann H, *Innerparteiliche Demokratie im Parteienstaat,* Berlin, Duncker & Humblot (1975)

Tsatsos DT and Kedzia Z (eds.), *Parteienrecht in mittel- und osteuropäischen Staaten: Entstehungsmomente des Parteienrechts in Bulgarien, Litauen, Polen, Russland, der Slowakei, Tschechien und Ungarn*, Baden-Baden, Nomos (1994)

Tsatsos DT, Schefold D and Schneider HP (eds.), *Parteienrecht im europäischen Vergleich: Die Parteien in den demokratischen Ordnungen der Staaten der Europäischen Gemeinschaft,* Baden-Baden, Nomos (1990)

Tyulkina S, *Militant Democracy: Undemocratic Political Parties and Beyond*, London, Routledge (2015)

United Nations Development Programme (UNDP) and National Democratic Institute for International Affairs, *Empowering Women for Stronger Political Parties: A Guidebook to Promote Women's Political Participation*, New York, UNDP (2012)

United Nations Office on Drugs and Crime (UNODC), *Technical Guide to the United Nations Convention Against Corruption*, New York, United Nations (2009)

Van Biezen I and Bértoa FC, "Party Regulation in Post-authoritarian Contexts: Southern Europe in Comparative Perspective", 19 (2014) *South European Society and Politics*, pp 71–87

Van Biezen I and Borz G, "Models of Party Democracy: Patterns of Party Regulation in Post-war European Constitutions", 42 (2012) *European Political Science Review*, pp 327–359

Van Biezen I and Napel ten HM (eds.), *Regulating Political Parties: European Democracies in Comparative Perspectives,* Leiden, Leiden University Press (2014)

Van Biezen I and Piccio DR, "Shaping Intra-Party Democracy: On the Legal Regulation of Internal Party Organisations", in WP Cross and RS Katz (eds.), *The Challenges of Intra-Party Democracy*, Oxford, Oxford University Press (2013), pp 27–48

Van Biezen I, "Constitutionalising Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe", 42 (2012) *British Journal of Political Science*, pp 187–212

Van Biezen I, "The Constitutionalisation of Political Parties in Post-war Europe", in I van Biezen and HM ten Napel (eds.), *Regulating Political Parties: European Democracies in Comparative Perspectives,* Leiden, Leiden University Press (2014), pp 93–118

Wittkopp S, "Article 7", in P Schulz, R Halperin-Kaddari, B Rudolf, and MA Freeman (eds.), *The UN Convention on the Elimination of All Forms of Discrimination against Women and Its Optional Protocol: A Commentary*, 2nd ed, Oxford, Oxford University Press (2022)

Wolfrum R, *Die innerparteiliche demokratische Ordnung nach dem Parteiengesetz*, Berlin, Duncker & Humblot (1974)

Wood T, "Reinforcing Participatory Governance Through International Human Rights Obligations of Political Parties", 28 (2015) *Harvard Human Rights Journal*, pp 145–200

*Table of cases*

*United Nations Commission on Human Rights communication*

MA v Italy, Communication No. 117/1981, Supp. No. 40, A/39/40 (1984)

*United Nations Human Rights Committee communications*

CCPR/C/48/D/313/1988 (Bwalya v Zambia), 14 July 1993

CCPR/CO/73/AZE (Azerbaijan), 12 November 2001

CCPR/CO/75/MDA (Moldova), 5 August 2002

CCPR/C/UZB/CO/3 (Uzbekistan), 7 April 2010

CCPR/C/KAZ/CO/1 (Kazakhstan), 19 August 2011

CCPR/C/TKM/CO/2 (Turkmenistan), 20 April 2017

CCPR/C/SWZ/CO/1 (Swaziland), 23 August 2017

CEDAW/C/NPL/CO/6 (Nepal), 14 November 2018

CCPR/C/BLR/CO/5 (Belarus), 22 November 2018

CEDAW/C/COL/CO/9 (Colombia), 14 March 2019

CEDAW/C/GUY/CO/9 (Guyana), 30 July 2019

CCPR/CO/72/PRK (Democratic People's Republic of Korea), 27 August 2001

*European Court of Human Rights cases*

Case of Refah Partisi (the Welfare Party) and Others v Turkey, Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003

Ždanoka v Latvia, Application No. 58278/00, 16 March 2006

*National court cases*

Federal Constitutional Court of Germany, Judgement, 17 August 1956, 1 BvB 2/51, BVerfGE 5, 85

Federal Constitutional Court of Germany, Judgement, 5 April 1952, 2 BvH 1/52, BVerfGE 208

Federal Constitutional Court of Germany, Judgement, 20 July 1954, 1 PBvU 1/54, BVerfGE 4, 27

Federal Constitutional Court of Germany, Judgement, 19 July 1966, 2 BvF 1/65, BVerfGE 20, 56

Federal Constitutional Court of Germany, Judgement, 17 January 2017, 2 BvB 1/13

Federal Constitutional Court of Germany, Judgement, 23 January 2024, 2 BvB 1/19

Federal Constitutional Court of Germany, Judgement, 23 October 1952, 1 BVB 1/51, BVerfGE 2, 1

*Table of legislation*

*National legislation*

Constitution of the Federal Republic of Germany, 23 May 1949, last amended on 19 December 2022

German Political Parties Act, 24 July 1967, last amended on 27 February 2024

*Comments, guidance, and opinions by international bodies*

Committee on the Elimination of all Forms of Discrimination against Women, General Recommendation No. 23: Political and Public Life, 1997, A/52/38

Committee on the Elimination of all Forms of Discrimination against Women, General Recommendation No. 25: Temporary Special Measures, 18 August 2004

Committee on the Rights of Persons with Disabilities, General Comment No. 2: Article 9: Accessibility, 22 May 2014, CPRD/C/GC/2

European Commission for Democracy through Law (Venice Commission), *Guidelines and Explanatory Report on Legislation on Political Parties: Some Specific Issues*, 12–13 March 2004, CDL-AD(2004)007rev

European Commission for Democracy through Law (Venice Commission), *Guidelines and Report* on the Financing of Political Parties, 9–10 March 2001, CDL-INF(2001)008

European Commission for Democracy through Law (Venice Commission), *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*, 10–11 December 1999, CDL-INF(2000)001

European Commission for Democracy through Law (Venice Commission), *Opinion on the Draft Amendments to the Law on Political Parties of Bulgaria*, Opinion No. 505/2008, 15 December 2008, CDL-AD(2008)034.

European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, Opinion No. 489/2008, 13 March 2009, CDL-AD (2009) 006

European Commission for Democracy through Law (Venice Commission), *Interim Opinion on the Draft Constitutional Amendments of Luxembourg*, Opinion No. 544/2009, 14 December 2009, CDL-AD(2009)57

European Commission for Democracy through Law (Venice Commission), *Report on the Method of Nomination of Candidates within Political Parties*, Study No. 721/2013, CDL-AD(2015)020

European Commission for Democracy through Law (Venice Commission), *Guidelines on Political Party Regulation*, 2nd ed, 14 December 2020, CDL-AD(2020)032

OSCE/ODIHR-Venice Commission, *Joint Opinion on the Draft Act to Regulate the Formation, Inner Structures, Functioning and Financing of Political Parties and their Participation in Elections of Malta*, Opinion No. 780/2014, 14 October 2014, CDL-AD(2014)035

United Nations Human Rights Committee, General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), 12 July 1996, CCPR/C/21/Rev.1/Add.7

United Nations Human Rights Committee, General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), 29 March 2000, CCPR/C/21/rev.1/Add.10

United Nations Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation on State Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13

United Nations Human Rights Committee, General Comment No. 32: Article 14 ICCPR: Right to Equality Before Courts and Tribunals and to a Fair Trial, 23 August 2007, CCPR/C/CG/32