

The Constitutionalization of Political Parties in Post-war Europe¹

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Introduction

The constitutions of western liberal democracies have traditionally paid little attention to the role of political parties. In part, this is a consequence of a historical sequence in which the adoption of the constitution in many countries predated the appearance of political parties. In addition, the long-standing absence of political parties from national constitutions can also be seen as a product of particular normative conceptions of democracy, which have long been incompatible with the phenomenon of political parties. These conceptions tended to be premised on the association between democracy and direct rather than indirect forms of political participation and decision-making, and generally perceived political parties as a threat to the – supposedly neutral – common interest (Daalder 2002). Ultimately, it seemed that the phenomenon of the political party remained difficult to reconcile with democratic traditions that are based either on the notion of individual liberty or with those which embrace the existence of something like a general will.

In contemporary democracies, however, political parties have come to be seen as procedurally necessary and democratically desirable institutions, even amid increasing concern that their actual functioning may sometimes undermine the quality of democracy. The relevance of political parties for modern democracy has also become recognized increasingly in constitutional terms. Indeed, the period following World War Two has witnessed an ongoing process of party constitutionalization in European democracies, with the restoration of democracy in Italy and the Federal Republic of Germany, in 1947 and 1949 respectively, providing the most notable examples. This practice of party constitutionalization has since been followed in constitutional revisions in many other polities,² to the point

where the large majority of European democracies today acknowledge not only the existence of political parties in their constitutions in one form or another but also that political participation, representation, pluralism and competition in many democratic constitutions have come to be defined increasingly, if not almost exclusively, in terms of party. Indeed, especially in many of the more recently established democracies in Southern and Eastern Europe that emerged out of recent waves of democratization, the very establishment of democratic procedures was often identified with the establishment of free competition between parties. Political parties were thus often attributed a pivotal role and privileged constitutional position.

Relatively little is known, however, about the process of party constitutionalization, about the substantive content of the constitutional position of political parties, about the regional or temporal variation between and within countries, or about the normative connotations of the parties' constitutional codification. As Bogdanor (2004: 718) observes, 'it is perhaps because the law has been so late in recognizing political parties that constitutional lawyers and other writers on the constitution have taken insufficient note of the fact that parties are so central to our constitutional arrangements'. This chapter partly addresses that gap in the literature by providing a cross-sectional and longitudinal overview of the patterns of party constitutionalization across Europe and exploring both the empirical and normative dimensions of party constitutionalization. In doing so, its aim is not only to contribute to a better understanding of the ways in which the constitutional codification of political parties varies between countries and over time, but also of the underlying normative conceptions about their role and place within the institutional architecture of the democratic polity.

Constitutionalizing party democracy

This section presents a descriptive overview of the process of party constitutionalization in post-war European democracies. By party constitutionalization we understand the incorporation of (an) explicit reference(s) to political parties, either as direct or indirect subjects, in the national constitution. The process is schematically represented in Figure 1, which depicts the chronology of party constitutionalization in post-war Europe. As can be seen from it, the constitutionalization of political parties was somewhat of a novelty in the immediate post-war period. By the end of the 1940s, only a handful of constitutions (Iceland,

Austria, Italy and Germany) contained references to political parties. In the subsequent two decades, only three more countries followed suit (France, Cyprus and Malta). The strongest impulse in the diffusion of party constitutionalization emerged from the third and fourth waves of democratization in Southern Europe in the mid 1970s and post-communist Central and Eastern Europe in the early 1990s: each of these new democracies enshrined the position of political parties in their new constitutions in the wake of the transition towards democracy. Most recently, Finland and Switzerland (both in 1999) and Luxembourg (in 2008) have amended their constitutions so as explicitly to include special references to the role and functions of political parties.

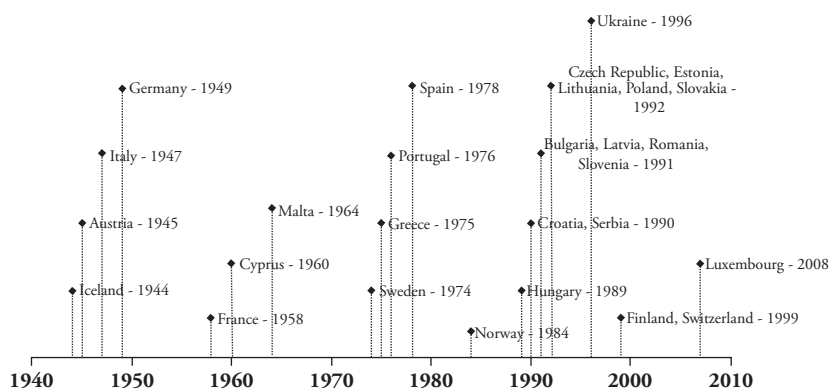


Figure 1. Waves of post-war party constitutionalization

The result of this ongoing process of party constitutionalization is that the large majority of post-war European democracies (28 out of 33) now acknowledge political parties in their constitutions in one form or another. It is only in four of the longer-established European democracies (Belgium, Denmark, Ireland, and the Netherlands – see also Nehmelman in this volume) that political parties are not mentioned in the national constitution.³ This codification of parties by national constitutions corresponds with a more general trend, as described by the various contributors to this volume, by which political parties in contemporary democracies are becoming increasingly subject to regulations and laws that govern their behaviour, activities, and organization.

Figure 1 shows that Iceland presents the earliest instance of party constitutionalization in post-war Europe. This occurred in 1944, when the country became formally independent from Danish rule.⁴ It provides a

good example of the indirect constitutionalization, with article 31 stating that:

[...] In allocating seats according to the election results, it shall be ensured to the extent possible that each political party having gained a seat in Althingi receive the number of Members of Althingi which is as closely as possible in accordance with the total number of votes it has obtained.⁵

Elections rather than parties are the actual subject of constitutional regulation in this case, as the main purpose of this constitutional provision is to enshrine a principle of proportional representation for national parliamentary elections rather than describing the role of parties within the political system. The reference to political parties in the Icelandic constitution thus appears only incidental and the allusion to their presence seems to take their existence for granted. Nonetheless, albeit couched in implicit terms, the Icelandic constitution presented a constitutional novelty in Europe at the time, being the first to create an unequivocal association between political parties and elections and thus effectively to acknowledge the institutional relevance of parties in the context of a modern representative democracy. We shall call this type of constitutional codification, whereby political parties are acknowledged, implicitly or explicitly, as necessary institutions for modern representative democracy, the constitutionalization of parties as a *functional necessity*.

Similarly, the subsequent case of party constitutionalization, i.e. Austria in 1945, is one in which parties are equally treated primarily as indirect subjects. The Austrian constitution was adopted in the wake of the restoration of democracy following World War Two and effectively reinstated the pre-war 1929 federal constitution (which had first been adopted in 1920 following the collapse of the Austro-Hungarian monarchy after World War One), while at the same time rescinding the Austrofascist constitution of 1934. Despite containing a relatively large number of provisions referring to political parties, the Austrian constitution does little to elaborate on the significance of political parties for the political system or the democratic decision-making process and seems to take their necessary existence more or less for granted (Pelinka 1971: 265). Moreover, the Austrian constitution barely recognizes or acknowledges political parties as institutions in their own right, but usually refers to them in their manifestation as parliamentary groups, or in their electoral capacity (i.e. as *Wahlparteien*). The only reference in the Austrian constitution to

political parties per se consists of a negative clause: persons who hold office in a political party cannot be members of the Constitutional Court (art.147.4). The Austrian constitution does illustrate, however, that the constitutionalization of parties is not exclusively a post-war phenomenon, as it incorporates a number of provisions from the earlier pre-war constitution. Moreover, the case of Austria echoes the 1919 constitution of Weimar Germany, in which the reference to political parties involved a requirement for the political neutrality of public officials, stipulating that 'civil servants are servants of the public as a whole, not of a party' (art. 130). As we shall see below, similar constitutional provisions, aimed at safeguarding the neutrality of the institutions of the state from partisan interests, can be found in many contemporary democracies.

The constitutionalization of parties in Iceland and Austria was followed by Italy in 1947 and by the Federal Republic of Germany two years later. The German Basic Law, together with the similar, but less detailed, article on political parties which had previously appeared in the Italian constitution, was one of the first cases of what could be called a positive constitutional codification of political parties in post-war Europe, attributing to political parties a constructive role in the democratic system. The Italian and German constitutions thus, as Pelizzo (2004: 130) notes, 'represent a novelty in the history of formal constitutional texts as they explicitly recognize the constitutional role and relevance of political parties in the functioning of democratic polities.' Moreover, and perhaps more importantly, both constitutions establish that the constitutional relevance of political parties is not confined to the role they perform in elections. This stands in sharp contrast to the earlier cases of party constitutionalization in Iceland and Austria, as well as some later examples such as in Sweden, Norway and Finland, where the constitutional relevance of political parties is essentially linked to their electoral functions. The Italian and German constitutions thus recognize that political parties are not only necessary but also desirable institutions in modern democracies. We shall refer to this type of constitutional codification as the constitutionalization of political parties as a *democratic desirability*.

While the Italian constitution stipulates that '[a]ll citizens shall have the right to associate freely in political parties in order to contribute by democratic means to the determination of national policy' (art. 49), it is only in the German Basic Law that political parties, rather than citizens (as in Italy) or elections (Iceland and Austria), become the direct subject of constitutionalization. Article 21 – entitled Political Parties – regulates issues such as the freedom of political parties, their role in the formation of

the political will, intra-party democracy, and the duty of parties to account for their assets. Furthermore, the German constitution does not tolerate political parties with purposes or activities antithetical to the democratic constitutional order, a provision which has subsequently provided the foundation for a constitutional ban on the descendants of the Nazi and Communist Parties (Kommers 1997: 217-24). More specifically, article 21 of the Basic Law, as amended in 1984, states:

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

Article 21 thus constitutionalizes political parties, and ‘formally acknowledges that they have a genuine and legitimate function to perform in modern democratic government.’ (Schneider 1957: 527). By assigning a key role to parties in the formation of the political will of the people, the German constitution associates one of the key principles of democracy with the institution of the political party and invests parties with the status of institutions under constitutional law. At a time when political parties had been constitutionally codified in only a handful of European democracies, the German Basic Law represented the most comprehensive set of constitutional rules on political parties (Tsatsos 2002).

The practice of party constitutionalization has since been followed in constitutional revisions in many other countries, with many taking their cue from the German model. This is true in particular of the new (third and fourth wave) democracies, in which parties are usually the direct subject of constitutionalization and which in most cases have constitutionalized political parties as a democratic desirability. In most of the older democracies, parties tend to be constitutionalized as indirect subjects and are usually regarded implicitly as a functional necessity for democratic elections (see Table 1).

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

	Parties are a functional necessity	Parties are democratically desirable	Other
Indirect subject	Iceland (1944), Austria (1945), Cyprus (1960), Malta (1964), Sweden (1974), Norway (1984), Finland (1999)	Italy (1947), <i>Latvia</i> (1991), <i>Lithuania</i> (1992), <i>Ukraine</i> (1996)	<i>Slovenia</i> (1991), <i>Estonia</i> (1992)
Direct subject	France (1958)	Germany (1949), <i>Greece</i> (1974), <i>Portugal</i> (1976), <i>Spain</i> (1978), <i>Hungary</i> (1989), <i>Croatia</i> (1990), <i>Serbia</i> (1990), <i>Bulgaria</i> (1991), <i>Romania</i> (1991), <i>Romania</i> (1991), <i>Czech</i> <i>Republic</i> (1992), <i>Slovakia</i> (1992), <i>Poland</i> (1992), Switzerland (1999), Luxembourg (2008)	

The only older countries to resemble Germany and the newer democracies are Switzerland and Luxembourg, which have recently amended their constitutions so as to incorporate political parties. In the latter, a new article was added to the constitution in 2008, which reads that ‘Political parties contribute to the formation of the popular will and the expression of universal suffrage. They express democratic pluralism.’ (art. 32bis) (Dumont *et al.* 2008: 1061).⁶ This amendment was officially motivated by the perceived need to modernize the constitution in line with the political reality of representative democracy and a desire to underscore the importance of political parties for the healthy functioning of the democratic system.⁷ In reality, however, an important part of the need constitutionally to codify their democratic importance seems to have been driven by the desire to provide a more solid legal basis for, and thereby enhance the legitimacy of, the direct state subsidies to political parties (Borz 2011). At the same time, the underlying logic behind the constitutional codification of parties in this case may be the basic principle of *do ut des* (Pacini & Piccio 2012): political

parties benefiting from public funding (or other resources such as media access) should become embedded within a regulatory framework so as to provide a legal basis for both their privileges and obligations.

The differences in the nature of party constitutionalization suggest that significant differences exist between new and old democracies. In this light, it is important to observe that the pattern of party constitutionalization as sketched in Figure 1 corresponds closely to the waves which Elster (1995) has identified as waves of constitution-making and which Huntington (1991) has observed for democratization processes (for a more elaborate discussion see van Biezen 2012). On this view, Iceland, Austria, Italy and Germany form part of the first wave of post-war party constitutionalization. A next wave was connected with the break-up of the French and British colonial empires: the establishment of the French Vth Republic in 1958, as well as Cyprus and Malta on acquiring independence in 1960 and 1964 respectively. A further wave of party constitutionalization corresponds to the third wave of democratization in Southern Europe (Greece, Portugal and Spain) in the mid 1970s, while a in a fourth wave the post-communist democracies in Central and Eastern Europe adopted new constitutions after the fall of communism in the late 1980s and early 1990s.

This suggests that moments of institutional restructuring in post-war Europe, including the establishment or the restoration of democracy as well as the (re)establishment of independent nation states, was always accompanied by the incorporation of parties in the newly written constitutions. The constitutional codification of political parties, therefore, is usually a product of a (re)constitutive moment, which often occurs in a context of institutional flux. Conventional amendments, on the other hand, such as the ones we find in Norway, Finland and Luxembourg, constitute a rather unusual mode of party constitutionalization. That political parties, without exception, were incorporated in the very first constitutions adopted by the newly established democratic states is indicative of the ways in which party democracy is understood, be it in normative or empirical terms, by the actors involved in the democratization and constitution-writing processes. It suggests, as Kopecký (1995: 516) has observed in the context of the post-communist democracies, that among the designers of these constitutions a conception of democracy prevailed, whether conscious or unconscious, in which political parties are the core foundation of a democratic polity.

Dimensions of party constitutionalization

Across European democracies, significant variation exists in the intensity as well as the substance of party constitutionalization. The intensity with which constitutions have codified the position of political parties can be measured along two dimensions: the absolute number of constitutional provisions about political parties, which we may call the *magnitude* of party constitutionalization, and the *range* of party constitutionalization, which refers to the scope encompassed by the different constitutional stipulations (van Biezen & Borz 2012). In some countries, the constitution says very little about political parties. Latvia constitutes an example on the extreme end of the spectrum, with the current constitution merely stating that [e]veryone has the right to form and join associations, political parties and other public organizations.' (art. 102). Other examples of low intensity constitutionalization include countries such as Iceland and Luxembourg, cited above, where the constitutions make only a short reference to political parties and the scope is limited to a single feature (elections in Iceland; democratic principles in Luxembourg). At the other extreme, we find countries such as Portugal and Greece, which stand out for high scores on both aspects, with the constitutions containing a high number of provisions on a large number of dimensions, including the rights and freedoms of political parties, their internal organizational structures, access to public resources such as state funding and the broadcasting media, mechanisms of judicial oversight of party activity and behaviour, and so on. In other countries such as Germany, but also Croatia and Serbia, the constitutional regulation of parties encompasses many categories (i.e. a high range) but with a relatively limited amount of detail (i.e. a low magnitude). Finally, in some countries (e.g. Sweden), the constitutions outline the place of parties in a small number of areas (in this case the electoral and parliamentary arena) but in relatively great detail.

Although the range and magnitude of regulation in principle may vary independently of each other (except that the magnitude cannot be lower than the range), in practice there is a strong correlation between the two. In addition, the differences in the intensity of party constitutionalization seem to suggest that the distinction between old and new democracies plays a role, with newer democracies tending towards a higher intensity of constitutionalization than their older counterparts. These differences are corroborated by significance tests: the magnitude of party constitutionalization in the newer democracies, which includes the younger Southern European democracies of Greece, Portugal and

Spain together with the post-1989 democracies in Central and Eastern Europe, is more than twice as high as in the older ones. In addition, the constitutional codification of parties in the new democracies encompasses twice as many areas, with the average range of party constitutionalization more than twice as high as in their older counterparts. The difference between the two groups of countries on both the magnitude and range of constitutionalization is statistically significant at the .05 level. Also significant are the differences between countries with a continuous democratic experience, on the one hand, and those with an unstable (or non-existent) democratic history, on the other. The latter include not only the more recent third and fourth wave democracies in Southern and Eastern Europe, but also the re-established democracies of Austria, Germany and Italy. The constitutions of countries that have experienced a period of non-democratic rule at some point during the twentieth century encompass a range that is more than three times as high compared to the so-called continuous democracies. Equally, the magnitude of party constitutionalization in the former is more than three times as high as in the continuous democracies. The differences between the two groups of countries are also significant at the .05 level on both dimensions (for more details see van Biezen & Borz 2012).

This suggests that a non-democratic experience is a powerful driving force behind the constitutional codification of political parties. Indeed, the constitutions of the more recently established democracies in Southern Europe and Central and Eastern Europe as well as the democracies re-constituted in the immediate aftermath of WWII (i.e. Austria, Italy and Germany) tend to regulate parties significantly more extensively than the older liberal democracies on nearly all domains. The constitutions of the older democracies stand out for privileging the parties in their electoral capacity, which is clearly a consequence of the predominant mode of constitutionalization by which parties are primarily conceived as a functional necessity for the conduct of democratic elections (cf. also Table 1).

The newness of democracy and the democratic history play a role not only with regard to the intensity but also the substance of party constitutionalization. When they refer to political parties, what do constitutions actually say? A content analysis reveals that provisions may range from symbolic and largely unenforceable stipulations about the contribution political parties (ought to) make to the realization of important democratic values and principles, such as popular sovereignty or political participation, for example, to detailed prescriptions about the

structure and functioning of the extra-parliamentary party organization, demanding that parties be internally democratic and structured from the bottom up along the lines of the classical mass party. Constitutions may emphasize the democratic rights and freedoms of political parties and their members, such as the freedoms of association, speech and assembly, while at the same time prescribing the activities and behaviour of the parties in the parliamentary, governmental and extra-parliamentary arenas. They may proscribe certain (anti-democratic) forms of behaviour or ideological orientations which are adverse to the democratic constitutional order and may establish a system of judicial monitoring of the parties' behaviour and activities.

For the content analysis of national constitutions we have adopted an analytical framework of party constitutionalization which is based on four broader domains (cf. Frankenberg 2006): i) democratic principles, outlining the role of political parties in terms of the fundamental values upon which the polity is based, such as participation, popular sovereignty, equality, or pluralism; ii) rights and duties, outlining the parties' relevant democratic liberties, such as the freedoms of association, assembly, and speech, as well as their responsibilities, including their duty to abide by certain rules on permissible forms of party activity and behaviour, or ideological and programmatic identity; iii) the institutional structure of the political system, including constitutional rules that apply to the extra-parliamentary organization, parties in their electoral capacity, parties as parliamentary groups, and the party in public office; and iv) 'meta-rules', establishing the hierarchy within the legal order and outlining the rules of constitutional interpretation and revision, including those which establish external judicial control on the lawfulness and constitutionality of party activity and identity. Each of these can be further divided into several sub-categories, such that we arrive at 11 different categories within four broader domains (for more details see van Biezen & Borz 2012). The relative importance of these elements, as well as the normative importance attached to them, has fluctuated over time and also varies between countries.

A small majority of countries associate political parties with essential democratic principles, such as political participation, pluralism, or popular sovereignty. The first sentence of article 6 of the Spanish constitution, for example, states that 'Political parties are the expression of political pluralism, they contribute to the formation and expression of the will of the people and are an essential instrument for political participation.' With only a few exceptions (e.g. the Luxembourg constitution cited

earlier), this type of constitutional codification tends to exist primarily in countries with an authoritarian or totalitarian past. This suggests that a preceding non-democratic experience is a powerful driving force, although not a necessary or sufficient condition, behind the identification of basic democratic values with the presence of political parties. The legacy of the non-democratic past is also manifest, and even more forcefully so, with regard to the identification of political parties with the freedoms of association, assembly, and speech.⁸ Indeed, most of the new or re-established democracies insist on a clear separation between political parties and the state by primarily associating parties with basic democratic liberties and underlining the private character of party organization and ideology. The prevalence of this type of provision may in part be a consequence of the growing importance that the constitutional bill of rights has now acquired as the essence of democracy (Bellamy 2007: 6). However, it is also likely that, in post-undemocratic regimes in particular, the constitutional recognition of political parties in terms of fundamental democratic liberties should be understood in light of the desire to identify and strengthen a private sphere that is free from state intervention. Hence, in democracies with an authoritarian or totalitarian past, a legacy of the non-democratic past is reflected in the new constitutions establishing an explicitly private sphere of social life, guaranteed by a judicially enforceable bill of rights (cf. Shapiro & Stone 1994).

Typical of post-communist democracies in particular, the intention to maintain clear boundaries between political parties and the institutions of the state can also be seen from the many provisions which regulate the incompatibility of party membership with certain elected or public offices, such as the judiciary, the law enforcement and security services, and the presidency of the republic. The Slovakian constitution in fact explicitly requires as much, by stipulating that 'political parties and political movements ... shall be separate from the State.' (art. 29.4) By demanding the political neutrality of public officers, such provisions also reflect an attempt to distance the democratic system from the past regime, in which the Communist Parties exercised more or less complete control over the institutions of the state.

Seemingly paradoxically, countries which most strongly emphasize the parties' constitutional freedoms are also the ones which are most likely to constrain party ideology or behaviour, as is revealed by the high incidence of constitutional provisions which aim to regulate permissible types of party activity and behaviour or the parties' programmatic and ideological orientations.⁹ It is not uncommon for new and re-established democracies

to prohibit political parties that are averse to the fundamental values of the democratic constitutional order. Hence, in an attempt to safeguard the often still fragile new regime from extremist, insurrectionary and separatist parties, these constitutions usually demand that parties respect democratic principles, as well as the national sovereignty and territorial integrity of the state. In doing so, they follow a general pattern whereby post-war constitutions typically reaffirm human rights in general, but also make efforts to restrict these rights in such a way as to make them unavailable to the enemies of constitutional democracy (Friedrich 1951: 18). Banning parties or impeding their activities with a view to the very survival of the democratic system touches upon the question of 'democratic intolerance' (Fox & Nolte 1995): how much tolerance should democratic governments exhibit towards antidemocratic actors in the name of preserving the governments' fundamental democratic character'? (see also Bale in this volume)¹⁰ Political parties appear only qualified bearers of the democratic freedoms of association and speech: they enjoy their rights only to the extent that they themselves are the essential servants of the democratic process' (Issacharoff 2001: 313).

Remarkable in this respect also is the fact that nearly two thirds of the democratic European constitutions contain provisions which regulate the structure and functioning of the extra-parliamentary organization. Many of the newer European democracies in particular appear to follow what Janda (2005) has called a 'prescription model' of party regulation, seeking legally to mould parties to correspond to a certain ideal type and privileging the – arguably outdated – mass party model over other styles of party politics. Various constitutions demand, for example, that the internal structures and organization of political parties are democratic. This requirement was first made explicit in the German Basic Law (art. 21.1) and has since been adopted in a number of other countries, enshrining this condition in the constitution first adopted in the wake of the transition to democracy (as in Spain in 1978) or incorporating it in the process of constitutional revision (Portugal in 1997, Croatia in 2000). The Portuguese constitution is the most explicit and requires that political parties be governed not only by the principles of transparency, democratic organization and management but also by the participation of all of their members (art. 51.5). In other countries, such as Greece, Italy and France or the post-communist democracies of Bulgaria, Lithuania and Poland, the principle of internal party democracy may be considered to be implicitly present in the constitutional requirement that political parties either serve or respect democratic principles or methods. In Italy, for example,

although the prevailing interpretation of the ‘democratic method’ (art. 49) has taken it to refer to the arena of *inter*-party competition, scholars are increasingly willing to consider that the constitution also provides a legitimate basis for the legal regulation of *intra*-party democracy.¹¹

By requiring the parties to be internally democratic, these constitutions effectively take the ‘democratic intolerance’ argument a step further by requiring that the parties themselves must reflect a commitment to democratic principles if together they are to form a democratic polity. In a narrow sense, the doctrine of militant democracy applies to the external activities of anti-democratic parties or their ideological profile. Understood more broadly, however, it may also apply to the internal organization of parties, on the grounds that a lack of internal party democracy signals a lack of commitment to democratic values *tout court*. On this view, efforts to guarantee that parties will not disrupt or destroy democratic government should therefore not be confined to constitutional control over their aims and behaviour but also over the party organization itself. The Israeli lawyer Ygal Mersel (2006) has even argued that a lack of internal democracy should be considered sufficient grounds for banning a party. The perspective advocated by the German Constitutional Court at the time was similar, arguing in its ruling on the constitutionality of the neo-Nazi *Sozialistische Reichspartei* that a logical relationship exists between the concept of a free democratic order and the democratic principles of party organization (Schneider 1957: 536). The rationale for imposing a duty of internal democracy on party organizations centres on a substantive rather than procedural conception of democracy, according to which key democratic values such as representation and participation cannot be realized in the absence of internally democratic parties (Mersel 2006: 96).

Although state intervention in the internal affairs and external activities of parties is often justified with a view to protecting the very survival of the democratic system, it should be noted that it is considered controversial from the perspective of some theories of democracy (see also Katz in this volume). The arguments against are both practical and theoretical. It is not evident, for example, that democracy at the system level requires, or is indeed furthered by, parties that are internally democratic. As Sartori (1965: 124) famously put it, ‘democracy on a large scale is not the sum of many little democracies’. In other words, the need for specific democratic values to be realized within the political system as a whole does not necessarily imply that the same values should be realized within each of its constituent parts. Moreover, the outcome of internally

democratic procedures is likely to produce policy choices that are closer to the preferences of the party memberships than those of the median voter. Given the continuous decline in party memberships in European democracies (see van Biezen *et al.* 2012), internal democracy is thus less and less likely to represent 'the will of the people'. Furthermore, from a conception of democracy which centres mainly on political competition and the maximization of voter choice, rather than popular participation, there are no compelling reasons to impose internally democratic structures upon the parties as long as the system guarantees, in Hirschman's terms, sufficiently meaningful 'exit' options (e.g. membership exit or electoral defeat). From this perspective, it is difficult to identify the interest of the state in controlling the internal governance of political parties. Such attempts, Issacharoff (2007: 1460) argues, bring 'the force of state authority deep into the heart of all political organizations', and therefore raise serious concerns about the relationship between political parties and the state. More fundamentally, such impositions threaten to compromise the political integrity of the parties and their organizational independence of the state. Political parties can 'play a key role in providing a mechanism for informed popular participation in a democracy precisely because they are organizationally independent of the state.' (Issacharoff 2007: 1461) The danger is that, as the internal life and the external activities of parties become regulated by public law and as party rules become constitutional or administrative rules, the parties themselves become transformed into semi-state agencies or public service entities, with a corresponding weakening of their own internal organizational autonomy (Bartolini & Mair 2001).

An additional consequence of increased state intervention in party politics by legal rules is the enhanced position of the courts, as the primary locus of accountability and adjudication is shifted from the internal organs of the party towards the judiciary. In other words, the constitutionalization of parties, and indeed their regulation more generally, may contribute to the increased judicialization of party politics. The role of the courts in monitoring the constitutionality and lawfulness of party activity and behaviour appears firmly anchored: over 40 per cent of European democracies have constitutionally enshrined a form of judicial oversight over the parties. A more important role for the courts corresponds to a general post-war trend by which the notion that the courts, rather than the legislative or executive authorities, should be the ultimate guardians of the constitution and its values took hold in continental Europe (Friedrich 1951: 20). In the various restored democracies after WWII (e.g. Germany and Italy)

Constitutional Courts were established as a mechanism of *ex post* judicial review of legislation, a model which has since been followed by many of the polities established in more recent waves of democratization (Brunner 1992). This makes the courts rather unique among the democratic organs of government today in having been accorded legitimacy by virtue of the fact that they are not political, and therefore presumably neutral servants of the law (Shapiro and Stone Sweet 2002: 3). The judicialization of party politics is reflected in the mechanisms that many of the contemporary – mostly post-authoritarian and post-communist – democracies have established for monitoring party activity and behaviour, by assigning this prerogative, as well as the power to dissolve or ban parties, to the Constitutional Court.

One of the (unintended) consequences of the judicialization of party politics is that it externalizes the channels of political accountability by transferring the primary locus of accountability from the party leadership to the courts. It may thereby create a greater distance from the ordinary party membership in the process, which may constitute an additional challenge for parties in an era in which they are already faced with criticisms of their representativeness and responsibility. In addition, the judicialization of party politics raises concerns on a normative level which are similar to those emerging from the diffusion of constitutional review and an active judiciary more generally: these processes arguably undermine fundamental principles of democracy by effectively transferring powers from representative to non-representative institutions (cf. Shapiro 2003: 64-73). Although the courts may sometimes act as a powerful constraint on the possible undemocratic or anti-competitive behaviour of political parties, the legal regulation of parties evokes anxieties not only about the state centralization and control of political participation and public life, but also about the democratic legitimacy of transferring the ultimate decision-making authority on their behaviour and organization from the responsible organs of the party to a non-elected body of judges (Avnon 1995: 285).

Models of party democracy

When we further explore the various dimensions of party constitutionalization and focus in particular on the ways in which they are associated with one another, our qualitative and quantitative content analysis of the national constitutions suggests that three distinct models of party constitutionalization can be distinguished. Each of these

corresponds to a particular conception of party democracy (for details see van Biezen & Borz 2012). The first model (the Party in Public Office) comprises the various categories of constitutionalization that are related to the manifestations of parties in their capacity as electoral agents, parliamentary groups or governmental actors. This model is illustrative of a more instrumental view of political parties and can be found principally in longer-established and continuous liberal democracies such as those of Iceland, Finland, Norway, and Sweden. As we have seen (e.g. Table 1), in these countries parties tend to be an indirect subject of constitutionalization. The constitutional importance of the parties is derived primarily from their role in the electoral process, as well as their manifestation as parliamentary groups or their governmental capacity. According to this model of constitutionalization parties are not necessarily recognized or acknowledged as institutions or organizations in their own right. Nevertheless, by creating an association between political parties and the electoral, parliamentary and governmental domains, this mode of party constitutionalization effectively signals that political parties are a functional necessity for the conduct of democratic elections, and the formation and operation of parliaments and governments. It thus reflects the inextricable and unequivocal connection that exists between political parties and some of the democratic structures fundamental to modern representative democracy, and the reality of party government.

In contrast, in the second model (Defending Democracy), parties are seen essentially as permanent extra-parliamentary organizations rather than primarily as electoral, parliamentary or governmental institutions. Here, the constitutionalization of political parties serves primarily to safeguard the continued existence of democracy. We find this model in most of the newly established or re-established democracies. As the bulk of European democracies have witnessed some form of democratic rupture in the past, it should come as no surprise that this is the dominant mode of party constitutionalization in Europe. The German Basic Law perhaps embodies the best-known example, but the model also applies to all of the post-communist democracies. In an attempt to defend the new democratic regime from insurrectionary and separatist parties, these constitutions demand that parties respect democratic principles, as well as the national sovereignty and territorial integrity of the state. As a legacy of their non-democratic past, these countries are keen to underscore the constitutional freedoms of the parties. At the same time, however, they tend rigorously to curtail the conduct of political parties, requiring that their activities, behaviour, ideologies and internal organizational structures are not adverse

to the fundamental democratic principles. From this perspective, the state emerges as the guardian of democracy, with corresponding prerogatives to intrude upon the parties' associational freedoms and their behavioural autonomy. The courts play a special role in ensuring their lawfulness and constitutionality.

A third mode of constitutionalization (Parties as Public Utilities) conceives of political parties as a special type of public good. On this view, political parties are the crucial mechanisms for the realization of democratic values and principles, such as participation, representation, and the expression of the popular will. This explicit association between political parties and the realization of substantive democratic values implies an especially close relationship between parties and the state, as these values 'reside in a realm beyond the disposition of the individual and call for their authoritative enforcement from above – usually by the state' (Frankenberg 2006: 456). In order for parties to perform their unique democratic services effectively, therefore, they are to be supported by the state, which is reflected in the constitutionally enshrined availability of public resources, as in Portugal for example, which constitutes one of the best illustrations of this model. The conception of party democracy signalled by this model of party constitutionalization is one in which parties are quasi-official agencies of the state because of the critical functions they perform in a modern democracy, and in which the democratic importance of political parties justifies that they are being supported by public means as well as their privileged status in public law and the constitution. This model of party constitutionalization reflects a notion of parties as public utilities (cf. van Biezen 2004) and a conception of party democracy in which the state assumes a proactive role in supporting parties financially as indispensable institutions for the healthy functioning of democracy.

Conclusion

This chapter has analysed the patterns of party constitutionalization, demonstrating that a clear tendency exists for modern democracies to accord formal constitutional status to political parties. While the constitutions of western liberal democracies have historically paid little attention to the role of political parties and the constitutionalization of political parties constituted somewhat of a novelty in the immediate post-war period, in contemporary European democracies, both old and new, political parties are increasingly accorded formal constitutional status. Today there are

only a handful of European democracies that do not acknowledge the role of political parties in their constitution. The European pattern thus trails regions elsewhere in the world, in particular in Latin America, where the phenomenon of party constitutionalization is both older and more pervasive (Zovatto 2006; van Biezen & Kopecký 2007). Because constitutions define the set of supreme rules of the game, the constitutional codification of political parties implies that the constitution acquires prominence in political practice as the explicit legal foundation and point of reference for the judicial adjudication of issues about the operation of political parties. This may involve questions about the admissibility of certain forms of party behaviour or the compatibility of certain ideologies with the fundamental principles of democracy and the constitutional order. This is evidenced, for example, by the increasingly prominent role of Constitutional Courts in the outlawing of anti-democratic or insurrectionist parties. It can also be seen from the rulings by Constitutional Courts such as the German *Bundesverfassungsgericht* on the constitutionality of certain forms of party financing. The constitutionalization of political parties, as indeed party legislation more generally, thus makes an important contribution to the judicialization of party politics.

Constitutions reflect the particular historical and political contexts within which they are designed. We have seen that the constitutionalization of political parties is in large part associated with waves of democratization, as newly established or reconstituted democracies, without exception, have constitutionally codified the position of political parties. Furthermore, a clear and significant correlation exists between the nature and intensity of party constitutionalization, on the one hand, and the newness and historical experience with democracy, on the other. New and re-established democracies are not only more likely than older ones constitutionally to acknowledge the relevance of political parties, they also tend towards more regulation in a larger number of areas, and thus towards more state intervention in party politics.

The increased intensity of party constitutionalization in post-war European democracies underscores that political parties are considered to be an important political and social reality, which are seen to make an essential contribution to the functioning of democracy. The predominant conception of modern democracy today is thus one that is unquestionably couched in terms of party. However, in most of the older democracies the mode of party constitutionalization tends to be indirect, emphasizing the parties' roles as contestants for, or holders of, public office. Here, the constitutional importance of the parties is derived primarily from their

functional necessity for the conduct of democratic elections, and the formation and operation of parliaments and governments. In the majority of the newly created or re-established democracies, on the other hand, parties have acquired a more permanent constitutional relevance also outside periods of elections. One of the most significant developments in this regard was the constitutional establishment of political parties as the constituent foundations of democracy following the re-establishment of democracy in the aftermath of WWII in Italy and, most notably, Germany. More generally, the mode of constitutionalization in most countries with a non-democratic history tends to be geared towards defending the new democratic order. As a consequence, they underscore the fundamental freedoms that political parties enjoy while at the same time adopting strict views on the permissible forms of parties' behaviour, ideology and organization, and establish a large degree of external oversight of party activity by the courts. A third model of party constitutionalization reflects a notion of parties as public utilities. On this view, political parties are essential vehicles for the realization of democratic values and principles. Accordingly, the state assumes a proactive role in supporting them as indispensable institutions for the healthy functioning of democracy.

The constitutional codification of political parties has strengthened both their material and their ideational position within the political system. As one of the important consequences of their incorporation in national constitutions, alongside the development of extensive legal frameworks of party regulation, the institutional relevance of political parties has now been firmly anchored within the overall architecture of most modern democratic systems. Their constitutionally enshrined position implies not only that, in comparison to other organizations, parties are bound by tighter restrictions but also that they have been endowed with special privileges. The parties' constitutional relevance not only justifies state support, but also effectively gives them an official status as part of the state: by being given constitutional status, political parties are granted explicit recognition to the institutional importance of democracy (Avnon 1995: 298).

Indeed, according to the German constitutional lawyer and former Constitutional Court Justice, Gerhard Leibholz, the constitutional codification of political parties signalled a revolutionary change, from both an empirical and a normative point of view, which ultimately reflects a fundamental transformation of the nature of democracy itself, from representative liberal democracy to a party state (*Parteienstaat*), which is built on parties as the central institutional mechanisms of

political integration. As early as in the late 1950s, Leibholz (1958: 78-93) argued that the constitutionalization of political parties effectively legitimizes the existence of party democracy and transforms political parties from societal organizations into institutions that form part of the official fabric of the democratic state. In the same vein, the German Constitutional Court has affirmed that political parties are more than mere socio-political organizations; they are also the integral and necessary units of the constitutional order. This clearly resonates with a more recent argument advanced by Katz and Mair (1995; 2009) that recent processes of party organizational transformation and adaptation reflect a movement of political parties towards the state and their concomitant embedding within the institutional structures of the state. In this sense, the constitutionalization of parties appears to parallel a more general trend by which the relationship between the parties and the state increases in strength, while the links between parties and civil society become progressively weaker.

The increased incidence of party constitutionalization in modern democracies attests not only to changed historical contexts and different empirical realities but also to changes in ideas and normative beliefs about parties and democracy. It has consolidated both the empirical reality of modern party government and the normative belief that parties are indispensable for democracy. Unlike in earlier epochs, political parties today have become fixed as permanent and often privileged structures of political representation in representative democracies. Furthermore, the existence of political parties is no longer necessarily seen as incompatible with predominant conceptions of democracy. Instead, modern constitutions point to a more or less general acceptance of political parties as the necessary foundations of democratic politics. Finally, it suggests that not only have conceptions of democracy changed but also those of the parties themselves, in that parties are no longer primarily private associations (albeit ones which fulfil important public functions) but to an important extent also public institutions or even semi-state agencies (Katz & Mair 2009), or at least organizations whose public role has become so important that it warrants their formal codification as permanent features of the institutional architecture of representative democracy. It remains to be seen if, and to what extent, the judicialization of party politics further exacerbates the already pronounced tension between the parties' enhanced position as public institutions and their weakening capacity as societal agents of democratic representation.

Notes

- 1 This chapter is an updated version and merger of several parts of two earlier pieces (van Biezen 2012; van Biezen & Borz 2012).
- 2 Including the European Union. The Lisbon Treaty places political parties prominently in Part II (Provisions on Democratic Principles), stipulating that ‘Political parties at European contribute to forming European political awareness and to expressing the will of citizens of the Union.’ (art. 8 A.4)
- 3 The UK does not have a written constitution codified in a single document and has therefore been excluded from this analysis.
- 4 Iceland is included in our analysis of *post-war* European constitutions because it forms part of the second wave of democratization and because, together with Austria, Italy and Germany, it can be seen to belong to the first wave of party constitutionalization (see van Biezen 2012).
- 5 Unless otherwise indicated, all translations are from Gisbert H. Flanz (ed.) (2004), *Constitutions of the Countries of the World*. New York: Oceana Publications.
- 6 Art. 137 of the Swiss constitution similarly reads: ‘The political parties shall contribute to the forming of the opinion and the will of the People.’
- 7 For more details see: ‘Proposition de Revision portant creation d’un article 32bis nouveau de la Constitution’, outlining the official positions of the Government, the Council of State and the Committee for Constitutional Reform, on www.chd.lu/archives/ArchivesPortlet, Chambre des Députés, 22 February 2007; 31 August 2007; 13 November 2007; 29 November 2007.
- 8 E.g. Croatia: ‘The formation of political parties is free’ (art. 6.1).
- 9 E.g. Serbia: ‘Activities of political parties aiming at forced overthrow of constitutional system, violation of guaranteed human or minority rights, inciting racial, national or religious hatred, shall be prohibited (art. 5).
- 10 Another often-used term in this context, coined by Loewenstein (1937) is ‘militant democracy’ (from the German *streitbare Demokratie*). The principle is constitutionally enshrined in the German Basic Law.
- 11 The question whether art. 49 it should not also be understood to apply to the internal organizational functioning of parties has in fact long dominated the debates among constitutional lawyers. It is with a view to the implementation of this interpretation of the Italian constitution that a number of law proposals aimed to establish minimal requirements for intra-party democracy are currently under examination with the Commission of Constitutional Affairs of the Chamber of Deputies (Piccio and Pacini 2012).

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