

## EUROPEAN CONSTITUTIONS AS SOURCES OF PARTY LAW – AND THE FUNDAMENTAL LAW OF HUNGARY

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### Resumen

La regulación de los partidos políticos parece un tema ligeramente descuidado en la literatura constitucional húngara. Así, a pesar de que hay un gran número de cuestiones que deben analizarse y entenderse en los ámbitos de la democracia representativa, en el sistema electoral y en la financiación de los partidos, derivadas de las particularidades del cambio del régimen político, y que hace necesaria la interpretación de nuestro sistema político actual. Un análisis sustantivo de estas cuestiones en términos de derecho constitucional (y desde las ciencias políticas) podría contribuir a una mejor comprensión de la democracia representativa húngara, el estado constitucional, así como la relación entre la sociedad civil y el Estado. En este documento voy a ofrecer una visión general de las normas constitucionales relativas a los partidos políticos europeos y comparar la redacción de la Ley Fundamental de Hungría con las normas constitucionales creadas en 1989.

#### ■ Palabras clave:

Democracia representativa húngara; Partidos políticos; Ley Fundamental de Hungría

#### ■ Keywords:

Hungarian representative democracy; Political parties; Fundamental Law of Hungary

### Abstract

The regulation of political parties seems a slightly neglected topic in the Hungarian constitutional literature.<sup>1</sup> It is so despite the fact that there are a large number of questions to be analysed and understood in the fields of representative democracy, election system and party financing arising from the particularities of the change of the political regime, the recent constitution-making or the necessary interpretation

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<sup>1</sup> In the Hungarian literature there is only one piece of work worth mentioning due to its length and depth i.e. Sólyom, László. *Pártok és érdekképviseltek az alkotmányban*. (Parties and Interest Representation in the Constitution) Bp., 2004, Rejtjel. We can also consider Kovács, Mónika–Tilk, Péter: *Pártok*. (Parties) In: *Az Alkotmány kommentárja*. (Commentary on the Constitution) (Edited by Jakab, András) Bp., 2009, Századvég (p. 270-289) and also Halmai, Gábor: *Párt, állam, jog. A magyar pártjog*. (Party, State, Law. The Hungarian Party Law). In: *Politikatudományi Szemle*, 1993/1. sz. p. 39-59, provides an

of our current political system. A substantive analysis of these questions in terms of constitutional law (and political science) could contribute to a better understanding of the Hungarian representative democracy, constitutional state as well as the relationship between civil society and the state. In this paper I will provide a rough overview of constitutional rules relating to European political parties and compare the wording of the Fundamental Law of Hungary with the constitutional rules created in 1989<sup>2</sup>.

I. Concept of party law, levels of legal sources of political party regulation – II. Outline of comparative European party constitutionalization – III. Epilogue: Novelities of Hungarian party constitutionalization – Bibliography

## I. CONCEPT OF PARTY LAW, LEVELS OF LEGAL SOURCES OF POLITICAL PARTY REGULATION

Party law is all legal regulations relating to political parties. It may pertain to party operation (establishing, activities and internal organisation), party membership (rights, duties and conflict of interest of members), relationship between parties and the state (financing, operation in representative bodies, state control over operation). External and internal party law includes the functions of parties as institutions in a democratic system as well as the rules on internal organisation and membership of these institutions.

The sources of rules ranges from constitutions and laws to parliamentary rules and the legal practice of (constitutional) courts. The level of legislation necessitated by the relation to fundamental rights, which is not covered by this paper, affects different fields of party functions: creation (establishing) and registration of parties, certain internal organisational and operational rules, certain rights/duties of membership, supervision of legitimacy or constitutionality, participation in electoral procedure (nomination, electoral commission membership, etc.), financing of campaign and

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early but comprehensive overview. Dissertations and other studies have been written mainly on party financing. For comprehensive political science literature on parties in see Enyedi, Zsolt-Körösenyi, András: *Pártok és pártrendszerek*. (Parties and Party Systems Bp., 2004, Osiris, and recently on the Hungarian party system Horváth, Attila – Soós, Gábor: *Pártok és pártrendszer*. (Parties and Party Systems In: *A magyar politikai rendszer – negyedszázad után*. (The Hungarian Political System after a Quarter Century) (Edited by Körösenyi, András) Bp., 2015, Osiris-MTA TKPTI (p. 249-278). Biezen, Ingrid van: *Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe*. In: *British Journal of Political Science* 2012/1. p. 187–212, drew attention even at European level to the relative lack of scholarly interest in constitutionalization. Published data of relevant research project at Leiden University see at <http://www.partylaw.leidenuniv.nl/>.

<sup>2</sup> This study as a part of a comprehensive research with this aim has been written within the framework of the research project entitled “*Constitutional values of public finance – democracy market economy, efficiency and the division of power*” subsidised by PADA (Pallas Athéné Domus Animae Foundation).

party organisation (rules on private and state financing, spending, accounting, transparency, control, etc.). All European legal systems include laws regulating political parties<sup>3</sup>, even those whose constitutions do not.

In this paper I will examine the level of constitutionalization about which on considering the panorama of the European regulations and constitutional standards by way of introduction we can state that

- not all states include political parties in their constitutions (even by just mentioning them), and
- the constitutional provisions of states mentioning and regulating political parties are very different in terms of their length and depth alike<sup>4</sup>.

Since the practice of not mentioning parties in constitutions seems to occur in “older” democracies (Belgium, Netherlands, Denmark, Ireland and also the United Kingdom) and also the Venice Commission disserts on the level of constitutional and legitimate regulation, we cannot declare formally that party constitutionalization is necessary or it would be expected according to European constitutional standards. Moreover, even a separate act on parties is not a democratic requirement since according to the Venice Commission because of administrative and other burdens less regulations can result in more democracy.<sup>5</sup> In terms of content constitutional level would be necessary if establishing and operation of parties did not have sufficient protection in comparison with other basic rights and constitutional values; if principles and rights, which can be called subsidiary such as political pluralism, democracy or the freedom of association, were not tangible enough. (E.g. Can the privilege of political parties to create an electoral list provided by the election system be defended against the principle of equal treatment if the constitution does not lay down the special role of parties to declare the popular will? etc.) If these provides political parties sufficient constitutional protection and legitimacy, a lower level of legislation can actually become a relevant aspect only in terms of stability (easier-harder modification).

According to László Sólyom as opposed to state organs parties are not created by the constitution, hence no constitutional regulation is necessary for their legitimacy. It is rather the result of an approach of constitutionalization that accepts the actual role of parties in a political system supported by their present and historical development<sup>6</sup>.

The symbolic and political significance of the level of legal sources of the constitution needs to be highlighted. Namely, its conviction on constitutionalising democracy has the message that political parties are central or even indispensable actors of democratic procedures and will assign them this position also in the future. Besides

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<sup>3</sup> These are often not specifically acts on parties but only touch upon certain aspects, e.g. financing, nomination, etc.

<sup>4</sup> BIEZEN, I. (2012). Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe. In: *British Journal of Political Science*, p. 199.

<sup>5</sup> CDL-AD (2010) 024 - *Guidelines on Political Party Regulation*, pp. 28-32.

<sup>6</sup> SÓLYOM, L. (2005). *Pártok és érdekképviseltek az alkotmányban*. (Parties and Interest Representation in the Constitution) Bp. Rejtjel, p. 12.

laying down the basic rules of political battles (in formal sense) inclusion in the constitution also conveys a normative message. A natural characteristics of fundamental law is that it is generally more difficult to modify therefore its provisions are not only more solid but they also define the regulating actors. As regards to normal legislation, the dominant influence of mainly those parties who are represented in parliament is a given while drafting and modifying the constitution may involve other actors (e.g. referendum), which can generate such expenses that incumbent parties do not want to undertake<sup>7</sup>.

## II. OUTLINE OF COMPARATIVE EUROPEAN PARTY CONSTITUTIONALIZATION

Biezen presents the waves of constitutional codification of parties in a parallel manner with the great waves of democratization in the 20th century. Thus, historically political parties appeared as early as before the end of World War II in the constitutions of Iceland (article 31, when defining the proportionate division of mandates in the Althing) and Austria (article 147, party officials shall not be constitutional judges). The overture of a widespread emergence was marked by the Italian Constitution in 1947 and the German Fundamental Law in 1949, with the latter having a major influence on later waves. According to Biezen the second wave was brought about by the collapse of the British and French colonial empires (constitutions of France, Malta and Cyprus) while the third wave is connected to the fall of authoritarian systems in Southern Europe (constitutions of Greece, Spain and Portugal) and the fourth wave to post-communist constitution-making<sup>8</sup>. She points out that political party constitutionalization and its content largely depends on the date of constitution-making in the history, opinion on the previous political regime (which was usually a dictatorship) and also the ideas and concepts on democracy at the time. Based on the above, the relationship between state and parties (e.g. rules on incompatibilities, constitutional court control) and emphasis of the freedom of association and other political communication rights are a conspicuous feature in “new” democracies while the constitutions of earlier democracies refer only to election functions.

Biezen presents the dimensions of constitutional codification (connected to the subject matters of constitutions) in the next matrix partly also followed in this paper<sup>9</sup>.

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<sup>7</sup> BORZ, G. (2016). *Justifying the constitutional regulation of political parties: A framework for analysis*. In: International Political Science Review, pp. 2-4.

<sup>8</sup> BIEZEN, I. (2012). Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe. In: British Journal of Political Science, pp. 197-199.

<sup>9</sup> Supplemented table of regulations (the number of constitutional provisions/rules relating to parties) provides quantitative proof of the connections between certain dimensions of regulations and constitution-making particularities of countries) BIEZEN, I. (2012). Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe. In: British Journal of Political Science, pp. 200-202 (with small corrections).

Principles and values	Rights/duties	Institutional structure	Meta-rules
democracy, participation, popular sovereignty, equality, pluralism	activity/rights with regards to programme: freedom of association, freedom of assembly, freedom of speech (and their limits)	extra-parliamentary party electoral party parliamentary party governmental party  public resources	decision of (constitutional) court on lawfulness and constitutionality  dictating the enactment of further legislation

Parties are most likely to appear in the *Principles chapter* also in order to convey the symbolic message and to extend the spectrum of legal interpretation of (constitutional) courts. Placing parties in principles and values in a systematic manner clearly signals their pivotal or even necessary and indispensable position and function in democratic procedures. Constitutions providing rules among basic provisions declare the basic functions of political parties along two core values of democratic systems i.e. popular sovereignty and political pluralism. In terms of this dimension the influence of the German fundamental law on later waves of constitution-making is obvious. Pursuant to article 21 of the Grundgesetz a constitutional function of parties is participation in forming the popular will, and parties threatening democratic order are unconstitutional.

Participation in forming or expressing the popular will appears with the same phrasing in the constitutions of Bulgaria (article 11), Luxembourg (article 32/A), Hungary (article 3. § of the text of 1989, article VIII of the Fundamental Law of 2011, in detail see below) Portugal (articles 10 and 51), Romania (article 8), Spain (article 6). The exclusive role in democratic procedures, representation and channelling the popular will stands out peculiarly in the constitution of Bulgaria which expressly prohibits any other organisations from engaging in political activities “which is in the domain of political parties” (article 12 (2)). The function of forming and expressing the popular will are promoted also by those declarations which state that the objective of parties is to influence state politics with democratic instruments (article 11 of the constitution of Poland), to define national politics through democratic procedures (article 49 of the constitution of Italy), parties are fundamental instruments of political participation (article 6 of the constitution of Spain), and which ensures parties rights to television and radio coverage (articles 40 and 119 of the constitutions of Portugal and Malta) or rights to the electoral system.

The explicit laying down of multiparty system and political pluralism and connecting them to parties fundamentally contribute to the determination of their democratic role. (In this context the freedom to establish parties is an *indirect* reference to pluralism). These principles are declared in the articles mentioned above by the constitutions of Bulgaria, Croatia (article 3), Luxembourg, Portugal (article 288 i.), Romania (article 40) and Spain. In Spain parties are “the expression of political pluralism” (article 6),

in Bulgaria it is forbidden to “usurp the expression of the popular sovereignty” (article 1) and no political party shall be proclaimed as a party of the state (article 11), in Hungary no one shall act with the aim of exclusively possessing power (article C), pursuant to the constitution of the Czech Republic the political system is founded on the free and voluntary formation of and free competition among parties (article 5).

Constitutional provisions of the constitutions adopted following the establishment of a democratic regime are part of a special “historical narrative” and were drafted driven by the fear of or respond to political parties of the previous regime<sup>10</sup>. Expressive examples of this beyond the German fundamental law are the prohibition to reorganise the Fascist party (section XII of Transitional Provisions), in post-communist states the prohibition of parties proclaiming totalitarian ideology and the narrative of article U of the Fundamental Law of Hungary, and also the numerous rules to limit party law ranging from the separation of state and parties to the prohibition of violent politics and the opportunity to declare something unconstitutional (see below).

Constitutional provisions of the party law reveals the civil origins of political parties in the *chapter on fundamental law*. These rules ensures the right of citizens to establish and join parties as well as rights concerning the most important elements of the operation of organising and they also can limit these rights. Basic rights of the creation and operation of parties are the freedom of association, the freedom of assembly and the freedom of speech<sup>11</sup>.

In terms of the freedom of association certain constitutions regulate the freedom of party establishing in a separate article or by a reference to it. According to the clear wording of the constitution of Portugal (article 51) “Freedom of association shall include the right to form or take part in political associations and parties and through them to work jointly and democratically towards the formation of the popular will and the organisation of political power”. The same approach can be found in the Charter of Fundamental Rights and Freedoms of the Czech Republic (article 20 (2)) and the constitutions of Estonia (article 48 (1)), Lithuania (article 35), Hungary (article VIII), Romania (article 40), Slovakia (article 29) and Slovenia (article 42<sup>12</sup>). We can see how important it is for post-communist constitution-makers to lay down civil initiation as a basis for party establishing<sup>13</sup>. Similarly, we can note that since the 1990s

<sup>10</sup> Constitutions are generally “created by fear” – András Sajó: *Az önkorlátozó hatalom*. (The self-limiting power) KJK – MTA JTI, 1995, p. 17-19; and Biezen (2012), p. 201.

<sup>11</sup> BIEZEN, I. (2012). Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe. In: *British Journal of Political Science*, p. 200.

<sup>12</sup> The constitution of Slovenia mentions political parties beyond ensuring the right to freedom of association so that it can limit party membership of the members of the defence forces and the police, see article 42 (4).

<sup>13</sup> According to Halmai the fact that the basis of party establishment is the act on free association is a considerable difference from the German model. En: HALMAI, G. (1993). *Párt, állam, jog. A magyar pártjog*. (Party, State, Law. The Hungarian Party Law.) In: *Politikatudományi Szemle*, 1993/1, p. 42. On the relation between the freedom of association and the freedom of party establishing also see SÓLYOM, L. (2005). *Pártok és érdekképviseletek az alkotmányban*. (Parties and Interest Representation in the Constitution) Bp. Rejtjel, pp. 69-74.

the number of cases based on article 11 of the Convention has increased in the case law of Strasbourg in connection with constitutional status and establishing of parties as well as joining them<sup>14</sup>.

The most intriguing question of constitutionalization is how much the constitution interferes with the autonomy of parties by treating (embracing) them as special forms of associations and how can limitations by fundamental law be justified. Besides justifying these limitations I consider party privileges (e.g. with regards to financing, parliamentary representation and electoral system), a secondary aspect which otherwise counts as a strong argument.

Defending democracy seems to be the main justification of the limits<sup>15</sup>. As we have seen above constitutions look upon political parties as main actors in a democratic political system, it, however, does not imply that some parties could not jeopardise democracy itself. By conceding this, constitutions also include certain limitations of establishing and operating parties in order to institutionalise the “self-defence of democracy”<sup>16</sup>.

Basic stipulations include:

- prescribing *democratic operation of internal organisations* (see article 21 of the German, article 6 of the Croatian, article 51 of the Portuguese and article 6 of the Spanish constitutions) or *transparency of economy* (article 6 of the Croatian constitution, article 21 of the German fundamental law);
- *prohibition of certain activities, ideologies and patterns of party organising* (see the constitution of Bulgaria prohibits to establish parties on ethnical, racial or religious grounds [article 11], the constitution of Poland prohibits the proclamation of totalitarian ideologies and hatred [article 13], according to the constitution of Portugal the name of political parties shall not relate to any religion or church and shall not employ national or religious symbols, the operation and objective of parties shall not have a regional nature [article 51], the constitution of Romania excludes parties organised against the sovereignty, integrity and independence of state as well as associations of a secret nature [article 40], furthermore the constitution of Slovakia lays down a public policy clause on limitation [article 29] echoing article 11 of the European Convention of Human Rights);
- *limitations on party membership* (see especially the prohibition of party membership of constitutional judges, members of law enforcement agencies, etc., furthermore according to the constitution of Estonia only Estonian citizens are

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<sup>14</sup> *Factsheet–Political parties and associations*, October 2016 available at [http://www.echr.coe.int/Documents/FS\\_Political\\_parties\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Political_parties_ENG.pdf).

<sup>15</sup> BORZ, G. (2016). Justifying the constitutional regulation of political parties: A framework for analysis. In: *International Political Science Review* 2016/1, p. 7.

<sup>16</sup> Based on the interpretation of article 21 of the German Fundamental Law the Federal Constitutional Court formulated this concept in its decision 2 BVerfGE 1 (1952) (the SRP case).

allowed to become party members [article 48], according to the constitution of Portugal no one can be a member of more than one parties at a time [article 51])<sup>17</sup>.

This study is confined to the constitutional level of party regulation, however we have to note that a great deal of limitations (also) appears in party laws. We believe that highlighting constitutional rules and functions of political parties along democratic principles can adequately justify these limitations.

Based on the argumentation of the German constitutional court expectation for internal democracy can be supported by the idea that as parties participate in the power of the state it may be probable that their participation will not be democratic unless their internal affairs are managed accordingly<sup>18</sup>. According to the Venice Commission besides respecting the freedom of association the requirements of internal democracy shall be narrowly interpreted generally meaning equal rights of party membership and possible participation in transparent decision-making, especially in the scope of selecting campaigners and creating the internal regulation of parties<sup>19</sup>. This status is also ensured by the right of party members to freely (voluntarily) enter and leave parties and the freedom of speech, etc.<sup>20</sup> The limits of the freedom of association and party establishing also need to comply with the values of plural democracy, at the same time, however, it has to be noted that by doing so parties possessing great influence on party regulation (even at constitutional level) will also regulate the competition of parties and supervise who can enter this “market”<sup>21</sup>.

When describing the institutional structure of state the message of party regulation is that parties have a dominant influence on the institutional structure of state especially in the case of representative organs (positive rules) as well as with regards to organs to be made independent of party politics (negative, incompatibility rules). The most widespread scopes of regulation of this nature embrace the roles and rights of parties relating to electoral system and parliament.

Beyond the general intermediary function of parties some constitutions include constitutional rules relating to explicit electoral rights and participation. Accordingly, the constitution of Finland ensures the non-exclusive rights of parties to nominate candidates for parliamentary and presidential elections alike (articles 25 and 54); pursuant to the constitution of France parties contribute to the exercise of suffrage (article 4); a part of the Greek parliament is elected on a country list of parties (article 54); pursuant to the constitution of Poland deputies and senators are nominated by

<sup>17</sup> According to the Venice Commission no one has the subjective right to become a member of an organisation but the limitations on entering a party and their reasons must be thoroughly examined lest they become discriminative but rather inclusive. See *Guidelines on Political Party Regulation*, pp. 116-120.

<sup>18</sup> 2 BVerfGE 1 (1952); and Halmay (1993) p. 49, According to Sólyom (2005), pp. 55-59. There is a clear conflict between the principle and the development in practice.

<sup>19</sup> *Guidelines on Political Party Regulation*, pp. 97-98.

<sup>20</sup> HALMAI, G. (1993). Párt, állam, jog. A magyar pártjog. (Party, State, Law. The Hungarian Party Law.). In: Politikatudományi Szemle, 1993/1, p. 49.

<sup>21</sup> BORZ, G. (2016). Justifying the constitutional regulation of political parties: A framework for analysis. In: *International Political Science Review* 2016/1, p. 5.



political parties or voters (article 100); deputies of the Luxembourg parliament are elected on a party list ballot in a proportional manner (article 51); the constitution of Malta specifies the advantages gained by parties in the course of the division of mandates (article 52); In Portugal, in the course of the election of the Assembly of the Republic political parties may nominate candidates (article 151) but during the election of local governments apart from parties a group of voters are entitled to nominate candidates (article 239); at the Swedish parliamentary election voters may vote for political parties, mandates are divided between parties (articles 1 and 7 of chapter 3).

The appearance of parties in legislative bodies peculiarly interferes with the free mandates of deputies. As the German constitutional court made a reference in its decision of 1952 mentioned above, following World War II constitution-makers rejected the standpoint that political parties destroy popular representation and popular sovereignty recognising the prominent role of parties in mediating between state and citizens<sup>22</sup>. Most states began to recognise parties in their constitutions in accordance with the new constitutional concept, taking parties' appearance in parliaments as a starting point<sup>23</sup>. Although parliamentary deputies continue to act in the public interest in accordance with the normative concept of free mandate, their party-based organisations and even the prerogatives of their deputy groups are widely accepted. Certain constitutions expressly provide for the deputy groups of parties, moreover in many cases the constitutionalization of parties is confined to this dimension<sup>24</sup>. The constitution of Cyprus enables parties reaching a minimum of 20 percent of mandates to form deputy groups as well as it specifies and secures them some procedural rights (article 73). In the constitution of Greece the power relations of political parties affects the appointment of prime minister (article 37) similarly, the composition of parliamentary and investigation committees are connected<sup>25</sup> (article 68). The constitution of Croatia ensures consultation rights to "parliamentary factions" (articles 79 and 104). Parliamentary opposition parties are mentioned in the constitution of Malta (article 90) and Portugal (articles 114 and 176). The constitution of Portugal enables faction-forming on party basis (article 180) by aggravating the situation that deputies will lose their mandates if they join a party different from the one nominating them (article 160). The president of Romania propose a prime minister upon consultation with parliamentary parties (article 103), similarly the ruler of Spain (article 99), the president of Portugal appoints the prime minister at his own discretion after consulting the parties with seats (article 187).

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<sup>22</sup> 2 BVerfGE 1 (1952), ill. Kommers Donald P. – Miller, Russell A.: *The Constitutional Jurisprudence of the Federal Republic of Germany*. Duke University Press, 2012, pp. 286-287.

<sup>23</sup> One of the strongest proof here is that party financing began to spread after parliamentary factions were subsidised, which was usually followed by the subsidy of extra-parliamentary parties. See Biezen, Ingrid van: *Financing political parties and election campaigns – guidelines*. Council of Europe Publishing, 2003, Strasbourg, p. 34.

<sup>24</sup> We can also mention here the case of Netherlands where the constitution does not include political parties but the definition of the act on party financing (article 1 b.) regards those associations as parties that at the elections obtained at least one mandate in the legislative body. see [http://wetten.overheid.nl/BWBR0033004/geldigheidsdatum\\_06-06-2013](http://wetten.overheid.nl/BWBR0033004/geldigheidsdatum_06-06-2013).

<sup>25</sup> Similarly article 178 of the constitution of Portugal.

Generally, the chapter on state structure contains those incompatibility rules stipulating generally or specifically public offices that no member of a party can hold. In order to exclude potential conflicts of interest and to ensure impartiality the Strasbourg Court accepted these rules as necessary and justified limitations in a democratic society<sup>26</sup>.

In this field the items collected from the Hungarian fundamental law make one of the longest list: members of the Constitutional Court may not be members of a party (article 24) the same holds true for judges (article 26), prosecutors (article 29) the Commissioner for Fundamental Rights and his/her deputies (article 30), professional staff members of the Hungarian Defence Forces, the police and the national security services (articles 45-46). Similarly, the constitution of Poland mentions some cases extending it to offices like the President of the Supreme Chamber of Control (article 205), members of the National Council of Radio Broadcasting and Television (article 214) and the President of the National Bank (article 227). Political science and constitutional theory literature considers political parties less as civil organisations but rather quasi state organs due to extensive state regulation and the expansion of party financing by the state<sup>27</sup>. State subsidies can be justified<sup>28</sup> by financing significant democratic functions of political parties and also in order to mitigate dependency on private donations which can contribute to the risk of corruption. Nevertheless, constitutions rarely mention state financing instead they refer to the management (its transparency, legal regulation) of parties. State subsidy of parties is expressly specified only in the constitution of Greece (“Political parties are entitled to receive financial support by the State for their electoral and operating expenses” article 29) and the constitution of Portugal (the requirements for “public funding” are specified by law; article 51) The constitution of Belgium (article 77) refers to the financing of political parties as a domain of law-making without specifications, the constitution of Romania has a similar approach (article 73). Authorization to create cardinal acts in Hungary is designed to regulate the management of parties (article VIII). Transparent management is prescribed by the constitutions of Croatia (article 6), Germany (article 21) and Poland (article 11). Further forms of state support of parties appear in the rules mentioned above ensuring them radio and television air time.

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<sup>26</sup> *Guidelines on Political Party Regulation*, pp.117-118, see e.g. the case of *Rekvényi v. Hungary* (1999) with special regard to historical proximity of totalitarian dictatorship.

<sup>27</sup> For this standpoint see also Biezen, Ingrid van: *Political Parties as Public Utilities*. In: *Party Politics*, 2004/6, p. 701-722; Biezen, Ingrid van – Kopecky, Petr: *The State and the Parties. Public Funding, Public Regulation and Rent-Seeking in Contemporary Democracies*. In: *Party Politics*, 2007/2, p. 235-254. Sólyom clearly asserts that “parties have not become public bodies, they have remained private associations”, however, “the constitutional task of a party is inseparable from public law, its legal status, however, must be separated”. Sólyom (2005) p. 74-75. At the same time he concedes that state subsidy is irreconcilable with the principle of independency from the state. *ibid.* p. 120.

<sup>28</sup> The spread of this practice can be linked to the development of the German constitution, the German Federal Constitutional Court accepted state subsidy in the context of the constitution as early as in the 1950s. See Halmai (1993) p. 52, *Guidelines on Political Party Regulation* [176-177].

Meta rules of party constitutionalization belong to the authorisation relating to the creation of acts on parties as well as the scope of authority of the decision on unconstitutional parties. All European countries have acts on parties, although the depth and scope of them are varied (party financing, operation, management, electoral rights, etc.). Such acts are also created without a special authorisation by constitutions.

The rule, which enables an investigation of constitutional operation of political parties and what is more, resulting even in their prohibition, is of much greater constitutional significance. This is the institutional pledge and keystone of the self-defending democracy mentioned above<sup>29</sup>. The constitutions of Bulgaria (article 149), Czech Republic (including dissolution, article 87), Croatia (article 129), Poland (article 188), Germany (article 21), Portugal (article 223), Romania (article 146) and Slovenia grant the constitutional court authorisation to investigate constitutionality of party activities. Pursuant to the constitution of Estonia prohibition of parties requires a court resolution (article 48); in Slovakia the Constitutional Court's scope of authority covers the decision on the constitutionality of the resolution to dissolve a party (article 129).

The Venice Commission and the Council of Europe regards the prohibition or dissolution of political parties as exceptional measures in cases if they use violence or threatens civil peace or democratic, constitutional order<sup>30</sup>. According to Sólyom prohibition of parties is always a political decision because judging when and why a party threatens democracy “*will always depend on the particular political situation since it is a preventive measure*”<sup>31</sup> [emphasis in original]. Biezen also notes here that this political decision is not made by parliaments slowly losing their supremacy and it is one of the instruments of “*judicialization of party politics*”<sup>32</sup>.

### III. EPILOGUE– NOVELTIES OF HUNGARIAN PARTY CONSTITUTIONALIZATION

Party regulation (3. §) appeared in the Act XX of 1949 in 1972 saying that “*the Marxist-Leninist party of the working class is the leading force of society*”. This political declaration was an indirect reference to single-party political system<sup>33</sup>. In Hungary “*due to historical development*”<sup>34</sup> the emergence of political parties or multi-party system in public law was not possible until 1989. In this chapter I do not attempt to analyse the text proven to be lasting for decades and brought about by the amendment of constitution during the course of the change of the political regime in

<sup>29</sup> HALMAI (1993), p. 46-47, SÓLYOM (2005), p. 94-100, BIEZEN (2012), p. 205-206.

<sup>30</sup> Resolution 1308(2002) on Restrictions on political parties in the Council of Europe's member states; *Guidelines on Political Party Regulation* [89-90].

<sup>31</sup> SÓLYOM, L. (2005). *Pártok és érdekképviseletek az alkotmányban.* (Parties and Interest Representation in the Constitution) Bp. Rejtjel, p. 94.

<sup>32</sup> BIEZEN, I. (2012). *Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe.* In: *British Journal of Political Science* 2012/1, p. 20.

<sup>33</sup> KOVÁCS, M. – TILK, P.: *PÁRTOK.* (Parties). (2009) In: *Az Alkotmány kommentárja.* (Commentary on the Constitution) (Edited by Jakab, András) Bp., 2009, Századvég, p. 271.

<sup>34</sup> Words of the communist leader, János Kádár, in 1987.

1989<sup>35</sup> (the methodology of basic scopes of regulation see above), instead I will focus on the particularities and novelties of party regulations in the Fundamental Law of 2011.

*Preamble.* A striking difference between the preambles of the two constitutions is that while the introduction of the transitional constitution of 1989 by mentioning multi-party system and parliamentary democracy lifts up the elements of pluralism as core values, the National Avowal does not even imply political freedoms especially parties, party system and representative democracy.

*Core values.* Regarding the foundation of democratic political system and the Hungarian constitutionality, the main ideas are principally similar in both constitutions, however, the functional definition of parties can be found in the chapter on fundamental rights in the Fundamental Law and not the chapter on Foundation. Changes beyond the novelties of the system will be covered below. We can note here that the prohibition of activities aiming at violent acquisition or exercise and exclusive possession of power as well as the resistance clause are taken over by the Fundamental Law as now a Hungarian constitutional axiom spanning over moments in the history.

The last article, U of Foundation enacted by the fourth amendment mentions the state party of the previous regime by its name (“The Hungarian Socialist Workers’ Party and its legal predecessors) declaring its non-lapsing responsibility for the historical crimes enumerated.

It also adds that “Political organisations having gained legal recognition during the democratic transition as legal successors of the Hungarian Socialist Workers’ Party continue to share the responsibility of their predecessors as beneficiaries of their unlawfully accumulated assets.” On the latter responsibility clause we can make two notes: 1) it does not include any reference to explicit prohibition of the reorganisation of the communist party, 2) present “legal predecessor” party/parties is/are not unconstitutional merely by fact that they “share” some responsibilities of the state party. Defendants of the need to do justice in relation with crimes of the state party are rather the “possessors of power” and some leaders of the communist dictatorship as well as those who committed certain crimes.

*Regulation of fundamental rights.* Relating to parties the chapter of the Constitution on fundamental rights besides the freedom of association included only that armed organisation with political objectives may not be established on the basis of the freedom of association, furthermore, detailed regulation required a majority of two-thirds. The chapter of the Fundamental Law on fundamental rights parallelly discusses the freedom of association with those functions of political parties which were in the Foundation of the Constitution. When reading these provisions we can note some fine differences:

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<sup>35</sup> SÓLYOM (2005), p. 15-26 gives an adequate summary of the creation of relevant rules of the new constitution of 1989 and party laws, see also Halmay (1993).

Constitution 3. §	Fundamental Law Article VIII
(1) In the Republic of Hungary political parties may be established and may function freely, provided they respect the Constitution and laws established in accordance with the Constitution.	(3) Political parties may be formed and may operate freely on the basis of the right to association.
(2) Political parties shall participate in the development and expression of the popular will.	Political parties shall participate in the formation and expression of the will of the people.
(3) Political parties may not exercise public power directly. Accordingly, no single party may exercise exclusive control of a government body.	Political parties may not exercise public power directly.
In the interest of ensuring the separation of political parties and public power, the law shall determine those functions and public offices which may not be held by party members or officers.	Article XXXIII (8) The law shall determine those public offices which may not be held by party members or officers.

The Fundamental Law abandons the phrasing “provided they respect the Constitution and laws established in accordance with the Constitution”, which does not provide too much normative surplus anyway<sup>36</sup> because it has been specified elsewhere that these sources of law are obligatory for everyone. We can add that this rule is not an obstacle to parties taking (democratic, legal) political actions to alter laws or even the constitution and exercising their rights provided otherwise<sup>37</sup>.

The Fundamental Law also abandons the prohibition of the control of government bodies, which must have referred to “direct” control since indirect influence in the case of government bodies is an obvious constitutional situation (e.g. the influence of parliamentary representative groups was provided by the Constitution in certain cases).

Concerning rules on separation of the state’s public power and parties the Fundamental Law now implies the creation of incompatibility rules besides the right to hold public offices.

<sup>36</sup> KOVÁCS, M.–TILK, P.: PÁRTOK. (Parties). (2009). In: Az Alkotmány kommentárja. (Commentary on the Constitution) (Edited by Jakab, András) Bp., 2009, Századvég, p. 275, footnote 15.

<sup>37</sup> KOVÁCS, M.–TILK, P.: PÁRTOK. (Parties). (2009). In: Az Alkotmány kommentárja. (Commentary on the Constitution) (Edited by Jakab, András) Bp., 2009, Századvég, p. 276.

*Secondary regulation.* Article 63.§ (3) of the Constitution prescribes qualified majority to adopt acts on both the freedom of association and the management and operation of parties, in the Fundamental Law, however, only party regulation comes under cardinal acts. This creates a new situation in that certain rules of party establishing derive from the right of association therefore with respect to certain statues a two-third “protection” is not provided. Authorisation relating to the specification of incompatible public offices are mentioned above.

*Parliamentary parties.* Although the Constitution mentioned “the deputy groups of parties with representation in the Parliament” several times in a sporadic and irregular manner but still supporting the parliamentary work of parties<sup>38</sup>. This dimension is not implied by the Fundamental Law at all, only mentioning deputy groups without connecting them to political parties.

*Incompatibilities.* Besides authorisation for legislation the constitutional level itself specifies offices that cannot be held by party members. According to both texts such offices are constitutional judges, ordinary magistrates, prosecutors and professional staff members of the Hungarian Defence Forces and the national security services. The new rule at constitutional level is that it includes the commissioner for fundamental rights and his or her deputies. In their cases previous regulation (article 5.§ (1) of Act LIX of 1993) excluded only political offices and roles. The same phrasing is applied in the constitution texts with regards to the President of Hungary<sup>39</sup>.

It can be noted that (both) our constitutions follows post-communist constitutional models in terms of their regulatory approach. The regulation, however, does not include parties’ roles and (specific) rights concerning the electoral system, the possibility of state financing, the expectation of the internal organisation to be democratic and also the possibility to prohibit unconstitutional parties or the possibility of investigation by constitutional court. The latter, of course, does not mean that the Hungarian legal system and authorities are incapable to take action against “anti-system” organisations or organisation violating the limits of freedom of association and party establishing prescribed. It is true that in the first place the application of forms of responsibilities of other areas of law comes to the foreground in connection with activities of party members and leaders in the system of “militant democracy”, however, dissolution of associations violating “the rights of others” is not without precedent<sup>40</sup>. Court decisions on the existence of parties can even reach the Constitutional Court through lodging a constitutional complaint.

<sup>38</sup> Article 19/B. § (2), article 28. § (5), article 32/A. § (5).

<sup>39</sup> The office of the president of Hungary is incompatible with any other political offices (article 12, similarly, article of the Constitution 30.§); though it does not imply an explicit prohibition of party membership, see Virág Kovács 30.§ [A köztársasági elnök összeférhetetlensége. (The incompatibility of the President of Hungary)] In: *Az Alkotmány kommentárja.* (Commentary on the Constitution) (Edited by András Jakab), Bp., 2009, Századvég (p. 1019).

<sup>40</sup> Instruments in the Hungarian legal system and marginal cases of (extreme right) organisations against democratic order are summarised by Renáta Uitz: *Hungary.* In: Marcus Thiel (ed.): *The ‘Militant Democracy’ Principle in Modern Democracies.* Ashgate, 2009, p. 147-181; and also see *Vona v. Hungary* case (2013).

## **BIBLIOGRAPHY**

- BIEZEN, Ingrid van – Kopecky, Petr: The State and the Parties. Public Funding, Public Regulation and Rent-Seeking in Contemporary Democracies. In: Party Politics, 2007/2.
- BIEZEN, Ingrid van: Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe. In: British Journal of Political Science 2012/1.
- BIEZEN, Ingrid van: Financing political parties and election campaigns – guidelines. Council of Europe Publishing, 2003, Strasbourg.
- BIEZEN, Ingrid van: Political Parties as Public Utilities. In: Party Politics, 2004/6.
- BORZ, Gabriela: Justifying the constitutional regulation of political parties: A framework for analysis. In: International Political Science Review 2016/1.
- ENYEDI, Zsolt-Körösi, András: Pártok és pártrendszerek. (Parties and Party Systems Bp., 2004, Osiris.
- Factsheet – Political parties and associations, October 2016 available at [http://www.echr.coe.int/Documents/FS\\_Political\\_parties\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Political_parties_ENG.pdf)
- HALMAI, Gábor: Párt, állam, jog. A magyar pártjog. (Party, State, Law. The Hungarian Party Law.) In: Politikatudományi Szemle, 1993/1.
- HORVÁTH, Attila – Soós, Gábor: Pártok és pártrendszer. (Parties and Party Systems In: A magyar politikai rendszer – negyedszázad után. (The Hungarian Political System after a Quarter Century) (Edited by Körösi, András) Bp., 2015, Osiris-MTA TKPTI.
- KOMMERS Donald P. – MILLER, Russell A.: The Constitutional Jurisprudence of the Federal Republic of Germany. Duke University Press, 2012.
- KOVÁCS, Mónika – TILK, Péter: Pártok. (Parties) In: Az Alkotmány kommentárja. (Commentary on the Constitution) (Edited by Jakab, András) Bp., 2009., Századvég.
- KOVÁCS, Virág: 30.§ [A köztársasági elnök összeférhetetlensége. (The incompatibility of the President of Hungary)] In: Az Alkotmány kommentárja. (Commentary on the Constitution) (Edited by András Jakab), Bp., 2009, Századvég.
- Resolution 1308(2002) on Restrictions on political parties in the Council of Europe's member states.
- SAJÓ, András: Az önkorlátozó hatalom. (The self-limiting power) KJK – MTA JTI, 1995.
- SÓLYOM, László. Pártok és érdekképviselések az alkotmányban. (Parties and Interest Representation in the Constitution) Bp., 2005, Rejtjel.
- UITZ, Renáta: Hungary. In: Marcus Thiel (ed.): The 'Militant Democracy' Principle in Modern Democracies. Ashgate, 2009.
- Venice Commission: Guidelines on Political Party Regulation. [CDL-AD(2010)024].

### **Cited Case Law:**

- 2 BVerfGE 1 (1952) (the SRP case).  
Rekvényi v. Hungary (ECtHR, 1999)  
Vona v. Hungary case (ECtHR, 2013).