

INTRODUCTION

Regulating Political Parties: European Democracies in Comparative Perspective

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The increase in party regulation

The question of how parties are, and ought to be, regulated, has assumed increased importance in recent years, both within the scholarly community and among policy-makers and politicians. Given the traditionally private and voluntary character of political parties, the state in liberal democratic societies would not normally intervene in the regulation of their behaviour and organization. But in recent years the legal regulation of parties has become more and more common, to the point that party structures have now become ‘legitimate objects of state regulation to a degree far exceeding what would normally be acceptable for private associations in a liberal society’ (Katz 2002: 90). In that sense, parties in contemporary democracies are to a growing extent managed by the state, in that their activities are increasingly subject to regulations and state laws which govern their external activities or determine the way in which their internal organization may function. Even in countries such as the Netherlands, where the regulation of parties has traditionally been relatively non-existent, the issue is assuming increasing importance. This can be demonstrated, for example, by the impending review of the party funding law and the recent court cases around the question of female representation within the Political Reformed Party (SGP). Both these cases are addressed in the present volume.

The increased importance of the law in describing, prescribing, or proscribing the operational activities and functions of political parties implies that the state is assuming an increasingly substantive role in the management of, and control over, their behaviour and organization. This

raises important questions and concerns, ranging from the motivations inspiring specific regulations to their effect on the parties and the party systems and the underlying conceptions of the role and place of political parties in modern democracies.

Surprisingly, however, despite the increasing relevance of state regulation of political parties, this phenomenon has hitherto received relatively little systematic and comparative scholarly attention, from political scientists or lawyers. Thus, a recently published handbook on comparative constitutional law acknowledges that '[p]olitical parties and party system dynamics are ... critical to understanding how constitutions work, and why they may not, in spite of well-intentioned designs'. It is added, however, that '[u]nfortunately, much of the recent literature in comparative constitutional law has paid little attention to the multiple ways our basic constitutional structures are conditioned by political parties and party system dynamics' (Skach 2012: 875; see also Pildes 2011: 254-264). Hirschl has advocated the idea of incorporating the social sciences in general, and political science in particular, in the comparative study of constitutions (2013; see also Von Bogdandy 2012).

Until such time, however, except in Germany, the 'heartland of party law' (Müller and Sieberer 2006: 435), the subject of party law tends to be a neglected aspect of research into political parties, with discussions limited to passing references and lacking a comparative dimension (Avnon 1995: 286). The very few existing comparative texts are generally not available in English (e.g. Tsatsos 2002). In addition, while some comparative work has been published on the financing of parties, this is not generally written from the perspective of party regulation more generally that is adopted in the present volume (e.g. Nassmacher (2009).

The current volume aims to address part of the gap identified above by discussing the various dimensions of party regulation, in the Netherlands as well as in Europe and in other regions of the world, referring to both conceptual issues and recent empirical findings. It is based on the papers presented at an international symposium held at Leiden University in June 2010, organized by the editors. The symposium brought together national and international scholars from the disciplines of law and political science to discuss the regulation of political parties, in the Netherlands and elsewhere, from an interdisciplinary and comparative perspective.

This volume is embedded within a larger, EU-funded research project (Re-conceptualizing party democracy),¹ which investigates the changing conceptions of parties and democracy in post-war Europe through a focus on public law and involves, among others, the development of a

comprehensive database on ‘The Legal Regulation of Political Parties in Post-War Europe’.² Within the framework of the volume, some of the empirical results emerging out of this research project are being published for the first time.

Outline of the volume

The volume provides an overview of the practical and theoretical dilemmas of state regulation of party financing and party organization (Chapters 1 and 2), and the historical patterns of party regulation and constitutionalization in the Netherlands and other European democracies, as well as the European Union (Chapters 3, 4, 5 and 6). In addition, several case studies and focused comparisons shed light on prevalent instances of party regulation and judicialization, such as the Dutch courts compelling the orthodox SGP party in The Netherlands to end the practice whereby women are denied passive voting rights (Chapter 7), the consequences of legal bans on political parties (Chapter 8), and the practices of regulation of ethnic parties (Chapter 9). Furthermore, the comparative reference is extended also to include an analysis of practices of party regulation in Latin America (Chapter 10).

The volume opens with a chapter by Richard S. Katz on ‘Democracy and the Legal Regulation of Political Parties’. The chapter has two related objectives. The first is to argue that evolving standards regarding the legal regulation of political parties are excessively weighted in favour of the expressive functions of parties (articulation), at the expense of their governing functions (aggregation). The second is to argue that this bias in favour of expression is based on a vision of democracy that, whether seen as a throw-back to the pre-democratic era of the cadre party in the 18th and 19th centuries or as being in the vanguard of a move to a post-partisan nirvana in the mid 21st century, essentially assumes away politics.

The second chapter, by Ruud Koole, deals with ‘Dilemmas of Regulating Political Finance, with special reference to the Dutch case’. The chapter explores the dilemmas faced by governments when introducing or changing the public financing regime for political parties. It concentrates on the importance of ideological considerations for the variation of political finance regimes, most notably general views on the role of the state. It presents two such opposing perspectives on the scope of state involvement, which are subsequently used to construct a typology

of rationales of political finance by confronting these general views with recent calls for more transparency in the field of political finance.

In Chapter 3, entitled 'Lessons from the Past: Party Regulation in the Netherlands', Remco Nehmelman provides an historical overview of the development of party regulation in The Netherlands. It discusses the desirability of special legislation on political parties, and focuses on the question which minimum standards of regulation should be adhered to such that the principle of democracy is guaranteed. In addition, the question is raised whether lessons can be drawn from the past discussions on regulating political parties.

In the following chapter, 'The Constitutionalization of Political Parties in Post-war Europe', Ingrid van Biezen shows that political parties in contemporary democracies are increasingly often accorded formal constitutional status. The chapter explores the temporal patterns of party constitutionalization and reveals their connection with moments of fundamental institutional restructuring such as democratization and state building. It furthermore reveals the different dimensions that lie beneath the constitutionalization of political parties in old and new democracies, and discusses the different models of party constitutionalization in light of the underlying conceptions of party democracy.

Chapter 5, by Fernando Casal Bértoa, Daniela Piccio & Ekaterina Rashkova, is entitled 'Party Laws in Comparative Perspective'. This chapter provides an overview of regulation by means of party laws in post-war European democracies. The chapter presents a qualitative and quantitative overview of the content of party laws in terms of the range and magnitude of party regulation, thus mapping the changes in regulatory trends over time. The chapter furthermore addresses the question which aspects of political parties are regulated most intensively and most frequently, and whether there are significant differences in the evolution of regulation between different groups of countries. The final part of the chapter supplements the quantitative examination of party regulation with a qualitative case study on the peculiarities of the party law of Spain.

Chapter 6 by Wojciech Gagalek is called 'Explaining Legislative Conflict over the Adoption of Political Financing Law in the European Union'. This chapter proposes an organizing perspective leading to the identification of sources and dimensions of the conflict over the adoption of party law in the EU. It then discusses the legislative procedures that led to the adoption of Regulation 2004/2003, which governs political parties at the European level and their funding. Finally, the findings of

this research are discussed by analysing the role of and divisions in the European Commission and, subsequently, the European Parliament (EP).

Chapter 7, by Hans-Martien ten Napel and Jaco van den Brink, is dedicated to a case study of ‘The Dutch Political Reformed Party (SGP) and Passive Female Suffrage’. The chapter first analyses the two – partially conflicting – judgments of the highest Dutch courts in this case, the Council of State and the High Court. Then, the authors discuss the case law of the European Court of Human Rights (ECtHR) in order to determine to what extent the ensuing admissibility decision in the SGP case corresponds to the Court’s conception of democracy.

‘Will it all end in tears? What really happens when democracies use law to ban political parties’, is the question Tim Bale asks in Chapter 8. An earlier comparative empirical investigation by the author of the consequences of recent bans on ‘extremist’ parties in three self-styled European democracies (Turkey, Spain and Belgium) found that those consequences were not as dire as predicted. In this chapter Bale attempts to answer the question whether the three countries still defy the predictions that bans will make no difference, that they will make things worse, or that they will put existing achievements at risk. Or, upon reflection and a return visit, did the fears of the critics turn out to be justified after all?

Chapter 9, by Ekaterina R. Rashkova and Maria Spirova, looks into ‘Ethnic Party Regulation in Eastern Europe’. The political integration of national minorities is one of the most challenging tasks facing the new EU member states. This chapter focuses on one form of political representation – political parties – and studies how legal arrangements in the region encourage or discourage the existence of ethnic parties. Focusing on the experiences of Bulgaria and Romania the paper argues that regulatory arrangements are important in but not key to achieving meaningful political representation.

In Chapter 10, ‘On the Engineerability of Political Parties: Mexico in Comparative Perspective’, Imke Harbers and Matthew C. Ingram examine how public law provisions regarding political parties have changed over time in the Mexican case, and how the extent of regulation has grown to the present day. Looking ahead, the authors demonstrate that party regulation has increased steadily since the 1950s and that it has had mixed effects on political contestation, cleaning up elections while simultaneously generating an electoral landscape that is markedly unfair and biased in favour of major parties.

Patterns of party regulation

On an overview of the various chapters, one is first of all struck by the apparent increase in party regulation that has taken place in recent years. The chapter by Casal Bértoa, Piccio & Rashkova clearly demonstrates that this trend is visible throughout Europe. It also holds true for the Netherlands, a country that has traditionally known little, if any, specific party regulation. As Nehmelman notes, Dutch political parties have for a long time been dominated by civil law and their own statutes. Today, however, it is not just the Electoral Law that contains references that specifically concern political parties, but also the Act on State funding for political parties, while the Media Act has certain sections guaranteeing their (cost-free) use of the public broadcasting media. Recently, moreover, a new Dutch law on party finance was adopted by Parliament, 'a combination of a subsidy law and a transparency law' as Koole characterizes it in his contribution to this volume. The SGP case might have led to further regulation, although, as Ten Napel and Van den Brink point out, this has not materialized in practice. Still, Nehmelman believes the time has come to include a specific Constitutional provision to guarantee the free shaping of the political will of political parties. Such a reform of the Constitution was proposed as early as in 1950 by the Dutch State Commissioner Van Schaik, but is perhaps even more relevant today, given the way in which Dutch and European courts apply in particular the principles of non-discrimination and of secularism. Van Biezen also notes that the Netherlands is one of the few countries where the judicialization of party politics has not yet affected their constitutional enshrining.

Secondly, it is interesting to see that the objectives of such party regulation tend to differ. As Katz argues in his chapter, the common justification for an increase in party regulation, used for example by the Venice Commission for Democracy through Law, is that states must protect and improve democracy. Another important reason given is that parties perform a number of crucial functions in the realization of democracy. Regardless of the exact objective, however, the volume also contains a clear warning, in the sense that it is clear from the various chapters that the objectives of the regulations are not always achieved. For example, according to Harbers and Ingram, the Mexican case illustrates that even extensive and detailed regulation is insufficient to guarantee responsible party government, and thus casts doubts on the idea of the 'engineerability of political parties'. In the case of ethnic party regulation

in Eastern Europe, the effects are often also indirect, as the chapter by Rashkova and Spirova illustrates.

Thirdly, there appears to be a trend towards regulation not just at the systemic level, but also at the level of individual parties. Although historically regulation started at the level of elections (the systemic level), increasingly also the units (parties) have to subscribe to the basic principles of the constitutional and political system (see also van Biezen & Piccio 2013). Thus, it is possible to discern a trend in the direction of a more militant democracy, a subject that Bale investigates for Turkey, Spain and Belgium. Bale concludes that we would be mistaken if we were to suggest that the consequences of party bans are always and everywhere malign. An intriguing question is whether the same applies to the regulation of internal party democracy, German style, which equally appears to be on the rise.

All in all, the developments as documented and analysed in this volume to a large extent point in the direction of a developing interpretation of political parties from, originally, essentially private into essentially public entities (cf. Persily and Cain 2000; van Biezen 2004; Webber 2012). In the process, the more public the parties become, the more regulation they appear to invoke. Dutch professor on Constitutional Law and former Judge of the Court of Justice of the European Union, A.M. Donner, suggested in a contribution to the annual Dutch constitutional conference in 1982: *'Let us postpone as long as possible the official recognition of the party system (in the Netherlands), because in its nature Law just brings regulation, and he who regulates, restricts.'* According to Nehmelman, who uses this quotation in his chapter, although by nature the law may indeed just bring regulation, regulation entails not only restrictions but also guarantees. The precise ways in which the law constrains or facilitates political behaviour, however, remain to be investigated in more detail.

At this stage, what seems clear is that the more parties become regulated, the more public they become. The contributions tie in, therefore, with current debates within the academic community on the changing nature of political parties, whereby recent processes of party organizational adaptation are seen to reflect a gradual strengthening of their relationship with the state (Katz & Mair 1995; see also Gauja 2008). As the legal regulation of parties through public law can be seen as one of the ways in which the link between parties and the state has acquired increased importance in recent years, this volume will no doubt be of interest to scholars concerned with such processes of party transformation, e.g. regarding the cartel party thesis. Party regulation leads, as Van Biezen

puts it in her chapter, to the transformation of political parties into integral units of the democratic state.

It is quite possible that this development will lead to a further withdrawal of citizens from existing party-political structures. In terms of political participation this can hardly be regarded as a positive outcome. In so far as this risk becomes more imminent, this volume thus not just documents and analyses but also contains a certain warning against taking the regulation of political parties too far. Perhaps the EU can serve as a model in this respect, because – as Gagatsek demonstrates – at least since the Tsatsos 1996 report the subsequent drafts and proposals for a political financing law have become less and less strict, to arrive in the final version only at a model of financing political parties. On the other hand, should ours indeed be a time of ‘expressive individualism’ (Taylor 2007) or ‘radical pluralism’ (Gauchet), both party discipline and party ideology may soon belong to the past (Vogelaar 2012). In that case increasing party regulation will at most be a supplementary explanation for the decline in organized political participation.

Notes

- 1 The research project Re-conceptualizing party democracy is funded by the European Research Council (ERC_Stg07_205660). Their financial support is gratefully acknowledged.
- 2 The online database can be found at <http://www.partylaw.leidenuniv.nl>.

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