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POLITICAL PARTIES FOR DEMOCRACY AND CHALLENGES OF LEGISLATIVE POLICY

ABSTRACT

Ensuring engagement of the population is the core precondition for the existence of the political party as an institute. The same idea is the source of its legitimation. This essence considers political party as an indivisible element for the government's democratic functioning. If a political party is discussed from this perspective, does public governance have an obligation "to protect inner party democracy"? To put it in other words, is it mandatory for the legislator to act in the area of a political party not only *ad extra* but also regarding the mentioned unification *ad intra*. Do there exist challenges (factual or ideological) that lead to the increase of legislative regulation?

INTRODUCTION

Political parties bear defining role in managing democratic processes. It is presumed that political parties will lead the social and political dialog. Thus, they will mobilize society, move forward interests of different groups that consequently must be expressed in the agenda of the party. Existence of such presumptions towards political parties turns the role of the parties into essential one. Accordingly, it is crucial, what kind of legal regulations will be set forth regarding their activities. Recent tendencies illustrate that states tend to 'the more regulations', which add significance to the factor of the legislator. According to the position presented in the paper, taking into account existing challenges in modern democratic processes, more regulation would possibly facilitate

the stimulation of the inner democratic processes in parties (with sub-aim), the engagement of a maximum vast number of population in decision making process (with the general aim).

For the political parties, context stipulates the frame of the legislation set by the government, broadly speaking – historical development, constitutional order, and governmental vector.

Guidelines on Political Party Regulation, adopted by the European Commission for Democracy through Law (the Venice Commission) discuss the best options for regulation that should meet the following criteria: (1) minimal legal regulation and (2) establishment of clearly defined limits.¹ However, minor regulation may cause chaotic political life.²

Forming regulatory legislation is a challenge for the state authorities, however, transnational process and identical challenges establishes the same approaches – the so-called good practice, that can considerably assist the legislator. Approaches can be different and legislators themselves should make the decision.

While setting the legal limits for the political parties, it is crucial to act with the same general philosophy (assumption) that political parties are the fundamental components of the development and maintenance of democracy. The object of the paper, while having this ideological approach, is to look for the answers to the following questions: what limits should legislator have in the sphere of the regulation of political parties? What function does the political party have in ensuring democracy? How can be achieved the inner activities to be in accordance with democratic principles?

Comparative, analytical, logical and historical research methods are used within the framework of the research.

The paper consists of an introduction, two chapters and the conclusion. The first chapter seeks theoretical answer on the matter such as the role of political parties in the effective work of democracy. Analyzing mentioned matter, is vital to form not fully unambiguous, but reasonable ideas concerning the limits of legal frames (ignoring the context is impossible). Discussion about democracy, political parties, basic concepts on legislator will be elaborated in this chapter. Acting area for the legislator is not only the political party *ad extra*³, but above mentioned unions *ad intra*,

¹ CDL-AD(2010)024, *Guidelines on Political Party Regulation*, adopted by the European Commission for Democracy through Law (Venice Commission), Venice, 15-16 October 2010, 7.

² Kenneth Janda, *Adopting Party Law, Political Parties and Democracy in Theoretical and Practical Perspectives*, National Democratic Institute for International Affairs, 3 (2005).

³ Terms (a) *ad extra* and (b) *ad intra* are used with following meanings in the paper: (a) means action or result that has external effects, while (b) means action or result that will have inner effect in the association.

inasmuch as democratic process has ideal goal and political parties are core elements of authority in the modern world.

In the second part of the paper, analyses will be made based on the idea that political party should not turn into the reflection of a political elite. Accordingly, the second part will discuss possible measures for ensuring inner party democracy. Thus, this part will cover practical matters.

I. PRINCIPAL FICTIONAL PLAYER OF DEMOCRACY — POLITICAL PARTY AND LEGISLATOR

I.1. For the Definition of Legislative Politics and Political Party

There is a great number of papers concerning the role and functions of political parties. However, it is not an unambiguous institute.⁴ There are two main directions concerning political parties in scholar literature: (1) global and (2) individual. The first one perceives organization as an actor according to its social goals, while the second one directly links it with the interests and preferences of the politicians.⁵ Although, these are two different sides of the same coin and political party can cover both definitions, however, analyzing from the angle of social purposes is more comfortable for the society.

While discussing political parties we should take into consideration axiomatic definition that was used in the middle of 20th century – organization’s main aim is to gain power and control.⁶ It is to be mentioned that Hans Kelsen (1881-1973) considered the role of the political parties so essential in the modern state that he used to refer to the recent as *parteienstaat*.⁷

In liberal democracies, political party can be the organization that acts according to the principles of “transparent functioning, stability and political accountability”.⁸ On the other hand, political party is characterized by having different prioritized directions. To be more precise, they are

⁴ Jonathan R. Macey, *The Role of the Democratic and Republican Parties as Organizers of Shadow Interest Groups*, 89 Mich. L. Rev. 1 (1990).

⁵ Thomas Saalfeld & Kaare W. Strøm, Political Parties and Legislators, the Oxford Handbook of Legislative Studies, Eds. Shane Martin, Thomas Saalfeld & Kaare W. Strøm, 381 (2014); James A. Gardner, *Can Party Politics Be Virtuous?*, 100 Colum. L. Rev. 667 (2000).

⁶ Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 JPE 135, 137 (April, 1957)

⁷ party-state.

⁸ Thomas Saalfeld & Kaare W. Strøm, Political Parties and Legislators, the Oxford Handbook of Legislative Studies, Eds. Shane Martin, Thomas Saalfeld & Kaare W. Strøm, 373 (2014).

more oriented on elections, gaining state authority and changing policy.⁹ However, the most logical assessment regarding political parties, apart from other political organizations,¹⁰ is deemed to have an aim to win the elections.¹¹ In the case of their success, they converse in legislative party implementing legislative politics corresponding to its ideology.

1.2. Political Parties – Against or in Favor of Democracy?

Political parties are the most important means of participation in governance for citizens. The interaction between political parties and democracy is seen from different angle. It is noted, that parties are essential for democratic functioning (this is the most popular and cited opinion)¹², the same idea supposes that “political parties created democracy”¹³. According to the opposing idea, political parties create danger for the democracy. Matter of citizen’s engagement in political parties needs to be analyzed deeply, taking into consideration the following question: is every political party democratic or not? The answer to this question is – no, in every case.¹⁴ Thus, it needs to be analyzed how the low level of inner democracy interferes with democratic processes in the state.

In the modern period, debates concerning political parties are generated with the historical arguments. During the end of the 19th century, different views were considered about the significance and importance of the existence of political parties. If liberals considered representative institutions as the best means for ensuring popular sovereignty (that was composed of political parties), sceptics perceived a risk, as political parties “were creating barrier between people and society”.¹⁵ The latter stipulation implied artificial division of the population that could consequently

⁹ Kaare Strom, *A Behavioral Theory of Competitive Political Parties*, 34 Am. Polit. Sci. Rev. 565, 566-568 (1990)

¹⁰ For instance, initiative groups, social organizations. See. Thomas Saalfeld & Kaare W. Strøm, *Political Parties and Legislators*, the Oxford Handbook of Legislative Studies, Eds. Shane Martin, Thomas Saalfeld & Kaare W. Strøm, 372 (2014)

¹¹ Thomas Saalfeld & Kaare W. Strøm, *Political Parties and Legislators*, the Oxford Handbook of Legislative Studies, Eds. Shane Martin, Thomas Saalfeld & Kaare W. Strøm, 372 (2014)

¹² Juan J. Linz, *Parties in Contemporary Democracies: Problems and Paradoxes*, *Political Parties: Old Concepts and New Challenges*, Eds. Richard Gunther, José Ramón Montero & Juan J. Linz, Oxford University Press, 291 (2002). This role of political parties was firstly noted by Kelsen in “The Essence and Value of Democracy” (929) (“it will be lie and hypocrisy to believe that democracy can exist without political parties. Democracy inevitably and unavoidably represents the state of parties”); Hans Kelsen, *On the Essence and Value of Democracy*, Weimar: a Jurisprudence of Crisis, Eds. Arthur J. Jacobson & Bernhard Schlink, 92 (2000)

¹³ Thomas Saalfeld & Kaare W. Strøm, *Political Parties and Legislators*, the Oxford Handbook of Legislative Studies, Eds. Shane Martin, Thomas Saalfeld & Kaare W. Strøm, 373 (2014)

¹⁴ Yigal Mersel, *Hans Kelsen and Political Parties*, 39 Isr. L. Rev. 158, 168 (2006); see Gregory Fox & Georg Nolte, *Intolerant Democracies*, *Democratic Governance and International Law*, Eds. Gregory Fox & Brad R. Roth, 389-435 (2000).

¹⁵ Bruce D. Graham, *Representation and Party Politics*, Ed. Gillian Peele, Oxford, 3 (1993).

be connected to the restriction of the freedom of expression and possibly, nullifying functional concept of representation.¹⁶

Alexis de Tocqueville (1805-1859) attempted to illustrate above mentioned problems and approaches. In 1831-1832 he tried to study American democratic society and published his analysis in the book named *De la Démocratie en Amérique*.¹⁷ The scheme of political parties' empowerment is essential among Tocqueville's results: equality, individualism and unity. To be more precise, he differentiated two categories: (1) equality of conditions and (2) emotional will of equality.¹⁸ In the first one, he considered equality before the law and in the latter one, an inner will of equality – that makes person more motivated.¹⁹ According to Tocqueville, consequently each member of society becomes more individual. Regarding him, Americans showed an important lesson in pre-condition of individualism – cooperation, expressed in forming unions. Hence, it can be assumed that political party is cooperative expression of achieving values of purpose. John Stuart Mill (1806-1873)²⁰ and Walter Bagehot (1826-1897)²¹ have expressed their ideas about political party, as an actor ensuring democracy.²² Considerations of Moisey Ostrogorsky (1854-1919) about political unions worsening and weakening idea of representation are broadly discussed in doctrine as well.²³

Hans Kelsen's philosophy, regarding political parties, does not lose its relevance. Actual representation is pure fiction and political parties are mediators among representatives and electorate according to his perspective.²⁴ They are conditioning social consensus. Talking about political parties and democracy, Kelsen puts stress on the notion of people and divides them in two categories with following characteristics: whether they have will to participate in decision making process or not. This does not fall in the interest sphere for one group, while for another one this is vice versa and only this recent group is the political party.²⁵

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.4.

²⁰ See John Stuart Mill, *Considerations on Representative Government*, *Essays on Politics and Society*, Ed. John M. Robson <http://oll.libertyfund.org/titles/234> (last visited on 28.05.2016).

²¹ See Walter Bagehot, *The English Constitution* (1873) <http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/bagehot/constitution.pdf> (last visited on 28.05.2016).

²² Bruce D. Graham, *Representation and Party Politics*, Ed. Gillian Peele, Oxford, 10 (1993).

²³ See Moisei Ostrogorski, *Democracy and the Organization of Political Parties* (1902) <https://archive.org/details/democracyandtheo031734mbp> (last visited on 28.05.2016).

²⁴ Hans Kelsen, *On the Essence and Value of Democracy*, *Weimar: a Jurisprudence of Crisis*, Eds. Arthur J. Jacobson & Bernhard Schlink, 97 (2000).

²⁵ Ibid.91-92.

Based on the tendentious approach, political party is the one that ensures democracy, as it protects individual freedom of person (opposition role)²⁶ and implements political freedom.²⁷ Thus, it had not been always this way – political parties were considered as negative elements,²⁸ which was reflected in their legal ignore. Consequently, history of political parties as the direct object of regulation starts from 1940.²⁹ If political party is discussed as stimulating element of democracy, public government has obligation “to protect democracy of parties” as well.³⁰

1.3. Fulfillment of Constitutional Goals and the Factor of the Legislator

Purposes and regulations set forth in different countries’ constitutions aim for an ideal state that can be achieved with “technical” tools. Certain models of government form a major structure and political parties are main elements of it. Hence, in most cases political parties are mentioned in national constitutions itself, but are not regulated in details. This tendency is common for constitutions of last wave of democracy.³¹ According to Kelsen, political parties have constitutional role and in this context, its constitutionalisation tendencies are understandable.³² The Venice Commission in Guidelines on Political Party Regulation prescribes ideal model, which includes functions and role of parties to be set forth in the supreme legal act of the state.³³

There are different extent of regulations on political parties in supreme political-legal acts. For instance, constitutions of Latin American countries prescribe regulation, that guarantees inner party democracy and furthermore, they regulate nomination issues in constitution. Article 21, paragraph one Basic Law for Germany sets forth, that inner organization of the political party must be in compliance with the principles of democracy. Article 51, paragraph 2 of Portuguese constitution, considers the following basic principles for political parties: transparency, democratic organization and governance, in addition, participation in political party activity of its each member.

²⁶ Ibid.93.

²⁷ Ibid.86-87.

²⁸ concept of Rousseau on “general will” see. Yigal Mersel, *Hans Kelsen and Political Parties*, 39 *Isr. L. Rev.* 158, 160-162 (2006); Pippa Norris, *Building Political Parties: Reforming Legal Regulations and Internal Rules*, Report commissioned by International IDEA, 3 (2004).

²⁹ CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission at its 84th Plenary Session, Venice, 15-16 October 2010, 6. However, Article 147 of constitution of Austria, 1920 restricted possibility for constitutional court judge to cooperate with political parties.

³⁰ Irakli Kobakhidze, *Law of Political Associations*, Tbilisi, 79 (2008).

³¹ Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve*, Carnegie Endowment for International Peace, Washington D.C., 160–61 (1999).

³² Hans Kelsen, *On the Essence and Value of Democracy*, Weimar: a Jurisprudence of Crisis, Eds. Arthur J. Jacobson & Bernhard Schlink, 92 (2000).

³³ CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission, Venice, 15-16 October 2010, 12.

Article 26 of Andorra's constitution indicates on democratic organisation of political parties'. Article 6, constitution of Spain considers that inner structure and functions of political parties should be democratic.³⁴

Political party and dynamics of party system guarantee implementation of the constitution.³⁵ This perspective is empirically proved, as the stability of the system of political parties is linked to the ability of the state having an adequate reaction on radical ideology of the political parties.³⁶ In this context, empowerment of political parties in this context and defining states regulatory policy become more crucial.

Legal Framework for political parties depends on the choice of the legislator, whether they opt in favor of liberal (a legal reflection of a party autonomy) or more regulated (ensuring democracy) systems.³⁷ Choice of the system is conditioned by historical experience as well as and mostly by modern challenges. It is to be noted, that nonexistence of specific legislation regulating political parties is not the "requirement of democracy".³⁸ In order to achieve constitutional goals, standards that are agreed in doctrine regarding legal regulations, forthcoming legal principles should be followed: impartiality, freedom and justice.³⁹ According to other approaches, regulation of political parties' law includes legislation management with four main principles: (1) freedom (2) equality (3) inner democracy (4) transparency.⁴⁰ Legislators actions are faced with certain challenges due to framework set by those principles.

According to the recent researches, the tendency is the following – from liberal to more regulated approach.⁴¹ Adopting special laws regarding political parties is extremely popular.⁴² From this point of view, the question of inner democracy is in the spotlight. The Venice Commission outlined

³⁴ See constitution of Costa Rica (Article 95) and constitution of Turkey (Article 69) on the democratic principles of political parties' functioning.

³⁵ Cindy Skach, *Political Parties and the Constitution*, Oxford Handbook of Comparative Constitutional Law, Eds. Michel Rosenfeld & Andras Sajó, 875 (2012).

³⁶ *Facism in Germany*.

³⁷ CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 3.

³⁸ CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission, Venice, 15-16 October 2010, 12.

³⁹ Pippa Norris, *Building Political Parties: Reforming Legal Regulations and Internal Rules*, Report commissioned by International IDEA, 5 (2004).

⁴⁰ Irakli Kobakhidze, *Law of Political Associations*, Tbilisi, 69 (2008).

⁴¹ Fernando Casal-Bértoa, Daniela Romée Piccio & Ekaterina R. Rashkova, *Party Law in Comparative Perspective*, Economic and Social Research Council & European Research Council, Working Paper 16 (March 2012).

⁴² CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 7.

three groups of states pointing to the inner democracy (1) special legislation on political parties with no regulations of inner democracy, (2) apart from the first type; legislation has indications about inner democracy (3) the third type of the states that use non-specified legislation about associations regarding political parties.

Gradually, political parties lose orientation on public interest.⁴³ However, according to Kelsen's theory, political parties are mostly acting on behalf of public interests, even though they may not be acting in accordance with the will of the electorate.⁴⁴ To sum up, societal control of the politics without political parties is hardly imaginable. To put in another words, implementation of political constitutional values – material democracy is utopia without political parties. Enjoying freedom of association itself, ensures “creating proper conditions” for exercising rights guaranteed by constitution and international acts.⁴⁵

2. LEGISLATIVE POLICY FOR THE FUNCTIONING OF THE DEMOCRACY (ENSURING INNER PARTY DEMOCRACY)

It is to be noted, that ensuring inner democracy in political parties is of primary importance. This conclusion is direct assumption from the discussion above. To be more precise, ensuring participation of population is the precondition of existence of political party as an institute. This idea is the source of its legitimation that considers political party as the indivisible element of democratic functioning.⁴⁶ There is no unified definition of the notion of inner party democracy.⁴⁷ Two basic principles can be defined concerning inner functioning of political parties: autonomy and inner democracy. According to the first notion, autonomy of the association should be applied towards

⁴³ Yigal Mersel, *Hans Kelsen and Political Parties*, 39 *Isr. L. Rev.* 158, 166 (2006).

⁴⁴ Hans Kelsen, *On the Essence and Value of Democracy*, Weimar: a Jurisprudence of Crisis, Eds. Arthur J. Jacobson & Bernhard Schlink, 96-97 (2000).

⁴⁵ Giorgi Kverenchkhiladze, *Freedom of Political Association according to Georgian Legislation and European Convention on Human Rights*, Protection of Election Rights and Freedom of Political Association in the Constitutional Court, Tbilisi, 33 (2006).

⁴⁶ For some scholars principle of inner party democracy is a panacea, however, this issue is extremely actual as it is perceived as the way of neutralizing social and governmental crisis. See, Hanna Suchocka, *Venice Commission Standards in the Field of the Establishment of Political Parties*, Political Parties – Key Factors in Political Development of Democratic Societies, Publication of Presentations, 24 (2013); see also Susan Scarrow, *Implementing Intra-Party Democracy*, Political Parties and Democracy in Theoretical and Practical Perspectives, National Democratic Institute for International Affairs, 3 (2005); William P. Cross & Richard S. Katz, *The Challenges of Intra-Party Democracy*, Oxford University Press, 1 (2013) https://www.ndi.org/files/1951_polpart_scarrow_110105.pdf (last visited on 28.05.2016).

⁴⁷ See William P. Cross & Richard S. Katz, *The Challenges of Intra-Party Democracy*, Oxford University Press, 2-3 (2013).

internal and external functioning of political parties. Broadly speaking, an association should have a possibility to define rules for selecting candidates and leadership.⁴⁸ The second central principle is the element of inner democracy, meaning implementation of democratic requirements in an organization.⁴⁹ According to the Venice Commission, putting minimal frameworks on political activities and system is the most effective way, however:

“As parties contribute to the expression of political opinion and are instruments for the presentation of candidates in elections, some regulation of internal party activities can be considered necessary to ensure the proper functioning of a democratic society.”⁵⁰

Thus, it is essential to ensure that individuals have a possibility to affect politics in order to let political parties function as guarantors of substantial and technical democracy. However, it is problematic that when *ad extra* actions of political parties may be in accordance with democratic principles and the rule of law and the lack of such approach in *ad intra* functioning is obvious.⁵¹ Hence, an inner democratic system is crucial in order to guarantee participation.⁵² Empowering inner party democracy ensures high quality of deliberation and supports strengthening of the democratic culture in general.⁵³

Prescribing relevant legislative obligations, to ensure the functioning of inner democracy in political parties, is interference in protected sphere of basic rights, however, its proportionality may be a matter of discussion. Choosing candidates can be one of the vivid examples. Selection of candidates is an important challenge firstly for states and secondly for political parties. Candidates are listed mainly behind closed doors. The need of creating transparent and clear criteria are in an agenda. This excludes a decisive role of the political elite in the process of electing candidates. Hence, it ensures dysfunction of “closed door party system”.⁵⁴

⁴⁸ CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 3.

⁴⁹ Ibid.

⁵⁰ CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission, Venice, 15-16 October 2010, 25.

⁵¹ CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 5; according to the doctrinal considerations, nonexistence of inner party democracy, may become ground for its abolition. See Yigal Mersel, *The Dissolution of Political Parties: the Problem of Internal Democracy*, 4 Int'l J. Const. L. 84 (2006).

⁵² Yigal Mersel, *Hans Kelsen and Political Parties*, 39 Isr. L. Rev. 158, 172 (2006).

⁵³ Susan Scarrow, *Implementing Intra-Party Democracy, Political Parties and Democracy in Theoretical and Practical Perspectives*, National Democratic Institute for International Affairs, 3 (2005) https://www.ndi.org/files/1951_polpart_scarrow_110105.pdf (last visited on 28.05.2016).

⁵⁴ Irakli Kobakhidze, *Law of Political Associations*, Tbilisi, 89 (2008).

Following this path hardly any detailed regulation is prescribed in political parties' or election law. Mostly legislator points at general principles. An example of detailed regulation can be German law on political parties,⁵⁵ likewise organic law of Portugal on political parties.⁵⁶ The Venice Commission includes Latin-American countries in the list of those countries, however, in the recent case, absence of strong inner party democratic structure is considered as motivation for providing regulation on inner democracy, and this may not be timely for European cases.⁵⁷

Legislative regulations emphasize elective bodies and their rights in the process of candidate nomination. According to the Article 21, Federal Elections Act of Germany⁵⁸ prescribes dual possibility for election of the candidates: (1) by members' assembly and (2) by delegates' assembly.⁵⁹ Demands become more detailed in regard to electing actors. According to the current regulation, members of the assembly can be the party members who are voters of their district at the time of the meeting (article 21.1). In the district itself, requirements for admissibility of the candidate are as follows: being member of only corresponding party and being elected at a party congress (or at a special or general delegates' assembly) held specifically only for electing constituency candidates (article 21.1.). Above mentioned regulations are binding for Bundestag election. As the delegate assembly elects candidates indirectly, legislation prescribes detailed rules concerning delegates' assembly. For instance, according to article 21 paragraph 3 of the same act indicates delegates are elected by secret ballot. Apart from this, any member, attending the meeting is entitled to present themselves and their programs. German mechanism pays attention to the matter of time limits and points out that elections should not be held earlier than 32 months from the time of Bundestag legislative term beginning, and delegate elections itself not earlier than 29 months. This rule does not apply to the case when the term of the Bundestag is terminated (article 21.3). Interestingly, executive committee can nullify the decision of the delegates' assembly (article 21.4).

Charter of the political parties applies to other procedural issues. However, law on elections of Finland obliges political party, in case it has no similar regulation in political party statute, to hold

⁵⁵ Article 17 (24 July 1697). see <http://www.bundestag.de/blueprint/servlet/blob/189734/2f4532b00e4071444a62f360416cac77/politicalparties-data.pdf> (last visited on 28.05.2016).

⁵⁶ Article 33 (2/2003). CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 8.

⁵⁷ CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 8.

⁵⁸ https://www.bundeswahlleiter.de/en/bundestagswahlen/downloads/rechtsgrundlagen/bundeswahlgesetz_engl.pdf (last visited on 28.05.2016).

⁵⁹ Same regulation is prescribed in the organic law on political parties of Spain (6/2002) Article 7.

election procedure of the candidate in accordance with regulations prescribed by law.⁶⁰ According to Finnish legislation, decision in regard to appointing candidates should be delivered by local organization (article 116). Similar regulation to the German one can be found in this law as well, setting forth “right of change” (article 117). According to it, management of the party (board) can recommend changes to the selected candidates, however presented list should not differ from the original with the proportion of one-fourth and it should contain more than a half of the original list as well.

One more example can be presented, the law on elections of Chile obliges political parties to hold primary elections for nominating president, members of parliament and mayors candidates.⁶¹

Evaluation of inner party democracy is mostly defined how decentralized the activity of the party is in regard to candidates selection. If its quality is high, then approach that candidate nomination issues is the discretion of the parties seems less problematic. However, the Venice Commission points on the adverse issues of “quite centralization” in regards to political parties in Central and Eastern European countries.⁶²

2.1. General Methodology

Influence of international standards and regulations is an important issue in defining law on political parties.⁶³ There are specific areas, with detailed and common approaches. However, one can less likely consider one accepted approach on the matter of inner organization of political parties. Some states specifically indicate the need of accepting principles ensuring inner party democracy (ex. Germany, Spain) but mostly, this is not the case.

The Venice Commission in the Guidelines on Political Parties Regulation discusses nondiscrimination and equality in inner functioning of the party.⁶⁴ According to their point of view, for providing de facto equality of women and ethnic minorities, introducing relevant regulation is a good prac-

⁶⁰ Article 113 Election Act of Finland (714/1998) <http://www.finlex.fi/en/laki/kaannokset/1998/en19980714.pdf> (last visited on 28.05.2016).

⁶¹ CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 9.

⁶² CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 10.

⁶³ Anika Gauja, *The Legal Regulation of Political Parties: Is There a Global Normative Standard?*, 15 Election LJ. 1 (2015).

⁶⁴ CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission, Venice, 15-16 October 2010, 18.

tice. According to its evaluation, this represents a relevant compensation for the historic inequality.⁶⁵ From the legal perspective, problem mostly depends on the electoral systems⁶⁶ and inner party democracy.⁶⁷

Taking into consideration crucial role of the political party, several states of OSCE created legislation that in its essence, ensures inner democracy in functioning of the party.⁶⁸ Good practice in this sense means transparent decision-making process in political parties, especially in regard to the nomination of candidates.⁶⁹ Parliamentary Assembly of the Council of Europe called on member states to introduce regulations that „will encourage implementation of inner party democracy”.⁷⁰

From the list of similar issues, gender quotas have been actual recently in Georgia. Its goal is to ensure balanced representation in political and public decision-making process.⁷¹

2.2. Gender Equality

Elections are the most important tool for the citizen’s political participation. From this point of view, legislator intensively interferes in the protected sphere of political parties. Interference in basic rights is justified if it occurs in the case of closed voting lists.⁷² The most common type of interference is establishing gender-based quotas. “Hindering normal functioning of democratic processes” is the ground for interference in the basic right of freedom of association.⁷³ From one point of view, issue of gender quota is understandable; however, there are many social-economic factors for the passivity of women (even in the case of rather open society).

Gender quotas are actively discussed in different states, as it is one of the most trending issues nowadays. In this sense, constitutional courts act as important actors. According to the decision

⁶⁵ Ibid.

⁶⁶ See CDL-AD(2009)029, Report on the Impact of Electoral Systems on Women’s Representation in Politics, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 12-13 June 2009.

⁶⁷ See CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015.

⁶⁸ CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission, Venice, 15-16 October 2010, 25.

⁶⁹ Ibid.

⁷⁰ William P. Cross & Richard S. Katz, *The Challenges of Intra-Party Democracy*, Oxford University Press, 1 (2013).

⁷¹ Recommendation Rec(2003)3 of the Committee of Ministers to member states on Balanced Participation of Women and Men in Political and Public Decision Making, 12 March 2003; Explanatory Memorandum, I C, 13.

⁷² CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 11.

⁷³ CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission, Venice, 15-16 October 2010, 25.

of the constitutional court of Italy 12 December 1995, #422 gender quotas are considered as anti-constitutional.⁷⁴ However, in 2003, decision #49 of same constitutional court, demonstrated gender quotas as corresponding to the constitution based on an amendment of Article 117, Constitution of Italy, 2001.⁷⁵ The latter concerned regional representative bodies and referred to the state's obligation of providing equal opportunities. During the same year, another amendment was introduced in Constitution adding the following phrase to the Article 51 – state is authorized to take special measures to ensure equal opportunities for males and females.

In 2008, Court of Spain discussed matter of gender quotas as well.⁷⁶ According to the appealed legislation, political parties were obliged to present balanced election lists, where each gender would have been represented not less than 40%. According to appellants' arguments, regulations setting forth such advantages cause violation of the following constitutional principles and rights: the principle of unity of population, right of equality (Constitution of Spain, Articles 14 and 23), right to participate in public life (Constitution of Spain, Articles 23 and 68 paragraph 5), right to political association (Constitution of Spain, Articles 6 and 22) in context of having possibility to form political will in frames of specific ideology (Constitution of Spain, Articles 16 and 20.1 a).⁷⁷ Constitutional Court deemed this regulation to be constitutional. Main argument of the court was based on the right of equality. Court differentiated between formal and material equality. Constitutional reflection of material equality for constitutional court was Article 9 paragraph 2, Constitution of Spain, which obliges government to provide conditions that would make enjoyment of basic rights "real" and "effective". From the constitutional courts perspective, this approach is not discriminatory as this division is not based on /majority/minority criteria (for instance as it would have been in case of considering race or age as criteria).⁷⁸ For the court, political parties' freedom is not absolute and gender quotas are precondition of the scale, such as the obligation of presenting closed election lists or any other criterion for admissibility.⁷⁹

The Venice Commission elaborates on positive effects of creating structural divisions inside political parties ensuring gender balance. However, it also points out that it may have a negative

⁷⁴ Maria Grazia Rodomonte, *Equal Access to Elective Offices: A Challenge for Italian Democracy*, J. Pol. Sci. Pub. Aff. (2013) <http://dx.doi.org/10.4172/2332-0761.1000107> (last visited on 28.05.2016).

⁷⁵ *Ibid.* 2.

⁷⁶ See decision N12, January 29. <http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC122008en.aspx> (last visited on 28.05.2016).

⁷⁷ See Decision N12, January 29, 3rd part. <http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC122008en.aspx> (last visited on 28.05.2016).

⁷⁸ *Ibid.* 5th part.

⁷⁹ CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 13.

effect in terms of marginalization and alienation of women inside the party.⁸⁰ According to its recommendation, if the party violates legislative provisions on quota, corresponding sanctions should be prescribed.⁸¹ Sanctions may be financial or in extreme cases, removal of the party from the election processes may be applied. Thus, a sanction should be proportionate to the violation.

2.3. Ensuring Participation of National Minorities

Constitutional heritage and realization of fundamental principles of Europe ensure the protection of ethnic minorities. This issue is discussed not only on the academic level, but it is a matter of public discussions as well (political debates).⁸² A possibility of participation in political decision-making process is a tool for conflict prevention.⁸³ However, there is no legal obligation throughout Europe that would guarantee representation of minorities. According to the Venice Commission, representation should be stimulated mostly in the states where forming the party based on ethnic or regional grounds is prohibited.⁸⁴

If legislator's goal is to ensure participation of minorities in decision making, it should be taken into account that if borders of election districts are similar to the living territories of minorities, then ensuring their representation is more likable. Moreover, potential of success of open or free lists in regard to ethnic minorities should be evaluated individually in every case.⁸⁵ Generally, the general principle of equality ensures participation of minorities.

Different policy exists concerning national minorities. Part of the states (a) directly provide their representation, when (b) the other part, establish different supporting mechanisms. (a) For instance in Croatia, places for minorities are reserved in the parliament.⁸⁶ One place is defined for Italian and Hungarian minorities in Slovenia.⁸⁷ Special approach is created by Article 62 paragraph 2,

⁸⁰ CDL-AD(2010)024, Guidelines on Political Party Regulation, adopted by the Venice Commission, Venice, 15-16 October 2010, 25.

⁸¹ Ibid, 31.

⁸² CDL-INF(2000)4, Electoral Law and National Minorities, adopted by the Venice Commission, Strasbourg, 25 January 2000, 2.

⁸³ Ibid.

⁸⁴ CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 15.

⁸⁵ CDL-INF(2000)4, Electoral Law and National Minorities, adopted by the Venice Commission, Strasbourg, 25 January 2000, 8.

⁸⁶ The Constitutional Act on the Rights of National Minorities in the Republic of Croatia the Croatian Parliament, 8. 19 (2002) <http://www.regione.taa.it/biblioteca/minoranze/croazia2.pdf> (last access date 28.05.2016).

⁸⁷ CDL-INF(2000)4, Electoral Law and National Minorities, adopted by the Venice Commission, Strasbourg, 25 January 2000, 3.

Constitution of Romania, by setting forth that if representative of national minority organisation will not be able to obtain place in the parliament, then each of them will have one mandate, however, only one union can represent corresponding minority. Law on elections prescribe the details: if in any chamber, representative of national minority organisation will not be able to obtain mandate and its received votes are equal to 10 percent of the average number of votes needed to be elected as a member, the party will be granted with mandate anyways.⁸⁸ (b) Similarly, election barriers are lowered for national minority associations in Germany, Denmark and Poland.⁸⁹

2.4. Political Parties and Freedom of Association – Borders Set by Goals.

Restriction of freedom of association considerably depends on constitutional record. Three different approaches can be distinguished: (1) inner democracy principle is pointed out in the Constitution; (2) there is no indication on political parties; (3) freedom of association of political parties is mentioned.⁹⁰ In the latter case, test of proportionality is the strictest, when in the first two cases intensity is reduced.

Ensuring inner democracy by the political party might be considered as their obligation (inner democracy is “explicit goal” for political parties⁹¹). Unfortunately and frequently they are not bonded with this responsibility.⁹² For providing inner democracy, issue of advisability of intensity of interference in the protected sphere of basic rights should be ascertained. While setting forth specific regulations, quantitative characteristics should be evaluated. To be more precise, it should be assessed what is the current capacity and what the maximum result can be achieved by setting potential regulation in motion.

According to one position, approach that democracy is not sum of democratic elements does not lose its actuality⁹³, and political parties should be understood as “group of politicians” and not as the union of citizens.⁹⁴ The fact, that policy or ideology received as the result of procedural or sub-

⁸⁸ Law on the Elections for the Chamber of Deputies and the Senate, articles: 4.2. and 93.1.i) (2004) <http://www.lexadin.nl/wlg/legis/nofr/eur/lxwerom.htm> (last visited on 28.05.2016).

⁸⁹ CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 16.

⁹⁰ CDL-AD(2015)020, Report on the Method of Nomination of Candidates within Political Parties, adopted by the Council for Democratic Elections and the Venice Commission, Venice, 19-20 June 2015, 6.

⁹¹ CDL-AD(2009)002, Code of Good Practice in the Field of Political Parties, adopted by the Venice Commission, Venice, 12-13 December 2008, 2.

⁹² William P. Cross & Richard S. Katz, *The Challenges of Intra-Party Democracy*, Oxford University Press, 1 (2013).

⁹³ Giovanni Sartori, *Democratic Theory*, New York, 124 (1965).

⁹⁴ William P. Cross & Richard S. Katz, *The Challenges of Intra-Party Democracy*, Oxford University Press, 5 (2013).

stantial democracy may not be widely acceptable by voters, is the real threat for the supporters of this idea.⁹⁵ This latter argument is strengthened with the empirical data, interest towards political parties is reducing, resulting in less representative decision making party society.⁹⁶ Apart from this, centralization quality of the actions of the party is so high, that political parties and state come closer, which results in undermining democratic process and pluralism.

According to the second position, external interference is justified if the goal is to restrict authority of non-accountable leadership⁹⁷ or exclude anti-democratic policy/plans⁹⁸ or for the protection of democracy⁹⁹ substantially as well as procedurally. Maximum involvement of citizens is legitimate goal and at the same time main factor that makes political party social-politically relevant. At the same time, involvement is necessary not only in terms of ideological or theoretical-philosophical perspective, but from the practical point of view as well. High chances of being representative of self or social interests raises society and gives the best result to the deserved ones.

CONCLUSION

Corresponding to recent tendencies, inner organizational procedures of political parties have become a subject of external regulation.¹⁰⁰ As empirical normative research has shown, legislative regulation of inner activities of political parties is an important characteristic of laws on political parties or elections in different countries. Thus, the preference of the legislator in favor of the parties that act according to the democratic principles is vivid. However, at the same time, making this decision is connected to the crucial legal dilemma and, on the other hand there is a matter of protection of the basic right of the freedom of association of political party. By analyzing the doctrine, it is also revealed the definition of political party is comprehended differently that puts forward new features in the process of finding balance by the legislator.

⁹⁵ Ingrid van Biezen & Daniela Romée Piccio, *Shaping Intra-Party Democracy: On the Legal Regulation of Internal Party Organizations, The Challenges of Intra-Party Democracy*, Eds. William P. Cross & Richard S. Katz, 46 (2013).

⁹⁶ Ingrid Van Biezen, *Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe*, 42 Br. J. Political Sci. 187, 205 (2012).

⁹⁷ James A. Gardner, *Can Party Politics Be Virtuous?*, 100 Colum. L. Rev. 667 (2000).

⁹⁸ Ingrid van Biezen & Daniela Romée Piccio, *Shaping Intra-Party Democracy: On the Legal Regulation of Internal Party Organizations, The Challenges of Intra-Party Democracy*, Eds. William P. Cross & Richard S. Katz, 45 (2013).

⁹⁹ Ingrid van Biezen & Gabriela Borz, *Models of Party Democracy: Patterns of Party Regulation in Post-War European Constitutions*, 4 Eur. Polit. Sci. Rev. 327-359 (2012).

¹⁰⁰ See Ingrid van Biezen & Daniela Romée Piccio, *Shaping Intra-Party Democracy: On the Legal Regulation of Internal Party Organizations, The Challenges of Intra-Party Democracy*, Eds. William P. Cross & Richard S. Katz, 27-48 (2013).

It is to be noted, that skeptical attitude towards political parties is an actual issue for sustained democracies as well as for other systems.¹⁰¹ The challenge for the legislative policy is to create such regulations that will enhance a trust to a political party, which is linked to the legitimacy of democracy. The same approach also means that society has a possibility of political alternatives. Meaning that, there is the potentiality not only to create new (in this case establishing political party), but also a chance to correct existing ones, participating in it fully (revision can be in persons or ideas (in the framework of corresponding political ideology)). Thus, a component of participation using political parties should not exist as a general right, but it should exist on the goal-oriented policy/mechanisms level. On the other side, all the above mentioned is complex and non-independent issue. Several outlined matter should be pointed out once again – challenges are individual and intensity of certain directions of legislative policy should be defined not only in proportion to the reality but future and result as well. In itself, public participation crisis cannot be solved by, this approach but it will make a big contribution in terms of functioning of democracy. It is crucial that in different cases, changes of political climate is not a reaction of an elite but rather a social effect.

¹⁰¹ Juan J. Linz, *Parties in Contemporary Democracies: Problems and Paradoxes*, Eds. Richard Gunther, José Ramón Montero, and Juan J. Linz, *Political Parties: Old Concepts and New Challenges*, Oxford University Press, 291, 294-308 (2002).

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