

Special Topic: Establishment and Unconstitutionality of Political Parties

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Various legal systems contain provisions on the unconstitutionality of political parties. However, the requirements and measures for their prohibition vary broadly. Since the Austrian legal framework contains the notion of unconstitutional political parties, the question arises which parties are considered to be unconstitutional and what procedure is applicable to such parties.

I. Introduction¹

The political landscape of Europe has witnessed radical changes in the last few years with the rise of new political actors and movements² and the growing support for radical, anti-establishment and populist protest movements. The importance of political parties for a functioning democracy is undoubted. Nevertheless, procedures for the prohibition and dissolution of political parties form part of many legal systems and have been subject to various decisions by the European Court of Human Rights (ECtHR).³ Recent examples for the topicality are the proceeding on the banning of the National Democratic Party (NPD) in Germany⁴ and the case on the Party for a Democratic Society (DTP) before the ECtHR.⁵

A comparison of various European states demonstrates a broad range of requirements and measures for the prohibition of political parties.⁶ Regarding the requirements some states opt for formal restrictions⁷ while other legal systems contain substantive restric-

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- 1 The article is based on a presentation held by the author at the CoCoA Summer School (Comparing Constitutional Adjudication) organised by the University of Trento in August 2016 on the general topic 'Constitutional Legitimacy of Political Parties: streitbare Demokratie and Anti-system Parties in Europe'.
 - 2 For further information see Poguntke (eds), *Anti-Party Parties in Germany and Italy: Protest Movements and Parliamentary Democracy* (LUISS 2015) 12.
 - 3 These cases are usually examined under Art 11 ECHR; see for example, the case of *Refah Partisi and others v Turkey*, App no 41340/98 and 25817/04 (ECtHR, 13 February 2003) and *Herri Batasuna and Batasuna v Spain*, App no 25803/04 and 25817/04 (ECtHR, 30 June 2009). For more information on the topic see Wolter, *Parteiverbote in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte*, EuGRZ 2016, 92; Beširević, *A Short Guide to Militant Democracy: Some Remarks on the Strasbourg Jurisprudence*, Jahrbuch Human Rights 2012, 243.
 - 4 Before the German Federal Constitutional Court: File number 2 BvB 1/13. Before the ECtHR: *Nationaldemokratische Partei Deutschlands, NPD v Germany*, App no 55977/13 (ECtHR, 4 October 2016).
 - 5 The ECtHR held that the dissolution of the DTP was in violation of Art 11 ECHR (*Parti pour une société démocratique [DTP] et autres c Turquie*, App no 3840/10 et al [ECtHR, 12 January 2016]).
 - 6 See *Guidelines on prohibition and dissolution of political parties and analogous measures* adopted by the Venice Commission at its 41st Plenary Session (Venice, 10-11 December 1999) and *Guidelines on political party regulations* adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010).
 - 7 For example, concerning the name or symbols of the party (Art 12 Portuguese Law governing Political Parties; Art 8 Slovenian Political Parties Act; § 6 para 3 Czech Law on association within political parties and political movements; Art 3 para 1 Spanish Organic Law on Political Parties) or criteria concerning a minimum number of members or founders (Art 11 para 3 nr 2 Polish Act of 27 June 1997 on political

tions concerning sanctions against parties which pursue certain aims or adopt certain behaviours.⁸ The German Constitution, for example, provides for the unconstitutionality of parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany (Art 21 para 2 of the Basic Law). In a similar vein, a number of states issue bans on extremist parties reflecting the recent historical experience with totalitarian regimes.⁹

In respect of the possible measures, various states implement preventive measures such as the ban on forming a political party or the refusal to register it¹⁰ while others choose repressive measures such as the dissolution of the party.¹¹ Within the framework of a militant democracy, Germany, for instance, in Art 21 para 2 of the Basic Law and in §§ 43 et seq of the Federal Constitutional Court Act assigns the power to conduct proceedings for the prohibition of political parties to the Federal Constitutional Court.¹²

In view of the above, this paper focuses on the Austrian provisions on unconstitutionality of political parties in a general sense, underlining the procedural aspects in the light of the case law of the Austrian Constitutional Court.

II. The Austrian Legal Framework on the Establishment of Political Parties

The Political Parties Act 2012 (hereinafter: PartG)¹³ forms the core of the law on political parties.¹⁴ Its § 1 PartG contains the constitutional basis for the founding of political parties. § 1 para 1 PartG holds that the existence and diversity of political parties are key elements of the Republic of Austria's democratic order.¹⁵ § 1 para 2 PartG defines a political party as 'a permanently organised association which, through common activities, aims at comprehensively influencing the national decision-making process, in particular by par-

parties; Art 5 [3] Lithuanian Law on Political Parties and Political Organisations; § 6 para 2 lit a Czech Law on association within political parties and political movements).

8 For example, Art 4 para 3 Lithuanian Law on Political Parties and Political Organisations; §§ 4 and 5 Czech Law on association within political parties and political movements; Art 9 para 2 Spanish (organic) Law on Political Parties.

9 For example, Art 8 Portuguese Law governing Political Parties; Art XII of the Italian Constitution.

10 For example, Art 14 para 3 Polish Act of 27 June 1997 on political parties; § 8 Czech Law on association within political parties and political movements.

11 For example, Art 17 et seq Portuguese Law governing Political Parties; §§ 12 et seq Czech Law on association within political parties and political movements; Art 10 et seq Spanish Organic Law on Political Parties.

12 Similar competences of the Constitutional Courts are for instance contained in the Slovenian (Art 160), Polish (Art 188 no 4) and Czech (Art 87 para 1 lit j) Constitution. In various other countries such as Albania (Art 131 lit d) and Slovakia (Art 129 para 4) the competence of the Constitutional Court also includes the prohibition of other political organisations.

13 *Bundesgesetz über die Finanzierung politischer Parteien (Parteigesetz 2012 – Part G)*, Federal Law Gazette I No 56/2012 as amended by Federal Law Gazette I No 84/2013; an English version is available online <www.ris.bka.gv.at/Englische-Rv/> [accessed 30 October 2016].

14 Various provisions have a constitutional character; the PartG also contains rules on the financing of (political) parties.

15 According to prevailing opinion, the multiparty system as laid down in § 1 para 1 PartG forms a component of the democratic principle of the Austrian Constitution; see Wieser, § 1 *PartG*, in Korinek/Holoubek et al (eds), *Österreichisches Bundesverfassungsrecht* (5th sup, Verlag Österreich 2002) para 17.

ticipating in elections for general representative bodies and the European Parliament, and whose statute has been deposited with the Federal Ministry of the Interior'.¹⁶ According to § 1 para 3 PartG, '[p]olitical parties may be freely established, unless the Federal Constitutional Law provides otherwise. Their activities shall not be subject to any restrictions by particular legal provisions'. The relatively simple procedure for the establishment of political parties is contained in § 1 para 4 PartG: The political parties shall resolve on their statutes,¹⁷ which they shall deposit with the Federal Ministry of the Interior. The political party shall obtain legal personality upon deposit of the statute. The statute shall be published by the political parties on the Internet in an appropriate manner. Considering that the procedure for the establishment only sets minimal requirements and is merely a formality, the PartG can be qualified as a 'registration law'.¹⁸

Two aspects of this provision need to be highlighted: Firstly, § 1 para 3 PartG contains a reservation on the freedom of establishment of political parties ('unless the Federal Constitutional Law provides otherwise'). Therefore, the question arises which political parties are excluded from the freedom of establishment or – in other words – are considered to be unconstitutional. Secondly, it can be noted that the Austrian legal framework does not contain provisions for the prohibition or dissolution of political parties. Accordingly, it needs to be clarified which procedure is applicable to political parties that are considered to be unconstitutional.

III. Unconstitutional Political Parties

As laid down in § 1 para 3 PartG the establishment of political parties is free to the extent that the Federal Constitutional Law does not provide otherwise. Accordingly, § 1 para 3 PartG contains a reservation to the guaranteed freedom of establishment of political parties and limitations can only be contained in constitutional provisions.¹⁹ However, the scope of this reservation remains unclear.

So far the case law of the Constitutional Court has provided various judgments that outline that the reservation in § 1 para 3 PartG refers to various constitutional provisions²⁰ of the National Socialism Prohibition Act 1947²¹ and the State Treaty of the Re-establishment of an Independent and Democratic Austria (State Treaty of Vienna).²² Essentially,

16 Despite their factual significance in the political landscape of Austria the constitutional law almost entirely ignored political parties. Only in 1975 political parties gained a legal basis with the 'Political Parties Act 1975' following the discussions on the financing of political parties. In 2012 this Act was fundamentally reviewed on occasion of the revision of the financing of political parties. For more information on the historical background see Zögernitz/Lenzhofer, *Politische Parteien-Recht und Finanzierung* (WUV 2013) 15; Wieser (n 15) para 1 et seq; Schambeck, *Politische Parteien und österreichische Staatsrechtsordnung*, in Mayer et al (eds), *Staatsrecht in Theorie und Praxis*, Festschrift für Robert Walter zum 60. Geburtstag (Verlag Manz 1991) 603 et seq.

17 § 1 para 4 PartG contains a list of minimum requirements that the statute shall contain.

18 Wieser (n 15) para 48; this has led to the enormous number of currently 1057 registered political parties [accessed 30 October 2016].

19 Berka, *Die Grundrechte* (Springer 1999) para 679.

20 The jurisdiction of the Constitutional Court does not provide a coherent picture of the particular provisions; for an overview see Wieser (n 15) para 60 et seq.

21 §§ 3 et seq National Socialist Prohibition Act 1947 (VfSlg 9648/1983, 10.705/1985, 11.258/1987, 11.761/1988).

22 Art 4 and 9 State Treaty of Vienna (VfSlg 11.761/1988); Art 4 no 2 State Treaty of Vienna 1955 contains the 'Prohibition of Anschluss' to Germany.

these provisions contain a ban on the revival of the national socialist party and its organisations.²³

According to prevailing opinion, these provisions form a punctual exception to the neutrality of the constitution towards the freedom of establishment of political parties in answer to Austria's historical experience and can hardly be generalised to the prohibition of other extremist parties.²⁴ Thus the constitutional legislator established an extensive freedom of establishment of political parties accepting that this could also lead to the establishment of antidemocratic parties.²⁵ This invokes the question how restrictive provisions – comparable to the ban of national socialist parties²⁶ – could be introduced: Rill/Schäffer suggest that the introduction of such provisions would constitute a total revision of the Federal Constitution in the sense of Art 44 para 3 Federal Constitutional Law (B-VG); meaning that the law would need to be submitted to a nationwide referendum. However, political parties that openly declare revolutionary tendencies could be banned by a constitutional provision without the necessity of the procedure of Art 44 para 3 B-VG.²⁷ Thienel argues that a provision to forbid antidemocratic parties could be introduced by constitutional law and that it would not constitute a total revision of the Federal Constitution. This argument is in particular based on the idea of a positive obligation of the constitutional legislator to secure fundamental rights – such as the right to vote – and on Austria's international obligation to ensure a democratic order.²⁸

This aspect becomes obsolete following Wieser's opinion: In contrast to the prevailing opinion, he argues that the scope of the reservation of § 1 para 3 PartG is not limited to national socialist parties but can be interpreted in a broader sense. He sees a basis for yet another constitutional provision prohibiting the establishment of political parties in the Federal Constitutional Act on Elimination of racial discrimination.²⁹ In addition with reference to Art 9 no 2 State Treaty of Vienna – that obliges Austria 'to dissolve all Fascist-type organisations existing on its territory, political, military and para-military, and likewise any other organisations carrying on activities hostile to any United Nation or which intend to deprive the people of their democratic rights' – he concludes that the second part of this Article is also applicable to non-fascist organisations and that therefore the establishment of political parties with other antidemocratic goals is forbidden.³⁰

23 As the Constitutional Court pointed out in its judgment VfSlg 11.258/1987 with regard to the question of national socialist activities it is necessary to obtain an overall view of the party's ideology and not to isolate single statements.

24 Öhlinger/Eberhard, *Verfassungsrecht* (11th edn, Facultas 2016) para 355; Thienel, *Wehrlose oder streitbare Demokratie?*, JRP 2005 (163 and 165) Rill/Schäffer, *Art 1 B-VG*, in Kneihls/Lienbacher (eds), *Bundesverfassungsrecht* (1st supp, Verlag Österreich 2001) para 34; Oberndorfer, *Art 1 B-VG*, in Korinek/Holoubek et al (eds), *Österreichisches Bundesverfassungsrecht* (3rd supp, Verlag Österreich 2000) para 20; Berka, (n 19) para 678; Ringhofer, *Die österreichische Bundesverfassung* (Verlag des Österreichischen Gewerkschaftsbundes 1977) 15.

25 Schambeck (n 16) 612 (with reference to the materials of the debate of the National Council).

26 According to the jurisdiction of the Constitutional Court the introduction of the National Socialist Prohibition Act 1947 did not constitute a total revision of the Constitution (VfSlg 1708/1948 and 10.705/1985).

27 Rill/Schäffer (n 24) para 34 Fn 100; see also Raschauer, *Die Rechtsstellung politischer Parteien*, in Pe-linka/Plasser (eds), *Das österreichische Parteiensystem* (Böhlau Verlag Wien 1988) 557 (567); by implication also Oberndorfer (n 24) para 20.

28 For instance, Art 6 TEU; Thienel (n 24) 168 et seq.

29 Wieser (n 15) para 65; see also Adamovich, *Bericht zur Lage in Österreich vor der EU-Delegation des französischen Senats*, EuGRZ 2000, 399 (402).

30 Wieser (n 15) para 64; of other opinion: Thienel (n 24) 164 fn 11 and Rill/Schäffer (n 24) para 35 fn 105. They are of the opinion that – especially in the light of the headline of Art 9 ('Dissolution of Nazi

IV. Procedural Aspects

In its landmark decision VfSlg 9648/1983 the Constitutional Court had to answer the question as to what procedure is applied to a political party not established in line with the Constitution.

The decision originated from a proceeding brought before the Constitutional Court against a decision of the Minister of the Interior to reject the deposit of the establishing statute of the so called 'List against foreigners' (*Liste gegen Ausländer*). In its statute the party for instance declared that it wished to implement a permanent stop to foreign workers. The Minister of the Interior argued that on the occasion of the deposit of a statute, he was not only obliged to evaluate if the formal requirements as set by § 1 para 4 PartG were met, but also if the establishment was in line with the Federal Constitutional Law (§ 1 para 3 PartG). Since in the opinion of the Minister of the Interior the statute of a party promoting xenophobia and ethnic hatred was clearly based on national socialist ideology, and was in consequence not in line with Art 9 State Treaty of Vienna, he rejected its deposit. The founder of the 'List against foreigners' appealed against this decision before the Constitutional Court.

The Constitutional Court annulled the decision of the Minister of the Interior on the grounds that the Minister of the Interior had unlawfully claimed jurisdiction. Stressing that neither the wording of § 1 para 3 PartG, nor any other constitutional provision contained any authorisation to reject the deposit of a statute of a political party, the Court held that the constitutional legislator had wilfully refrained from implementing provisions enabling the prohibition of political parties. On the contrary, with reference to the arguments brought forward during the debate in the national council³¹ the Court held that when enacting the Political Parties Act, it was the intention of the constitutional legislator in 1975 not to provide for such authorisation. Thus, no administrative authority or court could intervene in the freedom of the founding of political parties. Accordingly, the Minister of the Interior did not have any authorisation to reject the deposit of the statute. However, if a political party is established contrary to the Constitution the political party does not obtain legal personality. Therefore, every competent authority has to examine incidentally if a political party has obtained legal personality or not. Since the Minister of the Interior had claimed jurisdiction contrary to law, he had violated the constitutional right to one's lawful judge and his decision was subsequently annulled by the Constitutional Court.

The rule established in this case has been followed in later judgments.³²

In conclusion this means that a political party that is not established in line with the Constitution does not obtain legal personality.³³ There are no provisions for prohibiting or

Organisations') – the scope of the Article is clearly limited to the dissolution of fascist organisations and can therefore not be applied to other antidemocratic organisations.

31 According to the statement of Herbert Kohlmaier, the danger that violent or anarchistic political parties will establish cannot be averted by a party ban; in addition, it would be possible to take measures against the individual offender (P 14601 sten prot of the 150th session of the National Council, XIII. GP).

32 VfSlg 10.705/1985 ('Aktion Neue Rechte'), 11.258/1987 ('Nationale Front'), 11.761/1988 ('Nationaldemokratische Partei'). There is no act on the dissolution of a political party (VfSlg 19.844/2014); Wieser (n 15) para 50 et seq citing further literature.

33 This also applies if the statute of a political party does not fulfil the minimum requirements set by § 1 para 2 and 4 PartG; Wieser (n 15) para 51; Öhlinger/Eberhard (n 24) para 352.

dissolving political parties.³⁴ An establishment contrary to the law results in the absolute nullity of the founding act.³⁵ As a result, when dealing with such cases every competent authority, and as such the Constitutional Court, has to answer as a preliminary question whether a political party has obtained legal personality or not.³⁶

V. Final remarks

The absence of provisions on the prohibition or dissolution of political parties highlights the neutrality of the Austrian Constitution in regard to the freedom of establishment of political parties. Thus only the constitutional legislator is competent to limit this freedom.³⁷ The jurisdiction of the Constitutional Court that requires every competent authority to examine incidentally if a political party complies with the constitutional limitations can be seen as the reaction to this politically intended gap in the constitutional law on political parties.³⁸

However, the manner of incidental examination is quite uncommon to the Austrian legal system and on the down side can lead to legal uncertainty³⁹ and judiciary divergences;⁴⁰ especially with regard to the question which political parties are considered to be unconstitutional, since the discussion is still ongoing.

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³⁴ In contrast, associations can be dissolved if they engage in unlawful activities (§ 29 Associations Act 2002).

³⁵ Schambeck (n 16) 617 et seq; Schäffer, *Parteienstaatlichkeit – Krisensymptome des österreichischen Verfassungsstaates?*, VVDStRL 44 (1986) 47 (53) fn 25.

³⁶ Therefore, when answering this preliminary question, every competent authority has to establish the facts of the case. A political party that was initially established in line with the Constitution but subsequently violates the Constitution can become unconstitutional and thus lose its legal personality; Wieser (n 15) para 59.

³⁷ Schambeck (n 16) 612; Schäffer (n 34) 53.

³⁸ Adamovich/Funk/Holzinger/Frank, *Österreichisches Staatsrecht, Band 1: Grundlagen* (Springer-Verlag 2011) para 11.021.

³⁹ The question whether a political party obtained legal personality has to be answered repeatedly by the competent authorities when dealing with political parties (for example, in the process of the participation in an election but also in a civil proceeding). An individual has to answer the question when entering into a legal relationship with a political party (Schambeck [n 16] 618).

⁴⁰ Various authors doubt that every authority has the capacity to deal with these questions; Adamovich/Funk/Holzinger/Frank (n 38) para 11.021; Wieser (n 15) 51.