

THE POLITICAL PARTY PHENOMENON AS THE MAJOR UNDERPINNING AND AT TIMES A CONDUIT FOR THE DEMISE OF DEMOCRACY & RECHTSTAAT

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Abstract

Political parties are torn between the Scylla of their over-incorporation into the State mechanism with the ensuing possible impairment of their independence from the State and the Charybdis of their under-regulation, resulting in legal and/or constitutional lacunae iuris leading to anomalies detrimental to the public interest in maintaining the survival of a viable parliamentary democracy imbued with the principles of freedom, fairness, equality and the Rule of Law.

In my article I presented a historical and comparative insight into the so-called Four-phase theory, spearheaded by Heinrich Triepel on the treatment of the political party phenomenon by the State, namely: oppression, ignorement, legalization and constitutionalisation.

I also presented a survey of individual countries constitutional and legal approaches in regulating the political party phenomenon by citing definitions along with typical functions, which I then analyzed by discerning private ones from public ones.

I then went on and gave an insight and description of the so-called syndrome of the political market quagmire and concluded my article by illuminating the problem of surveying legitimate legal grounds for banishment of political parties under German and Slovenian law.

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1. Introduction

My thesis is that political parties are torn between the Scylla of their over-incorporation into the State mechanism and the Charybdis of their under-regulation that opens the leeway for dangerous constitutional and legal »lacunae iuris«, portending anomalies detrimental to the public interest.

In times of crisis it is the State that is at risk to be violently overtaken by a single political option or even a single political party, which in fact leads to the total privatization of the public interest and consequent demise of democracy-cum-Rechtstaat.

2. National milestones that contributed to global benchmarks that were developed for evaluating individual countries progress regarding treatment of the political party phenomenon from the constitutional and legal point of view from their historical inception to the present

The legal status of political parties even in our time rarely reflects, that is to say corresponds to their role and importance regarding the functions they perform. What lies at the core in this respect is how parties are mandated by law to carry out the function of galvanizing the so-called »volonte generale« by creative input of their own by rationally dissecting the input they receive from the civil society and bundling similar expressions of public will into coherent sets of issues, which are then studied and articulated so as to produce maximum impact, then further to find people that can cope with individual issues and are able to convey them understandably to the public at large and to be able to organize political campaigns encompassing all the pivotal issues at the strategic and tactical levels.

States were historically put to task to somehow find a way to legally address the difficult issue of political parties' phenomenon appearing on the horizon, but, as we shall see, they often weren't very successful in their task, what can be plainly seen even today.

Historically, Triepel, the Austrian theoretician in the domain of public law, distinguished four phases of how the State treats political parties from their advent on the scene up to today, which are namely as follows: (Triepel, 1930, 8)

- (i) Triepel discerns an initial phase of oppression that can be amply verified through careful study of historical factography stretching from experience stemming from pioneer democracies as the early United States probably under the influence of French ideas to other Anglo-Saxon and continental examples.
- (ii) The second phase, according to Triepel, was characterized by an outright ignorement of the factual existence of political parties by the positivistically harnessed legal order, which brought on its heels dangerous constitutional and legal lacunae, often resulting in opening the leeway for all kinds of anomalies, such as corrupt practices or outright buying of representative mandates by people having the means to propel themselves into the Legislature as members of parliament etc.
- (iii) The third phase was the phase of recognition of the political parties by legalizing them by mentioning them or referring to them in the texts of legal

- statutes, by defining the notion of a political party, by conferring upon them the status of legal personality, investing political parties with functions etc.
- (iv) And finally we came to the phase of incorporating the institution of political party into constitutional life, by referring to political parties in the constitution of the day, preferably along with a few paragraphs on their juridical status and position and also with a possible reference to their functions performed in the public interest. In spite of their primary private-law character as political associations, they are nevertheless vested with public responsibilities for which it should in theory be understood that they ought to get remunerated from the budget. Alas, most constitutions are very cursory and rarely go into much detail.

The Constitution of Uruguay of 1917 was the first example of a constitutional incorporation of the phenomenon of political parties into the constitutional text (Marcic, 1967, 24).

The European democracies were rather late in doing so; the flag bearers in this respect were the Italians via mentioning the political party phenomenon in their constitution of 1947, which granted all citizens of Italy the Right to Free Association into Political Parties in order to be able to participate democratically in the creation of the Political Will of the Nation (Constituzione de la Republicca Italiana, 1947). Biscaretti di Ruffia, the prominent Italian constitutional law theoretician, defined in his work »Diritto Constitutionale« the legal notion of the political party phenomenon as an »auxiliary entity in relation to the State, which privately carries out public functions, to put it in Italian originally: »Un esercizio privato di pubbliche funzioni« (Biscaretti di Ruffia, 1965, 764).

While the Italian Constitution grants to the citizens only a Right to exercise Freedom of Political Party Association, meaning in principle an unrestrained right to establish or in other words found political parties without much further ado regarding the subject, the German Constitution of 1949 seems to be more elaborate, because apart from allowing for the above-mentioned right, it goes further and states explicitly, that it also »allows for a general right of the parties to participate in the creation of the political will of the nation« (Grund-Gesetz der Bundes-Republik Deutschland, Art. 21, paragraph 1).

Article 21 also makes it a mandatory requirement for political parties to abide by a democratic internal order corresponding to the Principle of Democracy followed by a further requirement to the effect that political parties ought to publicly reveal their sources of income.

The second paragraph of Article 21 describes the conditions governing the outlawing of a political party, which can be decided upon exclusively by the Constitutional court.

This is followed by a clause stipulating that a special legal statute would be issued in order to be able to elaborately regulate in detail issues relevant to this field.

A vivid debate ensued in the wake of the German constitutionalisation of the political party phenomenon that was centered on issues such as the in-depth

meaning of it, long-term relevance of this break-through linked to legal and political repercussions.

The debate centered also on the issue whether to consider German political parties as a sort of organs of the State or that they should nevertheless, as hitherto, be considered as institutions pertaining to the private sphere of civil society in accordance with the Triepel definition. Political parties simply do not qualify to be treated as state organs, since their Will should not be considered legally to be the Will of the State, while the Will of the organs of state is legally considered and actually equated to the Will of the State as such.

Empirically, it can be easily shown, that the national political will is identical to the will of the political parties; however this can in no way be taken as a valid legal argument and is therefore immaterial from the point of view of ascertaining the legal status of the phenomenon of the political party in the face of the law. The German constitution grants to political parties only the right to participate in the generation (creation) of the national political will, but without any exclusivity, since also other players are allowed to participate in this endeavor, namely the press, the radio-television and other vehicles of mass communication.

Wolfgang Hering is of the opinion, that the constitutional interpretation of the diction »free establishment of political parties« can in no way be supposed to mean the incorporation of political parties into the state apparatus, because the term »free« regarding establishment of an entity is a typical hallmark of civil institutions, while it is precisely the state organizations that are not free formations (creations), but are conversely established by force (fiat) of the constitution and/or statute law (Hering, 1962, 63). The major part of German legal theory seems to agree with the above argumentation, viz: Maunz (Maunz-Duerig, 1991, 64), von der Heydte (Heydte, 1954, 486), Seifert (Seifert, 1975, 2) with the exception of Leibholz (Leibholz, 1974, 72) after whom it was named the Leibholz doctrine, which was then shed off by the German judicature.

German theory accepted the proposition, that a special status of political parties versus the State is appropriate and called for, owing to their co-participating role in the creation of national political will, especially if such role is recognized in the constitution and/or statute law. Consequently political parties deserve to be granted a privileged legal treatment commensurate to their special constitutional and/or legal position. This privilege guarantees political parties, that only the constitutional court or an equivalent court is exclusively empowered to probe into the constitutionality and/or legality of their activities, that could lead to their potential banishment or other similar restrictions.

The political parties' special status versus the State argument justifies the rationale for authorities having the right to test political party inner structure on grounds of potentially unsatisfactory internal democracy or outright lack of such on one hand and also the right to supervise political party financing sources on the other.

Menger borrowed from general administrative law the term »corporations of a public law character« for designating political parties as civil law associations, that are »ex proprio vigore«, ie. in their own name, carrying out competences of a

constitutional character (Menger, 1952, 160). It somehow perspires from all of this argumentation, that political parties are freely established associations, whose public status, is recognized by the State.

Hering compares political parties to associations with public tasks so that their status could be best described as being between the State and the electorate and characterized as free civil associations, established with the aim to seize the control lever of political power in order to exercise their influence on national policy (Hering, 1962, 87).

In France, the constitutionalisation of political parties did not materialize before the advent of the Fifth Republic and consequently the constitution of 1958 issued under the aegis of Charles de Gaulle. Article 4 of the French Constitution recognizes, that political parties have the right to participate in elections without much further ado so that prompted French theory to opine, that it should be, by reason of the above diction, interpreted to mean, that France distanced itself from the conception of the party State.

Austrian legal theory is quite conscious of the fact, that the Austrian Constitution does not literally (*strictu iure*) recognize the participation of political parties in the process of creation/formation of the national political will. According to Friedrich Koja, it is evident, that it flows from the wording and even more from the spirit of the constitution, that it understands democracy as a party parliamentary and thus presupposes the existence of political parties. (Koja, 1967, 22).

Austrian judicature does not treat political parties as ordinary associations of public law character, but as special public law associations, characterized as »*sui generis*«, while the only realm where they are still treated as ordinary public law entities, is in the field of taxation.

Anglo-Saxon legal systems do not in principle recognize a collective right to association *per se*, but in some countries the supreme courts construed such right in case-law; but political parties do not have the legal capacity to be recognized as holders of the status of incorporated associations of general benefit.

In addition to this, political parties cannot stipulate and accept legal obligations to be lawfully imposed upon them. Political parties cannot possess any real property, and cannot in their own proper name conclude any contracts. (Oleck, 1980, 51)

British political parties have no status of legal personality, so that they are devoid of legal capacity as far as status in law is concerned. However, the State has indirectly recognized the functions political parties carry out in the democratic parliamentary process, by means a special Act of 1937, in which the State put the Leader of the Opposition on her Payroll (Ministers of Crown Act, 1937).

In America the notion of permanent party members constantly helping finance political parties is practically unheard of. Unlike Europe, in America we do not have party members galvanized by high-profiled political party programs, but more or less ad hoc agendas at the time before elections are due, and moreover they tend to touch upon more concrete issues, so they are seldom of a pronouncedly ideological nature. In America party political functionaries do not exist as in Europe, but there are party activists exclusively on the local level. Party activists have no role in nominating

election candidates to run under the party banner, because this is the function of pre-elections with the outstanding role of the citizen-voter community at the grass-roots level.

The notion of the term »political party« in America represents a hybrid, which can either mean a voting party in the narrow sense or a party-in-election in a broader sense, where it is used to denote a voting coalition of different political groupings, which are nevertheless recognized at the polls to function under one and the same label.

A Party-in-Congress denotes all holders of Representative and Senate mandates, while Party-in-Government denotes all holders of government mandates.

In the United States the First Amendment not only protects basic rights to communicate; it also protects the right to join with others in exercising these rights. The Supreme Court has accomplished this through the development of a First Amendment Right of Association. Regarding types of associations protected, the American legal order differentiates between the following:

(i) Mere membership in subversive organizations versus mens rea

The Supreme Court has held that mere membership in an organization, which advocates subversion, cannot be made criminal (*DeJonge v. Oregon*, 299 U.S. 353 of 1937). However, a witness before a legislative investigatory hearing may be required to answer questions about his associational membership if the investigation is for a valid legislative purpose (*Barenblatt v. United States*, 360 U.S. 109 of 1959).

An individual may be punished or deprived of public employment because of membership in a political association if he or she is an active member of a subversive organization; furthermore that he or she knows of the illegal ends and does not merely support the general objectives of the association (*Elfbrand v. Russel*, 384 U.S. 11 of 1966).

(ii) Associational rights in the political process

The First Amendment rights to peaceably assemble and petition the government implicitly protect a right to join associations interested in political change through non-violent means. The State must show a »compelling state interest« in order to warrant intrusion into the realm of political and associational privacy protected by the First Amendment. Rarely has the state been able to satisfy this requirement. In *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 of 1981, the Supreme Court indicated, that the right to freedom of association necessarily presupposes, that an association (such as a political party) has the freedom to identify the people, who constitute the association and limit participation to those members only. The right to associate further implies a right to privacy in the membership files of the association, if the association makes some showing that its members may be subject to harassment, if their identities were to be disclosed. In *NAACP v. Alabama*, 357 U.S. 449 of 1958, the Supreme Court reversed a state court order, that the NAACP submit to the state the names and addresses of all of its Alabama members and agents. The Supreme Court in this case took the position, that the Right to Free Association and therefore to be able to become a member of a political party is covered by the guarantee of the Fourteenth (XIV) Amendment of the American Federal Constitution, that guarantees

»Due Process of Law«, which is the American equivalent to the English notion of Rule of Law or the German and continental notion of »Rechtstaat«. Thus, the Supreme Court in this case created for the first time a right of association, stating that »effective advocacy of both public and private points of view...is undeniably enhanced by group association, as this court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly«. The court went on to say, that the production order of the state court entailed »the likelihood of a substantial restraint upon the exercise by petitioners members of their right to Freedom of Association«.

Although threats and isolated incidents of violence are not protected activity, civil tort liability for such activity could not be imposed on individuals solely because of their participation in an organized boycott without establishing, that this group authorized or ratified unlawful conduct (NAACP v. Clairborne Hardware Co., 458 U.S. 886 of 1982).

(iii) Relative lack of legal regulation regarding political parties

Political parties as pyramidal organizations from the grass-roots to the top do not exist in America, so that the situation is not at all comparable to the one in Europe, because there is a tremendous void regarding their constitutional and/or legal incorporation within the American legal order. In America we wouldn't be able to find a specific act (law) on political parties as such, so that, from a legal point of view, one can only encounter discrete non-hierarchically linked associations on the local, county, state and national level, which are of a distinctly private-law character on a par with any other such organization such as the Rotary Club associations, charities and the like.

As regards their private-law capacity the above-stated local, county state and national associations are understood in a very narrow restricted sense to cater specifically to the need of indirectly participating in the voting process and even here it is underlined that political candidates are at the forefront, not the organizations. Only political campaigns are to some extent liable to regulation, especially extensively for presidential and congress elections on the national level and similarly for those at the state level and so on. The afore-mentioned is regulated by the Constitution and by a host of federal and state-level statutes. The supplementary article 24 of the Constitution amended in 1964 mandates the principle of equality regarding federal elections. A federal law of 1845, based on Section 1 of the Second Article of the Constitution, orders the presidential election should take place on the first Tuesday after the first Monday in November every even year. According to the Federal Election Campaign Act (FECA) of 1972 follows that the role of political parties is to financially participate in elections not only for the office of federal president, but also for those regarding the Senate and the House of Representatives, although even in these three instances the role of political parties seems to be rather relative or indeed marginal. There is also no unitary federal act regarding elections as such, but there are numerous provisions regulating issues like nomination and voting procedures scattered in different federal and state enactments that makes it quite difficult to fathom and understand the system.

Well, there seems to be more orderly legal regulation in the field of political party finance, where one immediately notices that America undoubtedly prefers a

candidate-centered system in which political parties play an auxiliary back-seat role. It can be plainly seen, that fragmentation is the order of the day also in this field, because there is no unitary federal law on the subject per se, but again a myriad of state law statute enactments, topped by federal ones, which do not take automatic precedence over state law, because of the rule of »lex specialis derogat generali«. To make matters even more complicated a third layer of regulations exists on the communal level.

All this makes election campaign regulation in the United States confusing and in the last analysis to some authors even non-transparent. Rules pertaining to election campaigns differ from state to state, from county to county, which makes the system really chaotic, that leads to the proliferation of professions like political adviser, political consultant, who are mostly lawyers specialized for election campaigns.

Every financial activity especially the one comprising the giving of money for the benefit of election campaigns is not only considered as political participation, but even more as Free Speech stemming from the right of expressing ones opinions, which is guaranteed by the First Amendment of the American Constitution (Buckley v. Valeo, 1976).

Consequently, first and foremost, the above court ruling means that any candidate may in any electoral campaign choose to use his or her own funds without any limitation and is furthermore exempted from expenditure ceilings set by law, as long as he or she refrains from making use of public moneys. The exception, where public funds can be utilized, is exclusively the presidential election campaign, and even this is only on an optional basis.

Secondly, the above court ruling gave rise to the rule, that every individual and every political organization for example the so-called Political Action Committees or any other association and even business company or corporation is entitled to the right to lead an independent campaign for or against an election candidate. Independent means that such campaign is not linked or coordinated with the election campaign organization of the candidate in question. This provision lies at the root of the well-known American negative campaigning, introduced by Terry Dolan from the National Conservative Action Committee.

Thirdly the above ruling brought about the right that any individual physical or moral (juridical) person can mobilize and try to persuade individual targeted groups to go to the polls and to vote, albeit it is not allowed to give preference to a specific candidate. These are the so-called GOTVs (Get-Out-the-Vote-Drives). This mechanism was a venue to introduce through the back door the so-called »soft money« that was spent on issues without going to the extent of specifically naming the candidate that espoused them. Soft money and independent campaigning makes sense only in view of the ceiling that is imposed by law regarding accepting money gifts in political campaigns by individuals, political action committees, national party committees and also ceilings for transfers of money from political action committees to national party organizations.

Election candidates must also report to the Federal Election Commission or to the various state Election Campaign Commissions the identity and address of anyone from whom they accepted money in excess of 100 dollars.

Finally a brief mention is warranted here of Amendment XVIII of the federal constitution, the wording of which is as follows, viz: »No law, varying the compensation for the services of the Senators and Representatives, shall not take effect until an election of Representatives shall have intervened (XVIII. Amendment of the Constitution of the United States of America). This means that the rules pertaining to finance and compensations are not allowed to be altered »during the game«, but to take effect only in the next legislature period, so as to prevent the incumbents to make rules voluntarily and be judged in their own affairs according to the Latin adage: «Nemo iudex in causa sua«.

3. Definition and functions of political parties

Political party freedom is legally considered as a functional sort of freedom. This fundamental fact should be taken into account whenever we are dealing with issues connected to the political party phenomenon, from the need to bring forward a meaningful definition of political parties in theory and even in the legal positivistic sense. Any given definition of political parties is expected to provide us with the notion of the ambit that is supposed to be covered by legal norms for which the definition is valid, along with the scope of activities of political parties that ought to be encompassed by it.

Another set of norms then cover conditions that have to be fulfilled for registering a political party.

The functional set of norms cover the delineation of core functions that ought to be differentiated from optional ones, which is relevant from the point of view of the budget alimentary duty, at least in our and the German system, where the so-called public core functions are financed out of budget, precisely because they pertain to the public sphere.

The moment we are faced with the task of defining the legal notion of a political party, it is necessary to bear in mind the crucial fact, that political party freedom is a functional sort of freedom, which precipitates us to give due consideration to functions a political party ought to perform and to be able to discern core ones from non-core ones and from the latter to discern in turn the ones exercised for furthering the public interest. This has some bearing even on devising criteria for delineating the core party organization from entities belonging in a way to the party yet dissociated from its core and therefore barred to be covered by the legislation specifically tailored-made and exclusively designated to be implemented solely on the core party organization.

The non-core parts of the party organization are not entitled to the constitutional guarantee of the so-called party privilege, which requires that the constitutional court is to be regarded as the only competent authority to rule on the merit of the core party being allowed or disallowed to exist, so that the non-core parts of a party organization may be barred out of their existence by a mere decree of the Minister of Interior.

The Slovenian constitutional law theoretician dr. Grad defines three constitutive elements as normative requirements to be fulfilled by entities vying for recognition of political party status, namely: (i) that they ought to be associations vying for political power as their specific objective, which should expressly be evident from

the wording of their programs. (ii) that they prove factual existence of a democratic context regarding self-formation of political will from within the association; (iii) and that only associations qualified that take active part in nominating their own electoral candidates on a constant and continuous basis and thus to permanently take active part in elections as proof of constantly aspiring for political party status (Grad, 1996,5).

The German Law on Political Parties from 1967 defines political parties as entities that while contributing with their permanent input to the formation of the national political will, are also on the other hand authorized by the constitution to fulfill functions of a public-law nature for which they are consequently empowered by the constitution accordingly.

In connection with this functional point of departure, we discern auxiliary organizations of political parties that are considered to be encompassed by the core organization such as party youth leagues, while so-called parallel organizations are not encompassed within the meaning of the core political party organization, so that for them the Law on political parties does not apply – so that they fall under the sway of the *lex generalis* regarding associations in general.

As regards functions of political parties we can discern public-law functions on one hand and private-law functions on the other.

- (i) Public-law functions could be summarized to encompass firstly the formation of state will by political parties represented in the Parliament entailing the function of comprising the activity of organizing a workable government ie. the setting up of the political position and the formation of its counter-part ie. the political opposition. Secondly the function of nominating election candidates is also to be considered to be a public-law function, provided a political party monopoly on nomination existing in a given country. In this rubric we can also squeeze in the educational function of giving party cadres designated to run for a given office the necessary training. In Slovenia and in the majority of continental European legal systems the above public-law functions are as a rule financed by the state budget, because of the nature of the functions performed.
- (ii) Semi-public functions comprise the cooperative effort of political parties in helping (together with other actors in the field such as the press etc.) in the formation of national political will. Political parties have clearly no monopoly regarding this activity, so there is no valid reason for it be funded from the budget, but in practice it nevertheless gets state funding in most continental European countries, because this is perceived to be in line with the public interest in order to buttress the functional viability of the system of parliamentary democracy, at least provisionally until it would be established that the public need for this kind of alimentation has ceased to be relevant. In Austria and Slovenia, for example, more than three-quarters of the total party funding stems from the state, while in Germany to a much lesser extent. Fledgling parliamentary democracies reborn in the nineties after the fall of the Iron Curtain still need a lot of budget financing in this regard.

- (iii) Private-law functions such as the function of political party press and other publication activity such as brochures are absolutely to be self-funded by the political parties themselves.

4. The syndrome of the political market quagmire

Probably the most precarious of all the above-mentioned issues is the way the State regulates the sources of political party finance, especially direct and indirect funding by the government budget along with private funding, all in view of quashing the potential of inviting corruption, graft or the syndrome of the political market quagmire.

The syndrome of the political market quagmire can be described as tolerating a system where money talks by allowing plutocratic anomalies to take root to such an extent as to endanger the core values enshrined in the fundamental constitutional and other principles of law such as the principles of freedom, fairness, equality and the principle of the Rule of Law, thus challenging the survival of a viable parliamentary democratic system of government.

In a brief summary, the aim of the State in this regard is to countervail not only totalitarian and party-monopolistic tendencies, but also plutocratic tendencies, that would lead to a sort of sordid, aimless and base culture of an Arabic »soukh« with everything that goes in tandem with it.

Uninhibited toleration of the said syndrome in tandem with letting this field under-regulated on purpose for such anomalies to flourish would take us all down the sad road of no return. It seems as if such anomalies lend a boost to the famous Huxley notion of the counter-point of life in liaison with a preposterous Marxian assumption that sees this political market quagmire as the logical institutional superpository to the existing capitalist system, supposedly denoting our mainstream notion of market-economy as we know it from the early days of Bretton-Woods onwards. One shouldn't take all this lightly especially in the new-born post-communist democracies, because why on earth should the existing frail new democracies play into the hands of die-hard neo-Stalinists and serve them arguments to be able to discredit the new-born *Rechtstaat* or to cite Lenin to give them on a silver platter the arguments for its demise. That is to say why serve the opponents of democracy the justification to first morally and then later possibly factually dismantle it, and to make matters worse to let this happen with the unintentional stewardship of a too unsuspecting and also possibly careless West, that is nowadays also facing the same problem at hand? Here I am inclined to infer a quote by the ex-French president Jacques Chirac: «Market-economy yes, while political market no».

And what's more such a system is simply not fair, even if some think it is efficient, because it may lead in the final analysis to cutting the branch on which the *Rechtstaat* sits, since unwarranted privileges that such a system breeds may prove to be fatal in the long run. It is unwise to underestimate this threat, because it may prove to become the sort of boomerang every responsible government would want to avert.

This threat in fact plays into the hands of each and every proponent of totalitarianism, either of a secular or religious character, especially of the contemporary Islamist brand.

It is also important for the *Rechtstaat* to diffuse such a time bomb well in advance, because it is important what an impression the *Rechtstaat* makes on the rank-and-file – and/ or just on the plain ordinary citizenry of a country. It is important not to convey the impression on the ordinary person that parliamentary democracy is far removed from the populace and that it has more to do with big players, big money, in a word exclusively the elite.

The worry in many places with interrupted development or plain hitherto non-existence of a *Rechtstaat* is that it would get torpedoed before it would even gets off the ground or that it would grow unnaturally, because of an uninviting social environment.

Luckily for proponents of a viable *Rechtstaat* is the fact that the apostles of her nemesis have tended, historically and actually, to drastically underscore its ability to be able to redirect or reinvent itself even by different balancing acts seemingly sometimes sacrificing unwarranted privileges of the moneyed class, ie. privileges it can do without perfectly well, once we look at things long-term.

It would be sad to let this splendid and precarious system of checks and balances to be thrown to the wolves by allowing it to get rotten to the core, having in mind almost three centuries of dogged and often bloody struggle to keep it alive and have it spread from country to country and continent to continent. The Western Allies during the Second World War in actual fact fought for the preservation of the *Rechtstaat*, and the Cold War that ensued had for them the same purpose.

As I had already noted above, that the syndrome of the political market quagmire has not by-passed mainstream western societies. Quite conversely, in actual fact, it has more and more been seen as a sinister problem to be dealt with hastily and interestingly enough in my opinion the situation is ripe for a tour-de-face in respect of hitherto more lenient approach concerning this issue. In this respect we encountered already deep surgical action on the part of the American establishment going back to the mid-seventies.

Germany – the then Federal Republic of Germany led the way in this respect on the European continent already from the late sixties and early seventies onward.

In the most prominent of Western societies this issue has never completely disappeared from the table and I think the momentum for the issue is gathering at present etc.

Here I would like to infer also the Greek philosopher Aristotle, whose teachings are still valid to the effect that we are constantly encountered, as far as democracy is concerned, with a dual threat to it, namely its degeneration into »ochlocracy, denoting the chaotic misrule catering to the vagaries of the mobs in the streets on one hand or its degeneration into a scary, sinister dictatorship often at the heels of a prolonged period of ochlocracy, ensuing out of the populace getting fed up with it – the people themselves then crave for change to more meaningful rule, even if it is openly perceived to be a dictatorial one.

It might just also happen that an unscrupulous elite would purposefully let things deteriorate via the syndrome of the political market quagmire so as to turn normal citizens into an »ochlos« citizenry, whose immunity deterrent to dictatorship would

drop to zero, in order to come up with a messianic overture leading to dictatorial rule. This is something not so far removed from the Aristotelian theory of vicious circles of the above-mentioned possible degeneration of good rule into its opposite.

5. Legitimacy of banishment of political parties under German and our law

The Freedom of Association and within its realm the Freedom of political party Association should in theory and practice not be easily subject to restrictions, barring cases when the Constitutional Court is competent to pass judgment on the existence of sufficient grounds to bar a political party because of a substantiated proven claim that such party was promoting, and /or expressing tendencies to install a totalitarian regime with the ensuing imminent threat of a violent »demontage« of the Rule of Law, to do away by using force the regime of parliamentary democracy as enshrined in the Constitution or to conspire to deliver a disabling blow or a series of such, aimed at the constitutional order of the existing *Rechtstaat* to bereave her of her normative essence as it is understood in the civilized world and thus challenge her future viability.

In the contemporary and current situation, at least in Europe, it is not primarily the sheer survival of the *Rechtstaat* that is at stake in this context, but rather a meaningful survival of the same. What I mean is, that today, we aren't anymore dealing with a direct threat at the very existence of the *Rechtstaat*, although in our unpredictable world even this cannot be totally discounted, but we would probably have to deal with more subtle threats of trying to deliberately disempower and disarm the functional potential of the existing *Rechtstaat* so as to lessen the chances of her meaningful survival.

In my country and in a host of other countries within the European Union was put in place a countervailing mechanism charged with the task of censuring and uprooting totalitarian tendencies, that are still unfortunately potentially germane in some political parties, but we should bear in mind the fragility and political dimension of this particularly touchy subject. The mechanism is called the political party privilege, which means that only the constitutional court is exclusively competent to hear cases of this nature, because of obvious touchiness of this issue. By law it is only the Constitutional Court of the Republic of Slovenia, which is empowered by virtue of the Statute by which its competencies were more precisely set in congruence and in accordance with articles in our Constitution of 1991, dealing specifically with the aforesaid court.

The court has the power to rule out of its existence parties that are found guilty of conspiring to forfeit the territorial integrity of the nation, which denotes quite a classical reason for barring a party and ruling it out of its existence, with the consequence that its registration as a party legal entity is cancelled and its membership disbanded and even barred to establish another legal entity in lieu of the disbanded one if it can be proven that this was tried in *fraudem legis* - on false pretences – *contra bona fides*.

The other reason for barring a party out of its existence is if it is found by the court to harbor totalitarian tendencies, either by expressly voicing them or if it is found that the leadership of a party consistently fails to distance itself from the above mentioned

expressly voiced and/or published totalitarian opinions and/or imminent calls for a violent disruption of the *Rechtstaat* or railings at the very core values enshrined within the constitutional public order.

The court is similarly empowered to bar a political party on the grounds that its internal organization shows that it is run in a totalitarian manner without internal democracy so that party members do not enjoy the access to internal party institutional channels to challenge the dictate of the party leadership or even worse – the dictate of a sole leader. Such political parties are purported to be burdened with the syndrome of the »*fuehrer-prinzip*« and are prone to be prohibited and consequently barred out of their very existence, their membership disbanded and their assets confiscated etc.

In addition to this, it is also recognized, that so-called crypto-political entities, purporting to be considered as political parties, while found by the authorities to be concealing their real intentions of a totalitarian nature are automatically stripped of their ill begotten claim to legal status of a political party under law, meaning, in effect, that they are prone to be also officially and expressly outlawed by the Minister of Interior on grounds of their contravention of the public order and/or security public interest or even barred on plain counter-terrorism charges. Entities that would fit the above description are for instance those that deny their real, ie. totalitarian intentions, especially if it is found that they represent an instrument of a foreign state or of a foreign intelligence service and/or that they represent an instrument of a terrorist organization or if it is found that such entity is manipulated from outside the country.

Such entities are considered then as ordinary associations that do not enjoy the political party privilege – meaning they can be barred as criminal associations by the competent repressive resort of the executive branch of the Government – in most cases (in Slovenia typically) – the Minister of Interior.

6. Conclusion

The Legislative branch is empowered to regulate whatever is necessary to bring about a legal regime inherently imbued by the tendency of enabling an equitable opportunity playing field for all legitimate participants concerned, that take part in the political party contest among other things also by regulating the complex procedures regarding a host of issues connected to party life in general and also specific issues of party definition, functions, inner organization, the possible minimum content of party statutes, minimum regulation of party organs and their decision-making procedures, inscription and expulsion procedures, financing, winding up, outward representation as a legal entity with the appropriate legal personality.

Over-incorporation of political parties into the state mechanism, that seems to be the order of the day in some countries of »*Mitteleuropa*« such as Austria and Slovenia and presumably even further, leads to an exaggerated alimentary over-reach, that brings on its heels an unhealthy dependency of political parties on state-budget funding. This tendency, if unchecked, would openly challenge the political parties assertions of their interconnectedness with the civil society, because once they can comfortably financially survive without their potential voters, they could

even become estranged from them alongwith everything else that comes in tandem with that development.

Conversely, it could be argued that under-regulation on the other hand might be construed as an invitation for the proliferation of the »syndrome of the political market quagmire«, which also in the final analysis leads to a semi-privatization of public affairs and could be quite damaging to the public interest of upholding the functional viability of a value-oriented democracy, that is prepared to defend such values, or in a word, to preserve the *Rechtstaat*. Democracy only hinging on the formal democratic procedure between the two wars in Europe walked a tight rope that gave in at the faintest of crisis. Countries with a strong Judiciary, modeled under the Anglo-Saxon tradition, are seemingly better positioned in relegating to the courts an effective defense of the *Rechtstaat* and they also seem to be able to cope in doing so without too many rules.

To prevent in time a possible mortal blow to democracy and *Rechtstaat*, it is prudent to have in store the counter-veiling mechanism of being able to outlaw political parties espousing totalitarian tendencies.

The fate of Democracy-cum-*Rechtstaat* is not yet neatly sealed for all times, in spite of Fukuyama's assertion to the opposite, if we embrace his notion of the End of History.

Even if the situation seems to be on the upbeat and the prospects of the *Rechtstaat* are looking good for the established old democracies alongside the newly incorporated ones in Central, Eastern and South-eastern Europe, and world-wide as in Australia, New Zealand, Japan, South Korea, Israel, along with an array of an ever-increasing number of democracies slowly mapping their way in Africa and Latin America, we still cannot be assured of her global successful predicament. If we just choose to take a hard look at the »problematic Crescent« of semi-failed states stretching across the Eurasian continent from Bosnia-Herzegovina to Afghanistan and beyond, to say nothing of the malaise we are facing in Africa, where we can find totally failed states such as Somalia, Sudan, Sierra Leone, Zimbabwe etc, we really haven't too much of a reason to cheer, because we are frostily reminded that the fate of the *Rechtstaat* from a global perspective is tethering on a tight rope that could give up in any time. Or we may just be experiencing a mirage of the *Rechtstaat* in many places of the world, so we can say that it is incontestably established only in those places of the globe, whose societies went through the Enlightenment or are, for example, so closely institutionally aligned with nations with longer democratic traditions as those making up the European Union, so that this serves them to bridge the gap.

References

1. Biscaretti di Ruffia, P., *Diritto costituzionale*, 7th edition, Edizioni Zambini, Napoli, 1965.
2. Constitution of the Federal Republic of Germany of May 23rd, 1949.
3. Consitution of the French Republic, 1958.
4. Constitution of the Republic of Italy, 1947.
5. Constitution of the Republic of Slovenia, 1991.

6. Constitution of the United States of America, 1788.
7. Constitution of the Republic of Uruguay, 1917.
8. Federal Election Campaign Act (FECA), 1974.
9. Federal U.S. Law of 1845 on Presidential Elections.
10. Grad, F., Constitutional Law of Slovenia, Government Press, Ljubljana, 1991.
11. Hering, W., Zur Frage der Anerkennung der Politischen Parteien als Staatsorgane, Nomos Verlag, Mainz, 1962.
12. Heydte, F., 'Freiheit der Parteien', in: Die Grundrechte, 2nd edition, Neumann/Nipperdey/Scheuner, Berlin, 1954.
13. Koja, Friedrich, Die Bundesverfassung und die Politische Parteien, Oesterreichische Monatshefte, Vienna, 1997.
14. Leibholz, G., Strukturprobleme der modernen Demokratie, Verlag Suhrkamp, Frankfurt/a.M., 1974.
15. Loesche, P., The Political Party Institution in the U.S.A., Delphi Verlag, Goettingen, 1997.
16. Marcic, R., 'Sentenzen zur Parteienfinanzierung', article, in: Oesterreichische Monatshefte, Vienna, 1987.
17. Maunz/Duerig/Herzog/Scholz, Grundgesetz-Kommentar, 2nd Part, C.H. Beck Verlag, Muenchen, 1991.
18. Menger, C. F., 'Zur Verfassungsrechtlicher Stellung der Politischen Parteien', separat, Annalen des Oeffentlichen Rechtes, TUEBINGEN, 1992.
19. Ministers of Crown Act, 1937 (Edv. 8 & Geo. C. 38).
20. Oleck, Howard L., Non-profit Organisations, and Corporations, Englewood Cliff, New Jersey, 1987.
21. Political party Act (Germany) of 1967.
22. Political party Act (Slovenia) of 1994.
23. Seifert, Karl-Heinz, Die Politischen Parteien im Recht der Bundes-Republik Deutschland, Heymans Verlag, Koeln/Berlin/Bonn/Muenchen, 1975.
24. Triepel, Heinrich, Die Staatsverfassung und die Politische Partei, 2nd edition, Mansche Verlag, Vienna.

UNITED STATES SUPREME COURT DECISIONS:

- Barenblatt v. United States, 360 US 109 of 1959.
- Buckley v. Valeo, 1974.
- De Jong v. Oregon, 249 US 353 of 1937.
- Democratic party of the United States v. Wiscounsins, 450 US 107 of 1981.
- Elfbrand v. Russel, 384 US 11 of 1966.
- NAACP v. Alabama, 357 US 449 of 1958.
- NAACP v. Clairborne Hardware Co., 458 US 886 of 1982.

UNITED STATES CONSTITUTIONAL AMENDMENTS

- First (I) Amendment to the Constitution of the United States of America.
- Article 24 of the American Constitution as amended in 1964.
- Eighteenth (XVIII) Amendment to the Constitution of the United States of America.