



POLITICAL PARTIES

- KEY FACTORS

IN THE POLITICAL DEVELOPMENT

OF DEMOCRATIC SOCIETIES



UNIVERSITATEA DIN BUCURESTI
FACULTATEA DE DREPT
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POLITICAL PARTIES – KEY FACTORS IN THE POLITICAL DEVELOPMENT OF DEMOCRATIC SOCIETIES

FACULTY OF LAW, UNIVERSITY OF BUCHAREST
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UNIVERSITATEA DIN BUCURESTI
FACULTATEA DE DREPT
ROMANIA

Faculty of Law, University of Bucharest

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Foreword of the Editors

On the 18th and 19th of October 2013, an international conference on “*Political Parties – key factors in the political development of democratic societies*” took place in Bucharest, in the Palace of the Faculty of Law of the University of Bucharest.

The Conference was co-organised by the Romanian Ministry of Foreign Affairs, the European Commission for Democracy through Law (the Venice Commission) of the Council of Europe and the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE), with the support of the Norwegian Ministry of Foreign Affairs and of the Faculty of Law of the University of Bucharest. It represented the 3rd Intercultural Workshop of its kind – two previous such workshops had been organised in March 2012 and May 2013 respectively, in Marrakech, Morocco; the latter was focused on the “*New Constitutionalism in the Arab World*”. The Bucharest Conference was also organised in the context of a series of events celebrating the 20th anniversary of the accession of Romania as full member of the Council of Europe (the 7th of October 1993), as a contribution of Romania to the neighbourhood policy of the Council of Europe.

The purpose of this event was to facilitate open, frank and substantial dialogue between and among international experts in the consolidation of democratic processes and the role of political parties, between specialists in political party regulation from Council of Europe and OSCE countries, including from Romania, and around 30 politicians, parliamentarians and academics from 10 countries and regions from North Africa and the Middle East, namely Algeria, Egypt, Iraq, Jordan, Lebanon, Libya, Morocco, Palestine, Tunisia and Yemen.

During the Conference, 28 speakers from a wide range of backgrounds and legal systems, including Europe, the United States, North Africa and the Middle East, shared their experiences and expertise in the areas of political party regulation. In particular, the Conference focused on three main topics for discussion, which underlined the important role that political parties play in the development of democratic societies: *The establishment and registration of political parties, the financing of political parties and the participation of political parties in elections*. At each of these sessions, representatives from the Council of Europe/OSCE region and the North Africa/Middle East had the opportunity to share experiences and state practices in the above areas.

The Conference was marked by in-depth expert presentations and vivid dialogue and debates, both formal and informal, between participants. Participants had the opportunity to discuss the constitutional *acquis* and practice developed in the Council of Europe and OSCE area in the field of political party regulation, but also to hear about the various national approaches of incorporating international standards into the domestic legislation and constitutions in countries and regions of the Arab world, taking into account the regional and local legal specificities and political contexts.

Moreover, the Bucharest event was also a good opportunity to review the existing European and OSCE democratic standards (in the particular field of political parties and political pluralism), and how they had been applied, and further developed in the relatively recent democratic transformation of numerous post-communist countries – the examples of Romania, the host of the conference, and of other Central and Eastern European States were raised during several interventions and debates. The ODIHR-Venice Commission Guidelines on Political Party Regulation were further cited as a useful compilation of international standards, and good state practice in this context.

Overall, this conference again showed that in a number of countries, democratic standards, free and fair elections, and political pluralism remain freedoms that still need to be fought for and defended on a daily basis. During the event, a number of interventions spoke of the absence, in certain countries, of the most basic factors ensuring political pluralism and democracy on the ground, mentioning especially fear of violence, lack of political will, and weak democratic structures. At the same time, certain aspects of political party regulation, such as the equal distribution of public funding, transparency of reporting on donations and other private income, and the fight against corruption, and the abuse of state resources, remain under-regulated, or suffer from the lack of implementation of key legal acts across the globe, as do the questions of internal party democracy, and gender equality.

We believe that this volume will help convey an idea of the different aspects of political parties and how they are regulated in the Council of Europe/OSCE region, and beyond. Political parties, and a diverse and vibrant political landscape, are key to ensuring a balanced democratic system. Finally, there is no better context in which to foster prosperity and stability than a solid and pluralist democratic society.

Dr. Bogdan Aurescu

*State Secretary for Strategic
Affairs, Romanian MFA
Substitute Member of
the Venice Commission*

Gianni Buquicchio

*President of the Venice
Commission*

Thomas Vennen

*Head of the Democratization
Department of the OSCE Office
for Democratic Institutions and
Human Rights*

OPENING REMARKS

Introductory Remarks

Titus Corlăţean,
Minister of Foreign Affairs of Romania

It is a great pleasure to address to you all, at the beginning of this conference, in the context of the 20th anniversary of the accession of Romania, as a full member, to the Council of Europe.

Looking back after 20 years, I can say that the road towards democratization was not easy, on the contrary. The accession to the Council of Europe, in 1993, has radically changed Romania's profile, after 1990, into a pluralist democracy, where respect for human rights is consecrated in the Constitution and practiced in the real, day-to-day exercise of governance, and where the rule of law is respected as a fundamental value of democracy. We achieved a lot, and this happened with the invaluable support of very good partners – the Council of Europe and, of course, of the Venice Commission.

From a legal perspective, the accession to the Council of Europe meant the adoption of fundamental human rights instruments and represented a first step in Romania's democratic transition. Consequently, Romania's membership in the Council of Europe led to the advance of the legislative reform and to the harmonization of the national legislation with the European one, which decisively reflected into meeting the criteria for Romania's membership in the European Union.

The Council of Europe was a constant partner in this process; this fact can only be a strong statement in support of the importance that this organization has in Europe with regard to the promotion of the culture of democracy, good governance and respect among nations.

The role of the Council of Europe, an organization that reunites states sharing the values of democracy, the rule of law, the respect of the fundamental human rights, is essential in the effort to strengthen the democratic structure of the European system. The important role played by the juridical instruments created by member states is evidenced through the evolution that these states had undergone in fields like human rights protection, child protection, fight against terrorism, protection of regional and minorities' languages or of the rights of persons belonging to minorities.

As such, in the context of today's challenges, it is worth mentioning that these legal instruments provided by the Council of Europe and the good cooperation between member states are vital elements in our efforts to meet these challenges.

Ladies and gentlemen,

Romania is an active member inside the organization, while being aware of the importance of the mission that the Council has, in Europe and beyond. Romania will continue to promote the normative framework and instruments made available by the Council of Europe in its neighborhood, be it the Eastern dimension or the Southern one.

Our conference is taking place at a moment when Europe, including European organizations, faces important and deep transformations.

The principle of cooperation with non-member states of the Council of Europe is essential, given the rapid rhythm of political and social changes in Europe's neighboring regions. With an active role in these regions, Romania is a firm supporter of the current processes of democratization, as well as a promoter of European values. Furthermore, an important goal is strengthening the cooperation, the dialogue and the exchange of good practices with neighboring states partnering with the Council of Europe.

The events of the Arab Spring made Europeans realize that there is a need for a new approach in the relation with the states from North Africa and Middle East. Therefore, the Council of Europe has elaborated a strategy, aiming at facilitating the strengthening of the relations and contacts with the states in its neighborhood. The goal is the transfer of expertise in the fields of democratization, human rights and rule of law, by offering the necessary support when asked.

Romania supports fully this process of getting closer to the states in the neighborhood of the Council of Europe, either from the South, or from the East of the European continent.

This Conference is an example of showing this support. Romania is ready to share its own experience, its lessons learned, even its mistakes in its own process of democratic transition and transformation – as sometimes it is better to learn how to avoid other's errors –, through its speakers which will address you throughout the sessions.

I am convinced that the theme chosen, which underlines the essential role of the political parties in the not-always-easy process of political change, will generate intense discussions and exchange of good practices between and among all of you.

Ladies and gentlemen,

At the end of my introduction, I would like to add one more thing, which regards our longtime partner, the Venice Commission.

Along the years, the Venice Commission proved to be a reliable friend of Romania. The Venice Commission had the opportunity to examine our Constitution, twice (both in 1990–1991, and in 2003), as well as other important pieces of legislation for the consolidation of the Romanian democracy. As a matter of fact, the Romanian Constitution was the first such fundamental act submitted for an opinion of the Venice Commission back in 1991.

Even today, the Venice Commission continues to be a solid partner for us. As a proof of our trust in the Venice Commission, we work nowadays together, again, on the second revision of our Constitution. The Venice Commission had and has a direct and frank dialogue with all Romanian authorities in this process of improving our constitutional provisions, so as to enforce even more the rule of law and the democratic principles. The experts of the Venice Commission, which we highly appreciate, are offering us all the needed expertise in this process.

I express my deep conviction that the Venice Commission is and can be a valuable partner for all countries whose esteemed representatives are present here today.

I wish in my turn all the success to the works of this Conference.

Thank you!

Opening Remarks

**Dr. Flavius-Antoniou Baias, Senior Lecturer,
Dean of the Faculty of Law,
University of Bucharest**

I have the honor and the pleasure to open, today, the works of this Conference. It is the second event I open, together with the Ministry of Foreign Affairs, since yesterday, 17 October, we hosted here, in the Palace of the Faculty of Law, another conference dedicated to the International Criminal Court, in the presence of the President of this important international jurisdiction. Yesterday we held the conference in the memory of the Romanian international criminal law professor and diplomat Vespasian Pella. The conference of today is organized in the context of the anniversary of 20 years since Romania's accession, as full member, to the Council of Europe. This is an important moment for Romania.

I have the pleasure to welcome you all. As a host, I feel honored. You are well known international experts, professors, and active politicians. Representatives of OSCE/ODIHR and an important number of members of the Venice Commission are here today, including the Romanian representatives. I am proud to say that the Romanian members of the Venice Commission are two respected professors of this Faculty of Law, namely Prof. Lucian Mihai, and Prof. Bogdan Aurescu.

On a more general note, I can tell you that for Romania, the cooperation with the Venice Commission was extremely useful in our transition to democracy. I also have the honor to invite you all to an important ceremony which will take place today, at 1,30 pm, in the Aula Magna of this Law School – the awarding of the *Doctor Honoris Causa* title to the distinguished President of the Venice Commission, Mr. Gianni Buquicchio. This is yet another testimony of the great respect the Romanian authorities and academia pay to the activity of this expert body of the Council of Europe!

The topic chosen for the conference is an always challenging one. I am sure that, having in mind the themes and your valuable expertise, your discussions will be fruitful.

The diversity among you will definitely be an asset for exchanging good practices, sharing personal experience. It is a wise and wide participation. You are active politicians, international experts, but also professors of constitutional law. As a professor, I am convinced that the contribution of other professor colleagues will be very important, as the lens of an academic is many times very helpful to the practitioners.

To conclude, once again, I am proud to attend this event and I wish every success to the works of this conference!

Thank you!

Opening Remarks

Mr Gianni Buquicchio
President of the Venice Commission

Dear Minister, dear Dean, ladies and gentlemen, distinguished guests,

It is with great pleasure that I welcome you to the third intercultural workshop, for which we are gathered today here in Bucharest, at a time when Romania celebrates its 20th anniversary as member of the Council of Europe.

I would like to start by thanking the Romanian Ministry of Foreign Affairs for organising this event. I would also like to thank the Norwegian Ministry of Foreign Affairs and the OSCE/ODIHR for their contributions.

I am particularly pleased that following the first two intercultural workshops which focused on constitutional and democratic processes, and which were held in Morocco in March 2012 and May 2013, we are also able to welcome here representatives of those numerous Arab countries that joined this initiative, even more so since it partially coincides with the festivities for Eid.

Today we welcome the engagement of participants from Algeria, Egypt, Iraq, Lebanon, Libya, Morocco, Palestine, Tunisia and Yemen.

As many of you are already aware, the Venice Commission numbers 59 member states. It renders its services available to states wishing to move forward on the path to democracy. Based on state requests, independent Commission members provide their expert opinions on draft constitutions and laws.

When preparing its documents, the Commission always seeks to enter into dialogue with state institutions, different political forces, as well as with civil society. Even if our opinions are merely recommendations, they are nevertheless followed by the states that request them because they offer them the collective constitutional expertise of the members of the Commission.

I am convinced that the Commission's reputation as a trustworthy and impartial partner is based in large part on its knowledge of comparative law, which was acquired over through dialogue and exchanges such as the one that has united us today in Bucharest.

The Venice Commission's cooperation with Arab nations started several years ago. The first contacts and mutual exchange took place in the field of constitutional justice.

In order to promote the implementation of constitutions, the Commission has been supporting Constitutional Courts and Councils ever since it was first established in 1990. Throughout all these years, it has promoted exchanges and cooperation between courts at both the regional and global level. Within the Arab world, the Venice Commission co-operates with the Union of Arab Constitutional Courts and Councils.

In recent years, our cooperation with Arab nations has gone beyond the field of constitutional justice. Our ties with countries of the southern Mediterranean have strengthened and many among you have decided to join the Commission, to take advantage of the Commission's broad, consensus-based status.

Today our Member States from this region are Algeria, Morocco and Tunisia, whilst Palestine enjoys a special status of cooperation. These countries benefit from direct access to constitutional, electoral and legislative expertise. The Commission maintains an exemplary level of cooperation with the National Constituent Assembly of Tunisia and is assisting in the process of drafting their new constitution.

Morocco's parliament and several of its institutions actively co-operate with the Commission on a significant number of subjects, such as the establishment of new institutions responsible for protecting human rights and constitutional justice.

Certain projects of mutual cooperation have resulted from initiatives undertaken by our Member States. In this context, I would like to emphasise the role played by Morocco, and in particular by its Venice Commission members Professors Menouni and Lamghari, in launching our intercultural workshops on democracy.

Algeria, Morocco and Tunisia, as Commission member countries, fully participate in events that favour dialogue and the exchange of experience with regard to reforms carried out in their own countries, as well as in other Commission member states.

At the same time, thanks to the support of our partners and in particular the European Union, Norway, and other Council of Europe member countries, the Venice Commission also co-operates with other countries in the region that are not as yet Commission members. There is thus great potential for the exchange of views and for concrete action.

Ladies and gentlemen,

I welcome the choice of theme for this third workshop: "Political Parties: Key Factors in the Political Development of Democratic Societies". I am also grateful to the Ministry of Foreign Affairs of Romania for its initiative in organising this workshop in Bucharest. Over the past twenty years Romania has been engaged in a process of democratisation and institutional reform. Political parties have played a fundamental role in this transformation.

This has also been the case with other Central and Eastern European countries. My colleagues at the Venice Commission, Ms. Hanna Suchoka and Messrs. Tanchev, Kirov, and Philipenko are here to contribute, through their experience, to our reflections on norms pertaining to political parties and their implementation in societies in transition.

We have among us eminent international experts in the field of political parties such as Professor Richard Katz, Chairperson of the OSCE/ODIHR Group of Experts on Political Parties, Professor Genckaya, member of the same group, and Mr. James Hamilton substitute member of the Venice Commission.

They contributed to the preparation of Guidelines on Political Party Regulation, which were adopted by the Venice Commission in October 2010. I also extend my welcome to Ms. Vita Habjan Barboric, member of the GRECO Bureau, and to all other speakers who have agreed to present their reports within the framework of this workshop.

I also appreciate the participation of high-level specialists and representatives from the academic world of Romania, whose contributions will no doubt serve to enrich our discussions.

The Arab Spring has been a significant factor in launching democratic reforms in countries of that region and the Commission wishes to make available to them its acquired experience regarding norms that apply to political parties in Europe.

Dear friends,

In spite of historical and cultural differences, and of certain political specificities, there is much common ground in how the role of parties in societies is perceived in Arab countries and the member countries of the Council of Europe.

I maintain that we all share the profound conviction that it is impossible to establish a democratic regime in the absence of political pluralism which itself expresses diverse points of view as to the development of society, the state, and its various institutions.

Opinions expressed by political parties allow different segments of society to compare alternatives put forward with respect to the development of their country. Even in cases where diametrically opposed ideas confront each other, such debate should take place within the framework of constitutional and legal provisions, and should involve respect for different opinions. The law will then reflect the willingness of political actors to respect democratic values and freedoms.

250 years ago, Charles de Montesquieu (1689–1755) provided a good definition of this much-needed diversity of opinion as embodied by political parties:

“What is called union in a body politic, is a very equivocal matter: the true union is a union of harmony which brings it about that all the parts, however much they may appear to us to be opposed to each other, co-operate for the general good of society; as dissonances in music combine to form an all-embracing accord”.

Europeans may sometimes appear as always wanting to teach others a lesson. This is open to debate. One thing however is certain, and that is that history has taught Europeans many lessons and that they have at least learnt some of them.

Let us return to Montesquieu and place him in his own context: “one faith, one law, one king”. One might be tempted to say that this is not much of an overture to pluralism. Union is rather understood as uniformity. It took quite some time for the concepts of unity and uniformity to be disassociated, and for diverse opinions and different worldviews to co-exist.

Even though the Jacobin movement was not a result of the Ancien Régime, it has remained synonymous with stifling centralism. And yet, France was more progressive in developing democracy and liberties than the vast majority of the European continent. It took time to learn the lesson.

Indeed, opinions are not necessarily personal creations of varying degrees of stupidity, in the Platonic sense of the term. They may be sometimes – or perhaps often – but not always! In any case, in politics it is few who can claim to have found the truth.

This is why constitutional texts, the same as contemporary international instruments on human rights, emphasise freedom of expression, also known as freedom of opinion. Without this freedom, political parties and the freedom of association from which they derive, remain emp-

ty shells. Every citizen, each individual thus has the right to express his/her political opinion, either individually or collectively.

It is true that harmony, as defined by Montesquieu, refers to an idealised view of how political parties function in a democracy, but this aim is not unrealistic in itself. It is up to all of us to ensure that it becomes a reality in our respective societies.

As you know, the Venice Commission has been working on the issue of political parties for many years. Since its establishment, the Commission has emphasised in its recommendations that freedom of association, and freedom of expression and opinion are indispensable for a well-functioning democratic society. Political parties, which constitute a means of collective political expression, must be in a position to exercise these rights without obstacles. Thus the Venice Commission has indicated in the Guidelines drafted jointly with the OSCE/ODIHR:

“Parties have developed as the main vehicle for political participation and contestation by individuals, and have been recognized by the European Court of Human Rights as vital to the functioning of democracy. The Parliamentary Assembly of the Council of Europe has further recognized that political parties are “a key element of electoral competition, and a crucial linking mechanism between the individual and the state” by “integrating groups and individuals into the political process...”

The Commission believes that, in a democracy, the existence of a special law on political parties is not indispensable. Where such a law does exist, it should nevertheless not “unduly inhibit the activities or rights of political parties” (Guidelines on Political Party Regulation, paragraph 29). Rather, it should facilitate their role as essential key players in a democratic society and ensure the full protection of their rights.

I would also like to stress that political parties themselves should promote democratic values through their own statutes, their internal organisation, and their practices. They shall also respect the values expressed in international instruments pertaining to the exercise of civil and political rights (the United Nations Covenant and the ECHR). The parties should respect the relevant constitution and applicable legislation. Nevertheless, nothing should prevent them from attempting to modify one or the other via the appropriate legal channels.

In the course of our discussion we will cover three essential topics related to parties:

- The establishment and registration of political parties
- Financing of political parties
- Participation of political parties in elections

These three areas will allow us to compare the legislation and practices existing in our own countries and to reflect on how to best profit from one another’s collective experiences and good practices, as well as from existing international instruments.

I am fully aware of the fact that the time that we have accorded to ourselves for this workshop will not be sufficient to allow for an in-depth reflection on topics as vast and essential as these three, but I hope that this event shall serve as a starting point for joint activities, and that we will have the opportunity to pursue said topics in the framework of more targeted activities, both bilateral and multilateral.

Ladies, gentlemen, and dear colleagues,

Intercultural workshops allow us to establish an open exchange between the countries of the southern Mediterranean and European countries. I am delighted that the subject matter proposed for this third event has generated such an acute interest and that so many of you have come to share your experiences and to discuss these important issues.

The Venice Commission is convinced that this type of dialogue is extremely useful, not only for the countries participating in this workshop, but also for parliamentarians, the public administration, political party representatives, and experts in this field.

I am sure that our meeting will allow us to better understand different approaches to the issue of freedom of association in the shape of political parties, and their role in democratic reform. This exchange will contribute to the process of integrating international norms and best practices into national legislation and into the statutes and internal practices of political parties.

I thank you for your attention.

Opening Remarks

Mr Thomas Vennen
Head of the Democratization Department
OSCE Office for Democratic Institutions and Human Rights

Excellencies, Honorable Judges, Ladies and Gentlemen,

On behalf of Ambassador Janez Lenarčič, Director of the OSCE Office for Democratic Institutions and Human Rights, I wish to begin by warmly welcoming you and by thanking you all for attending this conference. In particular, I would like to thank the speakers who have agreed to share their expertise through the preparation and presentation of their papers here today and the other co-organizers, primarily the Romanian Ministry of Foreign Affairs and the European Commission for Democracy through Law of the Council of Europe (Venice Commission), for their hard work in ensuring that such a large group of experts – from so many countries and backgrounds – is present at this event today. Building on our long-lasting partnership, it is a pleasure for our Office to cooperate with you, once more, in the organization of this conference.

Please allow me to briefly introduce the Organization for Security and Cooperation in Europe in general, and the OSCE Office for Democratic Institutions and Human Rights in particular. After the Fall of the Berlin Wall in the early nineties, the OSCE evolved out of the Helsinki Conference for Security and Co-operation in Europe, which had been established in 1975, based on the understanding that in Europe, and in other States that are part of our organization, security has several dimensions, namely a politico-military dimension, an economic and environmental dimension, and a human dimension. Overall, lasting peace and security can only be achieved if there is not only political/military security, but also economic and environmental, and human security. Today, the OSCE is made up of 57 States from Europe, North America, and Central Asia, and has its Secretariat located in Vienna, Austria. Mongolia was the last state so far to join our organization in 2012.

Moreover, the OSCE maintains special relations with certain countries in the Mediterranean region, the so-called Mediterranean Partners for Co-operation. These are Algeria, Egypt, Israel, Jordan, Morocco and Tunisia. The relationship is very much focused on sharing good practices, and on dialogue in key OSCE areas.

The Office for Democratic Institutions and Human Rights, located in Warsaw, Poland, focuses on the so-called “human dimension”, which involves the full respect by participating States of human rights and fundamental freedoms, through democratic structures that operate with due respect for the rule of law.

As part of the OSCE participating States’ commitments relating to the human dimension, political pluralism and multiparty democracy are cornerstone principles to which all OSCE participating States have subscribed. In OSCE commitments, the offices and institutions of the OSCE were mandated to support participating States in their attempts to develop political parties, and multi-party systems, and to ensure that all political actors work to preserve this system regardless of which party is in power. Adherence to a clear separation between the State and political parties, free and fair elections, as well as an explicit dedication to democracy as the only system of governance in the OSCE region, are also part of the key commitments made by participating States.

In accordance with this mandate, ODIHR delivers projects and reports that aim to strengthen democratic institutions – including political parties – in upholding democratic principles. This is done through concrete support projects, as well as by reviewing individual pieces of draft and/or existing legislation pertaining, for example, to political parties. While this mostly involves legislation from OSCE participating States, we have also, for instance, in 2012 reviewed the Decree Law on Political Parties of the Republic of Tunisia.

Generally, when reviewing political party-related legislation, ODIHR cooperates extensively with the Council of Europe's Venice Commission, mainly by preparing joint opinions on political parties' legislation. In 2010, following a lengthy and inclusive process, ODIHR and the Venice Commission jointly developed the *Guidelines on Political Party Regulation*, as a tool to support States in their efforts to regulate political parties in a manner that is consistent with OSCE commitments and international good practice.

These Joint Guidelines, hard copies of which we have brought to this conference in English and Arabic, focus on key aspects pertaining to the regulation of political parties, including registration, membership, women's political participation, political party funding, the prohibition and dissolution of parties, as well as the role of political parties in elections. They were created as a tool to assist OSCE participating States and Council of Europe Member States in formulating legal frameworks that comply with OSCE commitments and other international standards in facilitating the proper establishment, development and functioning of political parties. Discussions are currently underway to prepare a new edition of these Guidelines.

In follow-up to the preparation of the Guidelines, ODIHR also established an Expert Group on Political Parties, and it is my pleasure to extend a special welcome to Professor Katz from the United States, the Chairman of this Group, and Professor Genckaya, from Turkey, a member of this Group, as well as Mr. James Hamilton, who participates in this Group on behalf of the Venice Commission. The Core Group of Experts, which includes six other experts, and a representative from the Council of Europe's Group of States against Corruption (GRECO), advises ODIHR on all matters pertaining to the regulation of political parties, and is instrumental in the preparation of legal opinions on relevant legislation.

In this context, I would like to note how important the topics discussed at this conference are. Indeed, without strong and independent political parties, societies cannot establish stability and good governance. The manner in which political parties are established, registered, funded, and the way in which they are permitted to participate in elections, are all relevant in achieving this aim.

I believe that the exchange of experiences at this conference, and the standards and good practices that will be discussed will prove an important impetus for ensuring that legislation on political parties will, in all its aspects, conform to democratic principles, and international standards on freedom of association.

I thank you for your attention and wish us all an interesting and lively discussion and exchange of experiences.

SESSION I: ESTABLISHMENT AND REGISTRATION OF POLITICAL PARTIES

Part 1: A comparative European view on the legal framework for the establishment of political parties and their participation in public life

Venice Commission Standards in the field of the establishment of political parties

Ms Hanna Suchocka
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I. Challenges concerning the role of political parties in countries of transition

The process of transforming a political system from autocracy towards democracy is, as a rule, connected with the changing role of political parties. In an authoritarian regime real political parties do not exist. There is no place for political pluralism and democratic political game. The organisations (associations) which often are named parties, in reality in an authoritarian system, are not, in their substance, the same as parties in democratic societies. In non-democratic systems a political party is rather seen as an instrument in the hands of non-democratic authorities to help them keep and preserve power “forever”. There is no place for an opposition party, so there is no place for a democratic party system.

This negative party phenomenon was a common experience for all Central and Eastern European countries which gained or regained independence after the collapse of the Soviet system. The Soviet system, as an authoritarian one, was built on the anti – thesis of pluralism. The main political principle was a one party system where the communist party (worker’s party) played a leading role over all the state institutions. In the light of the rule of the leading role of the communist party, the existence of opposition parties was not allowed. There were indeed, some other associations (“parties”) but their political role was very limited. They were described as “satellite parties” to the communist party, because they had to act under directives coming from the ruling communist party. Such a system was an artificial party system bearing no resemblance to a real, democratic, pluralistic one.

For that reason real party pluralism was one of the goals which new democracies have been striving for since the beginning of the transformation, as political parties were (and still are) widely seen as vehicles for contemporary democracies.

During the political turning point of 1989–1990 the countries of Central and Eastern Europe, wished to break with the principle of unity of power, and repudiate the leading role of a single party. This in turn opened the way for a return to a political system based on the division of power and pluralism. Each of those states sooner or later aspired to membership of the Council of Europe, and European standards required such a solution.

One can fully agree with the opinion that: “The inclusion of political parties within the political system and the existence of competitive parties can help authoritarian states to transition to democracy and facilitate the survival of democracies.”¹

Sometimes, however, critical voices could be heard saying that at the end of what once had been called the “party state” – “[...] public opinion in most democratic systems is characterised

¹ B. Lai, R. Melkonian-Hoover, Democratic Progress and Regress: the Effect of Parties on the Transitions of States to and Away from Democracy, Political Research Quarterly, Vol. 58/4, 2005, p. 551 et seq.

by pervasive dissatisfaction with and distrust of political parties, and there is much debate in academic circles about the obsolescence or decline of parties.”²

Certain scepticism could be seen also in many post-Soviet countries at the beginning of the transformation. But as indicated above, it was rather based on the negative aspects of the previous party system in a communist regime and was directed against the “party-state” in the Soviet version. One can agree however that political parties are necessary despite some widespread scepticism about these institutions in the contemporary world.

New democratic forces in Central European Countries, being convinced of a need to create a real party system, were to some extent, allergic to using the term (notion) “party”. They tried to avoid the description “party”, as it had a negative connotation from the past. Different names were used; the most popular being the terms “movement” or “citizens’ committees”. In the beginning these were seen as less formal organisations, but in the process of transformation they evolved into political parties (for example, in Poland in the parliamentary election of 1989, solidarity was organised on the basis of a citizens’ committee).

The notion, however, was not an important factor. The substance of these new organisations and their capacity to guarantee the freedom of association and pluralistic society was more important.

The basis for the new regulations derived from international and European conventions. The regulations of the ECHR were important for countries aspiring to membership of the Council of Europe. The ECHR, however, does not regulate the right to create a political party as a separate right. In its Article 11, the ECHR protects the right to freedom of association, which is also a basis for the creation of political parties. In the framework of European standards, freedom to associate in political parties is part of the general freedom of association.

The post-communist countries chose a different way. They preferred to regulate separately freedom of association and freedom to associate in political parties. All post-transitional constitutions have special provisions on political parties separate from the provision on the right to association. Furthermore, freedom to establish a political party was seen as the basis for building a democratic political system. For that reason this freedom is often regulated in the first chapter of the Constitution devoted to the fundamental principles of the state, while the freedom to association is regulated in the chapter on human rights (for example Article 11 of the Polish Constitution on political parties and art. 58 on freedom of association).³

It was easier, of course, to change the constitution and to bring general principles concerning political parties (pluralism, democratisation) into line with the Council of Europe’s requirements, than to adopt detailed solutions in ordinary legislation, the legislative process being much more difficult.

2 R. Gunther, J. Ramon Montero, J. J. Linz (ed.), *Political Parties: Old Concepts and New Challenges*, Oxford University Press 2002, p. 291. See also: Analytical paper on the IPU survey concerning the impact of political party control over the exercise of the parliamentary mandate, Z. Kędzia, A. Hauser, Chair of Constitutional Law, Adam Mickiewicz University (not published).

3 Art. 11 1. The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means. 2. The financing of political parties shall be open to public inspection. Art. 58. 1. „ The freedom of association shall be guaranteed to everyone“

II. Legislative regulation on political parties and the role of the Venice Commission

One can agree that the adoption of a separate law on political parties is not a condition *sine qua non* in a democratic society. Many western democracies do not have a specific law on political parties.

The Venice Commission's opinion was very clear on this subject: "A specific law for political parties is not a requirement for a functioning democracy,(...) such legislation is not necessary for the proper functioning of democracy, and may be most effective when quite minimal in its scope."

Despite this opinion of the Venice Commission it became a fact in the legislative practice of Central and Eastern European Countries to adopt a separate law on political parties. Many member States of the Council of Europe prepared special legislations aimed at differentiating between political parties and other associations, including those involved in politics. The main purpose of such legislation was to stress the central importance for the functioning of democracy. Therefore, it was common for a political party law to underline the special role of political parties in the "formation of the will of the people".

Political experience within the country and legislative tradition determine what to regulate, how to do it and how to apply it. So in countries where such laws do exist, their content varies to a large extent.

For that reason the role of the Venice Commission was very important in this area to bring the solutions into line with European standards.

Since the beginning of its activity the Venice Commission has adopted many opinions on laws on political parties in different states; for example: Ukraine (CDL-AD(2002)017), Moldova (CDL-AD(2003)008), Azerbaijan (CDL-AD(2004)025), Armenia (CDL-AD(2007)002), Bosnia and Herzegovina (CDL-AD(2008)002), Bulgaria (CDL-AD(2008)034), Turkey (CDL-AD(2009)006), Serbia (CDL-AD(2010)048), Georgia (CDL-AD(2011)044), Russian Federation (CDL-AD(2012)003).

In addition to its activity concerning concrete States, the Venice Commission, on the basis of such opinions, has adopted several "guidelines", a kind of jurisprudence of its own, regarding crucial topics concerning the establishment and activity of political parties. As was stated by the Venice Commission and the OSCE, recognising the differences existing between different countries as well as the great diversity of legal traditions (particularly in relation to democratic development, constitutional order and the rule of law), the *Guidelines* are not intended to provide blanket solutions in the development of a single model law for use in all states. The *Guidelines* are rather intended to clarify key issues related to political party legislation and to provide examples of potential good practices for states (CDL-AD(2010)024).

One can mention here the following guidelines:

- a. CDL-INF(99)015 Guidelines on Prohibition and Dissolution of Political Parties and analogous measures,
- b. CDL-INF(2000)001 – Guidelines on prohibition and dissolution of political parties and analogous measures,
- c. CDL-AD(2004)007rev. Guidelines and explanatory Report on Legislation on Political Parties: Some Specific Issues,
- d. CDL-AD(2009) 002 Code of Good Practice in the Field of Political Parties,
- e. CDL-AD(2010)024 Guidelines on Political Party Regulation by the OSCE/ODIHR and Venice Commission.

The topics of these guidelines show the crucial points connected with the establishment of a political party.

In this process three questions were of great importance:

- 1) the general principles that should be taken into account in the process of establishment of the party
- 2) the registration, and requirements in the process of registration,
- 3) the prohibition and dissolution of political parties

It should be mentioned here that the definition of a political party did not involve a lot of controversies in the work of the Venice Commission. There is rather a common definition which was taken by the Venice Commission stating that: a political party is ‘a free association of persons, one of the aims of which is to participate in the management of public affairs, including through the presentation of candidates to free and democratic elections in order to be represented in political institutions and to exercise political power on any level: national, regional and local or on all three levels’.

The Venice Commission’s opinion also reiterated that the European Court of Human Rights has noted that political parties are a form of association essential to the proper functioning of democracy. (...)The court has described political parties as holding an “essential role in ensuring pluralism and the proper functioning of democracy.” (CDL-AD(2010)024)

There was also a rather common agreement as concerns the function of political parties.

They are generally described as follows:

- the aggregation of diverse basic interests represented in the society,
- the integration of voters into the democratic process not only through the election process but also through other forms of participation,
- the formulation of policy programmes and proposals for national or local agendas and the setting up of platforms to mobilise societal support, the selection of political leadership and the wider political elites (parties are the key actors in popular elections at different levels and in creating government and some other state bodies).⁴

The legal regulations which exist in the country should help fulfil the function of political parties being an effect of the right to association and the right to freedom of expression. For that reason in the process of legislation the general principles for the establishment of political parties must be taken into account. These are expressed in the Guidelines on Political Party Regulation of the OSCE/ODIHR and the Venice Commission (CDL-AD(2010)024).

Ad 1) General principles

- a) right to association; in the Guidelines it is clearly stated that the law on political parties must be rather general but very precise so as not to interfere with the right to association. Striking the appropriate balance between state regulation of parties as public actors and respect for the fundamental rights of party members as private citizens, including their right to association, requires well-crafted and narrowly tailored legislation. Such legisla-

⁴ R. Gunther and L. Diamond, Types and Functions of Parties, in: L. Diamond and R. Gunther (ed.), *Political Parties and Democracy*, John Hopkins University Press 2001, p. 7–8; M. L. Whicker, R. A. Strickland, R. A. Moore, *ibid.*, p. 137. See also: Analytical paper on the IPU survey concerning the impact of political party control over the exercise of the parliamentary mandate, Z. Kędzia, A. Hauser, Chair of Constitutional Law, Adam Mickiewicz University (not published).

- tion should not interfere with freedom of association. Political parties must be protected as an integral expression of the individual's right to freely form associations,
- b) legality; – limitations imposed on the right to free association should have their formal basis in the law – constitution or ordinary law,
 - c) proportionality; – any limitations imposed on the rights of political parties must be proportionate;
 - d) non-discrimination; – this is a very delicate issue. The individual right to free association does not extend itself to require that a political party be required to accept members who do not share its core beliefs and values. However, the voluntary imposition of the principle of non-discrimination by political parties is welcome.
 - e) equal treatment; – in order to eliminate historical inequalities measures can be taken to ensure equal opportunities for women and minorities. Temporary special measures aimed at promoting *de facto* equality for women and ethnic, racial or other minorities subject to past discrimination may be enacted and should not be considered discriminatory.
 - f) political pluralism; – pluralism is necessary to ensure that individuals are offered a real choice in their political associations and voting choices. Regulations of political party functioning should be carefully considered to ensure that they do not impinge upon the principle of political pluralism.

Ad 2) Registration

The question arises whether registration is a necessary step in the process of the establishment of political party. The proper functioning of democracy in many such states illustrates that requirements for registration are not necessary in a democratic society.

As the Venice Commission presented in its study:

“There are no registration requirements in Germany, Greece or Switzerland... In Denmark and The Netherlands, political parties are not obliged to register, but certain formalities are required in order for them to participate in elections. In Ireland, registration simply enables a party to post its name alongside those of its candidates, while in Sweden it protects the party's exclusive right to use the name. In some states where political parties are required to register this is merely a formality, as in Austria, Spain, Uruguay or Norway, where the only condition is to produce 5000 signatures. In other countries, however, the authorities make sure that the party fulfils the material requisites applicable to political party activities (this is the case, for example, in the Czech Republic, Latvia, Poland and Russia).” (CDL-INF(2000)1 – Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures.)

Sometimes the question arose, whether registration as such was not against the freedom of association protected by art. 11 ECHR.

The answer was given by the European Court of Human Rights which has consistently ruled that requirements for registration do not, in themselves, represent a violation of the right to free association. As political parties may obtain certain legal privileges, based on their legal status, that are not available to other associations, it is reasonable to require the registration of political parties with a state authority. While registration as a political party is required, substantive registration requirements and procedural steps for registration should be reasonable.

The Venice Commission shared the opinion of the ECHR stating that registration as such is a kind of limitation of freedom of association, but in a democratic society should be done under several conditions so as not to be against European standards. “Registration as a necessary step for the recognition of an association as a political party, for a party's participation in general elections or for public financing of a party does not *per se* amount to a violation of

the rights protected under Articles 11 and 10 of the European Convention on Human Rights. The conditions for registration must be very clear: any requirements in relation to registration, however, must be such as are: – ‘**necessary** in a democratic society’ and – **proportionate** to the objective sought to be achieved by the measures in question.” The conditions must be in line with the general principles mentioned above in p. 1.

In the Venice Commission’s opinion it is reasonable that legislation regarding political party registration requires that the state be provided with basic information regarding the party’s permanent address and the registration of party names and symbols to limit possible confusion of voters and citizens. Some states prohibit the use of names and symbols associated with national or religious institutions. This type of registration requirement is reasonable. The regulation of party names and symbols to avoid confusion is also important for the state to be able to ensure a duly informed electorate able to exercise its free choice. It is also a legitimate requirement that political parties provide basic information with their application for registration defining their organizational structure. In the opinion of the Venice Commission and the OSCE the payment of reasonable registration fees for the establishment of a political party is an acceptable requirement. However, registration fees should not be enacted to restrict party formation (see principle a) – free association) (CDL-AD(2010)024).

“Registration may be considered as a measure to inform the authorities about the establishment of the party as well as about its intention to participate in elections and, as a consequence, benefit from advantages given to political parties as a specific type of association. Far-reaching requirements, however, can raise the threshold for registration to an unreasonable level, which may be inconsistent with the Convention.”

One of the questions under discussion was the problem of other requirements needed in the process of the establishment (registration) of a political party. Two requirements in particular were met, i.e. minimal membership requirements and territorial requirements.

It is true that minimal membership requirements do exist in a number of States (*Azerbaijan, Bosnia and Herzegovina, Canada, Croatia, Czech Republic, Estonia, Georgia, Germany, Greece, Kyrgyzstan, Latvia, Lithuania, Moldova, Russian Federation, Slovakia and Turkey*).

Sometimes however, such a threshold could be a real obstacle for establishing a political party. Thus, founding a political party should not be more difficult than founding an ordinary association or company, (see the principle of proportionality p. 1) c). Although limitations based on minimum support established through the collection of signatures are legitimate, the state must ensure that they are not overly burdensome so as to restrict the political activities of small parties or to discriminate against parties representing minorities.

In its opinions, the Venice Commission has expressed doubts concerning the necessity to establish minimal membership for parties.

The Venice Commission was also very reluctant as concerns other requirements. A pluralist party system, fulfilling its essential role in a democratic polity, can only emerge if facilitated by a stable legislation which does not impose unjustifiable requirements for registration, nor intrusive controlling mechanisms. In the opinion of the Venice Commission some pre-conditions for the registration of political parties (existing in several Council of Europe member States) requiring a certain territorial representation and a minimal number of members for their registration could be problematic in the light of the principle of free association in political parties.

“(…) The requirement of a national coverage for political parties might represent a serious restriction to the political activity on regional and local level. Taking into consideration the status of the right to form political parties as a fundamental right and the legally privileged position of parties in political activities, the Commission considers that the requirement of a national character should be at least loosened (…)”.

Some requirements, especially of a linguistic or ethnic nature may be dangerous for social peace in the country. They can lead to the creation of separatist movements, which may resort to non-peaceful means if the democratic path is forbidden.

(CDL-AD(2012)003 Opinion on the Law on Political Parties of the Russian Federation, March 2012), §24.

The Venice Commission also expressed a very critical opinion as regards control over the internal affairs of political parties stating that “bureaucratic control over political parties should be reduced and any supervisory powers should be given to an independent authority not part of the executive branch, in order to ensure transparency and build institutional trust.”

It is of great importance to guaranty non-politisation of decisions on registration. The best solution would be if a decision on registration (despite the right of appeal to a court against a refusal of registration) would be taken by an independent body rather than by a governmental body.

Ad 3) Prohibition and dissolution of a political party

One of the most controversial questions strictly connected with the freedom of association and the freedom of expression is the problem of the prohibition and dissolution of a political party. This problem is crucial in times of transition from a non-democratic to a democratic system, always appears after a so called “great change” and is strictly connected with the need to condemn the previous non-human, non-democratic system. Such a need is extremely strong in the situation when one party played such a negative and destructive role in the previous authoritarian system, such as in communism or fascism. It is a great challenge to find solutions which are in conformity with European standards.

The Polish constitution-maker decided to establish on the constitutional level a rule on the prohibition of the existence of some parties. In art. 11 quoted above, in proclaiming the freedom of political parties to function, the Constitution of the Republic of Poland points out in its concluding part that parties may influence the formulation of policy **only by democratic means**.

However, the lawmakers realised that such guarantees might be insufficient to ensure democratic party pluralism under the new political system, considering that the mechanisms of the former system still retained much of their vitality. Hence the Constitution contains additional regulations clearly defining the limits of freedom that political parties (as well as other organisations) may enjoy.

Those restrictions are contained in art. 13 of the Constitution which states: “Political parties and other organisations whose programs are based upon totalitarian methods and the modes of activity of nazism, fascism and communism, (...) shall be forbidden.”

The Polish constitution’s restrictive formulation pertains to the essence of a political party’s functioning and its ideational link to totalitarian methods and practices. It excludes from public life all political parties as well as other organisations whose activities or programs make

use of totalitarian methods and clearly mentions three of the 20th century's well-known totalitarian systems.

The Venice Commission's position was clear but very restrained, especially when such solutions were proposed a long time after the beginning of the whole process of transformation. It was clearly stated that: "The prohibition or dissolution of political parties as a particularly far-reaching measure should be used with the utmost restraint. Before asking the competent judicial body to prohibit or dissolve a party, governments or other state organs should assess, having regard to the situation of the country concerned, whether the party really represents a danger to the free and democratic political order or to the rights of individuals and whether other, less radical measures could prevent the said danger." The position is clear. It must be a real "danger to the free and democratic political order".

(CDL-INF(99)015 Guidelines on Prohibition and Dissolution of Political Parties and analogous measures, adopted by the Venice Commission in December 1999); CDL-AD(2003)008 Opinion on the proposed amendment to the law on parties and other socio-political organisations of the Republic of Moldova, (March 2003), §10.

The Venice Commission expresses explicitly the conditions for such a possibility by saying that: "...the possibility to dissolve or prohibit a political party from forming should be exceptionally narrowly tailored and applied only in extreme cases. Political parties should never be dissolved for minor administrative or operational breaches of conduct. Lesser sanctions must be applied in such cases. Nor should a political party be prohibited or dissolved because its ideas are unfavorable, unpopular, or offensive." "The Venice Commission has found, upon completing a survey of national legislation relating to the regulation of political parties, that where allowed at all, prohibition and dissolution are applicable only in extreme cases including the following: threat to the existence and/or sovereignty of the state, threat to the basic democratic order, violence which threatens the territorial integrity of the state, inciting of ethnic, social, or religious hatred, and the use or threat of violence. Even where such reasons for prohibition or dissolution are listed in legislation it is important to note that prohibition must meet the strict standards for legality and proportionality discussed above in order to be justified."

CDL-AD(2010)024 OSCE/ODIHR-Venice Commission "Guidelines on Political Party Regulation" by the OSCE/ODIHR and Venice Commission, (October 2010), §§89–96.

This Venice Commission's opinion is of great importance in the process of establishing political parties. The organ which has to take the decision on the registration of the party should analyse very carefully in light of the general principles whether the party will make its policy by using a democratic method only. The position of the Venice Commission is very clear. The prohibition (which should be interpreted as a refusal to register the party) or the dissolution of political parties should:

- (1) be of an **exceptional nature**,
- (2) be **proportional** to the legitimate aim pursued and
- (3) **provide for all procedural guarantees**.

The Venice Commission's very detailed and concrete guidelines, are of great importance for legislators in all countries when they try to make a law on political parties based on real pluralism. The new dynamic situation in different regions of the world creates new challenges for lawmakers. The Venice Commission is always ready to help them in this process, to keep the solutions in line with democratic standards.

International Standards in the Field of Legislation on Political Parties

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The political parties without which modern democracy is, in the word of political scientist E.E. Schattschneider, “unthinkable” evolved over the course of centuries. During most of that time, they were largely unregulated, and indeed unrecognized, in special legal provisions – and when they were specifically recognized, it was generally as potential “sinister combinations” and not as vital components of a well functioning political system.¹ Moreover, as experience with communist and fascist parties in the last century demonstrates, that skepticism concerning the motives of parties was not always misplaced.

Although it has become fashionable in some places to speculate about post-partisanship, or about democracy without parties, it remains the case that modern democracy – at least at the national level – remains “unthinkable save in terms of the parties”.² Moreover, even countries with well established and stable democratic traditions have in recent decades deemed it important to establish regulatory frameworks specifically for political parties, in the form of party laws, political campaign and finance laws, and so forth. At the same time, a range of internationally accepted standards have developed for the regulation of parties: some specifically rooted in international agreements, and others emerging by induction from the generally accepted practices of those countries generally recognized to be successful democracies. Such regulations arguably are even more important in emerging democracies, where the problem is the establishment of entirely new political institutions. Effective regulation of political parties is increasingly recognized to be important to both the establishment, and the legitimate functioning of democratic politics.

In designing laws for the establishment and regulation of political parties, there is much that the emerging democracies can learn from the experience and advice of their “older brothers” – and, indeed, much that the long established democracies might learn from their own mistakes. Nonetheless, there are at least two caveats that must be borne in mind before offering any “one-size-fits-all” advice for those drafting legislation regarding political parties.

First, much of what makes democracy work in practice in the long established democracies is the result of culturally ingrained self-restraint rather than formal regulation: the unwillingness of those in power to exploit their position beyond what the opposition can accept – and conversely, the willingness of those out of power to accept the right of those in power to govern, at least for the time being. In many cases, this self-restraint was developed as the direct consequence of experiencing the violence that can result from failure to be “humble in victory and gracious in defeat.” In the absence of the reality and, perhaps especially in the absence of the expectation, of that self-discipline, however, regulation may be even more important, particularly in trying to head off excesses on either side of the government/opposition divide.

The second, and related, caveat is that trying to compress history – to reproduce by legislative fiat within the time span of a few years or even within a few months, institutions and prac-

¹ See Susan E. Scarrow, *Perspectives on Political Parties*, New York: Palgrave Macmillan, 2002.

² E.E. Schattschneider, *Party Government*, New York: Holt, Rinehart and Winston, 1942, p. 1.

tices that evolved in the long established democracies over decades or centuries – may be far from straight-forward, if indeed it is possible at all. The fact that something is, or is not, what they do in Germany or Britain or the United States may not be a good guide to what should, or should not, be enacted in Romania or Moldova or Tunisia.

The final thing that needs to be stated clearly by way of introduction is that while the *Guidelines on Political Party Regulation* that the ODIHR and the Venice Commission developed are largely based on recognized international obligations, and so represent what might be described as “minimum standards”, they also reflect inevitable compromises, or attempts to strike an effective balance: between protecting parties and limiting their excesses; between fostering diversity of expression and allowing clarity of popular choice; between allowing dissent and demanding responsibility; between liberalism and egalitarianism; in short, between democratic idealism and political realism. It is to highlight the need for some of those compromises or balances that this paper is primarily directed.

I. Defining Party

The first substantive sections of most laws involve the definition of terms. If parties are to be regulated or fostered, the first questions must be “what is a political party?” and “what should a political party be like?” We easily recognize major parties – they conduct obvious electoral campaigns; they win large numbers of seats in parliament; they participate in governing coalitions and organize cabinets. For other cases, such as newly organized groups that hope to become major parties but have not yet had a chance to prove themselves or associations that participate in electoral politics but only occasionally, if ever, present their own candidates, the question of whether they should be included under the same “political parties” rubric is less easily answered, and yet a clear boundary must be drawn if both the regulated and the regulators alike are to know to whom the rules apply and to whom special benefits should go.

In the *Guidelines on Political Party Regulation*, ODIHR and the Venice Commission adopted a very broad definition of party: “a free association of persons, one of the aims of which is to participate in the management of public affairs, including through the presentation of candidates to free and democratic elections.” That very broad definition comports well with the freedom of association enshrined in the Universal Declaration of Human Rights (art. 20) and the International Covenant on Civil and Political Rights (art. 22). Particularly once either valuable benefits or onerous requirements are attached to the status of “party,” however, the *Guidelines’* definition is actually too broad to serve as the basis for effective legislation. As a result, many of the interpretive notes attached to the *Guidelines* are concerned with ways in which the broad definition may be narrowed: what requirements can legitimately be imposed for the official recognition of a party – and conversely, under what circumstances can official recognition legitimately be suspended or annulled.

The last sentence deliberately refers to “recognition” rather than “registration” of a party – notwithstanding that the title of this session refers to registration – for two reasons. The first is that the idea of an official register of parties is relatively new, and indeed not all democracies have official registration of parties. The second is that many countries that do have party registers make a distinction between a broad category of political parties, and a narrower category of registered political parties, with most benefits and the most extensive regulations limited to this second category.³ For example, the *Canada Elections Act* (para. 2) defines a political party simply as “an organization one of whose fundamental purposes is to participate in public af-

3 In the United States, which has no registration of parties at either national or state level, the analogous distinction is between “minor” and “major” parties.

fairs by endorsing one or more of its members as candidates and supporting their election.” Even this definition is a bit narrower than the definition in the *Guidelines* in that it *requires* the endorsement and support of candidates rather than merely including it among the things a party *might* do, but to become a registered party, which brings a range of financial benefits, as well as being necessary if the party’s name is to appear on the ballot, requires that a number of other conditions be met, including making an official application giving the party’s full name as well as an abbreviated name for use on election documents such as ballots and a logo⁴, identifying a leader, a chief agent, an auditor, and a headquarters address, and having a membership of at least 250 qualified electors, each of whom signs a declaration of membership.

II. Requirements for Party Registration

Support

Particularly once we move to the privileged category of “registered party”, deciding upon the appropriate stringency or leniency of the requirements for registration raises fundamental questions about the role of parties in a democracy. Are parties primarily vehicles for the presentation and debate of a diversity of ideas, or are they primarily presenters of alternative leaders of potential governments among which voters make a choice. The natural inclination is to say that they should be both, but in the drafting of regulations, it will have to be faced that these visions are in a fundamental sense incompatible. On the one hand, to see parties as avenues for the expression of the wide range of opinions and interests that characterize any society naturally privileges a multiplicity of parties, with easy entry into the party political arena for new and small competitors. But on the other hand, to see parties as the mechanism allowing popular choice of who will govern emphasizes the importance of limiting access so that the voters, whose electoral vocabulary is necessarily limited to “this” or “that”, can make a clearly understandable decision, avoiding what might be called the Ostrogorski problem that “what was pompously called the national verdict was, as a rule, tainted with ambiguity and uncertainty....And after ‘the voice of the country had spoken,’ people did not know exactly what it had said”.⁵ As the European Court of Human Rights ruled in the case of *YUMAK AND SADAK v. TURKEY* (para. 125) “avoiding excessive and debilitating parliamentary fragmentation” is a legitimate aim of legislation, but within quite broad limits, the appropriate balance between avoiding “excessive and debilitating... fragmentation” and allowing easy access to the benefits of registered party status can only be a matter of political judgement.⁶

At a more practical level, the criteria that generally are applied are of several varieties. First, and most commonly, there are requirements that a minimum level of support or seriousness of purpose be demonstrated. Requirements of this type may take the form of a minimum required membership, a minimum number of signatures of voters on an application petition, a mini-

4 In fact, one of the common justifications for instituting party registration was to establish who has the right to use the party’s name. As with questions of trade mark protection, the governmental interest is in avoiding deception or confusion of voters. If party labels are an important cue for voters, then the right to identify oneself as “your Labour candidate” has to be restricted to those who really are representatives of the Labour Party – but that requires that the government be able to identify who has the right to authorize the use of the name. In the same vein, there is an interest in avoiding the use of names or symbols that are so close to those of already established parties that they are more likely to confuse than illuminate.

5 Moisei I. Ostrogorski, *Democracy and the Organization of Political Parties*, New York: Macmillan, 1902, vol. II, pp. 618–619. Ostrogorski was a Belarusian political scientist, historian, jurist and sociologist best known for his comparative study of political parties in the United States and the United Kingdom.

6 The actual question before the European Court of Human Rights in the case of *YUMAK AND SADAK v. TURKEY* was the permissibility of a 10% electoral threshold.

minimum level of support at the previous election, the support of a minimum number of already elected officials, or in some cases the payment of fees or deposits. In general, the more valuable the benefits of registration, the higher the threshold for registration may be set, but the threshold should not be set so high as to prevent potentially meaningful competitors from entering the arena in the first place. In the absence of other barriers to access to the ballot or other benefits, registration requirements that are too low (perhaps 25 members from a population of millions) risk excessive fragmentation of the vote, or the formation of parties more interested in the private benefits than in meaningful participation in public affairs.⁷ On the other hand, if the threshold is set too high (for example, a requirement of 40,000 members) it may have the effect of illegitimately entrenching those parties that are already in power by making any significant challenge practically impossible.⁸ Moreover, while claims of membership numbers or petition signatures may legitimately be subject to verification, care should be taken to protect those expressing support for unpopular parties from reprisal by the authorities, by their employers, or by others. In addition, it is important that the verification procedures themselves be transparent, and designed to minimize the possibilities of arbitrary abuse.⁹

In some cases, requirements of support have also included requirements of some geographic spread. While these may reflect a legitimate desire to develop a single, national, party system, they remain problematic in two respects. First, they ignore the fact that even national parties often arise in one place, and only develop a national base after they have achieved some local success. Second, they discriminate against parties seeking to represent interests that are geographically specific – be they defined by ethnicity, religious or cultural tradition, or even by economics. (For example, if agriculture is concentrated in only part of the country, one might expect an agrarian party to have similarly geographically circumscribed support; requiring all parties to have a significant presence throughout the country may have the consequence of preventing such interests from having their own parties.) Even when sectional parties are explicitly secessionist, the democratic legitimacy of secession or sectional interest often depends upon the side of the divide on which you stand, but even more, the question – usually only answerable after the fact – is whether denying the legitimacy of separatist or other sectional claims will encourage integration, or alternatively lead to violence.

Closely related to minimum level of support requirements would be requirements of a minimum level of activity – particularly electoral activity. The Canadian example is illustrative. Before 2003, a Canadian party was required to have 50 candidates in each parliamentary election in order to maintain its registration. Since each candidate was required to post a deposit of CA\$200 that was forfeit if the candidate did not receive at least 15% of the vote, this imposed a significant financial burden on small parties – as well as on parties that sought to represent

7 For example, the Court of Appeal for Ontario took cognizance of the perception that “[i]n the 1993 election, [the Natural Law Party] fielded over 200 candidates, received approximately 85,000 votes (or, 0.6% of the national vote), and was rewarded with a total of \$717,000 in public funds as reimbursement for its election expenses.... The perception was that the Natural Law Party had not participated in the election for the purpose of engaging in political discourse and enhancing the political process; rather, its purpose was to advertise its contemplative lifestyle, promote its fee-based meditation courses and enhance its commercial aims. It hired people to ‘run’ on its behalf.” (*Longely v. Canada (Attorney General)*, 2007 ONCA 852)

8 In 2012, the Russian requirement that a party have at least 40,000 members (as well as branches with at least 500 members in 45 regions) was reduced to an overall requirement of 500 members. In that year, the number of registered parties increased from 8 to 50, with more than 20 additional parties becoming registered in 2013. [<http://minjust.ru/nko/gosreg/partii/spisok>, accessed 25 September 2013]

9 To cite an example of what should not be done, it has been observed that there were at one time more than 40 ways in which a petition signature could be invalidated in the State of New York, including such things as the omission of a middle initial (if it was used in the original voter registration documents) or misstatement of the signer’s state assembly district.

local interests. (For example, the three provinces of Alberta, Saskatchewan, and Manitoba only had a total of 54 seats among them in 2000, effectively making a party specifically devoted to representing the economic and cultural interests of Canada's prairie provinces impossible.) In light of this, the Supreme Court of Canada overturned this requirement, which was subsequently lowered by legislation to 12, and then to 3, and ultimately to a single candidate.

In general terms, while requirements for registration of parties may legitimately be used to restrict the allocation of substantial public resources or other valuable benefits to "serious" competitors, they should not be so high as to deny potential challengers entry to the political marketplace. Neither should denial or revocation of registration be used punitively, except in the most extreme circumstances.

Commitment to Democracy

A second class of requirement that is sometimes imposed might be identified as "commitment to democracy." In fact, there are two possible subtypes here: rejection of antidemocratic ideologies; and adoption of internal democracy as a way the making party decisions. Both, however, immediately run into the ambiguity of the term "democracy" itself.

Clearly parties that advocate or incite violence, whether against the regime or against other citizens, may legitimately be banned. Parties that advocate fundamental change in the constitutional structure of the state (for example, federalism rather than a unitary state) or in the economic system (socialism rather than capitalism) or in the relationship between the state and religious authorities, all to be brought about peacefully through the existing legal process, are another matter. Here the problem may be a conflict between democratic rights and other principles or obligations. Aside from the question of secessionist parties, examples would include parties that support (or oppose) a strictly secular state – or parties that claim religious justification for discrimination against women.¹⁰ Can parties legitimately be denied registration, or otherwise penalized, for espousing, or even peacefully acting upon, positions that others regard as contrary to their own conceptions of democracy?

A related question concerns the banning of party names or symbols that are identified with antidemocratic regimes, or which offend the sensitivities of some group. The best known such regulation is, of course, prohibition of the use of the swastika in Germany. A similar regulation in eastern and central Europe would be to ban the use of the hammer and sickle. Although one might take an absolutist view with regard to freedom of expression that would bar any such prohibition, a more nuanced approach would be to ask whether that symbol is so intimately and uniquely identified with totalitarian communism as to make its use equivalent to the endorsement of violent revolution, or whether, alternatively, it can be understood to represent a broader political ideology which was perverted but not necessarily discredited by the Soviet experience.¹¹

10 The most prominent example is the Dutch Staatkundig Gereformeerde Partij (SGP), the Statement of Principles (art 10) of which states: "The notion of [the existence of] a right to vote for women which results from a revolutionary striving for emancipation is incompatible with woman's calling. The latter equally holds true for the participation of women in both representative and administrative political organs. Women shall be led by their consciences as regards the question whether casting their vote is in accordance with their God-given place." Until 2007, the SGP did not allow women to become members, and until 2012 it did not allow them to become candidates for public office. The legal issues and proceedings are summarized in the 2012 decision of the European Court of Human Rights (Third Section) in the case of STAATKUNDIG GEREFORMEERDE PARTIJ v. the Netherlands.

11 On this subject, see the Joint Amicus Curiae Brief for the Constitutional Court of Moldova on the Compatibility with European Standards of Law No 192 of 12 July 2012 on the Prohibition of the Use of Symbols of the Totalitarian

With regard to the second aspect of democratic commitment, regulations in many OSCE countries require that parties be “internally democratic,” although they rarely specify what that means beyond perhaps requiring some level of transparency in decision making and some input from members in determining the party’s constitution and choice of candidates. And, indeed, this is as far as the *Guidelines* go. Beyond this, however, calls for parties to be internally democratic have been evident in the pronouncements of organizations like Parliamentary Assembly of the Council of Europe, International IDEA, and USAID, and, of course, in the Venice Commission’s *Code of Good Practice in the Field of Political Parties*, which identifies “to reinforce political parties’ internal democracy” as “its explicit aim.”

A variety of arguments have been advanced to support this emphasis on intraparty democracy. One is that adopting intraparty democracy shows a commitment to system level democracy on the part of party leaders – or perhaps more generically reflects a belief that if democracy in some arenas is good, then democracy in more arenas must be better. A second is the suspicion that the near universal declines in party membership and in popular support for party politics more generally stem from a feeling of alienation and exclusion that can be cured by requiring parties to be more democratic internally. Often this is associated with the idea that internal party democracy will lead to greater demographic diversity in party candidates and leaders, which will also lessen feelings of alienation and exclusion. A third is the hope that internal democracy will force party leaders to be responsive, and thereby will produce governments that are more in tune with popular sentiment.

While these all sound plausible, on closer inspection the first two are at best questionable. The Italian democratic theorist Giovanni Sartori, for example, is quite explicit in saying that “democracy on a large scale is not the sum of many little democracies”;¹² in his view, what matters is that voters have a free choice among clear alternatives, not how those alternatives are individually constructed, and the redress for citizens who are dissatisfied with a party’s leadership is simply to vote for another party. I have recently published a paper arguing that the decline in popular involvement in parties can be explained by social and economic developments (the weakening of class divisions and ethnic hostilities; the expansion of interest group networks, and their dropping of explicit party ties; increasingly “networked” citizens who are less dependent on parties) that are both independent of party organizational practices and that are themselves usually regarded as good, notwithstanding that their consequence of popular withdrawal from parties is generally regarded as bad.¹³

The third argument raises the question: “responsive to whom?” There is, obviously but rarely admitted, the danger that parties are being forced increasingly to be responsive to the regulators themselves, for example choosing candidates to meet gender quotas that have been imposed from outside, or deciding to choose their candidates in primary elections simply because the party regulatory regime allows them to avoid meeting gender quotas provided that they

Communist Regime and of the Promotion of Totalitarian Ideologies of the Republic of Moldova, adopted by the Venice Commission and OSCE/ODIHR, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29004-e>
 Except for the passage of several hundred years, the analogous question from the perspective of some Jews or Muslims might be whether use of the “scudo crociato” (a red cross on a white shield) which was the symbol of Christian Democracy in Italy ought to have been banned on the basis of its connection to the genocidal history of the crusades and the Spanish Inquisition.

12 Giovanni Sartori, *Democratic Theory*, New York: Praeger, 1965, p. 124.

13 Richard S. Katz, “Should We Believe that Improved Intra-Party Democracy Would Arrest Party Decline,” in William P. Cross and Richard S. Katz (eds), *The Challenges of Intra-Party Democracy*, Oxford: Oxford University Press, 2013, pp. 49–64.

use primary elections.¹⁴ More significant, however, is the question of whether partisan officials should be responsive primarily to the general public or to their own party's members – raising what might be called the Matthew 6:24 problem¹⁵: “No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other”.

Particularly with regard to the selection of candidates, American parties represent what must be the limiting case of internal party democracy: anyone who meets the legal qualifications for the office in question and presents the required number of nominating petitions can enter a party's primary, with the winner automatically becoming the party's candidate, even against the active opposition of the party's leadership. We can note immediately that this has hardly furthered demographic diversity, but even more, it has furthered polarization and impeded accommodation – with conservative Republicans constantly afraid of being defeated by even more radically conservative challengers if they cooperate in any way with the Democratic president, and to only a slightly lesser degree with liberal Democrats fearing primary defeat if they are not left-wing-enough. Responsible democratic politics requires compromise, and yet internal party democracy may make compromise at the parliamentary level more difficult.

III. Moving Targets and Contradictory Expectations

The introduction of primary elections into American party politics was a reaction to the perception that the parties had become closed oligarchies and corrupt machines. Whether or not the cure has proven worse than the disease, the magnitude of the change in the fundamental nature of American parties that this reform stimulated illustrates what may be the fundamental problem of political party regulation. Simply, the changing nature of political parties over the last century and a half has resulted in inconsistencies and incompatibilities of expectations in the minds of citizens, regulators, and members of the parties themselves.

Especially in Europe in the third quarter of the 19th century, parties were generally small and elite affairs. In many countries, only a small percentage of men – and no women – could legitimately participate in politics;¹⁶ those who could vote were generally well-off economically and well-educated (at least the standards of their time). List proportional representation was just being invented – Victor d'Hondt, the “inventor” of the first widely used system of list proportional representation, was only born in 1841, and his system was not elaborated until 1878 (and not used, in the Swiss canton of Ticino, until 1890). Members of parliaments were elected as individual persons, and although they formed parties both to coordinate activity within the parliament and to cooperate electorally, the idea that the individual MP was the holder of a personal mandate was largely unchallenged.

By the end of the 19th century – and dominating politics through the middle of the 20th century – a fundamentally different kind of organization, the mass party, had emerged. Where the elite parties of the liberal, but basically predemocratic, era only had to appeal to a highly restricted – basically elite and independent – electorate, the mass party was the instrument of a large – and largely ill-educated and economically dependent – electorate, primarily defined

14 Although outside of the OSCE area, this appears to have been the case in Mexico. See Lisa Baldez, “Primaries vs. Quotas: Gender and Candidate Nominations in Mexico, 2003,” *Latin American Politics and Society* 49(3), pp. 69–96.

15 So called because the quotation is from the biblical Gospel According to Saint Matthew, chapter 6, verse 24.

16 In 1880, for example, less than 10% of the population could vote in Austria, Belgium, Finland, Italy, the Netherlands, Norway, Sweden, or the United Kingdom. See Richard S. Katz, *Democracy and Elections*, New York: Oxford University Press, 1997, pp. 233–238

by its working class status.¹⁷ The limited capacity of the mass party clientele meant that their political participation was largely restricted to use of the party or a union as the channel of representation. Particularly when viewed through the lens of typical working class life experiences, politics was seen more as reflecting a conflict among fundamentally opposed interests rather than disagreements about an identifiable common interest. Election by list proportional representation became common, with the concomitant idea that the object of electoral choice, and therefore the legitimate possessor of a popular electoral mandate, was the party, and not to the individual candidate or MP.

We can see the conflict between these models in the attempt in the *Guidelines* to reconcile the mass party ideal of party as the object of electoral choice, firmly rooted in society, and governed internally by democratic means with the 19th century ideal of a parliament made up of rational, independent, and individually responsible representatives. In the mass party model, for MPs to be responsible to leaders chosen by a broad-based party membership is part of what it means to have a political party – and to have democratic party government. In the earlier elite party model – and to a large extent in its successor, the electoral-professional party model, as well as for liberal or conservative “catch-all parties” – the independence of public officials to act without restraint from their party organizations is essential to responsible government.¹⁸ In its extreme form, neither the model of the total subservience of elected officials to their parties, nor the model of totally independent MPs, is really acceptable, but neither are they really compatible. This incompatibility becomes especially clear when trying to translate these two models into standards for the recognition or registration of parties. From the perspective of the mass party model, a significant membership and a “democratic” constitution are appropriate requirements, although at least in historical terms, commitment to the constitutional, economic, or religious status quo are not. From the perspective of the electoral-professional party, on the other hand, membership as anything beyond evidence of popular support (which might be expressed short of formal membership, or by membership in a supporters organization that is not formally part of the party), or institutions purporting to give supporters control over party leaders or elected officials would not be appropriate, while a relatively high electoral threshold, not only for achieving office but also for remaining eligible for public subsidies, would be appropriate.

Post 20th century developments have added an additional complication. On what might be described as the positive side (although there is little evidence to date to support this view), some people think that parties may be less necessary. Certainly more educated citizens, with access to the internet and various forms of social media may be able to participate in political life without requiring intermediaries, and even if they do require intermediaries, there are a host of organized interest groups, NGOs, etc. that can perform that function. While this may make

17 The other basis for the mass party form was religion, with the Anti-Revolutionary Party, representing orthodox tendencies in the Dutch Reformed Church and founded in 1879, as an early example.

18 Contrast, for example, the mass party view of the role of parties in democracy implicit in a statement by British Labour Party leader Clement Attlee with the elite, or electoral-professional, party view implicit in a statement by Conservative leader Winston Churchill.

Attlee: “The candidate of one of the major Parties stands for a connected policy and for a certain body of men who, if a majority can be obtained, will form a Government. This is well understood by the electors. If the Member fails to support the Government or fails to act with the Opposition in their efforts to turn the Government out, he is acting contrary to the expectation of those who have put their trust in him.” [“Party Discipline is Paramount,” *National and English Review* vol. CXLVIII, no. 887 (January, 1957), 15.]

Churchill: “All I will promise to the British electorate in your name, and the only pledge that I will give on behalf of the Conservative party is that if the government of Britain is entrusted to us at this crisis in her fate, we will do our best for all, without fear or favour, without class or party bias, without rancor or spite...” [Report 70th Annual Conference, National Union of Conservative and Unionist Associations, London, 1949, p. 119]

parties less necessary as articulators of interests, however, it leaves unaddressed the question of what agencies other than parties can perform the function of aggregating the myriad interests that can now be expressed into coherent programs of action. On the more negative side, there is the danger of party collapse. We used to talk about “couch parties” (figuratively, parties so small that their entire membership could be accommodated on a single couch) in central and eastern Europe, but basically party membership is shrinking nearly everywhere.¹⁹ With shrinking memberships, increasing reliance on technical expertise rather than manpower, and rising costs driven by modern campaign technologies, parties are increasingly turning to the state for resources.²⁰ One question that this use of state resources has raised is whether these resources are allowing parties to maintain closer connection to society, even between elections, or alternatively whether state support is simply making it easier for parties to detach themselves from society, upon which they are no longer as dependent for resources, and indeed whether this “feeding at the public trough” might not further alienate society from the parties.

The increased use of state resources has led to increasing regulation of parties – and indeed, as I suggested earlier, to an increasing need for a clear definition of who is, and who is not, a party eligible for resources and liable to regulation. Beyond this, however, the regulation of parties and their dependence on the state for resources, heightens the conflict between the view that parties ought to be private organizations external to the state, and the increasing reality that they are effectively part of the state – potentially too powerful to be left unregulated, but also in a position to write those regulations themselves.²¹

It also increases the problem – which is likely to be one of the most important problems for effective regulation in the early 21st century – of evasion through the creation of organizations that “walk like a party and talk like a party” but still can claim not to be parties. Two prominent examples would be the Dutch *Partij voor de Vrijheid* of Geert Wilders – which avoids many regulations (and also foregoes government grants) simply by not having any members except Wilders himself, and the various American organizations channeling campaign money and messages without formally coordinating with parties or candidates. Both of these cases highlight the fact that political parties as defined in law are not the only participants in democratic politics – and indeed the case of the *PVV* (which currently has the third largest group of MPs in the Dutch parliament) illustrates that even groups that would not qualify for party registration in many systems can nonetheless be successful in the electoral arena. Particularly the American case also points to another balance that must be struck, between regulation of political parties and the freedom of individuals or other third parties independently to participate in political life. On the one hand, the rights of independent candidates to stand for election and the rights of third parties to freedom of speech even within the context of electoral campaigns are well established in international obligations, but on the other hand they may allow regulation of parties to be bypassed under the guise of independent activity. More generally, it may be that the mantra “free and fair” actually is an oxymoron, in that if freedom means the unrestrained exercise of rights, then it may be that fairness can only be achieved by restricting freedom.²²

19 Ingrid van Biezen, Peter Mair, and Thomas Poguntke, “Going, Going.... Gone? The Decline of Party Membership in Contemporary Europe,” *European Journal of Political Research* 51(1), 2012, pp. 24–56

20 Perhaps citizens simply need parties less, and parties need members less. But if this is so, it will require us to seriously rethink the centrality of parties in democracy.

21 In contrast to the “state party” of totalitarian regimes, in which there effectively was fusion of the state and the single party, this casts the multiple parties collectively as part of the state, notwithstanding that one of their state functions is to compete with one another.

22 See Richard S. Katz, “Democratic Principles and Judging ‘Free and Fair’” in Michael D. Boda (ed.) *Revising Free and Fair Elections*, Geneva: Inter-Parliamentary Union, 2005, pp. 17–39.

IV. Final Remarks

The primary lesson of this analysis is that, although strong political parties are essential to the development of democratic societies, and although overly strong parties may be no less a danger to democratic development than are excessively weak parties, there are no simple or universal answers to the problems of facilitating or regulating the development of political parties. Regulation is necessary, but it is also essential that those regulations not be so restrictive as to infringe upon the freedom of association guaranteed by international agreements or effectively to prevent party pluralism. Balances must be struck between competing values, and both the appropriate balance and the consequences of any particular regulatory regime are going to be situationally specific. Although technical skill in drafting laws and regulations are important, political acumen and judgment are at least equally important.

This distinction between law and politics is also reflected in a difference in orientation between lawyers and social scientists. Lee Epstein and Gary King summarized one aspect of this difference in an article in the *Chicago Law Review*:

While a Ph.D. is taught to subject his or her favored hypothesis to every conceivable test and data source, seeking out all possible evidence against his or her theory, an attorney is taught to amass all the evidence for his or her hypothesis and distract attention from anything that might be seen as contradictory information. An attorney who treats a client like a hypothesis would be disbarred; a Ph.D. who advocates a hypothesis like a client would be ignored.²³

Two lessons follow from this observation. The first is that the lawyers are going to have to be more open to the possibility that the policies they have been championing may not, in fact, be effective, even if they are legally correct. At the same time, the social scientists will have to be more willing to accept that the regulatory process is political, and not scientific. Both will have to accept that the ultimate aim is not to be “correct” in either legal or scientific terms, but to secure and improve the effectiveness of democratic government.

The second is that it is important to be realistic about human behavior. At least from the perspective of a social scientist, it appears that lawyers have tended to be too quick to assume that people will behave in the way in which legislation or regulations intended them to behave – or in the way in which mechanical application of the findings of social science might predict them to behave – and thus to underestimate the difficulty of crafting rules that will actually produce the desired result. Three examples that have been relevant in my own work come quickly to mind. The first is the Israeli attempt to strengthen the position of the Prime Minister by having him directly elected, which instead had virtually 180 degrees the opposite effect: once the choice of Prime Minister was separated from the choice of parliamentary party, voters were more willing to give their parliamentary support to minor parties, leaving the winning prime ministerial candidate with a personal mandate, but a fragmented parliament in which his own party was dramatically weakened. The second is the 1993 Italian assumption that introducing an electoral system with 3/4 of the seats filled by first-past-the-post election would reduce the number of parties: in an effort to build majority support for their coalitions, prime ministerial candidates tried to buy the support of small parties by allowing their candidates to represent the coalition in a disproportionate number of safe districts, with the result that fragmentation in parliament actually increased. The third is the series of American attempts to limit the political influence of corporate or special interest money, each of which seems to lead to more money that is less easily regulated – or even reported. In each case, the

23 Lee Epstein and Gary King, “The Rules of Inference,” *The University of Chicago Law Review* 69:1 (Winter 2002), p. 9.

lesson is the political equivalent of Adam Smith's observation that "[i]t is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner." Rather than expecting political actors to act in ways that promote effective government because it is the right thing to do, it is likely to be more productive to try to design institutions in which, as with Smith's "invisible hand", the interplay of self-interest can further the public interest.

The final observation is that it is important to avoid unrealistic expectations. No human institution is perfect, but while this is no reason for complacency and passive acceptance of imperfections, it is also true that problems of political legitimacy are less often caused by the absolute deficiencies of institutions or behavior than they are by the gap between reality and expectations – and that gap can be narrowed by lowering expectations as well as by improving performance. Overly strict regulation, no matter how well intentioned or justified in the abstract, that leads to evasion rather than compliance not only will fail to achieve its purpose while creating an atmosphere that makes evasion of other regulations more likely, but also may undermine public faith in the system by raising expectations that are not, or indeed cannot be, satisfied.

Political Parties as an expression of freedom of association in a democratic society enshrined in national constitutions: legal framework of the names and “signs” used by political parties

The Romanian experience

Prof. Dr. Lucian Mihai
Member of the Venice Commission (Romania)

Judge Laura Andrei
President – Bucharest Tribunal

I. Preliminary considerations

Modern democracy is inconceivable in the absence of political parties.¹ Parties are some of the most important forms of exercising the freedom of association in a democratic state², playing an essential part in maintaining pluralism and the smooth functioning of democracy. Therefore, after the Second World War, political parties have been progressively regulated by the constitutions of European democracies and acknowledged at the constitutional level as indispensable institutional elements of the democratic system. Italy and the Federal Republic of Germany were among the first states to mention political parties in their constitutions, in 1947 and 1949 respectively. This initiative to include parties in the text of the constitution has been gradually followed by most European states.³

Nevertheless, the regulation of political parties in national legislations is not just a simple recognition of the fact that these are an important part of the political and social reality in any democratic state, but also a way by which states may control, limit or even suppress political parties. The issue of restrictions imposed on the political parties reflects the dilemma with which all democratic states are faced: on the one hand, the ideology of some extremist parties contradicts democratic principles and human rights, and on the other hand, any democratic regime has to provide maximum guarantees for the freedom of expression and association. Therefore, democratic states have to find a balance by setting out the degree of the threat posed to the democratic order by such parties and ensuring the necessary guarantees.⁴

Most national legislations regulate the conditions for the registration and operation of political parties. A thorough analysis of the provisions applicable in this field exceeds the scope of this presentation, and we have thus chosen to focus hereinafter on the issues regarding the establishment of political parties – especially on the limitations imposed in relation to the names

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- 1 This normative viewpoint on political parties, expressed by E.E. Schattschneider more than 50 years ago, is still undisputed. Please see E.E. Schattschneider, *Party Government: American Government in Action*, Transaction Publishers, New Brunswick, London, 2009, p. 1 (1st edition published in 1942 by Rinehart & Company Publishing).
 - 2 Please see B. Selejan-Guțan, in *Constituția României. Comentariu pe articole*, I. Muraru, E.S. Tănăsescu (coordinators), C.H. Beck Publishing, Bucharest, 2008, p. 85.
 - 3 Please see G. Borz, *Contemporary Constitutionalism and the Regulation of Political Parties: A Case Study of Luxembourg*, in *Working Paper Series on the Legal Regulation of Political Parties*, No. 9/2011, p. 3–4.
 - 4 Please see the Resolution of the Parliamentary Assembly of the Council of Europe No. 1308 (2002) on the restrictions applicable to political parties in states members of the Council of Europe, paragraph 3.

and symbols that they may use. Having as a starting point the relevant provisions from the Romanian legislation, our aim is to offer an overall view regarding the provisions applicable in the member states of the Council of Europe.

II. Regulation in the Romanian legislation

In Romania, political parties are currently regulated⁵ both by the Constitution adopted in 1991 (Articles 8 and 40), and by the provisions of: Law No. 14/2003 on political parties;⁶ Law No. 35/2008 on electing the Chamber of Deputies and the Senate and for amending and supplementing Law No. 67/2004 on electing local public administration authorities; Law No. 215/2001 on local public administration; and Law No. 393/2004 on the Statute of local representatives.⁷ Thus, even the Constitution adopted in 1991 stipulates that “*Pluralism in Romanian society is a condition and a guarantee of the constitutional democracy*” (Article 8 paragraph (1)), and political parties “[...] *contribute in defining and expressing the citizens’ political will [...]*” (Article 8 paragraph (2)). Political parties are defined, in Article 1 of the Political Parties Law, as “[...] *associations of political nature created by Romanian citizens having the right to vote, that freely partake in the formation and the exercise of their political will, fulfilling a public mission guaranteed by the Constitution.*”

As regards the specific issue of the name and symbols that political parties may adopt, Article 5 of the Political Parties Law provides that: “*Each political party should have its own full name, abbreviated name and permanent symbol. The full name, the abbreviated name and the permanent symbol must be clearly different from those of the previously registered parties, and it is forbidden to use the same graphic designs, irrespective of the geometric figure they are included in. [...] The full name and the abbreviated name, as well as the permanent symbol, cannot depict or combine national symbols of the Romanian state, of other states, of international bodies or of religious cults. Political parties that are members of other international political organizations are exempted from abiding by this rule and they may use the respective organization’s mark as such or in a particular combination.*”

The Law also regulates the manner in which the names, and the permanent symbols of political alliances and of other forms of association between parties and non-political formations are chosen⁸, as well as the consequences which the potential reorganization of political parties may have on their names and permanent symbols.⁹

Another important provision is that “*The full name and the abbreviated name of a duly registered political party, as well as the permanent symbol it uses, starting with 1990, rightfully belong to it, if it was the first to use them, and cannot be appropriated or used by subsequently registered political parties*” (Article 54 paragraph (1) of the Political Parties Law).

Moreover, the Electoral Law provides that: “*The political alliance or the electoral alliance that partook in previous elections under a particular name may keep that name only if its original membership did not change or if none of the political parties that left the alliance did not submit with the*

5 For an analysis conducted prior to these regulations: Lucian Mihai, Gabriela Bîrsan, Despre regimul juridic al denumirii partidelor politice (paper presented at the Scientific Session of the Bucharest University Law School in Bucharest, 29 August 1992).

6 Hereinafter called “Political Parties Law”.

7 Hereinafter called “Electoral Law”.

8 Please see Article 28 and, respectively, Article 32 of the Political Parties Law.

9 Please see Articles 39 and 41 of the Political Parties Law.

*Central Electoral Office a letter stating that it does not agree with the respective name to be kept by the alliance in its new membership. Also, the name in question cannot be used by another political alliance or electoral alliance.*¹⁰

Finally, in order to fully outline the legal regime of political parties, one must mention Article 3 letter (h) of Law No. 51/1991 on the national security of Romania, according to which the following represents a threat to the national security: “[...] *initiating, organizing, committing or supporting in any manner totalitarian or extremist acts of communist, fascist or legionary origin or of any other nature, racist, anti-Semitic, revisionist, separatist that may endanger in any manner the unity and territorial integrity of Romania, as well as incitement to acts that may endanger the order of the legal state.*” These legal provisions implicitly limit the sphere of ideas and actions that political parties may promote.

III. Regulations in other Member States of the Council of Europe

Other national Constitutions and laws also provide conditions for the registration of political parties and regulate, among others, more or less strictly, the names and symbols used by the parties.

For example, the “Act on Political Parties” from Germany imposes the obligation that the name of a political party shall be clearly distinguishable from that of any other existing political party, the same obligation being applicable to acronyms.¹¹

More restrictive provisions have been adopted under Spanish law, according to which “*The name of political parties may not include words or expressions that are misleading or confusing as to their identity or that breach the law or the fundamental human rights. They may not coincide, resemble or be identical themselves, even from a phonetic point of view, with the ones of any other political party previously registered or outlawed, dissolved or suspended by a court decision, with the name of natural persons, the name of previously existing entities or with registered trademarks.*”¹²

The Portuguese Constitution states that “*Notwithstanding the philosophy and ideology underlying their programmes, political parties shall not use names that include expressions directly related to any religion or church, or emblems that may be confused with national or religious symbols.*”¹³ It also provides that “*A party having a name or declared purpose indicating a regional connection or sphere of activity may not be established.*”¹⁴

Another example is the relevant legislation applicable in Great Britain. According to the provisions of the “Political Parties, Elections and Referendums Act 2000”, a political party may not be registered if its name: “(a) would either (i) be the same as that of a party which is already registered in the register in which that party is applying to be registered, or (ii) be likely to result in electors confusing that party with a party which is already registered in respect of the relevant part of the United Kingdom; (b) comprises more than six words; (c) is obscene or offensive; (d) includes words the publication of which would be likely to amount to the commission of an offence; (e) includes any script other than Roman script; or (f) includes any word or expression prohibited by order made by the

10 Article 91 paragraph (1) in conjunction with Article 35 paragraph (10) of the Electoral Law.

11 Article 4 paragraph (1) of Gesetz über die politischen Parteien/1967.

12 Article 3 paragraph (1) of Ley Orgánica 6/2002 de Partidos Políticos.

13 Article 51 paragraph (3) of Constituição da República Portuguesa.

14 Article 51 paragraph (4) of Constituição da República Portuguesa.

*Secretary of State after consulting the [Electoral] Commission.*¹⁵ Similar provisions are applicable to the “emblems” that British political parties may use.¹⁶

IV. Case law of the European Court of Human Rights

As follows from the above, the establishment of political parties and, in close connection with this, the name and symbols they may adopt, are subject to some more or less restrictive conditions set by each state. For the signatory states of the European Convention on Human Rights¹⁷, imposing such limitations raises the question of how far they can go in restricting the possibility of political parties to freely choose their names and symbols.

In order to answer this question, it must be mentioned that, by a constant case law, the European Court of Human Rights¹⁸ ruled¹⁹ that political parties fall within the scope of Article 11 of the Convention, as a manifestation of the freedom of association.²⁰ Moreover, given the essential role played by political parties in the proper functioning of democracy, which in its turn is indispensable to the guarantee of human rights, the ECtHR has established that the margin of appreciation enjoyed by the states in this regard is very limited. Thus, any interference in the rights of political parties must strictly observe the necessity and proportionality criteria.

The landmark decision in this regard was rendered by the ECtHR in the case *The United Communist Party from Turkey*.²¹ Analysing the decision of the Turkish courts to dissolve a political formation because, contrary to the provisions of the national legislation, its name included the word “communist”, which in the national judge’s view was proof of its intention to impose the domination of a social class above the others²², the ECtHR held that: „*The Court considers that a political party’s choice of name cannot in principle justify a measure as drastic as dissolution, in the absence of other relevant and sufficient circumstances. [...] Accordingly, in the absence of any concrete evidence to show that in choosing to call itself “communist”, the TBKP had opted for a policy that represented a real threat to Turkish society or the Turkish State, the Court cannot accept that the submission based on the party’s name may, by itself, entail the party’s dissolution.*”²³

The ECtHR’s standpoint relies on the fact that, when it comes to political parties, the exceptions provided by Article 11 of the Convention must be construed narrowly. Thus, only sub-

15 Article 28 paragraph (4) of Political Parties, Elections and Referendums Act 2000.

16 Article 29 paragraphs (1) and (2) of Political Parties, Elections and Referendums Act 2000: “(1) A party’s application under section 28 may include a request for the registration of up to three emblems to be used by the party on ballot papers.

(2) Where a request is made by a party under this section in relation to an emblem, the Commission shall register the emblem as an emblem of the party unless in their opinion it (a) would either (i) be the same as a registered emblem of a party which is already registered in the register in which that party is applying to be registered, or (ii) be likely to be confused by voters with a registered emblem of a party which is already registered in respect of the relevant part of the United Kingdom; (b) is obscene or offensive; (c) is of such a character that its publication would be likely to amount to the commission of an offence; or (d) includes a word or expression prohibited by virtue of section 28(4)(f).”

17 Hereinafter called “Convention”.

18 Hereinafter called “ECtHR”.

19 See, for example: ECtHR, 30 January 1998, *The United Communist Party from Turkey and others v. Turkey*, § 25; ECtHR, 25 May 1998, *The Socialist Party and others v. Turkey*, § 29; ECtHR, 3 February 2005, *Communists’ Party (Non-PCR) and Ungureanu v. Romania*, § 49; ECtHR, 30 June 2009, *Herri Batasuna and Batasuna v. Spain*, § 76.

20 See C. Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole*, second edition, C.H. Beck Publishing House, Bucharest, 2010, p. 867.

21 ECtHR, 30 January 1998, *The United Communist Party from Turkey and others v. Turkey*.

22 *Idem*, § 9–10.

23 *Ibidem*, § 54.

stantiated and persuasive reasons may justify the restriction of political parties' freedom of association. To determine whether such a restriction is necessary, according to Article 11 § 2, the signatory states enjoy only a limited margin of appreciation, that goes hand in hand with a rigorous supervision at the European level, both as regards the national legislation, and also the decisions by which it is implemented, including those rendered by independent courts.²⁴

If the issue of the names adopted by political parties has been expressly settled by ECtHR, the symbols that they may adopt has not yet – to our knowledge – been the subject of a conventionality control. Nevertheless, relevant indications with respect to the standard that the ECtHR expects the states to comply with may be extracted from two decisions rendered with respect to using in a political context some symbols of political connotation. In particular, this relates to the decisions rendered in 2008 in the case *Vajnai*²⁵ and, respectively, in 2012 in the case *Tatar and Faber*²⁶, which condemned Hungary's interferences in the use of the red star, a symbol with communist connotations, and the use of Arpad's flag, associated with the fascist ideology, respectively, during certain parades.²⁷ The Court held that, although in certain states that underwent traumatic historical events, the prohibition of certain manifestations, organized on the occasion of particular celebrations and which may offend the memory of the victims of totalitarian regimes who died in a particular place, may be acceptable, the limitations imposed by Hungary on the use of the symbols in question infringe Article 10 of the Convention on the freedom of expression, in conjunction with Article 11 on the freedom of association, since the use of these two symbols was not likely to give rise to violent reactions. In light of this case law, it seems likely that the European court would have a similarly permissive approach in a possible case regarding a symbol chosen by a political party.

As expected, the decisions adopted by the ECtHR have been echoed in the case law of the Romanian courts. An example in this respect is the case concerned with the registration of "Partidul Poporului – Dan Diaconescu" ("*Dan Diaconescu People's Party*").

In the first instance, the Bucharest Tribunal²⁸ dismissed the application to register this party, holding that it is unacceptable to include the name of a natural person in the party's name. As such, the Tribunal held that the only case in which a name of a natural person may appear in the name of a political party is when the name of a famous and renowned personality, held as representative for the promoted economic and social values or for the category of citizens the party addresses, would be used in a symbolic manner; in such case, the symbolic nature of the name used should be linguistically marked by using it between quotation marks. Or, using the name Dan Diaconescu in the name of the party, in the manner in which it appears in the case at hand, is indicative of the fact that the party serves to cultivate the personality of this natural person as a political value in itself, which infringes the Constitution and the applicable legal provisions (in particular, Article 8 paragraph (2) of the Constitution and Article 2 of the Political Parties Law; according to these provisions the purpose of the activity carried out by political parties is to abide by the principles of democracy and to promote natural values and interests, political pluralism, and to contribute to the formation of public opinion etc.).

24 *Idem*, § 46.

25 ECtHR, 8 July 2008, *Vajnai v. Hungary*.

26 ECtHR, 12 June 2012, *Tatar and Faber v. Hungary*

27 For a more detailed analysis of these decisions, please see N. Hervieu, „Libertés d'expression et de manifestation (Art. 10 et 11 CEDH): La tolérance européenne envers les manifestations et symboles de l'intolérance”, in *La Revue des Droits de l'Homme*, No. 8/2012.

28 Bucharest Tribunal, 4 Civil Division, Decision No. 16 P/2011 ruled in File No. 26184/3/2011 (unpublished).

The Bucharest Court of Appeal²⁹ had a completely opposite approach. The Court took as a starting point the interpretation given by the ECtHR to Article 11 of the Convention in the cases *Communists' Party (Non-PCR) and Ungureanu vs. Romania* and *United Communist Turkish Party*, according to which, in order to decide on the necessity of the contested interference, it is required to analyse, in concrete terms, the political program and the statute of the political formation to be incorporated. As such, given that from these documents it may not be concluded that the principles stipulated by Article 8 of the Constitution and Articles 2 and 3 of the Political Parties Law, concerned with abiding by the national sovereignty, territorial integrity and legal and constitutional order, among which political pluralism, universal suffrage and free participation in the political life, are not infringed³⁰, the Bucharest Court of Appeal held that the court of first instance wrongfully restricted its analysis to just the name of the party. By applying the principles developed at the European level, the Bucharest Court of Appeal has decided that dismissing the request to register “Partidul Poporului – Dan Diaconescu” exclusively for the reason that its name includes the name of a natural person does not answer a “social imperative necessity” and is not “proportional with the targeted legitimate scopes”, and for this purpose it amended the decision of the court of first instance and ruled that the party be registered.

V. Relation between legal norms regarding the name and the “signs” of political parties and intellectual property law

As shown above, the national law on the name and the permanent “signs” of political parties should be construed and applied by reference to the relevant provisions from the Convention. Given the fact that these names and signs mainly serve as differentiation means and are subject to a registration obligation, another branch of law whose potential applicability in this regard should be analysed is intellectual property law, and especially the provisions on registered trademarks.

The Romanian lawmaker does not expressly regulate the relation between the norms regarding the name and the signs of political parties, on the one hand, and intellectual property law, on the other hand. However, this matter was dealt with by the case law, through the decision rendered by the Bucharest Court of Appeal³¹ with respect to the registration of “Partidul Popular Maghiar din Transilvania” (*Hungarian People's Party of Transylvania*).³²

In this case, the People's Party requested the court, by way of an application of intervention, to dismiss the application for registration filed by the HPPT, holding that the name of “People's

29 Bucharest Court of Appeal, 3rd Division for civil matters and minors and family matters, Civil decision No. 1023/2011 ruled in File No. 26184/3/2011 (unpublished).

30 Article 2: “For the purpose of their activity, political parties shall promote the national values and interests, contribute to the formation of the public opinion, participate with their candidates to elections and incorporation of public authorities and stimulate citizens to take part in elections, as per the law.”

Article 3: “(1) Only associations of political nature, incorporated as stipulated by the law, and which promote national sovereignty, independence and state unity, territorial integrity, order of the law and the constitutional democracy may operate.

(2) Political parties which by their statute, program, propaganda of ideas or other activities they organize infringe Article 30(7), Article 40(2) or (4) of the Romanian Constitution, as republished, are prohibited.

(3) Political parties are prohibited from becoming affiliated with foreign organizations, if such affiliation infringes the values stipulated by paragraph (1).

(4) Political parties may not organize military or paramilitary activities or other activities prohibited by the law.”

31 Bucharest Court of Appeal, 4 Civil Division, Civil Decision No. 938 R/2011 ruled in File No. 32654/3/2011 (unpublished).

32 Hereinafter called “HPPT”.

Party” belongs to it, as it is registered with the State Office for Inventions and Trademarks as an individual trademark. After analysing this application, the Bucharest Court of Appeal held that, although the rights on trademarks are acknowledged and protected in Romania as per Law No. 84/1998 on trademarks and geographical indications, the provisions of this law “[...] target the commercial activity of individuals and applies to trademarks “of products and services”. In other words, the provisions of Law No. 84/1998, as republished, may not be opposed during the procedure of registering political parties regulated by Law No. 14/2003. Political parties are associations of political nature created by Romanian citizens having the right to vote who freely participate in the formation and the exercise of their political will, fulfilling a public mission guaranteed by the Constitution. They are legal entities of public law. The appellant, the People’s Party, may criticize the registration of another party whose name is not clearly distinguished from the name of a previously registered party, as stipulated by Article 5 of Law No. 14/2003. In this regard, the Court finds that the party whose registration is requested has its own full name, abbreviated name and permanent symbol, and these are different and impossible to confuse with the full or abbreviated name of the appellant, the People’s Party.” Based on these considerations, the court dismissed the application of the People’s Party as unsubstantiated.

The approach of the Bucharest Court of Appeal is very clear, leaving no room for contradictory interpretations. Indeed, holding an intellectual property right over a trademark may not be opposed in the context of registering a political party. However, it is worth mentioning that, although Law No. 84/1998 on trademarks and geographical indications is not applicable to political parties, to the extent that the provisions regulating the latter ones do not provide the criteria based on which it will be established whether the name of a political party is distinguished „in a clear manner from the previously registered ones”, it is allowed and even recommended to refer to those relevant criteria already developed by the legislation and practice in the field of intellectual property.

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SESSION I: ESTABLISHMENT AND REGISTRATION OF POLITICAL PARTIES

Part 2: The Arab experience:
association in political parties as an
expression of the diversity and social
structure of modern societies

Legislation relating to political parties in Tunisia: General considerations

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There was a time when, in Tunisia, using the term “political party” to refer to any party other than the party in power was considered by those in power to be *lèse-majesté*. Having lived under Bourguiba and Ben Ali for a long time, Tunisians did not need to refer to the party in power by its full name (first the Socialist Destourian Party and then the Democratic Constitutional Assembly). They simply referred to “the Party” and it was clear that they meant the party in power. This can be explained by the fact that a single party was in power for over two decades. There was only one legal party and other parties were forced to operate in secrecy (such was the case for the Tunisian Communist Party). At the start of the 1980s, a strong demand for democracy started to emerge and President Bourguiba had to slacken the reins and legalise opposition parties. Thus the single party regime became a dominant party regime.

Evidently, the aim of this concession made by the regime was not to democratise political life in the country but to lessen the pressure it was being subjected to from large sectors of society.

This power manoeuvre was brought to light during the first multi-party elections in Tunisia, which took place in 1981, where the results were fixed to prevent an opposition party from entering Parliament. The change in the Head of State in 1987 did nothing to improve the politics of the regime. The party in power was still a dominant party that merged into the State, using the administration to its advantage, dominating the media and using all possible means to intimidate the opposition and anyone who so much as thought of criticising or opposing the regime. This had the most damaging of consequences both for legal political parties and for those that had been forced to operate in secrecy, in terms of organisation, influence and financing. This led to the general weakness that has gone hand in hand with Tunisian political parties up until now, constituting one of the major stumbling blocks in Tunisia’s transition to democracy.

It goes without saying that this political situation has always been translated into the legal framework. It is a case of the regime saying that its actions in terms of political parties adhere to the legislation and that it therefore complies with the law.

However, the briefest of evaluations of Tunisian legislation relating to the political parties under the one-party state reveals its weaknesses and the fact that it was designed by an authoritarian regime in order to perpetuate its power and its hold on the State and society (I). After the revolution of 14 January 2011, many positive points have been observed in terms of the new legislation, although certain gaps remain to be noted (II).

I. Legislation relating to parties before the revolution of 14 January 2011

Organic law 88–32 of 3 May 1988 organising political parties is an example of the numerous tailored laws enacted by the former Tunisian regime in order to safeguard its power and to protect itself from any opposition and any alternative political or social agenda.

Through this law, the regime had put the formation of political parties under lock and key so that only “puppet” opposition parties whose loyalty was guaranteed could pass through the

“filter”. These parties posed absolutely no threat to the regime and were even involved in the foundation of its hegemony on the country and society to the extent that they were referred to as “administrative opposition parties”.

The centrepiece of this lockout device is the prior authorisation required for the formation of all political parties. Article 8 of law 88-32 of 3 May 1988 stated that “a political party can only be formed and carry out its activities after it has obtained authorisation by means of a decree issued by the Minister of the Interior publishable in the Official Journal of the Tunisian Republic”.

Evidently this provision gave the administration an almost discretionary power to refuse the formation of any opposition party and allowed the party in power to choose its competitors on the political stage by eliminating those that posed the most significant threat. Furthermore, even the process that this provision established for appealing against an administrative refusal does not give much scope for success given that the appeal is addressed to a special chamber in the administrative tribunal (two administrative judges, one judicial judge and two persons known for their competence in political or legal matters) whose members are named by decree. It would have been difficult to imagine the executive power naming two truly independent members and it is well known that judges did not escape the pressure and intimidation imposed by the regime.

The will of the regime to control the opposition parties is also reflected on another level — in the public financing of political parties. The reference text in this matter is law 97-48 of 21 July 1997 relating to the public financing of political parties. Article 2 of this law establishes that “the political party can only obtain the premiums established in Article 1 of the present law if one or more of the members of parliament sitting in the Chamber of Deputies is a member of this party...”. Given that the party in power fixed the elections according to its requirements, it was able to control which opposition parties were entitled to public funding. Thus, opposition parties had to show allegiance to the party in power if they wanted to obtain seats in the Chamber and therefore enjoy public funding. True opposition parties that completely refused to participate in elections orchestrated by the regime, considering them to be a parody of democracy, were punished as a result and deprived of all public funding. This aggravated their financial problems and called their very existence into question.

One of the most paradoxical legislative provisions is law 99-27 of 29 March 1999 supplementing law 97-48 of 21 July 1997 relating to the public financing of political parties. This law grants political parties “an annual premium, the amount of which is fixed by decree, as a subsidy for their newspapers, as a contribution towards the cost of the paper and printing”, which is, in itself, a very positive point. However, the law adds that “the aforementioned premium is distributed to the political party in four instalments on the condition that its newspaper is published continually”.

In the context of pre-revolution Tunisia, the origin of the difficulties encountered by political parties in the publication of their newspapers was well known. This condition, in the context of Tunisian politics, aimed to silence the opposition press, forcing it to become bound to the regime and to become nothing but a propaganda tool.

Although several successive laws have increased the amount of the premium granted to political parties (80,000 dinar in 1999, then 135,000 dinar in 2006 and finally 270,000 dinar in 2008), the conditions under which it is granted have remained the same and the premium has remained a very effective method for pressurising opposition parties instead of helping them to play their role in the political landscape.

II. Advances in the post-revolutionary legislation regarding parties

After the revolution of 14 January 2011, legislation of political parties had to be adapted to the new political situation in the country so that it was consistent with the aspirations of the people regarding democratic life and an open and multi-party political field.

Decree-law 87–2011 of 24 September 2011 relating to the organisation of political parties therefore states in its first article that “This decree-law guarantees the freedom to form, join and exercise the activities of political parties. It aims to provide freedom in political orientation, to support and promote political pluralism and to consolidate the principle of transparency in the management of political parties”. It is clear that the philosophy that inspires the 2011 decree-law is fundamentally different to that of the 1988 law.

Furthermore, and in contrast to the 1988 law, the 2011 decree-law replaces prior authorisation with the information system. Article 9 of the decree-law states that “Persons wishing to form a political party must send a letter including the following points by recorded delivery with confirmation of receipt to the Prime Minister:

a) A declaration stating the name of the party, its programme, emblem and head office

The party must not have the same name as any other legally established party.

b) A copy of the national identity cards of the founders of the party

c) Two copies of the statutes signed by the founders of the party

When the letter is sent, a bailiff verifies that the aforementioned information has been received, and draws up a report in two copies, which he returns to the representative of the party.”

If the Prime Minister has reason to believe that the party does not conform to the provisions of the decree-law, notably Article 3 and its corollary, Article 4¹, which set out the basic principles to be respected by the parties and the markers for healthy political activity respectively, he can decide to refuse the request to form the political party. The sizable difference between this decree-law and the 1988 law is that «the founders of the party can appeal against the decision to refuse the request to form the political party in accordance with the procedures for appeals on the basis of *ultra vires* set out in the provisions of law 72–40 of 1 June 1972, relating to the administrative tribunal”.

Thus, a special chamber in whose formation the executive power is involved by decree is no longer involved. This provides a guarantee for citizens who want to form a political party, insofar as the appeal will be examined by a tribunal without interference from the executive power.

Today, the public financing of political parties is organised in a very rudimentary manner. Decree-law 2011–87 of 24 September 2011, which revoked the 1997 law relating to the public financing of political parties, states in Article 21 that political parties benefit from public

1 *Article 3* — In their statutes, activities and financing, political parties must respect: the principles of the Republic; the supremacy of the law; democracy; plurality; the peaceful transition of power; transparency; equality; neutrality in administration, places of worship and public services; and the independence of justice and human rights as defined by international conventions and ratified by the Tunisian Republic.

Article 4 — Political parties are forbidden from—in their statutes, communications, programmes or activities—encouraging violence, hate, intolerance and discrimination founded on religion, class, sex or region.

financing. This establishes the principle of the public financing of political parties without organising the form thereof, notably the conditions of the financing and its amount.

The legislator chose this option because the 2011 elections were special elections aiming to elect a constituent assembly and not a legislative assembly. It will therefore be up to the constituent assembly to adopt the constitution and the whole legal framework relating to political parties for the post-transition period, amongst other things.

Furthermore, if decree 2011-87 revoked the provisions of the 1997 law, it was to prevent political parties that had already been formed and that were going to form from invoking the provisions of the decree to gain the right to public funding. This would have constituted an enormous financial burden that the country would not have been able to take on given the economic crisis at the time and the abundance of political parties. Therefore, only the electoral campaign for the party lists presented at the 2011 elections were financed, but even with this limitation it was noted that certain lists were established solely for the purpose of gaining public funding and that this caused a haemorrhage of public funds.

The amount and form of the public funding available to political parties must be defined in the new law on political parties as a matter of urgency. Naturally this funding must be inspired by democracy and freedom and aim to establish the basis of a political life that is both pluralist and healthy. The conditions for bestowing public funding must therefore be flexible in order to avoid excluding certain parties, and the amount allocated must allow political parties to play their full role in the political life of the country.

Furthermore, the new law on parties and all legislation pertaining to political parties must establish rigorous sanctions to dissuade party leaders and members from breaching legislation and to penalise them if applicable. Any breaches, especially during the upcoming elections, that go unsanctioned could call into question the result of the elections and damage the process of democratic transition in the country.

The legal arrangements governing the establishment of political parties in Morocco

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I. Introduction

Given the importance of political parties in democratic systems and the fact that they are a fundamental precondition for the establishment of a democratic regime and the construction of a state governed by the rule of law, as they are an essential means of political participation, the exercise of pluralism and the right to diversity of opinion, the authors of the Moroccan constitutions, ever since the first constitution adopted in Morocco in 1962, have stipulated that “Political parties shall participate in the organisation and representation of citizens. There shall be no single-party system”.¹ The subsequent constitutions in Morocco maintained the same requirements regarding political parties and the prohibition of a single-party system.²

It can therefore be said that Morocco, since its independence from Spanish colonial rule, codified the multi-party system and laid down the principle of freedom to establish political parties and the prohibition of the single-party system.³ In so doing, the authors of the Moroccan constitution adopted a liberal approach, contrary to many of Morocco’s neighbouring countries which operated on the basis of a single-party system.

Today, therefore, Morocco has considerable party pluralism, insofar as there are over 34 legally accredited political parties, and 18 political parties are represented in the current House of Representatives.

The establishment of political parties went through a historic development beginning with the 1958 Public Freedoms Act. A number of amendments were introduced with the 2006 law and the situation developed further with the institutional act promulgated in 2011.

In this paper, I shall therefore study and analyse the development of the establishment of political parties in Morocco, and discuss the most important problems that this raises, as well as some of the solutions put forward to ensure that this law offers a fundamental guarantee of the principle of freedom to establish parties and a central pillar of the democratic transition in Morocco.

1 Article 3 of the 1962 Constitution

2 See the Constitutions of 1970, 1972, 1992 and 1996.

3 It should be noted that Morocco had a multi-party system even before the drafting of its first constitution and even before independence from colonial rule.

1. The legal framework for the establishment of political parties prior to the 2011 constitution

As stated above, there were several political parties in Morocco even before the adoption of the first constitution in the Kingdom in 1962, and even before the parliament came into existence. The establishment of political parties was subject to the Associations Act,⁴ Article 15 of Chapter 4 of which provides that “associations constituting political parties or pursuing a political activity, in any form whatsoever, shall be subject to the provisions of this Royal Decree.”

Article 16 of the same Decree provides that “Political parties and associations of a political nature shall in addition be subject to the following special provisions.”

Article 17⁵ provides that “Political parties and associations of a political nature may be established only if they are not invalid under the stipulations laid down in Article 3 and provided they satisfy, in addition to submitting the declaration referred to in Article 5, the following conditions:

- i. They are established exclusively by Moroccan citizens and are open to all Moroccans without any discrimination in terms of race, religion or region of origin;
- ii. They are established and operated by means of national funds only;
- iii. They have their own articles of association whereby all members are able to participate in the management of the association;
- iv. They are not open to serving members of the armed forces, the judiciary, civil servants in positions of authority, members of the police, members of the auxiliary forces, prison guards, forest officers and guards or serving members of the customs authorities;
- v. They are not open to persons deprived of their national rights.”

These legal requirements regarding the establishment of political parties continued until 2006 when a special law was drafted on political parties, which were henceforth no longer subject to the Associations Act.

On 14 February 2006, a new law was promulgated regulating all aspects of the establishment, funding and supervision of political parties.⁶ Article 3 of this law provides that “Political parties shall be established and conduct their activities in complete freedom and in accordance with the constitution of the Kingdom and the provisions of this law.” Article 4 states that “the establishment of any political party which is founded on a cause or aim contrary to the provisions of the constitution or the laws, or which seeks to harm the religion of Islam, the monarchy or the territorial integrity of the Kingdom, shall be declared null and void. The establishment of any political party founded on a religious, linguistic, ethnic or regional basis, or in general, any basis that is discriminatory or contrary to human rights shall also be declared null and void.”

By means of this law, the legislature sought to limit the list of persons not entitled to be affiliated to a political party or be involved in its establishment. It also laid down a requirement to comply with a number of procedures to ensure the validity of the establishment of the party. At the same time, it sought to ensure the right of all Moroccan citizens, both male and female, who had reached the age of majority, to join in complete freedom any lawfully established political party.

⁴ Royal Decree (Dahir) No. 1-58-376 issued on 15 November 1958, governing the right to establish associations, Official Gazette No. 2404 of 27 November 1958.

⁵ This article was amended by Law No. 75-00 of 10 October 2002, Official Gazette No. 5046, 10 October 2002

⁶ Law No. 36-04 of 14 February 2006

However, despite the positive points contained in this law, there were a number of negative aspects. These include in particular the prohibition of establishing regional parties, the imposition of a large number of founding members and participants at the constituent assembly, the broad power granted to the Ministry of the Interior in the procedure for the establishment of parties, and the authority given to the government to dissolve any political party by issuing a decree, in a number of circumstances not specified in detail, including a breach of public order, an affront to public morals, or activities representing harm to the monarchy.

2. The legal framework for the establishment of political parties following the adoption of the 2011 constitution

Given the criticism levelled at the Political Parties Act in Morocco and in the light of the political transformation and democratic openness which was taking place in the Kingdom, there was a reconsideration of the legal provisions governing political parties in terms of both the constitution and the Political Parties Act.

At the constitutional level, the provisions relating to political parties were amended, and Article 7 of the 2011 constitution stipulates the following:

“Political parties shall work to provide a political structure and framework for Moroccan citizens and promote their participation in the life of the nation and the management of public affairs. They contribute to the expression of the will of the electorate and participate in the exercise of power on the basis of pluralism and alternation through democratic means within the context of the constitutional institutions.

Political parties shall be established and their activities shall be exercised freely, in full compliance with the constitution and the law.

There shall be no single-party system.

Political parties shall not be founded on a religious, linguistic, ethnic or regional basis, or in general, on any discriminatory basis or basis contrary to human rights.

They shall not have any aim which seeks to violate the religion of Islam, the monarchy, constitutional principles, democratic foundations or the national and territorial unity of the Kingdom.

Political parties shall be organised and shall operate in accordance with democratic principles.

An institutional act shall determine, in compliance with the principles set forth in this Article, the rules relating specifically to the establishment of political parties, their activities, the criteria for the allocation of financial support from the state and the arrangements for the supervision of their funding.”

Article 9 of the constitution provides that “political parties and trade union organisations may not be dissolved or suspended by the public authorities except by virtue of a court decision.”

This article of the constitution clearly shows that its authors sought to enhance the status of political parties, by formally acknowledging the principle of freedom to establish such parties, extending the range of functions they undertake, placing their dissolution or suspension in the hands of a judicial authority and stipulating that a special institutional act would be issued to replace the ordinary law in force prior to the 2011 constitution.

With regard to the establishment of parties, Article 3 of the new Institutional Act on Political Parties,⁷ promulgated in application of the requirements of the 2011 constitution, provides that “Political parties shall be established and conduct their activities in complete freedom and in accordance with the constitution and the provisions of the law.” This means that in line with this article the only thing limiting the freedom of citizens to establish political parties is the law. So what are the conditions laid down by this law with regard to the establishment of political parties in Morocco? And what is the nature of the relationship between these conditions and the rules and principles laid down in the 2011 constitution with regard to political parties? And are the conditions laid down in the law really able to give shape to the procedural relationship between the state and society regarding the establishment of parties? Was the law able to regulate all the details concerning the establishment of parties without leaving some margin of appreciation to the administrative authorities, which could prove a means of limiting the freedom of establishment? Are the conditions for the establishment phase able ensure that parties can achieve the objectives they have set themselves? And what is the position of the Constitutional Court regarding the legal conditions governing the establishment of political parties?

A. Limitations on the establishment of political parties

Reference should be made here to Article 4 of the Institutional Act on Political Parties which states that the establishment of any political party founded on a religious, linguistic, ethnic or regional basis, or in general on any discriminatory basis or contrary to human rights, shall be deemed null and void.

The establishment of any political party which seeks to harm the religion of Islam, the monarchy, or the constitutional principles, democratic foundations or the national and territorial unity of the Kingdom shall also be declared null and void. These are therefore the limitations relating directly to the aims and goals which parties must avoid so as not to be banned.

It should be noted that the Institutional Act on Political Parties was vague with regard to the situations in which the establishment of a political party whose aims would be in violation of constitutional principles and democratic foundations (Article 4) would be declared null and void. What is meant by constitutional principles and democratic foundations? These are vague semantic concepts which could grant the government (the Ministry of the Interior) wide powers to limit political parties.

B. The conditions for the establishment of political parties

Institutional Act No. 29–11 on Political Parties devotes the first section of Chapter 2 to the establishment of political parties, beginning with Article 5 which provides that “the founding members and leaders of a political party must hold Moroccan nationality, be at least 18 years of age, be registered on the electoral roll and enjoy their civil and political rights.” In addition to holding Moroccan nationality, the founding members and leaders must not hold any position of political responsibility in another country whose nationality they may also hold.

The Constitutional Court held that the conditions laid down by Article 5 for the founding members and leaders of a political party were the same conditions incumbent on any citizen to exercise his or her right to vote and to stand for election in accordance with Article 30 of the constitution, and complied with the provisions of Article 7 whereby political parties “contrib-

⁷ Institutional Act No. 29–11 of 22 October 2011, Official Gazette No. 5989, 24 October 2011

ute to the expression of the will of the electorate”, requiring the founders of political parties themselves to be registered on the electoral rolls.

The Court’s commentary on the provisions of Article 5 raise a fundamental problem as to what is the will expressed by the non-affiliated candidates with no party connections? And who reflects the will of voters who voted for candidates without any party affiliation? And on behalf of whom do the “independent representatives” express opinions? Article 6 relates to the conditions to be fulfilled regarding the establishment file to be submitted, stipulating that “the founding members of a party shall deposit with the competent governmental authority for internal affairs, directly or via a judicial officer, obtaining upon deposit a receipt duly stamped and dated, a file containing...” (please refer to the text of Article 6). Of interest among this set of conditions is one which requires “written undertakings, in the form of individual declarations, of at least 300 founding members, to hold the constituent assembly of the party within the deadline laid down”. It was this condition which the Constitutional Council considered, in its decision on the Institutional Act on Political Parties, sought to ensure a minimum level of seriousness in the process of establishing political parties which must at least be able, in terms of supporters, to set up their national and regional organisational structures, and it held that this did not limit the freedom of citizens to set up political parties. It also referred to the implementation of the provisions of Article 7 of the constitution, prohibiting the establishment of political parties on a regional basis, concluding that the provisions of Articles 6 and 11 contained nothing contrary to the constitution.

The position of the authors of this condition and the endorsement by the Constitutional Council regarding the provisions of Article 6 call for the following observations:

- i. The absence of reasons and justification giving force to the legislative choices made by the law-makers. On what basis did the authors impose written undertakings in the form of written declarations by at least 300 founding members to hold the constituent assembly, and why was this figure – no fewer and no more – requested? The problem is not in the number itself but in the criterion underlying it that led to the choice of this number (300). In other words, why was the number limited to exactly 300?
- ii. The Institutional Act on Political Parties contradicts itself in that Article 4 prohibits the establishment of parties on a regional basis and yet in Article 6, it imposes a geographical condition by providing that “the members referred to in paragraph 3 above must be distributed according to their actual place of residence in at least two thirds of the regions of the Kingdom, providing that their number in each region is no lower than 5% of the minimum number of founding members required by law.” This condition does not help achieve the objectives set by this law itself, since it is not possible to establish strong parties in accordance with this condition. There is a requirement for parties to have “sub-bases” in each region, even though they have not yet been established. The fact that the authors have imposed the requirement to have a supporter base despite the fact that the party has not yet been born and the requirement to have supporters spread throughout the country even though the party is just in the planning stage does not seem logical and constitutes a substantial defect in the conditions imposed on parties in the establishment phase, because the parties will be searching, in the establishment process, to amass groups of supporters in response to the 5% threshold requirement without there being any firm ideological links among the people making up this 5% or any common conviction prompting them to rally round the party as an organisation based on strong ideological foundations which would make it a means of nurturing human resources capable of good political planning on social issues. How can parties achieve the objective laid down in the institutional act in paragraph 2 of Article 2, regarding the political structuring of the citizens based on a strong supporter base when it has not yet been formed itself?
- iii. The ambiguity to be found in the Constitutional Council’s reasoning with regard to the above condition. Why did it consider that this condition contributed to ensuring the seri-

ousness of the work of the parties, while forgetting or overlooking the fact that seriousness begins with the qualitative and not the quantitative (numbers of supporters) aspect? There is nothing to prove that 5, 10 or 20 thousand will ensure seriousness. And what indicates that 5% will ensure seriousness?

In addition, it can be seen in the Constitutional Court's reasoning, regarding both Article 5 and Article 6 that it claims that the provisions drawn up by the authors "do not limit the citizens' freedom in establishing parties". However let us ask the question the other way. Are there any provisions which guarantee the citizens' freedom to establish parties?

Once the file has complied with the conditions stipulated in Article 6, the competent governmental authority for internal affairs forwards a copy of the party's establishment file to the public prosecutor at the court of first instance within 48 hours of the date on which it was deposited.

Turning to the Constitutional Council's decision to ascertain its position on these provisions, it will be noted that the Council adduces no data or legal reasoning for this part of Article 6, which is surprising.

Returning to the provisions of Article 6, one wonders what was the aim of making the Ministry of the Interior the "intermediary" in the link between the founders of the party and the court. Why did the law not authorise the founders to deposit the establishment file themselves with the court directly, rather than having to go through the competent governmental authority for internal affairs?

There is nothing preventing this authority from holding onto the file without forwarding it to the court, because the law, while stipulating that this authority shall transmit the file to the court within 48 hours from the date of deposit, does not provide for any penalty if this deadline is exceeded.

Article 7 of the institutional act contains some indications of the reasons for passing via the Ministry of the Interior as a fundamental link in the relationship between the founding members and the court. It provides that "if the conditions or formalities for the establishment of the party have not been fulfilled in accordance with the provisions of this law, the competent governmental authority for internal affairs shall apply to the Rabat Administrative Court to dismiss the declaration of the party's establishment within 60 days from the date on which the establishment file was deposited". Two important points may be concluded from these provisions:

- a. The Ministry of the Interior is the authority in charge of the first stage of the examination of the extent to which the conditions and formalities for the establishment of parties laid down in the law have been complied with. The danger here is that it is the administration that monitors the validity of the file, which raises the question as to the purpose in that case of transferring the file to the court if the Ministry of the Interior is the authority responsible for checking its "legitimacy".
- b. The "48 hours deadline", within which the Ministry of the Interior apparently shifts from verifying the legal conditions to looking for other matters, for if it was simply a matter of verifying compliance with the requisite procedures, the file could be deposited with the court to begin with.

The request to reject the establishment declaration has to be dealt with by the Administrative Court within 15 days from the date when it is deposited in the registry. If there is an appeal, the competent court must rule on the matter within 15 days from the date of referral. If the government authority confirms that the file satisfies the conditions and formalities laid down in the institutional act, it notifies the founding members, by registered letter with acknowledgement of receipt, within 30 days of the date on which the file had been deposited (Article 8).

However, before continuing this legal overview, let us look briefly at the comments of the Constitutional Court on the provisions of Articles 7 and 8. In its decision No. 2011/818, the Court stated the following: “the provisions of these two articles, in limiting the role of the competent governmental authority for internal affairs in the various stages of the declaration establishing political parties and authorising the judicial authority alone to reject the party’s declaration of establishment, are in conformity with the 2nd paragraph of Article 7 of the constitution which provides that “political parties shall be established and their activities shall be exercised freely, in full compliance with the constitution and the law”. It would therefore appear that the Constitutional Court raised no objections to the involvement of the Ministry of the Interior as an intermediary in the relationship between the founders and the court, and found that the provisions dividing the roles between the Ministry of the Interior and the courts complied both with the constitution and the law, without concerning itself with the remit of both parties, in view of the control exercised by the administration over a large part of this remit compared with the limited remit of the court which was restricted to declaring a rejection of the establishment of the party. In short, based on the substance of Articles 7 and 8, we can say that these provisions are at odds with the spirit of the 2011 constitution in authorising the Ministry of the Interior to apply to the Administrative Court in Rabat to reject the establishment of the party. The new logic of the constitution and the democratic principles are refuted in many of the provisions of the law and should have been fully reflected in those provisions obviating the need to call for the exclusion of the Ministry of the Interior and for the establishment file to be deposited directly with the court, which should be the authority responsible for verifying whether or not the file satisfies the requisite conditions. The law authorises the Ministry to apply to the court to reject the declaration of establishment, not to verify the legality of the conditions required by law. Who is responsible for ensuring the extent to which the law is complied with – the Ministry of the Interior or the court? The institutional act continues to add to the provisions for establishing parties as follows: “The constituent assembly of the party, whose establishment is in conformity with the law, must be held within a maximum of one year from the date of notification or of the date of the final ruling declaring that the establishment conditions and formalities are in conformity with the provisions of this law.”⁸ “Where the above deadline is not complied with, the declaration of the establishment of the party shall become null and void.” Article 10 states: “the date, hour and venue of the constituent assembly must be given in a statement, deposited with the local administrative authority of the location in which the assembly is held, obtaining upon deposit a receipt duly stamped and dated, at least 72 hours before the holding of the assembly. This statement must be signed by at least two founding members, failing which it will be declared inadmissible.”

C. Conditions for the validity of the constituent assembly

To be legally valid, the constituent assembly must be attended by at least 1,000 participants, including at least three quarters of the founding members, distributed according to their actual place of residence in at least two thirds of the regions of the Kingdom, provided that their number in each region is no lower than 5% of this number.⁹ The minutes of the constituent assembly shall include the conditions for the validity of the constituent assembly. The constituent assembly shall adopt the articles of association and the party’s programme and shall elect the party’s leadership organs. (Article 11).

⁸ Article 9 of the Institutional Act on Political Parties.

⁹ The same observation may be made in connection with these provisions as were made with regard to Article 5 above

D. The phase following the constituent assembly

At the latest 30 days following the end of the constituent assembly, a delegate designated by the assembly for this purpose, shall deposit a file with the competent governmental authority for internal affairs, obtaining upon deposit a receipt duly stamped and dated, containing the minutes of the assembly together with a list comprising the names of at least 1,000 participants satisfying the conditions set forth in the law, with their signatures and national identity card numbers, a list of the members of the leadership organs of the party and three copies of the articles of association and programme as adopted by the assembly.

The political party shall draw up and approve its internal rules of procedure within six months of its establishment (Article 12).

Three copies of the party's internal rules of procedure shall be deposited by the competent body as stipulated therein with the governmental authority for internal affairs, obtaining upon deposit a receipt duly stamped and dated, within 30 days of their approval.

The party shall be deemed to be legally established 30 days following the date of deposit of the file referred to in Article 12, unless the competent governmental authority for internal affairs applies to the Administrative Court in Rabat, within the same time-frame, to annul the establishment of the party if the said establishment is contrary to the provisions of the Institutional Act on Political Parties.

The court shall rule on the matter within 15 days of the application being filed. The Ministry of the Interior may ask the President of the Rabat Administrative Court, as a court with jurisdiction for urgent applications, to order the provisional cessation of activities of the party until a ruling has been given on the application to annul the establishment, which must take place within 48 hours and which takes immediate effect (Article 13).

E. Establishing branches of political parties

The conditions for setting up local, regional or provincial party branches are as follows:

A declaration shall be deposited with the competent local administrative authority, obtaining upon deposit a receipt duly stamped and dated (within 30 days of the date on which the branch was set up) (Article 16).

The declaration shall be submitted by the party delegate designated for this purpose, and must contain all the requisite information on the leaders of these branches (names, date and place of birth, profession and address, copy of their national identity cards).

F. Unions and mergers of political parties

It should be noted that the Institutional Act on Political Parties in Morocco confers upon legally established political parties the right to form unions, as provided for in Article 50 of the law, which states that "legally established political parties may organise themselves in unions having legal personality in order to work together to achieve joint objectives", adding that unions are not considered as political parties within the meaning of this law.

The law also provides in Article 56 that "legally established political parties may freely merge within an existing party or as a new party." It adds that "the merger of political parties shall be

subject to the same legal system as applies to political parties”, and must comply with certain specific conditions.

II. Conclusion

Various constitutional and legal provisions relating to the establishment of political parties in Morocco show that the law-makers sought to establish the principle of freedom, simplify the formalities of establishment and assign to the judicial authority the role of verifying compliance with the regulations and conditions laid down in the legislative texts in force. However, it would appear that the Moroccan authorities and in particular the Ministry of the Interior, continue to retain for themselves a pivotal role in the establishment of parties, which could constitute a means of impeding establishment or limiting the principle of freedom of establishment. Accordingly, there is a need to review and amend the Institutional Act on Political Parties to lay down new rules to prevent any obstruction or limitation of the principle of the freedom to establish parties, in view of the fact that political parties are a precondition for democracy and building a state governed by the rule of law.

Political parties and constitutional standards

Democracy or eternal vigilance

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Democracy—a collection of universal principles that can be organised in a number of ways so as to ensure their application—also means, and must mean, eternal vigilance, guarding against any deviation from the straight and narrow. The study of political parties in relation to the structure of the constitution is full of challenges. Nevertheless, the subject must be approached once more, and in a realistic manner.

The multifaceted experience of Lebanon and other Arab countries should prompt us to take great care as we consider political parties, an approach advocated by Aristotle. In short, political parties grant themselves access to power. Yet, in the words of Paul Valéry, “Power without abuse loses its charm”! Without regulation and without the counterbalance provided by unions and professional organisations, which more closely reflect the everyday interests of the population, a country risks falling into the trap of a particracy or partisan domination.

In many countries in Latin America, Africa and the Arab world, parties seize control of social policies and benefits granted by the State, with the aim of subordinating the electorate.

We perceive three problems in constitutionalising political parties.

1. *Parties and constitutional justice*: The attitude of parties vis à vis constitutional justice has gone through a long period of controversy and maturation in a number of countries. In 2013, the Constitutional Council of Lebanon was faced with accusations of deplorable practice, which it countered with Statement 94 of 31 July 2013, in which it clearly and unanimously affirmed that: “Members of the Constitutional Council, contrary to reports in the media and from several politicians, do not represent any faction or political party to the Council, and throughout their mandate their allegiance is solely to the Constitutional Council.”

2. *The creation and control of parties*: The Lebanese system of receipts, in accordance with the 1909 Law on Associations, itself inspired by French law, fully complies with international standards. In order to counter the administration’s misuse of the system of receipts, the State Council confirmed the system of receipts in judgment no. 135/2003–2004 of 18 November 2003. Faced also with administrative difficulties following this judgment, the Minister of the Interior, Ahmad Fatfat, published circular no. 10/AM/2006 (*Official Journal*, no 26 of 25 May 2006) indicating in concrete terms the administrative processes in accordance with the system of receipts. Long before this important circular, the extension of the system of receipts to parties was recognised in 2006 by the Council of Ministers. In response to a request to “authorise” a political party, submitted by the Minister of the Interior to the Council of Ministers, the Council adopted the defence of Minister Khaled Kabbani, arguing that parties are governed by the Law of Associations of 1909. The question was therefore considered to be a matter for the Minister of the Interior, not the Council of Ministers, in accordance with the general system of receipts, particularly where it states that no law specifically governs political parties.

Recent Lebanese electoral legislation regulates provision of information and financing of electoral campaigns for individual candidates, but makes no mention of parties, although we know

very well that they finance electoral campaigns and have sources of information at their disposal.

3. *The effectiveness of constitutional justice in relation to parties:* The exclusively constitutional approach adopted by parties leads to deadlock when deep, serious changes are mooted.

In general terms, we can observe the growth of political disengagement, estrangement from the parties and, most of all, the concentration of the four great powers into one compact bloc. In the past, the four great powers (politics, money, the intelligentsia and the media) held one another to account, but they now form one single power in the face of citizens in poverty. The media, once seen as the fourth power, is now monopolised by politicians, who also hold all the capital.

Today we seek a fifth power, one that is hypothetical and difficult: that of the vigilant, enlightened citizen. The journal *Esprit* recently published a whole edition on the question “Who benefits from the crisis of political parties?” (Aug–Sept. 2013). We speak nowadays of *The democracy of the credulous* (“La démocratie des crédules”, Gerard Bronner, PUF, 2013) and of *Counter-Democracy: Politics in an Age of Distrust* (“La contre-démocratie: La politique à l’âge de la défiance”, Pierre Rosanvallon, Seuil, 2006).

Within the Arab world, Lebanon enjoys a heritage celebrating partisan pluralism, with parties that have spread values of liberty, public debate and lawfulness throughout the region. One of the first post-independence parties in Lebanon is *al-Dastur*.

Today, there are organisations in the Arab world taking the name of parties but which are politico-religious groups — state-like organisations that transcend national boundaries. These organisations sabotage the constitutional process, target minorities, and are armed and funded by outside groups. They are beneath the law, beyond the law, born of motives that may initially have been legitimate, but the hatred from which they emerged ultimately prevails over their initially declared objectives. Hatred is always destructive, never constructive, eroding even those able to discern it. Hatred of the creation of the Jewish State and of the Palestinian exodus, hatred of the failure to execute UN resolutions, hatred of the West for failing to defend its fundamental values...

In the Arab nations, two causes have led to the formation of political organisations that are incompatible with the supremacy of the Constitution:

- Confusion between the *value-based sources* of the law (such as religions, traditions, currents of thought and international charters) and the *binding, legislative sources* of the law, in other words the objective, formalised law, created exclusively by human means as a social contract emanating from a legitimate parliament through free and fair elections, and whose application is ensured by an independent judiciary;
- The inherent immutability of the law, and of constitutional law in particular, which aims to separate the historic emergence of the legislative principle from the Arab experience

The effectiveness of the constitution in relation to political parties, when it comes to how they conform to the Constitution and how they inform and finance elections, depends on the acculturation and consolidation of constitutional culture through different agents of socialisation and also through the constitutional judiciary.

The regulation of political parties by constitutional justice

Summary essay, case study and perspectives for the Arab world

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The unqualified confidence in political parties as vectors of democracy, especially during the process of democratisation, or in transitioning or vulnerable democracies, conceals the deep-seated nature of parties, whose intentions are to fight for power and for access to power.

The standards and many regulations governing parties aim to ensure that parties work democratically, and rightly so. But the risks of a participacy, or of government or even dictatorship by parties, cannot be curbed simply by legal regulation alone, without the counterbalance provided by unions and professional organisations. These socioeconomic and professional counterbalances are generally closer to the vital, daily concerns of the population, guaranteeing a balance to the possible domination of parties.

Particularly in countries where democratisation is taking place, partisan organisations also try to politicise and recruit unions to their cause, even intervening in union elections, which in principle must remain independent, defending *social* and *professional* interests. Parties also tend to usurp social policies and social benefits provided by public institutions in order to subordinate an electorate in need.

Analysing the attitude of parties in relation to constitutional justice (I) and, in comparison, the extension of checks on political parties by constitutional justice (II) opens up a new issue that must be addressed in the Arab world: the constitutionalisation of outlawed organisations and the threat they pose to institutional structures (III).

I. The attitude of political parties towards constitutional justice

Constitutional justice has only ever been established and is only established *beyond* the ideology of parliamentary sovereignty, the rule of one or another of the three powers, the conventional notion of popular sovereignty and, above all, the rivalries between different parties and partisan leanings. In the history of constitutional justice we moved from the national sovereignty of Jean-Jacques Rousseau, to parliamentary sovereignty and, finally, to the sovereignty of the constitutional edifice and the State of *constitutional* law, itself derived from the deepest values of the Law and the will of the people in the widest sense. Michel Debré provides a good summary of the fruits of this evolution:

“The creation of a Constitutional Council demonstrates the will to subordinate the law, meaning the decisions of Parliament, to the superior rule laid down by the Constitution.”¹

1 Louis Favoreu (ed.), *Le Conseil constitutionnel et les partis politiques*, Journées d'études, 13 March 1987, Association française des constitutionnalistes, Paris, Economica, 1988, 120 p.

The author would like to thank Ms Rita Aouad, Curator of the Library of the Constitutional Council, for bringing this document to his attention while preparing this study.

Regulation of constitutionality is thus the logical corollary to the existence of a hierarchy of legal standards.

The procedures for nominating the authorities of constitutional justice, whatever form these procedures take, involve partisan considerations in the nomination or election of members. Any procedure necessarily entails risks of partisan allegiance when a country's democratic culture is not yet confirmed and when the cumulative experience of the constitutional judiciary has not yet confirmed its impartiality or its credibility.

The history of constitutional justice and parties' attitudes towards it demonstrates the reticence towards and even mistrust of constitutional justice by political parties, their desire to influence its decisions and their attempts to interfere. Edouard Lambert's description in his famous work "The government of judges and the struggle against social legislation in the United States" published in 1921² skirts around the thorny problems of constitutional conformity currently being experienced.

Is the supreme constitutional authority a conservative institution destined to hinder social progress? Is it an institution that encroaches on the erstwhile dogma of parliamentary sovereignty? The left and the right in political parties and parliamentary assemblies have taken time to acclimatise to the demands of normativity in a State with constitutional law. In France at the end of the Second World War, the three major parties that formed the majority in the constituent assemblies, elected in November 1945 and June 1946, were divided: The communist and socialist parties were hostile to any constitutional regulation, but some socialists, in particular André Philip, favoured a system of "checks combined with referendum".³ The Popular Republican Movement, following the example of their German and Italian counterparts, advocated establishing Europe-wide constitutional justice — in other words, a constitutional court similar to those that were to be created in Germany and Italy. The creation of the Constitutional Council in 1958 was therefore seen as necessary to the establishment of rationalised parliamentary government. When the President proposed reforming the system of referral to the Constitutional Council in 1974, left-wing parties opposed and voted against the reform, supposedly because it was a half-hearted reform, when in fact what was needed was to turn the Constitutional Council into a "Supreme Constitutional Court". Subsequent experience from 1974 to 1981 showed that the socialists and communists would use the right of referral largely to challenge the main laws voted in by the majority. When the left then came to power in 1981, it proved difficult for it to credibly challenge the institution it had used so much when it had been in opposition.

Tracing the historic evolution of the attitude of French parties to constitutional justice, Louis Favoreu writes:

"Each one sees the constitutional judge as a focus of power, a stronghold that must be conquered to shield itself from surprises (...)" It seems though that things had changed: The two changes in power had clearly shown that simplistic analyses—presenting constitutional justice as a stronghold to be conquered (or destroyed) simply because it sided with one camp or another—as well as grand yet inconsequential reform programmes, were no longer relevant.

The intervention of constitutional justice in the world of politics cannot be described in such summary or Manichean terms as it has been in the past. The subject requires much more

2 Edouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis* (L'expérience américaine du contrôle judiciaire de la constitutionnalité des lois), Paris, Marcel Giard et Cie, 1921, 276 p.

3 J. Lemasurier, *La Constitution de 1946 et le contrôle de la constitutionnalité des lois*, Paris, LGDJ, 1954, p. 100.

nuanced approaches, especially now that the main players on the political scene have come to realise this complexity.”⁴

There is certainly a risk of partisan politicisation. This has been the case throughout the history of the Lebanese Constitutional Council since its creation in 1994. Every member of a Constitutional Council, regardless of the country or the process of election to constitutional justice, already has behind him a career, social involvement, projects and publications, and so on, which do not preclude him from freedom and independence of decision-making. During the election of five out of ten members of the Constitutional Council by Parliament on 18 December 2008, then later, during the election of the five other members by the government, the media were quick to classify those elected according to the political divisions of the day. Neutrality, in the sanitised sense of the word, is inhuman and not desirable. Commitment to principles and standards, and the nature and professional quality of the previous lives of a member of the Constitutional Council do not indicate partisan or parochial allegiance. The independence of the constitutional judiciary comes down to the inherent personality of the constitutional judge. The length of the mandate, the fact that it cannot be renewed and, often, the age of individuals, means that those appointed in all likelihood no longer have political ambitions and are not tempted to indulge any individual. In the face of media predictions concerning which way “Muslim” and “Christian” members would vote in a case referred to the Council, the President of the Lebanese Constitutional Council, Issam Sleiman, declared:

“I know them by their names, not by their communities.”⁵

In Statement 94 of 31 July 2013, the General Assembly of the Lebanese Constitutional Council unanimously approved the following statement made by the President of the Constitutional Council, Issam Sleiman, from which follow several extracts:

“We have worked vigilantly to re-establish trust in the Constitutional Council and to perform our duties to the highest standard, despite difficult political conditions and the decline of the exercise of power. We have done this by publishing our unanimous decisions relating to the legislative elections of 2009 (...). We have also published decisions relating to appeals concerning the constitutionality of laws, decisions that have been positively received. We have also published three Reports of the Council for the years 2009–2010, 2011 and 2012 (...).

All these efforts and accomplishments have been seriously weakened while examining the law on the extension of Parliament’s term (...).

The Constitutional Council (...) confirms that members of the Constitutional Council, contrary to reports in the media and from several politicians, *do not represent any faction or political party to the Council, and throughout their term in office their allegiance is solely to the Constitutional Council.*”

The work of any Constitutional Council is focussed on *political right*, in the highest sense, following the clear subtitle chosen by Jean-Jacques Rousseau for his *Of the Social Contract, or Principles of Political Right* (1762). We quote Georges Burdeau:

“Regulation of the law is legal in purpose and political in its effects”,⁶

4 Louis Favoreu, “Introduction”, Foreword Louis Favoreu (ed.), *op.cit.*, pp. 7–11.

5 *Alnasra, Lebanonfiles and al-Jumhûriyya*, Beirut, 13 June 2013. For certain details: Sarkis Naoum, an-Nahar, 25 July 2013, p. 2.

6 Louis Favoreu (ed.), *op.cit.*, p. 27

which means that decisions are welcomed by some and criticised by others depending on the circumstances:

“Nonetheless, the Constitutional Council must take into account lines of sociological resistance (...). The Constitutional Council is aware of what it can do and what it cannot do, in the face of a public whose mind is firmly made up.”⁷

II. Regulation of political parties by constitutional justice

A survey carried out by the Association of Francophone Constitutional Courts (ACCPUF — *Association des Cours Constitutionnelles ayant en Partage l’Usage du Français*) for a seminar held on 1–3 December 2004 included the following questions on “Regulating the activities of political parties”:

- (...) 23. Is a procedure for regulating the activities of political parties in place?
- By the administration?
 - By a court of law?
 - By the Constitutional Court?
 - By other means?
24. What grounds would justify banning a political party?
25. Who can refer a case to the competent authority to request that a political party is banned?
26. Has a political party ever been banned in your country?
- By means of an administrative suspension?
 - Through legal dissolution?
 - By the Constitutional Court?
 - By other means?
27. Assuming that the Constitutional Court is able to control the activities of political parties, what legal precedence is there?
28. What other sanctions can be handed down to political parties, and for what reasons?
29. Does legislation on the freedom of association and the funding of political life and election campaigns permit any regulation of the activity of political parties? By what means?”⁸

1. In *Turkey*, the Constitutional Court regulates political parties under conditions laid down by Articles 68 and 69 of the Constitution:

“The statutes and programmes, as well as the activities of political parties shall not be contrary to the independence of the State, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic (...).

“The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the Constitutional Court determines that the party in question has become a centre for the execution of such activities (...).”

7 Jean-Claude Martinez, Front National Member of Parliament, *ibid.*, pp. 33–34.

8 ACCPUF, Le statut, le financement et le rôle des partis politiques: un enjeu de la démocratie, *Bulletin*, No. 6, November 2006, p. 124 (www.accpuf.org/le_bulletin?id=237).

Instead of dissolving it permanently in accordance with the above-mentioned paragraphs, the Constitutional Court may rule the concerned party to be deprived of State aid wholly or in part depending on the seriousness of the actions. This sanction, which allows the Constitutional Court to turn to the principal of proportionality, was introduced into the Constitution when it was revised in 2001.

The European Court of Human Rights' condemnation of Turkey, particularly because of its constitutional laws on political parties, has led to the "Europeanisation" of the judgments of the Constitutional Court, despite the fact that the ability of the European Court to control decisions of the Constitutional Court has been contested from time to time. The Constitutional Court of Ankara is the first to apply the dissolution sanction to political parties. It often reaches its decision in the name of the indivisibility of the State and the secular republic. This is seen in two series of Court judgments:

- The dissolution of political parties that undermined the concept of the secular State by becoming the centre of anti-secular activities
- The European Court of Human Rights condemned Turkey for violating Article 11 of the European Convention on Human Rights, on the grounds that the Court allowed the notion of the unitary State to prevail over that of democracy. However, it developed a legal precedent similar to that of the Turkish Constitutional Court when it came to the dissolution of a pro-Islamist party

The case of Refah Partisi (Welfare Party) is an important example. In this case, neither the chamber that held the initial hearing nor the Grand Chamber of the European Court of Human Rights condemned Turkey for dissolving the pro-Islamist party.

Constitutional reforms have also relied on the judgments of the Court of Ankara in favour of political parties. One judgment concerns the AKP (Justice and Development Party), the party in power. While the majority of members (six judges) were in favour of dissolving the party, the AKP was not dissolved because, following changes to the Constitution in 2001, a qualified majority (three fifths) is required to dissolve a party. Ultimately, the Court decided on partial deprivation of state aid, but this was also thanks to the differentiated sanctions introduced by the same constitutional revision. AKP was declared to have become a political party harbouring anti-secular activities.

Another judgment of the Constitutional Court can be found in the context of tension between secularism and democracy. It concerns regulating the constitutional validity of amendments to the constitution. From the point of view of regulating the constitutional validity of amendments to the constitution, and also from the point of view of the relationship between secularism and democracy, the National Assembly voted in a constitutional law on 9 February 2009 by means of which it wanted to allow female students to wear the veil in universities once again. This constitutional amendment (the "headscarf" case) was blocked by the Constitutional Court, which led to the annulment of the constitutional norm, since the Constitution does not allow amendments to be blocked at this final stage. The Constitutional Court used Article 4 of the Constitution to form its objection. A constitutional amendment such as this could not be proposed by the National Assembly because Article 4 of the Constitution declares the first three articles of the Constitution unalterable with a clause stating that no such amendment

shall be proposed. The Constitutional Court had therefore judged that there was a direct link between the “headscarf” case and the unalterable articles of the Constitution.⁹

2. Since 1974, the registration of political parties in *Canada* has been governed by electoral law. The head of the Communist Party of Canada, Miguel Figueroa, has contested the constitutional validity of this approach.

Registered political parties enjoy a number of advantages, including the right to issue tax receipts for gifts donated outside election periods, the right to give any funds not spent during electoral campaign periods to their party, and the right to indicate their political affiliation on ballot papers. Graeme G. Mitchell notes that reform of the electoral system is needed due to the *Figueroa* judgment:

“[...] The constitutional principles established in *Figueroa* call into question many of the benefits currently enjoyed by Canada’s mainline political parties as well as our present electoral system. The Court’s holding that inequality of economic resources can impair section 3 rights highlights obvious inequities in the political financing scheme recently enacted by Parliament. This legislation will steer public monies into the coffers of political parties in direct proportion to the number of votes garnered by those parties in a general election. More significantly, however, is the shadow which the Court casts over the FPTP system. Justice LeBel, for example, found the FPTP system to be biased, and the least ‘fair’ or proportional, in that it distorts the translation of votes into seats in favour of the largest parties.” Fundamental structural reforms to our electoral system may not be imminent; however, *Figueroa* signals clearly that such reforms are inevitable.¹⁰

Following *Libman v. Quebec (Attorney General)*, 1997 3 S.C.R. 569, where the Supreme Court judged that the provincial law in question, which imposed restrictions on third-party expenditure, had a valid legislative purpose, Parliament attempted to regulate third-party intervention. Part 17 of Bill C-2 adopted in September 2000 deals with third-party election advertising.¹¹

3. In the *Republic of the Congo*, parties are recognised in accordance with Article 53 of the Constitution, which requires them to adhere to the following fundamental principles:

- Respect for, as well as safeguarding and consolidation of national unity
- Protection and promotion of fundamental human rights
- Promotion of a State of law founded on respect, the defence of democracy, and on individual and collective liberties
- Defence of territorial integrity and national sovereignty
- Prohibition of intolerance, ethnicism and the use of violence in any form
- Respect for the secular nature of the State
- Fulfilment of national representation criteria as defined by law

9 “La justice constitutionnelle en Turquie” ([www.unicaen.fr/recherche/mrsh/files/justice constitutionnelle Turquie.pdf](http://www.unicaen.fr/recherche/mrsh/files/justice%20constitutionnelle%20Turquie.pdf)). Cf. Case of United Communist Party of Turkey and Others v. Turkey, Judgment of 30 January 1998. Case of Socialist Party and Others v. Turkey, Judgment of 25 May 1998. Case of Refah Partisi (The Welfare Party) and Others v. Turkey, Judgment of 31 July 2001, Court (third section). Case of Refah Partisi (The Welfare Party) and Others v. Turkey, 13 February 2003, (Grand Chamber).

10 Press release by Minister Jacques Saada, 10 February 2004.

11 Anne Roland, “La Cour suprême du Canada et les partis politiques”, in Accpuf, *op.cit.*, pp. 21–26.

Should a political party fail to operate in compliance with these criteria, the constitutional sanction is dissolution of the party (Article 53, last paragraph).¹²

In the context of constitutional regulation, Article 85 of the Constitution of 26 March 1991 stipulates that laws and regulatory acts can be deferred to the Constitutional Court by any legal entity affected by the contested law or act. These provisions allow legally recognised parties to refer to the Court if they wish to contest the constitutional validity of any infraconstitutional or infralegislative act. Referrals have often been carried out by a political party's parliamentary group. In this case, it is not the political party that is the focus, but a member of one of the parliamentary chambers. The referral can also be made by the president of a political party. In this situation, it is clearly the political party as a legal entity that is brought to the fore.

When it comes to assuring the proper conduct of political elections, referral to the Court is all the more clearly affirmed. Both the Constitution and organic law governing the Court state that every legally recognised political party refers the validity of an election to the Constitutional Court.

As parties split, regroup and metamorphose, the Constitutional Court faces many pitfalls. In an almost regular fashion, the Constitutional Court examines referrals from different sections of divided parties, whether relating to ensuring constitutional validity or monitoring elections.¹³

4. The National Assembly of *Slovenia* adopted a law on election campaigns in 1994. This law covers the issue of how election campaigns are funded, as well as other questions such as access to the media, election meetings etc. Political parties must win 1% of the vote in a parliamentary election in order to qualify for public funding. The Constitutional Court noted that this measure was in accordance with the principle of proportionality. The Court decided that provisions stating that parties have a right to public funding if they have won at least 1% of the vote (1.2% and 1.5% respectively) do not conflict with the Constitution. Nevertheless, the Court decided that the provision stating that a political party must present candidates in at least three quarters of electoral districts in order to qualify for public funding conflicted with the right to vote. The Court also rejected the following provisions, citing absence of legitimate interest:

- An application contesting the requirement that 10% of the budgetary resources set aside to fund political parties be equally distributed, and the remaining 90% be divided in proportion to the number of votes obtained by the parties in all the electoral districts. The applicant was a small political party that had failed to reach the required threshold to receive public funding at the last parliamentary election
- An application directed against the fixing of budgetary resources intended for funding political parties. This application was rejected because the applicant was acting in the name of the people rather than in his own name as part of a political party (Decision No. U -I-223/00, *Official Journal*, No. 94/02)

Cases can be referred to the Constitutional Court to rule on the unconstitutional nature of actions or activities of political parties either by petition or by request. Article 68 of the Law on the Constitutional Court governs this procedure:

12 Auguste Iloki and Simon Pierre Ngouonimba, "Le statut des partis politiques au Congo-Brazzaville", Accpuf, *op. cit.*, pp. 27-33.

13 Jean-Christophe Nze-Biteghe, "La saisine de la Cour constitutionnelle du Gabon par les partis politiques", Accpuf, *op. cit.*, pp. 39-42.

- “1. Anyone may lodge a petition, and the applicants referred to in Article 23 of this Act may submit a request to review the unconstitutionality of the acts and activities of political parties.
2. The petition or request must state the disputed acts or factual circumstances regarding the unconstitutional activities of the political party.
3. The Constitutional Court may order that the political party be removed from the register of political parties by a two-thirds majority vote of all judges.”
4. Fixing a threshold for the distribution of seats may infringe the equality of the right to vote, but a limitation is constitutionally permissible if it is necessary. The aim is to prevent political fragmentation of the National Assembly, which could result in it not being possible to form a stable government and could prevent normal operation of the political system.¹⁴
5. The powers of the Constitutional Court of *Romania* concerning political parties are laid down in paragraph K of Article 146, in the following terms:
“to decide on the objections of unconstitutionality of a political party”,

a provision found in organic law. In exercising its jurisdiction, the Court made judgments within the scope of *a priori* regulation of the constitutionality of certain provisions of the law on political parties.

After examining the complaints of unconstitutionality put to it, the Court stated that only Article 3 paragraph 2 of the law was unconstitutional. This provision related to Article 148 paragraph 1 of the Constitution, which details the limits on revising the Constitution. These constitutional provisions are worded as follows:

- “1. The provisions of this Constitution with regard to the national, independent, unitary, and indivisible character of the Romanian State, the Republican form of government, territorial integrity, independence of the judiciary, political pluralism, and official language shall not be subject to revision.
2. Likewise, no revision shall be made if it results in the suppression of the citizens’ fundamental rights and freedoms, or the safeguards thereof.”

The Constitutional Court settled the exception of unconstitutionality of the provisions of Article 3 paragraph 2 of Law No. 27/1996 on parties, after an appeal to the Bucharest Court of Appeal. The Bucharest Court of Appeal had to give an opinion on several challenges lodged against a judgment of the Bucharest Tribunal. The Tribunal had rejected calls to dissolve the *Greater Romania Party* based on specific articles of the law on parties. As a matter of principle, “we could not order the dissolution of a political party through judiciary means if the constitutionality of this measure was also contested”. In Decision No. 59/2000, the Court rejected the exception of unconstitutionality, after noting that the provisions of Article 3 paragraph 2 of the law on political parties are constitutional, and that the Court has exclusive jurisdiction to give an opinion on the constitutionality of a legally registered political party, according to Article 144 of the Constitution.¹⁵

6. In *Bulgaria*, the Constitution expressly forbids organisations that undertake activities against the sovereignty, territorial integrity of the country and unity of the Nation, that incite racial, national or religious hatred or the violation of civil rights and freedoms, and organisations that operate as clandestine or military groups, or that seek to achieve their aims through violence. The text relies on the principle set out in the Preamble to the Constitution, that protecting

14 Decision No. U-1-44/96, *Official Journal RS*, No. 36/96, quoted by Arne Mavcic, “Le rôle de la Cour constitutionnelle slovène dans le domaine des partis politiques”, Accpuf, *op.cit.*, pp. 43–40.

15 Claudia Miu, “La compétence de la Cour constitutionnelle roumaine et sa jurisprudence en matière de partis politiques”, Accpuf, *op.cit.*, pp. 51–55.

the national unity of the State of Bulgaria is an irrevocable duty, as well as the standard of Article 2, paragraphs 1 and 2, which states:

“The Republic of Bulgaria shall be a unitary State with local self-government. No autonomous territorial formations shall be allowed to exist therein. The territorial integrity of the Republic of Bulgaria shall be inviolable.”

To ensure that the aforementioned standards are respected, the Constitution has granted the Constitutional Court eight areas of jurisdiction, one being to rule on challenges to the constitutionality of political parties and associations.¹⁶

7. The Constitution of *Albania* is dedicated to principles concerning how political parties are organised and function in a democratic State. Article 9 of the Constitution stipulates that “Political parties are created freely. Their organisation shall conform with democratic principles”. The second paragraph of this article prohibits by law political parties or other organisations whose programmes or activities are based on totalitarian methods, that incite social, religious, regional or ethnic hatred, or that aim to use violence to seize power or to influence State policy.

Political infighting has led to a rise in the number of applications made to the Constitutional Court. During the general election in 2001, a large number of applications were made to the Court attacking decisions made by the Central Election Commission; these cases concerned 40% of all electoral districts. The Court was responsible for examining requests submitted by parties or electoral candidates demanding that they invalidate the election results in one district or another. Kujtim Puto writes:

“Examining cases brought by political parties presents a number of difficulties, due to the influence parties exert on the activity of the State and the efforts they make to influence and form public opinion.”¹⁷

8. As a result of a comparative investigation into standards developed by constitutional case law, the *Venice Commission* released a number of guidelines, including the following:

“(...) 6. Legal measures directed to the prohibition or legally enforced dissolution of political parties shall be a consequence of a judicial finding of unconstitutionality and shall be deemed as of an exceptional nature and governed by the principle of proportionality. Any such measure must be based on sufficient evidence that the party itself and not only individual members pursue political objectives using or preparing to use unconstitutional means.

7. The prohibition or dissolution of a political party should be decided by the Constitutional court or other appropriate judicial body in a procedure offering all guarantees of due process, openness and a fair trial.

Given the essential role of political parties in a democracy, the Venice Commission advocates great restraint concerning anything that might hinder the registration of a party, and even greater restraint concerning the forced dissolution of parties. Any sanctions against a party must be proportionate and necessary and strictly within a democratic State. They must be adopted by a judicial body with all the guarantees of a transparent, fair procedure. As regards

¹⁶ Kiril Manov, “Régulation constitutionnelle des partis politiques en République de Bulgarie”, Accpuf, *op.cit.*, pp. 57–58.

¹⁷ Kujtim Puto, “La saisine de la Cour constitutionnelle d’Albanie par les partis politiques”, Accpuf, *op.cit.*, pp. 107–109.

the funding of parties, the Commission notes a growing number of States adopting measures that are appropriate to the legal context of each country".¹⁸

The ninth international round table, which took place on 10–11 September 1993 and was organised by the Research and Study Group on Constitutional Justice, focussed on the subject of "Constitution and political parties", covering twelve countries (Austria, Belgium, Canada, the Federal Republic of Germany, France, Greece, Italy, Japan, Norway, Portugal, Spain, and Switzerland).¹⁹ From the contributions and discussions it emerged that there truly is a "constitutional conception of political parties".²⁰

9. In *Germany*, in accordance with Article 21 of the Basic Law, parties may be freely established and act freely. They can only be banned by decision of the Federal Constitutional Court on the request of the Federal Government, the Bundestag or the Bundesrat, and, if the party concerned is only active in one Land, on the request of the government of this Land (Article 43 of the Court Act), should their organisation, objectives or activities endanger the liberal and democratic order established by the Basic Law. This procedure, which corresponds to the idea that democracy must defend itself against its enemies, was used against a neo-Nazi party and particularly the communist party when the Federal Republic was founded.

In 1993, calls were made to ban two neo-Nazi groups: the "Nationale Liste", at the request of the government of the state of Hamburg, and the "Free German Workers' Party" (*Freiheitliche Deutsche Arbeiterpartei*), whose name evokes the infamous "National Socialist German Workers' Party", at the request of the federal government. In two decisions of 17 November 1994, the Federal Constitutional Court ruled that these requests were inadmissible. The Court reasoned that an association can only be considered a political party if there is objective evidence that it wants to participate in democratic debate between elections and take part in different general elections, and that it aims to achieve these aims by organising itself accordingly and recruiting activists.

An inward-looking group with very few members that reflects the opinions of almost none of the population (between 0 and 0.07% of voters) is only an association, and as such cannot be banned by the Court. As a result, the federal government or the government of the state concerned are responsible for banning such associations, a measure that they immediately took.²¹

Although Article 21 of the Basic Law only gives privileged status to political parties, the question of whether all political associations who take part in elections should enjoy the same financial support as political parties is justified. The Federal Constitutional Court rejected a request for independent voter associations to benefit from party funding during municipal elections, on the grounds that the legislator was free to decide whether party funding during municipal elections should be extended. Some "penetration" by such associations at a municipal level is clearly possible, and there is a lack of equality in the fact that political parties receive public funding while voter associations are excluded. If the State were to extend funding to the *general* activities of parties, the discrimination against other voter associations, that do

18 Schnutz Rudolf Dürr, "Les travaux de la Commission de Venise en matière de partis politiques", Accpuf, *op.cit.*, pp. 59–62.

19 IXe Table ronde internationale des 10–11/09/93: "Constitution et partis politiques", *Annuaire international de justice constitutionnelle*, vol. IX, 1993, pp. 50–236.

20 Otto Pfersmann, "Autriche", in *Annuaire...*, vol. IX, *op.cit.*, p. 55.

21 Michel Froment and Olivier Jouanjan, "République fédérale d'Allemagne", in *Annuaire international de justice constitutionnelle*, vol. X, 1994, pp. 729–758, pp. 732–733.

not have the status of a political party but still take part in municipal elections, would be much clearer.²²

10. In *Spain*, the Constitutional Court has no specific mandate to determine the “unconstitutionality” or—possibly more accurately—the “illegality” of a political party, a task entirely entrusted to the judiciary (judgment 3/1981). Nevertheless, decisions made by the court can be deferred to the constitutional judge using an *amparo* appeal, based on a violation of the general right of association (Spanish Constitution Article 22):

“A party is a particular form of association and Article 22 does not exclude associations with a political purpose, nor does it provide a basis for such an exclusion” (judgment 3/1981).²³

11. In *France*, political parties were “left out of constitutional law” for a long time. Forgotten by classical theorists (Esmein, Carré de Malberg, Duguit, Hauriou etc.), it was not until the 1950s that any reflection of the role of political parties in the operation of institutions, then a legal approach to the partisan phenomenon, was developed. They were also forgotten by constitutional texts: Whereas the constitutions adopted after the Second World War, particularly in Italy and West Germany, established the existence and role of political parties, the French Constitution of 27 October 1946 is silent on the subject, even though it had been debated in the Constituent Assembly.

The traditional French understanding of sovereignty is that, “no body or group must come between the citizen and the representatives he appoints, because, if this were to happen, the expression of popular will would be invalidated”. Parties were therefore considered to be associations with no particular function, which might even pose a danger to the formation of genuine popular will, defined by Maurice Hauriou as largely unorganized. This echoes the words of J.J. Rousseau, for whom: “It is therefore essential, if the general will is to be able to express itself, that there should be no partial society within the State, and that each citizen should think only his own thoughts”. The Constitution of 1958, the first, includes political parties in Article 4:

“Political parties and groups shall contribute to the exercise of suffrage. They shall be formed and carry on their activities freely. They shall respect the principles of national sovereignty and democracy.”

Neither the constitutional judge, nor indeed any other power, has the authority to regulate *the formation of political parties*. Since the law of 11 March 1988 was passed, political parties are by rights considered legal entities, without having to make any request or declaration to this end. It would be difficult to find a more liberal solution. However, the constitutional judge can intervene and censor any law that would impose any form of regulation on the creation or activity of parties.

The Constitutional Council states as principle that the provisions of Article 4 C “have neither the aim nor the effect of conferring rights upon political parties, in terms of freedom of the press, beyond those afforded to all citizens, as recognised by Article 11 of the Declaration of the Rights of Man and of the Citizen of 1789.”

Private funding of the normal activities of political parties was permitted and regulated by the Law of 15 January 1990, which also extended the use of private donations intended to finance electoral campaigns, formally recognised by the Law of 1988, to all elections. The Law of

22 Georg Ress, “République fédérale d’Allemagne”, *Annuaire...*, vol. IX, pp. 205–232, p. 210.

23 Francisco Rubio Llorente and Javier Jimenez Campo, “Espagne”, *Annuaire...*, op.cit., vol. IX, pp. 125–133, p. 129.

29 January 1993 supplemented this provision. However, to prevent abuse and maintain transparency, the legislator implemented strict regulation of such gifts, imposing various obligations on political parties. Some of these obligations have been contested in view of Article 4 C.

The evolution of laws relating to political party funding has led to an increase in the importance of public funding within the resources of parties. This increase has been supported by the Constitutional Council, which in this aspect differs from the German Constitutional Court.²⁴

III. Perspectives for the Arab world:

How effective is constitutional justice with respect to political parties?

Research into political parties in the Arab world in relation to the constitutional structure of the State has often been neglected in favour of research into the history, evolution and internal organisation of parties and their role in global society. The work begun by the UNPD and the Al Kawakibi Democracy Transition Centre (Kadem), on 12–13 May 2011 in Tunis is essentially

24 André Roux, "France", *Annuaire...*, vol. IX, op.cit., pp. 135–156.
 Cf. also Constantinos Bacoyannis, "La jurisprudence constitutionnelle du Conseil d'Etat grec en 1992", *Annuaire international de justice constitutionnelle*, vol. VIII, 1992, pp. 527–563.
 Jean Claude Escarras, "Introduction", *Annuaire international de justice constitutionnelle*, vol. III, 1987, pp. 625–629.
 The main judgments of the European Court of Human Rights in relation to the formation of political parties and the right of freedom of association:
Abdulkadir Aydin and others v. Turkey (2005) (Application No. 53909/00).
Ahmed and Others v. The United Kingdom (1998) (Application No. 65/1997/849/1056).
Associated Society of Locomotive Engineers and Firemen v. the United Kingdom (2007) (Application No. 11002/05)
Church of Scientology Moscow v. Russia. (2007) (Application No. 18147/02).
Cyprus v. Turkey (2001) (Application No. 25781/94).
Demir and the Democracy Party v. Turkey (2005) (Application Nos. 39210/98 and 39974/98).
Democracy Party (DEP) v. Turkey (2002) (Application No. 25141/94).
Emek Partisi and Senol v. Turkey (2005) (Application No. 39434/98).
Freedom and Democracy Party (Ozdep) v. Turkey (1999) (Application No. 23885/94).
Güneri and others v. Turkey (2005) (Application Nos. 42853/98, 43609/98 and 44291/98).
KPD v. FRG (1957) (Application No. 250/57).
Loizidou v. Turkey (1995) (Application No. 15318/89).
Moscow Branch of the Salvation Army v. Russia (2006) (Application No. 72881/01).
Ouranio Toxo and others v. Greece (2005) (Application No. 74989/01).
Presidential Party of Mordovia v. Russia (2004) (Application No. 65659/01).
Refah Partisi (The Welfare Party) and Others v. Turkey (2003) (Application Nos. 41340/98, 41342/98 and 41344/98).
Sidiropoulos and Others v. Greece (1998) (Application No. 26695/95).
Socialist Party and Others v. Turkey (1998) (Application No. 26482/95).
STP (Socialist Party of Turkey) and others v. Turkey (2003) (Application No. 26482/95).
United Communist Party of Turkey and Others v. Turkey (1998) (Application No. 19392/92).
Vogt v. Germany (1995) (Application No. 17851/91).
Yazar, Karatas, Aksoy and the Peoples' Work Party (H.E.P.) v. Turkey (2002) (Application Nos. 22723/93, 22724/93 and 22725/93).
Yumak and Sadak v. Turkey (2008) (Application No. 10226/03).
 Quoted from: European Commission for Democracy through Law (Venice Commission), Guidelines on Political Party Regulation (adopted by the Venice Commission at its 84th Plenary Session, Venice, 15–16 October 2010), study no 595/2010, 65 p. (www.osce.org/odihr/77812?download=true).

concerned with the constitutional aspects of parties, particularly how they are funded and whether they are constitutional.²⁵

The issue of the constitutionality of political parties in the Arab world is becoming an ever more urgent question now that the democratic transition of a number of Arab countries is hurtling towards major obstacles as a result of partisan organisations.

Lebanon's previous partisan experience is pioneering in the Arab world because of the political thinking that Lebanese parties have diffused throughout the region and because of the democratic participation in public affairs that these parties have created and focussed attention on. For more than half a century, Lebanese parties have created a discourse and spread concepts of democracy, human rights, nationalism, socialism, pluralism and Arab identity throughout the Arab world.²⁶

It is significant that one of the first parties founded in Lebanon following independence in 1943 is the Destour party, or the Constitutional Party, which is now defunct(!). But consciousness of this decline is apparent in the emergence of the Liqâ al-Mithâq wa-l-dastur political grouping (Pact and Constitution Grouping), run by the former minister and representative Edmond Rizk.

The electoral law in Lebanon that introduced judicial regulation of electoral campaign funding and electoral information makes no reference to parties, even though we know that they fund elections and that this funding is not exclusively Lebanese in origin.

A bill on parties was tabled in the Lebanese Parliament in 2006. The authors of the bill were unknown and, inspired by Libyan legislation, it was authoritarian and restrictive. The bill was so strongly contested by civil society that no group ever claimed responsibility for it. Lebanon has no need for legislation on parties separate from that governing associations, apart from laws concerning the funding of election campaigns, the regulation of said funding and laws ensuring the compliance of party (and association) activities with the State standards of constitutional law.²⁷

Lebanese State Council Judgment No. 135/2003–2004 of 18 November 2003 confirms the system of receipts relating to freedom of association. Following persistent administrative hindrances after this judgment, Ahmad Fatfat, the Minister of the Interior, published circular no. 10/AM/2006 (*Journal officiel*, no. 26 of 25 May 2006, pp. 2962–2965), indicating in concrete terms the administrative processes in accordance with the system of receipts. Long before this important circular, the extension of the system of receipts to parties was recognised in 2006 by the Council of Ministers. In response to a request to “authorise” a political party submitted by the Minister of the Interior to the Council of Ministers, the Council adopted the defence of Minister Khaled Kabbani, arguing that parties are governed by the general Law on Associations of 1909. The question was therefore considered to be a matter for the Minister

25 Conference on the legislation and funding of political parties in Tunisia: Comparative perspectives, 12–13 May 2011, UNPD, Al Kawakibi Democracy Transition Centre (Kadem), 58 p.

26 A. Messarra, “Les partis politiques: Une expérience arabe pionnière et en déclin”, Foreword A. Messarra, *Le Pacte libanais (Le message d’universalité et ses contraintes)*, Beirut, Librairie Orientale, 1997, pp. 89–109.

The most exhaustive and comparative work, with a volume on the Arab world (vol. 5), is that of Kay Lawson and Saad Eddine Ibrahim (ed.), *Political Parties and Democracy*, Praeger, 5 vol., 2010. In this work: A. Messarra, “The Lebanese Partisan Experience and Its Impact on Democracy”, vol. 5, pp. 27–46.

27 The bill on parties was contested and removed from all debate as part of the programme:

A. Messarra (ed.), *Lebanese Legislation Monitor*, Lebanese Foundation for Permanent Civil Peace in cooperation with National Endowment for Democracy, Beirut, Librairie Orientale, 2005–2007, 3 vol., vol. 2; contribution by Member of Parliament Ghassan Moukheiber, pp. 105–106.

of the Interior, not the Council of Ministers, in accordance with the general system of receipts, particularly where it states that no law specifically governs political parties.²⁸

Today, a number of factors threaten the process of democratisation, internal national stability and the solidarity of the Arab region: the Arab world's long experience of single-party politics, the party of the regime, of rudimentary nationalist ideologies about nation building, Arab organisations' use of the Palestinian tragedy as an ideology for mobilisation, and the emergence of armed organisations strategizing across borders.

There are "religious" political organisations and other organisations that are state-like, subject to cross-border strategies and sabotaging every institutional process. All of these factors form part of the "brutalisation of the world", destabilising governance²⁹. In the case of Lebanon, such organisations, calling themselves parties, threaten a secular heritage based on constitutionalism and liberty.

In *Tunisia*, Mohsen Marzouk, President of the Executive Committee of the Al-Kawakibi Centre, has suggested the creation of a National Council of Tunisian political parties in order to enhance civil, pluralist dialogue between all parties. Houcine Haj Massaoud, a magistrate at the Court of Auditors in Tunis, has suggested "regulation of party funding by the Court of Auditors", with parties required to present an annual report to the Court showing how they manage public funding. The independence of the Court of Auditors is essential to ensuring that it is able to fulfil its mandate without government interference. He has also suggested the creation of a national commission to regulate party funding.³⁰

In *Jordan*, the law on parties, to which significant amendments were made in 1992 and 2007, "was unable to meet the expectations of parties in that it failed to create a pluralist, democratic political environment". Hanadi Fouad from the al-Quds Centre notes that legislative reforms demanded by the people through demonstrations have led to the creation of a Commission for national dialogue on the drafting of a new electoral law, and another for parties establishing their rights to benefit from permanent and fair public funding.

The Jordanian Constitution promulgated in 1952 granted the right to establish parties and associations provided their activities were "peaceful" (Chapter II, Article 16.2). However, in 1954, all political parties were dissolved and the formation of new parties was made subject to government authorisation. The first law on parties (No. 15 of 1955) only officially recognised pro-Hashemite parties. After an attempted coup d'état on 13 April 1957, the Nabulsi government fell into demise and a period of political repression began. The parliament was dissolved and political parties were banned. The democratic openness ushered in by the general elections of 1989 allowed candidates to stand as independents, as political parties were still not authorised, but their political allegiances were known by all. Political parties were only legalised in the country in 1992. King Hussein ordered a Charter to be drafted to supplement the Constitution of 1952. It was approved by 60 members representing different political groups and defined the framework within which parties would exist. Their weak foothold in the population means that the parties have little popular support. They are not seen as a national necessity or as an agent for democratic change or modernisation, because they do not have clearly defined programmes. Automatic state funding has led to conflicts between parties and has been accompanied by an increase in corruption and vote buying. For this reason, the need has been identified for a new

28 Interview with Khaled Kabbani, former Minister and former Member of the Constitutional Council, 13 October 2013.

29 Josepha Laroche, *La brutalisation du monde* (Du retrait des Etats à la décivilisation), Paris, Liber, 2012, 186 p.

30 *Atelier...*, *op.cit.*, pp. 4–5

law and the current reform projects to encourage the role of parties within the political life of Jordan.³¹

In *Morocco*, parties are required to submit a detailed inventory of expenses with relevant supporting documents and their annual accounts to the Court of Auditors by 31 March each year at the latest. The Court then checks the receipts and expenses of the parties, as well as their annual accounts.

Delegates at the Tunis conference stressed the importance of regulating political party funding and the role of the Court of Auditors, the need to strengthen this institution and the complementary role that other state institutions can play.³²

The exclusively *constitutional* approach adopted by parties leads to deadlock, both in general and in the specific case of Arab countries. In the wider context, there is declining involvement in political parties, voter apathy, electoral use and misuse and so on. The journal *Esprit* recently published a whole issue on this question.³³

In the case of Arab countries, organisations that are manifestly incompatible with even the minimum requirements of a constitutional government undermine the most determined will of all central power and, in some cases, of democratic transition and the constituent processes.

We have most frequently studied parties from the perspective of history, political action or electoral role... What we need today is an *anthropological* diagnosis of political parties, through their often dubious beginnings, their internal organisation, their real, undeclared aims and so on. Arab, terrorist, parastatal and unconstitutional political groups are born out of a hatred that is, by its very nature, destructive, producing nothing beneficial. Hatred of the injustice inflicted by the creation of the Jewish State and the exodus of a whole people, hatred of the failure to execute UN resolutions, hatred of the West for failing to defend its fundamental values... This *original* hatred has become a populist method of mobilisation and domination.

What *power* does constitutional justice have when faced with *three resurgent phenomena*: the risks of patricracy, the demise of democratic practices in countries with a long democratic tradition³⁴, and faced with parastatal and cross-border organisations that threaten the progress of civilisation? A *fourth* phenomenon, found more generally with globalisation and growing apace for many years, deeply disturbs the conventional principal of the separation of powers. It consists of the concentration of the four powers that once would have regulated one another (politics, money, the intelligentsia and the media), into a single block, at the expense of the conventional mechanisms of democratic regulation.

How do we distinguish today between *mobilisation*, marketing, propaganda... and citizen *participation*? It has been written of the United States:

31 *Atelier...*, *op.cit.*, pp. 4–5, 26–28.

32 *Atelier...*, *op.cit.*, 32.

33 "Who benefits from the crisis of political parties?", *Esprit*, Aug–Sept. 2013.

34 Cf. particularly: Gérard Bronner, *La démocratie des crédules*, Paris, PUF, 2013.

Simone Weil, *Note sur la suppression générale des partis politiques*, new ed., Paris, Berg international, 2013.

Yves Sintomer, *Petite histoire de l'expérimentation démocratique. Tirage au sort et politique d'Athènes à nos jours*, Paris, La Découverte, 2011.

Pierre Rosanvallon, *La Contre-démocratie. La politique à l'âge de la défiance*, Paris, Seuil, 2006.

“The problems of organisation have taken on such great importance in political life and the cost of election campaigns become so great that third parties and independent candidates are practically condemned to be little more than political extras, or mere witnesses. They are literally ‘outside of the market’ and are unable to compete on equal terms with the ‘department stores’ of politics.”³⁵

The processes for appealing to constitutional justice by exceptional means, citizens referrals and recently, the priority preliminary ruling on constitutionality in France aim to extend the means of appealing to constitutional justice, in order to counter political forces that use agreements among the elite in violation of the law in a soft form of participatory. An academic or jurist without any experience of constitutional justice or civil society would be content with the limited perspective of political party regulation by constitutional justice.

With a broader perspective, the experience of Lebanon is highly instructive on three points.

Firstly, Lebanon, despite its hostile or uncondusive environment, enjoys a rich tradition of partisan pluralism: Since the Independence of 1943, political parties have formed, whose very names refer to the Constitution and the National Pact. Since 1990, the dilemma has not been militia groups having access to power to strengthen understanding and reconciliation, but the fact that new groups have not learnt the lessons of war, so they perpetuate revolutionary practices. Organisations without deep historic roots have emerged as *bu'ûtât* (parties headed by a family) that exploit the desire for change beneath the cover of modernity.

Secondly, a long period of internal conflict, vicarious and multinational, then of manifest or latent occupations, disturbed the inter-party balance by favouring parties without roots and by weakening institutional regulatory structures, particularly unions and professional organisations, which by nature are closer to the everyday interests of the population and are therefore cross-community in nature.

Thirdly, organisations that are funded and armed by foreign sources are not parties in the classic sense, but a State operating in parallel to the constitutional State, making decisions of peace and war, carrying out institutional sabotage, making use of constitutional provisions in certain circumstances, and targeting minorities.

In other Arab countries, the even more complex problem extends beyond conventional constitutionalism. Beneath the cover of religion, political groups defend *infra-legal* approaches relating to state regulation of religious topics. When law and political sciences are taught in Arab universities, there is often total confusion between the *value-based* origins of the law and the *binding, legislative* sources of the law, that is the rule of law that has emerged throughout history as a guarantee against both political abuses and religious abuses when power is in religious hands.

In the Arab nations, two causes have led to the formation of political organisations that are incompatible with the supremacy of the Constitution:

- Confusion between the *value-based sources* of the law (such as religions, traditions, currents of thought and international charters) and the *binding, legislative sources* of the law, in other words the objective, formalised law, created exclusively by human means as a social con-

35 “Les institutions des Etats-Unis”, *Documents d'études*, la Documentation française, no 1.01, 1997, p. 43. cf also: J.-P. Lassale, *La démocratie américaine*, Paris, Colin, 1991 and *Les partis politiques aux Etats-Unis*, Paris, PUF, “Que sais-je?”, 2nd ed., 1996.

tract emanating from a legitimate parliament through free and fair elections, and whose application is ensured by an independent judiciary;

- The inherent immutability of the law, and of constitutional law in particular, which aims to separate the historic emergence of the legislative principle from the Arab experience.

How then can we ensure the *effectiveness* of constitutional justice in countries where democracy is under threat or unconsolidated, or in countries transitioning towards democracy? For a society to become completely democratic, it must avoid drifting towards legalism, a concept that has not yet made its way into legal dictionaries or legal culture. Legalism, as opposed to the law, exploits a legal formulation to private ends, while the rule of law, functioning as a norm (*norma*), is in essence impersonal, general and imperative. The effectiveness of the law is dependent on power relationships in society, administrative and financial capabilities, the dominant culture, the state of the judiciary and of magistrates themselves.

We tend to dismiss this issue as a sociological matter. That may be so, but any serious work of legislation cannot draw up a law or amendment without taking into account the whole context and considering how the law might be *effectively applied*, justice actually *delivered*, while ensuring the optimal conditions for the law to be enforced.

The effectiveness of the constitution in relation to political parties, in terms of how they comply with the Constitution and how they finance elections, depends on the acculturation and consolidation of constitutional culture in society through different agents of socialisation and also through the constitutional judiciary. The Lebanese Constitutional Council, created 20 years ago now, makes great efforts to establish the foundations of constitutional justice in both Lebanon and the Arab world, and to promote constitutional culture, in particular by publishing its *Annuaire* report each year, and through its relationship with society.

Using the examples of Lebanon, Egypt, Jordan, Morocco and Tunisia as starting points, it is possible and necessary to begin a specifically Arab process of researching and working towards the *constitutionalisation of Arab political parties*. By this we mean requiring all parties to conform to the constitutional foundations in their ideology and activities and ensuring that any changes they advocate are implemented using non-violent, institutional means.

This means that from now on, in the Arab world in particular, we must approach the problem of political parties with much less optimism. As a result, we must directly link this problem with the need for balances to counter the risks posed by particracy and state-like terrorist organisations, and to the requirement for all organisations supposed to be serving the general interest to abide by the constitution.

The formation of parties and legalisation in reference to parties in Egypt:

A view on religious parties

**Mr Waël Rady,
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At the end of March 2011, the Supreme Council of the Armed Forces, which was temporarily running the country, passed a law that governs the formation of political parties in Egypt. This law was passed as a result of the Arab Spring and the process of political liberalisation in the country. The new law was a real boost for the formation of parties. New political parties have sprung up across Egypt as a result, including both secular and religious parties. The latter have been able to attain a legal status for the first time. However, since the departure of Morsi on 30 June 2011, there have been numerous calls for the dissolution of all religious parties.

Suddenly the question arises as to whether the creation and existence of religious parties should really be prevented. The judicial usefulness of retaining the prohibition on forming religious political parties as part of the law or constitution is also in question, particularly after finally seeing these parties attain legal status. It is these different questions that we are going to try to answer by analysing the development of the prohibition of religious parties in case law and positive law. However, it is vital that we briefly shed some light on the legal framework for the formation of parties in Egypt.

The 2011 law states that each new party requesting to be recognised as such must have at least 5000 founding members in at least 10 of the 26 Egyptian governorates and at least 300 members in each governorate. (Prior to 2013, the number of members required to form a party did not exceed 50 but, fearing a rise in the number of requests for the formation of parties, the Supreme Council of the Armed Forces increased the number of members required in the new law.)

Once the request has been submitted, it is examined by the Political Parties Commission. For the purposes of its examination, the Political Parties Commission is entitled to order the presentation of all necessary documents or information from the interested parties or institutions or public establishments. It can also undertake special inquiries or arrange for inquiries to be undertaken, if this proves to be necessary in order to check the requests submitted. It must, however, remain neutral when performing its duties.

The law radically changed the composition of the Political Parties Commission, as the Commission is now made up of only independent judges. The Political Parties Commission would be presided over by the first Vice President of the Court of Cassation. The Supreme Judicial Council selects its members: two Vice Presidents of the Court of Cassation, two judges from the Court of Appeal and two Vice Presidents of the State Council.

In terms of the essential conditions for the formation of a party, there are several. A party wishing to obtain legal status under Egyptian law must have a name that is distinct from other existing names. The law also demands that the programme of the party—its objectives and its politics—does not violate the fundamental constitutional principles. The parties must respect public peace as well as the principles of national sovereignty and democracy. The party must not aim to form military or quasi-military groups (which is standard since this would con-

tradict freedom of speech). Setting up branches of foreign parties in Egypt is also prohibited by law but existing parties are not in any way deprived of their right to contact like-minded political parties based abroad.

It must be said that the main advantage of the 2011 law lies in the fact that it finally abolished the obligation requiring parties to present a political agenda that was distinct from that of existing parties. According to a large majority of theorists, for over 30 years, this arbitrary stipulation served as a control valve for the government in terms of the creation of parties due to the simultaneous adaptation of a restrictive concept of what could be considered to be a “distinct” programme.

Finally, Egyptian law requires that the party is not founded on discrimination in terms of religion, class or geographical borders. The geographical condition is not a source of controversy at all given that the construction of regional parties normally constitutes a threat to the existence of the State. It is the condition relating to the legal basis that has caused great controversy for many years.

I. The legality of religious political parties in the Egyptian legal system

The successive Constitutions prior to 1971 did not address the subject of the legality of religious political parties, because the freedom to form parties was prohibited after the 1952 revolution, until Sadat reinstated this right in 1977. The only reference to religious political parties was in law 179 of 1952, which for the first time regulated the creation of political parties after the revolution—and before the official resolution of all parties in 1953—specifying that “*No association or group limited to social, cultural or religious objectives will be considered as a political party*”. This provision evidently targeted the Muslim Brotherhood organisation, which, as its name indicates, is open to Muslim men only.

When Egypt adopted the 1971 Constitution, the prohibition on religious parties went unnoticed. Contrary to the opinion of several authors, this question was first settled by law and not by the constitution. The latter simply mentioned, in Article 5, that the political system of the Arab Republic of Egypt is a multiparty system, within the framework of the basic principles of the Egyptian society as stipulated in the Constitution.

The law passed in 1977 subsequently prohibited the creation of political parties that placed any emphasis on religious discrimination, either in terms of membership to the party or during the exercise of its political activities. However, detailed examination of this provision shows without a doubt that this was clearly a further confirmation of the principle of equality and not a provision with the aim of completely prohibiting the creation of religious political parties. Under this law, a party would be considered religious if it limited membership to a given religion. In contrast, a party that did not adopt this discrimination would not be considered religious even if its programme was founded on the application of the “Sharia” or religious rules. We therefore believe that, at the time, the law adopted a very limited definition of religious parties from which it can only be understood that the formation of religious parties, in the global sense, was forbidden. However, no religious party was officially recognised before the 2011 revolution. Several requests were rejected by the Political Parties Commission on the basis that the parties’ political programmes were not distinct — it was considered that the application of the Sharia in the different programmes could not be used to distinguish the agenda of a party. The parties that were rejected on this basis included “Wasat”, “Eslah” and “El Sharia”.

The question of the religious character of a party was not examined at the time as a main reason for refusal except in the case of one refusal, that of “*Islamic Sahwa*”. In this case the Court

made the clear and obvious link between the principles of the party and the constitutional provisions. In this particular case, the programme of the party forbade non-Muslims from acquiring the office of minister, having granted them exemption from military service in return for a “Gezia” tax. According to the programme of the party in question, the President should be elected from among men of faith (Imams). The party also divided the world in two: the World of peace and the World of war and distinguished, in terms of rights and obligations, between Muslims and non-Muslims. The extremist nature of the party objectives directly exposed it to the main prohibition imposed on parties by the law: that of not contradicting the fundamental principles of society and the constitution. The Court based its reasoning on this prohibition.

In 2007, the government, acutely aware that its laws did not prohibit religious political parties, and in order to prevent the Muslim Brotherhood from establishing political parties after they had succeeded in winning 88 seats at the 2005 election, amended Article 5 of the constitution through a referendum held on 26 March 2007. The amendment was made in order to prohibit the creation of political parties with a religious basis and the text of the amended article was as follows: “*The political system of the Arab Republic of Egypt is a multiparty system, within the framework of the basic elements and principles of the Egyptian society as stipulated in the Constitution. Political parties are regulated by law. Citizens have the right to establish political parties according to the law and no political activity shall be exercised nor political parties established on a religious referential authority, on a religious basis or on discrimination on grounds of gender or origin*”.

The creation of religious parties thus came to be fully prohibited. The constitution does not only consider religious basis: Parties with a religious referential authority also came to be prohibited.

After the 2011 revolution and during the process of the referendum, religious forces showed their strength on the political stage and on the streets of Egypt. They managed to mobilise Egyptian public opinion to vote in favour of constitutional amendments, notably concerning the abolition of the prohibition of religious political parties. Faced with these pressures, the constituent assembly adopted the 1977 version of the law on political parties, i.e. only providing for the prohibition of creating a political party on the basis of religion or gender. Thus we return to a very limited definition of religious parties — any mention of a religious basis or of a religious referential authority disappears. There is no doubt that there is a difference between a definition limited to parties founded based on religious discrimination and the basis or religious referential authority on which a party may be based.

The Court of Parties itself displayed new moderate tendencies after the 2011 revolution through two successive judgments. The two judgments concern the Al-Wasat party, which had been refused official licence several times, and the Al-Benaʿa Wal Tanmenya «Construction and Development» party. These two decisions can sometimes be regarded as reversing case law.

1. The Al-Wasat party:

The Al-Wasat party followed the procedure prescribed by the law four times (in 1996, 1998, 2004 and 2010) but was always rejected by the Political Parties Commission. On 19 February 2011, just a few days after the fall of Mubarak, the most recent decision was overturned on appeal, allowing the party to finally attain the legal status it had sought for 15 years.

The key factor, when this decision is analysed, is certainly the fact that the Wasat programme in 2010 was different to that of 1996, but not entirely different compared to those of 1998 and 2004. The founders of the party removed almost all traces of the Sharia from its programmes after 1995. The second significant element is that the overturned decision to reject the party

was, like previous decisions, based on the opinion that the programme of the political party was not distinct from that of other parties. However, the Court annulled the decision of the Commission.

In order to justify its precedent, the Court adopted a new precedent that put its former precedent into perspective. The Court thus adopts a new understanding, putting the requirement for a distinct programme into perspective and allowing partial distinction in relation to existing political programmes: *«It is neither necessary, nor logical, to require complete distinction in programmes presented; a partial distinction is sufficient as it constitutes an addition to political life»*. According to the Court, the programme of the party must be considered in its entirety, without establishing partial comparisons with other existing programmes. This new precedent by the Court will offer more flexibility in the interpretation of the former law on parties and serve as a basis for the recognition of the Al-Wasat party and its programme.

2. The Construction and Development party

A clearer and more open position appeared in the case of the Construction and Development party. In this case, the Court was to define the parties that fell under the prohibition established by the constitution and the latest constitutional declaration. In this particular case, the programme of the party rested, as the Court revealed, on two main axes: the first being the protection of the Islamic identity of citizens, which exists in competition with the civil identity. All Muslim and non-Muslim Egyptian citizens have played a role in the creation of the latter. The founders of the party believe that applying the Sharia is the best way to reinforce the Islamic identity of the country. The founders of the party have, however, specified that their concept of the Sharia is not limited to the Hudud (which makes up part of Islamic criminal law) but is a complete judicial system that governs all aspects of community life. However, the codification of the Sharia will be the task of an elected Assembly and will not fall to religious men. **The second axis** of the political programme concerns the State. The philosophy of the party rests on a democratic State that guarantees freedoms without discrimination and is founded on the work of institutions. The programme of the party does not recognise the right of the Islamic clergy to govern; it is citizenship that forms the basis of rights and obligations.

The Political Parties Commission initially rejected the request for legal status made by the founders of the party due to the religious character of the party. The Commission considered that the call for the application of the Hadud constituted not only a reference to Islam but also a clear religious basis. The party's request was rejected. The founders of the party, not satisfied with this decision, brought the case before the court.

The Court then set about analysing the different axes of the programme presented by the party in question in minute detail and, in order to mark boundaries for defining the religious party, it first distinguished between the rules concerning religion, which governed the relationship between a person and his God, and the other rules that governed civil relationships, i.e. the Sharia. The Court thus created a definition of the religious party that covered any party that merged the two concepts or founded its programme on the first category of rules set out above, known as "religious rules". The Court explains the basis of its reasoning: The rules of the Sharia are the main source of legislation, we therefore cannot prohibit the constitution of a party for the simple reason that its programme is set in the framework of the judicial system of the State. The role of the Sharia in the reasoning of the Court has thus radically changed in relation to former case law. After years of being an aspect that could not be used to distinguish the agenda of an Islamic party, the Sharia has become the judicial framework for the reasoning of the court targeting legal status for these parties.

By departing from this definition, the Court recognises that the programme of the party in question is civil in nature since, while examining the programmes of the parties, it observed that the party founders were aware of the difference between the religious rules and the rules governing civil relations known as Sharia and that the political activities of the party have solely political objectives.

Before 30 June 2013, the prohibition of the creation of religious parties was severely limited. The question is currently the centre of Constitutional Commission debates, but the final version of the text has not yet been decided. Although the spokesperson of the “Committee of 50” states that the Committee has agreed on a text prohibiting the creation of religious parties, it would be difficult to predict what the legal situation will be before seeing the final version of the article governing the formation of parties, since it is the scope and extent of the prohibition that is important.

Should the version by the first Constitutional Amendment Commission (committee of 10) be adopted, under which “*No political activity may be exercised or political parties formed on the basis of religion*”, we believe that from a legal point of view, the recent precedent of the Court of Parties would still be applicable and the definition of religious parties would be very limited. Parties with a religious referential authority could not be deprived of a legal status as seen in the case of the Al-Bena’a Wal Tanmeya party.

Still, it must not be forgotten that the prohibition of religious political parties caused much debate within Parliament during the discussion of the first law on parties in 1977. Certain Members of Parliament argued against the implementation of this prohibition, drawing inspiration from the situation in several European countries. According to the Members of Parliament, if a restriction needs to be applied, it must be limited to parties that discriminate on the basis of religion.

**SESSION II:
FINANCING OF
POLITICAL PARTIES**

Recommendations of the Venice Commission and the OSCE/ODIHR in the field of financing political parties

**Mr. James Hamilton,
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I. Introduction

There are huge variations in the way different countries regulate political parties. This is so because of the different historical experiences of different countries as well as the differences in social conditions within them. National history and political traditions in this field are often linked to national pride and therefore resistant to outside change.

In many of the older democracies of Europe laws and regulations concerning political funding are a recent phenomenon. Indeed, in some countries the matter still remains unregulated. Traditionally, the funding of political parties was left to private initiative and unregulated by specific legislation. However, in recent years, partly as a result of scandals in a number of countries involving corrupt donations to political parties in return for advantages such as the awarding of public contracts, and partly in order to provide a more equal basis for citizens to participate in democratic life at a time when such participation has become ever more expensive, there has been an increased tendency to provide state funding for political parties, to limit expenditure on elections, and to limit the amount of private donations, and to require greater transparency and publication about these matters.

Despite the fact that political parties are the lifeblood of democracy, it is also remarkable how frequently national constitutions make no express mention of them. Of course, political activity is regulated by provisions relating to freedom of expression and assembly and the right to participate in democratic life. Indeed, it is also true that the various general human rights conventions and charters make no mention of political parties either. The right to participate in political activity is protected in the European Convention on Human Rights by the general rights to freedom of expression and of assembly and association in Articles 10 and 11 and the right to free elections in Article 3 of the (First) Additional Protocol but there is no express reference anywhere to political parties even though Article 11 expressly refers to trade unions.

II. The European Convention on Human Rights

The starting point for any consideration of European standards in relation to political parties must be the European Convention on Human Rights. In discussing Article 11 the European Court of Human Rights has often referred to the essential role played by political parties in ensuring pluralism and democracy. For example, in *The United Macedonian Organization Ilinden & Others v Bulgaria* (application No. 59491/00) (at paragraphs 60–61):

“60. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfillment. Subject to paragraph 2 of Article 10, it is applicable to not only “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”....

61. Consequently, the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on freedom of association. In determining whether a necessity within the meaning of Article 11 paragraph 2 exists, the states have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts....”

Consequently, any limitations on the rights of political parties to raise funds must be prescribed by law and must be such as are necessary in democratic society and are to be strictly construed.

III. Standard Setting Instruments

Despite the variety of systems and practices in different states, there have been a number of attempts to set common standards in the area of financing of political parties and elections. Firstly, there is the Council of Europe’s Recommendation Rec (2003) 4 of the Committee of Ministers on Common Rules against corruption in the funding of Political Parties and Electoral Campaigns of 8 April 2003.

Secondly, the European Commission for Democracy through Law (the Venice Commission) has been working on legal questions concerning political parties for more than a decade and has adopted a series of guidelines. The first of these dealt with the prohibition of political parties and analogous measures.¹ The second set of guidelines, (the Finance Guidelines), adopted in 2001, dealt with the financing of political parties.² A third set of guidelines was issued under the title of the Code of Good Practice in Electoral Matters which was adopted in October 2002³. A fourth set of guidelines adopted in March 2004 dealt with a number of specific issues including registration of political parties, activity requirements for political parties, the involvement of public authorities with the activities of political parties, and the membership in political parties of foreign citizens and stateless persons.⁴

Two other publications of the Venice Commission are worth mentioning: in 2006 the Commission adopted a report on the participation of political parties in elections⁵ and an opinion on the prohibition of financial contributions to political parties from foreign sources.⁶

In addition the Venice Commission has given numerous opinions on specific regulations concerning political parties and elections in various member states of the Council of Europe.

The work of the Venice Commission in this area culminated in the joint adoption in October 2010 of the OSCE/ODIHR-Venice Commission Guidelines on Political Party Regulation (the Joint Guidelines) which were jointly drafted and elaborated by the two bodies and which were

1 CDL-INF (2000) 1 dated 10 January 2000 available at [http://www.venice.coe.int/docs/2000/CDL-INF\(2000\)001-e.asp](http://www.venice.coe.int/docs/2000/CDL-INF(2000)001-e.asp)

2 CDL-INF (2001) 8 adopted on 9–10 March 2001 available at [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)008-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)008-e.asp)

3 CDL-AD (2002) 23 rev adopted on 18–19 October 2002 available at [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-e.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.asp)

4 Guidelines and Explanatory Report on Legislation on Political Parties: Some Specific Issues, CDL-AD(2004)007, adopted 12–13 March 2004

5 Report on the Participation of Political Parties in Elections, CDL-AD(2006)025, adopted 9–10 June 2006

6 Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources CDL-AD(2006)014, adopted 17–18 March 2006

intended to bring together in a single document the expertise and good legislative practices of OSCE participating states in regulating political parties and the various guidelines and recommendations of the Venice Commission. As was stated in the foreword to these Joint Guidelines, they were not intended as “a final, complete code of regulation, but rather as a living instrument that will be enriched by further development and input from those who make use of it.” Indeed, so much is this the case that already the possibility of further revising the Joint Guidelines is under consideration.

The European Union has also addressed the issue of the funding of political parties through a regulation governing political parties at the level of the European Parliament and the rules regulating their funding.⁷

The NGO Transparency International adopted Standards on Political Funding and Favours in 2005, revised in 2009.⁸

Finally, the United Nations Convention against Corruption calls on states “to enhance transparency in the funding of candidates for elected public office and, where applicable, the funding of political parties.”⁹

IV. Issues concerning the funding of political parties and election campaigns

I will now discuss some of the principal issues which arise in relation to the funding of political parties and election campaigns and refer to the approach adopted in some of the instruments already referred to, concentrating particularly on the provisions of the Joint Guidelines.

V. Limitations on Private Funding

The first question is to what extent limitations on private funding of political parties are permissible.

The Council of Europe Recommendation Rec (2003) 4 begins by stating that citizens are entitled to support political parties. It goes on to provide that states should ensure that any support from citizens does not interfere with the independence of political parties. It provides that measures taken by states concerning donations should provide specific rules to avoid conflict of interests, to ensure the transparency of donations and to avoid secret donations, as well as to avoid prejudice to the activities of political parties and ensure their independence. It adds that states should provide that donations to political parties are made public. Regarding donations exceeding a fixed ceiling, states should consider the possibility of introducing rules limiting the value of donations to political parties and should adopt measures to prevent established ceilings from being circumvented.

The OSCE/ODIHR-Venice Commission Joint Guidelines begin the chapter on funding political parties as follows:

“Political parties need appropriate funding to fulfil their core functions, both during and between election periods. The regulation of political party funding is essential to guaran-

7 Regulation (EC) no 2004/2003 of the European Parliament and of the Council (15 November 2003 L297/1)

8 Revised and issued as Policy Position 01/2009, www.transparency.org

9 United Nations Convention against Corruption, Article 8(3).

tee parties' independence from undue influence created by donors, to ensure parties the opportunity to compete in accordance with the principle of equal opportunity, and to provide for transparency in political financing. Funding of political parties through private contributions is also a form of political participation. Thus, legislation should attempt to achieve a balance between encouraging moderate contributions and limiting unduly large contributions."¹⁰

Permissible methods of achieving this would include the imposition of restrictions on limits on private contributions, creating a balance between private and public funding, as well as imposing spending limits for campaigns and requiring transparent party funding and credible financial reporting.¹¹

Detailed provisions in the Joint Guidelines concerning private funding include consideration of membership fees.¹² These should not be so high as to unduly restrict membership, although they are a legitimate source of private funding. However, membership fees should not be used to circumvent contribution limits. This can be accomplished by treating membership fees as contributions. While charging a membership fee is not inherently counter to the principle of freedom of association, care needs to be taken to ensure that it does not become such in practice, particularly in relation to persons who are not wealthy. Where members of Parliament are required to make contributions, care should be taken to ensure that these do not contravene contribution limits. Care has to be taken to avoid the negative impression that elected parliamentarians have purchased their mandate from the party. Candidates' own contributions may be limited.

The Joint Guidelines refer to private funding as a form of political participation which it is appropriate for parties to seek, and go so far as to suggest that legislation should require that all political parties be financed at least in part through private methods.¹³ In this respect the present writer wonders if the authors of the document do not take an overly benign view of the possible motivations behind political donations or are not perhaps too influenced by the views of political parties themselves. To permit small donations is one thing but to see them as always motivated by considerations of the purest democratic altruism which should not merely be permitted but required is another. Even small donors may expect favours in return for their donations and the non-donating citizen may feel at a disadvantage. The donor may feel that at the least a donation may give a greater access than would be otherwise available. Donations may also be made, not to secure a corrupt benefit in the classic sense, but to ensure a greater input into policy issues by the donor. It would be surprising if such a motivation was not a factor in many corporate donations.

The Joint Guidelines provide that individuals should have the right to make financial and in-kind contributions. Reasonable limits may be imposed on these. While it is permissible to allow parties and candidates to take out loans to finance election campaigns or party activities, it is important that the real cost of these loans is reflected properly in financial reports. Loans that are granted at advantageous conditions should be treated as a form of financial contribution. Similarly, a loan that is repaid by a 3rd party must be treated as a contribution.

¹⁰ Joint Guidelines paragraph 159.

¹¹ Ibid paragraph 160.

¹² Ibid paragraphs 163-4.

¹³ Ibid paragraph 170. "In fact, legislation should require that all political parties be financed, at least in part, through private means as an expression of minimum support."

Among the reasonable restrictions on private contribution which are described in the Joint Guidelines are limitations on contributions from state owned or controlled companies, and anonymous donors. The imposition of reasonable limitations on private contributions may include the determination of the maximum level that may be contributed by a single donor.

A number of issues are not dealt with in the Joint Guidelines. For example, there is no discussion of whether a ban on corporate contributions, or a ban on donations from companies with industrial, financial or commercial objectives, or even a ban on donations from companies or individuals who tender for public contracts, may be justified. The growing problem of contributions being made, not directly to a political party or candidate, but to a support group which advances the aim of that party or candidate, is referred to but not discussed in any depth.¹⁴

The earlier Venice Commission Financing Guidelines contain some provisions which are not reproduced in the Joint Guidelines. The right of political parties to receive private financial donations is asserted, but the Financing Guidelines also provide that limitations may be envisaged, including a maximum level for each contribution, a prohibition of contributions from enterprises of an industrial or commercial nature, or from religious organizations, and prior control of contributions by members of parties who wish to stand as candidates in elections by public organs specialized in electoral matters.¹⁵

Transparency International's Standards (as set out in Policy Position 01/2009) contain similar provisions to those in the Joint Guidelines. They provide as follows:

“Parties and candidates must practise transparency and demonstrate commitment to ethical standards in public life.

Political parties, candidates and politicians should disclose assets, income and expenditure to an independent agency.

Reports should be presented publicly in a timely fashion, on an annual basis, but particularly before and after elections, so that the public can take account of it when they vote.

Reports should list donors and the amount of their donations, including in-kind contributions and loans, and should also list destinations of expenditure.”

Despite this, the Transparency International Policy Position 01/2009 notes that surprisingly few countries have good disclosure laws. It refers to a comprehensive study by USAID made in 2003 which found that of 118 countries reviewed, 28 had no disclosure laws at all and only 15 of those who had laws required parties and candidates to disclose income and expenditure accounts and disclose the identity of donors to political parties.

VI. Public Funding

A corollary of placing limitations of private funding is that in order to enable political parties to carry out their activities some public funding would be required. The Council of Europe Recommendation speaks of the state's entitlement to support political parties, and goes on to provide that the state “should” provide support to political parties. This support should be limited to reasonable contributions and may be financial. Objective, fair and reasonable

¹⁴ Ibid, paragraph 205

¹⁵ Financing Guidelines, paragraph 6

criteria should be applied regarding the distribution of state support. As with private support any state support should not interfere with the independence of political parties and the same principles on donations which apply to private donations should also apply to public donations aimed at avoiding conflict of interests, ensuring transparency and avoiding prejudice to the activities of political parties.

The Joint Guidelines describe public funding as “aimed at ensuring that all parties are able to compete in elections in accordance with the principle of equal opportunity, thus strengthening political pluralism and helping to ensure the proper functioning of democratic institutions. Generally, legislation should attempt to create a balance between public and private contributions as sources of funding for political parties. In no case should the allocation of public funding limit or interfere with a political party’s independence.”

The Joint Guidelines establish a number of detailed principles. Public funding should supplement rather than supplant private donations.¹⁶ The allocation of funding should be objective and unbiased.¹⁷ A number of possible in-kind benefits should be considered, such as the possibility of tax exemption or tax credits for political parties, or giving candidates access to free media time.¹⁸ Public allocation of funds should be objective, fair and reasonable¹⁹ but it is possible to consider either absolute equality between candidates or alternatively equitable funding based on proven levels of support.²⁰ Consideration should be given to pre-election determination of funding as systems based on the vote actually received which of course cannot be calculated until after the election may make it difficult for new parties to participate.²¹ Where a threshold is set as a qualification for funding this should not be set too high.²² At a minimum all parties represented in Parliament should get funding. However, this should not mean that new parties do not also get a fair chance.²³ One or two parties should not monopolise funding.²⁴ Finally, it is permissible to make funding contingent on a party’s encouragement of participation by women and this should be considered in the light of the requirement for special measures as defined by article 4 of CEDAW (the Convention for the Elimination of All Forms of Discrimination against Women).²⁵

VII. Funding for elections only or for political parties in general?

The question arises whether parties should be assisted with public funding solely during election periods, to enable them to face the high costs involved in an election campaign, or whether some form of regular permanent funding of political parties should be introduced. The matter is discussed in a report by M. Jacques Robert which is annexed to the Venice Commission’s Financing Guidelines. He points out that the option of funding only election campaigns merely aims to avoid emptying the party’s coffers every time an election takes place but the thinking behind it is to regard political parties as private organizations which have a free hand in raising the funds necessary for their day-to-day functioning but which require assistance during the holding of elections. Under the second approach, which funds political parties at all times,

¹⁶ Joint Guidelines, paragraph 177

¹⁷ *Ibid*, paragraph 178

¹⁸ *Ibid*, paragraphs 179–182

¹⁹ *Ibid*, paragraph 179

²⁰ *Ibid*, paragraph 185

²¹ *Ibid*, paragraphs 183–184

²² *Ibid*, paragraph 185

²³ *Ibid*, paragraph 188

²⁴ *Ibid*, paragraph 187

²⁵ *Ibid*, paragraph 191

parties are regarded as officially recognized bodies, since they contribute to the state's ongoing democratic function, and it is therefore reasonable that the state should help to support their existence. Both models are found in democratic states although M. Robert notes that most of the major European democracies follow the second approach.

The Joint Guidelines are unequivocal in their view that political parties need appropriate funding to fulfil their core functions, both during and between election periods.²⁶ Where states provide funds only for campaign financing then it is necessary to have precise guidelines for the appropriate use and allocation of funds for the different purposes of party and campaign financing.²⁷

The Council of Europe's Recommendation Rec (2003)4 provides that states should consider adopting measures to prevent excessive funding of political parties, such as establishing limits on expenditure on electoral campaigns. The Venice Commission Financing Guidelines provide that electoral campaign expenses should be limited to a ceiling, appropriate to the situation in the country and fixed in proportion to the number of voters concerned. They also propose that the total amount of private contributions should not exceed the stated ceiling. There should be a possibility of prohibition of contributions from enterprises of an industrial or commercial nature or religious organizations.

VIII. Prohibition of Foreign Funding

Many states, though not all, prohibit financial contributions to political parties from foreign sources. There are historic reasons for this. In the period between the two world wars both Nazi Germany and the Soviet Union financed political parties in other countries which supported fascism or communism respectively. During the Cold War both the USSR and the United States frequently gave financial support to organizations which they saw as supporting their particular view of the world. In addition, some states which had ethnic minorities were frequently concerned about the possibility of foreign donations being used to undermine their national position. There are states which take a deep interest in their neighbour's democratic processes, but such interest is not always welcomed or regarded as benign or disinterested by the neighbour concerned. In other states, there are no prohibitions presumably because the issue simply never arose.

On 17–18 March 2006 the Venice Commission adopted an opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources.²⁸ An analysis of the Member States of the Council of Europe showed that 28 of them had a ban on such contributions whereas 16 did not. The Financing Guidelines adopted by the Venice Commission in 2001 stated that donations from foreign states or enterprises must be prohibited. However, the Venice Commission does not consider that this should apply to financial donations from nationals living abroad.²⁹

The Council of Europe Recommendation (2003)4 provides that states should specifically limit, prohibit or otherwise regulate donations from foreign donors.

26 Ibid, paragraph 159

27 Ibid, paragraph 161 and 162

28 See footnote 6 above

29 Financing Guidelines, paragraph 6

Transparency International has also proposed (in its Policy Position 01/2009) that “consideration should also be given to limiting corporate and foreign support, as well as large individual donations”.

In its opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources, with regard to the question as to whether such a prohibition can be considered “necessary in a democratic society”, the Venice Commission concluded that each individual case had to be considered separately in the context of the general legislation on financing of parties as well as the international obligations of the state concerned and among these the obligations emanating from membership of the European Union. While it pointed out the historical situation which had existed between the two world wars and during the Cold War, it also pointed to the argument for a much less restrictive approach in modern Europe given the cooperation of political parties within the many supranational organizations and institutions of Europe today, such cooperation being “necessary in a democratic society”. They commented that it was not obvious that the same could be said about the raising of obstacles to cooperation by restricting or prohibiting reasonable financial relations between political parties in different countries or at the national level on the one hand and at the European or regional level on the other. However, the Commission pointed to the reasons which could be used to justify such prohibition, such as financing used to pursue aims not compatible with the constitution and the laws of the country, or which undermined the fairness or integrity of political competition or could lead to distortions of the electoral process or posed a threat to national territorial integrity.

The Joint Guidelines state that the prohibition of contributions from foreign sources may be prohibited and indeed refer to the Council of Europe Recommendation REC(2003) 4 which requires that this should be done. However the Joint Guidelines refer to the necessity to avoid the infringement of free association in the case of political parties which are active at an international level, where care has to be taken to ensure that the provisions of article 12 (2) of the Charter of Fundamental Rights of the European Union are respected.³⁰

IX. The Keeping of Accounts and Monitoring of Compliance with Financial Standards

Recommendation Rec (2003)4 requires the keeping of records of all expenditure on all electoral campaigns and of the keeping of proper books and accounts of political parties. All donations should be recorded and if over a certain value identified in the records. These accounts should be presented regularly and at least annually to an independent authority which should monitor them. This should include supervision over the accounts of political parties and the expenses involved in election campaigns as well as their presentation and publication. Infringement of rules should be subject to effective, proportionate and dissuasive sanctions.

The Joint Guidelines refer to the necessity for transparency in relation to the keeping of accounts and compliance with financial standards.³¹ Accounts must be kept of all contributions and also of all expenditures both on election activities and political party activities generally. Reasonable spending limits may be established for political parties and there should be a state body to develop and review these limits.³² Information should be filed with the electoral regulatory authority to cover in particular the identification of all bank accounts and the names and

30 Joint Guidelines, paragraph 172

31 Ibid, paragraphs 193-4

32 Ibid, paragraph 197

details of those party members who are designated to be personally accountable for income and expenditure. In the case of election campaigns, reports on campaign income and expenditure should be filed within 30 days of the election. In relation to non-campaign periods annual reports should be filed. The Joint Guidelines deal with a number of other matters, including the improper and abusive use by political parties of state resources. They also provide that there should be an independent monitoring body in relation to electoral campaign financing. Finally, the Joint Guidelines provide that sanctions for irregularities in relation to electoral or party financing should include the loss of all or part of any state provided funds as well as the possibility of fines.

The Venice Commission's Financial Guidelines are to similar effect. In particular they regard proportionate sanctions as including the loss of all or part of public financing for the following year. They also envisage the possible reimbursement of the public contribution, the payment of a fine or another financial sanction or the annulment of an election.

Transparency International recommends in its Policy Position 01/2009 that:

“Public oversight bodies must effectively supervise the observance of regulatory laws and measures. In order to do so, they must be endowed with the necessary resources, skills, independence and powers of investigation. Together with independent courts, they must ensure that offenders be held accountable and that they be duly sanctioned.

The funding of political parties with illegal sources should be criminalised.”

X. Corruption

One should not lose sight of the fact that regulations concerning the public and private financing of political parties and elections do not exist in a vacuum for political parties' benefit alone, but exist largely to prevent corruption by enabling private interests to purchase influence within the political system. It should be borne in mind that regulations concerning financing are only a part of the solution to this problem and in themselves may not be effective to achieve the necessary aim. Transparency International Standards on Political Funding and Favours draws attention to this fact and provides that donations to political parties, candidates and elected officials should not be a means to gain personal or policy favours or buy access to politicians or civil servants. They draw attention to the need for adequate conflict of interest laws that regulate the circumstances under which an elected official may hold a position in the private sector or a state owned company, the need for periodic declarations of assets held by parliamentarians and party officials and their families, the need for time restrictions on elected politicians moving into corporate positions, and clear immunity rules all of which serve to limit the influence of business on government.

Political financing: transparency and supervision

Some considerations in the light of GRECO reports

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Group of States against Corruption
Groupe d'États contre la corruption

PART 1 – General information

1994: Conference of Ministers of Justice of the CoE in Valetta, Malta: anti-corruption policies become a new topic for the intergovernmental cooperation (+ priority following 2nd Summit of Heads of State and Government 1997):

- Preparation of **programme of action** against corruption (1996): multidisciplinary approach including prevention and repressive aspects; identification of issues to be addressed
 - Results: 6 anti-corruption instruments adopted between 1997 and 2003, including **Recommendation (2003)4** of the Committee of Ministers to Member States **on common rules against corruption in the financing of political parties and election campaigns**
 - Creation of GRECO in 1999 to monitor the implementation of all anti-corruption instruments (mutual evaluations, peer pressure): to date, 49 member States (+ negotiations EU), thematic evaluation rounds. Round 3 (2007-2011): transparency of political financing ((2012...): Round 4; prevention of corruption of parliamentarians, judges and prosecutors); implementation of improvements examined through specific compliance procedure – about 300 reports in total to date
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General information (cont.)

- Recommendation (2003)4: an autonomous set of standards on political financing (not corruption-specific): issue of corruption appears only in relation to rules on donations to parties and candidates by legal entities (art.5):
 - › Donations from legal entities must be registered in the books and accounts of such entities;
 - › shareholders and other members must be informed;
 - › donations from entities providing goods/services for any administration should be limited, prohibited or strictly regulated;
 - › donations from state-controlled or other public entities should be prohibited
- Articles 1 to 9 deal with general principles and sources of funding (incl. applicability of rules both to party funding and election campaign funding – art. 8)
- GRECO's 3rd round evaluations focused on TRANSPARENCY (article 10 to 13), SUPERVISION (articles 14, 15) and SANCTIONS which should be effective, proportionate and dissuasive in case of infringement to national legislation (article 16)



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PART II - Transparency of party and campaign funding

Article 10 Records of expenditure

States should require particular records to be kept of all expenditure, direct and indirect, on electoral campaigns in respect of each political party, each list of candidates and each candidate.

Article 11 Accounts

States should require political parties and the entities connected with political parties mentioned in Article 6 to keep proper books and accounts. The accounts of political parties should be consolidated to include, as appropriate, the accounts of the entities mentioned in Article 6 (entities related directly/indirectly to or controlled by parties)

Article 12 Records of donations

- a. States should require the accounts of a political party to specify all donations received by the party, including the nature and value of each donation.
- b. In case of donations over a certain value, donors should be identified in the records.

Article 13 Obligation to present and make public accounts

- a. States should require political parties to present the accounts referred to in Article 11 regularly, and at least annually, to the independent authority referred to in Article 14.
- b. States should require political parties regularly, and at least annually, to make public the accounts referred to in Article 11 or as a minimum a summary of those accounts, including the information required in Article 10, as appropriate, and in Article 12.

PART II - Transparency of party and campaign funding – some remarks

- variety of funding systems (e.g public/private, donations from natural vs. legal persons)

Examples of frequent insufficiencies identified in GRECO reports:

- lack of adequate accounting/book-keeping format
- lack of consolidated accounts (local party structures, related entities such as NGOs and businesses, no rules on third parties)
- lack of periodic publication of party accounts (and/or major donors), or not done in timely manner in the context of elections
- inconsistent rules on forms of supports: direct financial support, in-kind support, sponsoring, support at preferential prices, loans not addressed adequately etc.
- anonymous donations not adequately dealt with
- problems of distinction between membership fees and member contributions
- misuse of public resources (infrastructures, equipment, administrative/ministerial staff, public finances, media...): an issue of integrity but also fairness etc.

= often inexplicable over-spending + controversies on legitimacy of income

PART III – Supervision and sanctions of party and election campaign financing

Article 14 Independent monitoring

- States should provide for independent monitoring in respect of the funding of political parties and electoral campaigns.
- The independent monitoring should include supervision over the accounts of political parties and the expenses involved in election campaigns as well as their presentation and publication.

Article 15 Specialised personnel

States should promote the specialisation of the judiciary, police or other personnel in the fight against illegal funding of political parties and electoral campaigns.

Article 16 Sanctions

States should require the infringement of rules concerning the funding of political parties and electoral campaigns to be subject to effective, proportionate and dissuasive sanctions.



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PART III – Supervision and sanctions - Some remarks:

- a variety of models/bodies entrusted with supervision of political financing: ad hoc independent body, Electoral Commission, Parliament, Central public audit body, Ministry (finance, interior) – sometimes a combination
 - supervisory body often lacks operational independence (from the government, from the parties themselves), inadequate composition, inadequate decision process
 - supervisory body often lacks capacity of control (powers, e.g. access to information.)
 - supervisory body often lacks adequate other means (expertise, staff...)
 - supervisory body has limited approach to its role (“doing the maths”) and lack of proactivity; over-reliance on external auditors or other controls, external tips,
 - inadequate supervisory arrangements (one entity supervises income, another the expenditures + no full responsibility)
 - no sanctions available for all main requirements, sanctions are ineffective (minor fine even if large amounts of illegitimate funding involved) or applied
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Financing of political parties – the Romanian Experience

**Mr Stefan Deaconu,
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- I. The financing of political parties, a condition for democracy
- II. Brief history of the legal regulations concerning the financing of political parties in Romania
 - 1. The Decree-Law no. 92 of 14 March 1990 for the election of the Romanian Parliament and President
 - 2. Law no. 27 of 26 April 1996 on political parties
 - 3. Law no. 43 of 21 January 2003 related to the financing of political parties and electoral campaigns
 - 4. Law no. 334 of 17 July 2006 related to the financing of political parties and electoral campaigns
- III. Types of financing in the current legal regulations
 - 1. Public financing (governmental)
 - A. Indirect public financing
 - B. Indirect public financing
 - 2. Private financing (non-governmental)
- IV. Financing control

I. The Financing of political parties – a condition for democracy

The need to finance political parties and electoral campaigns can only be understood and accepted through a highly accurate understanding of the relation between the civil society and democracy. Is the control of electoral campaigns financing the biggest problem in the functioning of Romanian political parties? And if so, will the amendment of the legislative aspects lead to a better functioning of democracy and to a bigger respect from the electors towards politicians?

An analysis of the legal regulations concerning the financing of political parties and their electoral campaigns in Romania in the last 23 years shows that Romania is part of a special category of states with new regulations, the category of Central and Eastern European countries in transition, whose legislation was repeatedly amended after the fall of the Communist regime, by drawing up laws dedicated to parties and their financing. With a highly diverse content, these laws have been inspired by an identical core objective: to avoid situations where a specific administration or State body, at the central or local level, provides financial support to a party at the expense of another.

II. Brief history of the legal regulations concerning the financing of political parties in Romania

1. The Decree-Law no. 92 of 14 March 1990 for the election of the Romanian Parliament and President

In the first years following the Revolution of December 1989, Romania did not have a legislation that strictly regulated this field of financing. The Decree-Law no. 92/1990 for the election of the Romanian Parliament and President stated, in Article 53, that: *“Political parties and groups taking part in the electoral campaign shall receive subsidies from the State budget, set upon setting the date for the elections. After the entry into force of this Decree-Law, subsidising the electoral campaign with funds from abroad or from other sources that have not been publicly declared is forbidden”*. The same Decree-Law stated in Article 95 that all *“Expenses for conducting the electoral operations were covered from the State budget. Any acts conducted in exercising the electoral rights referred to in this Decree-Law are exempt from the stamp duty”*.

2. Law no. 27 of 26 April 1996 on political parties

Later on, only in 1996, through Law no. 27 of 26 April 1996 on political parties, more detailed rules concerning the financing of political parties have been established. Chapter 6 of the law, called “Financing of political parties” (Articles 32–45) stated:

- **The financing sources of a party:** public and private. The public ones were represented by subsidies from the State budget, in compliance with the annual budget law, and the private ones were represented by a) party members dues; b) donations and legacies; c) incomes from own activities. The total incomes generated by dues did not have a maximum ceiling;
- **The limit of the dues that could be paid over a period of one year by a party member.** Dues paid over a period of one year by a person could not exceed 50 minimum gross salaries at the national level;
- **The limit of the donations received over a period of one year by a political party.** The donations received by a political party over a period of one year could not exceed 0.005% of the State budget income for the respective year. In the financial year in which parliamentary, presidential or local elections take place, the ceiling shall be of 0.010% of the State budget income for the respective year. The donation received from an individual over a period of one year could not exceed 100 minimum gross salaries at the national level for the respective year, and the donation received from a legal person during one year could not exceed 500 minimum gross salaries at the national level;
- **Transparency of financing political parties through donations.** Upon receiving the donation, a verification and recording of the donor’s identity was necessary. Upon a donor’s request, his/her identity could remain confidential, but not for an annual donation of more than 10 minimum gross salaries at the national level. The total amount received by a political party as confidential donations could not exceed 20% of the maximum subsidy granted from the State budget to a political party during the respective year. The list of donors of amounts exceeding 10 minimum gross salaries at the national level was published in the Official Gazette of Romania. Donations of goods or money with the obvious purpose of obtaining economic or political advantages are prohibited;

- **Prohibition of donations.** The law prohibits donations from public institutions, from self-managed public companies, from trading companies, and from banking companies with majority State capital, as well as donations from other countries or foreign organisations;
- **Prohibition of conducting activities specific to trading companies by parties;**
- **Introduction of rules concerning the amount of State budget subsidies.** According to the law, the amount allotted each year to political parties could not exceed 0.04% of the State budget income. Political parties represented in Parliament received a subsidy proportionately to the number of seats obtained. Political parties without parliamentary seats, but having obtained at least 2% of the ballots cast, received equal subsidies;
- **Granting seat-related facilities.** Local authorities had to ensure, with priority, spaces for the seats of the political parties, upon their motivated request. Political parties were exempted from paying taxes on buildings that they owned;
- **Introducing an authority for verifying the financing of political parties.** The Court of Audit was the body entitled to check the observance of the legal provisions concerning the financing of political parties.

3. Law no. 43 of 21 January 2003 related to the financing of political parties and electoral campaigns

Law no. 43/2003 is the first law adopted after 1989 to establish a detailed list of rules of transparency in the activity of political parties. Still in 2003, Parliament adopted a new law concerning the organisation and functioning of political parties (Law no. 14/2003) replacing Law no. 27/1996. These two laws lay the foundation of a transparent system of financing political parties and using their funds. The non-transparent financing of political parties is a source of corruption. At the same time, the real need for financing political parties was one of the objectives of this law.

This is also the reason for which the law:

- **Has raised the maximum ceiling of dues** paid on a yearly basis by a person from 50 to 100 minimum gross salaries at the national level;
- **Has raised the maximum ceiling of donations** received by a political party over a period of one year from 0.005% to 0.025% of the State budget income for the respective year;
- **Has raised the maximum ceiling of donations received by a political party from an individual** over a period of one year from 100 to 200 minimum gross salaries at the national level for the respective year;
- **Has raised the maximum ceiling of donations received by a political party from a legal person** over a period of one year from 500 to 1,000 minimum gross salaries at the national level for the respective year.

4. Law no. 334 of 17 July 2006 related to the financing of political parties and electoral campaigns

Law no. 334/2006 brought a series of amendments concerning the transparency of the means to use the funds by political parties, considering the need to ensure a transparent legal framework for their functioning. The Report of the European Commission, of 2005, concerning Romania's monitoring, highlighted this need to amend the Romanian legal framework as concerned the achievement of complete transparency concerning the incomes of political parties and the way in which these incomes were used.

Moreover, the revision of the Constitution, in 2003, required a legislative amendment considering the fact that the authority set up for assessing the lawfulness of fund usage by political parties is the Permanent Electoral Authority and not the Court of Audit.

III. Types of financing in the current legal regulations

Currently, the Romanian legislation includes standards referring to the financing of political parties and electoral campaigns, as well as to the control of abuse resulting from the public financing of the electoral campaigns. These standards regulate the different types of financing that can be met and different other aspects related to the limitation of campaign expenses. Thus, we are considering: a) public subsidies (from the State budget); b) in-kind grants (the free allotment of broadcasting time, mail election campaign etc); c) expense limitation (setting ceilings for the campaign expenses of candidates); d) dues limitation (restrictions on individual donations); e) fund transparency (proxy statements concerning the names of the donors and the publication of the amounts donated); f) prohibition of certain types of dues (those incurred by corporations, unions, foreign individuals or bodies, State institutions); g) prohibition of certain categories of expenses (pecuniary and in-kind "prizes" offered to voters); h) prohibition of certain types of electoral advertising on TV; i) measures for stimulating donations (granting fiscal facilities: tax cutbacks or exemptions); j) verification of the different types of party financing by the institution certified for this purpose; and k) sanction hardening.

From the perspective of the money source, party financing considers: **a) public financing (governmental)** and **b) private financing (non-governmental)**.

1. Public financing (governmental)

There are several ways to perform public financing. Thus, parties or candidates may benefit from several types of public financing: a) subsidies for electoral expenses; b) annual subsidies for expenses generated by the routine activities of political parties; c) fiscal facilities granted to private donors and free allotment of broadcasting time to competitors during the electoral campaign. So, we have a direct public financing by granting subsidies from the State budget for the expenses related to the unfolding of the electoral campaign, but also an indirect public financing by a free allotment of broadcasting time or the various facilities to private donors.

A. Direct public financing

Political parties benefit from direct financing from the State budget. Introducing direct public financing had as an objective to ensure the survival of smaller political parties who, obviously, are facing hardships related to the financing of their activity. Ensuring the means to finance the activity of political parties must be the expression of the free, equal and honest nature of

political competition. Since small parties most often lack the necessary financial support, public financing solves this problem.

Public financing is a strong supporter of political pluralism, multiparty system and competition of political ideas. It offers to small players, to newly created political groups and extra-parliamentary parties the possibility to express themselves.

The purpose of these regulations is to limit and equalize the level of electoral expenses, to control private financing sources and to introduce a control and sanction regime in this field.

Law no. 334/2006 sets the subsidies allotted to political parties during the electoral campaign and their amount. Thus, political parties receive, on a yearly basis, subsidies from the State budget and the amount allotted annually cannot exceed 0.04% of the State budget income. For political parties promoting women on the electoral lists, for eligible seats, the amount allotted from the State budget shall be increased proportionately with the number of mandates obtained by women candidates during the elections.

State budget subsidies are granted depending on the following criteria:

- a) the number of votes obtained in the parliamentary elections;
- b) the number of votes obtained in the local elections.

75% of the annual budget allotted to political parties shall be divided between political parties proportionately with the number of votes obtained in the parliamentary elections, if they have attained the electoral threshold (5%).

25% of the annual budget allotted to political parties shall be divided between political parties proportionately with the number of votes validly cast, obtained in the local elections for electing county counsellors and counsellors of the Municipality of Bucharest, if they have obtained at least 50 mandates of county counsellor and counsellor for the Municipality of Bucharest.

The State budget subsidy shall be paid on a monthly basis into the account of each political party, through the budget of the Permanent Electoral Authority and is reflected distinctly in the accounting records of the political parties.

B. Indirect public financing

Indirect public financing can take various forms, including: a) ensuring free party seats; b) allotment of broadcasting times; c) electoral correspondance or d) tax cutbacks or exemptions (VAT, postale taxes, etc.).

According to Law no. 334/2006, the authorities of central and local public administration shall ensure, with priority, within 90 days from the request, buildings for the central and local seats of political parties, as well as the underlying land, upon their motivated request.

Political parties can receive one seat, at the most, per each territorial administrative unit, which can be used throughout the existence of a party. Political parties ceasing their activity following reorganisation, self-dissolution or dissolution ruled through final court rulings must entrust to the authorities of local public administration, within 30 days, the buildings for which they had signed lease agreements.

As for the broadcasting time, it can be fixed, limited – free (State funded) and allotted fairly, based on criteria established by law or variable, unlimited – not funded by the State. Technical problems related to the allotment of broadcasting times appear in relation to the variety of

radio-TV stations, some of them public, others private, because the law must establish very clearly which of these stations are under broadcasting time allotment obligations and to what extent.

Romanian law also provides for indirect public financing for political parties, groups and independent candidates by granting them free broadcasting times on public and private radio and TV stations. What is notable is the fact that although the law does not establish anything in relation to the free nature of electoral correspondence, MP's benefit from free mail correspondence with the voters, and, during the electoral campaigns, they can use these means freely without violating the law.

2. Private financing (non-governmental)

This type of financing refers to the scheme of contributions and donations or legacies originating from individual or legal persons. This includes mainly: a) setting the legal ceiling for donations; b) the prohibition of certain categories of donors, within and outside the respective country, as well as c) the prohibition of certain categories of expenses. The limitation of the contributions is intended to reduce the possibility to influence a certain candidate or party by a taxpayer.

In Romania, Law no. 334/2006 sets as private sources of financing dues, donations and other sources of income. As for dues, the total income that can come from dues does not have a maximum ceiling, but the amount of the dues paid over a period of one year by a party member cannot exceed 48 minimum gross salaries at the national level (compared to the wage paid on 1 January of the respective year). Political parties must publish in the Official Gazette of Romania, Part I, the total amount of the due-generated income until 31 March of the following year, as well as the list of party members that have paid over a period of one year dues that sum up more than 10 minimum gross salaries at the national level.

In the case of donations, Romanian law is more restrictive and sets out very clearly who can make donations, of what amount and what sums a political party can raise from donations during one year. First of all, only Romanian individuals and legal persons can make donations, while donations from other countries or foreign organisations, as well as from foreign individuals and legal persons are prohibited. In-kind or pecuniary donations or free service provisions with the clear purpose of obtaining economic or political advantages are also prohibited. Free donations or free service provisions offered by public authorities or institutions, by self-managed public companies, by trading companies, and by banking companies with majority State capital, as well as donations from unions or religious cults are also prohibited.

Secondly, the law sets the annual donation level. Thus, the donations received annually by an individual person cannot exceed 200 minimum gross salaries at the national level (for the fiscal years during which several elections are held, donations from individual persons can be up to 400 minimum gross salaries at the national level), and in the case of legal persons, they cannot exceed 500 minimum gross salaries at the national level (for the fiscal years during which several elections are held, donations from legal persons can be up to 1,000 minimum gross salaries at the national level). In the case of legal persons, at the date of the donation, they must not have outstanding debts of more than 60 days to the State budget, the social security budget or local budgets.

Thirdly, the law establishes the amount that a party can receive as donations. This amount varies depending on the type of year, whether or not it is an electoral year. In years with no elections, the donations received by a party cannot exceed 0.025% of the State budget income

for the respective year, and during electoral years, donations cannot exceed 0.050% of the State budget income for the respective year.

Another source of private financing referred to by Romanian law is represented by: the publication or dissemination of propaganda materials and of political culture materials, the organisation of reunions and seminars on political, economic or social topics, the organisation of cultural, sport and entertainment activities, the renting of own buildings for conferences and socio-cultural activities, as well as bank interests or good sales. We should notice that these sources are not substantial and do not represent a main source of financing.

IV. Financing control

From the analysis of the legal sources for financing a political party we can notice that the traditional sources of party financing consisting of collecting dues from its members, the management of its own properties, pecuniary sources resulting from other activities (publications, fund raisings) are not enough, so the State ensures direct and public financing of the political parties and their electoral campaigns, considering them as the expression of the diversity of opinions that underlies democracy.

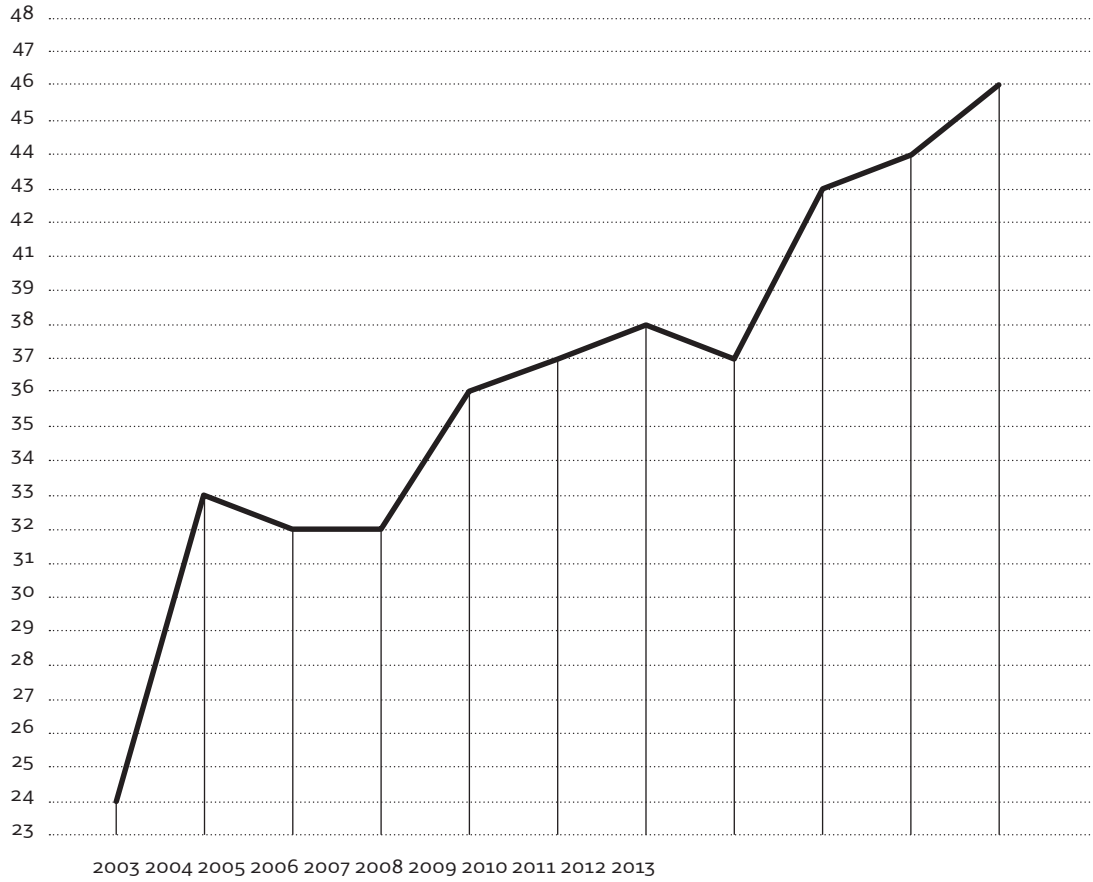
Subsidy-based financing implies only public funds compliant with the legislation that anyone can be informed of: in exchange, donations come from private sources. In Romania's case, subsidies from the State budget, donations or legacies from individual or legal persons for the electoral campaign are received only through a financial manager specifically appointed for this purpose by the leaders of the party. The financial manager must keep an accounting record of the financial operations for each constituency, in the case of the elections for the Chamber of Deputies and, respectively, for the Senate, as well as for each county and, respectively, for each candidate for mayor, in the case of local elections. This manager shall be jointly liable with the party having appointed him/her for the lawfulness of the financial operations conducted during the electoral campaign. The financial manager can be an individual or legal person, and a party can have several financial proxies, at the central level, for its subsidiaries or for its candidates.

In order to ensure full transparency of the electoral campaign, political parties and alliances, as well as independent candidates must print on all the electoral propaganda posters and materials the name of the candidate, of the party or alliance having ordered them, and the name of the economic agent having printed them and shall declare to the Permanent Electoral Authority, through its financial manager, the number of electoral posters printed.

Within 15 days from the date of the elections, the financial manager must file with the Permanent Electoral Authority a detailed report of the electoral incomes and expenses for each political party, political alliance, electoral alliance, the organisation of Romanian citizens belonging to the national minorities or independent candidate. The reports shall be published by the Permanent Electoral Authority in the Official Gazette of Romania, Part I, within 30 days from the publication of the election results. The mandates of the candidates declared elected cannot be validated if the detailed report of electoral incomes and expenses for each political party or independent candidate has not been filed pursuant to the law.

ANNEX 1

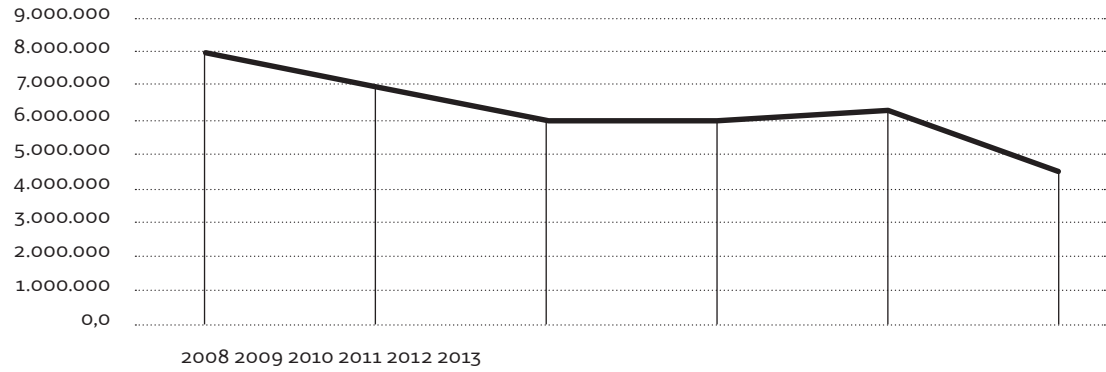
NUMBER OF THE POLITICAL PARTIES AND POLITICAL ALLIANCES REGISTERED AT THE BUCHAREST TRIBUNAL DURING 2003 – 2013 *



* Until October 1st, 2013

ANNEX 2

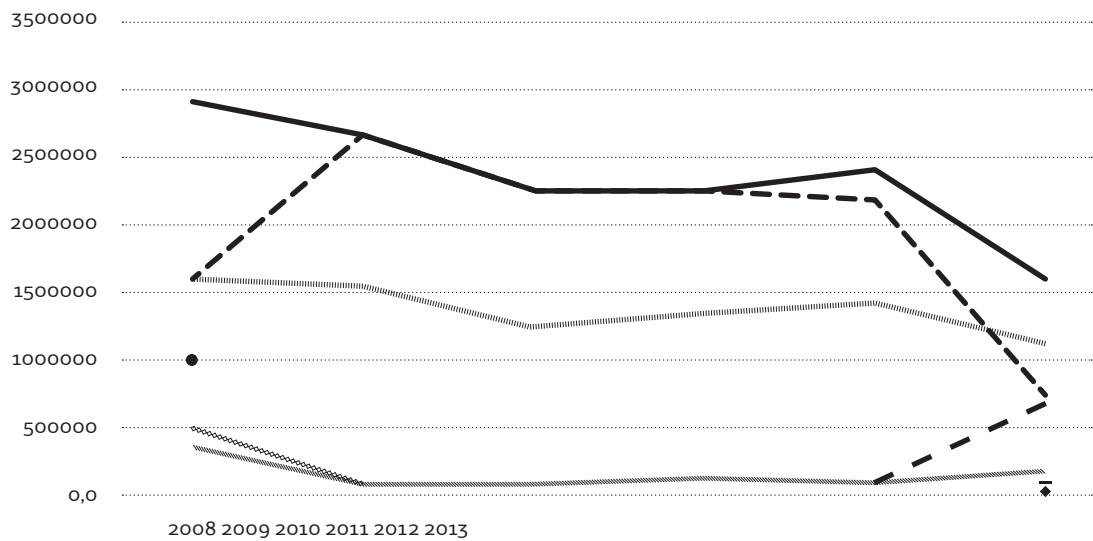
THE AMOUNTS ALLOCATED TO THE POLITICAL PARTIES FROM THE STATE BUDGET DURING 2008-2013*



* Until October 1st, 2013

ANNEX 3

THE AMOUNTS ALLOCATED TO EACH POLITICAL PARTY IN THE PERIOD 2008 - 2013*



* Until October 1st, 2013

ANNEX 4

Year	The amounts allocated to the political parties from the state budget (Amounts are calculated in national currency LEU; 1 LEU = 0,22 Euro)
2008	8.051.000,00
2009	6.970.494,45
2010	5.947.168,00
2011	5.970.514,00
2012	6.180.753,00
2013*	4.405.124,00

* Until October 1st, 2013

ANNEX 5

**THE AMOUNTS ALLOCATED TO EACH POLITICAL PARTY IN 2008
(AMOUNTS ARE CALCULATED IN NATIONAL CURRENCY LEU; 1 LEU = 0,22 EURO)**

	PSD	PC	PNL	PDL	UDMR	PRM	TOTAL
January	201.877,00	38.709,00	107.240,00	85.033,00	34.507,00	77.634,00	545.000,00
February	203.693,68	36.892,02	99.860,14	92.413,12	34.507,42	77.633,62	545.000,00
March	203.529,50	37.939,23	103.930,07	89.048,65	34.633,85	77.918,70	547.000,00
April	202.785,33	37.800,51	103.550,07	88.723,06	34.507,22	77.633,81	545.000,00
May	202.785,33	37.800,51	103.550,07	88.723,06	34.507,22	77.633,81	545.000,00
June	203.529,50	37.939,23	103.930,07	89.048,65	34.633,85	77.918,70	547.000,00
July	237.432,65	35.240,86	134.611,85	138.803,96	42.448,61	78.462,07	667.000,00
August	238.655,49	35.240,86	133.422,23	138.882,36	42.336,99	78.462,07	667.000,00
September	238.010,78	35.206,98	137.477,52	135.433,12	42.460,15	78.411,45	667.000,00
October	330.234,09	48.883,91	186.366,02	192.183,38	58.823,59	108.842,01	925.333,00
November	330.234,45	48.883,96	185.943,72	192.606,08	58.823,67	108.842,12	925.334,00
December	331.432,05	26.798,55	189.484,12	268.231,77	60.232,10	49.154,41	925.333,00
Total 2008	2.924.199,85	457.335,62	1.589.365,88	1.599.130,21	512.421,67	968.546,77	8.051.000,00

ANNEX 6**THE AMOUNTS ALLOCATED TO EACH POLITICAL PARTY IN 2009****(AMOUNTS ARE CALCULATED IN NATIONAL CURRENCY LEU; 1 LEU = 0,22 EURO)**

	PSD	PC	PNL	PDL	UDMR	TOTAL
January	216.919,39	5.618,85	125.550,33	215.675,13	40.061,30	603.825,00
February	216.919,39	5.618,85	125.550,33	215.675,13	40.061,30	603.825,00
March	228.962,98	5.930,81	132.521,02	227.649,64		595.064,45
April	220.934,64	5.722,84	127.873,89	219.666,63		574.198,00
May	206.276,13	5.343,70	119.390,13	205.093,04		536.103,00
June	219.748,06	5.692,84	127.187,53	218.487,57		571.116,00
July	220.933,92	5.723,56	127.873,89	219.666,63		574.198,00
August	220.933,92	5.723,56	127.873,89	219.666,63		574.198,00
September	220.933,92	5.723,56	127.873,89	219.666,63		574.198,00
October	226.215,14	5.859,64	130.930,66	224.917,56		587.923,00
November	226.215,14	5.859,64	130.930,66	224.917,56		587.923,00
December	226.215,14	5.859,64	130.930,66	224.917,56		587.923,00
Total 2009	2.651.207,77	68.677,49	1.534.486,88	2.635.999,71	80.122,60	6.970.494,45

ANNEX 7**THE AMOUNTS ALLOCATED TO EACH POLITICAL PARTY IN 2010****(AMOUNTS ARE CALCULATED IN NATIONAL CURRENCY LEU; 1 LEU = 0,22 EURO)**

	PSD	PC	PNL	PDL	TOTAL
January	208.674,42	5.405,89	120.778,24	207.477,45	542.336,00
February	208.674,42	5.405,89	120.778,24	207.477,45	542.336,00
March	172.526,76	4.469,69	99.856,41	171.537,14	448.390,00
April	196.505,45	5.090,27	113.734,99	195.378,29	510.709,00
May	196.505,45	5.090,27	113.734,99	195.378,29	510.709,00
June	197.223,94	5.109,57	114.150,84	196.092,65	512.577,00
July	239.292,96	6.191,36	138.506,56	240.823,12	624.814,00
August	239.292,96	6.191,36	138.506,56	240.823,12	624.814,00
September	156.444,22	4.046,44	90.553,85	158.069,49	409.114,00
October	156.372,51	4.049,29	90.508,18	156.193,02	407.123,00
November	156.372,51	4.049,29	90.508,18	156.193,02	407.123,00
December	156.372,51	4.049,29	90.508,18	156.193,02	407.123,00
Total 2010	2.284.258,11	59.148,61	1.322.125,22	2.281.636,06	5.947.168,00

ANNEX 8**THE AMOUNTS ALLOCATED TO EACH POLITICAL PARTY IN 2011****(AMOUNTS ARE CALCULATED IN NATIONAL CURRENCY LEU; 1 LEU = 0,22 EURO)**

	PSD	PC	PNL	PDL	TOTAL
January	159.972,31	4.142,27	92.591,74	159.788,68	416.495,00
February	177.884,85	4.607,00	102.959,49	177.680,66	463.132,00
March	177.885,21	4.606,07	102.959,70	177.681,02	463.132,00
April	171.794,57	4.448,61	99.434,45	171.597,37	447.275,00
May	171.794,57	4.448,61	99.434,45	171.597,37	447.275,00
June	172.153,23	4.458,13	99.642,03	171.955,61	448.209,00
July	210.170,40	5.442,13	121.646,32	209.929,15	547.188,00
August	210.170,40	5.442,13	121.646,32	209.929,15	547.188,00
September	210.529,05	5.451,66	121.853,90	210.287,39	548.122,00
October	210.170,40	5.442,13	121.646,32	209.929,15	547.188,00
November	210.170,40	5.442,13	121.646,32	209.929,15	547.188,00
December	210.529,05	5.451,66	121.853,90	210.287,39	548.122,00
Total 2011	2.293.224,44	59.382,53	1.327.314,94	2.290.592,09	5.970.514,00

ANNEX 9**THE AMOUNTS ALLOCATED TO EACH POLITICAL PARTY IN 2012****(AMOUNTS ARE CALCULATED IN NATIONAL CURRENCY LEU; 1 LEU = 0,22 EURO)**

	PSD	PC	PNL	PDL	PP-DD	TOTAL
January	160.600,31	4.158,51	92.955,22	160.415,96		418.130,00
February	186.716,67	4.834,66	108.071,33	186.502,34		486.125,00
March	186.716,67	4.834,66	108.071,33	186.502,34		486.125,00
April	177.891,67	4.606,43	102.963,43	177.687,47		463.149,00
May	177.891,67	4.606,43	102.963,43	177.687,47		463.149,00
June	178.608,97	4.624,47	103.378,61	178.403,95		465.016,00
July	218.657,55	10.129,67	128.110,78	192.232,89	17.354,11	566.485,00
August	218.657,55	10.129,67	128.110,78	192.232,89	17.354,11	566.485,00
September	218.630,55	10.093,93	128.592,35	192.016,38	17.225,79	566.559,00
October	139.118,15	6.437,99	81.614,38	122.264,90	11.014,58	360.450,00
November	258.413,76	11.958,13	151.599,76	227.108,63	20.459,72	669.540,00
December	258.413,76	11.958,13	151.599,76	227.108,63	20.459,72	669.540,00
Total 2012	2.380.317,28	88.372,68	1.388.031,16	2.220.163,85	103.868,03	6.180.753,00

ANNEX 10**THE AMOUNTS ALLOCATED TO EACH POLITICAL PARTY IN 2013*****(AMOUNTS ARE CALCULATED IN NATIONAL CURRENCY LEU; 1 LEU = 0,22 EURO)**

	PSD	PNL	PC	UNPR	PDL	FC	PNȚCD	PP-DD	TOTAL
January	176.015,72	122.317,89	17.107,59	8.048,36	85.514,07	2.964,75	1.482,38	73.963,24	487.414,00
February	176.015,72	122.317,89	17.107,59	8.048,36	85.514,07	2.964,75	1.482,38	73.963,24	487.414,00
March	141.436,72	98.288,05	13.747,18	6.467,23	68.714,49	2.382,31	1.191,16	59.432,86	391.660,00
April	164.375,48	114.228,78	15.975,82	7.516,11	79.858,87	2.768,69	1.384,34	69.071,91	455.180,00
May	164.375,48	114.228,78	15.975,82	7.516,11	79.858,87	2.768,69	1.384,34	69.071,91	455.180,00
June	164.717,21	114.466,26	16.009,72	7.531,73	80.024,90	2.774,44	1.387,22	69.215,52	456.127,00
July	201.283,07	139.876,82	19.563,33	9.203,71	97.789,76	3.390,35	1.695,17	84.580,79	557.383,00
August	201.283,07	139.876,82	19.563,33	9.203,71	97.789,76	3.390,35	1.695,17	84.580,79	557.383,00
September	201.283,07	139.876,82	19.563,33	9.203,71	97.789,76	3.390,35	1.695,17	84.580,79	557.383,00
October									
November									
December									
Total 2013*	1590.785,54	1105.478,11	154.613,71	72.739,03	772.854,55	26.794,68	13.397,33	668.461,05	4405.124,00

* Until October 1st, 2013

Political Funding Regimes in Muslim Majority Countries with Special Reference to the Turkish Case

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Political funding is a vital element of free, fair political competition in democratic systems of governance. The constitutional system, geographical and demographic structures, as well as universal standards, are considered to be important factors in designing a suitable model for party and campaign finance in any given country. There are basically two aspects to providing a fair and transparent political competition system: regular state funding of political parties to prevent undue influence of private money and declaration of revenues (e.g. donations) and expenditures of political parties and candidates for transparency and accountability.¹ Undue influence of private resources on politics may lead to corrupt relations by eroding the management of public funds.² This also negatively affects public trust in government. As expressed in several international documents, compulsory (e.g. the UN Convention against Corruption)³ or advisory (e.g. Council of Europe, Venice Commission and ODIHR recommendations)⁴, regulation of funding of political parties and candidates in a transparent manner including reporting, monitoring, oversight, spending limits are fundamental agenda items. However, legal regulations are not sufficient by themselves and must be supported by political and social culture, free media and organized civil society.

This paper underlines the basic dimensions of a “good” model of political funding first and then discusses the current state of political funding regimes in Muslim majority countries with special reference to Turkey.

I. The Basic Dimensions and Standards of an Effective Political Funding Regime

The ways and means of politics have changed profoundly and the use of various technological tools requires more financial resources than the amount of simple fees collected from the party’s members forty years ago. Money is needed for the healthy operation of political competition among political parties as well as candidates. However, in order to avoid undue influence of money on politics, an effective regulation of political funding is necessary for the transparency of private or public resources which may be directly or indirectly, legally or illegally used or abused in political competition processes.

1 R. Austin and M. Tjernström eds. IDEA, Funding of Political Parties and Elections Campaigns, Handbook Series, (Stockholm: IDEA, 2003), http://www.idea.int/publications/funding_parties/funding_of_pp.pdf

2 I. van Biezen, Financing political parties and election campaigns – guidelines, (Strasbourg: COE Publishing, 2003), http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/Financing_Political_Parties_en.pdf and

3 United Nations Convention against Corruption, 31 October 2003, http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

4 Parliamentary Assembly of Council of Europe, Recommendation 1516 (2001), <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/tao1/EREC1516.htm>, ODIHR/Venice Commission (2010): “Guidelines on Political Party Regulation”, [http://www.venice.coe.int/webforms/documents/CDL-INF\(2001\)008-E.aspx](http://www.venice.coe.int/webforms/documents/CDL-INF(2001)008-E.aspx), and “International Standards of Financing of Political Parties And Election Campaigns, CDL(2008)148, Strasbourg, 20 January 2009, [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2008\)148-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2008)148-e)

In light of the comparative experiences worldwide, there are several key aspects of regulating political funding.⁵ The regulation should include several principles and mechanisms such as limits, disclosure requirements, oversight and stakeholders' participation.

Transparency in political life is the heart of free speech, fair contest and pluralistic decision – making. Therefore, financial disclosure must be a binding principle. In this respect, a ban on certain kinds of donations (contributions) and spending limits for political parties and candidates can be introduced.

It may be easy to advise common principles yet quite difficult to observe the similar results across societies which have different traditions and cultures. Considering the fact that political competition is a cyclical process which takes place not only during the legally defined electoral period but also between two consecutive elections and at different levels, local/regional/national/supranational, more attention must be given to not blueprinting every single common principle, but to adopt these guiding principles in the given context for operational reasons.

Undoubtedly, adopting a good political funding regime is not sufficient. Any political funding regime cannot be governed without an effective enforcement mechanism including reporting, spending limits and oversight. An effective funding regime should also eliminate any regulation in favor of the governing party/parties at the expense of minimizing the benefits of the opposition parties. In this respect, especially the government party/parties must be careful in reforming funding regimes and in using public resources in their domain for their campaign activities, directly or indirectly.

The historically, but especially recently, emerging issue of third party contributions and expenditures seriously undermines transparency. Individuals and organizations other than political parties and candidates may make or receive political donations including indirect donations such as the funding of political advertising for a party or candidate, or incur political spending in campaign periods without registration. Such amounts may constitute a major soft money issue in the struggle against corruption. Kickbacks, bribes and other benefits as such can be crucial for both central and local party offices in financing their day to day or campaign spending.

Eventually, political parties, members, delegates and candidates should incorporate these principles and guidance into their daily activities. On the other hand, the participation of other stakeholders, basically a free and responsible media and organized civil society, are essential elements for the enforcement and enhancement of an effective political funding regime.

In light of these principles, some common standards can be taken into account in regulating political funding. There are several international documents which highlight these standards.⁶

The OSCE/ODIHR, in collaboration with the Venice Commission, introduced *Guidelines on Political Party Regulation* in 2010.⁷ The *Guidelines* include a separate section on Campaign and Political Finance. First of all, contributions from members, parliamentarians, intra-party

5 M. Öhman and H. Zainulbhai eds, *Political Finance Regulation: The Global Experience*, (Washington, D.C.: IFES, 2009). http://www.ifes.org/files/Political_Finance_Regulation_The_Global_Experience.pdf

6 See inter alia United Nations Convention Against Corruption (2003), Council of Europe Parliamentary Assembly Recommendation 1516 (2001) Financing of political parties, Venice Commission Guidelines on the Financing of Political Parties, 2001. CDL-INF (2001) 8, Council of Europe Committee of Ministers, Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns. For comprehensive analyses of these documents see also Öhman and Zainulbhai eds., 2009 and Öhman ed., *Financing Politics: The Middle East and North Africa*, (Washington, D.C., IFES, 2013).

7 *Guidelines on Political Party Regulation* (Warsaw: OSCE/ODIHR, 2011). <http://www.osce.org/odihr/77812?download=true>

fundraising activities, other sources and candidate's personal resources must have an upper limit (pars 163,165, 169 and 170). Contributions from foreign sources are generally prohibited (par 172) without violating freedom of association. In order to secure the independence of a political party, a balance between public and private contributions should be protected (par 176). In this respect, anonymous contributions must be regulated strictly to prevent undue influence from unknown third parties (par 174). In order to discourage the usage of soft money, public support to political parties "is often considered integral to respect for the principle of equal opportunity for all candidates, particularly where the funding mechanism includes special provisions for women and minorities" (pars 178–180, 183–192). Free air time to political parties and candidates by public radio and television is another form of public support (par 181). In order to ensure a transparent party and campaign finance and equality among competing candidates, a realistic spending limit must be determined by law (pars 193–197). Moreover, reporting campaign finance, both public and private funds, is a crucial standard of political funding. Political parties and candidates should keep the records of all contributions and such records must be publicly available (par 198). Furthermore, parties should also be required to file basic information regularly with the appropriate state authority to review, including the contributions and expenditures for pre-election and election periods separately (pars 199–206). Monitoring can be undertaken by a variety of different bodies, including a competent supervisory body or state financial body (pars 212–214). The abuse of state resources –using public vehicles, building, employee and similar – by incumbent candidates and parties must be carefully regulated in such a way that political parties will not merge with the state (pars 207–210). As the Council of Europe Committee of Ministers has stated, political parties should be subject to "effective, proportionate and dissuasive sanctions" for violation of political-funding laws (par 215).

In short, basic universal standards permit the regulation of political funding. The respective regulations must provide limits for contributions and spending; ban or strictly limit certain types of donations –foreign or anonymous–; require regular reporting and oversight of the contributions and expenditures of parties and candidates annually and during campaign periods and introduce measures to prevent abuse of public resources to the incumbent's advantage.

II. Regulations on Political Funding: The Turkish Case

In Turkey, the first legal regulation on political funding was introduced to provide free air time for political parties in 1949.⁸ However, this provision was repealed by the Democratic Party government in 1950 and the state radio assumed a monopoly of the government party similar to that of the single party period. Political funding was regulated by Law No. 648 on Political Parties in 1965, following the classification of political parties as "indispensable elements of

8 Political parties which were organized in 10 provinces or had three seats in the parliament and three provincial organizations were permitted to have 15 minutes of speech time for 13 days during the election campaign. However, the speech texts were examined by the prosecutor within 24 hours before the broadcast, Ö. F. Gençkaya, "Siyasi Partilere ve Adaylara Devlet Desteği, Bağışlar ve Seçim Giderlerinin Sınırlandırılması – Karşılaştırmalı Bir İnceleme ve Türkiye İçin Bir Öneri (State Aid to Political Parties and Candidates, Donations and Limitations on Electoral Expenditures)," in A. Çarkoglu et al., *Siyasi Partilerde Reform (Reform in Political Parties)*, (Istanbul: TESEV, 2000), 172. See also, Ö. F. Gençkaya, "Turkey," in Thomas D. Grant, ed., *Lobbying, Government Relations and Campaign Finance Worldwide, Navigating the Laws, Regulations and Practices of National Regimes*, (New York: Oceana Publications, 2005), pp. 513–530, "Public Funding of Political Parties: The Case of Turkey," in M. Walecki et al., *Public Funding Solutions for Political Parties in Muslim-Majority Societies*, (Washington D.C.: IFES, 2009), 39–49 and "Turkey," in the KAS Democracy Report – *Political Parties and Democracy*, (Bouvier: Bonn, 2007), 333–352.

democratic life” by the 1961 Constitution. Currently, Law No. 2820 on Political Parties of 1983 is the major regulation on political funding.⁹

The Sources of Party Revenues

The current Political Party Law also defines official sources of income in detail (Article 61), stating that they may be membership fees; “deputy fees” paid by party MPs; “special fees” for candidates paid to run for MP, mayor, members of town councils and general provincial council, as determined by the authorized central organs of the relevant political party; the earnings from selling a party’s flags, streamers, badges and similar signs and symbols; the earnings from selling party’s publications; the money charged for issuing party’s identity cards and notebooks, receipts and papers; the earnings from social events such as balls, entertainment and concerts organized by the party; the earnings from the party’s properties; donations; and state aid.

The amount of permissible membership dues is determined by the party’s statute. In practice, it is difficult and expensive to collect membership dues; therefore, they constitute less than 1 % of the annual revenues of political parties on average.¹⁰ However, small parties basically survive by members’ contribution only. Donations to political parties are regulated by the Political Party Law in a separate provision (Article 66) and the upper limits and prohibitions on certain sources are fixed. Donations are the second biggest source of party revenue, especially during the campaign period, but are not registered properly. The donation ceiling is determined every year in accordance with the re-evaluation ratio set by the Ministry of Finance and is at 30,710 Turkish Liras (10,236 EUR) in 2013.

Although the 1995 constitutional amendments enabled political parties to cooperate with and receive donations from associations, the Constitutional Court annulled the financial provision of the Law on Associations in 2007. Political parties thus cannot engage in commercial activities and accept financial assistance –cash or in kind – from foreign states, international institutions and persons and corporate bodies and any public organizations (Constitution, Article 69 and the Political Party Law Articles 66 and 67).

State aid to political parties was first introduced by Law No. 648 on Political Parties in 1965 and was subject to constitutional amendments and constitutional review until the mid-1970s. Eventually, in 1974, the Law No. 648 was amended so that “political parties which entered the last general elections and received at least 5 % of the total valid votes or won seats sufficient to form a parliamentary party group” were entitled to receive state aid in proportion to the votes the party received in the last general elections. Finally, on September 12, 1980, all political parties were banned and the constitutional order was suspended by the military government temporarily.

The 1982 Constitution (Article 68) which was amended in 1995 to include the state aid to political parties requires that “the state shall provide the political parties with adequate financial means in an equitable manner.”According to the current Political Party Law (Additional Article 1) political parties which passed the national 10% threshold for obtaining a seat in the parliament receive annual state aid in proportion to the parties’ valid votes in the 1984 local

9 Election Laws include the Law No. 298 on the Basic Principles of Elections and Electoral Registry, Law No. 2839 on Deputies Election and Law No. 2972 on the Elections of Local Administrations and Neighborhood Headmen and Elder Councils.

10 Ö. F. Gençkaya, *Devletleşen Partiler (Stateness of Political Parties)*, (Ankara: ANSAV, 2002).

elections (30 % of aid) and the number of seats (70 % of the aid). Later, the criteria for receiving state aid became subject to amendments and constitutional review again.

In addition to this criterion of vote sharing, the number of seats was also considered as another criterion for annual state aid in 1990 (Provisional Article 16). Thus, political parties which did not enter the last general elections, yet have seats – no less than 3 and no more than 20 – in the parliament also received annual state aid. However, this mechanism led to seat shifts, especially before the general elections and fluctuations in the party system. The government and opposition parties, which controlled an overwhelming majority in the parliament, decided to repeal these categories from the Political Party Law in May 2005. Thus, only those political parties which entered the last general elections can receive state aid in proportion to the votes received. According to the current system of state aid, two per five thousand of the total amount of the Column – B of the Revenues of the General Budget of that year is allocated to political parties which were entitled to enter the last deputies' election by the Supreme Board of Election (the Board) and passed the 10% countrywide threshold.¹¹ Political parties which failed to pass the countrywide 10 % threshold but received more than 7 % of the valid votes cast are also eligible to receive state aid. This aid is given as much as three times in a general election year and as much as twice in local administration elections, however cannot be given more than three times per year in case both general and local elections are held at the same time. The regular annual state aid is paid ten days after the law on annual budget enters into force; in an election year, it is paid ten days after the Board publishes the election calendar. State aid constitutes about 80–90 % of the eligible parties' annual revenues. Therefore, these political parties become dependent on the state financially.

In election years, as explained above, the annual state aid is multiplied by three in the year of general elections and by two in the year of local elections. Where two elections are held in the same year, the total amount cannot be higher than three-fold. The state aid is paid to the political parties within ten days following the announcement of the Supreme Election Board's decision concerning the election calendar.

The Political Party Law underlines (Additional Article 1) that state aid must be spent for parties' needs and activities. The major party units such as those dealing with local issues, youth and women may receive financial aid from the party center irregularly, especially during the elections, and mostly stand on their own feet. According to the 2001 Constitutional amendments, the Constitutional Court may rule that a party may be deprived of State aid wholly or in part when a motion for dissolution is brought before the court (Article 69). However, it is unclear what kind of sanction can be applied if a party does not receive state aid.

Campaign Finance

The major loophole in the Turkish political funding regime is campaign finance of political parties and candidates; the latter is not subject to any regulation in terms of transparency of political funding. The 1995 constitutional amendment added a provision requiring that "election... expenditures of political parties and candidates are regulated by law" (Article 69/final). Political parties submit their campaign finance figures attached to the relevant year's annual accounts to the Constitutional Court for supervision. However, currently there are some formal prohibitions applicable only to the election period, which are regulated by Law No. 298 (Articles 63–66). In this regard, public officials, including officers and servants and workers, as well as their equipment, supplies and facilities, cannot be involved with any political party or

11 The Law No. 2839 on Deputies Election, Article 33. Column B of the Revenues of the General Budget includes tax, enterprise and real estate, capital and similar revenues.

a candidate during the elections (Article 63). All elected officials including the Prime Minister, cannot use their official vehicles or vehicles assigned to public service during the election period (Article 65). These provisions can be interpreted within the framework of a restrictive approach to party regulation in Turkey. However, in order to bypass these prohibitions, the elected officials organize official ceremonies or visits to certain destinations and may hold public speeches usually related to election campaigns. The Supreme Council of Elections can only examine the legality of such activities during the official electoral period. Therefore, the abuse of state resources for political activities of the government party(ies) has become a usual practice outside the official electoral period, which is not subject to any investigation.

With the exception of the rules on campaign financing of presidential candidates (Law No. 6271 on Presidential Elections, Article 14) which was adopted on 19 January 2012, no regulation was introduced until now. The presidential campaign finance rules cover transparency, registration and reporting to the Supreme Board of Elections, which is different than the annual reporting authority for political parties. Thus, three institutions will deal with the supervision of political finance, namely the Constitutional Court in collaboration with the Turkish Audit Court and the Board.

Expenditures and Auditing

In accordance with the constitutional prescriptions, political parties' revenues and expenditures must be in line with their objectives. The Political Party Law defines the procedures to be applied in obtaining revenues and spending (Articles 69 and 70). There is no ceiling for expenditures; however, it is required to document the expenditures that are above a certain limit (23,72 EUR in 2013). Besides, political parties are exempted from paying advertisement tax within the scope of political activities described by the Political Party Law. In contrast, independent candidates are not provided with such a privilege.¹² This obviously constitutes another obstacle for full competition in elections.

Political parties may acquire real estate only for their residential needs, purposes and activities and use revenue from their immovable property only in line with their objectives (Political Party Law, Article 68). Furthermore, political parties can borrow money or take loans from any legal or natural person only in order to meet their needs.

The Constitution states that auditing of political parties by the Constitutional Court, and the definition of sanctions to be applied where contravention is determined are regulated by law (Article 69). The Constitutional Court shall obtain the assistance of the Audit Court in fulfilling its auditing duty. The current Political Party Law (Articles 69–71) provides the procedure and principles governing the party revenues and expenditures. Political parties at every level are obliged to keep an income and expenditure book and an inventory list (Article 60). Final accounts of political parties must be prepared according to the principles of balance sheet accounting (Article 73). Provincial organizations of the parties, including the party headquarters and affiliated sub-provinces, have to prepare the final accounts illustrating the previous year's performance results until the end of April following each budget year. The united balance sheet of political parties must be submitted by the party headquarters to both the Constitutional Court and the Office of the Chief Public Prosecutor until the end of June (Article 74). In case of failure to submit the party accounts on time or of violations of the legal provisions related to the acquisition or expenditure, there are administrative, civil and criminal sanctions to be imposed on political parties, party officials/candidates or other persons (e.g. donors) including confiscation, light and heavy imprisonments (Articles 77–77 and 111–118). Financial audit

¹² Law No. 2464 on Revenues of Municipalities, Article 14/7.

decisions by the Constitutional Court are to be published in the Official Gazette (Constitution, Article 153/6)

Although the current system seems to be more centralized and tighter, the parties' accounts are examined according to "whatever political parties return and the information and documents are available."¹³ The lack of standardized format for party accounts and of independent accountants leads to a low level of quality in auditing.¹⁴

Nomination Fee

Political parties may ask a fee from the candidates and this is regulated by the party's statutes. There is no regular declaration about such revenues. However, this amount varied between 1000 to 3000 YTL (500 to 1500 USD) in the 2011 general elections. Parties applied positive discrimination for female candidates by reducing the fees.

Independent candidates for national parliamentary elections submit a petition together with the receipt of the fee, which is equal the amount of the monthly gross salary of the highest ranked civil servant and consigned to the revenue department of the provincial election board where s/he shall enter the elections (Law No. 2839 Article 21/2). If an independent candidate fails to obtain enough votes to win a seat, this deposit shall be registered as an income to the Treasury (Article 41/1).¹⁵ In local elections the same procedures applies to the independent candidates (Law No. 2972 Article 13). If a candidate dies, withdraws his/her candidature before the legal deadline, or receives more votes than the quota for eligibility, or if his/her candidature is declined, the candidate or his/her legal successors will get back the deposit; to this end, they will have to apply for reimbursement after the elections. However, in local elections the fee which is deposited by the candidate for local elections is registered as revenue automatically without regard to electoral success or failure. This is another discouraging factor for independent candidates at local elections.

Indirect Funding

As expressed earlier, free air time for political parties' election propaganda was introduced in Turkey in late 1940s, yet was short-lived. The state radio and television company (TRT) was regulated as an autonomous state institution by the 1961 Constitution but the 1982 Constitution described it as an impartial state institution in its original text. The state monopoly in broadcasting was abolished by the constitutional amendment (Article 133) in 1993. The Law No. 3984 on the Establishment of Radio and Television Enterprises and Their Broadcast of 1994 (Article 27) underlines that "broadcasts during election periods are regulated by the Supreme Board of Elections within the framework of powers vested in the Board by law."¹⁶ The Supreme Council of Radio and Television (Article 32, Law No. 3984) is entitled to monitor the broadcasts of the radio and television enterprises during the election period in accordance with the decisions of the Board. The Law No. 298 (Article 52–55) enables political parties to express their program and objectives through radio and television during the election period. According to Article 52 of Law No. 298, "every political party which enters the elections is entitled to have two propaganda broadcasts on the first and last day of the broadcast propaganda period which

¹³ Gençkaya, 1999 and 2002.

¹⁴ GRECO, Evaluation Report on Turkey on Transparency of Party Funding, Third Evaluation Round, 26 March 2010, [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2009\)5_Turkey_Two_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2009)5_Turkey_Two_EN.pdf)

¹⁵ The nomination fee was 7,734 YTL (about 4,833 USD) in the 2011 elections.

¹⁶ See also Articles 52, 54, 55, and 55A of Law No. 298 on the Fundamental Principles of Elections and Electoral Registry. See also Articles 5, 20, 22 and 23 of the Law No. 2954 on Radio and Television of Turkey

begins on the seventh day prior to the polling day until 6 pm on the day before the polling day and with each broadcast lasting 10 minutes. Every parliamentary party group is given an additional 10 minutes of broadcast time. The government party, or in the case of a coalition government, the bigger party in government are given an additional propaganda time of 20 minutes; and minor government parties are given 15 minutes extra broadcast time. The main opposition party is also given 10 minutes additional broadcast time. These audio visual records can also be broadcast by all radio and television channels in Turkey at the same time.” These provisions do not apply for local elections. The broadcast of private radio and television stations is subject to the general provisions for the broadcast during the election period and supervised by the Board.

Besides, since the late 1980s the government is given special broadcast time each month in the state television (TRT) to promote the government’s activities in compliance with the principles of broadcasting, without the right of reply and without carrying any political objective: private channels may also broadcast this program simultaneously or later (Law No. 2954, Article 19).

No duties, taxes and levies are imposed on the income obtained by political parties, except for income deriving from their assets (Article 61). This rule does not apply to income obtained by independent candidates for their election campaign.

Both political parties and independent candidates are given equal opportunity in terms of space and cost in using the common advertisement boards provided by the municipalities or the township election boards directly (Law No. 298, Article 60).

Other Political Funding Sources

The state funds the conduct of elections during the general and local elections. Law No. 298 describes “electoral expenditures” including the budget of the Supreme Board of Elections and the General Directorate of Electoral Registry (Article 181). Moreover, the authorities referred to a special financing instrument in the election period consisting of – tax-free – daily fees to be paid to members and staff of ballot-box committees, the amount of which is determined by the Supreme Election Board (Article 182).

The Constitution regulates the salaries, allowances and pensions of the members of the Turkish Grand National Assembly (Article 86). The monthly amount of the salary shall not exceed the salary of the most senior civil servant; the travel allowance shall not surpass half of that salary. The social security expenses of their dependents are also paid by the general budget.

A Comparative Assessment

Except for Turkey and Lebanon, many of the Muslim majority countries in the Middle East and North Africa have, until recently, had limited democratic and multi-party experience. The findings of the chapters on North African/Middle Eastern countries in two comparative studies¹⁷ indicate that many of these countries incorporated guiding principles on political funding into their constitutional/legal framework recently. In all countries, the regulations basically comply with the international standards. However, there are some variations in terms of the sources of income, spending, reporting and sanctions. First of all, foreign donations are banned during and between elections. Private donations from legal persons (Egypt, Jordan and Tunisia) and anonymous sources (Yemen) are also banned. Basically, national natural and legal persons are

17 Walecki et al., 2009 and Öhman ed, 2013. These studies Egypt, Jordan, Lebanon, Morocco, Tunisia, Turkey and Yemen included respectively. See also, IDEA, Political Finance Database, <http://www.idea.int/political-finance/>.

the sources of donations in these countries. Some countries (Jordan, Lebanon, Morocco, Turkey and Tunisia) apply an annual ceiling for certain private donations, such as electoral expenditure limits. The only contradictory situation was the total ban of private donations in Tunisia during the 2011 electoral campaign.¹⁸ There is no spending limit regulation for political parties. However, spending limits for campaigns vary in Egypt, Lebanon and Tunisia. The major problem is the lack of effective enforcement mechanism in all countries. The main reason behind the introduction of public funding in these countries was to promote pluralist party systems and fair competition. However, there are problems of existing mechanisms and implementation. Currently, direct public funding is provided regularly in Jordan, Tunisia (in election campaigns only), Morocco, Turkey and Yemen. Free access to media (Tunisia, Turkey and Yemen) and tax exemption (Egypt and Turkey) are types of in-kind public funding.

The major issues in these countries are the financial reporting and disclosure requirements and the effectiveness of the relevant mechanisms. Moreover, the state aid to political parties is not regular and based on a fair allocation method. Indirect state funding, as well as public media, is also controlled by the ruling party. It is obvious that unregistered indirect funding –public or private – is widespread in these countries in varying degrees. These studies underline that an effective enforcement mechanism is also necessary for regulating political funding against corruption. Political culture and the party-state connectedness also hinder the development of pluralistic party system, transparent and accountable politics.

The recent Arab Spring uprisings in many of these countries, where a *de facto* one-party state existed, challenged the party life including party laws. Although there seems to often be a quite negative perception of political parties in these countries, political parties can play an important role in the transition period. For a long period, certain segments of these societies were either isolated from the political system or neglected secular political patterns. It is expected that the grassroots effect on political parties will also impact on the party regulations. The so far unspecified extent of women quotas in political parties (Jordan and Tunisia) is a sign of widening participation.¹⁹ Consequently, political funding regulations will be reregulated in such a fashion that they provide fair, equal and pluralistic practices.

In Turkey specifically, direct public funding constitutes a major source of revenues for the eligible parties (currently only three). The threshold for receiving state aid is high and debatable. Access to free air time during the election period constitutes another area of dispute among political parties in Turkey. On the one hand, opposition parties complain about the privileged status of the government and opposition parties with regard to broadcast time. On the other hand, the ownership structure of private media has changed rapidly and foreign capital has become a significant share holder in these companies. In conclusion, like the “premature” model of state aid to political parties in many North African/Middle Eastern countries, the historically longer experience of direct and indirect state aid to political parties in Turkey is also unfair and ineffective. In general, the legal provisions regulating direct and indirect political funding lead to less competitive, less pluralist and less representative party systems.

¹⁸ In Egypt an upper limit on donations for presidential election campaign exists. However, the newly adopted Law on Presidential Election does not include any spending limit in Turkey.

¹⁹ Among all Arab countries, Iraq is the first country that included women quotas into its Constitution in 2005. Muhamad S. Olimat, *Arab Spring and Arab Women Challenges and opportunities*, (Abington and New York: Routledge, 2014).

Report on the funding problems faced by political parties in Algeria

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The question of the funding of political parties has been a very sensitive issue in Algeria for a number of years. It is a sensitive issue because it has, from experience, provided evidence of the link between money and politics. The latest legislative elections in May 2012 bear witness to this fact, provoking new problems regarding the funding of political parties. These problems related in particular to questions of transparency, equity, foreign funding and, generally, the cleansing of political life in a country that has long been marked by a long single-party tradition, and in which the question of the funding of political parties had never been an issue.

Thus, like many States moving towards multi-party systems, Algeria has, since 1989, had legislation relating to the public financing of political parties. In reality, it is in the framework of a recent process of reforms controlled and initiated by the Government during 2012 that the judicial and institutional provisions designed to provide a framework for the cleansing of political life and, more precisely, the funding of political parties were taken up and designed. These provisions are based on three major laws: the organic law of 12 January 2012 relating to political parties,²⁰ the organic law of 12 January 2012 relating to the electoral system,²¹ and the law of 20 February 2006 relating to the prevention of and fight against corruption.²²

With these provisions in place, can we consider that there is a sufficient and definitive framework for the funding of Algerian political groups? The answer to this question would be provided in the course of 2012. We have mentioned the legislative elections of May 2012 and we will also mention the local elections in November of the same year. These two elections show that the funding of political parties is still a worrying question for Algeria. Certain legal loopholes persist in texts that have been adopted and structural weaknesses and a lack of precision characterise several provisions. Today, the operation of political parties and their electoral activities still create processes that often push the limits of legality.

It seems important to approach the topic of the funding of political parties in Algeria in this precise context, as an examination of solutions adopted reveals the need to go back to the legislator once again.

We will examine the questions that arise, in Algeria, from the funding of political parties. These fall into two categories: private funding (1) and public funding from the State (2). Next we will describe the limits of the State's control over the resources and expenses of political parties (3). Then we will consider certain key problems concerning the transparency of political party funding (4).

²⁰ Organic law dated 12 January 2012 relating to political parties, Official Journal of the Algerian Republic (JORA — *Journal Officiel de la République Algérienne*) no. 02 dated 15 January 2012, p. 9.

²¹ Organic law dated 12 January 2012 relating to the electoral system, Official Journal of the Algerian Republic (JORA) no. 01 dated 14 January 2012, p. 8.

²² Law dated 20 February 2006 relating to the prevention of and fight against corruption, Official Journal of the Algerian Republic (JORA) no. 14 dated 8 March 2006, p. 4.

I. Financing from private resources

By law, political parties may only benefit from three sources of private funding: contributions from members; donations, bequests and gifts received; and income related to activities and assets.

1. Contributions from members

Contributions from members are those made by ordinary and elected members. The amount of the contribution is fixed by the decision-making and executive bodies of the party. This amount is generally low and the total of the contributions is not enough to cover operating expenses.¹ The low value of this source of funding is primarily due to the financial resources and economic situation of activists and members or due to the shortcomings in the contribution collection systems within the parties. Contributions from members are, in fact, just a mark of belonging as a supporter and of the activist's loyalty to his party — his form of commitment as a supporter.

Contributions from Members of Parliament and elected persons feed a party's funds to a far greater extent than the contributions of ordinary members. In their statutes, the majority of parties establish that any member who is elected to the chambers of Parliament must make a contribution to the party equivalent to one month's annual parliamentary allowance that said member receives.² This contribution from elected members constitutes a significant source of funding for political parties.

2. Donations, bequests and gifts

By law, donations, bequests and gifts can only be made by identified natural persons, thereby entirely excluding donations from legal persons.

These donations are generally obtained during the elections.

The first limit fixed by law regards the amount of this source of funding. Donations, bequests and gifts cannot exceed three hundred (300) times the national minimum wage per donation per year.³

The second limit, by law, forbids political parties from «directly or indirectly receiving financial support or material from any foreign party in any form or on any grounds».⁴ The law is not very precise in terms of the form that this type of funding can take, or the particular sanctions to which the violating party would be exposed should it receive financing from foreign sources. Here it is necessary to refer to the provisions of the organic law of 12 January 2012 relating to the electoral regime. This law relates to candidates standing in a local or national election rather than the political party itself.

1 The annual contribution for a member of the National Liberation Front (FLN — *Front de Libération nationale*) is set at the sum of 400 dinar (4 euro). For the National Democratic Rally (RND — *Rassemblement National démocratique*), another party of the presidential majority, the annual contribution is 200 dinar (2 euro).

2 The monthly allowance from the Algerian Parliament is 400,000 dinar (4000 euro). The statutes of the Workers' Party (PT — *Parti des travailleurs*) oblige any member elected to Parliament to pay one half of the payment they receive back to the party. Elected members of the FLN make a contribution of 50,000 dinar (500 euro) per year to their party's funds.

3 The national minimum wage is 18,000 dinar (180 euro).

4 Article 56 of the organic law relating to political parties.

Here it is appropriate to emphasise that although these two limits are expressed in law, the limits are merrily breached in practice. Certain political parties are more affluent. Their internal financing relies on certain key contributors, whose gifts greatly exceed the amounts permitted.

Despite the provisions restricting donations from abroad, certain parties benefit from colossal sums to finance their activities. In this respect, we can cite the case of the, now dissolved, Islamist party.⁵ Although the leaders of this dissolved party always denied the existence of foreign funding, the party benefitted from money from the international Islamist community.⁶

The donations must be paid into an account opened by the political party with a bank or national financial institution.⁷

3. Income from the activities and assets of the party

This income constitutes another form of self-financing for Algerian political parties.

Although political parties are forbidden by law from undertaking any commercial activity, they can use income related to their activity and resulting from non-commercial investments.

Regarding this form of financing, the parties in power hold a real advantage over new or opposition parties. FLN, the party from the old single-party regime, has significant real estate holdings acquired before the introduction of the multi-party system. This problem of the inequality in the allocation of real estate property and assets to political parties is often condemned and remains one of the concerns of the democratic political field.

II. Public financing from the State

Public financing from the State is the main source of income for political parties. This financing is carried out in two ways: via the direct subsidy of the operation of political parties and via the direct and indirect involvement of the State in expenses related to financing electoral campaigns.

1. Financial aid for the operation of political parties

Financial aid from the State for the operation of political parties is carried out in the form of direct financial subsidies for operational activities of parties. This aid covers the operating costs of parties, the organisation of their ordinary national conferences and the operation of parliamentary groups.

This aid is annual and is fixed by law through the Finance Law. The total amount is stipulated in the State budget.

5 The Islamic Salvation Front (FIS — *Front Islamique du Salut*), formed in February 1989, was a political group campaigning for the creation of an Islamic State in Algeria. This group was dissolved in March 1992 by the Algerian Administrative Court.

6 Several studies have emphasised the role of the external financing of the FIS and other religious groups. During the legislative elections of 10 May 2012, the general secretary of the Workers' Party condemned the financial support that had reportedly been received by certain Algerian Islamist parties from countries such as Qatar and Turkey. A leading member of the RND also maintained that Algerian Islamists were receiving subsidies from abroad.

7 Article 62 of the organic law relating to political parties.

For each party, the amount of aid is calculated on the basis of the number of seats obtained in Parliament and the number of the party's female members elected to the assemblies.⁸ Thus, the number of members of parliament determines the sum that each party receives.

Here we must note the appearance of an additional criterion for the usual attributed assistance. The new organic law of 2012 relating to political parties differs from its predecessor in the addition of aid depending on the number of female party representatives elected to the assemblies. This innovation, designed to increase the opportunities for women to enter elected assemblies, is an incentivising measure contained in an organic law of the same date.⁹ Article 7 of this law stipulates the opportunity for political parties to «benefit from specific financial aid from the State, based on the number of their female candidates elected to the People's Municipal Assembly, People's Provincial Assembly and Parliament».

This new aid relates to local elections as well as national elections. Although the total of this specific aid is not currently fixed, due to a lack of implementing provisions, the measure is an incentive for parties to reserve a more prominent role for female candidates when they draw up electoral lists. The implementation of this measure was one of the factors that allowed 146 female members, i.e. a representation of 31.6%, to enter the new assembly at the last legislative elections of 10 May 2012.¹⁰

Also, whilst awaiting the implementing provisions for this measure, each party benefits from annual aid, the total of which is calculated on the basis of the number of its representatives in the two chambers of Parliament. This annual aid totals 200,000 dinar (2000 euro) for each member of the People's National Assembly and each member of the Council of the Nation.

Financial aid from the State for the operation of political parties is also granted by covering certain costs linked to the operation of parliamentary groups related to the political parties.

These groups, which play an essential role in parliament, benefit from a certain number of amenities and means necessary for their operation. Places are assigned to them inside the chambers. Their operating expenses are partially covered by the budget of each chamber. The financial aid attributed is proportional to the number of members of parliament registered with each group. The various funds from which these parliamentary groups benefit can be considered as indirect financial assistance for political parties.

2. State aid for financing electoral campaigns

The involvement of the State in the financing of electoral campaigns constitutes another form of subsidy available to political parties. It is differentiated from the other subsidies because it is specific to an occasion — aid is provided when an election is due.

The Electoral Code establishes the form of this aid by distinguishing two types: direct aid and indirect aid.

8 Article 58 of the organic law relating to political parties "A registered political party can benefit from financial aid from the State, based on the number of seats obtained in Parliament and the number of its female members elected to the assemblies.

The total possible aid to be allocated by the State to political parties is stipulated in the State budget".

9 The organic law of 12 January 2012 establishes the methods of increasing the opportunities for women to enter the elected assemblies, JORA no. 01 dated 12 January 2012, p. 39.

10 The previous People's National Assembly elected in 2007 included 31 women out of a total of 389 members, i.e. a representation of 12.5%.

The direct participation of the State in the financing of electoral campaigns is mentioned in Article 203 of the Code: “the electoral campaigns are financed through resources coming from possible aid from the State, awarded fairly”.

The law does not provide for advance financing of electoral campaigns but rather for a partial reimbursement for political parties that win at least 20% of votes. For these parties, the reimbursement reaches a total of 25% of expenses incurred within the authorised ceiling of one million dinar (around 10,000 euro) per candidate.

The partial reimbursement is also available for candidates at the presidential election: The rate can reach 30% for candidates who obtain more than 20% of the votes cast.¹¹

The reimbursement is paid to the political party under whose aegis the candidate ran.

Some people think that this threshold of 20% is too high because it favours the parties with the best grounding and who therefore already have the resulting financial benefits. In fact the cost of a campaign at the legislative elections for a party with a presence in 48 wilayas (provinces) is estimated to be between 60 million dinar (6 million euro) and 70 million dinar (7 million euro). The cost for a campaign at the local elections is estimated to lie, in total, between 10 million dinar (1 million euro) and 30 million dinar (3 million euro). Thus at each legislative election, the organisational and financial methods constitute a true challenge for a large number of political parties, in particular for those most recently registered.¹²

The involvement of the State in the financing of electoral campaigns also includes indirect aid. Certain costs are covered such as the provision of free television and radio air time, public buildings, billboards and air transport subsidies.

III. Regulation of political party financing

The regulation of political party financing is as much the subject of special provisions in the organic law relating to the electoral regime as in the organic law relating to political parties.

This regulation is performed by the internal bodies of the party since the “party leader must present a financial report validated by an auditor to the delegates at a congress or general meeting”.¹³

This is also regulated by external bodies. Under the organic law relating to political parties «aid allocated by the State to a political party can be subject to regulation regarding its usage». ¹⁴ The law establishes a special accounting procedure whereby «any political party must have double-entry book-keeping and an inventory of its movable and immovable assets». The party must therefore present its annual accounts to the competent administration, in this case to the Minister of the Interior and the Budget Minister.

The regulation of political party financing for legislative or presidential elections, and in this case in terms of the campaign accounts, is the subject of special provisions in organic law

¹¹ Article 206 of the organic law relating to the electoral regime.

¹² Observation from the final report of the European Union election observation mission on the occasion of the May 2012 legislative elections. The Mission notes that the parties of the Presidential Alliance were the most active, their financial position being notably stronger.

¹³ Article 60 of the organic law relating to political parties.

¹⁴ Article 59 of the organic law relating to political parties.

no. 12–01 of 12 January 2012 relating to the electoral regime. The candidates in the legislative elections must therefore create a campaign account detailing all revenue and expenses. The regulation of campaign accounts is a task that is exclusively reserved for the Constitutional Council, without further regulation by the Court of Accounts. If an account is rejected by the Constitutional Council, no reimbursement may be made on this account.

These two organic laws establish a system of administrative penalties from the suspension to the dissolution of a party that receives funding outside of the established legal framework.

These laws also include penalty provisions. Articles 77 and 79 of the organic law relating to political parties stipulate that members and leading members of political parties who have breached the law or proceedings «are restrained in accordance with the legislation in force», the legislation in force being understood to be the Penal Code. The organic law relating to the electoral regime mentions penalties depriving candidates who have violated the prohibition against receiving donations from abroad of their freedom by punishing them «with imprisonment for a term of one to five years, and a fine of 2000 to 20,000 Algerian dinar».¹⁵

Reference is even made to the law relating to the prevention of and fight against corruption. Article 224 of the organic law relating to the electoral regime establishes that «anyone who accepts or solicits donations or promises» is subject to the penalties set out in the law relating to the prevention of and fight against corruption. Article 80 of the organic law relating to political parties also establishes that «the penalties set out in the law relating to the prevention of and fight against corruption apply to any objectionable action occurring during the course of the activity and the management of a political party».

In fact, although through its laws the State imposes an abundance of provisions relating to penalties for breaches to regulations regarding the financing of political parties, nothing is less certain than its ability to apply them.

For many provisions, there are still no implementing provisions. There is still very little control of the public financing of political parties. The question therefore arises as to whether the State really has the means or the desire to bring political party finances into order.

IV. The question of transparency in the funding of political parties

The question of transparency in the funding of Algerian political parties arises at every election. This is an important question given that it relates to the issue of good governance and that the money given to the parties must be spent according to the designated objectives.

The last legislative elections in May 2012, as well as the local elections in November of the same year, demonstrated the lack of effective mechanisms even for preventing the illicit use of funds in Algerian political party activities. Several cases of overspending were identified during these elections, particularly with regard to the origin and legality of sources of financing for campaigns. It was found that the ceilings set out in the electoral code were significantly surpassed. Several candidates spent more than the fixed amounts buying votes. Certain parties sold positions on their lists in exchange for funding.

This situation shows that the ceiling is not regulated and that the mechanisms for tracing financing, particularly during the elections, are not well developed. During these latest elections, as in previous elections, political parties did not publish their campaign accounts. We know

¹⁵ Article 231 of the organic law relating to the electoral regime.

that publishing accounts constitutes an essential guarantee of transparency. Funding and pressure from financial powers to be avoided.

This dark side that characterises the funding of parties also features in the management of political party assets. Although the internal statutes of the political parties prescribe that parties must present financial management reports during conferences, a significant number of political parties do not adhere to this obligation. Party members remain completely unaware of the total assets of the parties. To this question of party asset management we must add the lack of accounting reports. Despite the law that governs these reports, most parties do not keep accounts; as of yet, no political party has published the state of its finances. This is, without doubt, proof that the funding of political parties in Algeria requires further regulation.

Although the law has laid down a specific regulation regarding the funding of political parties, this particular text was late to appear in the legal schedule.¹⁶ The legislator displays a certain indifference in this area. In the same way, whilst the law exists, its provisions, in their concrete form, are not proving effective, given the absence of implementing provisions.

Finally, one of the key questions that arises today is that of the equity that must exist between political parties. Experience shows that some parties benefit from State subsidies whereas others do not. In this area, the lack of disclosure examined above and the difficulty in identifying those violating requirements give rise to the pressing need to create an independent or jurisdictional body in charge of the funding of political parties in Algeria. This call has found increasing resonance thanks to the changes seen in the Algerian political field, notably the emergence of an independent press that pays great attention to the subject.

¹⁶ Article 63 of the organic law relating to political parties: "Without prejudice to the provisions of the present organic law, political party funding is the subject of a specific text".

SESSION III: PARTICIPATION OF POLITICAL PARTIES IN ELECTIONS

**Part 1: General standards and
some specific issues related to the
participation of political parties in
elections in European countries**

Venice Commission Standards on Political Parties and Elections

**Mr. Evgeni Tanchev,
Member of the Venice Commission,
Former President of the Constitutional Court of Bulgaria**

I. Introductory Remarks

This report does not analyse the whole range of implications of the relationship between parties and elections and the impact on political representation and constitutional government. It does not concentrate on the comparative constitutional and para-constitutional interrelationship between parties and elections but on the international standards governing the role of parties and elections to the representative government as provided chiefly in the Venice Commission documents.

Legal issues concerning registration, prohibition, financing and oversight of political parties, elections and electoral marketing are omitted, not because they are underestimated or assumed to be of less significance, but for the simple reason that they would be approached in the other reports and panels by my respected colleagues and participants in this conference.

To avoid redundancy by repetition and a situation where my attempts to compare the emerging national models and best practices would be tantamount to bringing water to a well, I will limit my approach which should be considered as a part of the whole treatment of the issue by the speakers on the present panel.

My report is based on the international and especially European standards established mainly in the soft law instruments of the Venice Commission of the Council of Europe and OSCE/ODIHR. Without any doubt, issues over the relationship of parties and elections and its impact on political pluralism and inter-party and intra-party democracy in a comparative perspective deserve special attention, but for the present purposes and for fear of excessive length, I will limit myself. In a few words, from a historical perspective, pluralist representative democracy based on parties and competitive elections has aimed to prevent oligarchical trends that had been a long-time tradition in history represented by despotic one-man rule, few party leaders, decisions in a smoky room or caucuses, well depicted by Moisei Ostrogorsky or Robert Michels' iron law of oligarchy (Organisation tantamount to oligarchy) or in Max Weber's portrayal of parties as formations fighting for rule with a tendency to adopt an authoritarian structure for themselves.¹

Last but not least in the present paper, the intra-party democracy aspects (inherent in the structure, functioning and organisation within a party) and inter-party democracy as one of the cornerstones of democratic constitutional governance founded on free, pluralist, competitive elections are treated from the perspective of the Venice Commission documents and standards.²

¹ K. von Beyme, *Political Parties in Western Democracies*, Gower, Aldershot, 1985, 232

² See clear-cut differentiation between these categories in K. Janda, *Political Parties and Democracy in Theoretical and Practical Perspectives*, 2002, NDI, p.21, www.ndi.org

II. Legal Regulation of the Functioning of Political Parties and the Issue of Intra-party Democracy

Though political parties have been described by ancient historians, especially in Greece and Rome, and through the Middle Ages, they have been strangers to ancient laws, constitutions and parliamentary statutes for a period of three centuries since the emergence of the modern nation states after the 1648 peace treaty of Westphalia. It was only after World War II that some of the constitutions³ mentioned and legislation addressed the issue of political parties.⁴

There are two basic models of regulation of issues of internal democracy according to the degree of legal intervention in the political party's life and activities.

The liberal approach – US or Anglo-Saxon gradual institutionalisation leaving the door wide open to the party self-regulation based on the gradual evolution of the political and party systems in those countries, where parties appeared and disappeared without undermining the robust competitive inter-party democracy.

The regulatory approach might be observed mostly in Europe. Germany and Austria are most typical examples, striving for meticulous completeness and entering into detailed regulation partly, but not solely, reacting to their past experience. Different countries follow one or a combination of these patterns, but the selected type does not determine the level of intra-party democracy in a particular party.

Today three levels of regulation of the interrelationship of parties and elections might be distinguished with the first two of them being legal (national and supranational) and the other, though most extensive, layer of norms belonging to the area of autonomous party regulations, constitutional conventions and democratic traditions. I will leave aside the national constitutional and para-constitutional level of regulation of political parties.

III. International Standards on Political Parties

In the preparation of its opinions and reports/studies related to political parties, the Venice Commission takes into account a number of international standards concerning in particular the freedom of association, the freedom of expression, and the prohibition of discrimination as set out, among others, in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

“At the international level, the provisions of two basic instruments must be taken into account. The International Covenant on Civil and Political Rights (1966), developing the rights of this nature proclaimed by the Universal Declaration of Human Rights (1948), recognises the right to hold opinions and the right to freedom of expression (art. 19) alongside the right to freedom of association (art. 22), notwithstanding the possibility of establishing legal restrictions to their exercise due to the special duties and responsibilities that these rights imply”.

3 Among the first constitutional references to political parties were the 1944 Island constitution and 1946 Guatemala constitution, contrary to the widely circulated facts that the first constitutions were the 1946 Italian one and the 1949 German Grundgesetz

4 For an extensive treatment of the evolution of legal regulation in the world, see Biezen, Ingrid van and Gabriela Borz (2009). ‘The Place of Political Parties in National Constitutions: A European Overview’, Working Paper Series on the Legal Regulation of Political Parties, No. 1. 2009, <http://www.partylaw.leidenuniv.nl/uploads/wp0109.pdf>

“With a regional scope and for the purpose of advancing the collective enforcement of certain of the rights stated in the Universal Declaration, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), agreed by the Council of Europe Member States, likewise recognises the rights to freedom of expression (art. 10) and to associate in political parties as part of the general freedom of assembly and association (art. 11)”.

“Other significant provisions of the ECHR include the prohibition of discrimination with regard to the enjoyment of the rights and freedoms set therein (art. 14) and the admission of restrictions on the political activity of aliens (art. 16). The case law of the ECtHR has accordingly developed a consistent interpretation of the non-discrimination principle, making clear that not every distinction or difference of treatment amounts to discrimination. Protocol no. 12 to the ECHR, establishing a general clause of non-discrimination, and the Convention on the Participation of Foreigners in Public Life at Local Level (1992) are also relevant”.⁵

“The International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) are the two main legally binding instruments applicable to states in this regard. In addition, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) is integral to understanding the state’s rule in ensuring gender equality with regards to political parties. Further, the rights and protections articulated in these legally binding documents are reiterated in International Customary Law through the Universal Declaration of Human Rights (UDHR). In addition, there are a number of political commitments persuasive upon OSCE states which are relevant to a full understanding of these issues. Such instruments include, most notably, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE (Copenhagen Document). The Council of Europe (through both the Committee of Ministers and the Parliamentary Assembly), the European Commission on Democracy through Law (Venice Commission) and other bodies of the Council of Europe have also published a number of guiding documents which can provide an understanding of good practice with regard to legislation concerning political parties. A recent addition to this body of instruments is the United Nations Convention Against Corruption (UNCAC) and the 1999 Council of Europe Criminal Law Convention on Corruption”.⁶

“The International Covenant on Civil and Political Rights and the European Convention on Human Rights represent legal obligations upon states, having undergone a process of ratification. While the Universal Declaration of Human Rights and the Copenhagen Document do not have the force of binding law, the nature of these political commitments make them persuasive upon signatory states”.⁷

CDL-AD(2010)024 Guidelines on Political Party Regulation by OSCE/ODIHR and Venice Commission, adopted by the Venice Commission at its 84th Plenary Session (Venice, 15–16 October 2010), Annex A.

5 CDL-AD(2009)021 Code of Good Practice in the field of Political Parties, adopted by the Venice Commission at its 77th Plenary Session (12–13 December 2008) and Explanatory Report, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13–14 March 2009), §§87–88–89.

6 CDL-AD(2010)024 Guidelines on Political Party Regulation by OSCE/ODIHR and Venice Commission adopted by the Venice Commission at its 84th Plenary Session (Venice, 15–16 October 2010), §31

7 Ibid, Annexe A

A. International Conventions, United Nations and UN specialised agencies

- International Covenant on Civil and Political Rights (1966) (ICCPR) Art.: 2, 14, 19, 22.
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Art.: 3, 4 and 7.
- International Convention on the Elimination of Racial Discrimination Art.: 2, 5.
- United Nations Convention against Corruption Art. 7(3).
- Universal Declaration of Human Rights Art. 19, 20.

B. Council of Europe

- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Art. 10, 11, 14.
- European Convention for the Protection of Human Rights and Fundamental Freedoms-Protocol 12, Art. 1.
- Framework Convention for the Protection of National Minorities Articles 4, 7 – Convention on the Participation of Foreigners in Public Life at the Local Level, Article 3.
- Decisions of the European Court of Human Rights.
- Recommendation and Resolutions adopted by the Parliamentary Assembly of the Council of Europe, in particular, Resolution 1308 (2002) Restrictions on political parties in the Council of Europe member states, Resolution 1344(2003) Threat posed to democracy by extremist parties and movements in Europe, Resolution 1546 (2007) The code of good practice for political parties.
- Recommendations and Resolutions adopted by the Committee of Ministers of the Council of Europe, in particular, Recommendation (2003)4 on common rules against corruption in the funding of political parties and electoral campaigns.
- Council of Europe, Group of States against Corruption – GRECO, Evaluation Reports.

C. European Union

- Charter of Fundamental Rights of the European Union, Art. 12, 21, 23.

D. OSCE

- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE), Articles 5.4, 5.9, 7.5, 7.6, 9.1, 9.2, 9.3, 9.4.

A short overview of the regulative sources would certainly include Council of Europe Parliamentary Assembly Resolutions like Recommendation 1438 (2000) and Resolution 1344 (2003) on the threat posed to democracy by extremist parties and movements in Europe, Resolution 1308 (2002) on the restrictions on political parties in the Council of Europe member states, Recommendation 1516 (2001) on the financing of political parties, and Resolution 1264 (2001), Resolution 1320 (2003) and Recommendation 1595 (2003).

IV. Political Parties and Elections in the Venice Commission Soft Law Comparative Studies and Opinions

- 1) **CDL-AD(2010)024** Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission – Adopted by the Venice Commission at its 84th Plenary Session, (Venice, 15–16 October 2010)
- 2) **CDL-AD(2009)002** Code of good practice in the field of Political Parties adopted by the Venice Commission at its 77th Plenary Session (Venice, 12–13 December 2008)
- 3) **CDL-AD(2006)025** Report on the Participation of Political Parties in Elections adopted by the Council for Democratic Elections at its 16th meeting (Venice, 16 March 2006) and the Venice Commission at its 67th plenary session (Venice, 9–10 June 2006)
- 4) **CDL-AD(2002)** *The Code of Good Practice in Electoral Matters*
- 5) **CDL(2012)025** Comments of the Institute of Legislation and Comparative Law under the Russian Federation government on the Federal Law of the Russian Federation on political parties
- 6) **CDL-AD(2011)046** Opinion on the draft law on amendments to the law on political parties of the Republic of Azerbaijan adopted by the Venice Commission at its 89th Plenary Session (Venice, 16–17 December 2011)
- 7) **CDL-AD(2011)006** Joint Opinion on the revised draft law on financing political activities of the Republic of Serbia by the Venice Commission and the OSCE/ODIHR – Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25–26 March 2011)
- 8) **CDL(2013)045 COMPILATION OF VENICE COMMISSION OPINIONS AND REPORTS CONCERNING POLITICAL PARTIES**

As a specific type of “free association of persons”, the central importance of political parties in the functioning of a democracy, their foundational significance to a pluralist political society and their fundamental role in the formation of the will of people have been constantly stressed by the Venice Commission in its opinions, reports, studies and guidelines on political parties. They are primordial to the formation of parliaments and, when the president is directly elected, in the selection of the head of state and the executive legislative relationships in the nation states that are members of the Council of Europe.

The relationship of political parties and elections has been present in the definition of political parties as their main function in constitutional democracies. “A political party is ‘a free association of persons, one of the aims of which is to express the political will of citizens including through participation in the management of public affairs and the presentation of candidates to free and democratic elections.’ This definition of parties includes associations at any level that function in order to present candidates for elections or exercise political authority through election to governmental institutions.”⁸

“A political party is an association with the task of presenting candidates for elections in order to be represented in political institutions and to exercise political power on any level: national, regional and local or on all three levels.”⁹

Political pluralism, toleration and interchangeability of parties in governance and opposition (democratic alternation in power) based on the voters’ free will expressed in competitive and fair elections has been axiomatic to constitutional democracy. In principle, it is difficult to imagine that an authoritarian or even more a totalitarian party might initiate, support and adhere

8 CDL-AD(2010)024 Guidelines on Political Party Regulation by OSCE/ODIHR and Venice Commission, adopted by the Venice Commission at its 84th Plenary Session (Venice, 15–16 October 2010), §26.

9 CDL(2013)045 at 9, CDL-AD(2009)002 Code of Good Practice in the Field of Political Parties, adopted by the Venice Commission at its 77th Plenary Session (Venice, 12–13 December 2008), §§10–11

to constitutional democracy requirements and principles. From another prospective it would be hardly possible for a party enforcing democratic values and principles to survive and compete for power when the governmental system rules out democratic values. Though intra-party democracy obviously does not coincide with inter-party democracy, both are closely interconnected and functionally related and sine qua non to constitutional democracies.

V. Logistics of Parties' Participation in Elections

Venice Commission guidelines and opinions on legislation on political parties underline the essential role of political parties in the electoral process, and highlight the existence of some issues of great importance in the practical implementation of the right to free and fair elections.¹⁰ Parties are the main players in the electoral process, the field and the rules of which are defined mainly by electoral laws, laws on political parties and the regulation of political parties through charters and other prescriptive party instruments. Hence the understanding of elections as one of the main reasons for the existence of political parties as basic elements of the 'electoral game'. National diversity due to specific historical, cultural, political, social and national factors was reflected and laws often a reaction to national problems and experiences.

Parties are important throughout the whole electoral process. Issues in the electoral campaign may be grouped according to the phases observed in any election.

1. Registration of Political Parties and Candidates in the Election

The *Code of Good Practice in Electoral Matters* considers universal suffrage as the first of the principles underlying Europe's electoral heritage which "means in principle that all human beings have the right to vote and to stand for election". However, this right may be subject to certain conditions, usually concerning age and nationality and payment of an electoral deposit.¹¹ The individual right to stand for election may be affected by two different sets of rules: first, by the national legislation concerning all parties and candidates contesting an election and, second, by rules adopted by the parties for nominating their candidates. Legal regulation has to comply with the European Court of Human Rights' jurisprudence on political pluralism as a precondition of democracy. Monitoring of standards must ascertain that additional requirements imposed on parties' and candidates' registration are not so heavy as to impair the social pluralism.¹²

The concept and basic function of a political party has been to participate in the management of public affairs by fielding candidates for free and democratic election in an effort to gain and

10 For this review I have relied on the comments provided by Messrs A. Sanchez-Navarro and H.-H Vogel, as well as on some remarks provided by the members of the Council for Democratic Elections. This report was adopted at the 16th meeting of the Council for Democratic Elections (Venice, 16 March 2006) and the 67th Plenary session of the Venice Commission (Venice, 9–10 June 2006).

11 The Code of Good Practice in Electoral Matters (CDL-AD(2002)023 rev), I, 1.a. See also Report on the abolition of restrictions on the right to vote in general elections endorsed by the Venice Commission at its 61st Plenary Session (Venice, 3–4 December 2004) (CDL-AD(2005)012).

12 Some countries require the fulfilment of some additional conditions for applications to be presented. In particular, they may consist in a number of signatures (200 persons eligible to vote in the constituency, in Germany; one percent of the voters registered in the constituency, in Spain), or in the deposit of certain amounts of money. While Albania, Latvia, "The Former Yugoslav Republic of Macedonia" or Slovakia, amongst others, allow only 5 parties to participate in elections, in most of the others, parties do enjoy a more advantageous position than independent or non-party candidates with respect to matters such as requisites for presenting candidates and access to public mass media.

exercise political authority.¹³ Political parties are, as some Constitutions and the European Court of Human Rights have expressly acknowledged, essential instruments for democratic participation and are entitled to register themselves and register their election candidates. The registration requirement has been accepted, being considered not *per se* contrary to the freedom of association, provided that conditions for registration are not too burdensome. Requirements for registration of political parties are very different from one country to another: they may include, for instance, organisational conditions, requirement of minimum political activity, of reaching a certain threshold of votes when standing for elections, certain territorial representation, and a minimum number of members for party registration. Generally, measures to limit the number of political parties able to contest an election are not considered incompatible and could be seen as reasonable for the administration of elections and to prevent fragmentation. However, legislation should avoid restricting the number of parties through overly burdensome requirements for registration or expressions of minimum support. Not only do such restrictions inherently minimise the free functioning of political pluralism in society; they can easily be manipulated to silence parties or candidates who express opinions unpopular to those in power.¹⁴

The ability of all parties to access the ballot should be equal and free from discrimination on any grounds.¹⁵

In closed-list electoral systems, parties are able to assign or define the order of their candidates on an electoral list. This is acceptable, but parties should on the contrary be forbidden to change the order of candidates on an electoral list after voting has commenced.¹⁶

13 CDL-AD(2010)024 Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission – Adopted by the Venice Commission at its 84th Plenary Session, (Venice, 15–16 October 2010), 126.

14 CDL-AD(2010)024 Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission – Adopted by the Venice Commission at its 84th Plenary Session, (Venice, 15–16 October 2010), 124.

15 While monetary deposits may be required, monetary deposits which are excessive may be deemed discriminatory as they limit the right of citizens without adequate resources to stand for election as protected under human rights instruments. As with other regulations on political parties, such fees must be applied objectively to all parties. States are recommended to also provide for non-monetary methods for registration in elections, such as expression of minimum support through the collection of signatures. Alternative non-monetary methods should be available, just as registration should be determined based on a minimum level of support as opposed to financial status. When parties are required to show minimum support levels, they should be given adequate time to collect and file signatures. The system for the verification of signatures should be clearly defined in law so as to avoid the possibility of misuse. Particularly, requirements that a citizen only be able to sign for the support of one party should be avoided as such a regulation could easily disqualify parties who attempted in good faith to fulfil this requirement. The system for ballot access should not discriminate against new parties. While parties who won mandates or a minimum percentage of votes in the previous election may automatically be eligible to be placed on the ballot, there must also be fair, clear, and objective criteria for the inclusion of new parties. Individual candidates should have an equal opportunity to those running as a political party's candidate to access the ballot. However, legislation commonly allows candidates of parties to be exempt from particular requirements for ballot access which have already been fulfilled by the party. For example, party candidates may be exempt from the collection of signatures to show support if the party has previously collected signatures to gain recognition as a party. In such cases, independent candidates may still be required to fulfil the signature support requirement. Such systems are not necessarily discriminatory; however, legislation must clearly outline what exemptions are applicable and ensure that requirements placed upon independent candidates are not more restrictive than those previously fulfilled by the party, CDL-AD(2010)024 Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission – Adopted by the Venice Commission at its 84th Plenary Session, (Venice, 15–16 October 2010), 142–146.

16 CDL-AD(2010)024 Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission – Adopted by the Venice Commission at its 84th Plenary Session, (Venice, 15–16 October 2010), 129.

2. *Nomination of Candidates for Election by Political Parties*

Venice Commission standards are extrapolated from the best practices established in countries which are member states of the Council of Europe after extensive and in-depth comparative studies. Due to time constraints, this premise would be exemplified only in the process of selection and nomination of party candidates in the elections. European standards for nomination of candidates by parties in the elections do not prescribe particular methods, nor do they give any method special preference over the other devices. At the same time, some principles are emphasised in the Guidelines of political party regulation: “Parties must have the ability to determine party officers and candidates, free from government interference. Recognising that candidate selection and determination of ranking order on electoral lists is often dominated by closed entities and old networks of established politicians, clear and transparent criteria for candidate selection is needed, in order for new members (including women and minorities) to gain access to decision-making positions. Gender-balanced composition of selecting bodies should also be commended.”¹⁷ In the selection of the party officers and candidates for public office, parties must also comply with the principle of non-discrimination on the basis of gender. The individual right to stand for elections may be affected by three sets of rules, those imposed by the state for registration as a candidate, those imposed internally by the party itself for selecting candidates, and admissible restrictions such as age, residence or citizenship requirements. While the first set of rules must not unduly limit the right of free expression and association for parties, it is good practice (though not required by law) that the second set also respect the need to ensure that candidates are chosen with the support of the party at large. Internal party rules for the selection of candidates should not be subject to regulation by the state except to ensure that selection is consistent with the political party constitution.¹⁸

The selection of party officers and candidates for public mandate is critical for assessing the degree of intra-party democracy, which depends on different relevant features of the regulation of these procedures: regarding the selection of party officers, the main aspects to be taken into account are the selection device (party assembly, membership ballot, combined mechanisms) and the party units entitled to be selectors; concerning the selection of election candidates, the requirements for eligibility to vote and be nominated and elected must be considered together with possible party rules conferring pre-nomination or veto rights on the party leadership. The general rule has been that active and passive suffrage for party office and for the selection of candidates for public office has been attributed to party members. Nevertheless, their rights are actually limited by the specific regulation on the constitution of each party body and on the list of election candidates, introducing formal requirements of seniority, membership of other bodies within the party or in public institutions, or support by certain bodies or quorums of members. Different levels of the party intervene in the selection of party officers and candidates for public office, depending on the party post or public office for which they are being elected. With regard to the selection of candidates for public office, the practices of the political parties are quite inclusive, opening the selection of prospective elected representatives to participation by party members. Democratisation of nomination processes has been marked by the widening of the selection bodies within the parties. In a development process lasting more than a century, methods for nomination evolved from the monopoly of a caucus, cabal or party oligarchy to the highest representative party organs and to direct participation by party members or the electorate in open or closed primaries. Some restrictive practices still

17 CDL-AD(2010)024 Guidelines on political party regulation by OSCE/ODIHR and the Venice Commission, adopted by the Venice Commission at its 84th Plenary Session (Venice, 15–16 October 2010), §113.

18 CDL-AD(2010)024 Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission – Adopted by the Venice Commission at its 84th Plenary Session, (Venice, 15–16 October 2010),127

persist, securing pre-selection or veto rights in favour of central party elites to ensure that they retain the ability to include certain nominees and exclude the unwanted ones.¹⁹

In the Central and Eastern European region, political parties have been strongly centralised and dependent on their leadership after the fall of communism. In this context, the prevailing trend is that inner leadership or the leader himself control the selection of candidates at all levels. Country-wide ballots in particular are dominated by the central authority, with the leader at the top, closely followed by the inner leadership. Even where the local party organisation has attained a certain autonomy, the central party leadership maintains a veto right over local or regional ballots.²⁰

Nomination processes are deemed democratic or not according to the degree of centralisation, that is to say, how much power is given to regional, district or local bodies in the selection process. Secondly, the scale of participation in the nomination is also considered: the more people involved in the selection, the more democratic the procedure. Finally, also the scope of decision-making – number of candidates competing for nomination – is important. The nomination process is governed by law only in a few countries. In most legal systems, parties are entitled to make their own decisions on the most appropriate processes and internal regulations.

3. Parties and Election Management Bodies

There are different approaches in the Council of Europe member states to the composition of electoral management bodies and to the procedure for nominating their members. However, the electoral management bodies should be composed in such a way as to ensure the trust of all forces taking part in elections and of individual voters in their impartiality and professionalism, for their prime function is to guarantee the fairness of the electoral process.²¹ This aim may be achieved by different means, although composition of election management bodies greatly differs from country to country. The Venice Commission recognises these differences and does not look, as some comparative academics engaged in social engineering would insist, for unification built on convergence of peculiar systems, attempting to provide a single example of structure, composition and functions of electoral management bodies for all states. The role of political parties during the process of forming these bodies ranges from minimal to extremely significant in the Council of Europe member states.²² Different models of election

19 However, examples of inclusive procedures have been developed by the Labour Party and the Liberal Democrats in the United Kingdom, where members of the relevant electoral area are invited to participate in the process of short-listing and final selection of candidates through direct ballot. The Social Democratic Party in Sweden admits proposals of candidates by any individual member and other party constituencies, though final selection corresponds to an assembly of delegates (election conference) unless one third of the present delegates call for a general vote among members, who will then be able to draw up the ballot paper by ranking candidates according to their preferences. So-called primaries may be conducted by the United Left in Spain for the selection of the presidential candidate for internal elections. Primaries are thoroughly regulated by the Spanish Socialist Workers' Party, admitting proposals for candidates by party members (10 per cent of them for the particular case of the presidential candidate) and submitting the final selection to a party-wide ballot.

20 The exchange of money for nominations of the sponsors at the forefront of candidates' lists, thus securing a seat for them in parliament, has become a common practice in some of these countries. However, different features of the democratic transition and institutional path of some other countries (like the division of the state into multiple constituencies in the Czech Republic) have favoured a certain degree of independence for regional and local levels of party organisation.

21 See *The Code of Good Practice in Electoral Matters* (CDL-AD(2002)23 rev), Part II, item 3.1 para 71.

22 In some countries such as Germany, the electoral law does not specify whether the assessors appointed to form the Electoral Committees have any partisan component. In Spain, Higher Electoral Committees are mainly composed of judges, with a number of experts who have to be jointly nominated by parties with seats in the Lower Chamber, whilst Polling Station Committees are formed by drawing lots among voters registered in each Polling

management bodies should meet the requirements that such a body be balanced, impartial and competent. While some election management bodies have no partisan component, other states have adopted the practice of forming election management bodies with some or all members nominated by the major political parties. In such cases, high-level positions within the body must be distributed among parties to ensure balance.²³ However, national electoral management should be in line with democratic constitutional values and principles based on the European constitutional heritage. In this respect, different elements should be considered. For instance, the different kinds of election management bodies, their size, the way their members are nominated, or which parties have the right to participate in this process. It could be argued that since lower committees have to deal with the functioning of the voting process, solving problems as fast as possible, they need to be functional and politically trustworthy in reality and in appearance. That implies that they possibly should not include too many members, and that their operation should not be subject to politically oriented criteria. In this sense, bodies mainly or totally composed of politically nominated members, sometimes do not seem to be a practical option.²⁴ On the other hand, higher bodies mainly have to deal with complaints or particular problems which have to be solved according to more general criteria, in a quasi-judicial function. In this case, the number of people is possibly less important, and of course the confidence of the rival parties must be assured, whether because of the independence and technical expertise of their members, or because the parties (all or just the main ones?) have a role in their nomination process. In fact, the guarantee of pluralism does not require that all parties participate in every sphere of electoral organisation; mutual control among some of the main ones may be enough.

4. Political Parties and Observers

During the electoral process, party observers and representatives must have the same opportunities for defending their interests in any sphere of political activity. It does not necessarily follow that all parties do have to take part in every organ of the electoral administration, but it implies that all concurring parties must have the right to be heard in the decision-making process and to complain against any legally unfounded decision. It is important that representatives of the political parties keep their observer status not just until the voting is over but up to the date when the last disputes concerning election results are settled. This could have a positive impact on the credibility of the results.

Station, and by the observers that all parties can nominate (although, in practice, only major parties are able to have representatives in most of the Polling Stations). Other countries, such as Ukraine, Bulgaria etc. prescribe Election Commissions formed by representatives of concurrent parties, with the offices of president, deputy president and secretary proportionally distributed among parties on their proposals to the forming institutions.

23 The inclusion of biased persons in election management bodies should be carefully considered by the state when developing legislation. If such a system is chosen, it must clearly state the required qualifications for nominees and the procedures for political parties to nominate members to EMBS., CDL-AD(2010)024 Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission – Adopted by the Venice Commission at its 84th Plenary Session, (Venice, 15–16 October 2010), 155,156.

24 The Venice Commission and OSCE/ODIHR adopted the *Preliminary Joint Opinion on the Revised Draft Amendments to the Electoral Code of Armenia* (CDL-AD(2005)008) which underlines the “strong partisan interest” of the members of the Central Electoral Commission, and states that “the rule of having the commissions constituted only by parliamentary appointments... without any non-partisan based appointments...[so] that the commissions cannot be regarded as being sufficiently pluralistic and providing an adequate balance of overall impartiality and independence”, highlighting the importance of “inclusiveness of political and civil interests in order for there to be a sufficient level of public confidence in the election processes and results” (emphasis added). Similarly, the already mentioned *Joint Recommendations on the Electoral Law and the Electoral Administration in Albania* (CDL-AD(2004)017) express a “major concern” about “provisions regulating formation of electoral commissions... [which] have given an extremely dominant role to each of the two main political parties at every level of the election administration”, establishing a “highly politicized environment”.

Paragraph 8 of the OSCE Copenhagen Document states the importance of both domestic and international observers in elections. As part of domestic observation, it is particularly important that political parties be entitled to have observers present on election day. While it will be inherently easier for parties to exercise this right than for independent candidates (given the pre-existence of party membership networks and communication tools), such a right should explicitly be made equally available to all political contestants in legislation. Observers should have the right to see all aspects of the voting process, to express concerns if any arise, and to report problems to their respective parties throughout the day. It is good practice that electoral legislation includes a provision allowing party observers to obtain copies of the voting results at the polling station and all levels of election administration. Such a practice can greatly increase the credibility of the process. All parties should be able to fully exercise their right to have observers present throughout the voting, counting, and certification processes. Legislation must award all parties due standing before bodies tasked with electoral dispute resolution to ensure effective redress for any alleged violations of the rights of parties and their candidates. Such practices should be protected by legislation as positive measures which can increase the credibility of election results.

5. Financial Issues of the Election Campaign

Financial issues include the equality principle and the use of public (State) resources. The Venice Commission has already established guidelines on the financing of election campaign expenses, which differs from regular financing. Due to a special report of Mr Hamilton, I will not deal with this issue.

6. Parties and access to (public and private) media

Access to mass media is the best instrument for parties to transmit their message to electors. Therefore, that is possibly the main resource that parties may seek. Access to publicly-owned media is, at the same time, the least expensive of the aids that the State authorities may offer, so that there is a clear interest on both sides. Of course, problems will arise when deciding the details of that access (time allowed the different parties and/or lists, presence of the campaign in the news, etc.). In this respect, the existence of a model of party registration may also be taken into account, giving some advantages to registered parties, but it cannot be used as a discriminatory instrument, depriving other social sectors of any opportunity to defend²⁵ their positions in a fair campaign. The Code of good practice in electoral matters provides that *“Equality of opportunity must be guaranteed for parties and candidates alike. This entails a neutral attitude by the state authorities, in particular with regard to: the election campaign and the coverage by the media, in particular by the publicly owned media [...]”*

The allocation of free airtime is integral to ensuring that all parties, including small ones, are able to present their programs to the electorate at large. While the allocation of free airtime on state-owned media is not legally stipulated under international law, it is strongly recommended that such a provision be included in relevant legislation as a critical means of ensuring an informed electorate. When made available, free airtime must be allocated to all parties reasonably and in accordance with the principle of equal treatment before the law. This principle with regard to the media refers not only to the time given to parties and candidates, but also to the timing and location of such facilities. Legislation should set out requirements for equal treatment, ensuring there are no discrepancies between parties through the allocation of prime viewing times to particular parties and late-night or off-peak slots to other parties.

²⁵ Code of Good Practice in Electoral Matters (CDL-AD(2002)23 rev), I.2.3.a.,1.2.3.c.

In the field of private media, problems are clearly different. The principle of fair elections must be compatible with that of free elections: if all parties and/or candidates have the right to campaign, and to address their messages to all citizens, it is also true that many private media have clear social, ideological and political orientations, which may be considered when defining a right of access to all mass media. This cannot justify the definition of different economic conditions for the different parties' publicity, but it might even support claims to deny some parties access to some media.

Private media cannot always be regulated as strictly as publicly owned media. However, private media outlets may play a fundamental role in the public process of elections. Some OSCE states impose a regulation that if airtime is offered on private media, then it must be offered to all parties at the same monetary rate.

A key role of the media in any election is to ensure that the public has sufficient information on all candidates to make an informed choice. As such, it is a good practice to ensure that women and minority candidates, who often receive less funding or support than their male counterparts, are guaranteed a fair and impartial share of media coverage.²⁶

7. Freedom of Assembly for Political Parties

All political parties should be able to fully exercise the right to peaceful assembly, particularly during the election period. Freedom of assembly should only be limited on the basis of legitimate and objective grounds necessary in a democratic society including public order, public safety, protection of health and morals, protection of the rights and freedoms of others, and national security. For example, a silence period in the immediate pre-election period (generally 48 hours or less) is an accepted restriction on campaign activities which necessitates a limit on public party assemblies during this time. The *OSCE/ODIHR-Venice Commission Guidelines for Freedom of Peaceful Assembly* provide an overview of appropriate regulations and recommendations regarding the right of freedom of assembly, and should be observed when developing legislation relevant to political parties. Parties should enjoy the right to organise and participate in public rallies and legitimate campaigning free from undue restriction.²⁷

8. Parties and Issues on the Election Day

a) Role of party observers

It is particularly important to guarantee the possibility for all parties and candidates to have observers on the election day.²⁸ In this respect, it is evident that parties have some elements – permanent organisation, membership and so on – which help them in this task and are much more difficult for other non-partisan candidates to have at their disposal. The observers must have the right to control all aspects of the voting process (ballot boxes, election committees at all levels), to intervene – at least, to be heard – in the resolution of possible conflicts which may arise, and to inform the parties which they represent about the problems during the observation so that the latter may lodge appeals against any decision not legally founded.

²⁶ CDL-AD(2010)024 Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission – Adopted by the Venice Commission at its 84th Plenary Session, (Venice, 15–16 October 2010), 149,151, 152.

²⁷ As noted in the OSCE/ODIHR Venice Commission Guidelines for Freedom of Peaceful Assembly p. 5, this right may extend to access to any place or service intended for public use.

²⁸ The *Code of Good Practice in Electoral Matters* (CDL-AD(2002)23 rev), Part II, item 3.2., item 3.3

b) Complaints procedures

The *Code of Good Practice in Electoral Matters* insists on the importance of “an effective system of appeal.” And, as has just been pointed out, that requirement has to be applied to the whole system, including of course the appeals which can be lodged on election day by individual citizens or by any other subject. In the context of elections, an effective system of appeal would mean that any decision by any state authority can be challenged and that a decision by a competent body is taken immediately. Any delay in complaints and appeals procedures can seriously compromise the credibility of an election.

9. *Contesting Election Results*

- a) Contesting election results. There is a list of persons who enjoy the right to act as the authorised proxy of the claimant (plaintiff, accuser, or appellant) and the respondent (defendant). As well as the issue of the respondent (defendant), the aspect of representatives of relevant parties is very topical in terms of practicality.

Challenging election results and dispute resolution in elections in the Council of Europe member states varies quite a lot in substance or form, so the common denominators and best practices should be extrapolated after conducting in-depth comparative analytical studies.²⁹ Complaints procedure follows different paths and needs to be addressed contextually and not just as a legal axiom according to a nomothetic approach.³⁰

The “deadlines for taking decisions on complaints and appeals”, including of course the decision to contest election results, have to be “realistic”. This is obviously an important element of the whole system of appeal, but the precise timeframe must vary not only from one country to another (depending on multiple factors, such as the systems of ballot-counting and of transmitting results), but also from case to case (different elections, which may be held in different contexts: single-seat districts or national constituencies, for instance; different chambers...). It does not seem easy to draw general conclusions about what deadlines should be accepted or not, and it will greatly depend on the circumstances.

29 A good example is the report of Serhii KALCHENKO, COMPARATIVE ANALYSIS OF THE EUROPEAN STANDARDS ON ELECTORAL COMPLAINTS AND APPEALS IN THE COUNCIL OF EUROPE, AND PRACTICES IN THE MEMBER STATES, Strasbourg, 29 October 2012

30 For example, Article 66.4 of the Electoral Code of the Republic of Moldova contains the only specific provision regarding a complaint lodged on behalf of an electoral competitor by its authorised **proxy**, who is registered by the relevant election management body, or whose authority is certified by a power of attorney according to the **general** rules of the legislation. Under Article 133.4 of the Electoral Code of the Republic of Albania, parties are entitled to be **represented** during administrative proceedings by their authorised representatives or by making a declaration in the plenary session. When electoral subjects are represented at the Central Election Commission, this is usually done by their accredited representatives to this Commission. Article 178 of the Code of Administrative Adjudication of Ukraine provides for regulation similar to the Moldovan Electoral Code, stating that authorised representatives of political parties and proxies of candidates registered by the relevant election commission enjoy the right to **represent**, correspondingly the party and candidate **without** any power of attorney. At the same time, the general norms establishing the rules of representation of parties, envisaged by Article 56 of this Code, may also be applied. This article provides for the possibility to represent a party on a power of attorney issued according to the general requirements of the civil legislation. In addition, it is envisaged by Article 108.1 of the Law of Ukraine on Parliamentary Election that a proxy shall be given the right to lodge a complaint to the relevant election commission on behalf of the candidate concerned. A party agent is also entitled to lodge a complaint on behalf of the political party concerned.

VI. Conclusion

The Council of Europe member states have different approaches to the regulation of political parties' activities in elections. However, there are some common trends and concerns as to the equality of different forces seeking political representation, financing of parties and issues related to the internal operation of parties.

A set of common standards has been developed already and is in preparation for a certain number of fields. In the areas of equal treatment of different parties and individual candidates competing in elections, the possibility to have observers during the elections until the last complaints are dealt with by the competent bodies, transparency in campaign financing and accountability of parties for the resources used and equal access to mass media etc. standards were gradually developed and established during the last decade.

Regarding the rules for the nomination of candidates for different elections, effective complaints and appeals systems, a speedy procedure for the settlement of different electoral disputes during the whole electoral process and respect for the principle of proportionality in case of sanctions, etc., preparation of standards is under way.

Political parties and the mass media – new technologies in the electoral process

Brief presentation of the Permanent Electoral Authority (PEA)

**Mr Csaba Tiberiu Kovacs,
Secretary General of the Permanent Electoral Authority of Romania**

The Romanian Constitution was revised in 2003, more than half of the articles suffering small or large changes, among them the constitutional basis for the establishment, in 2004, of the Permanent Electoral Authority (PEA).

The Permanent Electoral Authority is an autonomous administrative institution, fundamental to the Romanian state, which ensures the organization and conduct of electoral processes, in order to ensure appropriate conditions for exercising voting rights, equal opportunities in political competition, transparency in funding of political parties activity and electoral campaigns.

The Authority's mission is to ensure the organization and conduct of elections and referendums, and the financing of political parties, according to the Constitution, law and international standards in domain.

Permanent Electoral Authority activity is oriented towards several directions:

The first, electoral control direction, includes:

- the unitary application of legal provisions in its field of activity;
- the organisation and coordination of activities and necessary resources for the electoral processes organization;
- control over, and monitoring of public authorities and other bodies in the preparation and organization of the electoral processes;
- the unitary application of legal provisions in its field;
- the development and the implementation of strategies, programs and projects in the election field;
- the information, education and training activities of the participants in the electoral process;
- the accreditation of election observers and media representatives who want to observe the elections;
- the Parliament information on its activity, on the organisation and conduct of elections and referendums.

The second important activity is related to the control of financing political parties' activity and electoral campaigns, including the allocation of state budget subsidies to the political parties. The main goal regarding the political parties' control activity involves checking accounting organisations and capital records. During the time of electoral campaigns, the objective of PEA activity includes:

- the registration of financial representatives appointed by the political parties;
- the registration of received donations by the electoral candidates during the electoral campaign;

- solving the complaints regarding the financing of electoral campaigns law violations;
- verifying the detailed reports of electoral incomes and expenses followed by their publication in the Official Journal and on the PEA official website.

Related to this activity, it is worth mentioning the Romanian accession to the Group of States against Corruption (GRECO). Within the GRECO report regarding the transparency of financing political parties' activity and electoral campaigns, GRECO concludes that Law 334/2006 regarding the financing of political parties' activity and electoral campaigns represents a well-structured normative act. As regards the implementation of the GRECO recommendation against corruption, PEA Romania elaborated a draft Law for modifying and completion of Law 334/2006.

The third direction means the Electoral Registry, which represents a centralized database comprising all Romanian citizens, including those with a domicile or residence abroad, who have reached the age of 18, with the right to vote.

The main targets of the Electoral Registry are to develop instruments that will allow the Permanent Electoral Authority (PEA):

- to obtain accurate information regarding polling stations and voters at any given time,
- to create the optimum way of assigning voters to polling stations;
- to rapidly and accurately provide polling stations' officials with an up-to-date electoral roll and other materials required (legislation guides, procedures, forms etc.).

There are a total of 3186 administrative units in Romania, among them 320 cities. All the mayors, of the above mentioned 3186 administrative units, can access the Electoral Registry, with assigned usernames and passwords and perform various tasks, such as:

- assigning voters to polling stations based on their domicile;
- approving the Electoral Register and the electoral roll for their community;
- approving the Polling Stations' Register;
- generating, downloading and printing the electoral roll.

One functionality of the Electoral Register that has not yet been regulated by law, is the possibility to electronically verify the identity of the voter in the polling station.

An extended IT system that could ensure, at the polling stations' level, an electronic ID check, has the following benefits:

- preventing illegal (double) voting;
- monitoring and informing the public opinion regarding the turnout in real time;
- electronic editing, verifying and submitting the data summary for the polling stations concerning the recording of the turnout;
- an accurate data base regarding the active voters.

In 2012, taking advantage of the favorable moment created by the parliamentary elections on 9 of December 2012 and to support the idea of reforming the electoral law, PEA has also launched the debate of the draft law on the electoral code, originally released in 2011.

Another project of the PEA in Romania is related to the registration of political parties. This activity is made at the Bucharest Court, where the Register of political parties is kept. The Permanent Electoral Authority's aim is to take over the Register of political parties' activity.

I. Political parties and the mass media – new technologies in the electoral process

The mass media are essential to democracy, and a democratic election is impossible without mass media. A free and fair election is not only about the freedom to vote and the knowledge of how to cast a vote, but also about a participatory process where voters engage in public debate and have adequate information about parties, policies, candidates and the election process itself in order to make informed choices. Furthermore, mass media acts as a crucial watchdog to democratic elections, safeguarding the transparency of the process. Indeed, a democratic election with no mass media freedom, or stifled mass media freedom, would be a contradiction in terms.

The mass media have traditionally been understood to refer to the printed press as well as radio and television broadcasters. Such technologies allow for the mass distribution of a one-way message from one-to-many. How do young people get information on the world around them, politics, news – and on elections? Ten years ago, the answer to that question would have been the enumeration of traditional communication tools such as posters, leaflets, press advertisements and TV spots. However, in the last decade the appearance and the widespread diffusion of the Internet, mobile communication, digital media and a variety of social software tools throughout the world has transformed the communication system into interactive horizontal networks that connect the local and global. Also these tools changed our conception of forms of communication and the definition has become broader, encompassing new media, including new forms of social media (the terms “social media” and “information and communication technologies (ICTs)” are often used interchangeably) such as SMS, blogs, social networking sites, podcasts and wikis, which cater to the flow of messages from many-to-many. They have provided alternative mediums for citizen communication and online journalism. The citizen journalism (also known as „public”, „participatory”, „guerrilla” or „street” journalism) is based upon citizens in the process of collecting, reporting, analyzing, and disseminating news and information. Citizen journalism is widely gaining traction, including in countries where traditional mass media is either controlled or strictly regulated.

In terms of terminology to name the new technologies in the electoral process, the option was between “the new media” and “social media”.

The new media means on-demand access to content anytime, anywhere, on any digital device, as well as interactive user feedback, and creative participation. Some examples may be the Internet, websites, computer multimedia, video games, CD, DVDs, etc.

Social media refers to the means of interactions among people in which they create, share or exchange information and ideas in virtual communities and networks. Social-media technologies take on many different forms including Internet forums, weblogs, social blogs, micro-blogging, wikis, social networks, podcasts, photographs or pictures, video, rating and social bookmarking. Technologies include blogging, picture-sharing, wall-posting, music-sharing, crowdsourcing and voice over IP.

As can be observed, new media is a little bit broader than social media, but the latter covers better the area of new technologies in the electoral process. So, the option chosen was social media, which is the terminology which shall be used from now on.

A prime concern of mass-media coverage of elections is the right of voters to full and accurate information, and their rights to participate in debates and dialogue on policy matters and with politicians. Inherent to this task is the entitlement of parties and candidates to use the mass media as a platform for interaction with the public.

II. Roles of the Mass Media in Elections

The mass media play an indispensable role in the proper functioning of a democracy. Discussion of the mass media's functions within electoral contexts, often focuses on their „watchdog” role, but they also have other roles in enabling full public participation in elections:

- providing a platform for the political parties and candidates to communicate their message to the electorate;
- allowing the parties and candidates to debate with each other;
- reporting on the development of an election campaign;
- providing a platform for the public to communicate their concerns, opinions, and needs, to the parties or candidates;
- educating voters on how to exercise their democratic rights;
- reporting results and monitoring vote counting;
- scrutinizing the electoral process itself, in order to evaluate the process's fairness, efficiency, and probity.

III. The Social Media

In the last decade the appearance and swift spread of social media tools changed our conception of forms of communication.

The social media consists of the Internet, mobile phones, social media such as blogs and micro-blogs (such as Twitter and Sina Weibo – a popular chinese site), social networking websites like Facebook, video-sharing sites such as YouTube, application and use of Instant Messaging (Skype, MSN Messenger, Gadu-Gadu, which means chit-chat, very popular in Poland, etc.) and others. In other words, social media is a broad term that describes a range of media that are utilized for many different purposes, but also mean new challenges that also electoral stakeholders should face. There are some characteristics that make the social media different from traditional mass-media (radio, television, newspapers and magazines) such as:

- They are usually interactive;
- They use digital, online and mobile technology;
- They function in real-time;
- They are often audience-created and user-driven;
- The information is often short-lived;
- They are usually borderless;
- The infrastructure for publishing or broadcasting is usually cheaper for individuals to access;
- They are more difficult to regulate – and to censor;
- They do not always adhere to journalistic standards and ethics.

The line between traditional media and social media is often blurred, with most „traditional” journalists using the internet as a key source of information for stories; and many traditional media creating online editions or transforming into full multi-media outlets. Traditional media also utilize „citizen journalism” pieces – for example CNN's *iReport* which invites any viewer to contribute stories.

There are many views on the overall impact of social media, but few contest the fact that it has spurred further globalization, allowed for communities of interest (political and otherwise) to better organize and communicate despite geographical distances, changed the face of traditional journalism, and blurred the lines between published and personal communication.

In addition, social media has allowed individuals, groups, and smaller companies to challenge traditional media monopolies – which have become a growing concern of democracy advocates worldwide – by using the borderless and relatively inexpensive infrastructure of the Internet to voice alternative perspectives.

The ways in which mass media (traditional and new) ensure democratic electoral processes generally can be included in one of the following categories: mass media as a watchdog, as a campaign platform, as an open forum for debate and discussion and as a public educator.

IV. Mass Media as a Watchdog

In today's politics and society, mass media is essential to safeguarding the transparency of democratic processes. This is often called its „watchdog” role. Transparency is required on many levels including for access to information; accountability and legitimacy of individuals; institutions and processes themselves; and for rightful participation and public debate.

Transparency as required for access to information means that an electorate is provided with necessary and comprehensive information so as to make informed choices as well as to be able to hold officials and institutions accountable.

Media acts as a mechanism for the prevention and investigation of allegations of violations or malpractice. This watchdog role extends from accountability of officials and their actions while „in office” to entire processes. For example, media presence at voting and counting centres is critical to preventing electoral fraud.

V. The Social Media as a Watchdog

The social media has begun to play a key part in reinforcing transparency in democratic processes, including elections. Short Message Service (SMS) is now being used around the world by many election monitoring groups for the quick gathering and disseminating of information on election irregularities, quick-count processes, as well as other purposes. The ACE Electoral Knowledge Network mention a couple of examples. In Montenegro in 2005, an SMS-based quick-count process helped defuse tensions regarding the integrity of the referendum election count, and thereby helped persuade voters to trust the official referendum result. Citizens use social media to monitor electoral fraud. In the 2012 elections in Mexico, social media networks were used to expose vote-buying, including videos posted across social media networks of a warehouse stuffed with grocery give-aways, allegedly intended to bribe voters.

Traditional media's watchdog role is significantly enhanced by its utilization of social media as both a source of information and a mouthpiece for elections reporting. By monitoring social media discourse, observing citizen journalism postings, and by creating social media of their own through blogs and micro-blogs on official media websites, traditional media's elections investigations have become faster, more diverse, and more interactive.

Social media has also been utilized extensively to monitor hate speech, as well as social media „rumors” that might lead to or signify elections violence. It has also been used to monitor and map on-going elections-related conflict.

VI. Mass Media as a Campaign Platform

Candidates and parties have an explicit right to provide the electorate with information regarding their attributes, political agendas, and proposed plans. Besides meeting directly with members of the electorate, candidates and parties accomplish this task through campaigns via mass media. It is cardinal to democratic electoral processes therefore, that all candidates and parties are provided equal access to media.

Candidates and parties use the mass media for campaigning through sponsored direct access spots, paid political advertising, televised debates, use of social media, and other mechanisms. They also hope the media will voluntarily cover them because of the newsworthiness of their campaign activities.

Among the most effective, but least analysed, means of autocratic survival is an uneven playing field. In many countries in transition, democratic competition is undermined less by electoral fraud or repression than by unequal access to state institutions, resources, and the media.

VII. The Social Media as a Campaign Platform

Creative use of social media for political campaigning continues to grow, and candidates and parties now use a full range of tools to gain voters. Much has been said about the masterful use of social media by the Obama campaign. Barack Obama famously used social media to raise funds and spread campaign messages for his successful 2008 presidential campaign, which some call the first „Facebook election”. On November 4, 2008, more than 12 million young Americans selected the person who made them believe in their abilities to bring about change, the person who gave them hope, and the person who let them feel united. Obama used the Internet to develop personal relationships with supporters, and was elected for many reasons, among them because he became an individual for them, not just a distant politician.

It was not the Internet that brought him the presidency, nor was it his charisma, nor was it the money. It was a complex mechanism consisting of components that could only work all together: a message, methods, an instrument, tools, and a man at the wheel.

Change was the message of the campaign, which arrived as the country had been in the war for years and was facing a recession. The Campaign's method was organizing, something that has been driving that country for ages. The instrument was money: this campaign became the most expensive presidential campaign in USA history. The tool was the media, which meant a great deal in the informational age. And the man at the wheel was Obama, who himself was already a symbol of change, who had years of organizing experience, and who hired a team that raised money using media, and got the most out of the media by spending money on it. To put it differently, indeed Obama could not have won without the Internet, because he simply would not have been able to raise that much money without it. But there is no guarantee that he would have won without his timely message or without employing the organizational strategy he chose in his campaign.

Many political parties and candidates have their own more-or-less sophisticated websites. British Prime Minister David Cameron used the „Webcameron,” an Internet video diary, to appeal to voters in the 2010 UK elections and beyond.

The internet was first used in electoral campaigns in Romania, in 2004, the year when one of the candidates running in the presidential elections, Traian Băsescu, launched the “digitalguerrilla” on his campaign website and finally he became the president of Romania.

In 2004, Romania had 4 million internet users, a figure which means an impressive growth compared to 2000, when there were only 800.000 users. In 2012, in Romania there were 9,642,383 internet users (out of a population of 19.697.103) of which 5,374,980 were registered on Facebook.

Before video-sharing websites such as You Tube appeared, or content-oriented networks like Flickr, or the blogs as political public relations instruments, or the social networks (Facebook, Twitter, LinkedIn), the most common uses of internet for online Romanian political communication in 2004 were e-mail, discussion groups, forums, web browsing, file transfer and chatting through Yahoo Messenger.

In 2004 the Digital Guerilla was the first online communication platform to incorporate a negative campaign. The online environment was used to stir young people's interest in the presidential campaign through so called guerilla actions, such as sending fake email warning messages about the alleged frauds at the poll or mobilizing people to vote for their candidate, through forums and online discussion groups (such as Yahoo Groups).

The 2009 elections in Romania represented the first presidential campaign within which the candidates used the social network Facebook after the social network had been already used for the local elections in 2008. In 2009, presidential candidates used websites and electoral campaign blogs, but also social media networks such as: video sharing sites (YouTube) and social media networks (Facebook, Twitter).

Online campaign techniques differ not only in medium but also in message, tone, and time-frame. It appears that it is not so much the quantity of social media usage by candidates that appeals most to voters, but the quality and interactivity.

VIII. Mass Media as an Open Forum for Debate and Discussion

While candidate and party campaigns are of course a form of debate, there are also other voices that are to be heard within public forums. The role of mass media in providing this platform for debate and discussion is therefore vital. Mass media provide a mechanism for regular citizens to be heard and to therefore influence political agendas and campaign platforms, and sometimes to gather support and influence fellow voters. Here we can find: members of the public, interest groups, experts with different perspectives, and candidates being interviewed by mass media for their views on certain policies; news reports on press conferences, protests and other events held by interest groups; mass media surveys of public opinion or even letters to the editor.

IX. The Social Media as an Open Forum for Debate and Discussion

In many countries, social media has become one of the most vibrant platforms for people to voice views, share information, interact with leaders, and debate key elections issues. Social media offers the advantages of being democratic, allowing anyone to post their opinions on blogs and micro-blogs, share links, send and forward emails, create websites, and so on. It also has the advantage of working in real-time, thereby allowing people to keep up with dynamic and ever changing developments. Finally, social media is also much more difficult to censor or silence, as governments cannot easily suspend blogger "licences", raid offices of Twitter users, or prosecute someone for posting links on Facebook.

The use of social media in the Arab Spring uprisings is an example of the contribution of these new tools to political change. Since the beginning of 2011, social protests in the Arab world have cascaded from country to country, largely because digital media have allowed communities to unite around shared grievances and nurture transportable strategies for mobilizing against dictators. In each country, people have used digital media to build a political response to a local experience of unjust rule. They were not inspired by Facebook; they were inspired by the real tragedies documented on Facebook.

Social media has also allowed traditional mass media to dodge censorship. For instance, in Venezuela, when president Hugo Chávez forced Radio Caracas Television off the air in May 2007, it continued its broadcasts via YouTube.

Social media lends itself to informal and ironic opposition too. For example during the UK 2010 general election campaign one of the most successful independent sites was a satire of a major party's election billboards. Using what was felt to be an overly "airbrushed" photograph of the party leader, visitors to "mydavidcameron.com", could create and publish their own digital versions of real posters, complete with amusing slogans.

X. Mass Media as a Public Educator

Mass media's role as a public educator is in essence a combination of media's three other roles with a few added aspects. For example, mass media as a mechanism for transparency ensures that voters are provided with the information necessary to fully evaluate the conduct of officials as well as the process at large. Mass media as a campaign platform ensures that the public is educated in political agendas of all participating parties and candidates equally. Mass media as an open forum for debate and discussion ensures that voters can educate other voters, politicians, and officials. Mass media also educates through the transmission of voter information. It also happens indirectly. For example, when mass media report on an electoral event, details such as the location of voting sites, the necessity of voter registration, how the count will be conducted, and so forth, may be provided to the audience. This is one reason why it is very important that an EMB communicates frequently with all media, providing them with the necessary facts and figures to ensure accurate reporting.

Media also play an important analytical role, because without analysis of the press release in relation to events on the ground, results, or opposing opinions, the information received by the media audience is one-dimensional. In ensuring that the public has the level of informational detail required to make informed choices or action, media utilize various tools of analysis, such as opinion polls; research and scrutiny of policies, records and reports; investigative journalism; assessments of community needs and opinions; use of expert input and opinions or measuring candidates' and parties' deliveries against their promises.

XI. Social Media as a Public Educator

The decentralized, multi-media, and interactive nature of social media has opened up its potential as a public education tool. For example, EMBs, international democracy promotion organisations, civil society groups and others have made extensive use of YouTube and other video sites to share civic and voter education videos.

EMBs have Facebook profiles to attract new voters and provide information to existing ones, as well as to get feedback. Elections New Zealand, for example, has an active Facebook page

with 10,000 likes. The UK Electoral Commission puts out almost daily tweets on Twitter with announcements of key dates, guidelines, highlights from reports, and so on.

XII. Social Media Support to Collective Action and Social Movements

Can the social media support collective action, protests and social movements? Yes, social media could be an important mechanism for collective action, protests and social movements. Leaders of social movements have used new information and communication technologies, such as mobile phones and the Internet, to mobilise public opinion, organise mass protests and publicise concerns and demands locally and globally. Information and communication technologies reduce costs associated with publishing and accessing information and facilitate communication and coordination across distances. This, in turn, reduces the transaction costs for organising collective action and the costs of participation. More specifically, the Internet for example, allows groups advocating for social change to spread not only their ideological messages but also their training programmes and operation plans. YouTube videos enable core activists to explain a movement's principles and tactics to dispersed followers without having to travel.

Communication technologies can foster collective identity across a geographically dispersed population. Individuals may get the sense, through online discussion groups for example, that they are members of a larger community with shared grievances. This allows civic groups to find and attract new members and to build affiliations with groups in other cities and countries. Relationships can be strengthened through the maintenance of networks across distance, sharing information and discussion. The creation of particular group understandings regarding the meaning and significance of specific events and politics can be crucial to support for a movement.

Although social media allows for the development of community and collective identity at low cost, this does not necessarily translate into street action, which is necessary for the success of a protest movement. New technologies might actually make citizens more passive, by leading them to confuse online rhetoric with substantial political action, diverting their attention away from productive activities. Instead of attending meetings, workshops and rallies, uncommitted individuals can join a Facebook group or follow a Twitter feed at home. This may not motivate them to leave the comfort of their homes to join the chaos of street action. Social media seems to favour the development of weak-tie connections instead of strong-tie connections, developed through face-to-face interaction prominent during prior movements, for example, the civil rights movements in the 1960's (as in the United States, Canada, Northern Ireland, the student strikes in Germany and France or the Prague Spring). Weak ties are less likely to result in strong commitment and individual sacrifices, and less likely to help change the status quo.

XIII. Deontology of Social Media

Are the regulatory practices and styles of reporting that have developed over the years for conventional mass media equally applicable to social media? When it comes to regulating the behaviour of social media, many of the assumptions that underlie the regulation of conventional media simply do not apply. For example, the space to publish material on the Internet is literally infinite, compared with the assumption behind broadcasting regulations that the frequency spectrum is a finite resource that must therefore be shared. The convergence of traditional and social media also means that governments face the challenge of where and how to draw the line with regulation.

The Internet has transformed human rights movements. States can no longer exercise control by claiming a monopoly over information. The regulatory challenge posed by social media so far has been the following: old mass media can be regulated in a way that does not constitute censorship and enhances, rather than restricts, freedom of expression. Such regulation of social media has proven impossible. Social media can be regulated, but the content of the Internet, for example, is so diverse and widespread that regulation has been heavy-handed and has amounted to censorship: interception of emails, closure of web sites, and pressure or legal action against Internet service providers.

The Internet poses a challenge to traditional views of mass media conduct in elections. Pre-polling blackouts on campaign coverage, for example, are difficult to police because of unregulated web sites. Attempts by national regulators to close down websites are met by the creation of mirror sites (replicas) beyond the country's borders. Self-regulation by social media users is also more difficult if not impossible, and social media has sometimes ignored conventions that have been widely accepted by "traditional" mass media (for example by not reporting exit polls before voting has ended). It is generally accepted that it is difficult to do anything specific to regulate social media around elections. The law defines what is and is not acceptable in terms of campaigning and other media-related activities. Therefore all mass media, traditional and new, as well as political actors need to abide by that law.

XIV. The European Electoral Heritage

In accordance with the guidelines of the Venice Commission's Code of Good Practice in electoral matters, "(i)n the framework of the European electoral heritage, suffrage is governed by five principles: it must be universal, equal, free, secret and direct".

The need for free and secret polling it is explained, because secrecy helps shield voters from pressure to vote for a specific party or candidate.

The principle of universal suffrage means the only type of suffrage which is deemed genuinely democratic.

Equality before electoral law means that elections must guarantee equality of treatment for the citizens and must not be applied in a discriminatory manner.

Principles which are not questionable regarding the use of social media – universal and free suffrage.

But what can be said, regarding the use of social media, about the secrecy of the vote and the equal suffrage? We will let the reader give possible answers.

XV. International Instruments

International Covenant on Civil and Political Rights (ICCPR), Article 25 b:

To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3, Protocol 11:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Copenhagen Document 1990, I 5.1:

– free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives;

The European approach is more regulation oriented, aiming to reduce the possibility of fraud committed by social media. When assessing whether enforceable national law regulations are possible concerning social media, the non-transparent and cross-border features of social media platforms need to be taken into account.

When dealing with the use of social media during elections by election officials, special care has to be taken to clearly differentiate platforms of official communication from the disclosure of information on social media platforms. It shall also be taken into account that the accessibility of social media platforms is rather limited among the older generation.

Social media is an existing phenomenon providing an environment that may shape the attitude of voters and hence overall voting activity, thereby providing a significant impact on the outcome of every election. Social media shall be used as a cost-efficient communication platform between electoral management bodies, voters, political parties and candidates before, during and after elections.

It is said that the Internet would democratize society and would transform the user into a responsible citizen. Others argue that the Internet does not represent a real debate, but it has contributed massively to partisan mobility of the voters' turnout and to fundraising campaigns.

The Impact of Electoral Systems on Parties' Electoral Strategy

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The mission of the political parties in the society is to form the policy of the state, to obtain government offices and to conduct public affairs. The representation of the interests of the party in power is possible only through democratic election procedures, which allow parties to compete for key positions in the state government.

The direct exercise of the people's power through free elections is the basic principle of organizing state and local governments. The will of the people, expressed during the elections, is something that enables the organization of a democratic government in Ukraine. Representative bodies of the state power are formed through the elections. Therefore, the features of the electoral system have significant effect on the achievement of the statutory aims by the parties and on their ability to influence political processes in the country.

Today, there is a mixed (proportional-majority) system of parliamentary elections in Ukraine. In accordance with the Law of Ukraine On Election of the People's Deputies of Ukraine dated 2011 (*mutatis mutandis*), 225 members of the Parliament are elected on the basis of a proportional system in a nationwide multiseat electoral district under electoral lists of MP candidates from political parties, while the remaining 225 are elected by a simple majority system in single-seat electoral districts.

This electoral system replaced the proportional system, which had existed in Ukraine since 2005. A distinctive feature of the proportional system was the closed electoral lists, which were formed by the parties at their own discretion, and the voters could not influence the deputies corps, being in favour of one of the parties or its bloc participating in the elections. Given the fact that parties in Ukraine are mainly centrist-formed, i.e. from the top to bottom, such an electoral system took the Ukrainians away from forming the deputies corps and allowed the parties to focus only on the top five famous figures who represented their election programme to the society. As a result, people who did not have any authority among the electorate and saw no reason to communicate with them, often became People's Deputies of Ukraine. Under the proportional system, when the composition of the Verkhovna Rada and the party lists were mainly determined by the party leaders, the deputies and the voters were considerably detached from one another and there was no direct interaction with people *in loco*.

The return to the proportional majority system in 2012 forced the parties to approach the question of cooperation with the voters *in loco* in a new way. The need to nominate candidates in the single-seat electoral districts, caused a search for representatives who would enjoy authority and public support *in loco*. The nomination of a candidate in a particular electoral district was weighed with the level of popularity of the party as a whole in a particular region. Where the party enjoyed considerable support and popularity among the people, a lesser-known candidate from the party could be elected. His authority was reinforced by the authority of the party. However such a technique did not always work, and in many districts, where a party enjoyed popularity, its representatives just lost. And the victory was gained by more authoritative candidates who were self-nominated as a rule. These results reflect a significant interest of the voters in the candidate's personal qualities, his authority in the district and electoral slogans. These circumstances lead the parties to pay more attention to the nomination of candidates in electoral districts and to take into account the authority of a particular person in a particular locality.

In my opinion, the quality of party lists could be considerably improved if open-type party lists would be established and voters would be able to select a particular candidate from such lists. Such a model appears to be in line with the principle of direct elections above all, which arises from *Article 3 of the Protocol I to the Convention for the Protection of Human Rights and Fundamental Freedoms*.

In general, the electoral law applicable to the parliamentary elections in 2012 was much better in many aspects compared to previous models used, proving the strengthening of democratic electoral principles and adherence to universal, equal, free, and direct suffrage.

Without any doubt, the introduction of the unified register of electors is a positive step for ensuring an active suffrage for the citizens. *This register is based on the requirements of p.1.2. "The Lists of Electors" of European Common Principles in Elections, which were adopted by the Venice Commission at its 51st Plenary Session (page 52)*. However, the recent elections have shown some imperfections of these electoral rolls and some faults of the officials of the executive powers who were responsible for its forming. In particular, some dead persons were included in the electoral rolls; some inaccuracy in the addresses of voters also took place (in one of the districts more than 140 voters were listed as being domiciled in the cinema). However, these problems did not significantly affect the suffrage, as the law establishes quite simple and clear procedures that allow voters to check their electoral rolls and make corrections, in case of need.

In this situation, the problem mainly lay in the indifference of voters who had not checked information about themselves in the electoral rolls and in the passivity of the political parties which paid little attention to explanatory work and education of their electorate. In general, not only political parties but also public authorities devoted too little attention to familiarizing citizens with the rules of the election during the election process.

For example, being a candidate for deputy in a district which mainly included remote farmlands, firstly I had to tell local people how to realize their right to vote correctly and only then I told them about my campaign ideas and programme. Of course, the lack of awareness of voters about their electoral rights has a negative impact on the quality of the electoral process and its democratic character, and this problem should be resolved primarily by state authorities and by explanatory work of the parties.

Some legal nihilism of the voter was demonstrated by a conscious and voluntary violation of the secrecy of voting. In particular, some families voted in a booth together, some voters photographed their ballots or showed them to third parties. These actions could allow individual candidates and political parties to influence voters and buy their votes.

The territorial organization of elections in Ukraine is well-established to some extent and does not cause any problems. However, some electoral districts were divided in such a way that one electoral district included different communities (two districts of different sizes) that are virtually unrelated. Therefore, it was difficult for the candidates nominated in such electoral districts to campaign, as results of their work, moral and manager's qualities were usually known only in one part of the electoral district, while the other part had other favorites. Thus, in communities of different sizes united in one district a candidate promoted by the greater community will always win, and the smaller one will not be able to effectively influence the electoral process.

In addition, I believe, that the deviation of the number of voters in single-seat electoral districts at the level of twelve percent of the estimated average might be too high and has already raised the concern of some experts of the Venice Commission.

The current rules on the forming of election commissions account for almost all the problems that occurred during the previous parliamentary elections.

All election commissions are formed from the representatives of political parties participating in elections and of the self-nominated candidates. Moreover, one representative of the parties, factions of which are registered in the Verkhovna Rada of Ukraine of the current convocation, should be included in the composition of these commissions. The obligatory representation of parliamentary parties in the election commissions allows these parties to train their representatives better and ensure their professionalism. In addition, such a rule can be considered as a bonus for confidence in previous elections.

Also the provision, which allows the rest of the members of the commission to be chosen from the representatives of other parties and candidates by lot, thus ensures the principle of equality. For this purpose, a list of representatives of parties and candidates is being made and to each of the above-mentioned persons a number, determined by the date and time of the receipt of the submission to the district election commission, is assigned. After these lots are made with these numbers (they can be in the form of balls, cards identical in size and colored paper, etc.), they are placed in a cylinder in order to be mixed. Authorized persons, pulling out these lots, declare numbers of those representatives of the parties who will become members of the relevant commissions.

However, in practice there were cases of abuse in the election commissions' formation. In particular, during the drawing of lots, those numbers that had to be chosen, were placed in frozen balls or balls with different roughness. Also the participation in the election of a large number of so-called party-satellites that worked for large parties, made it possible for large parties to form their majority in the electoral commission.

There were also some problems with the functioning of the electoral commissions. In particular, many representatives of parties with low rating in these districts refused to work in election commissions, which created a situation where there was a lack of quorum and where the work of the commissions was made impossible. However, due to well-defined procedures for replacing members of election commissions such sabotage could not be fatal to the election results.

The low level of education of the members of the electoral commissions did not allow them to efficiently execute their duties and might be considered as a big disadvantage. Apparently, next to compulsory training, educational qualification – higher education – should be established for chairmen, deputy chairmen and secretaries of commissions. Also, it is useful to add to the current legislation a provision about the obligation of the authorities to meet specific requirements and needs of commissions. *This norm will meet p.85 Chapter 3 “Procedural Safeguards” (p.77)*

Some difficulties in observing democratic electoral principles may emerge during the operation of special polling stations (stationary hospitals, penal institutions). Such closed regime will likely not allow effective campaigning with voters in these stations, and will sometimes hamper their freedom of expression and encourage some abuse. As a result, the election can demonstrate the absolute support of the ruling party at closed special polling stations. In order to avoid the operation of such stations, maybe it will be better to hold elections in such places with ballot boxes, so that the results in such places are counted with election results at other polling station and the choice of people from the secure setting could not be traced.

Much attention should be paid to the extremely effective work of authorized persons and official observers during elections. They were responsible more than others for the protection of

the interests of parties and candidates, election results, and democratic principles. The execution of their duties greatly simplified the enacted right to form acts of violation of election laws. However, the analysis of the judicial practice has shown that a large number of acts were not considered and that the courts refused to satisfy claims, because of the failure to take formal note of the offence. Obviously, higher-level courts should interpret the law in such a way that formal grounds of refusal of a claim are inadmissible and should oblige the courts to analyze such acts not only based on their form but also based on their content.

At the same time, the parties should also pay more attention to training their observers, in particular with regard to drawing up the required documentation.

Elections in 2012 also demonstrated other problems related to the activity of the official observers. In particular, a large number of them and a small area of the polling stations sometimes physically prevented the observers from participating in the election procedures specified by law. Numerous lawsuits also concerned the unjustified removal of observers from polling stations by the decision of the election commissions. It seems necessary to provide for the possibility of legal responsibility of the members of the election commission for unjustified removal of observers, as even an renewal of their status through the courts often did not allow them to fully trace the elections (during the time of their removal until the reinstatement of the rights by the court). Even a short absence of the observer makes it possible to apply certain forbidden technologies. Also, to my mind, the lack of the ability of official observers to vote at the station, where they execute their duties, limits their right to vote in some way. One of the possible ways of resolving this problem is to make parties prepare local observers who would work at those polling stations where they vote.

The detailed rules for campaign financing positively influence the course of the campaign and the adherence to the principle of equality.

An obligation of parties and candidates to create an electoral savings account allows for making procedures of elections funding transparent, but having no restrictions on the size of the election fund of political parties or candidates can be considered as a lack of legislation. Thus, small parties which do not have rich subscribers are unable to compete with wealthier parties. Recently, parties actually emphasized the size of the election fund more than other forms of getting their ideas across to the voters. The prohibition for individuals to transfer more than the maximum contribution and the prohibition of foreign subscribers to the election funds are incomplete, as the contributions can be transferred to the account of the party, from which they can easily be transferred to the election fund.

Financing the electoral campaign is closely connected to the canvassing and the use of media. In this field Ukrainian legislation has something to work with. Firstly, I find the requirements to submit a copy of all campaign materials, created by the party or a candidate to the CEC (Central Election Commission), to be an overregulation. It is clear that the CEC would not have any physical possibility to check all these materials. And since the law does not set the principle of selection for these checks, a situation, when individual parties or candidates will be subject to intrusive inspections, may arise. *Similar warnings are set out in the Terms of principles in Part 1, p.61, where such actions are regarded as an unacceptable form of censorship (p.73).*

The obligation to indicate specific data (circulation, publishing company, customer, etc.) throughout campaign materials was aimed at strengthening the party's responsibility for the content of such materials. However, there were cases, when campaign materials were printed by unknown persons without appropriate data as a provocation. This usually means an ill practice, but mechanisms to prevent such practices are still to be developed.

At the same time, there is a need to strengthen the responsibility for campaign funding from sources other than campaign funds.

Widely used technology for canvassing voters by handing out food packages, free of charge consultations, and charity events (equipping playgrounds, computers for schools, etc.) also needs analysis. These actions on behalf of the candidates or parties were conducted by specifically designed NGOs and formally candidates had no ties with them.

The last parliamentary elections have revealed problems with campaign coverage in the media. Typically, mandatory state-provided air for agitation is not sufficient. Therefore, most of the air space was used on a contractual basis. Therefore, wealthy parties had many more advantages. There were also situations of special pleading for campaigns in various media in favor of certain parties. Parties also used hidden advertising by having their candidates participate in various shows and entertainment programs.

Obviously, only restrictions over election funds and strict control over their execution can improve the situation. *The reasonability of setting a maximum limit arises from § 107–109 Part 3 of Chapter 5, “The Financing”, where the excess of statutory maximum expenses is considered to be a ground for the invalidation of elections (p.80).* It also seems that an analysis of the financial statements of parties and candidates should be executed not by the CEC, but by a special body, in which members have the experience of financial audit. We should also clearly prescribe in the legal basis the conditions of legal liability for infringement of elections financing.

As for the nomination and registration of candidates, election law quite clearly prescribes its implementation, but it allocates only 11 days (from the 90th to the 79th day before the election) for all the procedures of party nomination and the congress meetings. It is a very short period in which to hold necessary congresses, discuss possible candidates, and establish appropriate lists. This rule makes the party start forming lists earlier than required by law, so that they are formed behind the scenes, which, of course, hardly complies with democratic principles.

Very little time (4 days) is also given to register candidates, so in some cases excessive fault-finding by the CEC with regard to content and form of candidates' applications seems to be dangerous. Several times, forms were returned to applicants because of formal remarks, which might lead to a refusal to register a candidate for election or to the exclusion from the electoral list.

There is some gender disparity in the formation of candidate lists by political parties. There are still a very small number of female MPs in Ukraine. Obviously, the party should manage such inequalities on their own. It would be good to determine at the legislative level the minimum number of women to be included in the electoral list and their alternation with men. *This norm will meet p.2.5 Equality and parity of the sexes of the European principles of the Venice Commission (p.54) and the Declaration on women's participation in elections, adopted by the Venice Commission at its 67 Plenary Session (p.83).*

The length of the ballots also caused some problem for voters. Many people, especially the elderly, could not understand these lists printed in small type and, failing to find the party that they support, they just spoiled the ballots or did not fill them out.

A similar situation arose with ballots in single-seat electoral districts. A certain know-how of these elections involved picking votes from rating candidates in their districts through balloting their namesakes. This misled voters during a direct vote.

Such strategies became widespread after the presidential elections in Ukraine in 2009. Due to certain moods in society and the desire of many citizens not to support any candidate for president, lawyer Mr Vasil Gumeniuk changed his surname to “Againstall” («Protyvsih») and entered the presidential race under this surname. Such manipulation allowed him to gain 0.16% of the vote, which was the 14th result from among 18 candidates.

Further, following the recommendations of the Venice Commission, Ukraine refrained from adding the column “Againstall” to the ballot, which provided an opportunity not to support any candidate. This obliged voters to be more attentive and examine candidates’ CV.

After the election a lot of attention was required from the parties during the counting and processing of the results. In particular, there were differences between the data that passed to the CEC electronically and that received on paper, in some districts. In the electronic record the total number of voters always coincided with the paper copy, but the number of votes on the paper record cast for one party could be larger in the electronic record or otherwise.

In conclusion, it may be asserted, that despite the current problems of legal regulation and practice of electoral legislation, Ukraine has been steadily moving towards improving its election laws by testing different electoral systems and models. In these circumstances, an essential role is assigned to political parties as key actors of the electoral process, designed with the help of legal institutions to work for electoral principles and transform voters’ will into certain legal solutions. I hope that our experience will be of use for the international community in reforming the national electoral law.

SESSION III: PARTICIPATION OF POLITICAL PARTIES IN ELECTIONS

**Part 2: Political parties
and the electoral process
in Arab countries**

Political Parties and the Election of the Members of the General National Congress

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Libya is a country that is new to democracy, and for 40 years was under a one-man regime which did not believe in political participation and which consequently attacked parties, portraying them as traitors to the country.

As a result, the party experiment in Libya will not be easy, and the road will not be smooth. In this study, I seek to describe this experiment and its features, remaining as objective as possible. The first part of this purely legal study analyses the texts and legislation introduced and the clear legal attitudes and positions adopted. The second part will be political. It looks at the political situation and examines the various political positions. Despite the difficulty in identifying these political positions as in many cases they are undocumented, I shall focus solely on confirmed issues and the positions that have been clearly established. I shall then present a general assessment of this simple experiment.

May God grant me success.

Part 1. The legal organisation of political parties

Part 2. The political activities of Libyan parties

I. The legal organisation of political parties in Libya

The text of the Interim Constitutional Declaration issued by the National Transitional Council, the political leadership of the Libyan revolution, laid down the most important principles of the revolution and the most important elements of the new Libyan state. Article 4 of that declaration states that “the state shall seek to establish a political democratic regime to be based upon political and party pluralism with a view to achieving the peaceful and democratic transfer of power.”

In addition, “Freedom of opinion and expression for individuals and groups, freedom of scientific research, freedom of communication, freedom of the press, the media, printing and publishing, freedom of movement, freedom of assembly, freedom to demonstrate and freedom to engage in peaceful strikes shall be guaranteed by the state insofar as they are not inconsistent with the law.” (Article 14)

Article 15 of the constitution provides for the freedom to form political parties and the state’s obligation to enact legislation to guarantee that freedom and regulate their activities. “The state shall guarantee the freedom to form political parties, associations and other civil society organisations, and shall enact legislation to regulate such entities. It shall be forbidden to establish secret associations, armed organisations, those contrary to public order or public morals, or any other entities prejudicial to the state and the unity of the nation.”

This is the general guidance that has been laid down, but in order to determine the legal status of parties, we must study them in the light of the institutional law specific to them, and the

procedural laws defining their role in every instance (in terms of what they can and cannot do) as a political and legal means of exercising power. We shall deal with each point in separate sections.

Section 1: The institutional law on political parties – Law No. 29–2012 on the organisation of political parties

This law was promulgated by the National Transitional Council on 2 May 2012, pursuant to the Interim Constitutional Declaration. This law regulates political parties in a comprehensive way, stipulating that a political party is “any political organisation formed with the agreement of a group of Libyans, established in accordance with the provisions of this law. Its activities shall be managed openly through peaceful and democratic means with the aim of contributing to political life, in order to implement specific and published programmes in the political, economic, social and cultural fields, with the aim of participation in the responsibilities of governance and the transfer of authority in accordance with the law on general elections.” (Article 2)

Parties are also considered a means of contributing to the achievement of political, social, cultural and economic progress, raising the awareness of citizens and providing them with political representation (Article 4). The law guarantees the protection and legitimacy of parties and stipulates that all parties are equal before the law. (Article 7)

In order for parties to be established and obtain authorisation to carry out their activities, the law stipulates that their principles, aims, programmes and means of action must not be in conflict with the principles set out in the constitutional declaration; that they must have at least 250 members; that their aims, principles, means of action and sources of funding must be made public; that they may not be an offshoot or branch of a non-Libyan political party or associated organisationally with such a party; and that they must have a political statute and a political programme. (Article 8).

The law also prohibits parties from establishing or helping to establish military or paramilitary formations, from using, threatening to use or inciting the use of any form of violence, from including in its programmes and publications anything that incites violence or hatred or sedition, and from circulating or publishing any ideas contrary to Islamic law or calling for political despotism.

The law establishes the right of all Libyans to establish parties and to join parties (Article 3). It lays down conditions for membership of political parties – members must be Libyan nationals of at least 18 years of age and must enjoy their political and civil rights (Article 5). Members of the armed forces, the civil service or the judiciary may not be affiliated to any political party (Article 6).

The above is in addition to a number of other organisational and procedural conditions. Parties must have a slogan, a symbol and articles of association, comprising the full name and the abbreviated name of the party, its registered office, its aims, the conditions for obtaining and losing or withdrawing membership, the rights and obligations of party members, the party’s organisational structure, the procedure for choosing the leadership body and their terms of reference, the means to monitor the latter’s activities and hold them accountable, the name of the positions in the leadership body, the sources of funding and expenditure procedures, the methods of internal monitoring, the procedure for amending the articles of association, and the provisions regarding the duration of the activities of the party, recommencing its activity, reorganising the party or terminating its work. (Article 12).

In pursuance of the provisions of this law, the state is also required to support those political parties authorised to engage in political activities. This support is organised as follows: 50% of state support shall be allocated among all registered and authorised political parties; the remaining 50% shall be allocated to registered political parties according to the percentage of votes received, providing that this is not lower than 3% (Article 20).

This law authorises parties to have their own media outlets to express their views and opinions and achieve their objectives provided that this does not violate the law. It guarantees protection for parties and proclaims their inviolability, insofar as all monitoring and inspections of their headquarters or confiscation of their documents shall be prohibited, except in cases of “flagrante delicto” and by judicial decision. The public prosecutor must notify the Committee of the measures taken within 48 hours (Article 27).

The law also established a precise mechanism for the supervision of parties, and the procedure for terminating their activities and dissolution (Articles 29–32).

Undoubtedly, this law guarantees extensive freedom for parties, ensures that they have the means to achieve their objectives and confirms the protection afforded to them and their independence. It is an excellent start and constitutes considerable encouragement. However, this law still has not fully implemented its clauses, since the supervisory mechanism has not yet been activated, nor has the financial support.

Nonetheless, the important issue now is to activate the role of parties as a political means to gain power and establish political institutions, since this lies outside the scope of this institutional law. This is covered by other laws which regulate the political process, such as Law No. 4/2012 on the elections to the General National Congress, which regards political parties as a secondary means of participation in the elections to the General National Congress; and Law No. 17/2013 on the election of the Constituent Assembly, which prohibits parties from taking part in the elections to that body.

In order to determine the general legal position of political parties, we must now look at the most important of these procedural laws.

Section 2: Regulations governing the role of parties in political elections

In this section, I shall focus on the actual role of parties as a political means to form sovereign institutions. In order to identify this role, we must turn to the procedural laws which regulate the political processes separately. Two laws have been promulgated in Libya regulating two important political processes. The first refers to the elections to the General National Congress, and the second to the election of the Constituent Assembly responsible for drafting the constitution.

1. Regulations governing the role of political parties in the elections to the General National Congress.

Law No. 4/2012 on elections to the General National Congress was promulgated on 28 January 2012 to regulate the elections to the General National Congress, and accordingly, to regulate the role of political parties in these elections. It considers parties as a non-fundamental, secondary means of participation, assigning them 80 seats out of 200, in other words 40% of the constituent council. It does not authorise them to participate in all constituencies, limiting the permitted constituencies to 13 out of 20.

The law also authorises “political entities” to take part in the elections, defined in point 7 of Article 1 as a group of individuals, a political grouping or a political coalition submitting a list of candidates based on a political agreement. Consequently, many political entities were constituted from a group of sometimes no more than three people coming together to take part in the elections, competing with the political parties for the 80 seats allocated to them.

More than 100 parties and political entities took part, and if we exclude the five main political parties, those political entities were local, running only in the constituency in which they had been formed.

The system of proportional representation, closed list and a single non-transferable vote was adopted for these elections, whereby voters have a single vote on the closed list, in which the candidates must be ranked in order of priority, and may not vote for the individuals on the list. For the purposes of the allocation of seats, the electoral average for each constituency is determined by dividing the total number of valid votes in the constituency by the total number of seats allocated to it. Then the total sum of the votes for a political entity is divided by the electoral average, and the seats are allocated to the political entities in accordance with the actual numbers resulting from that division.

Any remaining seats in the constituency are allocated in accordance with the highest remainder. Consequently, all the political entities benefit from the remaining votes. Seats on winning lists are allocated in descending order (Article 7).

According to the results announced by the Supreme Electoral Commission, the composition of the National Congress was as follows:

National Forces Alliance, considered as belonging to the liberal tendency – 39 seats; the Justice and Construction Party, founded by a grouping of the Muslim Brotherhood and others – 17 seats; the National Front for the Salvation of Libya, one the largest political organisations opposed to the Gaddafi regime since the 1980s – 3 seats; the National Centrist Party – 2 seats; the Union for the Homeland – 2 seats. The remaining seats were allocated amongst various small parties, obtaining one seat each. These were: the Wisdom Party, The Message Party, the Homeland Party, the Nation for Development and Welfare Party, the Centrist Youth Party, Labaika National Party, the Libyan National Party, the Foundation Party, the National and Prosperity Party, the Wadi Ash-Shati National Assembly, the Wadi Al-Hayah Alliance; the Libyan List for Freedom and Development; the National Parties Alliance; the Moderate Umma Assembly and Libya –The Hope.

Leaving aside the top five parties, the other fifteen parties which obtained just one seat are all local parties, receiving votes in their own area. Most of them participated in the election only in their own areas and did not have a national political programme, their campaigns focusing solely on spatial development in their own areas and addressing local problems. They also relied on holding leading positions locally and consequently cannot be considered as political parties. Despite that, they obtained roughly 25% of the seats allocated to parties, and consequently the number of seats obtained by genuine parties came to 63 out of 200, equating to just 31% of the total.

The main criticism of this law can be summed up as follows:

1. Participation by parties was absent in certain areas and did not cover the whole country since parties were not permitted to run in all constituencies, but were restricted to just 13 out of 20 constituencies. Party members were permitted to stand as independents, and parties were allowed to support independents.
2. Participation by parties was partial and incomplete since:

3. (i) they could compete only in respect of 40% of the seats on the National Congress (80 out of 200), based on the fact that parties were regarded as a secondary, non-essential means of participation in these elections
4. (ii) the 40% quota was not limited to the organised and authorised parties but included what is termed “political entities”. The latter are small legal persons, comprising at least three people, whose basic motive is primarily individual or tribal and consequently they are in reality natural persons rather than legal persons.

This law adopted a proportional representation system, which enabled the aforementioned political entities to take approximately 25% of the quota set aside for parties, as they benefited from the remainder system. Most of these formations obtained the last seat in the constituency having received less than 10% of the votes obtained by the winner of the first seat there. For example, we find that the National Forces Alliance obtained 950,000 votes in the elections to the National Congress, i.e. some 65% of all votes, but obtained no more than 50% of the seats allocated to parties. This is a result of proportional representation. We also find that the winner of the first seat in a given constituency obtained 10,000 votes whereas the third seat was won by someone obtaining just 500 votes, and usually this was a political entity.

There is therefore no doubt that this law has reduced the role of political parties and runs counter to the general direction pursued by the state as enshrined in the constitution. It has been prejudicial to the political process as a whole, by making parties a secondary means, by inventing the idea of political entities and by adopting a proportional representation system.

Nonetheless, the political parties were able to assert their existence and presence in this election, to take a leading role in the political movement and in the electoral process and to take part in the constituencies reserved for independents by means of independent candidates. They have shown that they have a real presence in the Libyan political structure.

2. Regulations governing the role of political parties in the election of the Constituent Assembly

The law on the Constituent Assembly responsible for drafting the Libyan Constitution was passed by the General National Congress to arrange for the election of 60 Libyan members to draft the Libyan Constitution. This law stipulates that candidates for membership of the Assembly must be independent and have no party affiliation. Consequently, this law not only prevented parties from direct participation in announcing their programmes and candidates, but it also prevented them from indirect participation in this Assembly.

Many felt that this was contrary to the constitution, whether as regards the prohibition of their participation as political parties and thereby playing a fundamental role, or by violating the idea of equality enshrined in Article 6 of the constitution by preventing anyone with a party affiliation from standing as a candidate to be elected to the Constituent Assembly.

However, promulgation of this law by the General National Congress was prompted by the prevailing political situation. It was passed with a quorum set at 120 members, following long debates and discussions in the General National Congress and following a public consultation. The second part of this presentation identifies some of the reasons which led to this position vis-à-vis parties.

II. The political activities of parties in the General National Congress

The General National Congress is the supreme sovereign power in Libya. It carries out a complete legislative and supervisory role, in addition to an executive role and a constituent role, thereby making the political situation within it reflect political life in the country as a whole. Accordingly, assessing the role of parties within the Congress equates to assessing their role in political life in Libya generally.

In assessing the political activities of parties in the National Congress, and despite the fact that it was founded no more than one year ago, it is apparent that these activities can be divided into two periods. In the first period, essentially a “party” ideological factor dominated political life in Libya. In the second period, this factor diminished and a regional factor emerged as a major driving force at the expense of the ideological factor. I have therefore divided this part of the presentation into two sections and in each of these I shall discuss and analyse the role played by the parties.

Section 1. Predominance of the ideological factor (complete party domination)

The predominance of the ideological factor as a prime political driving force began with the elections to the General National Congress. Despite the fact that Libyan society is primarily a tribal and regional society, for historical and other reasons connected with the policies of the former regime to exploit the tribal society and regional disputes in order to consolidate power, and despite this regional pride and the radicalisation of tribal affiliations in many Libyan towns and villages after the revolution, the ideological factor was a key factor in the elections to the General National Congress, in which parties had an active and genuine presence. Competition between parties in those elections was limited to two main parties – the liberal National Forces Coalition and the Islamist Justice and Construction Party. Both parties achieved good results at the expense of the small regional parties in their own regions, and in most constituencies took first place.

Following the announcement of the preliminary results of the elections, the real competition between these two parties became apparent, with each party attempting to attract the independents according to its own political leanings. And this was successful to a certain extent. This resulted in the formation within the General National Congress of two main camps – one with moderate liberal leanings and the other with Islamist leanings, comprising all the various Islamic currents. The independents joined the parties in a number of ways, either by announcing their affiliation to the party bloc or by forming an independent bloc, considered as an allied or secondary bloc of the party, or by remaining independent in form but with an allegiance to and acting in co-ordination with the party.

This partisan division within the National Congress became manifestly apparent, and was reflected even in the members’ seating arrangements. While the Islamic bloc sat on the right, the civilian liberal bloc sat on the left and it appeared that this seating arrangement facilitated the harmonisation of positions and the rapid internal consultations during debates and voting. We therefore see that the members from a variety of regions sat together, united by the ideological factor at the expense of the social factor, which perhaps divided them. The members of a single city and a single constituency sat with one of the two camps, each working against their colleagues, giving priority to the interests of their party or their bloc.

The share-out among the parties that took place in that period included the formation of the Congress Bureau, the formation of the parliamentary standing committees and the formation of the government.

The presidency of the Congress was decided in accordance with a share-out among the parties. The National Forces Alliance took the position of first Vice-President and the Justice and Construction Party that of second Vice-President. The post of President was given to the National Front which subsequently joined the Islamic bloc. The remaining Congress leadership positions were allocated as follows: the position of official spokesperson was given to the Alliance and the positions of rapporteur and deputy rapporteur were given to the Islamic bloc. The standing committees and their chairs were allocated in accordance with this share-out arrangement.

Perhaps the largest role played by the party factor in the political movement within the Congress was in the formation of the current government, where the competition was fierce between the two parties, leading to the formation of a government along purely party lines. This share-out on occasions extended to heads and staff of departments.

This then extended to certain sovereign positions in Libya, such as the Principal State Prosecutor, the President of the Supreme Court, the head of the intelligence services, the Mufti, the Chair of the Supreme Electoral Commission, the Chair of the Integrity and Patriotism Commission, ambassadors and international envoys.

This was also reflected in some of the institutions belonging to the National Congress, such as the supervision and follow-up apparatus, the Board of Auditors, the Anti-Corruption Commission and the railways board, as well as the administrative organs of the Congress, such as the Congress Bureau and the presidential guard.

During this period, therefore, the General National Congress was divided into two main blocs. The Justice and Construction Party headed the Islamic bloc, which comprised small, independent parties from various regions throughout Libya. The same was true of the liberal bloc, headed by the National Forces Alliance, which also comprised small independent parties from various regions. The regional and tribal factor ultimately disappeared at this stage and was considered to virtually no longer exist. Political participation was exercised via these two parties, within which an effort was made to ensure a degree of balance based on tribal and regional factors.

Perhaps the party factor was the optimum factor with regard to political participation as it appeared to be a regulated factor, facilitating co-operation and harmonising viewpoints and positions. In addition, it was a factor supporting the unity of the country, bringing with it a sharp reduction in the tribal and regional factor that was conducive to division and conflict.

Section 2. Predominance of the social factor (weakening of the role of the parties)

Over the last six months, the role of the parties has considerably weakened and there are perhaps many reasons for this. Internally, these include the parties' poor organisation and relationships with the allied blocs. Externally, it is due to the political situation of the country as a whole, which had a serious impact on the role of the parties, as shown below.

A. Reasons for the weakening of the parties

• Internal reasons

- i. The parties' weak internal organisation and the poor allocation of positions within them.
- ii. Their poor distribution of political positions and benefits, as they failed to ensure equality between their members and between towns, which provoked the resentment of the members of the Congress affiliated to them.

- iii. Failure to allow members of the General National Congress belonging to them a degree of freedom. This also derives from their internal organisation, especially where the private or regional interests of a member conflicted with the direction taken by his or her party, which the member concerned may feel was unjustified. What made matters worse was the party's frequent lack of understanding of the embarrassing situation this placed the member in vis-à-vis his or her constituency. One example was where the National Forces Alliance called for the withdrawal of membership in the Congress of two members of the Alliance because they had voted against the party.

- **External reasons**

- iv. The issuing of Resolution No. 30/2013 which stipulated the complete independence of members of the General National Congress from their parties and the fact that the latter could not revoke their membership or oblige them to take a particular line. This resolution came about following the request from the National Forces Alliance for the withdrawal of membership of the Congress of two of its members. The Congress Legal Committee ruled that such a request was impossible since the Constitution and the Rules of Procedure established immunity for Congress members and the only way of withdrawing membership was by the Congress with the specified quorum (120 votes) and exclusively in specific cases. A party was allowed to revoke membership only with the agreement of the Congress. This view was contrary to the view of the National Forces Alliance, whereby Article 7 of Law No. 4/2012 on elections to the General National Congress was explicit on this matter, stipulating that the seats belonged to the political entities and not to the candidates. Overall, this resolution had a major impact, weakening the party's role of supervising and instructing its members and making members independent as regards their decisions and not under any obligation to heed the instructions given to them by their parties. Some felt that this resolution was tantamount to bringing about an end to parties, while others felt that the presence of parties was necessary in the general interest and for reasons of protection and co-ordination, not to impose views and issue threats. Consequently, this resolution was to serve as a means of rectifying the situation and putting matters right.
- v. The Political Isolation Law. This law was passed to politically isolate the majority of the party leaders, such as the leader of the National Forces Alliance and other powerful party leaders.
- vi. The political conflict in the country. The parties entered into political conflict among themselves and shifted from a concept of harmony to a manifest escalation in which each party hurled accusations at the other. This led to attacks via the media, satellite channels and TV programmes and even to court cases.
- vii. The tense political and security situation, on account of the political conflict. The parties were held responsible for the worsening political situation and the government was unable to implement any development plans, maintain the security and protection of citizens, put an end to human rights violations and improve living conditions. Accordingly, the parties were seen as being responsible for this failure as they were responsible for the political conflict within the country.
- viii. The public's low level of confidence in the parties. The public accused the parties of corruption and held them responsible for the deteriorating conditions. The media began criticising the parties and the satellite channels became a vehicle for attacking them, damaging their reputation, and accusing them of bribery and corruption, of pushing through external agendas and of having armed militias.
- ix. The anti-party demonstrations. There were numerous demonstrations calling for the dissolution of the parties and a freezing of their membership. Many of these dem-

onstrations were peaceful, waving banners or writing on walls, but this degenerated into attacks on party headquarters in various towns, and there were attacks on the main headquarters of the National Forces Alliance and the Justice and Construction Party, the latter's headquarters being burned and the former's being destroyed. There were also attacks on many of their branch headquarters.

B. The impact of the weakening of the parties' role

- i. The impact of all this was that there was a significant weakening of the parties' role. The two main parties put their activities on hold, the initiative beginning with the Justice and Construction Party. This position was in keeping with what was happening in Egypt. The party announced that its activities would be frozen until the adoption of the permanent constitution. The party's members of the Congress were to be considered independents and not subject to the party's instructions. The National Forces Alliance subsequently followed suit.
- ii. The prohibition of party participation in the Constituent Assembly. Law No. 17-2013 on the election of the Constituent Assembly in charge of drafting the Constitution, prohibited parties from submitting candidates for membership of the Assembly. It also prohibited anyone affiliated to a party from standing as a candidate. This was in line with, on the one hand, the then prevailing climate of accusations against the parties and the fact that they were no longer accepted by public opinion and, on the other, the parties' desire to calm things down and downplay their role.
- iii. The emergence of the regional factor as a main driving force. On many occasions, members of the Congress began asserting the regional factor over the ideological factor and several regional alliances emerged, along with numerous tribal alliances and agreements. Many statements were issued by the Libyan tribes and towns, setting out their positions on specific issues.

III. Conclusion

There is no doubt that the party experiment in Libya is still a nascent experiment, and the "labour pains" are still severe. However, this does not prevent us from attempting to evaluate the experiment and identifying the course it has taken. On a legal level, it started off well; the constitution set out the general principles governing parties, in terms of an obligation on the state to protect and organise them and their being acknowledged as a means of political participation. Then Law No. 29-2012 was promulgated providing for the sound organisation of parties. However the other procedural laws did not regard these as an adequate means of limiting the exercise of authority over them and so Law No. 4-2012 on the elections to the General National Congress stipulated a minor role for parties with participation in the elections no higher than 40%, and Law No. 17-2013 on the election of the Constituent Assembly prohibited parties from taking part.

However, on a political level, the party factor was fundamental in the political process in Libya. Nonetheless, because of a failure to organise the parties, because of their lack of experience and because the public did not understand their role, there was a revolution in the general perception of parties, and they became prey to accusations and contempt, causing them to freeze their activities and withdraw somewhat from the scene. This allowed other factors to emerge, which could have an adverse effect on the national unity of Libya. Accordingly, we see that the political parties are experiencing a genuine crisis and they must do all they can to pull themselves out of this crisis and reconstitute themselves.

The Participation of Political Parties in the Constituent Assembly Elections of 23 October 2011

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After 55 years of independence, Tunisia held its first democratic election in 2011. It was an election that suddenly traced a new political landscape for Tunisian society and finally allowed voters to be represented fairly. The analysis of the participation of political parties in these elections, and particularly the results thereby obtained, have the merit of showing the real and new power relationships in the country for the first time, identifying progress that has been made and backward steps, consolidation or stagnation of parties, as well as the new phenomena likely to catch the attention of observers. This is all the more important given that Tunisia has never known true representation of the real forces evolving within it. Previous legislative and presidential elections, which took place under the authoritarian regimes of Bourguiba and Ben Ali, were affected by widespread fraud.

Firstly, it is necessary to highlight the existence of certain difficulties hindering the effective and complete participation of parties in the constituent elections. We can find five:

- Firstly, there is the fact that the Revolution was the work of civil society, which participated in all riots and protests, and was not led by political parties. Antoine Messara asked the question "Who benefits from the crisis of political parties?" We could simply answer, as far as Tunisia is concerned at least, that civil society has and still benefits from this crisis. It is civil society that revolted, that determined the political agenda in the first phase of transition, that causes the most difficulties for Islamists when they have been elected and puts pressure on the Constituent Assembly and the government
- Next the fact that the party formerly in power under Ben Ali, the Democratic Constitutional Assembly (RCD — *Rassemblement Constitutionnel Démocratique*), and its members, were excluded from political participation in this election by the decree-law of 10 May 2011 relating to the National Constituent Assembly (Article 15). The RCD has itself subsequently been dissolved by a court ruling
- Another difficulty lies in the fact that half of the eight opposition parties that existed during the rule of Ben Ali collaborated with the former regime and came to be discredited in the minds of voters
- There is also the fact that political parties participated in this election in the absence of any established party system that would be able to structure political life. After the revolution, more than a hundred parties were developing amid vast confusion. The party system being, we recall, the type of power relationships existing between the majority and the minority as well as the nature of the combinations and alliances found within Parliament. Now, for 23 years there was a hegemonic party in Parliament, which decided whether to authorise the entry of any "opposition" party to Parliament, depending on its degree of allegiance, by manipulating voting methods and rigging elections

- The final difficulty is the fact that most of the 115 parties formed after the revolution barely feature in public opinion and are almost unknown to the public as a whole. People do not even know the name of the heads or main leaders of these parties. This explains new parties' pursuit of extreme media coverage.

For this reason, of the 115 parties in existence in the country on the eve of the elections, only 77 decided to participate in the elections of 23 October 2011, which would serve to elect the people's representatives at the National Constituent Assembly (ANC — *Assemblée Nationale Constituyente*). This explains the limits of the new parties whose instigators thought that the creation of a party would be comparable to the creation of an ordinary association.

In any case, in these elections the vote was, largely, favourable to some rare organised and structured former opposition parties, naturally selected by the electorate. However, curiously it was not favourable to other "former" opposition parties, such as the Progressive Democratic Party (PDP) or Ettajdid (left-wing), the latter presenting itself as part of an alliance.

Overall, the participation of political parties in this election produced four big surprises and semi-surprises: the great extent of Ennahda popularity (opinion polls all predicted 25–30% of votes or seats); the penetration of Moncef Marzouki's Congress for the Republic (CPR — *Congrès Pour la République*); the Al Aridha "Popular Petition" lists (a Tunisian Poujadist current with tribal and regional characteristics); and the decline of Najib Chebbi's PDP, which had been well-placed by most pre-election polls. At the same time, the (not yet scientific and professional) polls that appeared after the revolution were unable to definitively predict any of the four big surprises. They have always shown a proportion of 25–30% in the "no response" or undecided categories. However, visibly and against all expectations, the votes behind these "no response" figures seem to have contributed to the appearance of the Al Aridha lists and to the improvement of the Ennahda Islamists' score. Likewise, the false "answers" in favour of the PDP probably depleted this party's count on the day of the vote. There are many polls that only come to a conclusion at the last minute. Many voters visibly decided at the last minute, faced with the abundance of new parties of which they had no knowledge. Perhaps they wanted to conceal their choices. Other voters (1.2 million) saw their votes disappear into thin air by voting for the innumerable parties and independent candidates who were not able to obtain seats. Other lost votes such as spoilt ballots, which amounted to 3.6%, and blank ballots, which totalled 2.3%, must then be added. In all these latter cases, it is as if 6% of voters were not able to vote effectively given that 258,528 voters out of a total of 4,308,800 were not able to help lead to the appointment of a representative because they voted for low representation candidates (either presented by parties or independent).

Fundamentally, the major novelty of these elections consists without doubt in the political consecration of a new divide in the country. In fact, as has been predicted for some time by many Western and Eastern political theorists specialising in the Arab-Muslim world, the major political division in these countries, once they have moved to democracy, will not be between left and right, as in the West, but rather between Muslims and non-religious people (or reformist democrats), with variations depending on the country. This is what appeared in the very results of the Tunisian constituent elections of 23 October. In Tunisia, of the two major secular parties that have been able to face up to the Ennahda Islamists to a certain extent, one is centre-left (the CPR) and the other social-democratic (Ettakatol). A duopoly results from this between, on one the hand, the Islamists, supposed at this time to embody a moderate and democratic party, based on the Turkish model, and, on the other hand, the moderate left, who fundamentally believe in secular modern democracy.

I. The nature of the vote and party configuration

Tunisians were certainly enthusiastic about the vote of 23 October. They embraced it as an event to be celebrated, although it subsequently divided and destabilised the nation.

Politically, Tunisians were in no doubt that, in appointing a constituent assembly, their vote would be interpreted as the logical follow-up or major consequence of the revolution, or even as the legalisation thereof. This vote was, in their mind, a founding act of the democratic process.

Socially, this vote appeared to be the vote of the poor and unemployed, motivated by economic and social considerations, like at the start of the revolution in Sidi Bouzid, Kasserine and Thala after 17 December 2010, rather than a pure political vote or the vote of the believer or Islamist in search of a comforting God. Islamist activists said to the popular masses and disadvantaged people “if you vote for Ennahda, you will have a place in paradise”.

This is one of the factors that goes towards explaining the appearance of the Al Aridha lists, the electoral discourse of which is being frankly populist in terms of socio-economics, just like that of Ennahda. The Islamic vote itself remains, in the Arab world, the vote of the working-class and deprived areas. This has previously been shown by the examples of the Islamic Salvation Front (FIS — *Front Islamique du Salut*) in Algeria in June 1990, Hamas in Palestine, or Hezbollah in Lebanon at the legislative elections of 2003 (in 2009 the party obtained fewer seats), and was again shown by the Justice and Development Party (PJD — *Parti de la Justice et du Développement*) in the Moroccan legislative elections at the end of November 2011, when it came out on top of the polls (it reached third place in the 2002 elections with 10% of votes and 42 Members of Parliament out of 325). Finally, it was shown above all by the legislative elections in Egypt where the Salafist Al-Nour party and Freedom and Justice Party (PLJ — *Parti Liberté et Justice*), itself linked to the Muslim Brotherhood, were attributed two thirds of votes.

Thus in Tunisia, the vote of 23 October does not entirely seem to be a vote for political democracy, or for the Constituent Assembly, this being an inaccessible luxury for the poor and the masses with little knowledge and experience in terms of politics. The general public does not understand the significance of the election of a Constituent Assembly. Rather, this vote was perceived as a vote appealing for economic help. It is not a political vote, but a vote to assure the social revenge of disadvantaged people in the South, North-West and Mid-West against the very visible corruption of power in these regions, and against the upper middle classes of the Grand Sahel and Grand Tunis areas. This is why we find the CPR, Ettakatol, and even Al Aridha, i.e. centre-left and populist parties looking to embody the poverty of disadvantaged regions, not far behind the Islamists, who tend to defend humble and poor believers by supporting the market economy and capitalism. The liberals found themselves electorally out of the game.

This type of vote shows that the middle class is no longer the pillar supporting the political regime, nor does it guarantee its stability, as had been the case in Tunisia since Bourguiba. The new or traditional parties representing the middle class won few votes: PDP, Ettakatol, despite its progress, the MDS, Al Moubadra and Afek Tounes. Whilst, on the one hand, two popular populist parties (Ennahda and Al Aridha) are on the rise, on the other hand, the CPR has also managed to attract the popular vote across the country through middle class votes. Doubtless a substantial proportion of people were able to recognise themselves in its discourse, which drew on issues close to humble and disadvantaged people.

In terms of electoral technique, and given the results of this election, the proportional representation method was a blessing for the secular parties running against Ennahda. This is because if first-past-the-post voting had been used, like in the United Kingdom, a voting system

that we know to favour large parties, Ennahda would have taken almost all seats, i.e. 209 seats (it would only have lost the constituency of Sidi Bouzid, represented by 8 seats: 217 seats – 8 = 209 seats). In such an election, the list that comes out on top in a constituency with a simple or relative majority swipes all the seats for that constituency. The Ennahda lists came out on top in 32 constituencies out of the 33 in the country (Al Aridha being most popular in Sidi Bouzid).

Moreover, if voting had been through a first-past-the-post system in two rounds, then only the top two from the first round would have been able to take part in the second round. In this case, Ennahda would have almost automatically achieved the first position and a secular party second position. Without doubt, in the second round, votes from the other parties that failed in the first round would be redistributed in favour of the party taking part in the second round, and said redistribution would bring to light evidence of bargaining and alliances. This is a constant factor in this method of voting. Should there be an alliance between the two rounds in favour of the secular party in the second round in the different constituencies of the country, in which supporters join forces and vote against Ennahda, the following possibilities could arise. For example, in Tunis 2, the top two lists that would go through to the second phase of voting would be those of Ennahda, having obtained 68,131 votes, and Ettakatol having obtained 43,142 votes. Here, votes in favour of other low ranked parties (in this case the CPR, PDM and PDP) would undoubtedly go to Ettakatol in the second round. The redistribution of the votes in favour of these three parties, assuming that this number is the same in the second round, will amount to over 80,000 votes. In this case, this alliance could sweep up all the seats in the constituency in the second round. The same is true in other constituencies in terms of supporting the second party opposing Ennahda. However, according to the results of the election, beating Ennahda, with this method of voting, in the second round is only possible in seven constituencies (Tunis 2, Ariana, Nabeul, Sousse, Monastir, Mahdia, Sidi Bouzid), where the total votes obtained by other parties, together, was higher than that the number obtained by Ennahda. On the basis of the election results and under this hypothesis, these secular parties would, together, obtain at most 51 seats out of 217 against Ennahda. The method of voting would here too be beneficial to Ennahda. What about the elections themselves?

In Tunisia, on the eve of the constituent elections there were 7,569,824 electors who were old enough to vote but only 4,308,800 of these electors had registered. Of those registered, 4,053,100 turned out to vote on 23 October to democratically elect the 217 seats of the Constituent Assembly. According to the Independent High Authority for Elections (ISIE — *Instance Supérieure Indépendante de l'Élection*), which had been tasked with organising and announcing the results of the elections, the turnout rate for this election was only 52% of “potential electors” (estimated to be 7.5 million). If truth be told, the idea of the turnout rate is very blurred in the definitive results from the ISIE dated 14 November 2011 (these results were delayed several times due to the need to await the rulings of the administrative court relating to numerous electoral disputes). It is in fact unclear when reading the official results and the artificial and useless classifications that the ISIE has established, whether it has calculated this rate by comparing the total number of voters at the election with the total number of registered electors or with the “potential electors” — those legally old enough to vote. The whole problem therefore revolves around understanding what the ISIE means by “potential electors”. If it means potential electors, the calculation would be incorrect, because in electoral politics, the turnout rate is calculated by comparing the number of voters with the number of registered electors alone. The possible or potential electors, i.e. those not registered, do not even exist electorally.

The result of the parties, their rough size and power ratios in terms of numbers of votes can be established based on the following table:

Parties	Number of votes	Percentage of votes	Number of seats	Percentage of seats
Ennahda	1,500,649	37.02%	89	41.01%
CPR	341,549	8.42%	29	13.36%
Al Aridha	252,025	6.21%	26	11.98%
Ettakatol	248,686	4.30%	20	9.21%
PDP	111,067	2.74%	16	7.37%
Al Moubadra	97,489	2.40%	5	2.3%
PDM	49,186	1.21%	5	2.3%
Afek Tounes	29,336	0.72%	4	1.84%
Al Badil Al Thawri (PCOT)	11,898	0.29%	3	1.32%
People's Movement	13,979	0.34%	2	0.92%
MDS	8230	0.20%	2	0.92%
Other parties that each won a seat	98,768	2.29%	16	7.5%
TOTAL	2,762,855	68.2%	217	--

It should be noted that the parties obtaining all the seats (217) only received 2,762,855 votes (out of a total of 4,308,800 votes). This corresponds to 68.2% of all valid votes.

Moreover, all the innumerable other lists (whether related to parties or independent) that did not manage to win seats, received 1,290,293 votes, i.e. 31.8% of all valid votes. In other words, the votes of more than one third of voters (1,290,293 votes out of 4,308,800) were not put to use and disappeared into thin air. This is both worrying and reassuring for democracy. It is worrying for democracy because here the election seems truncated and the elector deceived. It is also worrying because the parties did not play their primary role, which consists of leading and structuring opinion because, really, public opinion has not shifted. It is reassuring in the sense that it is certain that the 1,290,293 lost votes, which were for both various secular parties and for independent lists in equal measure, are non-Islamist votes, which are unlikely to be given to Ennahda in the future. This shows that the civil and reformist precedent is still present in the political culture of the country. Finally, these lost votes, used wisely, if they were to be redistributed to the major secular parties, could allow these parties to beat Ennahda. To allow this to happen, it is clear that it would first be necessary for the major central, liberal and left-wing secular parties and the unnecessarily numerous independent lists to join together or form serious, structured and solid alliances well in advance of the elections. The fondness for civil democracy, the Republic and freedoms should, in the transition phase, have the upper hand over all political or programme-orientated considerations. These lost votes should be properly taken into consideration at the next legislative elections and attempts should be made to raise awareness of them. The alliance between the major secular parties is one that is essential in order to establish a balance in the power ratios on the political field. This is also one of the significant lessons to be drawn from this election.

II. The great extent of Ennahda popularity

The Ennahda party unquestionably came out as the overall winner of these elections. The party obtained the most votes in all constituencies with the exception of Sidi Bouzid (32 con-

stituencies: 26 in Tunisia and 6 abroad). It won 89 seats out of 217, i.e. 41.01% of seats. At the legislative elections in 1989 under the regime of Ben Ali, the party obtained 13% on a national level, when it ran in independent lists (the party was banned at the time) and this whilst only running in 19 constituencies out of 25. From 1989 to 2011, this figure rose from 13% to 41.01%: 13% in secrecy and 41.01% as a legal party.

However, Ennahda also holds 1,500,649 votes out of a total of 4,053,100, i.e. 37.02% of votes. There is therefore a slight discrepancy between the number of votes won by Ennahda (37.02%) and the proportion of seats this party obtained (41.01% of seats = 89 seats). Ennahda has more seats than votes.

Although Ennahda won seats in 32 constituencies, the CPR, by comparison, won seats in 28 constituencies, Ettakatol in 19, Al Aridha in 19, the PDP in 16, the PDM in 5, Afek Tounes in 4, Al Moubadra in 3, Al Badil Al Thawri (PCOT) in 3, MDS in 2, the People's Movement in 2. Other lists won one seat in one constituency alone.

Ennahda still obtained 1,500,649 votes out of 4,308,800 registered, i.e. 34.82% of registered electors; and 19.82% of the 7,569,824 potential electors. Now it is not clear whether those who did not vote, registered or not, were likely to vote for Ennahda. Those who vote for Ennahda are generally decided, determined, very disciplined, mobilised and structured because for them it is a question of the long-awaited opposition challenge finally dawning. Still, exceptions cannot be excluded here. Those who are not registered and those who did not vote are just as likely to be people who are indifferent to politics, passives who do not support any party, people who are illiterate or poorly educated with little involvement in public affairs, or elderly people, as they are to be disappointed RCD supporters, who would previously have made up the majority of voters, and not just those supporting Al Aridha and Al Moubadra.

Although Ennahda won 89 seats, all the other parties (which are secular) figuring in our table together won more, i.e. 107 seats (and certainly even more with the addition of the seats of the 8 other parties or 8 independent lists who each won a seat). This provides food for thought in terms of forming alliances. Supposing that Ennahda wishes to govern alone, the other parties will therefore mathematically have more seats than it does (107 seats if we only count the parties with more than 2 seats and take into account the Al Aridha lists, which have more than one reason for causing Ennahda to fall). In this case, it is possible for this alliance to cause a purely Islamist government to fall. However, without the unpredictable Al Aridha lists (Islamist offshoots mixed with RCD offshoots), the total number of seats held by these parties would fall to 88. Without the Al Aridha seats, this alliance can still overturn Ennahda and its 89 seats by working with the parties and independents who obtained one seat. In fact, it is very difficult to unite so many people and so many parties in one alliance. The large parties will be at the mercy of the whims of very small parties, which know that the alliance will depend on them at critical times.

In any case, Ennahda has more weight than all the other (secular) parties above in terms of the number of votes obtained. It alone has 1,500,649 votes, whilst all of the other secular parties together (excluding the independents and Al Aridha) have 954,785 votes, and still only have 1,262,256 votes if we include the votes for all independent parties (including Al Aridha). We can therefore deduce that the party grounding and the sociological and geographical roots of Ennahda, as shown by the number of votes (37.02% of the total number of votes), are as important as its political representation in terms of the number of seats in the Constituent Assembly (89 seats = 41.01%). The number of votes and seats thus unquestionably identify Ennahda as a party of the masses.

The largest numbers of Ennahda votes were obtained in Ben Arous (98,216), the electoral stronghold in which it had already obtained a score of close to 30% in the legislative elections of 1989, then in Tunis 1 (94,938), which essentially includes working-class delegations (such as Tunis Médina, Bab Souika, Sijoumi, Ezzouhour, Hrairia, Sidi Hassine, El Ouardia, Kabbaria, Sidi El Béchir and Jebel Jloud, as well as Bab Bhar), then in Sousse (86,590), Sfax 2 (81,816), Bizerte (80,576), Gabès (73,416), Medenine (73,316), Kairouan (70,192), and Ariana (71,170). In short, it did well in the large cities, particularly in the working-class areas of these cities, as well as overall in disadvantaged rural areas where electors were visibly receptive to its donations and gifts and its populist discourse, which calls to the emotions of the disadvantaged and unemployed more than to their reasoning, with the promise of finding God or paradise when they vote. In these 9 large constituencies alone, Ennahda won 35 seats, i.e. over a third of all its seats.

III. The penetration of the Congress for the Republic (CPR)

The CPR is the largest secular party emerging from this election. It is a centre-left party, formed in 2001 and led by Moncef Marzouki, an exiled human rights activist, who was intransigent against the dictatorship of Ben Ali. It won exactly one third of the number of seats that Ennahda obtained (29 compared with 89), but much less than one third of the number of votes (341,549 compared with 1,500,649 for Ennahda) and 8.42% of all votes cast (4,053,100). The CPR is well grounded — it came second in 14 constituencies and won in 28 out of 33 constituencies. Overall in this election it is the second most popular Tunisian party. It became a member of the Troika, the government alliance, benefitting from some portfolios limited to the government.

This party seems the most strategically linked to Ennahda, in that its discourse is intransigent towards the members and the practice of the former regime, and in that it defends the Arab-Muslim vocation in its election campaign. But for this party, which is not ready to rid itself of its basis in secular philosophy, human rights and fundamental freedoms remain deeply important. In this, it differs from Ennahda.

IV. The expected positioning of Ettakatol

Founded in 2002 by a professor of medicine, Mustapha Ben Jafar, the Democratic Forum for Labour and Liberties, also known as Ettakatol, is a social-democratic party (like the MDS, the party formerly led by Ahmed Mestiri from which some of its members, including its leader Mustapha Ben Jafar, have come), close to the middle classes, especially in certain branches of the Grand Tunis upper middle class. However, its participation in the constituent elections was underwhelming. In fact, the results show that it is not well founded across the country. It is an electorally localised party that has a lot to gain from expanding if it wants to play a key role. It did well in Grand Tunis (Tunis 1, Tunis 2, Ariana and Ben Arous) where a little over half of its votes originated from (138,142 of 248,686). It is important to note that, in these constituencies, it managed to position itself just behind Ennahda. Only in Manouba did it finish in third position after the CPR. Ettakatol also achieved second position in Jendouba.

The progress of this party undoubtedly owes a lot to the personality of its founder, Mustapha Ben Jafar. Just as Moncef Marzouki (CPR) seems inflexible, crushing, twisting and turning in all directions and full of certainties, and just as Najib Chebbi (PDP) struggled to differentiate his ambition and his enthusiasm, so Ben Jafar gives the image of a mature, patient, reassuring man.

V. The decline of the Progressive Democratic Party (PDP)

The PDP, led by Najib Chebbi, a charismatic speaker from a good family, an old nationalist with recently acquired liberalist virtues, was almost certain to come in second position after Ennahda, at least according to the opinion polls. It was in any case one of those opponents to the former regime that believed that, after the fall of the dictator and the popular revolution, the gateway to power would be wide open to them. However, this was not the case — political success did not produce the expected effects. Supported by wealthy business men, the party spent a lot of money and distributed a wealth of advertising material for its campaign with the aim of achieving its objectives. However, this solid party that fiercely opposed Ben Ali suffered a stinging retraction from electors. This is one of the great surprises of this election. Curiously, after the revolution, Chebbi, though an old dog on the political scene, gave the impression that he was out of sync as a politician. Whilst almost everyone wanted to see a constituent assembly elected after the revolution, he, curiously, called for the partial modification of the constitution (in which no one believed anymore) and for the presidential election (the people were still more preoccupied with demolishing the dictatorship). Whilst everyone was calling for the dismissal of Ben Ali's RCD ministers in the government of Mohamed Ghannouchi, he accepted a ministerial post in a government made up of several RCD ministers. Whilst Ben Jafar felt, when he was named Minister for Health in this government, that this type of government was anti-historical, and therefore refused to accept this nomination the next day, Chebbi wanted to unite the RCD supporters and the Destourians suited to his recovery of power. However, the return of the RCD supporters, should they be suitable, which will certainly come in due course, once the collective agitation has passed, was still premature in the minds of Tunisians, although the strategy was not unfounded. Chebbi poorly managed his "side-lining of the government" through the daring Prime Minister, Beji Caid el Sebsi, who called his ministers to choose between the truly legitimate constituent candidature and the necessary neutrality of a member of the transition government. Whilst everyone wanted a clean campaign, ruled, for once, not by the Minister for the Interior but by an independent High Court, he did not want to play by the rules in his campaign in terms of the electoral campaign expenses threshold. Furthermore, in all his actions the leader of the party showed a great greed for power. It is not by chance that he ended up losing votes, especially in disadvantaged areas, through his fruitless game and his poorly perceived certainties. For someone on the Nidhal Takadoumi list (progressive), he gave the impression of being a conservative or an aristocrat, an image that was certainly badly perceived in the difficult social and economic climate of the country. By comparison, voters preferred Moncef Marzouki's CPR, which was more clear-cut regarding its electoral position on the dictatorship, Arab-Muslim identity, democratic values and political money. Hence the surprise: the spectacular rise of one party (CPR) and the no less spectacular decline of another (PDP). The latter expected to win at least 40 seats, but only obtained 16 seats (7.37%) and 111,067 votes. Even worse, the independent Al Aridha lists, a movement that came from nowhere, was much more successful, winning 26 seats.

VI. Al Aridha Al Châabia ("Popular Petition") or the tidal wave of an independent movement in a class of its own

Al Aridha is a tribal protest movement, a series of quasi-anarchic lists, promoted by Hachemi Al Hamdi, from Sidi Bouzid, the owner of the "Al Mostakilla" satellite channel, which broadcasts from London, a channel intended to serve the political ambitions of this rich business man. This man has bought into all extremes. He has been just as much an Islamist dissident from Ennahda, as an instrument of embellishment for the image of Ben Ali. The question that arises regarding him is how, by some miracle, a group of lists that were not organised by a party, could, in a matter of weeks, obtain such a high number of seats in this election, not only in his native region of Sidi Bouzid or even in Kairouan, but also across the country and

even abroad (such as in Italy). The Independent High Authority for Elections originally invalidated six of the lists under the electoral decree-law regarding private and foreign election campaign financing (permanent campaign on “Al Mostakilla” in favour of his lists) or under the prohibition imposed on leaders of the former party in power, the dissolved RCD, on running as candidates. However, the administrative court subsequently reinstated these. This independent movement really has been a tidal wave. It has managed to undermine the game played by traditional parties. In fact, it seems that such lists benefitted from networks of the former party in power, wanting to return to the fore through unknown independent lists.

“Popular Petition” won 26 seats in total, making it the third power in the country after Ennahda and the CPR. It ranks higher than Ettakatol, even though this is one of the components of the government alliance, the PDP and other old parties. It obtained 252,025 votes. The party illustrates the birth of populism, traditionally foreign to the Tunisian political scene (except for the fact that Ben Ali was a populist himself). It is possible that the fertile ground for populism is rooted both in the poverty of the masses in the South and Mid-West of Tunisia and in humiliation. This humiliation is maintained by years of corruption, the arrogance of the rich who enjoy success without any merit other than their proximity to power, and by the abandoning of a large number of disadvantaged regions of the country by the authorities, whose populations are no longer able to feel “Tunisian” in the same way as their “compatriots” in big cities, Northern regions and the Sahel coasts. It was not by accident that the topic of dignity appeared in the discourse and programmes of many parties, associations and movements in civil society.

VII. The participation of other parties

Of the new parties, formed after the Revolution, those who managed to make a name for themselves quickly and obtain seats in the Constituent Assembly are undeniably the Al Moubadra Party (The Initiative), which won five seats, and Afek Tounes (Tunisian Aspiration), a liberal party that won four seats. This is all the more remarkable given that other old opposition parties, such as Ettajdid, known in opinion polls for their activism, the PDM, made up of five parties, citizen and independent movements, the MDS (two seats) or Hamma Hammami’s PCOT (Al Badil Al Thawri) (three seats), received very little electoral attention.

The Al Moubadra Party is a centralist party with Destourian tendencies, created by Kamel Morjane, the last minister for foreign affairs in the Ben Ali government, who—and he is not the only one—wanted to rebuild the Destourian movement on new grounds, accepting critical readings of the Destourian and RCD heritage. Before the election, this party did not want to join the Republican Alliance, which brought together a large number of parties (about 50) with Destourian and RCD relations. Al Moubadra won 5 seats, like the PDM. But with 97,489 votes, it received twice the votes of the PDM, which received just 49,186 votes. Al Moubadra is strongly represented in Sousse and Monastir, traditional Bourguiba Destourian strongholds, in which it obtained almost all its votes (it won few votes in Mahdia).

Afek Tounes is a fashionable, liberal, modern, middle class, elitist and francophone party, which includes a large number of people holding dual nationality and which plays a little too much on political marketing and media seduction. Its merit is that it represents a new current with which certain Tunisians seem to identify. It won its four seats in the constituencies of Nabeul 1, Mahdia, Sfax 2 (where the PDP failed to win any seats) and Medenine where, curiously, it came in third position after Ennahda and the CPR. However, despite being a party that includes a number of people of dual nationality, it did not obtain any seats abroad in Europe.

In the end, we can learn the following from the participation of political parties in this democratic election:

- This election was unclear, improvised and disorganised, as transition is in general
- The political parties were wrong to approach the elections as dispersed parties, while they were for the most part new, unknown and still political amateurs. They refused to form alliances because, being new, they wanted to see the extent of their power, their real representation in this democratic election, and an alliance risked diminishing their effect
- Paradoxically, the Islamist party, Ennahda, was the most professional on the political scene. It carefully performed the groundwork before the elections and during the campaign, managing to make its mark on the more disadvantaged areas, particularly given the financial means it had available to help it do so, coming from the Gulf states
- The political parties were incapable of structuring and framing public opinion in this election, despite this being one of their main roles, in a country with no multiparty democratic election tradition. The electorate has indeed been left to itself.

Political parties and elections in the Moroccan experience: A constitutional and legal analysis of the elections held on 25 November 2011

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I. Theoretical perspective

Political parties in Morocco fall under a mixed system combining the organisational model of the alliance and a divisible multi-party system, which means that it is a model that allows for competition between all political parties, both big and small, and at the same time, comprises instruments giving an advantage to those parties with significant representation in parliament. These are to be found in the legal measures concerning the threshold and rules on funding.

1. Problematic constitutional and legal issues prior to the July 2011 constitution

Problematic issue No. 1

The instruments of the electoral system included in the institutional law on the election of members of the House of Representatives of 27 September 2002, stipulating a 3% threshold for the allocation of seats, had a limited impact on the reorganisation and regulation of the political field.

The list system based on proportional representation in effect produced a uni-nominal ballot and the electoral process, despite its list-based approach, in practice became a uni-nominal system, enabling the smaller parties (with a low level of representation) to win seats in the House of Representatives.

Problematic issue No. 2

The results of the September 2002 elections showed that the ballot system was inadequate and led to discussions on legislative reform of the way parties are regulated.

This was to result in a shift from the organisation of political parties in accordance with the Royal Decree (Dahir) on public freedoms to a system set out in a special law on political parties (Law No. 36-04 of 2006).

This law was designed to achieve a number of objectives, including:

Raising the level of political participation, laying down rules governing democratic organisation and party alternation and seeking to create organisational models to encourage parties to form alliances and amalgamate.

Problematic issue No. 3

Morocco does not consult with the independent electoral commission in drafting electoral texts, it merely adopts a mixed approach involving the Ministry of the Interior and the political parties in the preparatory stages of drafting the legal texts, offering civil society organisations the opportunity to put forward their views (for example, the women's "One third" movement).

However, this approach to drafting texts showed that the Ministry of the Interior was more professional and the negotiations in the elections of 2002, 2007 and 2011 showed that the political parties had statistics, field information or expectations regarding voting systems.

This meant that the political parties during the period between 1963 and 2011 had failed to develop any electoral experience despite the fact that the scope for debate and for putting forward their views and suggestions had widened considerably.

Problematic issue No. 4

Continuation of the legitimate demands of the small parties for equality in electoral competition, such as their request for abolition of the threshold and the taking of further measures against the unlawful use of money and all means of unfair competition.

These political parties at times resort to protests or boycotts in the face of obstacles to negotiations which may on occasions be legal, linked to the antipathy reflected in the electoral system, such as the territorial organisations of constituencies and the existence of a threshold.

II. The judicial and constitutional situation regarding some of the problematic issues

1. The Constitutional Council dealt with the question of the nomination of non-affiliated candidates: departing from a royal interpretation of Article 3 of the old constitution, it issued Decision No. 2002/475 enabling candidates not affiliated to a political party to run for election, providing a supporting guiding interpretation (laying down the conditions for candidatures).
2. The Constitutional Council opened up the possibility for small political parties to participate without conditions in the September 2007 elections, ruling as unconstitutional the special conditions concerning the 3% threshold stipulated in the institutional law (Decision No. 2007/630).
3. The Constitutional Council did not grant political parties the capacity to contest the parliamentary elections, thereby making a distinction between the candidate and his or her party (Decision No. 94/21 of 7 June 1994). This ambiguity continued until the position of the Constitutional Council was clarified following approval and endorsement of the list-system.

1. Analysis of the position of political parties in the elections held on November 25 2011: Did the new constitution and the electoral law have an impact on the strategy of the political parties in the elections?

Observation No. 1: A new constitutional authority:

1. A clear reference to the role of parties in providing a political structure for citizens and expressing the will of the electorate (Article 7 of the constitution).
2. The constitution stipulates that free and transparent elections are the foundation of democratic representation and guarantees that the law will ensure the impartial use of the mass media and the full exercise of the rights associated with election campaigns and the voting process.

Conclusion No. 1

Progress in comparison with what had been achieved under the previous constitutions (1962, 1970, 1972, 1992, 1996) on account of the explicit link between political parties and elections.

Observation No. 2

The organisation of elections in accordance with three institutional laws (election of the members of the House of Representatives; the institutional law on parties, the law governing independent observation), seven regulations and three ministerial decisions.

Conclusion No. 2

The existence of legal safeguards more extensive than for the previous elections.

Observation No. 3

An increase in the number of seats in the House of Representatives to 395, distributed as follows:

305 constituency seats

60 national seats for women

30 national seats for young males

Conclusion No. 3

The parties were not ready for this expansion on account of the absence of criteria regarding nominations, and proceeded to violate the constitution by submitting a list for young men excluding young women.

Observation No. 4

The election results showed a considerable impact of the electoral legislation on the political parties, which can be seen in the difference between the party that came out on top (Justice and Development Party – 107 seats) and the party that came second (The Independence Party – 60 seats)

This impact can also be seen by the fact that the Justice and Development Party obtained a greater number of votes than the total of those obtained by 27 of the parties participating in the elections, of which there were 31.

Conclusion No. 4

The beginning of a consolidation of the list-system and duality of the national lists. The increase in the number of seats proved to be a victory for the small parties.

Observation No. 5

The voting pattern was in line with the schismatic nature of the Moroccan parties, in that seven parties obtained more than 20 seats.

III. New factors in the relationship of the Moroccan political parties with the elections according to this analysis

1. The new situation regarding the relationship between the political parties and the elections appeared to highlight a number of new issues, including:
 - The substance of the electoral disputes was no longer related to aspects of transparency and the use of funding, but focused on disputes over principles of a constitutional and representative nature (for example, the violation of the principle prohibiting all forms of discrimination)
 - The issue of government coalitions and withdrawal therefrom (the Independence party's withdrawal from the first "Benkirane" government)
 - The issue of the government's election manifesto and the entry of a new partner with an election manifesto that was opposed to the Justice and Development Party which heads the government.
2. Limited ability of the political parties to protect their constitutional and legal gains (the constitution and electoral legislation are bigger than the political parties).

The Participation of Political Entities in Iraqi Elections

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The complexity of the socio-political structure of Iraq has generated the most controversial matters since the collapse of the former regime. After 2003, Iraq has experienced a new form of political life including individual rights and freedoms, elections, and political participations. The above-mentioned rights and freedoms have been adopted and guaranteed by the Constitution of 2005 after the US invasion of Iraq in 2003.

In Kurdistan, however, pursuant to Security Council resolution 688 that limited the central government's power over the regional government of Kurdistan, a semi-autonomous region was established in 1991. Right after independence, this new regional government has adopted a more democratic form of government, compared to the rest of Iraq, by holding elections and broadening the scope of freedoms and individual rights. Lately in 2003, the same form of political life has been transformed into the Iraqi political system. The experiment of Kurdistan has created a more appropriate environment for all political parties and entities to participate in the 1991 elections. Furthermore, this political form of government has developed many aspects of people's life, such as economical, political and social interactions.

I. The Iraqi 2005 Election

With regard to Iraqi elections in 2005, the "Election Law" established the "Council of Representatives" consisting of 275 seats, which split into 18 governorates. As a new experiment and in a free environment, all entities and parties, Sunnies, Sheie's and Kurds, started their campaigns in order to introduce their candidates and familiarize people with their future programs after elections.

Below, are political parties and affiliations that took part in the election:

- Unified Iraqi Coalition: composed mainly of Shei' forces
- Kurdistan Coalition: composed mainly of two Kurdish parties, PUK and PDK
- Iraqi National List headed by Iraqi former prime mister Ayad Alawi and secular parties
- Iraqi Patriotic Conference list headed by Ahmed Chelabi
- Sunni Factions and Entities under the name of "Iraqi Accord Front" (Islamic Party of Iraq)

The 2005 election changed the course of political life in Iraq because it transformed the power from the Sunni on one hand to Shie's and Kurds on the other to run the government for the time after the establishment of Iraq in 1925. By the end of the Election, Shie' Affiliation gained the majority of seats (128), followed by Kurds Coalition winning 53 seats, while Sunni's earned just 44 seats. Consequently, the Shie's and Kurds have played a great role in reformulating a new Iraq on new democratic bases, which were quite different from the former. After its formulation, however, the government faced many problems and crises; on one hand it was not successful in solving political disputes between parties, on the other hand, it could not prevent violence and riots, and finally protect people from terrorist attacks.

II. The Iraqi 2010 Election

In 2010, Iraq held another election for the “Council of Representative” which was composed of 325 seats. What made this election different from the former was its highly competitive nature and the scope of participation of Iraqi people, especially Sunni. Moreover, the wide participation of women in this election balanced the scale in favor of women in the Council. With regard to this, 167 political entities and parties campaigned for gaining the above-mentioned seats and forming the next government. In addition, 325 seats were distributed as follows:

- 310 seats for 18 governorates
- 8 for the minorities (5 for Christians, 1 for each of Sabia, Ezidi and Shabak)
- 7 Compensating seats for the list or entity that gains the majority of votes.

As a result, the Independent High Electoral Commission in Iraq announced that the Iraqia “Secular” list headed by Ayad Alawi gained 91 seats and respectively, it was the biggest parliamentary block in the Council. The Second block led by Noori Almaliki gained 89 seats.

Below is the nature of political Coalitions and affiliations in the 2010 election:

- Iraqia List headed by Ayad Alawi and Sunni leaders like Osama Nujaifi and Salih Mutlaq
- State of Law Coalition headed by the current Prime Minister
- Iraqi National Coalition headed by former prime minister Ibrahim Al-jafari and Muqtada Sadir
- Kurdistan Coalition consisting of PUK and PDK
- Iraqi Accord Front led by the Islamic party of Iraq (Sunni)
- United Iraqi Alliance led by the Interior Minister Jawad Polani
- Change list (Kurdistan) headed by Nushirwan Mustafa
- Liberals led by Ayad Jamaladin
- The Communist party of Iraq headed by Hamid Musa

The result was as follows:

- Iraqia List of Ayad Alawi: 91 seats
- State of Law of Maliki: 89 seats
- Iraqi National Coalition 70 seats
- Kurdistan Coalition 43

Kurdistan Elections (2009)

III. Kurdistan Elections under Law NO. 1 of 1992 with 4 Amendments

The 2009 Elections of Kurdistan did not bring a dramatic change to political life in Kurdistan because the two largest parties PUK and PDK created a coalition and gained the majority of the votes. However it was a good democratic experience which allowed all entities to participate that fulfilled the legal conditions. For the presidential election, the same Coalition’s candidate Masud Barzani gained the majority of votes and became the first directly – elected president in Kurdistan. Also, the second list called “Goran” emerged and gained 25% of votes followed by the “the List of Reforms and Services.”

With regard to the presidential election, the results were as follows:

- Massud Barzani 69.57%
- Kamal Mirawdali 25.32%
- Hassan Garmeani 0.59%
- Hallo Ibrahim Ahemd 3.49%
- Safeen Shex Muhamad 1.4%

The Parliamentary election's result was as indicated below:

- Kurdistan List (PUK and PDK) 57.34%
- "Goran" Change 23.75%
- Reforms and Services 12.8%
- Islamic Movement of Kurdistan 1.4%
- Kurdistan-Turkmani Democratic List: 0.99%
- Freedom and Social Equality List 0.82%
- Turkmani Reform 0.38%
- Al-Rafidain 0.30%
- Erbil Trukmani 0.21%
- Kurdistan Labor party 0.18%
- Kurdistan Conservative Party 0.12%
- Kurdistan Reform Movement 0.11%
- Kurdistan National Democratic Union 0.10%
- Independent Youths 0.10%
- Kildani Union 0.09%

IV. Kurdistan Election (2013)

This election was for 111 seats of the Kurdistan Parliaments Region. 31 political entities have participated in that election including parties in power at the time, and opposition parties. For the first time during the democratic process, one of the opposition parties has become second on the list as a result of elections.

The parliamentary election's result was as outlined below:

- 1 – PDK list
- 2 – Change list
- 3 – PUK list
- 4 – Islamic lists
- 5 – Minorities lists

In the end, it is noteworthy that the elections were held successfully and that they were a "big attainment for Kurdistan Region" in the words of the Representative the Arab League in Iraq.

“POLITICAL PARTIES – KEY FACTORS IN THE POLITICAL DEVELOPMENT OF DEMOCRATIC SOCIETIES”

**FACULTY OF LAW, UNIVERSITY OF BUCHAREST
BUCHAREST, ROMANIA**

18 October 2013 (9.00 a.m. – 6.30 p.m.)

19 October 2013 (9.00 a.m. – 1.00 p.m.)

17 OCTOBER 2013

Arrival of participants

Buffet dinner from 20:00 –23:00 – Reception hosted by the OSCE/ODIHR (*Hotel Epoque*)

18 OCTOBER 2013

9.00–9.45 Opening remarks

Mr Flavius-Antoniou Baias, Senior Lecturer, Dean of the Law School, University of Bucharest
Mr Titus Corlăţean, Minister of Foreign Affairs of Romania
Mr Gianni Buquicchio, President of the Venice Commission
Mr Thomas Vennen, Head of the Democratization Department, OSCE/ODIHR

9.45–10:00 Coffee break

10:00–11.00 Session 1 – *Establishment and registration of political parties*

Part 1: A comparative European view on the legal framework for the establishment of political parties and their participation in public life

Chair: Ms Simina Tanasescu, Professor, Vice-dean of the Faculty of Law, University of Bucharest, Romania

1) Venice Commission standards in the field of the establishment of political parties (main documents of the Venice Commission in the field of the establishment and registration of political parties)

Speaker: Ms Hanna Suchocka, Member of the Venice Commission (Poland)

2) International standards in the field of legislation on political parties

Speaker: Mr Richard Katz, Professor of Political Science, Johns Hopkins University, Chairman of the OSCE/ODIHR Core Group of Experts on political parties

3) Political parties as an expression of freedom of association in a democratic society enshrined in national constitutions: legal framework of the names and “signs” used by political parties. The Romanian experience

Speaker: Mr Lucian Mihai, Member of the Venice Commission (Romania)/ Ms Laura Andrei, Judge, President of the Bucharest Tribunal

Discussion

11.00–12.30 Continuation of Session 1

Part 2: The Arab experience: association in political parties as an expression of the diversity and social structure of modern societies

Chair: Mr Gianni Buquicchio, President of the Venice Commission

1) Legislation on political parties in Tunisia

Speaker: Mr Larbi Abid, Deputy Speaker of the National Constituent Assembly of Tunisia

2) Legal framework for the establishment of political parties in Morocco

Speaker: Mr. Ahmed Moufid, Professor, Law Faculty, University of Fès

3) Comparative study of regulations on political parties through the case-law on constitutional justice

Speaker: Mr Antoine Messarra, Member of the Constitutional Council of Lebanon

4) Establishment of political parties and their registration in Egypt: the issue of religious parties

Speaker: Mr Waël Rady, Judge at the Court of Cassation of Egypt

Discussion

12.30–13.30 Lunch

13.30–14.30 Ceremony, by the University of Bucharest, awarding the *Doctor Honoris Causa* title to Mr Gianni Buquicchio, President of the Venice Commission

14.30–16.00 Session 2 – *Financing of political parties*

Chair: Ms Laura-Maria Craciunean, Lecturer, University “Lucian Blaga” of Sibiu, Romania

1) Recommendations of the Venice Commission and the OSCE/ODIHR in the field of financing political parties

Speaker: Mr James Hamilton, substitute member of the Venice Commission (Ireland), member of the OSCE/ODIHR Core Group of Experts on Political Parties

2) Standards in the field of corruption prevention and GRECO's monitoring mechanisms

Speaker: Ms Vita Habjan Barboric, Member of the GRECO Bureau, Chief Project Manager, Corruption Prevention Center, Commission for the Prevention of Corruption of Slovenia

3) Financing of political parties. The Romanian experience

Speaker: Mr Stefan Deaconu, Professor, Faculty of Law, University of Bucharest, Romania, former Presidential Advisor for Constitutional Affairs

Discussion

16.00–16.15 Coffee break

16.15–17.30 Continuation of Session 2

Chair: Mr Larbi Abid, Deputy Speaker of the National Constituent Assembly

1) Public funding and financing from private sources – margin of appreciation by authorities (thresholds, reporting procedures, sanctions)

Speaker: Mr Omer Genckaya, Professor, Member of the OSCE/ODIHR Core Group of Experts on political parties

2) Financing political parties in Algeria

Speaker: Mr Amine Khaled Hartani, Professor of public law, Director of the research laboratory on fundamental rights

Discussion

17:30–18:30 Conclusions of the first working day

19.30 Reception hosted by Mr Titus Corlăţean, Minister of Foreign Affairs of Romania (Hotel Epoque)

19 OCTOBER 2013**9.00–10.15 Session 3 – Participation of political parties in elections**

Part 1: General standards and some specific issues related to the participation of political parties in elections in European countries

Chair: Mr Bogdan Aurescu, Substitute Member of the Venice Commission (Romania)

1) Main documents of the Venice Commission on the participation of political parties in elections

Speaker: Mr Evgeni Tanchev, Member of the Venice Commission (Bulgaria)

2) Political parties and the mass media – new technologies in the electoral process

Speaker: Mr Csaba Tiberiu Kovacs, Secretary General of the Permanent Electoral Authority of Romania

3) The impact of electoral systems on parties' electoral strategy

Speaker: Mr. Volodymyr Pylypenko, Member of Parliament of Ukraine, substitute member of the Venice Commission (Ukraine)

Discussion

10.15–10.30 Coffee break**10.30–12.45 Continuation of Session 3**

Part 2: Political parties and the electoral process in Arab countries

Chair: Mr Abdelouahed El Ansari, Second Vice-President of the House of Representatives

1) Political parties and the election of members of the General National Congress of Libya

Speaker: Mr Omar Mohamed Hmedan, Member of the General National Congress of Libya

2) The 2011 elections to the National Constituent Assembly of Tunisia

Speaker: Mr Hatem M'rad, Professor of legal, political and social sciences, University of Tunis, President of the Tunisian Association of Political Sciences

3) Political parties and electoral perspectives in Tunisia

Speaker: Mr Fadhel Moussa, Dean of the Faculty of legal, political and social sciences of Tunisia, Member of the National Constituent Assembly

4) Report on the participation of political parties in elections in Morocco

Speaker: Mr Abderrahim Manar Esslimi, Professor, Law Faculty, University of Rabat.

5) Report on the participation of political parties in elections in Iraq

Speaker: Mr Maarooof Omer Gul, Professor, Dean, Faculty of Law and Politics, Suliamany University

Discussion

12.45-13:00 Closing session

13.00 Lunch

Departure of participants

