

THE PLACE OF POLITICAL PARTIES IN A DEMOCRATIC STATE, THROUGH THE GLASS OF CONSTITUTIONAL REVIEW

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Abstract

Political parties are nowadays key actors in democratic societies, shaping social mentalities, creating and following ideologies, inducing common vision, establishing targets and ideals. Their main goal is gaining the political power by conquering the access to the highest levels of decision in the State. They are based on the freedom of association and, unlike other associations, they have a specific constitutional and legal position because they are defining and giving expression to the citizens' political will, in respect of the principles of democracy. Romanian Basic Law provides that political pluralism represents one of the supreme values of the Romanian State governed by the rule of law. In this context, the Constitutional Court has solved, over the years, various issues regarding the political parties. Authorities of constitutional jurisdiction in European countries have also been asked to express, one way or another, their opinion in connection with the activity of the political parties. Taking into consideration their importance for a healthy democratic system, the European Commission for Democracy through Law - Venice Commission has paid special attention to the complexity of aspects involved by the protection of democratic values.

Keywords: Political parties, Democracy, Freedom of association, Freedom of expression, Constitutional review.

1.Introduction

The present study aims to analyze the topic of political parties as they depend, in various stages of their existence, by the authorities of constitutional jurisdiction's decisions, trying to highlight the role the latter play in the life of a political party. Basically, constitutional courts seek to preserve the values of democracy and the rule of law, as they are defined in the Constitution. In what concerns the political parties, constitutional jurisdictions may be asked to decide on the degree of political parties' conformity with the requirements enshrined in the Basic Law for their registration and operation, the ultimate penalty being the dissolution of the party declared unconstitutional. The issue in discussion also requires the analysis of some decisions rendered by the European Court of Human Rights in what concerns the respect of the fundamental right of association and freedom of expression by the common courts or the constitutional jurisdictions regarding the political parties. So, the importance of this study lies in emphasizing the need to comply with the constitutional and legal rules of the registration and operation of political parties. In clarifying this matter, the paper will present the case law of constitutional jurisdiction authority, in particular those rendered by the Constitutional Court of Romania, the German Federal Constitutional Court, the Constitutional Tribunal of Spain and the Turkish Constitutional Court. The paper will also try to point out the fact that political parties manage to turn into

vectors for the political will of their members and/or of their supporters. Acquiring the state power, they manage to transform their ideologies into markers that influence the general will when endowed with binding force due to its embedding into rules laid down by the Parliament or Government, as authorities which are formed as a result of free and fair elections. They also contribute to the effective expression of every citizen's political options during the electoral process, by offering adequate options. In the specialized juridical literature, the problems involved by political parties were a frequently approached topic, especially in terms of political doctrines or in what concerns the way they intervene, how they act and how they evolve in the general landscape of the State and society. For example, an exhaustive presentation was made by Professor Maurice Duverger¹. In the Romanian literature, reputable scholars like Dimitrie Gusti², Ion Deleanu³ or Ioan Muraru⁴ approached the complexity of the issues regarding political parties. Nevertheless, a study that conduct an analysis of the Romanian and foreign constitutional case law in this area is necessary, taking into consideration the recent cases that were solved in this field, not only by the Romanian Constitutional Court, but also by other foreign authorities of constitutional jurisdiction.

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¹ Maurice Duverger, *Les partis politiques*, (Paris: Librairie Armand Colin, Collection „Points”), 1976.

² Dimitrie Gusti, „Partidul politic”, in *Doctrinile partidelor politice*, Institutul Social Român (București: Editura Cultura Națională, 1922).

³ Ion Deleanu, *Instituții și proceduri constituționale în dreptul român și în dreptul comparat* (București: Editura C. H. Beck, 2006), p.159-173.

⁴ Ioan Muraru, „Aspecte teoretice privind conceptul de partid politic”, in *Studii constituționale*, vol.I (București, Editura Actami, 1995), p.129-137.

2.Framing The Political Parties In A Democratic Society

Authentic representative democracy and effective citizens' participation in the process of government would not be fully realized unless the political parties represent active entities in the life of the state. The whole State's architecture is based on the essential ability of political parties to shape and define the political will of citizens, conducting their beliefs and gathering them under the same vision. Due to the political parties, the ideas and opinions expressed by every individual, member of that party, have the potentiality of becoming general will, if the party succeeds in elections and its leaders gain the right to issue, as State's representatives, decisions endowed with binding force⁵. From this point of view, a very concise definition provides that a political party is „a group of people who try to achieve political power and who are united by common beliefs about how the country should be run”⁶.

They are based mainly of the freedom of association, enshrined in Article 10 of the European Convention for Human Rights, and usually granted at the national constitutional level, as well. Freedom of expression is also a key element that define the activity of a political party. The goal of association in political parties is the intention to participate in the management of public affairs and the main means of doing that is the presentation of candidates to free and democratic elections.

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 also noted: "It is in the nature of the role they play that political parties, the only bodies which can come to power, also have the capacity to influence the whole of the regime in their countries. By the proposals for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organisations which intervene in the political arena.”⁷.

Political parties also inter-connect the executive and legislative branches of government and shape the decision-making process in accordance with their own doctrine and with their own view on the legislative agenda within a system of government.

The European Commission for Democracy Through Law - the Venice Commission noticed that, given political parties' unique and vital role in the electoral process and democratic governance, it is

commonly accepted for states to regulate their functioning insofar as is necessary to ensure effective, representative and fair democratic governance⁸.

According to the Romanian Basic Law (Article 8), the political parties assist in defining and giving expression to the citizens' political will and they are urged to respect national sovereignty, territorial integrity, the legal order and principles of democracy. They are established and pursue their activities in accordance with the law. This fundamental rule, prescribed by the Romanian Constitution has to be read through the glass of the Venice Commission's view, who noticed that „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”⁹.

It is also of particular importance that the regulations concerning political parties be elaborated also in accordance with the universal and regional legal instruments that provide the main landmarks in this field, most relevant being the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 11 of the European Convention on Human Rights and Article 22 of the said Covenant protect the right to associate in political parties as part of the general freedom of assembly and association. In addition to these legally binding instruments applicable to states in this regard, there are also relevant political commitments persuasive upon the states members of the Organization for Security and Co-operation in Europe (OSCE). One of the most notable is the Document of the Copenhagen, which is the final act of the meeting of the Conference on the Human Dimension of the Commission for Security and Co-operation in Europe (CSCE), the so-called Copenhagen Document, but there are also a number of guiding documents which can provide an understanding of good practice with regards to legislation concerning political parties, like those adopted by the Venice Commission¹⁰.

In this respect, Romanian Political Parties Law no.14/2003 regulates the whole range of aspects involved by creation, functioning and dissolution of political parties. In the post-communist era, Romania prizes the idea of a pluralist political society that has been established by the new democratic Basic Law adopted on the 8th of December 1991, in contrast with the previous period dominated by the unique party that monopolized the entire power of decision in the State.

⁵ Ioan Muraru, Simina Elena Tănăsescu, *Drept constitutional și instituții politice*, vol.II (București, Editura C. H. Beck, 2013), p.27.

⁶ Peter Hodgson Collin, *Dictionary Of Politics and Government*, third edition (London: Bloomsberg Publishing Plc., 2004), p.183.

⁷ Case of the Refah Partisi (The Welfare Party) and Others v. Turkey. (40/1993/435/514) (European Court of Human Rights, February 13, 2003), paragraphs 87-89.

⁸ 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), CDL-AD(2010)024, p.6.

⁹ Ibidem, p.7.

¹⁰ One of the most important is the Code Of Good Practice In Electoral Matters, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e), accessed March 23, 2017.

In this context, it is worth noticing that the European Court of Human Rights has appreciated that political parties hold an "essential role in ensuring (...) the proper functioning of democracy"¹¹. Thus, the State should enact legislation that facilitate a pluralistic political environment, that help the citizen to choose most appropriate political viewpoints, from a wider variety, contributing to the creation of a healthy democratic society.

3. Freedom Of Association And The Two Important Moments For A Political Party: Registration And Cessation Of Activity

In Romania, according to Article 40 paragraph 1 of the Basic Law, citizens may freely associate into political parties, trade unions, employers' associations and other forms of association. The purpose of the association in political parties is different from that of other associations established under Article 40 of the Constitution. The main goal of the political parties is to shape and express the political views of citizens and to materialize their political freedom, developing and strengthening political society and obtaining the votes of the majority of citizens in order to conquest and exercise the state power in accordance with its own political program¹². Legal benchmarks for their activity are set by the Law no. 14/2003, which provides that in their activity, political parties have to promote national values and interests and political pluralism. They also have to contribute to the formation of public opinion, participate with candidates in elections and in establishing a public authority and stimulate the participation of citizens in polls (Article 2).

4. Issues Of Constitutionality Regarding The Registration Of Political Parties

The registration application of the political party has to be addressed to the Bucharest Tribunal which examines it both from the point of view of fulfilling formal registration requirements and from the perspective of complying with the fundamental values enshrined in the Constitution and the law.

4.1. Issues of constitutionality regarding the formal requirements

According to Article 19 Paragraph 3 of the Law no. 14/2003 on political parties, among the requirements consisting in various documents, there appeared a list of at least 25 000 supporting signatures of founding members, residing in at least 18 state counties and in Bucharest, but no less than 700 persons for each of those counties and Bucharest. These legal

provisions made the subject of the a posteriori constitutional review performed by the Constitutional Court¹³. Considering that the impugned regulation is an interference by the State authorities with the right of association, the Constitutional Court analysed, by applying a proportionality test, whether it is justified under the rigorous requirements of the European Court of Human Rights and of the Venice Commission. Regarding the legality of the challenged law, the Court found that it was originally provided by Decree-Law no. 8/1989 on the registration and operation of political parties and public organisations in Romania, that revived the political pluralism and set a minimum number of 251 founding members as preliminary requirement. Seven years later, the Law no. 27/1996 on political parties increased the number to 10,000; while the new law in 2003 (Law no. 14/2003 on political parties) increased it even more, to 25,000. According to the explanatory memorandum, expressed during the adoption of the latter bill, through the significant increase from the minimum 10,000 to 25,000 founding members, the legislator wished to avoid „the incorporation of certain political parties with reduced representation or of certain regional parties”, aiming at the occurrence of „some persons who have the ability to submit lists of candidates in most state counties”.

However, the Court found that although, in the abstract, this measure is adequate in the sense that it can lead to the fulfilment of its purpose, it is not necessary in a democratic society. The alleged requirement for the registration of a political party is excessive and disproportionate in the current social and political context of the country and in relation to the legal measures in force concerning the public funding of political parties and election campaigns, as well as the parliamentary representation of the electorate.

Having examined the reasons provided by the legislator at the moment of the adoption of Law no. 14/2003, the Constitutional Court found that they no longer reflect the current state of Romanian society marked by the natural historic and political evolution of the democratic system installed in late 1989. Thus, if the risk of creating a large number of political parties, of the „devaluation” of the idea of political party, of the fragmentation of their parliamentary representation and of an excessive burden of the State budget on account of their public funding represented an acceptable justification in the social and political context of the 1990s, the Court noted that, precisely at that time, the minimum number of founding members required for the registration of a political party was the lowest in the entire evolutionary history of the legislation, i.e. 251 members (during 1989-1996), which increased then to 10,000 (during 1996-2003). Then, in 2003, 14 years after the events in December 1989, which marked the change of the communist regime and the transition to a

¹¹ Case of the Refah Partisi and Others v. Turkey.

¹² Bianca Selejan-Guțan in Ioan Muraru, Elena Simina Tănăsescu (coord.), *Constituția României. Comentariu pe articole* (București: Editura C. H. Beck, 2008), p.84.

¹³ Decision no.75 of 26th of February 2015, published in the Official Gazette of Romania, Part I, no.265 of 21st of April 2015.

democratic form of government, the legislator significantly increased again this number, citing the same reasons.

The Court found that the possible negative effects that would occur in the absence of adopting the legal measure examined are counteracted by the existence of appropriate legal instruments and such a requirement can no longer be considered necessary.

Thus, the Court found that there is no fair balance between collective and individual interests, since, by the requirement of a very high representation, the subjective right of the persons concerned to register a political party meets a drastic restriction, which exceeds the possible benefits. Likewise, in order to establish and maintain the right balance, the legislator must use means which entail the lowest possible interference with the right of association. However, in this case, the requirement of the minimum number of founding members and their territorial dispersion exceeded what is fair and equitable in relation to the protected fundamental right, namely, the right of association.

For these reasons, the Court held that the challenged provisions of Article 19 paragraph 3 of Law no. 14/2003 on political parties, in relation to the current state of evolution of Romanian society, no longer meet the requirements of necessity and, by their excessive nature, impede the exercise of the right of association guaranteed by Article 40 of the Constitution, which is tantamount to affecting the right in its very substance. As a result, by majority vote, the Court allowed the exception of unconstitutionality and held these provisions to be unconstitutional.

The Court also held that Article 61 of the Constitution accords the sovereign power of law-making on Parliament, which is the supreme representative body of the Romanian people and the sole legislative authority of the country. Consequently, in order to remove the flaw of unconstitutionality, within its limited margin of appreciation, the legislator must re-examine the provisions of Article 19 paragraph 3 of Law no. 14/2003 in order to decrease the minimum number of founding members in the lists of supporting signatures for the registration of a political party and for reconfiguration of the requirement of territorial dispersion, ensuring that all requirements justifying such interferences by the State with the right of association are met.

Soon after this decision of the Constitutional Court, less than a month later, the Parliament amended the Law no.14/2003 and diminished massively the required number of signatures¹⁴. According to the new provisions, the list has to comprise the signatures of at least three founding members. This proves the positive effect the Constitutional Court's decisions can have on the effectiveness of fundamental rights and freedoms.

4.2. Issues regarding the compliance with the constitutional fundamental values

In this last-mentioned respect, Article 40 paragraph 2 of the Basic Law provides that political parties or organizations which, by their aims or activity, militate against political pluralism, the principles of a State governed by the rule of law, or against Romania's sovereignty, integrity or independence, shall be unconstitutional.

The registration application is submitted to the Bucharest Tribunal, which is, according to Article 18 of the Law no.14/2003, the court entitled to analyse and approve it. When it examines the registration application, the tribunal checks if the future political party that requests the registration observes all these imperatives. If the party's program proves beyond any reasonable doubt that it does not fall under the scope of the constitutional requirements, the tribunal will reject the application.

Nevertheless, the refusal to register the political party on the fore mentioned reasons has to be wisely balanced with the citizens' right to association. Romania has been subject to a decision where the European Court of Human Rights found that the Romanian State has violated Article 11 of the European Convention in the Case Of *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, 3 February 2005. The Bucharest Tribunal rejected the application of registration of the said party, reasoning this decision on the fact that it follows from the party's statute and political programme that it „pursues the aim of establishing a humane State based on communist doctrine, which would imply that the constitutional and legal order in place since 1989 is inhumane and not founded on genuine democracy”. The applicant appealed against that decision to the Bucharest Court of Appeal, which dismissed the appeal on the ground that the assessment made in the tribunal's decision had been correct.

Analysing the complaint lodged by the party and its leader, the European Court of Human Rights stated that there can be no democracy without pluralism and that is why freedom of expression as enshrined in Article 10 is applicable not only to 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. The fact that their activities form part of a collective exercise of the freedom of expression in itself entitles political parties to seek the protection of Articles 10 and 11 of the Convention (§§ 45). The Court underlined that it has previously held that a political party may campaign for a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must in every respect be legal and democratic, and secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders

¹⁴ Law no.14/2003 has been amended by Law no.115/2015, published in the Official Gazette of Romania, Part.I, no.346 of 20th of May 2015.

incite to violence or put forward a policy which does not comply with one or more of the rules of democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds (§§ 46).

The Court noted that the national courts based their refusal of the applicants' application solely on an assessment of whether the PCN's statute and political programme complied with the provisions of political parties law (at that time, Legislative Decree no. 8/1989). In the same time, the Court also noticed that the PCN had not been politically active before applying for registration. It observed, in this connection, that neither the Romanian courts did not base their rejection decisions on any other document produced by the PCN or on any particular position taken by the leaders of the PCN (§§ 51). Examining the PCN's statute and political programme, the Court noticed that these documents laid emphasis on upholding the country's national sovereignty, territorial integrity and legal and constitutional order, and on the principles of democracy, including political pluralism, universal suffrage and freedom to take part in politics. It further noted that they did not contain any passages that could be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles – an essential factor to be taken into consideration – or for the “dictatorship of the proletariat”.

The Court considered one of the principal characteristics of democracy to be the possibility it offers of addressing through dialogue, without recourse to violence, issues raised by different strands of political opinion, even when they are irksome or disturbing. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group that complies with fundamental democratic principles solely because it has criticised the country's constitutional and legal order and sought a public debate in the political arena.

The Court noticed that national jurisdictions did not show any way in which the PCN's programme and statute were contrary to the country's constitutional and legal order and, in particular, to the fundamental principles of democracy. The Court also dismissed the Government's argument that Romania cannot allow the emergence of a new communist party to form the subject of a democratic debate. The European Court stressed that the PCN's programme could hardly have been belied by any practical action it took, since its application for registration was refused and it consequently did not even have time to take any action. It was thus penalised for conduct relating solely to the exercise of freedom of expression. The Court took into account the historical background, meaning Romania's experience of totalitarian communism prior to 1989.

However, it observed that that context cannot by itself justify the need for the interference, especially as communist parties adhering to Marxist ideology exist in a number of countries that are signatories to the Convention (§§ 54-57).

A similar situation occurred in Spain, where the Constitutional Tribunal stated¹⁵ that the refusal to register a political party, based solely on the suspicion that it could continue the activity of a banned political party, violates the fundamental freedom of association, by violating the right to create political parties. In the case, the Special Chamber of the Supreme Court declared the founding of the political party *Sortu* to be unlawful and refused its incorporation in the Register of Political Parties. In its judgment, the Supreme Court ruled that *Sortu* continued the unlawful activities of *Herri Batasuna*, *Euskal Herriarrok* and *Batasuna*, which were political parties banned in 2003 by a judgment pronounced by the same Chamber of the Supreme Court. *Sortu* appealed at the Constitutional Tribunal against that decision. The Constitutional Tribunal considered that the expressions in support of exclusively peaceful and democratic ways to achieve political objectives and the condemnation of terrorism (expressly including ETA) as an instrument of political action, comprised in the party's statute, should be regarded as a sufficient circumstantial evidence to counteract or dilute the probative force of other pieces of evidence from which it could be inferred that *Sortu* could continue or pursue the activity of legally banned and dissolved parties. Therefore, the suspicion that *Sortu* could continue the activity of outlawed parties could not constitute a legally sufficient argument to infringe the exercise of the freedom of association.

5. Cessation Of Activity Of A Political Party Due To Unconstitutional And/Or Unlawful Activity

It is possible that a party which initially complies with the requirements stated in the Basic Law, to disregard them during its activity. The constitutional provisions of Article 40 Paragraph 1 in the Romanian Basic Law that grant the freedom of association have to be read in conjunction with those of Article 30 Paragraph 7 that forbid defamation of Country and Nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morals. In this situation, the Constitutional Court of Romania is competent to rule upon the challenges as to the unconstitutionality of a political party, according to Article 146 Letter k) of the Basic Law. A similar provision can be found in Article 39 of the Law no.47/1992 on the Organisation and Operation of the Constitutional Court.

¹⁵ Decision 138/2012 of 20th of June 2012, published in *Boletín Oficial del Estado* (Official Gazette), 163 of 9th of July 2012, <https://www.boe.es/boe/dias/2012/07/09/pdfs/BOE-A-2012-9214.pdf>, accessed March 23, 2017.

To this end, the Court verifies the fulfillment of substantive requirements regarding the political party's activity, provided in Article 40 paragraph 2 of the Basic Law, which states that parties or organizations which, by their aims or activity, militate against political pluralism, against the rule of law or against the sovereignty, integrity or independence of Romania are unconstitutional. In the same time, exercising this type of constitutional review, the Court also takes into account Article 3 of the Political Parties Law No.14/2003, which states that only political associations that are duly established and that militate in favor of national sovereignty, state independence and unity, territorial integrity, legal order and constitutional democracy principles, may function as political parties. The same article states that political parties that, by their statutes, programs, propaganda or by other activities they organize, breach the fore mentioned constitutional provisions are prohibited.

The Romanian Constitutional Court has rendered only one decision regarding the constitutionality of a political party¹⁶. The complaint was rejected as inadmissible, mainly because the plaintiff was not entitled by law to lodge such a complaint. Subjects which may apply to the Court to exercise this power are expressly and exhaustively listed in Article 39 Paragraph 2 of the Law no. 47/1992. Thus, the law grants this right only to the Government and the President of the Chamber of Deputies and the President of the Senat, based on a decision taken by the Chamber's majority of its members. In light of these legal provisions, the application was considered inadmissible, being drawn by a person that did not have the legal ability to call the Constitutional Court to rule over the constitutionality of a political party.

Moreover, the Court noted that an impediment to judging on the merits of the application lied in its very object. In this regard, the Court stated that, according to Article 146 letter k) of the Constitution, it has the power to decide on complaints regarding the constitutionality of a political party. The case concerned the Democratic Alliance of Hungarians in Romania (*Uniunea Democrată Maghiară din România*). As reflected in the electronic records of the Ministry of Justice, it is not listed in the register of political parties kept by the Bucharest Tribunal, but in the National Register of Nongovernmental Organizations. The Court stated that the assimilation made by the law in terms of participation in the electoral process does not lead to the transformation of the Democratic Alliance of Hungarians in Romania into a political party, but preserves its status of legal association. Since the

Democratic Alliance of Hungarians in Romania do not fall under the provisions of the Law No.14/2003 on political parties, the Constitutional Court was not entitled to review its constitutionality and, therefore, it rejected the application as inadmissible.

A similar type of argumentation has been used by the Federal Constitutional Court of Germany¹⁷ when the National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands*) drew an application asking the Court to ascertain that the mentioned party is not unconstitutional. The Court dismissed the applications as inadmissible, noting that the Federal Constitutional Court Act does not provide a party with the option to invoke the Federal Constitutional Court's jurisdiction for a declaration of its constitutionality. Political parties are free to exercise their rights as long as the Federal Constitutional Court has not established their unconstitutionality. If it is contested that they are entitled to exercise these rights, they can take recourse to the courts¹⁸.

The National Democratic Party of Germany (NDP), which was considered a party far to the right of the political spectrum¹⁹, represented a subject that the Federal Constitutional Court dealt with in several occasions. In 2001, the Court decided jointly on applications lodged by the Federal Government and the two chambers of the Federal Parliament, the *Bundestag* and the *Bundesrat*. The Court noticed the co-ordinated nature of the applications, lodged by the three politically highest ranking institutions of the Federal Republic of Germany, fact that indicated the extraordinary political importance of the case. During the proceedings, the Court learnt that several important functionaries of the NPD were, at the same time, working not only as party functionaries, but also as undercover agents of the *Verfassungsschutz*, the public authorities which investigated the NPD and prepared the case for the Constitutional Court. In March 2003, considering this information, the Constitutional Court decided that the proceedings had to be discontinued²⁰.

Very recently, on the 17th of January 2017, the Federal Constitutional Court re-opened the proceedings and rendered a decision regarding the constitutionality of the fore-mentioned party²¹. In order to do that, the Court firstly examined the admissibility of the application to prohibit the NPD. In this regard, it stated that there is neither an infringement of the strict requirement that there be no informants at the party's executive level (*Staatsfreiheit*) nor an infringement of the principle of fair trial that would preclude carrying out the proceedings. The applicant convincingly demonstrated to the Court that all police informants at

¹⁶ Decision no.272 of 7th of May 2014, published in the Official Gazette of Romania, Part I, no.451 of 20th of June 2014.

¹⁷ Cases before the German Federal Constitutional Court are quoted as published either in *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)* or - since 1 January 1998 - on the website of the Court at <http://www.bundesverfassungsgericht.de/entscheidungen.html>, accessed March 23, 2017.

¹⁸ Bundesverfassungsgericht, 2 BvE 11/12, Decision of 20th of February 2013, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/02/es20130220_2bve001112.html, accessed March 23, 2017.

¹⁹ Hans-Heinrich Vogel, "Prohibition Of Political Parties In Germany", in CDL-JU(2009)052, report presented at the Conference "Constitutional Restrictions On Freedom Of Association", Belgrade, Serbia, 2 June 2009, p.5.

²⁰ http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2001/07/bs20010703_2bvb000101.html, accessed March 23, 2017.

²¹ <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-004.html>, accessed March 23, 2017.

the executive levels of the NPD had already been deactivated, at the latest, at the point in time at which the intention to file an application to prohibit the NPD had been announced, and that there had been no follow-up aimed at obtaining information. It could also be assumed that the NPD's procedural strategy has not been spied out with intelligence service means and that there have been sufficient precautions to ensure that information obtained incidentally through the observation of the NPD is not used to the party's detriment.

The applicant, the *Bundesrat*, requested the declaration that the NPD is unconstitutional because it seeks, by reason of its aims or the behaviour of its adherents, to undermine the free democratic basic order. The Court noticed that, indeed, the National Democratic Party of Germany advocates a concept aimed at abolishing the existing free democratic basic order. The NPD also intends to replace the existing constitutional system with an authoritarian national state that adheres to the idea of an ethnically defined "people's community" (*Volksgemeinschaft*). Its political concept disrespects human dignity and is incompatible with the principle of democracy. Furthermore, the NPD acts in a systematic manner and with sufficient intensity towards achieving its aims that are directed against the free democratic basic order. However, the Court noted that, currently, there is a lack of specific and weighty indications suggesting that this endeavour will be successful. For that reason the Second Senate of the Federal Constitutional Court unanimously rejected as unfounded the *Bundesrat*'s application to establish the unconstitutionality of the NPD and its sub-organisations²².

In the German constitutional case-law, there were two more decisions which implied the prohibition of political parties, both of them delivered on applications made by the Federal Government in November 1951. They challenged the constitutionality of a party of the extreme political right, the *Sozialistische Reichspartei* (SRP), and one party of the extreme political left, the *Kommunistische Partei Deutschlands* (KPD). Both parties were declared unconstitutional, the first one in 1952²³ and the second one²⁴, in 1956. The Court dissolved them, confiscated their assets and issued a ban on establishing organisations to replace the dissolved party.

Turkey is also one of the countries that faced the problem of potentially unconstitutional parties and the Constitutional Court has been called to solve this kind of cases. For instance, in one case, the Chief Public Prosecutor at the Court of Cassation launched a court action seeking the dissolution of the Rights and

Freedoms Party (*Hak ve Özgürlükler Partisi HAK-PAR*). He claimed that the statute and programme of the Party described the "Kurdish problem" as "the main problem of Turkey". He pointed out that such an approach, drawing a distinction between Turks and Kurds and accepting the existence of a separate Kurdish nation, entailed the rejection of the concept of nationhood, which depends on conscience of citizenship. Analyzing the application, the Constitutional Court reiterated that political parties are indispensable elements of democratic political life and they are free to determine policies and to suggest different solutions to society's social, economic and political problems. They can only be banned if their policies and activities pose a clear and present danger to the democratic regime. The *HAK-PAR* Party was only established a short time before the application and there is no evidence of its having committed unconstitutional acts since its establishment. It is therefore safe to say that the party does not pose a serious threat to the democratic regime²⁵.

In an other case, the Constitutional Court of Turkey decided the dissolution of the Democratic People's Party, based on the fact that the defendant party rejected the concept of a modern nation and its political program depended on racial and regional discrimination. The Court also noticed that there was made a discrimination between Turks and Kurds in the Party's manifesto and the party asserts that there is an ethnically Kurdish nation which is subjected to assimilation. In these circumstances, the Court concluded that it was clear that this kind of conception could corrupt the state order, which depended on territorial and national unity. The Court also found that the party aimed to create minorities by protecting, by promoting and by disseminating languages and cultures other than Turkish and Turkish culture²⁶.

6. Conclusions

The basic idea that it has been intended to be depicted in this study centers on the fact that regulations regarding political parties offer an image of the degree of democracy in each state and the way the legislator approaches this issue is defining for the stage of development of the society. The existence of the political parties itself is one of the signs of a genuine democracy. Nevertheless, the mere possibility granted by law to form a political party is not enough if the legal requirements are so restrictive that jeopardize its institution. The fundamental right to association has to be permanently kept in mind by the legislative when it

²² Bundesverfassungsgericht, 2 BvB 1/13, Decision of 17th of January 2017, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/01/bs20170117_2bvb000113.html, accessed March 23, 2017.

²³ 1 BvB 1/51, BVerfGE 1, 349.

²⁴ 1 BvB 2/51, BVerfGE 5, 85.

²⁵ [http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/tur/tur-2008-2-004?f=templates\\$fn=document-frameset.htm\\$mq=%5Bfield,E_Alphabetical%20index%3A%5Bborderedprox,0%3APolitical%20party%5D%5D%20\\$х=server\\$3.0#LPHit1](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/tur/tur-2008-2-004?f=templates$fn=document-frameset.htm$mq=%5Bfield,E_Alphabetical%20index%3A%5Bborderedprox,0%3APolitical%20party%5D%5D%20$х=server$3.0#LPHit1), accessed March 23, 2017.

²⁶ [http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/tur/tur-2001-3-012?f=templates\\$fn=document-frameset.htm\\$mq=%5Bfield,E_Alphabetical%20index%3A%5Bborderedprox,0%3APolitical%20party%5D%5D%20\\$х=server\\$3.0#LPHit1](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/tur/tur-2001-3-012?f=templates$fn=document-frameset.htm$mq=%5Bfield,E_Alphabetical%20index%3A%5Bborderedprox,0%3APolitical%20party%5D%5D%20$х=server$3.0#LPHit1), accessed March 23, 2017.

adopts legal provisions regarding the institution and the functioning of political parties.

The authorities of constitutional jurisdiction are the guardians of democracy and, in most European countries, they have the power to protect the values incorporated in the essence of any political party, which is mainly to express and shape the political will of citizens and to convey it to the highest levels of decision in the State. The aim of this paper was to highlight the importance of political parties in contemporary societies and the necessity to design a legal framework adapted to the constitutional exigencies required by the protection of the right to free association. At the same time, any sideslip has to be amended. Constitutional jurisdictions hold the legal instruments to keep the balance in the political life, by sanctioning the infringements of the freedom of associations, on one hand, and, on the other hand, by banning those political parties that diverge from the standards of good faith in relation with the State or its

institutions and put in peril the conquests of democracy by trying to establish a radical, extremist political order, attacking the values of democracy and undermining the rule of law.

The sphere of political parties' activity is very wide and it offers many research possibilities for legal scholars. Topics like the internal discipline and the responsibility of the members, the involvement in the electoral proceedings or the system of alliances political parties form in various moments of their existence on contingency basis are only few of them. A vast, intriguing and very proteic issue is also represented by the political doctrines chosen, followed and spread by political parties. In other words, the subject of political parties opens a very generous field of research and also rises awareness in what concerns their importance both in the life of individuals that thanks to them are able to participate in the State's decisions and in the State's life itself.

References:

- Ion Deleanu, *Instituții și proceduri constituționale în dreptul român și în dreptul comparat* (București: Editura C. H. Beck, 2006);
- Maurice Duverger, *Les partis politiques*, (Paris: Librairie Armand Colin, Collection „Points”), 1976;
- Dimitrie Gusti, „Partidul politic”, in *Doctrinile partidelor politice*, Institutul Social Român (București: Editura Cultura Națională, 1922);
- Bianca Selejan-Guțan in Ioan Muraru, Elena Simina Tănăsescu (coord.), *Constituția României. Comentarii pe articole* (București: Editura C. H. Beck, 2008);
- Peter Hodgson Collin, *Dictionary Of Politics and Government*, third edition (London: Bloomsberg Publishing Plc., 2004);
- Ioan Muraru, „Aspecte teoretice privind conceptul de partid politic”, in *Studii constituționale*, vol.I (București, Editura Actami, 1995);
- Ioan Muraru, Simina Elena Tănăsescu, *Drept constitutional și instituții politice*, vol.II (București, Editura C. H. Beck, 2013)
- Hans-Heinrich Vogel, “Prohibition Of Political Parties In Germany”, in CDL-JU(2009)052, report presented at the Conference “Constitutional Restrictions On Freedom Of Association”, Belgrade, Serbia, 2 June 2009;
- Code Of Good Practice In Electoral Matters, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002);
- 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), CDL-AD(2010)024;
- Law no.14/2003 has been amended by Law no.115/2015, published in the Official Gazette of Romania, Part.I, no.346 of 20th of May 2015;
- Decision of the European Court of Human Rights in the Case of the Refah Partisi (The Welfare Party) and Others v. Turkey, February 13, 2003;
- Decision no.75 of 26th of February 2015 of the Constitutional Court of Romania, published in the Official Gazette of Romania, Part I, no.265 of 21st of April 2015;
- Decision no.272 of 7th of May 2014, of the Constitutional Court of Romania, published in the Official Gazette of Romania, Part I, no.451 of 20th of June 2014;
- Decision 138/2012 of 20th of June 2012 of Constitutional Tribunal of Spain, published in Boletín Oficial del Estado (Official Gazette), 163 of 9th of July 2012;
- Bundesverfassungsgericht, 2 BvE 11/12, Decision of 20th of February 2013;
- Bundesverfassungsgericht, 2 BvB 1/13, Decision of 17th of January 2017;
- 1 BvB 1/51, BVerfGE 1;
- 1 BvB 2/51, BVerfGE 5;
- www.codices.coe.int;
- www.boe.es;
- <http://www.bundesverfassungsgericht.de>.