

Political Finance: Checks and Abuses
– Current Problems and New Developments

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This contribution explores some fundamental aspects of political finance. The author looks at public subsidies for European political parties as well as the planned Statute for Members of the European Parliament. The author decided to take Germany as the starting point because this country ranks as *the* embodiment of the party state.¹ However, apart from the German perspective, the author also takes several other countries into consideration. It is not by pure chance that Germany was the first European state to introduce state financing of political parties, which slowly led to its acceptability in other countries. On the one hand, 'pioneering' in the field of state finance for political parties gave early rise to dangers of excessive public subsidies for political parties in Germany. On the other hand, the German Constitutional Court has the jurisdiction to counteract decisions made by the parliament for its own benefit. In a long struggle against the legislative influence exercised by the treasurers of the political parties, the German Constitutional Court, from its relatively removed position, monitored the matter carefully and tried to develop reasonable regulations and limits regarding public subsidies for political parties.

A. Definition: Political Parties in a Narrow and Broad Sense

Discussing 'financing of political parties' requires a definition of what 'parties' mean and, above all, whether this concept is to be used in a broad or narrow sense. Political parties are associations of citizens contending for political power by means of elections.² Usually constitutional law (at least in Germany) strictly

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¹ Fundamentally G. Leibholz, *Strukturprobleme der modernen Demokratie* (Structural Problems of Modern Democracy), 3rd ed. 1967; see also G. Smith, *The Party System at the Crossroads*, in G. Smith/W.E. Paterson/S. Padgett (eds.), *Developments in German Politics* 2, 1996, pp. 55 (at pp. 71 et seq.).

² See for instance §2 of the German Party Law. This is also true for other Western democracies.

separates political parties from political foundations, political groups, members of parliament, members of the government and political civil servants. This is due to the fact that all institutions cited are separately organized and have different rights and duties. Office-holders, for instance, are especially bound by considerations of public welfare.³ However, as a matter of fact (as demonstrated by political science), a close connection exists between political groups, parliamentarians, members of government, political civil servants and their political parties, especially in parliamentary democracies. They are linked together by the same political objectives.⁴ This affects political finance. We therefore have to separate the financing of political parties in a narrower legal sense, from the notion of political bodies in a broader sense. The latter work in conjunction with the former in varying ways and often create a political unity with them.⁵ For reasons of brevity, we will, in this paper, mainly focus on the financing of parties in the narrow sense.

B. Overview of the Sources of Income of Political Parties

As any organization does, political parties also need money. The sources of income for political parties include:

1. Membership contributions: Membership fees are the initial and the less problematic source of income for political parties. In Germany they are the main source of income for the political parties in their narrow sense.⁶
2. Donations: Donations to political parties also are unproblematic, as long as

See T. Papadopoulou, *Politische Parteien auf europäischer Ebene (Political Parties at the European Level)*, 1999; G. Deinzer, *Europäische Parteien (European Political Parties)*, 1999, pp. 21 et seq.

³ See, for instance H.-C. Link, *Staatszwecke im Verfassungsstaat – nach 40 Jahren Grundgesetz (State Purposes in Constitutional States – after 40 Years of the Grundgesetz)*, 48 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 1990, pp. 7, at pp. 19 et seq. with further evidence.

⁴ G. Wewer, *Plädoyer für eine integrierende Sichtweise von Parteifinanzien und Abgeordneten Alimentation (Pleading for an Integrative Perspective on Political Finance and Payment of Parliamentarians)*, *Forschungsberichte und Diskussionsbeiträge aus dem Institut für Politische Wissenschaft der Universität Hamburg*, Nr. 33, 1988; C. Landfried, *Parteifinanzien und politische Macht (Political Finance and Political Power)*, 1990, pp. 91 et seq.; H.H. von Arnim, *Die Partei, der Abgeordnete und das Geld (The Party, the Representative and Money)*, 2nd ed., 1996, pp. 133 et seq.; R. Ebbinghausen, *Die Kosten der Parteiendemokratie (The Costs of Party Democracy)*, 1996, pp. 195 et seq.; M. Morlok, *Thesen zu Einzelaspekten der Politikfinanzierung (Some Aspects of Political Finance)*, in D. Tsatsos (ed.), *Politikfinanzierung in Deutschland und Europa*, 1997, pp. 77 (at pp. 86 et seq.); P. Lösche, *Ein Nachtrag zum Symposium, in D. Tsatsos (ed.), Zur Lage des deutschen Regierungs- und Parteiensystems (On the Situation of the German Government and Party System)*, 2002, pp. 107 (at pp. 111-112).

⁵ Von Arnim, *Die Partei*, supra note 4, p. 29.

⁶ Von Arnim, supra note 4, pp. 119 et seq.; Ebbinghausen, supra note 4, pp. 49 et seq.

they stay within certain limits.⁷ If this is the case, donations can even enjoy tax benefits, just as membership contributions do.

3. Income derived from property: In general, income from property does not play an important role. Only some forms of property can be problematic, especially if political parties own a considerable share of media firms such as broadcasting corporations or newspapers. In Germany, a discussion is going on about shares held by the Social Democratic Party (SPD). The media should control all forms of political power and not be controlled by them.
4. Public subsidies: In addition, public subsidies are granted partly directly, and partly indirectly.
 - a) Indirect subsidies: Indirect public subsidies for political parties are especially
 - contributions to political parties diverted from remunerations of office holders and members of parliament ('party taxes'),⁸
 - tax privileges for membership fees and donations;
 - free advertising through public broadcasting corporations.
 - b) Direct public subsidies: For several decades, direct public subsidies have been playing an increasingly important role in the budgets of political parties. Germany has pioneered this position from the beginning. When the political parties represented in the German Bundestag first allowed themselves direct public funding in 1959, this was a European première, and would have been a world première, had not Costa Rica and Argentina already introduced public funding for political parties earlier.⁹ In contrast to political parties, political groups, members of parliament, members of government and political civil servants are completely funded by the State, whilst political foundations are almost completely state-funded (at least as far as Germany is concerned).¹⁰ Whether public funds for political parties (in the narrow sense of the word) were compatible with the Constitution, was initially highly controversial (at least in Germany), until the German Constitutional Court generally allowed them to a marginal note in 1958 (obiter dictum).¹¹ The constitutional need for public subsidies for political parties, however, remained under discussion.¹² In the

⁷ Von Arnim, supra note 4, pp. 50 et seq., at p. 120-121; Ebbinghausen, supra note 4, pp. 81 et seq.

⁸ Von Arnim, supra note 4, pp. 312 et seq.; Ebbinghausen, supra note 4, pp. 97 et seq.; I. Janis/M. Pinto-Duschinsky/D. Smilov/M. Walecki, *Political Finance in Central Eastern Europe: An Interim Report*, 31 *Österreichische Zeitschrift für Politikwissenschaft* 2002, p. 21 (at pp. 28 et seq.).

⁹ H.H. von Arnim, *Das System (The System)*, 2001, pp. 106 et seq.

¹⁰ Von Arnim, supra note 4, pp. 137 et seq.; H.H. von Arnim, *Der Staat als Beute (The State as Spoils)*, 1993, pp. 175 et seq.

¹¹ BVerfGE 8, 51 (63) - 1958.

¹² See the arguments in J.A. Frowein/R. Blank, *Financing of Political Parties in Comparative*

meantime, many countries have followed the German example and have introduced a regime of public subsidies for political parties in one form or the other. This is the case, e.g. for Belgium, Denmark, Greece, Finland, France, Italy, Austria, Portugal, Sweden, and Spain as well as in nine of the ten new Member States of the European Union. Exceptions are Great Britain, Switzerland and Latvia, for example.

C. Public Financing as a Way of Accessing Power

Public regulations of political finance (just as in the case of electoral rules) need to be considered in the more general context of power, as the way they are formulated may directly influence the gaining or retention of political power.¹³ On the one hand, they are particularly important, as the legitimation of democratic power depends on their adequate force and expression. Their appropriateness, on the other hand, is especially endangered because the system of party financing lies in the hands of those directly concerned.¹⁴ The German Constitutional Court speaks of 'parliamentary decisions on one's own behalf.'¹⁵ Politicians are – due to the lack of effective outside controls – easily tempted to adjust the regulations to suit their own short-term interests.¹⁶

D. Justification of Public Subsidies

I. Defusing Large Donations?

Justifying public funding of political parties in their narrow sense and in their present form sometimes is not quite easy. In Germany, public subsidies were introduced in the late 1950s in order to make it possible to ban high amounts of donations, which 'always have an odour of corruption' (as the political scientist

Perspective, *Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht* 2001, 29 (38 et seq.).

¹³ R. Wildenmann, in Mühleisen (ed.), *Das Geld der Parteien* (The Money of Political Parties), 1986, 80 (82). See also R. Wildenmann, *Regeln der Machterwerbung* (Rules for the Acquisition of Power), *Kölner Antrittsvorlesung* 1963, in idem, *Gutachten zur Frage der Subventionierung politischer Parteien aus öffentlichen Mitteln* (Expert Opinion on the Question of Public Subsidies for Political Parties), 1968, at p. 70.

¹⁴ H.H. von Arnim, *Der strenge und der formale Gleichheitssatz* (The Strict and the Formal Principle of Equality in Treatment), *Die Öffentliche Verwaltung* 1984, at p. 85.

¹⁵ BVerfGE 40, 296 (327) - 1975.

¹⁶ The necessary critical view towards this (which is applied by the author since the beginning of the 1970s) is nowadays gaining recognition in constitutional law. See for instance M. Morlok, *Für eine zweite Generation des Parteienrechts* (For a Second Generation of Party Law), in D. Tsatsos (ed.), *30 Jahre Parteiengesetz in Deutschland* (30 Years of Party Law in Germany), 2002, at p. 53 et seq.

Theodor Eschenburg pertinently formulated¹⁷). Later, however, this line of argumentation was 'forgotten.' In fact, in Germany, both are now packaged together: large donations and huge public subsidies.¹⁸

II. Expansion of Party Functions?

Repeated attempts have been made to find objective criteria for determining the appropriate level of party finances, thus setting a reference point for the *If* and *how much* of public party funding to be granted. In this context, it seems logical to focus on the functions of political parties. But this approach necessarily fails because political parties decide for themselves not only the details of their financing regime, but also those concerning their functions. Let us once more use Germany as an example: in the Law on Political Parties, the political parties have defined their functions in an extremely broad manner – thus also legitimizing their huge public funding. Their income now is only seemingly derived from their functions; in reality, it is the other way round: their functions result from their income, thus putting the cart before the horse.¹⁹

Due to the lack of control, these public subsidies can jump up, as the history of German party financing shows. When public subsidies for political parties were surprisingly declared permissible by the Constitutional Court in 1958, there was no holding back the political parties represented in the Bundestag: in 1959 they granted themselves 5 Mio. Deutschmarks; a few years later, they were at 38 Mio. Deutschmarks; and in the middle sixties, an increase to 90 Mio. Deutschmarks per year was already planned.²⁰ The Court was therefore forced to apply the emergency brake and to set a limit for public party funding. But money for political parties seems to be just like water: it always finds a way. The parties bypassed the judicial hurdles by diverting the public pecuniary sources to their supporting organizations, that is, to the political parties in the broad sense of the word;²¹ political foundations and political groups were covered with money to a vast extent and subsidies have multiplied by a factor of approximately forty in the last thirty years.²² At the same time, part-time MPs in the Länder were transformed to fully-funded party-workers, and huge amounts of money were dedicated to the employment of personal staff for parliamentarians. These

¹⁷ T. Eschenburg, *Paragrafen gegen Parlamentarier* (Articles against Parliamentarians), in idem, *Zur politischen Praxis in der Bundesrepublik* (On Political Action in Germany), Vol. 1, 1967, p. 124.

¹⁸ See K. von Beyme, *Die Chance der Skandale* (The Chances of Scandals), *Süddeutsche Zeitung*, 20 January 2003: 'In pretended innocence we have combined the worst of both worlds: high state subsidies as a European model and a system of donations [...] just like the anglo-saxon model'.

¹⁹ Von Arnim, *supra* note 4, pp. 27-28.

²⁰ Von Arnim, *supra* note 9, pp. 106 et seq.

²¹ Von Arnim, *supra* note 9, pp. 112 et seq.

²² See H.H. von Arnim, *Staatliche Fraktionsfinanzierung ohne Kontrolle?* (State Subsidies for Political Groups without Control?), 1987.

personal assistants often also work for the political parties.

E. Typical Dangers of Misuse

Party financing involves typical risks of misuse, which can be divided into three categories:²³

- Large donations to political parties (both in the narrow and the broad sense of the word) can turn economic power, which is distributed highly unequally in the society, into political power. The democratic principle of political equality ('one man – one vote') can then be dodged. 'Big money's influence' on politics threatens to hurt the democratic principles of independence and balance. Democracy is then not far from plutocracy.
- Political parties are tempted to take unfair advantage of their extra-parliamentary opponents when distributing public subsidies. The principle of equal chance in political competition is then hurt.
- Political parties in the Parliament easily tend to help themselves excessively from the treasury of the state, which makes them less dependent on donations and membership fees. This increases the distance between them and the people.

Adequate regulations are necessary to avoid these risks. This approach, as the reader may notice, is based on the idea that institutions do matter. Therefore, donations above a certain amount, even from natural persons, are prohibited in several countries,²⁴ in order to hinder the 'big money' from influencing politics. In other countries, donations from companies are prohibited,²⁵ which seems consistent, as they have no voting rights. Behind them, there are always natural persons who should not hide behind a juridical facade. A softer approach to the outright banning of large donations is to require all donations to be made public (together with the name of the donor). Requirements to do so already exist in almost all countries²⁶

²³ See H.H. von Arnim, *Parteienfinanzierung (Party Financing)*, 1982, p. 32.

²⁴ As for instance in Belgium (a maximum of 500 Euro per political party each year is allowed), in France (7,500 Euros), Ireland (6,500 Euros), Portugal (thirty times the minimum salary) and Spain (60,000 Euros). In Germany, however, no limit for donations for political parties exists. For an overview see Frowein/Blank, *supra* note 12; D. Tsatsos/D. Schefold/H.P. Schneider (eds.), *Parteienrecht im europäischen Vergleich (Party Law in a European Perspective)*, 1990; D. Tsatsos (ed.), *Parteienfinanzierung im europäischen Vergleich (Party Financing in a European Perspective)*, 1992; K.-H. Naßmacher (ed.), *Foundations for Democracy 2001*; idem, *Die Kosten der Parteitätigkeit in westlichen Demokratien (The Cost of Party Activity in Western Democracies)*, 31 *Österreichische Zeitschrift für Politikwissenschaft* 2002, pp. 7 et seq.; J. Ikstens et al, *supra* note 8; W. Lehmann/R. Coman, *Statut et financement des partis politiques européens*, Luxembourg (Parlement Européen) 2003.

²⁵ As for instance in Belgium, France and Spain. In Germany there is not even a limit for donations from companies.

²⁶ As for instance in Belgium (125 Euros), France (3,000 Euros), Italy (6,614 Euros) and the Netherlands (4,500 Euros). Donations for political parties at the European level have to be published according to the new Regulation on the Statute and financing of European political

(often starting from a lower amount for donations than in Germany²⁷). Only recently, Great Britain introduced such a requirement,²⁸ even though scepticism about the effectiveness of such legal controls had long existed.

Judicial regulations concerning the expenditure or income of political parties can help check self-serving from the state treasury. Judicial limits on party expenses exist, e.g. in the United States for publicly subsidised presidential campaigns. Spending limits also exist in France and in Great Britain, in Hungary, Lithuania, Poland and Slovakia. In Germany, however, income of political parties coming from public funds is constitutionally²⁹ limited for parties in the narrow sense of the word,³⁰ but not for parties in a broader sense.

F. Possible Controls and Counterbalances

Legislation, however, is not always reliable. After all, it is in the hands of the political parties. This constellation creates a specific control problem. As the opposition also profits from public subsidies for political parties, the usual mechanism of control of the majority through the parliamentary opposition fails. The German Constitutional Court commented on this fact as follows: the legislative process 'in this field regularly lacks the adjusting element of contrary interests.'³¹ Mainly, the following institutions can therefore be seen as means of control:³²

- Constitutional Courts
- the public
- elections
- governments and second chambers
- referendums.

I. Constitutional Courts

In Germany, the Federal Constitutional Court has made use of its power of control several times, based on the principles of strict political equality and the doctrine that parties must maintain their contacts and common interests with the electorate. Accordingly, most regulations concerning political finance have developed from judicial decisions. The last fundamental decision of the Constitutional Court dates

parties if they exceed 500 Euros. Donations above 12,000 Euros are prohibited. The Regulation entered into force after the elections to the European Parliament in June 2004.

²⁷ In Germany only donations above 10,000 Euros have to be published. And this is done with delay. Only donations above 50,000 Euros have to be published immediately. See F.1.

²⁸ In Great Britain donations are admitted without any restriction. They have to be published above an amount of 5,000 Pounds. Donations to the regional organisation of a political party have to be published from 1,000 Pounds on.

²⁹ BVerfGE 85, pp. 264 (at pp. 289 et seq.) – 1992.

³⁰ See also § 18 II, 5 German Party Law.

³¹ BVerfGE 85, pp. 264 (at pp. 291-292).

³² Von Arnim, *Die Partei* (Footnote 4), pp. 378 et seq.

back to 1992.³³ It required a complete rearrangement of the law on political parties. Despite the German Constitutional Court's specially guaranteed independence, the court as a tool of control should not be overestimated because judges are nominated by the authorities they are supposed to control.

The German Constitutional Court has been fighting the danger of plutocracy by:

- lowering the limits for the publication of donations from 40,000 to 20,000 Deutschmarks³⁴ and by extending this regulation to direct donations to Members of Parliament,³⁵
- prohibiting tax reliefs for donations from companies³⁶ and limiting tax privileges for private donations,³⁷ a limitation which has only partly been respected by the political parties deciding on their own behalf.³⁸

In addition, the German Constitutional Court aimed to counteract the discrimination against extra-parliamentary political parties by enforcing their share of direct public subsidies (provided that they receive 0.5% of the votes cast in Bundestag general elections),³⁹ as well as their entitlement to tax privileges for donations and membership fees⁴⁰ and cost-free advertising in public broadcasting networks.⁴¹

The German Constitutional Court finally tried to work against the alienation of political parties from their voters by:

- establishing an absolute limit for public subsidies to political parties⁴² which, however, can be adjusted according to the price index. It was originally set at 230 Mio. Deutschmarks and now amounts to 133 Mio. Euros in 2002;
- establishing a so-called relative limit for public subsidies, which means that public funds may not exceed 50% of the income of each political party;⁴³
- regulating public subsidies in order to lessen the distance between political parties and the population.⁴⁴

³³ BVerfGE 85, pp. 264.

³⁴ BVerfGE 85, pp. 264 (at pp. 318 et seq.). According to § 25 III of the party law, donations above the limit of 10,000 Euros per year have to be published in the statement of accounts, which is published up to two years after the actual donation took place. Since 2002, donations above 50,000 Euros have to be announced immediately to the President of the Bundestag who has then to publish them forthwith. However, there are no legal sanctions in place when this provision is violated.

³⁵ BVerfGE 85, 264 (324 et seq.).

³⁶ BVerfGE 85, 264 (315).

³⁷ In some countries, as for instance in Belgium, Austria, Estonia, Latvia, Lithuania, Poland and Slovakia no tax relief for donations is granted at all.

³⁸ *H.H. von Arnim*, Die neue Parteienfinanzierung (The new Party Financing), Deutsches Verwaltungsblatt 2002, p. 1065 (p. 1070 et seq.).

³⁹ BVerfGE 24, 300 (342 et seq.) - 1968.

⁴⁰ BVerfGE 6, 273 - 1957.

⁴¹ BVerfGE 7, 99 (108) - 1957; 14, 121 (138) - 1962.

⁴² BVerfGE 85, 264 (290 et seq.).

⁴³ BVerfGE 85, 264 (289 et seq.).

⁴⁴ BVerfGE 85 (264) 292 et seq.).

II. The Public

At least, the principle of transparency concerning the income of political parties was laid down from the beginning in the German Grundgesetz.⁴⁵ It was ignored by the political parties for 18 years until the Constitutional Court forced reports of party finances,⁴⁶ and they were then finally included in the law on political parties of 1967. Later, the duty of reporting was extended to expenses and the property (including debts) of political parties by amending the Constitution and changing the party law.⁴⁷ Meanwhile, parliamentary groups in Germany also have to account for their funds publicly. Corresponding regulations were put into force at the Federal level as well as in all 16 Länder. According to German constitutional law, the principle of transparency can also be extended to the decision process: the regulations concerning the financing of political parties, especially those concerning the amount of direct and indirect public funding, must be enacted legally in a public procedure in the parliament.⁴⁸ However, this principle is not always fully observed.⁴⁹

III. Elections

a) Personal elections

General elections can be a means of control, especially if the parliamentarians are elected according to the majority vote. Being directly accountable, they are not strictly bound to party discipline and party policy.⁵⁰ This institutional factor may be one reason, why practically no public party financing exists in Great Britain and public subsidies are limited to subventions during presidential campaigns in the United States.

b) Weakening of control by cartel parties and the 'political class'

Voters' control however, is limited when parliamentarians are elected through a system of proportional voting combined with rigid party candidate lists. Voters here are limited to the election of parties (and their fixed contingent of candidates) alone. If governmental and oppositional parties agree on the regulations concerning party financing, and the members of parliament are neither elected directly by the people nor vote individually in the parliament, thus somehow forming a political cartel,

⁴⁵ Art. 21 I, 4 Grundgesetz.

⁴⁶ BVerfGE 20, 56.

⁴⁷ Art. 21 I, 4 now reads: 'They (the political parties) have to publicly account for the sources and use of their funds and for their assets'.

⁴⁸ Concerning the remuneration of Members of Parliament see BVerfGE 40, 296 (316 et seq., 327). See also *H.H. von Arnim*, Zur 'Wesentlichkeitstheorie' des Bundesverfassungsgerichts (About the Theory of Essentiality of the German Constitutional Court), Deutsches Verwaltungsblatt 1987, 1241.

⁴⁹ *Von Arnim*, *supra* note 4, 379 et seq.

⁵⁰ *Von Arnim*, *supra* note 4), 420 et seq.

voters can no longer have any effective voice against unwanted regulations. No matter whom they elect, they are all part of the cartel.

The emergence of political cartels and, correspondingly, the fact that voters are deprived of their power is not only visible within the context of party financing regulations. In these cases, however, they are especially common. Thus the political scientists Richard S. Katz and Peter Mair established their theory of political parties in western European democracies gradually turning into cartel parties. They illustrated this development through the example of public political finance in general and its German practice in particular.⁵¹

The concept of the political class, which is experiencing a revival in German political science,⁵² also derives from the field of political finance (in the broader sense of the word). Its starting point is the presumption that professional politicians act according to their own interests, no matter whether they belong to the government or to the opposition. It is completely normal for members of the same profession to have similar interests. In the case of professional politicians, however, the specific problem lies in the fact that they are in control of the state, in terms of passing laws, deciding budgets and even determining their own status.

⁵¹ R. Katz/P. Mair, *Changing Models of Party Organisation and Party Democracy. The Emergence of the Cartel Party*, *Party Politics*, 1995, p. 5 et seq. See also K. von Beyme, *Funktionenwandel der Parteien in der Entwicklung von der Massenmitgliederpartei zur Partei der Berufspolitiker (Changing Functions of Political Parties in the Evolution from Member Parties to Parties of Professional Politicians)*, in O. W. Gabriel/O. Niedermayer/R. Stöss (eds.), *Parteiendemokratie in Deutschland (Party Democracy in Germany)*, 1997, p. 359 (p. 369 et seq.) as well as E. Wiesendahl, *Die Parteien auf dem Weg zu Kartellparteien? (Parties on their Way to Cartel Parties?)*, in H.H. von Arnim (ed.), *Adäquate Institutionen: Voraussetzungen für gute und bürgernahe Politik? (Adequate Institutions: Necessary for Competent and Citizen-Oriented Politics?)*, 1999, p. 49 et seq.

⁵² The conception of the political class, already used by G. Mosca (*The Ruling Class*, 1895) has been experiencing a revival for about a decade. See for instance C. Landfried, *Parteifinanz und politische Macht (Party Finances and Political Power)*, 2nd ed., 1994, p. 144 et seq., p. 271 et seq.; Klingemann/ Stöss/Wefels, *Politische Klasse und politische Institutionen (Political Class and Political Institutions)*, 1992; Leif/Légrand/Klein, *Die politische Klasse in Deutschland (The Political Class in Germany)*, 1992; K. von Beyme, *Die politische Klasse im Parteienstaat (The Political Class in the Party State)*, 1993, p. 30 et seq.; Borchert/Golsch, *Die politische Klasse in westlichen Demokratien: Rekrutierung, Karriereinteressen und institutioneller Wandel (The Political Class in Western Democracies: Recruiting, Career Interests and Institutional Change)*, *Politische Vierteljahresschrift* 1995, p. 609 et seq.; H. Rebenstorf, *The Political Class*, 1995; H.H. von Arnim, *Fetter Bauch regiert nicht gern – die politische Klasse selbstbezogen und abgehoben (The Glutton as Caterer. The Political Class - self-serving and remote from the people)*, 1997, Chapter 1 and 2; D. Zolo, *Die Demokratische Fürsteherrschaft (The Democratic Rule of Aristocracy)*, 1997; L. Golsch, *Die politische Klasse im Parlament (The Political Class in Parliament)*, 1998; J. Borchert, *Politik als Beruf. Die politische Klasse in westlichen Demokratien (Politics as a Profession. The Political Class in Western Democracies)*, 1999; J. Borchert, *Die Professionalisierung der Politik. Zur Notwendigkeit eines Ärgernisses (Professionalisation of Politics. About the Necessity of a Nuisance)*, 2003; see also H. Schmidt, *Auf der Suche nach einer öffentlichen Moral (Searching for a Public Moral)*, 1998, 51 et seq.

IV. Governments and Second Chambers

Governments can also be seen as a counterweight against possible misuse of power by cartels or political classes who decide on their own behalf. This is less true for parliamentary democracies, where the government is elected by the Parliament (and can also be dismissed by it) and where therefore the parliamentarian majority and the government form a political unity. Nevertheless, in 1995, the German Bundesrat, consisting of the 16 Bundesländer governments, overthrew a law linking the allowances for national parliamentarians to the salaries of judges of the Federal Constitutional Court, a law that had already been adopted by the Bundestag. This occurrence was certainly also due to massive public criticism and a public appeal from 86 German professors of Public Law.⁵³ However, it is easier for governments not dependent on the parliament for their legitimacy to offer a counterbalance in this area.

An example of current relevance is the Council of the European Union, whose control varies according to whether unanimity is required or a majority vote is sufficient. According to Art. 308 of the Treaty (in connection with Art. 191 of the Treaty), the Council was charged with deciding – at the urgent instance of the European Parliament – on the introduction of a system of public funding for the so-called political parties at the European level. The unanimous vote required by Art. 308 could not be achieved. Meanwhile, after the Treaty of Nice came into force, a second paragraph concerning party financing at the European level was introduced into Art. 191 of the Treaty. A qualified majority can now take decisions concerning the financing of political parties. On 19 June 2003, the European Parliament reviewed a draft statute on the European political parties presented by the European Commission (and made some amendments). The Council adopted the new Regulation on 29 September 2003, in conformity with Art. 251 of the Treaty against the votes of Austria, Denmark and Italy. Previous negotiations between the Parliament and the Council had taken place, so that a compromise had been found before the vote, which then was formally adopted.

According to Art. 190 V of the Treaty, the Council's consent is still needed for the Statute on Members of the European Parliament which aims to create a homogeneous salary for all Members of the European Parliament. This Statute had been adopted by the Parliament on 4 June 2003.⁵⁴ At its sessions of 29 September 2003 and 13 October 2003, such consent of the Council could not be achieved.

⁵³ H.H. von Arnim, *Der Staat sind wir! (We are the State!)*, 1995; H.H. von Arnim, *Das neue Abgeordnetengesetz. Inhalt, Verfahren und Irreführung der Öffentlichkeit (The new Law for Members of Parliament. Contents, Decision Process and Misleading of the Public)*, 1995 (No 169 of the Speyerer Forschungsberichte).

⁵⁴ See the criticism of the planned Statute by H.H. von Arnim/M. Schurig, *Das Abgeordnetenstatut des Europäischen Parlaments (The Statute for Members of the European Parliament)*, *Deutsches Verwaltungsblatt* 2003, 1176 et seq. This study was distributed to all Members of the Council as well as to their permanent representatives in its English version (H.H. von Arnim/M. Schurig, *The Statute for Members of the European Parliament, Discussion Paper of the Research Institute for Public Administration of the German University for Administrative Sciences Speyer*, 2003) in good time before their negotiations.

Before Christmas 2003, the Parliament again urged the Council to pass the Statute. But the necessary qualified majority could not be achieved in the Council at its session of 26 January 2004 because Germany, finally joined by Austria, France and Sweden, did not agree.⁵⁵

V. Referendums

A quite effective means of control against misuse can be seen in referendums and plebiscites, at least in those cases where they are permitted and their realization is not prevented by many juridical hurdles. This might be the reason why in Switzerland, where practically every law needs to be approved by the people, neither public financing of political parties nor a publicly subsidised pension system for Members of Parliament exists.⁵⁶

G. Financing Political Parties out of the European Budget?

The history of German party financing shows the extent to which initially modest public funding can expand if effective counterweights are lacking. This observation must be kept in mind when it comes to judging the public subsidies for European political parties, for which an amount of 6.5 million Euros is actually provided.

The proposal for a *Regulation on the Statute and Financing of European Political Parties* to be financed from the European budget (see above, section F. IV.), which was passed by the European Parliament and the Council⁵⁷ (and entered into force after the election of the European Parliament in June 2004), despite several amendments made by the Council, is highly problematic.⁵⁸ It will be dealt with by the European Court of Justice, which will have to develop adequate constitutional criteria for the judgment of the Regulation.⁵⁹ Were the constitutional standards for German parties applied, the planned European Regulations would

⁵⁵ See *H.H.von Arnim*, A salary of 9,053 Euros for Members of the European Parliament?, 2004 (FÖV-Discussion Papers No 7). The German version of this paper had been sent to the German Chancellor, the English version to the governments of the other fourteen Member States at the beginning of January. A week later it was launched to the press. Thus it became the basis of public criticism in Germany, Austria and Sweden. An extended version of the FÖV-Discussion Paper was published as a book in May 2004: *H.H.von Arnim*, 9,053 Euro Gehalt für Europaabgeordnete? Der Streit um das europäische Abgeordnetenstatut, Duncker & Humblot, Berlin, 2004. The book contains a summary in English.

⁵⁶ *H.H.von Arnim*, *supra* note 4, at p. 41 et seq. with further evidence.

⁵⁷ See Regulation (EC) No 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding, Official Journal of the European Union 2003 L297, of 15 November 2003 at p.1.

⁵⁸ A group of Members of the European Parliament has brought in a law suit before the Court (Case T-13/04, *Bonde and others v Parliament and Council*).

⁵⁹ See *H.H.von Arnim/M.Schurig*, The European Party Financing Regulation, Lit, Münster 2004.

hardly be admissible.⁶⁰ The reasons are:

- The political parties at the European level do not fulfil the minimum criteria of the German notion for political parties: they are no 'associations of citizens' but alliances of national parties and political groups in the European Parliament. The European political parties are not supposed to take part in the 'representation of the people.' Candidates for seats in the European Parliament shall rather still be chosen by the national parties and afterwards elected under their label. Whether this is compatible with Art. 191 of the Treaty, according to which political parties shall 'contribute to forming a European awareness and to expressing the political will of the citizens of the Union,' will have to be examined.
- According to the proposed Regulation, political parties at the European level shall be granted public subsidies that are permissible up to a total of 75% of their total budget. Considering that these 'own resources' of the European political parties will largely be derived from donations and membership fees of their national member parties, from party taxes and out of contributions of political groups in the European Parliament, which to a large extent come from public funds, the public share of the whole budget will probably reach 90% or more.
- Only political parties which are represented in at least one quarter⁶¹ of the Member States by Members of the European Parliament, in the national Parliaments or regional Parliaments or regional assemblies, or have received, in at least one quarter of the Member States, a minimum of three per cent of the votes cast in each of those Member States at the most recent European elections, can be eligible for public funding. These regulations are an obstacle for new political parties. It greatly exceeds the limit of 0.5% of votes in federal elections or of 1% of votes in one of the 16 state elections set by the German Constitutional Court in order to maintain competition between political parties.⁶²

H. Scandals Triggering Reforms of Party Financing

Due to parties deciding on their own behalf, it is especially difficult to reform the regulations concerning party finances. The self-interest of politicians does not even allow necessary reforms. Therefore, political scandals often lead to public pressure, which is necessary to force reforms against the objection of those concerned.⁶³

⁶⁰ *Von Arnim*, *supra* note 9, p. 120 et seq.; *M. Morlok*, Constitutional Frame-work, in *K.M. Johansson/P. Zervakis* (eds.), European Political Parties between Cooperation and Integration, 2002, p. 29 et seq.; *H. Merten*, Europäische Parteien im Sinne von Art. 191 EGV (European Parties in the Sense of Art. 191 of the European Community Treaty), *Mitteilungen des Instituts für Deutsches und Europäisches Parteienrecht und Parteienforschung*, Heft 11, August 2003, p. 40 et seq.

⁶¹ That is seven out of 25 Member States.

⁶² The Regulation on the Statute and financing of political parties at European level not being compatible with European primary law is argued in *von Arnim/Schurig*, *supra* note 59).

⁶³ A general view about scandals concerning political finance in Germany is given by *H.H. von Arnim*, *Der Staat als Beute* (The State as Spoils), 1993; *Ebbinghausen*, *supra* note 4, p.

The latest reforms of party funding in Great Britain, the United States and Germany were also launched by scandals. In Great Britain, there was the scandal about the donation by Bernie Ecclestone, head of the Formula 1 competition to the Labour Party among others — a contribution, which was given back, but which still led to the speedy implementation of the proposals of the Neill Committee.⁶⁴ By this means, the most complete reform of the party financing system that Great Britain has ever experienced was affected.⁶⁵

In the United States, it became apparent after the Enron crash that this company had actually provided numerous members of the House of Representatives and the Senate as well as many candidates from both political parties with campaign donations. A public outcry followed and paved the way for some reforms long overdue.⁶⁶ These reforms hope to stop the worst cases of misuse and the infringement of existing regulations (as, for example, through the payment of so-called soft money). Finally, the Senate surrendered its position of obstruction and adopted the draft propositions.⁶⁷ In Germany, it was the donations affair that became public at the end of 1999 and that led to a modest reform in spring 2002.⁶⁸ The donations affairs involving the SPD and, later on, the Free Democratic Party (FDP) in 2002 once again proved that the German law on political parties still has considerable gaps to fill.⁶⁹

In the end, adequate checks and balances are required to prevent excessive public subsidies for political parties and the consequent scandals. As a corollary, the problematic proposal to finance European political parties through the European budget should also be reconsidered.

103 et seq.; Beschlussempfehlung und Bericht des Untersuchungsausschusses "Parteispenden", Bundestagsdrucksache 14/9300; H. Leyendecker, *Die Korruptionsfalle* (The Corruption Trap), 2003.

⁶⁴ *The Committee on Standards in Public Life*, *The Funding of Political Parties in the United Kingdom* (chairman Lord Neill), 1998.

⁶⁵ J. Fisher, *Campaign Finance: Elections under New Rules*, *Parliamentary Affairs* 2001, p. 689 et seq.

⁶⁶ Y. Esterhazy, *Reform der US-Wahlspenden rückt näher* (Reform of US campaign financing approaches), *Financial Times Deutschland* of 12 March 2002.

⁶⁷ D. Balz, *In Long Battle, Small Victories Added Up*, *Washington Post* of 21 March 2002; *Victory for Reform*, *Washington Post* of 21 March 2002. The reform was contested before the Supreme Court, but the key parts of the law were upheld in the Supreme Court decision, issued 10 December 2003.

⁶⁸ Von Arnim, *supra* note 38.

⁶⁹ See H.H. von Arnim, *Parteispenden: Kontrolle ist besser* (Party Donations: Supervision is better), *Die Welt*, 30 October 2003.