

Hans Herbert von Arnim

Political finance: Checks and Abuses
Current problems and new developments



• • • • •
FÖV

6

Discussion Papers

Hans Herbert von Arnim

**Political finance: Checks and Abuses
Current problems and new developments**

**FÖV 6
Discussion Papers**

Forschungsinstitut für öffentliche Verwaltung
bei der Deutschen Hochschule für Verwaltungswissenschaften Speyer

2003

Der Beitrag ist in einer deutschsprachigen Vor-Fassung erschienen in:
Neue Zeitschrift für Verwaltungsrecht, Heft 9/2003, S. 1076-1080.

Nicht im Buchhandel erhältlich

Schutzgebühr: € 5,-

Bezug: Forschungsinstitut für öffentliche Verwaltung
bei der Deutschen Hochschule für
Verwaltungswissenschaften Speyer
Postfach 14 09
67324 Speyer

<http://www.foev-speyer.de>

Universitätsprofessor Dr. iur. Hans Herbert von Arnim, Dipl.-Volkswirt

Ordentliches Mitglied des
Forschungsinstituts für öffentliche Verwaltung

Inhaber des Lehrstuhls für Öffentliches Recht, insbesondere Kommunalrecht und
Haushaltsrecht, und Verfassungslehre an der Deutschen Hochschule für
Verwaltungswissenschaften Speyer

Contents

I.	Definition: Political parties in a narrow and a broader sense ..	1
II.	Overview of the sources of income for political parties	3
	1. Membership contributions	3
	2. Donations	3
	3. Income derived from property	3
	4. Public subsidies	3
	a) Indirect subsidies	4
	b) Direct public subsidies	4
III.	Ways of accessing power	5
IV.	Justification of public subsidies	6
	1. Defusing large donations?	6
	2. Expansion of party functions?	6
V.	Typical dangers of misuse	7
VI.	Possible controls and counterbalances	9
	1. Constitutional Courts	10
	2. The Public	11
	3. Elections	12
	a) Personal elections	12
	b) Cartel parties	13
	c) The Concept of the “political class”	13
	4. Governments and second chambers	14
	5. Referendums	16
VII.	Financing political parties out of the European budget ?	16
VIII.	Scandals triggering reforms of party financing	18

Political finance: Checks and Abuses Current problems and new developments*

This contribution explores some fundamental aspects of political finance as well as some issues of immediate interest. Departing from the German perspective, the author also takes several other countries into consideration. Besides, he 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 a starting point as this country ranks as *the* embodiment of the party state.¹ 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 very carefully and tried to develop reasonable regulations and limits regarding public subsidies for political parties.

I. Definition: Political parties in a narrow and a broader sense

Discussing “financing of political parties” requires a definition of what is meant by “parties” and, above all, whether this concept is to be

* This text is based on a lecture held at the conference of the “Centre for European Constitutional Law” dealing with “The Political Parties in the 21st Century” in Athens on 14th June 2002 and was updated for this publication. The author would like to thank *Martin Schurig* and *Russel Cope* for their valuable help with the translation of the text into English.

1 Fundamental *Gerhard Leibholz*, *Strukturprobleme der modernen Demokratie* (Structural problems of Modern Democracy), 3. Aufl. 1967; also see *Gordon Smith*, *The Party System at the Crossroads*, in: *Gordon Smith/William E. Paterson/Stephan, Padgett* (eds.), *Developments in German Politics* 2, 1996, 55 (71 ff.).

used in a wider or narrower sense. Political parties are associations of citizens contending for political power by means of elections.² Usually constitutional law (at least in Germany) strictly 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 organised and have different rights and duties. Office-holders, for instance, are especially bound by considerations of public welfare³. 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 objectives⁴. 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.

2 See for instance § 2 of the German Party Law. This is also true for other Western democracies. See *Triantafyllia Papadopoulou*, *Politische Parteien auf europäischer Ebene* (Political Parties at the European Level), 1999; *Gerold Deinzer*, *Europäische Parteien* (European Political Parties), 1999, 21 ff.

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

4 *Göttrik 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; *Christine Landfried*, *Parteifinanzien und politische Macht* (Political Finance and Political Power), 1990, 91 ff.; *Hans Herbert von Arnim*, *Die Partei, der Abgeordnete und das Geld* (The Party, the Representative and Money), 2nd ed., 1996, 133 ff.; *Rolf Ebbinghausen*, *Die Kosten der Parteiendemokratie* (The Costs of Party Democracy), 1996, 195 ff.

5 *Von Arnim*, *Die Partei* (Footnote 4), 29.

II. Overview of the sources of income for political parties

As any organisation, political parties need money.

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 sense⁶.

2. Donations

Donations for political parties also seem unproblematic, as long as they stay within certain limits⁷. If this is the case, they 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 SPD.

4. Public subsidies

In addition, public subsidies are granted partly directly, partly indirectly.

6 Von Arnim, Die Partei (Footnote 4), 119 ff.; Ebbinghausen, Die Kosten (Footnote 4), S. 49 ff.

7 Von Arnim, Die Partei (Footnote 4), 50 ff., 120 f.; Ebbinghausen, Die Kosten (Footnote 4), 81 ff.

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 for the budgets of political parties. Germany has pioneered this position from the beginning. (When the political parties represented in the German Bundestag allowed themselves direct public funding first 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 earlier⁹.) Political groups, members of parliament, members of government and political civil servants are completely funded by the State anyway, whilst political foundations are almost completely 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 in a marginal note in 1958 (obiter dictum)¹¹. The constitutional need for public subsidies for political parties, however, remained under discussion.¹² In the

8 *Von Arnim*, Die Partei (Footnote 4), 312 ff.; *Ebbinghausen*, Die Kosten (Footnote 4), 197 ff.; *Janis Ikstens/Michael Pinto-Duschinsky/Daniel Smilov/Marcin Walecki*, Political Finance in Central Eastern Europe: An Interim Report, *Österreichische Zeitschrift für Politikwissenschaft* No 31(2002), 21 (28f.).

9 *Hans Herbert von Arnim*, *Das System (The System)*, 2001, 106 ff.

10 *Von Arnim*, Die Partei (Footnote 4), 137 ff.; *idem*, *Der Staat als Beute (The State as Spoils)*, 1993, 175 ff.

11 BVerfGE 8, 51 (63) - 1958.

12 See the arguments in *Jochen A. Frowein/Roland Blank*, Financing of Political Parties in Comparative Perspective, *Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht* 2001, 29 (38 f.).

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).

III. Ways of accessing power

Public regulations of political finance (just as 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 power¹³. 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 concerned¹⁴. (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 interests¹⁶.

13 *Rudolf Wildenmann*, in: Mühleisen (ed.), *Das Geld der Parteien* (The Money of Political Parties), 1986, 80 (82). Also see *Rudolf 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, 70.

14 *Hans Herbert von Arnim*, *Der strenge und der formale Gleichheitssatz* (The Strict and the Formal Principle of Equality in Treatment), *Die Öffentliche Verwaltung* 1984, 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 1970ies) is nowadays gaining recognition in constitutional law. See for instance *Martin Morlok*, “Für eine zweite Generation des Parteienrechts” (“For a Second Generation of Party Law”), in: Dimitris Tsatsos (ed.), *30 Jahre Parteiengesetz in Deutschland* (30 Years of Party Law in Germany), 2002, 53 ff.

IV. Justification of public subsidies

1. Defusing large donations?

Justifying public funding of political parties in their narrow sense is not quite easy. In Germany, public subsidies were introduced in the late 1950ies in order to make it possible to ban high amount donations, which “always have an ordour of corruption” (as the political scientist Theodor Eschenburg formulated pertinently¹⁷). Later, however, this line of argumentation was “forgotten”. In fact, in Germany both is now packaged together: large donations *and* huge public subsidies¹⁸.

2. 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 should 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 a extremely broad manner – thus also legitimising 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 and thus the cart is put before the horse¹⁹.

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 Con-

17 Theodor Eschenburg, Paragraphen gegen Parlamentarier (Articles against Parliamentarians), in: *idem*, Zur politischen Praxis in der Bundesrepublik (On Political Action in Germany), Band 1, 1967, 124.

18 See Klaus von Beyme, Die Chance der Skandale (The Chances of Scandals), Süddeutsche Zeitung of 20.1.2003: „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, Die Partei (Footnote 4), 27 f.

stitutional Court in 1958, there was no holding back any more for 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 planned²⁰. 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 organisations, that is, to the political parties in the broad sense of the word²¹: political foundations and political groups were covered with money to a vast extent (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 personal assistants often also work for the political parties.

V. 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 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.

20 *Von Arnim*, Das System (Footnote 9), 106 ff.

21 *Von Arnim*, Das System (Footnote 9), 112 ff.

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

23 See *Hans Herbert von Arnim*, Parteienfinanzierung (Party Financing), 1982, 32.

The principle of equal chance in political competition is then hurt.

- Political parties in 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. 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 (often starting from a lower amount for

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* (Footnote 12); *Dimitris Tsatsos/Dian Schefold/Hans Peter Schneider* (eds.), *Parteienrecht im europäischen Vergleich* (Party Law in a European Perspective), 1990; *Dimitris Tsatsos* (ed.), *Parteienfinanzierung im europäischen Vergleich* (Party Financing in a European Perspective), 1992; *Karl-Heinz Naßmacher* (ed.), *Foundations for Democracy 2001*; *idem*, *Die Kosten der Parteitätigkeit in westlichen Demokratien* (The Cost of Party Activity in Western Democracies), *Österreichische Zeitschrift für Politikwissenschaft* No 31(2002), 7ff.; *Janis Ikstens/Michael Pinto-Duschinsky/Daniel Smilov/Marcin Walecki*, *Political Finance in Central Eastern Europe* (Footnote 8).

25 As for instance in Belgium, France and Spain. In Germany there is no 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 parties if they exceed 500 Euros. Donations above 12,000 Euros are prohibited. The Regulation will come into force after the elections to the European Parliament in June 2004.

donations than in Germany²⁷). Only recently, Great Britain introduced such requirements²⁸, even though scepticism about the effectiveness of such legal controls had long been the case.

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.

VI. 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 and/or

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 VI.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, 264 (289 ff.) – 1992.

30 Also see § 18 II, 5 Parteiengesetz.

31 BVerfGE 82, 264 (291 f.).

32 *Von Arnim*, Die Partei (Footnote 4), 378 ff.

- referendums.

1. 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 from 1992³³. It required a complete rearrangement of the law on political parties. But despite the German Constitutional Court's specially guaranteed independence, the court as a tool of control should not be overestimated, as 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 Deutschmarks to 20,000 Deutschmarks³⁴ and by extending this regulation to direct donations to Members of Parliament³⁵,
- prohibiting tax reliefs for donations from companies³⁶ and limiting tax privileges for private donations³⁷, a limitation which has only

33 BVerfGE 85, 264.

34 BVerfGE 85, 264 (318 ff.). 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 ff.).

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.

partly been respected by the political parties deciding on their own behalf³⁸.

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 networks⁴¹.

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 party⁴³,
- regulating public subsidies in order to lessen the distance between political parties and the population⁴⁴.

2. *The Public*

At least, the principle of transparency concerning the income of political parties was laid down from the beginning in the German Grundgesetz⁴⁵. It was ignored by the political parties for 18 years until the

38 *Hans Herbert von Arnim*, Die neue Parteienfinanzierung (The new Party Financing), Deutsches Verwaltungsblatt 2002, 1065 (1070 f.).

39 BVerfGE 24, 300 (342 f.) - 1968.

40 BVerfGE 6, 273 - 1957.

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

42 BVerfGE 85, 264 (290 ff.).

43 BVerfGE 85, 264 (289 f.).

44 BVerfGE 85 (264) 292 ff.).

45 Art. 21 I, 4 Grundgesetz.

Constitutional Court forced reports of party finances⁴⁶, 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 law⁴⁷. 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 parliament⁴⁸. However, this principle is not always fully observed⁴⁹.

3. 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 policy⁵⁰. This institutional factor may be one reason, why in Great Britain practically no public party financing exists and why in the United States public subsidies are limited to subventions during presidential campaigns.

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 f., 327). Also see *Hans Herbert von Arnim*, Zur „Wesentlichkeitstheorie“ des Bundesverfassungsgerichts (About the Theory of Essentiality of the German Constitutional Court), *Deutsches Verwaltungsblatt* 1987, 1241.

49 *Von Arnim*, *Die Partei* (Footnote 4), 379 ff.

50 *Von Arnim*, *Die Partei* (Footnote 4), 420 ff.

b) Cartel parties

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 parliament, thus somehow forming a political cartel, voters can no longer have any effective voice against unwanted regulations. No matter who 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

c) The Concept of the "political class"

The concept of the political class, which is experiencing a revival in German political science,⁵² also derives from the field of political fi-

51 *Richard Katz/Peter Mair*, Changing Models of Party Organisation and Party Democracy. The Emergence of the Cartel Party, *Party Politics* 1995, 5 ff. Also see *Klaus 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: *Oscar W. Gabriel/Oskar Niedermayer/Richard Stöss* (eds.), *Parteiendemokratie in Deutschland* (Party Democracy in Germany), 1997 359 (369 ff.) as well as *Elmar Wiesendahl*, Die Parteien auf dem Weg zu Kartellparteien? (Parties on their Way to Cartel Parties?), in: *Hans Herbert von Arnim* (ed.), *Adäquate Institutionen: Voraussetzungen für gute und bürgernahe Politik? (Adequate Institutions: Necessary for Competent and Citizen-Oriented Politics?)*, 1999, 49 ff.

52 The conception of the political class, already used by *Gaetano Mosca* (*The ruling Class*, 1985) has been experiencing a revival for about a decade. See for instance *Christine Landfried*, *Parteifinzen und politische Macht* (Party

nance (in the broader sense of the word). Its starting point is the presumption that professional politicians act accordingly 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 having similar interests. In the case of professional politicians, however, the specific problem lies in the fact that they are in control of the state, passing the laws, deciding budgets and even determining their own status.

4. 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 parliamentary 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 which had already been adopted by the Bundestag. This occurrence

Finances and Political Power), 2.ed. 1994, S. 144 ff., 271 ff.; *Klingemann/Stöss/Weßels*, Politische Klasse und politische Institutionen (Political Class and Political Institutions), 1992; *Leif/Legrand/Klein*, Die politische Klasse in Deutschland (The Political Class in Germany), 1992; *Klaus von Beyme*, Die politische Klasse im Parteienstaat (The Political Class in the Party State), 1993, 30 ff.; *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, 609, 609 ff.; *Hilke Rebenstorf*, The Political Class, 1995; *Hans Herbert 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; *Danilo Zolo*, Die Demokratische Fürsteherrschaft (The Democratic Rule of Aristocracy), 1997; *Lutz Golsch*, Die politische Klasse im Parlament (The Political Class in Parliament), 1998; *Jens Borchert*, Politik als Beruf. Die politische Klasse in westlichen Demokratien (Politics as a Profession. The Political Class in Western Democracies), 1999; *idem*, Die Professionalisierung der Politik. Zur Notwendigkeit eines Ärgernisses (Professionalisation of Politics. About the Necessity of a Nuisance), 2003; also see *Helmut Schmidt*, Auf der Suche nach einer öffentlichen Moral (Searching for a Public Moral), 1998, 51 ff.

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 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) it was until now charged with deciding at the urgent instance of the European Parliament on the introduction of a system of public funding for the so-called European political parties. 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. Decisions concerning the financing of political parties can now be taken by a qualified majority. On June 19, 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 September 29, 2003, in conformity with Art. 251 of the Treaty against the votes of Denmark, Italy and Austria. Previous negotiations between 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 an homogeneous salary for all Members of the European Parliament). This Statute had been adopted by the Parliament on June 4, 2003⁵⁴. At its sessions of September 29, 2003 and October 13, 2003, such a consent could not be achieved.

53 *Hans Herbert von Arnim* "Der Staat sind wir!" ("We are the State!", 1995); *idem*, 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 *Hans Herbert von Arnim/Martin Schurig*, Das Abgeordnetenstatut des Europäischen Parlaments (The Statute for Members of the European Parliament), Deutsches Verwaltungsblatt 2003, 1176 ff. This study was distributed to all Members of the Council as well as to their permanent representatives in its English version (*von Arnim/Schurig*, The Statute for Members of the European Parliament, Discussion Paper of the Research Institute for Public Administration of the

5. 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 realisation is not prevented by too high 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 exist⁵⁵.

VII. 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 8.4 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, VI d), which in the meantime has been passed by the European Parliament and the Council⁵⁶ (and will enter into force after the election of the European Parliament in June 2004), despite several amendments made by the Council, is highly problematic. It will probably be dealt with by the European Court of Justice⁵⁷. Were the constitutional standards for German parties applied, the planned European Regulations would hardly be admissible⁵⁸:

German University for Administrative Sciences Speyer, 2003) in good time before their negotiations.

55 *Von Arnim*, Die Partei (Footnote 4), 41 ff. with further evidence.

56 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 L297, of 15.11.2003, p.1.

57 See *Hans Herbert von Arnim/Martin Schurig*, Die Europäische Parteien-(finanzierungs)verordnung (The European Regulation on [the Financing of] Political Parties), to be published.

58 *Von Arnim*, Das System (Footnote 9), 120 f. Beschlussempfehlung und Bericht des Untersuchungsausschusses „Parteispenden“, Bundestagsdrucks-

- The European political parties 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, European political parties shall be granted public subsidies which 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 quarter of the Member States by Members of the European Parliament, in the national Parliaments or regional Parliaments or regional assemblies, or must 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 parties⁵⁹.

che 14/9300; *Hans Leyendecker*, Die Korruptionsfalle (The Corruption Trap), 2003.

59 The Regulation on the Statute and financing of European political parties not being compatible with European primary law is argued in *von Arnim/Schurig* (Footnote 57).

VIII. 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 concerned⁶⁰.

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 of 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 Committee⁶¹. By this means the most complete reform of the party financing system that Great Britain has ever experienced was effected⁶².

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.⁶³ These reforms are hoped 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 propositions⁶⁴. In Germany, it was the donations affair which became public at the end of 1999 which

60 A general view over scandals concerning political finance in Germany is given by *Hans Herbert von Arnim*, *Der Staat als Beute* (The State as Spoils), 1993; *Ebbinghausen*, *Die Kosten* (Footnote 4), 103 ff.

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

62 *Justin Fisher*, *Campaign Finance: Elections under New Rules*, *Parliamentary Affairs* 2001, 689ff.

63 *Yvonne Esterhazy*, *Reform der US-Wahlspenden rückt näher* (Reform of US campaign financing approaches), *Financial Times Deutschland* of 12.2.2002.

64 *Dan Balz*, *In Long Battle, Small Victories Added Up*, *Washington Post* of 21.3.2002; *Victory for Reform*, *Washington Post* of 21.3.2002. The reforms are being contested before the Supreme Court, however, as they are claimed to be unconstitutional.

led to a modest reform in spring 2002⁶⁵. The donations affairs involving the SPD and, later on, the FDP in 2002 once again proved that the German law on political parties still has considerable gaps to fill⁶⁶.

65 *Von Arnim*, Die neue Parteienfinanzierung (Footnote 38).

66 See *Hans Herbert von Arnim*, Parteispenden: Kontrolle ist besser (Supervision is better), *Die Welt* of 30.10.2003.