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 Germans 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.

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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

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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 Parteifinanzen 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*, Parteifinanzen 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

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[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 ordour of corruption' (as the political scientist

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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 Subvenionierung 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 Principal 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 formulated[17]). 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

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[17] *T. Eschenburg*, Paragraphen 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 countries[26]

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[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 politiqes 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 Germany[27]). 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 constitutionally[29] 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

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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 Deutschmarks[34] and by extending this regulation to direct donations to Members of Parliament,[35]
- prohibiting tax reliefs for donations from companies[36] 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 fees[40] 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 parties[42] 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]

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[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 in 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,

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[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.

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[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 Insitutions: 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*, Parteifinanzen und politische Macht (Party Finances and Political Power), 2nd ed.,1994, p. 144 et seq., p. 271 et seq.; *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; *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 Fürstenherrschaft (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.

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[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 andFfinancing 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 Council[57] (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

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[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 quarter[61] 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]

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[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 Pareienrecht 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.

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

[64] T*he Committe 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.

The Idiosyncracies of Legislating Numbers*

Dimitris Melissas**

A. Introduction

The Pythagorean suggestion that all things are numbers[1] reveals how deeply the latter are embedded in our culture as a representation of the magical or rational order of our cosmos. At the same time as helping us make sense of the world of objects, they also regulate it, not in the normative manner of the law, but by setting predictable patterns that are to be expected to recur, but can also be pursued in order for the 'normal' course of things to be maintained or restored. When these two systems of interpretation and regulation of our universe, namely the law and numbers, overlap, analysis is clearly urgently called for. However, this relationship remains oddly under theorised with great repercussions both in legislation and law application.

This paper moves on two levels, which are intertwined and at constant interplay. On a specific level, I deal with a particular case of numbers in the law, namely that of age restrictions in the exercise of human rights. Despite their obvious importance, such restrictions are rarely justified thoroughly and specifically. There is insufficient grounding for the selection of one number over another and sometimes such grounding is even altogether missing. The same justificatory void is noticed in other contexts, in which numbers come into legislative play, such as the introduction of quotas for the representation of political parties in national and the European Parliaments. I will try to point out the problems and outline the general framework of the idiosyncratic task of setting those number thresholds.

The above analysis takes place against the background of my broader concern, which is the place of numbers in the law in general. I will pose and begin to answer the question of how the law ought to make sense of numbers and the numerals representing them. I will also address the question as to why the law opts for one specific number instead of another.[2] I will further examine whether there is a danger

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* The present paper was originally part of a research project undertaken by the Centre for European Constitutional Law. A Greek version of it was published in Greek in *D. Melissas (ed.)*, Age Restrictions in the Exercise of Fundamental Rights, Ant. N. Sakkoulas, 2001. Assuming that not many readers will be able to understand the Greek references in the original, I have translated them into English. The exact opposite assumption led me to leave the German references and direct quotations untranslated.

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[1] *B. Rusell*, History of Western Philosophy, New York 1946, p. 53.

[2] Großfeld seeks to answer some similar questions in *B. Großfeld*, Zeichen und Zahlen in Recht - Zahlen in Rechtsgeschichte und Rechtsvergleichung, Tübingen 1993, pp.76 et seq. His examples

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of arbitrariness during the enactment of laws containing numbers given that the validity and correctness of the latter are seldom questioned substantively and that it is often forgotten that, inspite of their purely formal system, they too refer to real states in the natural world. In particular, I will be looking at whether the legislator can choose a number randomly[3] and I am also discussing the relation between contingency and the law. If it is proven that arbitrary choices can indeed be made, then perhaps the whole historical role of positive law might begin to be seen doubtfully, especially in view of the insufficient grounding of legislative choices. I will be seeking to address the issue of whether there is indeed a risk of the choice of a legal age being random and therefore peremptory, and argue that such a choice ought not to be opposed to constitutional principles. That argument is also grounded on and supported by the case studies of legislative material referred to in this paper.

I must make a very important introductory remark concerning the methodology of this paper. Its arguments first arose in a Greek context and were partly informed by German case law and constitutional theory. Thus it is from those two very closely related legal orders that I drew the empirical and judicial data substantiating my points. However, the issue of age in law as well as that concerning the formal substantive testing of laws for rightness recur in all legal orders. To that extent, the arguments of this paper are relevant irrespective of the legislative context.

B. Numbers and the Law

From the transcendental-mythical perception of numbers that prevailed in all known civilisations from ancient Greece to the Middle Ages,[4] numerals gradually began to represent absolute, irreducible entities drawing their validity from rational thought.[5]

The number is defined as the 'limit and order' (Ordnung); it is the means of

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are telling: Why is it the case that the failure to have a valid ticket on mass transportation means bear a monetary penalty amounting to twenty times the price of the ticket and not thirty or fifteen times that price? Or why should a travel agent that has caused damage to a customer by action or omission be obliged to refund three times the amount that the latter has already paid instead of double that amount?

[3] Cf. *I. Strangas*' interesting theses in his Introduction to Law, Athens 1991, pp. 25 et seq; *I. Strangas*, Justice and Procedure, in Festschrift In Memoriam N. Vervessos, 1991, pp. 354-374; *I. Strangas*, Zur Struktur der Anwendung praktisher Prinzipien, in *Th. M. Seebohm (ed.)*, Prinzip und Applikation in der praktischen Philosophie, Mainz/Stuttgart 1991, pp. 189-221.

[4] *E. Cassirer*, Philosophie der symbolischen Formen, Part 2. Das mythische Denken, originally published in 1925, here quoted from the 1977 edition published by Wissenschaftliche Buchgesellschaft in Darmstadt, p. 174. Cassirer mentions that Philolaos in Ancient Greece sought the nature of 'numbers and their powers' not only in human speech and achievements but also in the actions of gods and demons. For the myth-creating aspect of numbers in Ancient Greece, the Bible, and the Middle Ages see *B. Großfeld,* Kernfragen der Rechtsvergleichung, Tübingen 1996, p. 219 et seq.

[5] A classic read on numbers is *R. Dedekind*, Essays on the Theory of Numbers, Dover 1963. Crump offers a very interesting and comprehensive anthropological account of the use of numbers both as magical entities and as expressions of universal rationality in *T. Crump,* Anthropology of Numbers, Cambridge 1990.

calculating; it guarantees precision and facilitates the communication between people co-existing in a congruent polity.[6] Its characteristic trait is an especially high degree of personalised generality. As Cassirer points out, 'each number has a particularly personalized nature and force'.[7] This is what made natural scientists introduce the concept of *value*. Value is defined as the product of the multiplication of a number by a unit (*Zahl mal Einheit gleich Grösse*).[8] Time was also attributed a value to facilitate the calculation of temporal durée.[9] The measurement of height, width, length, weight became possible in the same manner. With their incorporation in the law, the time unit and the number help organise social co-existence. The introduction of deadlines in contracts proves this at a glance. The recognition on behalf of the legal order of the importance of calculable time in civil claims is consistent with the historical role of law as a safeguard of the balance and stability of transactions.[10]

There is nothing very original about the institution of a particular number in a law: it is set by the legislator based on a specific case or a range of real or hypothetical cases[11] and aims at the rational and fair regulation of a problem. Naturally, the enactment of a law and the subsequent 'legalisation' of a number in reality aim at the materialisation of a particular policy.[12] Laws have this essentially active political role despite the rhetoric that their 'regulatory objective'[13] is the generality of the rule because they seek to compromise or resolve a social conflict, and at the same time, maintain their validity beyond that particular conflict with the use of general, abstract concepts for the delivery of their meaning. Since it is not the concern of the legislator to grasp the abstract problem that dictated the formation and wording of a particular law, a problem emerges with the clarity of the meaning of a law, when it is called upon to transcend its historical context, i.e., the conflict that originally led to its enactment.[14]

This fact leads to a qualitatively new parameter: although legislation is the outcome of negotiations and compromises between interest groups and governmental bureaucracy, these negotiations are marked by a 'corporatization of

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[6] Cf. *R. Schmidt*, Zahlen im Recht, in *C.W. Canaris, U. Diederichen (eds.)*, Einige Bemerkungen, Festschrift für K. Larenz zum 80. Geburtstag, Munich 1983, pp. 559-570.

[7] *Cassirer*, *supra* note 4, at p.172.

[8] *Schmidt*, Zahlen im Recht, *supra* note 2, p. 562, believes that the characteristic 'generality' of a number is directly connected to its individualisation by any other unit, which leads literally to its practical inapplicability.

[9] For an interesting and comprehensive collection of philosophical essays on time see *R. Le Poidevin and M. MacBeath (eds.)*, The Philosophy of Time, Oxford 1993.

[10] *N. Papantoniou*, General Principles of Civil Law, Athens 1983, pp. 231 et seq. and 460 et seq.

[11] *J. Vollmuth*, Prüffragenkataloge als Instrument der Bedarfs und Wirkungsprüfung, in *Bundesakademie für öffentliche Verwaltung (ed.)*, Praxis der Gesetzgebung, Eine Lehr- und Lernhilfe, 1984, pp. 178-184; also *Bundesministerium des Inneren (ed.)*, Handbuch zur Vorbereitung von Rechts- und Verwaltungsvorschriften, Bonn 1992.

[12] *R. Rhinow*, Rechtsetzung und Methodik; Rechtstheoretiche Untersuchungen zum gegenseitigen Verhältnis von Rechtssetzung und Rechtsanwendung, Basel 1979, p. 233 et seq.

[13] Cf. *D. Tsatsos*, Constitutional Law, Vol. 1, Athens 1994, p. 382.

[14] I have broached on that issue in my previous work: *D. Melissas*, Pre-parliamentary Legislative Procedure: the Informal Legislator, Athens 1995, p. 49 et seq.

interests',[15] i.e. the demand to secure the claims of organised groups without taking legislative planning into account.[16] Such haphazard compromises and concessions on behalf of the government, under the pressure of interest groups and due to the transformation of power constellations, are bound to have a bearing on the law at hand.

Therefore and despite the fact that a central concern of the legislative body is the diachronic durability of the law in the midst of social changes and conflicts, frequent amendments have an exactly opposite effect, which disturbs legal stability and poses many problems in law application.[17]

To return to the specific theme of this paper, although at first sight changing a number seems trivial and inconsequential as far as the social stock that it regulates is concerned, in reality such a seemingly minor amendment can set a wide range of social, economic, and political powers in motion, thus achieving everything but the original goal of stability through time. For instance, fluctuating age restrictions concerning the awarding of a professional license, access to vocational training, or the introduction of an age ceiling in a profession, contribute to the reduction or increase of unemployment amongst young people as well as policy shifts in the areas of education and labour.

C. The Special Nature of Setting an Age Signifier

Despite the importance of the legislative choice of one numeral signifying age over another, as discussed above, such a choice in reality is not grounded convincingly, if at all!

The correctness of the universal adult franchise is rarely ever doubted nowadays in most countries around the world. There is also no question that the 18th year of age has been legislatively promoted as the threshold insofar as restrictions are concerned. That choice was made on 'the basis of a different approach' to the one that puts forward the 'maturity of biological features of the person' or his/her 'physical abilities', and it focuses on the 'critical element of self-determination, that is the freedom of will', which is assumed to have been reached at the end of basic or further and vocational education as well as when the 'criterion of the socialisation process set by the Constitution' is met.[18]

Since determining an age restriction is considered as rather unimportant and it is therefore not tested in the public sphere, there are perhaps constitutional norms according to which such a choice on behalf of the legislator is especially grounded.

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[15] See *St. Alexandropoulos*, Corporatist Representation Trends and Greek Reality, 4 Parliamentary Review 1990, pp. 64-79; For the role of guilds in Greece see, *G. Mavrogordatos*, Professional Associations in Contemporary Greece, Athens 1988; See also *K. von Beyme*, Der Gesetzgeber, Westdeutscher Verlag, Opladen 1997, p. 139 et seq.

[16] See *D. Melissas*, State Planning; a State-Theoretical Approach, Athens 1991, p. 29 et seq.

[17] *E. Benda*, The Welfare State, translated by P. Tsoukas, Athens 1998; *P. Noll*, Gesetzgebungslehre, Tübingen 1973, p. 95 and p. 160 et seq.

[18] See *T. Vidalis*, Age Restrictions in the Exercise of Fundamental Rights, in *D. Melissas (ed.)*, Age Restrictions in the Exercise of Fundamental Rights, Athens 1994, p. 51.

Or is it the case that the particular legislative option is left to chance? I seek to answer these questions in the following paragraphs. First, I shall give a brief exposition of the problem concerning the setting of a quota for the representation of political parties in parliament. That issue does not, strictly speaking, belong in the present context. However, it is important to refer to it, as it is the only numeral restriction that has been heavily criticised and debated upon politically as well as academically. Then, I go on to explore the constitutional requirement of introducing an age-signifier by examining the possible arbitrariness of setting an age-signifier and the constitutional principles regulating such an introduction.

I. Setting a Quota for the Representation of Political Parties

The Greek Special Highest Court [19] has adopted the reasoning of the German Federal Constitutional Court on the desirability and legal justification of a threshold of the popular vote for parties seeking representation in parliament:[20] the introduction of the quota is dictated by the need for the formation of viable governments and to avoid the fragmentation of the electoral power of political

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[19] Although the Special Highest Court does decide on certain constitutional issues, it is not a constitutional court. Article 100 of the Greek Constitution provides for the creation of the Tribunal and determines its competences:

Article 100 [Special Highest Court]:

(1) A Special Highest Court shall be established, which shall deal with the following matters: a) The trial of appeals under Article 58 [election results]; b) the examination of the validity and the results of referenda held under Article 44 (2); c) The rendering of judgment in relation to incompatibilities or the forfeiture of the office of deputy under Article 55 (2) [eligibility] and 57 [incompatibility of duties]; d) The remedy of conflicts between the courts and administrative authorities, or between the Council of State and the regular administrative courts of the one part and of the other part the civil or penal courts, or, finally, between the Council of Comptrollers and the rest of the courts; e) The clarification of the constitutional character or the meaning of a provision of a formal law, in the event that contrary decisions have been issued by the Council of State, the High Court or the Council of Comptrollers; f) The clarification of the nature of provisions of international law as generally accepted, in accordance with the provisions of Article 28 (1).

(2) The court mentioned in the aforegoing paragraph shall be composed of the President of the Council of State as President, and the President of the Supreme Court and the Council of Comptrollers, four Councilors of the Council of State and four members of the Supreme Court, chosen by lot every two years, as members. President of the court shall be the President of the Council of State or the President of the Supreme Court, according to seniority. In the cases specified in Subparagraphs d) and e) of the aforegoing paragraph, two professors of law of the Law Faculty of Greek Universities, also chosen by lot, shall be members of the said tribunal.

(3) A special law shall regulate matters relating to the organization and function of the tribunal, the appointment, substitution and compensation of the members thereof. and the procedure of the said tribunal. (4) The decisions of the said court shall be irrevocable. A law provision, which has been declared unconstitutional, shall cease to have any effect from the publication of the decision relating thereto or from the time specified in the said decision.

[20] Special Highest Court decisions 11, 12, 13/1994 and 58/1995: *Ath. Raikos*, Testing the Validity of Parliamentary and European Elections, 1996, p. 153 et seq.

parties.[21] The justification of those laws[22] in Germany and Greece was based respectively on the painful experience of the Weimar Republic, and on the deadlock experienced in Greece in 1989-1990, when multiple fruitless elections failed to provide a viable government. In both legal orders there was no question that the quota set constraints on the free and unobstructed founding and functioning of political parties; hinderered the fair representation of all ideological strands of the electoral body; renderered the election of independent candidates extremely difficult; and also obstructed the formation of new political constellations.[23] However, these objections, as well as the main arguments of the critique drawn from the principles of representation and the equality of vote,[24] have been overridden. The German Federal Constitutional Court consistently accepts that the institution of a quota is justifiable only in a system of proportional representation, so that the representation of the electoral body is guaranteed to as great an extent as possible, which is after all the quintessence of the principle of equality of vote.[25] Proportional representation also helps in safeguarding the function of state institutions.[26] In fact, the argument put forth for the justification of the introduction of a quota of 3% for parties and 5% for coalitions for the representation in the European Parliament by the Special Highest Court as well as by the German Federal Constitutional Court was that the existence of stronger political groups expands the operative potential of the European Parliament.[27]

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[21] See *P. Badura,* Staatsrecht, Munich 1996, p. 384; *H. Meyer*, Wahlgrundsätze und Wahlverfahren, in *J. Isensee and P. Kirchhof (eds.)*, Handbuch des Staatsrechts, Vol.II, Heidelberg 1987, pp. 269-311; *K. Stern,* Das Staatsrecht der Bundesrepublik Deutschland, Munich 1997, p. 244; *G. Theodossis*, The German Federal Constitutional Court Decision of 28th September 1990 Concerning the Electoral Law and the Court's Decisions on the Constitutionality of the Exclusive 5% Clause, Nomiko Vima, 1991, pp. 301-305; *K. Chrysogonos*, Electoral System and Constitution, Athens 1996, p. 115.

[22] For the parliamentary procedure of ratification of the quota in the German electoral law (1949) §6 VI BWahlG, see *M. Antonioni*, Grundgesetz und Sperrklausel, ZfP 1980, pp. 93-109.

[23] See *M. Morlok*, Commentary on Article 21, in *H. Bauer and H. Dreier (eds.)*, Grundgesetz Kommentar, Tübingen 1998; *G. Leibholz*, Sperrklauseln und Unterschriftsquoren nach dem Grundgesetz, in *G. Leibholz (ed.)*, Strukturprobleme der modernen Demokratie, Heidelberg 1958, is enlightening concerning the conceptual definition of the term Splitterpartei, that is, the fragmentation of political constellations.

[24] Cf. *W. Frotscher*, Die parteienstaatliche Demokratie – Krisenzeichen und Zukunftsperspektiven, DVB1 1985, pp. 917-927; *Meyer*, *supra* note 21, at p. 284.

[25] *Leibholz*, *supra* note 23, at p. 44 et seq.

[26] See *J.Frowein*, Die Rechtssprechung des Bundesverfassungsgericht zum Wahlrecht, AöR 1974, pp. 84 et seq. with an excellent bibliography and a wide selection of cases. See also *E. Lange*, Wahlrecht und Innenpolitik, Meisenheim 1975, for an account of decisions of constitutional courts in the states of the federation before the enactment of the electoral law.

[27] BVerfGE 51, 230. *J. Hahlen* argues in favour of that decision in, Europawahlgesetz ist Verfassungskonform, DÖV 1979, pp. 282-285; However, *D. Murswieck*, Die Verfassungswidrigkeit der 5% Sperrklausel im Europawahlgesetz, JZ 1979, at pp. 48-53, heavily criticizes that decision and focuses on the argument that the European Parliament is not exclusively a legislative body and it has a different function to the Commission. See also *D. Dorr*, Die Verfassungsmässigkeit der 5% Sperrklausel im Europawahlgesetz, JuS 1981, pp. 108-112; *Theodossis*, *supra* note 21, at p. 305.

Nevertheless, German courts have rarely sought to justify the *particular* quota as opposed to *the need to introduce a quota in the abstract.* The German Federal Constitutional Court grounds particular quotas by recourse to the notions of the needs of a particular polity and the prevalent legal consciousness.[28] Thus, opting for one number over another is not a diachronic choice and a normative recurrence. On the contrary, it is determined in relation to time and the specific social and political parameters that prevail in a given state at a specific stage of its historical development. If the choosing of one number over another was not based on specific situations, the decisions of a constitutional or a common legislator would be peremptory and in constant risk of being overturned especially under the pressure of academic criticism.[29]

So, we can come to the following conclusions concerning the question of when electoral quotas, or numbers, are arbitrary and when quotas are deemed necessary: a) Firstly, the issue is examined by theory and justified convincingly by the courts only partly; that is, only as far as the need to set a quota in the first place is concerned. However, the reasons why one number is promoted over another remain unclear. b) The limitation of pure representational electoral systems clashes with the need for viable governments. c) Redetermining quotas especially in view of unofficial polls[30] can effectively exclude certain political groups. If it is established from previous electoral results or polls that a political constellation consistently has an electoral popularity of 4% in Germany or 2% in Greece, then adhering to a quota of 5% and 3% respectively de facto excludes that constellation from parliamentary life. Moreover, such exclusion is clearly unwarranted, as it does not derive from the legislative framework or the original official justification of the law in question.

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[28] BVerfGE 1, 248 (249).

[29] *Murswieck, supra,* note 27, at p. 50; *Antonioni, supra,* note 22, at p.109. Although this paper focuses on legislation, it must be noted that the problem is as difficult and perhaps even more acute in law application. The age old question of the open-texturedness of the law, first posed by H.L.A. Hart, is revealed here forcefully: How can a number be interpreted? Does it leave the judge the same amount of discretion as words or is it a 'hard case'? Is it the case then that judicial discretion can go as far as to question all the reasons supporting it? However, are numbers not introduced precisely to preclude discretion and creativity in interpretation? They are absolute, irreducible entities and as such they are supposed to offer a guarantee of unequivocal judgments. But if the judge proceeds to substantive reasoning concerning the number, then all those guarantees are automatically raised. Moreover, there is also the question of what kind of reasons are acceptable in that substantive reasoning. Clearly, the literature on substantive reasoning in judicial decision-making becomes relevant in this context. The following texts are essential reading, as they form the theoretical basis of the debate: *H.L.A. Hart*, The Concept of Law, Oxford 1994; *R. Dworkin*, Taking Rights Seriously, London 1977; *D.N. MacCormick*, Legal Reasoning and Legal Theory, Oxford 1978; *R. Alexy*, A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification, Oxford 1989.

[30] *G. Mavris*, Polls and Political System in 20th Anniversary of the 1975 Constitution, Athens 1998.

II. The Constitutional Requirement for a Well Justified Introduction of an Age Signifier

It is commonly known that the shaping of the normative content of a law takes place mainly at the pre-parliamentary stage with the implicit or explicit participation of a plethora of agents. The outcomes of these processes of negotiations and compromises are usually accepted without significant changes by the legislative body and they are made binding.[31] The justifying report accompanying the draft law ought to reflect those negotiations and the compromises reached in the political arena. Thus, the goals of the law and the needs it comes to satisfy would be more fully understood by the representatives that are called to approve its enactment[32] and the whole procedure would become public and transparent, and thus could be more easily and publicly probed. The report would also be of decisive help in the full implementation of the law, as it would constitute a constant source of useful information on the political reasoning, the criteria, the goals of the law, as well as the ways in which it seeks to regulate and transform social stock.[33] Despite their obvious importance, more often than not, reports are laconic and do not shed much or any light on the action of the agents that interfere and partake in the shaping of the law.[34]

The prevalent view in Greek constitutional theory is that restrictions in the exercise of fundamental rights on grounds of age are not embodied in the Constitution. However, it is also generally accepted that in order for such restrictions to be valid, they ought to meet certain prerequisites of consistency with the constitutional ratio.[35] It has also been noted[36] that the classification of age restrictions derives from the Constitution. The aim of such restrictions is either to offer protection to persons of a limited social experience in the exercise of their fundamental rights, so that possible unpleasant repercussions on transactions and legal stability are prevented, or to establish the gradual socialisation of young people as a procedure of 'developing' self-determination. In the following two paragraphs, I turn more closely to those constitutional requirements.

1. Can an Age Signifier Be Set Arbitrarily?

Ancient Greek texts allude very often to the notions of contingency and randomness, or to events that diverted from a normal course which would be predictable by a reasonable person. In that sense, the *random* resembles the *coincidental*; it is not

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[31] Cf. *K. von Beyme*, *supra* note 15, at p. 56 et seq.

[32] *M. Schürmann*, Grundlagen und Prinzipien des legislatorischen Einleitungsverfahrens nach dem Grundgesetz, Berlin 1986; *H. Hill*, Einführung in der Gesetzgebungslehre, Heidelberg 1982.

[33] *H. Schulze-Fielitz*, Theorie und Praxis parlamantarischer Gesetzgebung, Berlin 1988, p. 516 et seq; *R. Herbold*, "Kosten", in *Bundesakademie für öffentliche Verwaltung (ed.)*, Praxis der Gesetzgebung, 1984.

[34] See *Melissas*, *supra* note 18, at p.140 et seq. for a thorough account of the problematic permeating justificatory reports.

[35] Cf. *D. Tsatsos*, Constitutional Law, in Fundamental Rights, Vol. 3, Athens 1988, pp. 233 et seq.

[36] *Vidalis*, *supra* note 18.

connected causally to other events and, subsequently, remains unjustified. Thomas Aquinas uses theological criteria to categorise the random. He distinguishes between the enigmatic, the plausible, and the dispersed.[37] According to Plato, the indirect distribution of offices by lot aimed at achieving equality through difference for the fair ordering of the polity.

However, our western, modern, 'rational' law defines itself in and through opposition to the random and it does not allow the latter to interfere with decision-making.[38] The law resorts to chance only for want of a better solution. Seen from a different point of view, when a legislating body seeks recourse to chance, the deadlock to which it has arrived is revealed.[39]

The normativisation of what was originally a random choice is not precluded. For instance, football teams consist of eleven players because in 19th century Cambridge University, where the rules and terms of the game were first set, ten students plus their captain resided in the same university house.

In various legal orders,[40] there is provision for the resolution of disputes by lot in the last instance. For example, resolution by lot very often provides a solution in cases of a tie in local elections or elections in unions, guilds, and associations.[41]

German case law sought to regulate this inevitable choice of the legislator by setting the following prerequisites: a) The random choice must be accompanied by a guarantee that the outcome will be accepted by the participants in the process of solving the legal question at hand. In other words, it must not depend on external events and it must not be manipulated[42] so that it does not give rise to any doubt as to whether the participants are treated equally and granted the same chances. b) When a coin is tossed, it is required that it be thrown to a height that will allow it to rotate enough times.[43]

2. Constitutional Principles Regulating the Introduction of Age Restrictions

Even if one assumes that the parliamentary sponsor of the draft law does not think in general terms, but only in terms of the specific law and the problem it seeks to solve, his/her decisions cannot be based solely on his/her democratic reason and sensitivity, that is, on transconstitutional principles that circumvent the nature and mission of the law. Setting an age restriction cannot infringe constitutional clauses, even if it is the outcome of secret negotiations of all the participants.

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[37] *O. Depenheuer,* Zufall as Rechtsprinzip?, JZ 1993, pp. 171-179.

[38] *Plato,* The Laws, translation by V. Moskovis, Nomiki Vivliothiki, 1988.

[39] *Depenheuer, supra* note 37, at p.178.

[40] For a comparative account of relevant rules in English, Italian, and French public law see *P. Dagtoglou,* Kollegialorgane und Kollegialakte der Verwaltung, Stuttgart 1960.

[41] Many examples of disputes being resolved with recourse to chance can be found in administrative, civil, constitutional, and procedure laws in Greece. In case of a tie, the chairpersons of local councils are selected by lot and so are the members of the Bar Associations executive councils; apartments in housing estates are distributed by lot; in certain cases, the composition of courts is determined in the same manner.

[42] For relevant case law see Neue Juristische Wochenschrift (NJW), 1991, p. 3232 et seq.

[43] VGH München, Vol. 3, No. 2, 1991; NJW 1991, pp. 2306-2307.

The actions of the administration at the stage of preparation of the draft, including the invitation of interest groups, the collection of information and data, the selection of goals, choices, means, as well as the needs that the future law is called on to satisfy, are not merely technical, organisational, or political matters.[44] The inclusion of numbers in laws is subject to constitutional requirements.

It is then rightly pointed out that if the legislative organization of a right makes its exercise unnecessarily difficult, there might be indications of unconstitutionality. It has been shown that putting forward 'special' pragmatic circumstances has resulted in the introduction of rules of questionable constitutionality that infringe upon human rights disproportionately. Considerations of space dictate that I make only the following brief remarks on that issue.

The introduction of an age restriction different from the 18th year of age is attributed to the 'nature of things' (*Natur der Sache*) that constitute the special circumstances, where laws are made to act as judges so that peremptoriness is disclosed, the legal order is safeguarded, and inequalities are prevented.[45] However, according to the German Federal Constitutional Court, this criterion is not a *legal* principle[46] and therefore it bears great risks. For instance, the special circumstances of a profession that fall within the conceptual realm of the 'special nature of things' can easily become a legislative alibi for extending the lower age limit and curtailing the upper one.

When a law sets the 21st year of age as a threshold, that choice could be characterised as a 'legislative anachronism'. A prima facie convincing reason for diverting from the general rule setting the 18th year of age as a restriction threshold could be the fact that such a diversion has been legally instituted in another state, especially if the latter is a member of the European Union.[47] But it must be noted that such a legislative import must be qualified in view of all the national, social, economic and political particularities in order for it not to pose more problems than it solves.

Perhaps, then, setting a restriction beyond the 18th year of age can be perceived as the outcome of pressure exercised by interest groups that seek to secure the 'terms of reproduction of a professional sector'[48] by demanding that the general limit be significantly transcended.

Any diversions from the 18th year must be separately justified, and its rightness be tested by its duration and not on the basis of the occasional and circumstantial pressure exercised by interest groups. Such compromises cause the temporary retreat of the government, but also more importantly, render the materialisation of the rule

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[44] *U. Karpen*, Zum gegenwärtigen Stand der Gesetzgebung in der Bundesrepublik Deutschland, Heidelberg 1998, pp. 371-396; *V. Christianos*, Shifts in ECJ Case Law, Athens 1998, p. 36 et seq.

[45] Relevant case law can be found in *F. Müller*, Juristische Methodik, Berlin 1993, p. 38 et seq.

[46] *Müller*, ibid., emphasizes: 'Es handelt sich nicht um ein eigenes, methodisch selbständig umschreibbares Kriterium, sondern allgemein um die Berücksichtigung realer Gegebenheiten der sozialen Welt für den Entscheidungszusammenhang des zu lösenden Falls'.

[47] Naturally, there is no question of a national legal order 'adopting' an age restriction, when the latter is set by a European directive or regulation.

[48] See *Alexandropoulos*, *supra* note 15, at p.74.

of law[49] as well as the principle of proportionality problematic.

Legal regulation is very commonly understood as a means for the spherical satisfaction of a political goal.[50] Putting that means-ends relation to the test amounts to testing the requirements of the principle of proportionality. Every legislative restriction in the exercise of fundamental rights is tested in light of that principle.[51] Naturally, the principle of proportionality dictates that the weighing of means and ends always involves an individual evaluation. In combination with what I have discussed earlier, this can give rise to false arguments questioning the very applicability of the principle. At the end of the day, the principle of proportionality as an autonomous criterion of legitimation and legality of State decisions does not only 'constitute a logical necessity but it also serves the social need of regulating social relations and using power in a manner that is reasonable, rational, balanced, and directly connected to its aim, apart of course from its formal validity'.[52]

Given the high level of unemployment amongst young people, high age restrictions effectively deprive the young the right to gain access to a profession, to the extent that these restrictions are set at the crucial age when one chooses a profession. Thus, we are led to the formation of closed professions, since the legislator takes into account the historic elements of the ratio of the law, but overlooks its ability to evolve, its durability or, to be more precise, its capacity to keep up with societal development.

The extension of an age restriction further than the 18th year must be justified thoroughly in the original justifying report accompanying the draft law or it must derive directly from the law itself, for instance with mention of any special skills, experience, or the exceptional dangers attributed to the profession. Otherwise, such rules can be deemed unconstitutional, because they infringe upon the right to work as well as the principle of equality. The principles of liberty and equality are set as normative principles and not only in the sense of a prohibition of arbitrariness and unjustified discrimination. They are also meant as 'equal opportunities of enjoying liberty and human rights, which is a goal that is achieved with the par participation of all the social, economic, and political life'.[53] But the same legal, constitutional, moral and political restrictions must hold as far as 'legal numbers', so to speak, are concerned. Legislators must always bear in mind that one cannot unquestioningly rely on the assumed rationality and correctness of numbers. Numbers refer to something real in the world of objects and social relations, and therefore call for interpretation and evaluation.

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[49] *Depenheuer, supra* note 37, at p. 171 et seq.

[50] *B. Pieroth & B. Schlink*, Staatsrecht, Grundrechte II, Heidelberg 1996; *A. Gerondas*, The Principle of Proportionality in German Public Law, To Syntagma, 1983; *V.Voutsakis*, The Principle of Proportionality: From Law Interpretation to Law Formation, in *K. Stamatis (ed.)*, Aspects of the Rule of Law, Athens 1990.

[51] *Tsatsos, supra* note 35, at p. 245 et seq; *Hill, supra*, note 32, at p. 37; *T. Maunz & R. Zippelius*, Deutsches Staatsrecht, Munich 1985, p. 95 et seq.

[52] *A. Manitakis*, Rule of Law and Judicial Control of Constitutionality, Athens 1994.

[53] Id. at p. 165.