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POLITICS AND JURISPRUDENCE IN WEST GERMANY: STATE FINANCING OF POLITICAL PARTIES

Donald P. Kommers*

I. INTRODUCTION

THE RELATIONSHIP between political parties and representative government has been an important consideration in the constitutional jurisprudence of the Federal Republic of Germany. This jurisprudence forms a fascinating chapter in the postwar development of German constitutional law, not only because the Federal Constitutional Court has gone further than any other constitutional tribunal in the West to promote a free and competitive party system, but also because the Court's decisions affecting the status of parties under the Basic Law, especially those having to do with party finance, are a marvelous illustration of the interplay between politics and law. Political interests and constitutional values could hardly become more entangled than they did in the Federal Constitutional Court's Decision of July 19, 1966, which invalidated a federal plan for subsidizing political parties.¹ It is the purpose of this article briefly to consider this and related cases, along with their impact on the West German political system.

II. BACKGROUND

A. Theories of Representation

In western liberal democracies political parties have not counted for much in constitutional law. This is not really surprising since the idea of constitutional government long preceded the emergence of political parties as an aspect of the democratic process. Parties in the modern sense originated with the extension of the franchise, serving as an efficient means for the organization of electoral competition. But this was a political development largely beyond

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¹ 20 *Entscheidungen des Bundesverfassungsgerichts* 56 (Tübingen: J. C. B. Mohr [Paul Siebeck], 1967). (Hereafter cited as BVerfGE)

constitutional law's concern for civil rights and the formal distribution of powers within government. Whether parties as corporate units outside of government flourished or languished was of little moment in western constitutional theory.

Constitutional law's reticence on the subject of political parties, which continues to this day, may be traced to certain traditional yet contradictory notions of political representation that persist and coexist in modern constitutional theory. These notions or "images" of what really happens when the process of representation takes place are largely hostile or, at best, neutral toward the role of parties in democratic systems. Since these theories continue to influence judicial attitudes toward certain constitutional claims of political parties they need briefly to be considered.

One such theory, taught by Jeremy Bentham and other early nineteenth-century liberals, views the political system as a collection of self-seeking individuals. In support of this rather atomistic view of society Bentham himself wrote that "individual interests are the only real interests."² Hence, if the representative would only serve those individual interests the greatest good of the greatest number somehow would result. This was one reason Bentham, James Mill and their fellow utilitarians emphasized the importance of elections and suffrage as paths to constitutional reform.³ It was assumed that by these means maximal correspondence between public law and public opinion would be achieved, for individual interests could not adequately be represented or harmonized within the framework of large groups. This individualist conception of the political process suffuses United States Supreme Court decisions proclaiming the one-man one-vote principle as the only valid basis of legislative representation;⁴ it is also at the basis of the recent holding of the Italian Constitutional Court that a member of Parliament cannot validly be bound on how to vote by instructions from his party.⁵

Converging somewhat paradoxically with this atomistic theory is the notion of representation as an expression of general will; that is, representatives owe their allegiance to a will that actually transcends party, the vested interests of social groupings and the personal interests of individuals. Thus Article 38

² John Bowring, *The Works of Jeremy Bentham* (London: Simpkin, Marshall & Co., 1843), I, 321.

³ See Elie Halevy, *The Growth of Philosophic Radicalism* (New York: The Macmillan Company, 1928), p. 259.

⁴ See *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *WMCA v. Lomenza*, 377 U.S. 633 (1964); *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Swann v. Adams*, 385 U.S. 440 (1967); *Sailors v. Kent County Board of Education*, 387 U.S. 105 (1967); *Dusch v. Davis*, 387 U.S. 112 (1967); *Avery v. Midland County*, 390 U.S. 474 (1968); and *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969).

⁵ Decision of July 7, 1964 (Nr. 72) *Giurisprudenza Costituzionale* (1964), p. 92.

of the Basic Law of the Federal Republic of Germany declares that deputies of the German Bundestag are representatives of the "whole people," subject only to their conscience, and not bound by instructions of any kind. Even Article 21, defining the role of parties in the German system, makes reference to shaping the "political will of the people." The Rousseauistic tone of these provisions is accented by the suggestion that community consensus is necessary if public policy is really to reflect general will. Rousseau himself believed that dissensus, like tumult and long debates, marked the ascendancy of particular interests and the end of the state.⁶ He would not have tolerated a regime of political parties because by definition they divide people, create discord, and usurp the true functions of government. He thus envisioned no instrumentalities mediating between people and government.

Finally, there is the corporate theory of representation. According to this theory those groups performing distinct and necessary functions in society are the basic units of a political system; hence these groups, not individuals separated artificially by legislative district lines, are the true units of representation. Represented in its most degenerate form by Fascist Italy, the "corporate state" as such is no longer regarded as compatible with parliamentary democracy. Nevertheless, the idea of corporate representation is still today, owing partly to the influence of Catholic thought, expressed in European constitutions. It is the idea that men achieve meaning and political identity as members of social, economic, and occupational groups. The Italian Constitution, for example, perceives the individual as a member of "social groups through which his personality develops [and therefore requires] the fulfillment of inalienable duties of political, economic, and social solidarity."⁷ Institutional manifestations of this idea are France's Economic and Social Council, established under Article 69 of the Constitution of the Fifth Republic, along with Italy's National Council of Economy and Labor, created by Article 99 of the 1947 Constitution.⁸

⁶ Jean Jacques Rousseau, *The Social Contract* (1762 trans. G. D. H. Cole, New York: E. P. Dutton & Company, 1913), p. 92.

⁷ Constitution of the Italian Republic (December 22, 1947), Article 2.

⁸ Political theory in the United States, while rejecting functional representation as a formal constitutional device, has been most heavily influenced by Madison's theory of checks and balances among group interests, both at the level of government and of society. But where European theory seems largely to assume a natural harmony among interests, Madisonian theory begins with the assumption that man is basically a passionate creature and prone to selfishness. Hence conflict among groups is natural and, as Madison put it, "essential to liberty." Such conflicts in fact need to be encouraged—"liberty is to faction what air is to fire," said Madison—so as to create a balance of interests that would make it difficult, if not impossible, for any one group to gain control of government. Many modern defenses and explanations of the American political system are at root adornments of Madisonian theory. According to the prevailing view in American academic circles, political parties are themselves the products of group conflicts. See, for example, David Truman, *The Governmental Process* (New York: Alfred Knopf, 1951), pp. 262-287.

It bears repeating that none of these theories is very congenial to political parties. The constitutional law of the West has been written as though parties were little more than benign intruders in the process of legislative representation. In no instance have they been regarded as constitutionally essential to the principle of limited government. What is interesting about recent developments in German constitutional law is the effort that is being made to adjust these traditional constitutional theories of representation with prevailing political theory about party.

B. Parties in the German Experience

Today it is axiomatic that political parties are necessary agencies of democratic government. Leaders must be recruited, citizens consulted, issues crystallized, governments organized, policies made, and laws enforced. In the modern nation-state, with millions of voters, political parties are regarded as the most rational and democratic means for carrying out these functions: rational because they provide the electorate with alternative choices of policy; democratic because they allow these choices to be made by majority rule. Obviously, this assumes a party system that is competitive if not necessarily dyadic. In short, parties constitute the critical linkage between people and government, affording people the only genuine opportunity to translate their views on political issues into public policy.

This is a liberal democratic view of the political process largely rejected by German ideology. Since Napoleon's retreat from German soil in 1815 the dominant thrust of Germany's political tradition, as historians ceaselessly remind us, has been neither liberal nor democratic, but rather conservative and authoritarian. This was not an environment that would easily nurture a system of political parties. Actually, the intellectual and political history of Germany reflects an antiparty bias that was reinforced by the Weimar's ruin. Yet it is interesting to note that, though Weimar was a regime of parties, the only mention of political parties in the Weimar Constitution was the directive instructing civil servants to serve the state and not political parties.⁹ Under the shattering impact of events that are too familiar to be recounted here the Weimar Republic degenerated into a regime of warring factions, rendering parliamentary government all but impossible. With the advent of Hitler, Germany's brief experiment with democracy—and party government—came to an end. What emerged was a totalitarian regime unmatched in violence, fanaticism, and terror.

⁹ The Constitution of the German Reich (August 11, 1919), Article 130 (1).

C. Parties Under the Basic Law

The Weimar experience was uppermost in the minds of West Germany's constitution-makers after World War II. One interesting feature of the Parliamentary Council, which convened in 1949 to draft a new constitution for Germany, was its complete domination by representatives of political parties, with Christian and Social Democrats making up the large majority of delegates. To create a stable regime of political parties was an objective of many of the framers.¹⁰ Whether this could be achieved within an antiparty civic culture and among people psychologically unprepared to accept parties as critical instruments of democratic government was a query that had no ready answer. It certainly could not be achieved by constitutional fiat. Yet the framers were not unaware of the symbolic importance of devoting an article of the Constitution to the status and role of political parties in the new republic.

Article 21 of the Basic Law provides:

- (1) The political parties participate in the forming of the political will of the people. They must be freely formed. Their internal organization must conform to democratic principles. They must publicly account for the sources of their funds.
- (2) Parties which, by reason of their aims or the behavior of their adherents, seek to impair or destroy the free democratic basic order or to endanger the existence of the Federal Republic of Germany are unconstitutional. The Federal Constitutional Court decides on the question of unconstitutionality.
- (3) Details will be regulated by Federal legislation.

It is difficult to say, however, which of the first two sections of Article 21 was more important to the framers. Was the Article occasioned more by fear of internal subversion than by the desire constitutionally to legitimate political parties? Whether section two was originally a qualification of section one or the other way around did not, in any case, obscure the fact that these provisions could be used to promote a regime of parties. Constitutional law was one tool immediately seized upon for this purpose.

¹⁰ For the historical background to Article 21 see Hermann von Mangoldt, *Das Bonner Grundgesetz* (Berlin and Frankfurt: Verlag Franz Vahlen GbmH, 1953), pp. 144-145 and 1 *Jahrbuch des Öffentlichen Rechts* 202-210 (1951).

D. Judicial Interpretation

The Federal Constitutional Court wasted no time in spelling out the meaning of these provisions. Decisions interpreting Article 21, together with related cases involving electoral law, are important both for the novel juridical theories that they embody and for their impact on West German politics. It is not our intent here to embark upon a lengthy discussion of every case that has arisen under Article 21 but simply to articulate the general principles that have governed the Court's attitude toward the role of political parties in West Germany.¹¹

The Basic Law differs from the German constitutions of 1871 and 1919 in that it makes specific reference to the role of political parties. Under the monarchy and the republic both jurisprudence and political science were heavily influenced by the analytical distinction between state and society that Germans were fond of making. What belonged to the order of the state was *ipso facto* excluded from the order of society. Since political parties, like other interest groups, were a manifestation mainly of social relations they could not juridically be regarded as components of the state. As we shall soon see in our discussion of the party finance case this distinction has not wholly lost its force in German constitutional theory.

Yet the Federal Constitutional Court regards the political system under the Basic Law as a "party-state" or *Parteienstaat*. Political parties, within the meaning of Article 21, are not simply social formations; they are also elements of constitutional structure and actually carry out the functions of a constitutional organ. An open system of competitive political parties, suggests the Court, is implicit in the very concept of the liberal democracy that the Basic Law purports to create. Parties are constituent units of liberal democracy mainly because of their participation in shaping the political will of the people (*politischen Willensbildung des Volkes*). It is in this sense that parties are ultimately to be distinguished from other associations of citizens; for parties seek to influence and shape the people's will for the purpose of ruling the entire society.¹²

What therefore makes parties so critical to German democracy is that they have the fundamental responsibility of organizing the electorate in such a way as to secure the expression of a political will capable of directing the organs

¹¹ Annotations on Article 21 are included in Gerhard Leibholz and H. J. Rinck, *Grundgesetz für die Bundesrepublik Deutschland* (Cologne and Marienburg: Verlag Dr. Otto Schmidt KG, 1966), pp. 273-288. See also Heinz Laufer, *Verfassungsgerichtsbarkeit und Politischer Prozess* (Tübingen: J. C. B. Mohr [Paul Siebeck], 1968), pp. 479-550.

¹² These principles were defined mainly in three early decisions of the Federal Constitutional Court. See 1 BVerfGE 208, 223-228 (1952); 2 BVerfGE 1, 1-79 (1953); and 5 BVerfGE 85, 133-147 (1956).

of the state. Government in effect is powered by the will of the political community. Indeed the very legitimacy of German democracy, again from the point of view of constitutional theory, is contingent upon the realization and identification of the people's political will. The principle of popular sovereignty commands no less than that the will of the state reflect the will of the people. But the will of the people must be *formed* before it can be discovered or expressed and, *a fortiori*, before a democratic government can be licensed, as it were, to rule. This process takes place primarily in parliamentary elections.¹³

The Court has come near to suggesting that it is constitutionally imperative that parties play a meaningful educative role within the political system. Occasionally the Court seems to be saying that if parties do not function in this way—that is, if they do not offer the voting public a coherent program of political action on the basis of which voters can make a rational choice among policy alternatives—they cannot be regarded as parties within the meaning of Article 21.¹⁴ Though the Court has not made the point in so many words, one rather clear implication of this view is that a party which lacks a well-defined policy orientation might be barred from competing in elections. For to allow any electoral grouping, no matter how ephemeral or narrow its interests, to compete at the polls would defeat the very purpose of the *Parteienstaat* whose intent is to inject a measure of rationality into the electoral process. One might suggest that on this view political parties based primarily on charisma or other nonrational factors could be banned from electoral competition without doing violence to the principle of liberal democracy. Perhaps there is an element of paternalism in the notion that voters should be protected against the frivolous exercise of the franchise. In any case, the German Court

¹³ *Ibid.*

¹⁴ To be regarded as a party within the meaning of Article 21 a political group must also have an organization or structure, possess a membership list, and actually compete in elections. Of course the most obvious criterion for determining whether a political grouping is a political party under the Basic Law is whether it has representatives in Parliament. But supposing a group does not have such representation. How detailed or specific must these criteria be for a group to qualify as a party? On this point the Court has hedged, preferring to remain open and flexible on the matter, saying little more than that a group's longevity, continuity, and membership strength would probably determine party status. These criteria are important because they affect the right of political groups not only to secure ballot positions in state and federal elections but also to achieve standing in the Federal Constitutional Court should their rights as corporate units of the political system be infringed. A political party's access to the Federal Constitutional Court is severely limited, and has been a source of some dispute within the Court itself. Parties do not, like ordinary citizens, corporations, or other private groups, have the right to file constitutional complaints with the Federal Constitutional Court. Parties may bring suits only under the Court's so-called *Organstreit* jurisdiction. That is, a party must claim that its rights as an organ of the state have been infringed to invoke the Court's jurisdiction. Inasmuch as parties are so regarded only for electoral purposes, this limits the situations under which parties may go before the Court. See generally Gerhard Leibholz and Reinhard Rupprecht, *Bundesverfassungsgerichtsgesetz* (Cologne and Marienburg: Verlag Dr. Otto Schmidt KG, 1968), p. 34.

has come closer than any other constitutional tribunal to incorporating the modern theory of responsible party government into its constitutional law.¹⁵

Because party competition is regarded as so essential to German democracy the Federal Constitutional Court has closely scrutinized all regulations alleged to impinge on this process. This posture of judicial activism with respect to legislation involving electoral matters goes back to the Court's first term when it nullified a Schleswig-Holstein statute that required a party to poll, for purposes of proportional representation in the state legislature, seven-and-a-half percent of the total vote.¹⁶ Both federal and state quotas of five percent, however, have been upheld as a reasonable and legitimate means of promoting political stability by discouraging the emergence of splinter parties.¹⁷ The Court has ruled also that no party can validly be denied, under the equality principle of Article 3, radio or television time advertising during election campaigns, although the length of time allocated for such purposes may be tailored to the importance and strength of the party in the community.¹⁸ On another occasion the Court actually ordered new elections in a Saarland community after a local citizens group was denied the right to file a candidates' list in a district election pursuant to a law which reserved this right to political parties.¹⁹ A similar statute of North Rhine-Westphalia was also invalidated, along with a Lower Saxony statute that required a person to secure a relatively high number of signatures on a petition before he could become a candidate for a municipal or district election.²⁰

These decisions, however, do not imply, as suggested earlier, that every group or any individual is constitutionally entitled to run in an election. A limited number of signatures may be required to show that a political group has a stable following in a local community and is really representing interests that might otherwise go unrepresented. Generally, though, the Court has actively sought to protect the democratic character of the electoral process. In doing so it seems to have established a workable balance between the competing values involved in all these cases. On the one hand, it has approved minimal threshold restrictions on candidate qualification and legislative representa-

¹⁵ See Gerhard Leibholz, "Parteien und Wahlrecht in der Modernen Demokratie," *Parteien, Wahlrecht, Demokratie* (Cologne and Opladen: West Deutscher Verlag, 1967), pp. 40-60. For American views of this subject see Committee on Political Parties of the American Political Science Association, *Toward a More Responsible Two-Party System* (1950); E. E. Schattschneider, *The Semi-Sovereign People* (New York: Holt, Rinehart and Winston, 1960); and Austin Ranney, *The Doctrine of Responsible Party Government: Its Origin and Present State* (Urbana: University of Illinois Press, 1954).

¹⁶ 1 BVerfGE 208 (1952).

¹⁷ 6 BVerfGE 104 (1957), 6 BVerfGE 99 (1957), and 6 BVerfGE 84 (1957).

¹⁸ 14 BVerfGE 132 (1963).

¹⁹ 11 BVerfGE 266 (1961).

²⁰ 11 BVerfGE 351 (1961) and 12 BVerfGE 9 (1962).

tion to keep the political system from flying apart; on the other, it has invalidated electoral impediments which unreasonably thwart dissent or place emerging parties or electoral associations at a competitive disadvantage *vis-à-vis* the established parties.²¹

West Germany's regime of political parties is not, however, wholly an open system, as paragraph 2 of Article 21 makes clear, for it introduces the concept of an "unconstitutional party." Bonn's democracy does not, like Weimar's republic, assume a posture of neutrality toward political parties. Bonn, according to the Federal Constitutional Court, is a "fighting democracy" ordained to protect and safeguard the democratic principles on which the Basic Law is founded.²² Political parties which reject the highest values of the constitutional system are unconstitutional. So far, only two parties have been declared unconstitutional by the Court: the neo-Nazi Socialist Reich Party in 1952 and the Communist Party in 1956.²³ In sharp contrast to American theory no substantial, clear, or present danger is required as a standard for determining the unconstitutionality of such parties; the sole question before the Court in these cases is whether the party is totalitarian in character or whether the aim or intent of the party is to subvert the existing political system.²⁴

III. COMPETING VIEWS OF THE "PARTEIENSTAAT"

The Federal Constitutional Court's decisions under Article 21 of the Basic Law have been the object of sturdy debate among West German lawyers and legal scholars. It is not at all certain that these decisions enjoy the support of West German political leaders. Clearly, the decisions which occasioned the harshest criticism of the Court were the party finance cases. Much of the criticism was not wholly without warrant, however. The American legal scholar immersed in the pragmatic jurisprudence of his own country would find these decisions perplexing insofar as they seek to adjust the modern notion of *Parteienstaat* to the older theories of political representation discussed earlier. Some of the concepts employed in these decisions are difficult to reconcile with political reality, though part of the problem stems from the language of the Basic Law itself.

²¹ See Hans Kutscher, "Judicial Review of Supreme Courts and the Principle of Equality under the Law," 9 *Jahrbuch des Öffentlichen Rechts* 197-201 (1960).

²² 5 BVerfGE 139 (1956).

²³ The Socialist Reich Party was declared unconstitutional in the Decision of October 23, 1952, 2 BVerfGE 1-79 (1953); the Communist Party was so declared in the Decision of August 17, 1956, 5 BVerfGE 85-393 (1956).

²⁴ For an excellent discussion of the Communist Party case see Edward McWhinney, "The German Federal Constitutional Court and the Communist Party Decision," 32 *Indiana Law Journal* 295-312 (1957).

A good example is the Article 21 concept of "political will of the people." The proposition that the people as a whole have a will has an ominous ring to it, particularly when the idea of people or *Volk* is merged with the idea of the state. Quite apart from the implication these notions have for democratic theory it is sufficient for our purpose to point out that the use of abstract concepts like "people" and "state" pervades German scholarly writing on the subject of parties. As the German notion of *Staatswissenschaft* might suggest, this approach tends to be formal and conceptualistic, resistant to the utilization of experimental or empirical methods of inquiry.

There is also a latent tendency in contemporary German jurisprudence to regard the state as a *transcendent reality* rather than as a complex *political system* of interrelated parts and interacting forces inside and outside the formal structure of government. The influence of Hegelian thought is still very much manifested by the dichotomization of society and state, politics and administration, and legal and social order. Apparently there lingers both in German theory and among Germans generally an aversion to partisan conflict, a repugnance for power struggles among vested interests, and a distaste for individual political activism. To the German public mind conflict among men, interests, and parties all too frequently represents the debilitating spirit of Weimar. By contrast, the beauty and virtue of the state is attributable to its nonpartisan character, its moral authority, its representation of unity, its embodiment of the rule of law, and its competence in public affairs. This was the glory of Imperial Germany.²⁵

The analytical distinction between the realm of politics and the realm of the state seems to have influenced the development of the constitutional idea of *Parteienstaat*. Actually, two views of the party state are currently competing for supremacy in contemporary German constitutional law. These views will be elaborated before proceeding to a consideration of the party finance cases.

One view is represented by Professor Gerhard Leibholz, a Justice of the Federal Constitutional Court since 1951 and unquestionably West Germany's leading theoretician of the *Parteienstaat*. Though Justice Leibholz has occasioned a large amount of controversy inside and outside the Court, his influence in constitutional disputes dealing with political parties and elections has been very substantial. He proceeds from several suppositions concerning the nature of modern democracy.

Justice Leibholz distinguishes between what he calls "parliamentary representative democracy" and "parliamentary political party mass democracy." The former, based on suffrage and representative in character—the classical

²⁵ See Ralf Dahrendorf, *Society and Democracy in Germany* (Garden City, New York: Doubleday & Company, Inc., 1967), chap. 13, pp. 197-213.

19th-century liberal model of democratic government—is a system ordained primarily for the protection of *individual* rights, mainly economic rights, and of the constitutional framework within which these rights are exercised. Society is perceived atomistically with representation being largely virtual, since there exists no basis of social unity in terms of which to formulate legislation. Because of lack of any organizing principle of politics common interests are sacrificed to private interests. Thus a wedge is driven between state and society. As Justice Leibholz notes, “the danger arises when economic society comes into conflict with the political community and prevents it from being a community.”²⁶

“Parliamentary political party mass democracy,” on the other hand, implies *universal* suffrage and is actually a species of plebiscitary democracy. The *Parteienstaat* assumes absolute equality in voting—as Leibholz unequivocally puts it, “*radikale arithmetisch-mathematische Gleichheit*.”²⁷ To this extent he is in full accord with the one-man one-vote principle enunciated by the U.S. Supreme Court in the apportionment cases. But this is only the first step to genuine popular democracy and in this sense Justice Leibholz is more realistic than are his counterparts on the American Supreme Court. For numerical equality in voting is insufficient to accord just representation to the general will of the community. Article 21 of the Basic Law requires, in addition to numerical equality in voting, *effective* equality of representation. In Justice Leibholz’s view this is achieved only through a multiparty system; what is more, the system requires a certain *kind* of political party, namely a unified program-oriented organization of active citizens capable of forming the political will of the people. Edmund Burke’s definition of a political party as “a body of men united for promoting by their joint endeavors the national interests upon some particular principle on which they are all agreed” seems implied in this view. Thus parties cannot be allowed to become the tools or the handmaidens of special interest groups. The *Parteienstaat*, by definition, excludes the *Verbändestaat*, a system in which interest groups monopolize the political process. The Federal Constitutional Court’s Decision of June 24, 1958, disallowing tax deductions to corporations for their contributions to political parties was based partially on this supposition. Justice Leibholz is most emphatically in the tradition of those European critics who have found little to admire in the interest-oriented oligarchies of American parties that Ostrogorski described so well in his classic treatise on that subject.²⁸ It is

²⁶ Gerhard Leibholz, *Politics and Law* (Leyden: A. W. Sythoff, 1965); p. 59.

²⁷ See Leibholz, “Parteien und Wahlrecht,” pp. 40-60.

²⁸ See Moisei L. Ostrogorski, *Democracy and the Party System in the United States* (New York: The Macmillan Company, 1910), esp. pp. 225-281.

indeed fair to say that Justice Leibholz is one of West Germany's leading intellectual adversaries of an interest group theory of politics.

Now all of this involves certain consequences for the political system. First, an electoral structure is needed which will produce political parties broadly representative of the popular will, one that does not attenuate legitimate opinion clusters with substantial support in the community. While acknowledging that a two-party single-member constituency system has the special virtue of facilitating political decision and promoting governmental stability, Justice Leibholz nevertheless believes that the notion of just representation under the Basic Law requires at least a modified form of proportional representation. The combination of proportional representation with the single-member plurality voting system in the ruling electoral law of West Germany would seem to meet this need. Second, a close nexus between political parties and the state is required, for the *Parteienstaat* governs through parties. It implies the primacy of the party system. Should it become necessary this may even imply an obligation on the part of the state to insure that parties freely carry out the constitutional function mandated by Article 21. Thus political parties are fully constitutional organs within the meaning of the Basic Law and integral to the very organization of the state.²⁹

The competing view is closer to the traditional German theory. While accepting the proposition that parties are necessary agencies of modern democracy and that Article 21 looks toward the creation of a *Parteienstaat*, this view does not postulate the fundamentality of parties in any constitutional sense. Under this interpretation political parties are chiefly voluntary associations with deep roots in the sociopolitical structure of the community. As such they can be regarded neither as permanent constitutional organs nor as integral parts of the state.

This view draws an even sharper distinction between the will of the people and the will of the state. The main responsibility of parties is to shape the will of the people in their capacity as electoral organizations. Indubitably this helps to shape the will of the state. Yet parties do not and may not monopolize this process. For the will of the state must remain open to the influence of all sorts

²⁹ Justice Leibholz has explained these views more fully in numerous publications. Among them are "Der Parteienstaat des Bonner Grundgesetz," 66 *Deutsches Verwaltungsblatt* 1-8 (1951); *Strukturprobleme der Modernen Demokratie* (Karlsruhe: Verlag C. F. Müller, 1967), esp. pp. 71-77; *Das Wesen der Repräsentation und der Gestaltwandel der Demokratie in 20. Jahrhundert* (Berlin: Walter de Gruyter, 1966); and *Politics and Law*, pp. 24-71. A further defense of these views is contained in Hans-Justus Rinck, "Der Verfassungsrechtliche Status der Politischen Parteien in der Bundesrepublik" in Karl Dietrich Bracher *et al.*, *Die moderne Demokratie und Ihr Recht* (Tübingen: J. C. B. Mohr [Paul Siebeck], 1966), II, 305-330. An excellent analysis of Leibholz's position is contained in Konrad Ammermüller, *Das Proportionalwahlverfahren in moderne Parteienstaat* (doctoral dissertation, University of Cologne, 1966), pp. 10-38.

of interests and groups outside of parties. Although it is inconceivable that a democratic electoral process would function adequately without parties, the claims of parties are inherently no more superior than the claims of other non-governmental groups or interests in society. Ultimately this is the meaning of the free political process that is required by the rights of free speech and association under the Basic Law.³⁰

Furthermore, Article 21 must be read alongside of Article 38 which provides that legislators are representatives of the whole people. Justice Leibholz, incidentally, regards these two provisions as incompatible. In fact, the attraction of the "party delegate" theory of representation has led some party officials to suggest that Article 38 be repealed.³¹ But one could argue that Article 20 of the Basic Law also qualifies any such "party delegate" theory that might be read into Article 21. It provides: "All state authority emanates from the people. It is exercised by the people by means of elections and voting and by separate legislative, executive, and judicial organs." This might be taken to imply that constitutionally the responsibility for making public policy is not exclusively to reside in party councils.

It is interesting to note that elements of both views inhere in German constitutional law. And both present conceptual difficulties that are not easily resolved. One wonders, for example, whether the distinction between "will of the people" and "will of the state" is analytically useful for determining complex constitutional disputes arising under Article 21. Is the distinction, contained in both views of the *Parteienstaat*, operationally viable? Is the idea of "will" susceptible to orderly investigation outside of the heavenly world of jurisprudence? What role does majority rule, conceived in terms of a voting majority, play in these calculations and how does it fit into the scheme of West German democracy? How does majority rule become operable in the multiparty system subsumed into Justice Leibholz's concept of *Parteienstaat*? How are people actually represented in large modern nation-states such as West Germany? Can there be effective representation of *people* within government? For that matter who are the "people"? In short, *who* really is represented?

It is not our purpose to pursue these queries here, but only to point out that they have not been very satisfactorily resolved by the Federal Constitutional Court in decisions relevant to the role of parties. Concepts such as "will," "state," "representation," and "people" still remain largely unexamined. They

³⁰ This was the prevailing jurisprudential view of the proper relationship between parties and the state during the Weimar Republic. It is in fact still the conventional argument put forth in many contemporary German treatises on German constitutionalism. For a discussion of and citations to this literature see Laufer, pp. 480-485.

³¹ See *Frankfurter Allgemeine Zeitung*, March 10, 1970.

were probably examined closer than ever before in the party finance cases. Even so these concepts were employed there in ways that raise as many questions as they resolve. On the other hand, is it asking too much of the judicial process to demand that the Federal Constitutional Court answer these queries to the satisfaction of the purist who insists that every conceptual category be specified in terms of its empirical referents? Perhaps the questions raised above cannot be fully answered if the Court is not to abdicate responsibilities accorded to it under the Basic Law. Then again perhaps they need not be answered. Legal fictions may be useful in assisting courts to resolve constitutional disputes requiring tough choices between competing values. The remaking of history by the U.S. Supreme Court may very well have served this function on occasion in American constitutional law.³²

IV. THE PARTY FINANCE CASES

All of these questions and considerations converge in the Federal Constitutional Court's decision of July 19, 1966, commonly known as the party finance case. But the case cannot really be withdrawn from its proper socio-political context, anymore than *Marbury v. Madison* (1803) can be appreciated apart from the American political struggle out of which it arose. The legal context or constitutional setting of the case has already been described in detail, except for the income tax law case of 1958 that helped to generate the problem of party finance in West Germany. It will be discussed below.

A. *The Socio-Political Setting*

The civic culture of Germany has been largely one of low public participation in political affairs. Germany's tradition of parliamentary government has not been particularly strong. The driving spirit of German politics has been more authoritarian than democratic. Governmental affairs in Germany have generally been regarded as the special preserve of an elite trained for public administration in the service of the state. After the experience of the Third Reich, which actually deepened the apoliticism of the German people, the Founding Fathers of the Bonn Republic sought to institute a regime of political parties. It was hoped that such a regime, when joined to constitutional safeguards designed to obviate the crisis that befell Weimar, would invite the loyalties of the electorate and advance the democratization of German political life. To say this, however, is to beg questions with which

³² See, for example, the opinions of Justices Hugo L. Black and John M. Harlan in *Wesberry v. Sanders*, 376 U.S. 1 (1964).

the Federal Constitutional Court continues to grope. What kind of party system? A two-party system broadly representative of the electorate? A multiparty system that might cleave the electorate into opposing groups? Should parties function primarily as instruments of political integration and socialization? Who should bear the expense of maintaining political parties?

Even if the framers' blueprints for the reconstruction of Germany's party system had been clear it would be doubtful that the system could have been remade according to specification. After all political parties are primarily social formations and only secondarily creatures of law. Yet, law may guide the evolution of party systems. If, for example, law creates single-member constituencies it may promote a two-party system; if it establishes multimember constituencies where legislative seats are distributed on the basis of proportional representation it may lead to the proliferation of parties. Similarly, voting laws may facilitate or hinder partisanship. Laws which provide for closed primary elections, adopt party-column ballots, or allow straight-ticket voting are more likely to encourage voting along party lines than laws which prescribe open primaries, office-bloc ballots, and permit the cross-filing of political candidates in the primaries of all parties.³³

In West Germany the law provides that one-half the members of the Bundestag shall be elected in 247 single-member constituencies by plurality vote; the other half shall be selected from party lists on the basis of proportional representation.³⁴ But a party must obtain at least five percent of all votes in the nation to obtain seats under the list system.³⁵ These laws, devised to prevent the fragmentation of the electorate into splinter groups, seem largely to have produced their intended effect. For Germany has evolved into a modified two-party system composed mainly of Social Democrats and Christian Democrats, with the balance of power being controlled by a much smaller group of Free Democrats. It is interesting to note that this configuration seems congruent with the Christian, Socialist, and Liberal ideologies that have held sway among large sectors of the German electorate. The Federal Constitutional Court has in fact upheld the five percent clause over equal protection objec-

³³ See generally, Maurice Duverger, *Political Parties* (1951 trans. Barbara and Robert North, New York: John Wiley & Sons, 1963) and Angus Campbell *et al.*, *The American Voter* (New York: John Wiley & Sons, 1960), pp. 268-276.

³⁴ For an authoritative commentary on West German electoral law see Karl-Heinz Seifert, *Das Bundeswahlgesetz* (Berlin and Frankfurt: Verlag Franz Vahlen, 1965). An excellent treatment in English is U. W. Kitzinger, *German Electoral Politics* (Oxford: The Clarendon Press, 1960), pp. 17-37.

³⁵ Originally, seats accorded to the parties in the Bundestag under proportional representation depended solely on electoral results in the states; included in a state's delegation to the Bundestag were representatives of parties securing five percent of the votes at the state level. The current requirement of five percent of all voters in the nation makes it far more difficult for minor parties to secure representation at the national level.

tions partially on the ground that it neither obscured the visibility nor hindered the emergence of those clear and distinct opinion clusters in Germany whose scope and durability would rightfully entitle them to representation in the national legislature.³⁶ It remains to be noted that West Germany seems rapidly to be heading toward a two-party system on the American model, a conclusion that appears warranted by the demise of the Free Democrats in the federal elections of 1969, together with their elimination from parliamentary representation in Lower Saxony and Saarland and as a result of the June 14, 1970, state elections.³⁷

Equally important as law in speeding Germany toward a broad-based two-party system was the willingness of Christian and especially Social Democrats to shed dogma and ideology for programs of wide-ranging appeal. Thus law and social change converged to give Germany two strong political parties that now claim the allegiance of over 90 percent of the German people, affording Germany a large measure of political stability.³⁸

Yet, if it is the *raison d'être* of the *Parteienstaat* to create or to sponsor parties which will serve as instruments both of political education and social integration, who actually should bear the expense of maintaining political parties so as to enable them to perform these functions? Party members? But suppose citizens are unable or unwilling to support the party of their choice with voluntary contributions. What needs to be stressed in this connection is that though Germans do vote in overwhelming numbers for the two dominant parties the party system itself seems not to be a matter of national pride. Party politics is still very much the object of popular misgiving in Germany. It has been observed by close students of this matter that Germany's civic culture combines high popular knowledge of politics with low popular esteem for politics.³⁹ If this be true may it be said that parties have failed as effective instruments of political socialization, and could this failure be at least partially attributable to lack of financial support to sustain programs of political education on a year-round basis? Perhaps Germany is going through a transitional stage in her political development which would temporarily warrant some form of public support for a regime of parties. This is Justice Leibholz's main concern. His hope is that parties will serve not only as effective electoral

³⁶ See, for example, 6 BVerfGE 104 (1957).

³⁷ *Neue Zürcher Zeitung*, June 15, 1970, p. 1.

³⁸ See Lewis J. Edinger, "Political Change in Germany: The Federal Republic After the 1969 Election" and Max Kaase, "Determinants of Voting Behavior in the West German General Election of 1969" (University of Mannheim: Institut für Sozial Wissenschaft), papers delivered at New York Meeting of Conference Group on German Politics, December 11, 1969.

³⁹ Gabriel A. Almond and Sidney Verba, *The Civic Culture* (Princeton: Princeton University Press, 1963), esp. pp. 89-90, 102-103.

organizations, providing the means for peaceful transfers of power, but also as organs of political education, overcoming popular distrust of politics together with the apoliticism of the German people. If parties are that crucial to the future of German democracy why should not the state intervene in their behalf?

B. The State Income Tax Case

But how should the state intervene to support parties in performing the role specified by Article 21? One way is through tax legislation. Thus on December 21, 1954, the Bundestag amended, over the opposition of the Social Democratic Party (SPD), a federal income tax law making donations to political parties by individual citizens and corporations tax deductible.⁴⁰ The SPD-controlled state government of Hesse at once challenged the law in a proceeding before the Federal Constitutional Court. Holding that it discriminated against those parties—notably the SPD—not favored by large contributors, the Court invalidated the law on equal protection grounds. That the SPD, unlike the Christian Democratic (CDU) or Free Democratic Party (FDP), was a mass party with several hundred thousand dues-paying members made little difference to the Court. What was controlling in the case was that the state, in effect, subsidized some parties through tax legislation while other parties, based mainly on a dues-paying membership, were not in the nature of things being similarly assisted.⁴¹

There are dicta in the decision that clearly reflect the influence of Justice Leibholz, who served as *rapporteur* in the case. Corporate donations, the Court noted, might augment the influence of certain parties well beyond their actual numerical strength within the electorate, and thus distort the representation of the people's will. If such contributions are allowed to pour unchecked into party coffers, parties might well become the tools of special interest groups. The Court is not likely, incidentally, to have ignored the magnitude of the CDU federal election campaign a year earlier when expenditures, especially by the CDU, dwarfed the outlay of previous elections. This observation should be bracketed with the further notation that 1957 was the first time that Christian Democrats under Adenauer had won an absolute majority in the Bundestag.⁴²

Yet Justice Leibholz and his colleagues must have realized that the volume

⁴⁰ The personal income tax was amended by *Bundesgesetzblatt*, I, p. 441; the corporate income tax by *Bundesgesetzblatt*, I, p. 467.

⁴¹ See 8 BVerfGE 51 (1958).

⁴² Kitzinger, pp. 275-303.

of corporate contributions to certain parties is not determined solely by tax legislation. Moreover, it would have been most difficult to show that the rise in corporate contributions to the CDU in 1957 was actually occasioned by the tax law. In any case, the CDU has always been the favored party of big business in West Germany and could expect corresponding support from business.⁴³ What really seemed to trouble the Court was the lack of any auditing of party records by public officials even though Article 21 expressly states that parties "must publicly account for the sources of their funds." Up to now the Bundestag had passed no statute implementing this provision of the Basic Law. What is more, the situation was aggravated by the failure of the CDU and the FDP, in contrast to the SPD, voluntarily to publish accounts of their campaign expenditures. There was no policing of the party financing process and no way, therefore, to measure the link between parties and their sources of support. Thus, toward the end of its opinion, the Court took the unconventional step of suggesting the possibility of financing political parties out of state funds, intimating that such subventions would be constitutionally valid.⁴⁴

C. State Financing of Political Parties

The Bundestag, under the control of the Christian Democrats, proceeded almost immediately, with FDP and, surprisingly, SPD support to implement the Court's suggestion, as did several states within the German Federation. In 1959 the federal budget included an appropriation of five million marks to assist the parties in fulfilling their responsibility to form the political will of the people under Article 21 of the Basic Law. The Minister of Interior was instructed to distribute the money in an amount proportionate to each party's numerical strength in the Bundestag, the effect of which was to bar financial disbursements to parties not represented in the national legislature. Under the statute the money was turned over to the Executive Committee of each national party organization, to be spent as party officials directed, with the proviso that a report of expenditures be filed with the Federal Court of Accounts within six months after the close of the fiscal year. Thereafter, annual appropriations to political parties became the rule, with the total federal outlay increasing each year, climbing to DM 38 million (\$9.5 million) under the Federal Budget Law of March 18, 1965.⁴⁵

⁴³ Arnold J. Heidenheimer, "German Party Finance: The CDU," 51 *American Political Science Review* 369-385 (1957). See also document of the Social Democratic Party, *Die Finanzierung des Wahlkampfes 1957: Eine Untersuchung über die Abhängigkeit politischer Parteien von Wirtschaftlichen Machtgruppen* (Bonn, 1957).

⁴⁴ 8 BVerfGE 51, 62-63 (1958).

⁴⁵ For a detailed description of this and subsequent laws pertaining to party finance see 20 BVerfGE 56, 57-59 (1967).

Once again, choosing the 1965 statute as its target, the Hesse state government filed suit in the Federal Constitutional Court challenging the general validity of the subsidies. This was not, however, the first challenge to the party finance law. The All-German Party and the Bavarian Party brought cases in 1962 and 1964 assailing the validity of the provision restricting financial support only to those parties strong enough electorally to win seats in the Bundestag. Both minor parties, along with the far-right National Democratic Party (NPD), joined Hesse in oral argument before the Federal Constitutional Court in 1966.

Without digressing too far from the Court's jurisprudence, it is of some interest to note that this case generated intense feeling both on and off the Court. The interpersonal dynamics among the Justices of the Second Senate,⁴⁶ which had jurisdiction of the case, are especially noteworthy. For a time the Justices appeared to be deadlocked in view of the Court's repeated postponement of decision day. While the case was pending Justice Leibholz, in October, 1965, delivered a lecture at the University of Würzburg under the title "*Staat und Verbände*" ("The State and Interest Groups") in which he reiterated his well-known views on the *Parteienstaat*, after which he proceeded to describe the plaintiffs before the Court as an "unholy alliance of liberals and anti-democrats" working against the party state, his implication being that liberals, besieged by their traditional distrust of the state, were inadvertently assisting antidemocratic parties, notably the NPD, by undermining the Bonn democracy much as they had "conspired" to destroy the Weimar republic.⁴⁷

The remark cost him further participation in the case. For it prompted the NPD and other petitioners before the Court formally to move for Leibholz's disqualification on the ground that he could not render an impartial judgment. In a surprising judicial maneuver the Court reopened the case to hear oral argument on this particular question. The result was Leibholz's exclusion from the case by vote of his colleagues in the Second Senate, a precedent clearly at variance with the common practice in other countries of leaving such matters to the conscience of each justice.⁴⁸ Whatever the motives of Leibholz's colleagues, the Justices gave the impression that they were playing politics inside the Court.

⁴⁶ The Federal Constitutional Court sits in panels of eight justices each, called senates. What is interesting about this institutional arrangement is the fact that justices are recruited to either the First or the Second Senate. The jurisdiction of the senates is mutually exclusive. For further discussion of the internal organization of the Federal Constitutional Court see Donald P. Kommers, "The Federal Constitutional Court in the West German Political System" in Joel B. Grossman and Joseph Tanenhaus, *Frontiers of Judicial Research* (New York: John Wiley & Sons, 1969), pp. 76-80, 107-110.

⁴⁷ Gerhard Leibholz, "Staat und Verbände," *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, Heft 24 (Berlin: Walter de Gruyter & Co., 1966), pp. 6-33.

⁴⁸ The Disqualification Case was decided on March 3, 1966, 20 BVerfGE 9 (1966).

In any case, the party finance law was invalidated shortly thereafter. CDU and FDP officials greeted the decision with extreme disappointment, predicting sharp cutbacks in their staffs and year-round activities that in recent years had expanded because of the availability of state funds. The SPD, more effectively organized on the broad base of a large dues-paying membership, was not as hard hit by the decision. While leaders of the major parties declaimed decision day as "black Tuesday" minor party officials regarded it as a day of sunshine.

The Court declared that state subsidies in support of *general* party expenditures, even though for the purpose of making public opinion and shaping the political will of the people on a year-round basis, are incompatible with both Article 21 and Article 20, paragraph 2, of the Basic Law. While admitting that the income tax case of 1958 might be interpreted to permit such expenditures, the Court also reiterated that political parties are basically electoral organizations whose financial resources are to be used mainly in support of election campaigns. In an obvious compromise among conflicting judicial views the Court went on to hold that since parties are primarily electoral organizations the state may validly reimburse them for expenditures consumed by a parliamentary election campaign. The result is that public funds may be used only to defray campaign costs.⁴⁹

The reasoning of the Court represents a rather uncomplicated image of the political process. The Court begins with the old distinction between the will of the people and the will of the state. State authority emanates from the people, according to Article 20, and "is exercised by the people by means of elections and voting and by separate legislative, executive, and judicial organs." Article 21, on the other hand, is concerned with organizing the will of the people, the main responsibility of political parties. But political parties are not *ordinarily* to be regarded as constitutional "organs" within the meaning of Article 20. They do serve as constitutional organs, but only at election time when the double process of forming the will of the people *and* will of the state merges in complete unity. At this point in time parties are engaged in the vital public function expressly sanctioned by the Basic Law. When shaping the political will of the people at other times political parties are not, in contrast to Justice Leibholz's view, to be regarded as performing the function of a constitutional organ. For then they are engaged in the opinion-making business much as any other political group. The general right to influence public opinion, emphasized the Court, is protected by the free speech provisions of

⁴⁹ See Decision of July 19, 1966, 20 BVerfGE 56 (1967). My translation of the party finance case appears in Theodore L. Becker, *Comparative Judicial Politics* (Chicago: Rand McNally and Company, 1970), pp. 269-280.

the Constitution. Thus the opinion-formation or will-making process must remain completely open and unregimented. Any intrusion or infringement of this process violates the free speech imperatives of the liberal democratic state. State financing of political parties does just that. It gives the state leverage over the organization of public opinion that could undermine the principle of popular sovereignty and lead to the destruction of liberal democracy. The will of the state must be derived from the will of the people. State financing of political parties is tantamount to an unconstitutional inversion of this process.

In so ruling the Court rejected certain components of the Leibholz theory of *Parteienstaat*. The constitutional role accorded to political parties under the Basic Law does not imply state funding in support of this role. In an obvious rebuff to Justice Leibholz the Court said: "This argument implies doubts about the capacity and readiness of the ordinary citizen voluntarily to support party organizations and to render them effective instruments of political expression." Parties thus are fundamentally voluntary associations. State funding on a yearly or monthly basis, said the Court, "would not actually transform the parties into state institutions, but would force them across the boundary separating state from non-state institutions." It is not the responsibility of the state either to see to the financial needs of political parties or even to use the power of the purse to balance the competitive position of parties seeking to shape the will of the electorate.⁵⁰

In support of the federal finance law the three parties represented in the Bundestag argued that allocations under the law were essentially no different from many other kinds of subventions. Examples raised included: appropriations for the public relations activities of governmental agencies; stipends and allowances to individual members of parliament; allocations to party factions within the Bundestag; and grants-in-aid to certain nongovernmental social, professional, and cultural groups.

The Court rejected all these analogies. First, the public relations work of government agencies falls into a different category because it is informational in nature, seeking objectively to explain public policies and programs. Second, legislators are *state* officials; hence, allowances for their daily support are needed actually to secure their freedom of decision and independence. Third, parliamentary factions are entitled to state support because they are constituent units of the Bundestag, not because they are parliamentary arms of political parties. Last, grants to social, economic, and cultural groups are for nonpolitical purposes that the state recognizes as worthy of public support. The Court also rejected as spurious the distinction drawn by SPD lawyers

⁵⁰ Becker, pp. 272-273.

between funds allocated for purposes of political education and those allocated for purposes of political propaganda.

After delving into the constitutional history of Article 21 the Court concluded that the framers, while emphatically subscribing to the concept of *Parteienstaat*, did not envision the kind of nexus between party and state that such financial support would create. The principal objective of the framers in writing Article 21, said the Court, was to maintain a free and competitive party system, which was to be accomplished mainly by a proscription of anti-democratic parties along with the requirement of disclosure of party finances. Recalling the experience of the Nazi period the Court said:

The authors of the Basic Law, emphatically rejecting the ruling system of the National Socialists, anchored the legitimacy of parties in the newly created parliamentary democracy. At the same time, mindful of developments under National Socialism, the support it received from wealthy industrialists, and the destruction of all party competition in 1933, the authors of the Basic Law sought to adopt measures which would guarantee the security of liberal democracy. This purpose is served not only by Article 21, paragraph 2, of the Basic Law concerning the unconstitutionality of certain parties, but also by the provision that the internal organization of parties correspond to democratic principles and that the parties should give a public accounting of the origin of their finances. Only in the interest of securing the liberal democratic basic order did the framers impose these limitations upon the freedom of parties. Finally, the framers looked decisively toward a model of parties openly competitive and independent of the state in every regard, much as had been the case under the Weimar Constitution.⁵¹

Yet the Court went on to rule that public support of political parties would be permissible during an election campaign. "The special importance that parties have for voters," the Court noted, "constitutionally justifies state financing of those costs which are essential for the conduct of a reasonable election campaign."

Reimbursement for such costs, however, must be limited to expenditures *directly* related to an election campaign. Said the Court: "Only those specific costs which enable the parties to present their programs, aims, and purposes in the course of an election campaign may form the basis of computing total election expenditures." This computation, moreover, is not to be based on the estimates of the parties themselves; the legislature must itself formulate objective measures for determining what are appropriate election expenditures.

It remained to decide whether such subventions could constitutionally be

⁵¹ *Ibid.*, p. 274.

limited to political parties represented in the Bundestag. If the legislature elects to defray the costs of an election campaign it must be in accordance with a formula that does not offend the principle of equal opportunity. This principle is violated when the state limits such funds to the parliamentary parties. Hence, all parties which take part in a campaign are entitled to share in the distribution of such funds.

The Bundestag assumed originally that the five percent clause, if valid for purposes of parliamentary representation, would be valid as applied to party financing. Indeed, it was calculated that public financing of political parties had to be limited to parties in the Bundestag if the proliferation of parties was to be avoided. The Court did not agree, for "the legislature has already taken precautions to prevent the fragmentation of the vote and the formation of splinter parties; it is not permissible to base the allocation of campaign funds on whether a party has received five percent of all valid votes. This measure would in fact double the effect of the five percent clause, and make virtually impossible the entrance of a new party into the Parliament."⁵² This did not mean, however, that every party entering an election campaign was entitled to identical support by the state. The Court laid down two general criteria in terms of which the Bundestag might restrict disbursements to political parties. First, the legislature might make disbursements contingent on a party's receiving a minimum number of votes, but this figure must be considerably below the five percent level required for parliamentary representation. Second, if parties satisfy the threshold requirement, funds may be disbursed proportionate to a party's showing at the polls or in accord with some other formula that reasonably takes into account genuine differences between the parties.

V. IMPACT AND CONCLUSION

The Party Finance case did not wholly constitute a rejection of the view that parties are constitutionally necessary instruments for the proper functioning of liberal democracy, though one might conclude, as did Edward McWhinney, that the decision was a rejection of "a highly imaginative piece of legislation that attempted to relate the extraordinary cost of election expenses in the modern democratic state to the political reality that, if there is not to be a form of public subvention on a politically impartial basis, then the political parties will inevitably become dependent upon and subject to possible undesirable pressures from their principal financial donors."⁵³

⁵² *Ibid.*, p. 280.

⁵³ Edward McWhinney, "Federal Supreme Courts and Constitutional Review," 47 *Canadian Bar Review* 596 (1967).

To some of the Court's critics the Party Finance case revived the traditional distinction between state and society which, while perhaps analytically sound, is useless as a measure by which to calibrate deviations from a free electoral process.⁵⁴ Yet to the Court this case was not exactly an exercise in conceptual jurisprudence. The Court was faced with a genuine clash of constitutional norms and judicial views. Some justices were against all financing of political parties out of state funds. Others were prepared to uphold the law so long as minor parties were not excluded from its benefits. This was Justice Leibholz's position; though he would have approved the principle of all-purpose financing he would have rejected the statute's discriminatory provisions. Still other justices were quite prepared to accept the law as it stood. Achieving a single position supported by a majority of the Court was not to be easily achieved in these circumstances.

Maneuvering inside the Court, particularly Justice Leibholz's disqualification from the case, should not obscure the fact that both sides of the controversy could draw heavily on German political experience for support. On the one hand, the justices were too astute to be lulled into the belief that public financing of established parties on the massive scale provided by the 1965 statute might not impinge upon the independence of parties or, equally objectionable from their point of view, solidify the status quo in such a way as to strangle incipient though legitimate political movements. They might also have argued that state subsidies would reinforce the power of party oligarchies, induce laxity in the recruitment of new members, halt the expansion of the party's base of support in the electorate, and thus undermine the purpose of Article 21. On the other hand, these considerations had to be balanced against the equally cogent argument mentioned above by McWhinney, together with the view that party financing without discrimination might fractionalize the political community and undermine governmental stability.

By any standard this was a difficult case and, as frequently asserted, difficult cases do not make very good law. Out of this welter of competing values and policy alternatives the Court managed to formulate a constitutional rule; a rule which, when all is said and done, contains a good deal of practical wisdom. Though sure to generate problems for politicians the rule did seem to strike a reasonable balance between the two opposing views of *Parteienstaat* discussed earlier in this paper.

The immediate effect of the decision was to throw the whole question of party finance back to parliament. But the party finance case would not be the first instance in which a constitutional tribunal has in effect said to the legislative branch: "We have decided. Now you work out the details." Some

⁵⁴ See Laufer, pp. 512-534.

of the loose ends left untied by the Court in this case were: What is a "campaign" within the meaning of the decision? When does a campaign begin? End? Is campaigning a seasonal activity or a perpetual preoccupation? The Court seemed to intimate that "proper campaign expenditures" would include only those costs incurred in a campaign during an election year. For purposes of calculating which campaign expenditures are "proper"—that is, constitutional—campaign costs would have to be separated from other kinds of costs incurred by parties.

The Federal Constitutional Court's decision prompted the Bundestag to act almost immediately if public funding of political parties was to be restored. The parties ensconced in the Bundestag were not about to return exclusively to private sources of funding after feeding at the public trough for six years. Despite the fact that for sixteen years various interior ministers had pressed futilely for a general law on political parties to enforce the reporting, disclosure, and other provisions of Article 21, all three parties—the CDU/CSU, SPD, and FDP—on their own initiative introduced a comprehensive bill on parties that passed by an overwhelming majority.⁵⁵ Approved by the Bundesrat, it became law on July 27, 1967.⁵⁶ Besides provisions for reimbursing the parties for the cost of election campaigns, the Parties Law of 1967 contains detailed provisions relating to the 1) constitutional status and function of parties, 2) party organization and programs, 3) nomination of candidates, 4) rights of party members, and 5) unconstitutional parties and enforcement of their prohibition. The act was carefully drawn to avoid the classifications and discriminations that spelled nullification for so many state and federal laws impinging on the electoral process in the past. What the Bundestag did in effect was to codify many of the principles and rules laid down by the Federal Constitutional Court in numerous decisions since 1951. This was one of the more important by-products of the party finance case.

The finance provisions of the statute have already generated considerable litigation in the Federal Constitutional Court, all of the cases so far having been filed by minor parties outside of parliament objecting on constitutional grounds to the formulae and procedures by which parties are reimbursed for their campaign expenditures.⁵⁷ It is not yet clear which among the three major parties will benefit most from the Parties Law or, if such benefits do result, whether the disadvantaged parties would be able to claim a denial of

⁵⁵ *Verhandlungen des Deutschen Bundestages*, 5. Wahlperiode, 116. Sitzung (June 28, 1967), p. 5813.

⁵⁶ See "Gesetz über die politischen Parteien vom July 24, 1967," *Bundesgesetzblatt*, I, 773-781.

⁵⁷ On this general question see Arnold J. Heidenheimer, "Public Subsidization in West Germany and the U.S.," 16 *Jahrbuch des Öffentlichen Rechts* 367-378 (1967).

equal protection.⁵⁸ Though the Court has up to now sustained the validity of the Law's provisions it has made indisputably clear its intention to carefully examine all complaints of unequal treatment that may arise under the statute.

The Parties Law of 1967 closes the first chapter of the Federal Constitutional Court's jurisprudence under Article 21. It is a record that rivals that of the United States Supreme Court in its role as guardian of the electoral process. It is worth noting here in conclusion that the Federal Constitutional Court's decisions in the 1950's actually anticipated the Supreme Court's reversal of its policy beginning with *Baker v. Carr*,⁵⁹ to remain aloof from apportionment controversies. Whether the Supreme Court would follow a policy of abstention in the event that Congress were to pass a law similar to the German statute is hard to say. Yet in *William v. Rhodes*,⁶⁰ the ramifications of which Chief Justice Warren—in dissent—feared would be comparable to those of *Baker*, the Supreme Court touched on many of the problems that worried the German justices in the party finance case. In *Williams*, decided on October 15, 1968, the Supreme Court nullified Ohio laws that had the effect of keeping Governor George Wallace's American Independent Party off the presidential ballot, over the objection that it was within the state's power to pass reasonable regulations devised to maintain a two-party system, facilitating electoral choice, and thus to promote political stability. There are of course those who see something ominous in the likelihood that the judiciary may have given a boost to right-wing extremist movements in both countries. Yet, it is surely some cause for wonder that the top constitutional tribunals of two of the West's most powerful democracies have deemed it necessary to exert judicial power in support of minor parties, no matter what political philosophy they embody.

For Germany the Federal Constitutional Court's role is all the more remarkable in view of that country's past history, along with the erstwhile

⁵⁸ 24 BVerfGE 300 (1969) and 24 BVerfGE 363 (1969). The formula on which public subsidies are granted is based on the 1965 federal election. Total election cost computed for that year was DM 95 million (\$24 million). This sum was divided by the number of eligible voters estimated to have been around 38.5 million. The sum per voter was thus fixed at DM 2.50 or approximately 63 cents per voter. The reimbursement fund for the 1969 federal election, with nearly 39 million eligible voters, would therefore amount to around DM 100 million. Parties receiving at least 2.5 percent of all votes cast are eligible to receive reimbursement proportionate to their electoral support. The law also provides that parties may receive payments up to a certain amount in advance of the federal election, but not in excess of 60 percent of the total fund. Installments are granted beginning with the second year following an election.

⁵⁹ 369 U.S. 186 (1962). The best and most recent treatment of the Supreme Court's role in the electoral process is Richard Claude, *The Supreme Court and the Electoral Process* (Baltimore and London: The Johns Hopkins Press, 1970).

⁶⁰ 393 U.S. 23 (1968).

quiescence and conservatism of the German judiciary. What is more, the German Court's decisions have been heeded, and this would seem to bode well for the future of constitutional government in West Germany. It is, of course, true that no judicial tribunal can create a regime of parties that some members of the German Court seem to think is the quintessence of a constitutional democracy. This only Germans themselves can do. So long as the German people strive to create a working democracy and to build a truly competitive party system the Federal Constitutional Court, as this paper has tried to show, can help to insure that the political process will be harnessed to serve the broad purposes of the Basic Law.