



# Party Law in Modern Europe

The Legal Regulation of Political Parties in Post-War Europe

## Law as Politics? An examination of the interdependence between law and politics in the German Federal Republic

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## **Law as Politics? An examination of the interdependence between law and politics in the German Federal Republic**

*The legal regulation by constitutional and public law has trends to become the norm in European representative democracies. What are the implications in normative and “praxis” terms of this development? How does legal regulation influence politics and especially the instruments of politics such as political parties? The Federal Republic of Germany constitutes the first state to have embarked upon an extensive regulation by law of political parties, thus constituting itself as an example that was later to be followed by other states in Europe. In my paper I will explore, using the Federal Republic of Germany as an example, the influence that the legal regulation of political parties by law has had upon the nature of political parties, as instruments of politics, as well as over the very content of political parties as such. The influence upon the normative and formative aspects of politics that the legal regulation of political parties has will be explored as a result. Such an analysis is needed in order to understand the way that representative democracies have been evolving in the recent past and as they will in the near future. The legal regulation of political parties by constitutional and public law raises the question of the nature of political parties and the question of the relationship that exists between political parties and the state, as firstly established in the Federal Republic of Germany, which was to function as the leading paradigm for other representative democracies in Europe.*

### **Introduction**

British and American political science tended until recently to underestimate the influence that constitutional law and public law have upon the structures and working of a developed political system, Nevil Johnson wrote in 1978 (Johnson 1978). Since then, various aspects of laws that regulate politics have come under scrutiny. The impact that legal regulation has had upon the development of the “game of politics” or politics has also become repeatedly the focus of contemporary political science. The discipline of constitutional law has made its own contribution in augmenting our understanding of the interaction that is constantly taking place between constitutional law and politics. What has been missing from the literature of these disciplines of political science, constitutional theory and legal science, is the influence that the legal

regulation of politics has upon the behaviour of the political actors which participate into the “game of politics” or exercise governance in liberal democracies. Moreover, what has been missing is the exploration of the influence that legal regulation has upon the *contents of politics* and, more specifically, upon the *very nature of the instruments of politics*, such as *political parties*. By *content of politics* I refer to the normative and formative influence (i.e. the influence upon the values) that political actors participating in democratic politics present, articulate and advocate, while with *formative politics* I refer to the influence that legal regulation has upon the forms and structures these political actors are forced or encouraged to adopt, in order to conduct the political functions they perform.

What were the reasons though that led to the partial neglect of the influence that law has upon politics? The predominance of the idea of the neutrality of law as well as the absence of extensive regulation of politics by public or constitutional law in the past, as well as the distinctive character that common law has from the Roman law tradition, can be identified as two of the main reasons behind the limited attention. This way, the articulative and formative importance that legal regulation and law has upon the issues it addresses, received less attention by British and American political scientists. However, law or laws are not normatively neutral documents. They are political texts, that is texts embedded with normative ideas and values, which, through well defined institutional procedures, are elevated to the status of universal rules. As a result, far from being neutral documents, law or laws encompass normative values, ideas and presuppositions which are political to their core. In the past, these values, ideas and presuppositions that laws encompassed, constituted the main political battlefield between opposing political actors. The principles to be embedded within laws and expressed through laws constituted the most important part of the political debates that were taking place within Parliaments. Parliaments’ Acts for example that

involve questions of civil and political rights or issues that incorporate religious values within the parameters that laws established over individual and societal action are examples of such practices which characterised political debates during the 19<sup>th</sup> and early 20<sup>th</sup> century.

As the extensive regulation of politics by public or constitutional law has become the norm in contemporary European democracies (Tsatsos and Schefol et al. 1990), political parties are constitutionally acknowledged in 28 European states (Biezen and Borz 2009) while political parties themselves are regulated by 133 laws adopted in 18 states in Europe (Kyzirakos 2011). Electoral laws and more recently laws regulating the finance of political actors such as political parties can be found in every state in Europe. If the laws which provide access to political parties at public media time are included, then the picture of the extensive regulation of political parties in contemporary democracies emerges. The question of the influence that the legal regulation of political parties has had upon political parties as institutions as well as upon their individual identities as distinct political subjectivities arises if the amount of legal regulation that has taken place in all the above mentioned forms is taken into account. The exploration of an example which has constituted the paradigm of the influence that legal regulation has had upon political parties in Europe would be a useful supplement to the study of this relationship. Given the complexity of the exploration that laws and the implication of legal regulation has upon politics and political parties it is important that the reader keeps in mind that this relationship cannot be captured by a single-dimensional analysis as the legal environment is multifaceted. The reason for the need of a multiple-dimensional analysis derives, among other things, from the fact that laws besides their specific contents are composed of coercion and deliberation. This is the reason why in legal science, legal acts are categorized according to the amount of coercion they encompass. Laws that

do not include coercion and sanctions are characterized as *leges imperfectae*, not complete legal acts, while laws that include coercion and sanctions are characterized as *leges perfectae* or complete legal acts.

The coercion included in any law and the legal regulations of politics are clearly defined by the rank that each law has within the hierarchy of every legal system. Deliberation in the other hand, or to be more specific the examination of the deliberation involved and encompassed within the legal acts regulating political parties, has to be also explored. This is due to the fact that deliberation consists of the study of the events and circumstances that have provided the environment and have functioned as catalysts for the emergence of the normative and intellectual innovations which are lying in the decision to legally regulate political parties. This deliberation involved and encompassed within the laws that have been adopted, has defined the contents of the corresponding laws. As a result the study of political developments that constitute the non-theoretical conditions of theory has to be implemented, so that our understanding of the logical structures, the intellectual and normative foundations of the doctrines and the various legal and political theorizations that have emerged concerning political parties in a given country, can be comprehended.

### **Party regulation in Germany: historical experience and political dilemmas**

“Par excellence” examples of the normative and formative influence that law has upon politics are the constitutional provision and public law on political parties that have been adopted in the Federal Republic of Germany. Thus, the Federal Republic of Germany constitutes a paradigm for the legal regulation of politics and political parties. The exploration of the example of the Federal Republic of Germany will facilitate our inquest upon the normative and formative influence that the legal

regulation of political parties has upon them. The legal regulatory framework that has been created in the Federal Republic of Germany has had a profound influence upon the nature and praxis of the political actors of politics, such as political parties, which have functioned within the Federal Republic. The reason why the Basic Law of the Federal Republic, as well as the many times amended Law on political parties<sup>i</sup>, has had a profound effect over politics and political parties, is that they have had defined not only the context within which political parties had to function, but also the form that political parties had to adopt.

However, as defining the form implies defining as well the subjectivity that adopts this form, by defining the form of political parties the laws of the Federal Republic of Germany influenced the articulation of the subjectivity that was constructed when political parties came into being. The mechanism for the exercise of such an influence over the political parties that were constructed, came through the adoption of the legally defined and imposed forms which political parties had to adopt. As a result, the regulation of political parties by public law in Germany, influences the subjectivity that a political party constitutes per se. Political parties are coerced by law into adopting a specific form in order to articulate their creation and to follow specific legally defined internal procedures in order to formulate themselves as obliged by law. The newly formed political parties came to be embedded with values, ideas and symbolisms imposed or introduced to them by law from the first moments of their foundation. As in any institution, procedures are important constituent parts; such is the case for political parties. Thus, the form which defines the procedures that an institution should adopt and follow defines an important part of the institution's distinct character, even its material reality. This means that the way through which an institution comes into being defines how its distinct identity is constructed and transformed into practice. Forms, furthermore, are embedded with values; and in the

long run, if the form is retained, the values embedded become part of what the subjectivity that has been coerced into adopting the given form *is*. As a result by defining the form, the subjectivity upon which you have imposed the form via the use of the coercive power that Law has, is partly defined as well.

An observer could question the reasons why I take as fact that forms are not neutral and why I presuppose that forms themselves are embedded with values. Aren't forms just the expression of the common sense of their time? Do not forms of organisation constitute the way things are done within their proper timeframe, one could ask. Without utilising the help of the social or organizational science (Edelman and Suchman 1997; Sitkin and Bies et al 1994), let me respond to these possible questions with the use of rhetorical questions. The use of such rhetorical questions will contribute to the exploration of the motivation and political calculations that rest behind the political subjects or individuals that have been advocating for the adoption of one over another form of doing politics. Thus if forms were not embedded with values and did not have a normative influence upon the subjectivity they capture, then why did legislators think that it was so important to legislate and make the adoption of specific forms bounding for any subjectivity that wanted to participate in politics? Why multiform politics were not permitted in, for example, the case of Political parties that functioned in the Federal Republic of Germany? And why a specific form of doing politics with specific procedures and structures was promoted, imposed and made compulsory to follow for every subjectivity that wanted to participate in politics by forming a political party?

There is a further explanation of the importance of the form in politics as well as of the importance of procedures. Procedures have a highly symbolic value as they are seen, even in a theatrical way, to represent the way specific political ideologies are



embodied. The form of political parties and the procedures that they encompass have a highly educative role for the people that participate in them as well as for the people that witness or follow these events. As a result due to the highly symbolic value and the pedagogical role that the form of political institutions and their procedures play, selecting and making compulsory a specific form for doing politics constitutes a way of defining what the symbolic value of the political institutions that adopt this form will be.

By defining the symbolic value, one defines, to a large extent the impact and nature of the influence that a political institution will have upon the “spectators” of politics in a representative democratic system. Thus, by preferring one form of politics over another, and including this form in the domain of law or presenting it with the use of the language of law, the form of politics that is imposed legitimizes the normative values that are embedded within this form of politics and which are symbolically associated with a given set of politics in the public domain. Presenting a form of doing politics as the only legally legitimate way constitutes furthermore a way of delegitimizing other alternative symbolic ways and acts of doing politics. As a result the normative values that are identified with these alternative ways of doing politics are delegitimized in the public domain due to the trust and normative importance that people give to the institution of the law.

The exploration of the influence that legal regulation by public law and constitutional law has had upon politics and upon the instruments of politics that political parties constitute, cannot be conducted without an analysis of the political and intellectual dilemmas that led to the creation of the constitutional order of the German Federal Republic. The dilemmas that past experience presented to the founders of the new Republic, the different intellectual legal currents that existed, as well as the debates

that had taken place between these currents, have to be taken into account during the conduct of the analysis of the Federal Republic of Germany. Finally the praxis that the legal regulation of political parties by party law and the “case law” that the Constitutional Court’s decisions produced upon these issues have to be taken into consideration. Political calculations, party interests and tactics have to be examined as well, in order to illuminate the normative and functional influence that law has had upon politics in the Federal Republic of Germany.

The issues mentioned above that constitute the non – theoretical and theoretical conditions of the way political parties came to be understood in the Federal Republic Germany, can be interpreted and envisioned to form three interlocking circles, each consisting of issues, concepts and events. The first circle consists of the historical experience that the collapse of the Weimar Republic, the rise of the NSDAP dictatorship and the tragedy of the Second World War, has bestowed upon the formation and shaping of the institutions of the German Federal Republic as well as of the political culture that came to characterize the “Bonn Republic” (Schram 1971).

The second circle consists of the intellectual debates that took place between different schools of legal and political thought and whose legacy and influence had to be addressed during the formation of the German Federal Republic. The conflicting interpretations, theorizations and understandings of the question of “what a state is”, presented by the different schools of thought, constituted one of the major themes of these debates. Furthermore, the relationship between law and the state consisted an integral part of these debates as they explored the issues of the nature of the state and its functions, in the ways presented within the German intellectual traditions (Krieger 1957; Dyzenhaus and McCormick et al. 2000).

As political events in the Federal Republic led to the re-emergence of various schools of legal and political thought (Starck et al. 1995), particular political events – in fact, the praxis of political actors, such as political parties, with their motives, aims and actions – also have to be taken into account. As a result, the third circle will consist of the practical political issues that the Federal Republic had to face in the post War era. Such issues were the financing of political parties.

These three circles, even though distinct, at the same time interlock as the events and outcomes that took place in one circle influenced the events that took place in the following circles. Without the influence exercised by the non-theoretical conditions of theory upon the intellectual traditions and legal and political theorization, it is doubtful whether the intellectual innovation and understanding that took place in the first years in post war Germany would have materialized in the birth of a new constitutional order and a new consensus in legal and political theory and praxis.

The tasks that the founders of the Federal Republic faced were not simply due to the multiplicity of the facts, challenges and the intellectual currents that had contributed or permitted the downfall of the Weimar Republic (Kolb 2004). If the rebalancing of the Constitution of the Weimar Republic (Spevack 2002: 253), as this was expressed in the drafting of the Basic Law of the new Republic, can be interpreted as a relatively simple act, the construction of the legal intellectual tradition that would lead the new Republic was neither a simple nor a foregone conclusion (Spevack 2002). In fact, the need to reach a new consensus point concerning the legal intellectual traditions according to which the new Republic was to function (Southern 1988: 81; Stolleis 2004) and democratic politics were to be re established and successfully safeguarded, was a prominent task during the first post War years in the territories that were to become the Federal Republic. The conduct of these tasks was complicated by the

presence of a second German state, the German Democratic Republic which represented an alternative response to the same facts and normative events that had led to the collapse of the Weimar Republic (Triska 1968: 216 - 239).

In their attempt to articulate their answers to the challenges they faced, the framers of the Constitution of the Federal Republic turned to legal reasoning and the legal intellectual tradition of positive law. However, positive law had contributed to the justification and suppression of the emergence of democratic politics on many occasions in the past in Germany. Furthermore, it was due to the oppressive nature of positive law that the intellectual current of *uberspositives Recht*, super positive law, had initially emerged in Germany. It was thought the evolution of the *uberpositive Recht* that liberal movements and oppressed non – privileges social subjectivities in the 19<sup>th</sup> and early 20<sup>th</sup> century (Sheeham 1999) had found a voice and articulated their response and opposition to the justification and legitimization that positive law expressed for the monarchical government and the privilege sectors of the German Society (Blackbourn and Eley 1984: 221 – 223).

As democratization of German politics and society had evolved since the late 19<sup>th</sup> century and early 20<sup>th</sup> century and the use of natural law had declined, the new democratic political culture had amalgamated in the intellectual tradition of super positive law. *Uberspositives Recht*, became closely associated with German liberalism and the political struggles against authoritarian government. In association to the above, multiple currents attempting to accommodate and express democratic politics emerged within the tradition of positive law itself. Next to legal theorists that justified authoritarian government - for example L. Duguit and E. Forsthoff as well as in a significantly different way Carl Schmitt - one could find legal theorists, such as Hans Kelsen and Hermann Heller, whose democratic orientation of the prior and humanistic

perspective of the latter, placed them firmly against any form of authoritarian and non-democratic government (Stolleis 2004; Jacobson and Schlink 2002). As a result of this evolution, positive law in 20<sup>th</sup> century Germany had emerged not as a single unified intellectual tradition. Positive law did not perform though a single-dimensional role in 20<sup>th</sup> century German by prohibiting, for example, the emergence of democratic politics as it had done in the past.

However, it was theorists of positive law such as Léon Duguit, Ernst Forsthoff (Stoilles 2004) who presented the founders and new political elite of the Federal Republic of Germany with a troubling challenge. It was legal theorists like the aforementioned, with their emphasis on the predominance that procedural rules have for the transformation of a political act into law, which afforded justification to undemocratic political practices and governance. The disqualification of the normative contents of the law, as well as of its need to conform to some aspect of basic principles of justice, had led this intellectual current of legal theorization to justify and support the inhuman judicial practice of the NSDAP state. The fact that this disintegration of the Weimar Republic into the NSDAP dictatorship had taken place without any significant break of formal procedures (Goltz 2009), as they had been set by the constitutional and legal order of the Weimar Republic (Scheuerman et al. 2007), was a fact that had not been forgotten by the framers of the Basic Law of the German Federal Republic (Spevack, 2002).

### **Towards a new legal tradition: the Basic Law and the 1958 decision of the Constitutional Court**

The normative understanding of the state that was embedded in the Basic Law, broke a long German tradition of state - centism and replaced it with a Constitutional - centred approach (Jakab 2006) which not only limited the state and the power that it

could exercise, but also had profound effects on the practice of constitutional law and politics. Constitutional - centred understanding of the state meant that the constitutional documents and its textual references constituted the source of the law and nothing else. As a result the Basic Law, the constitutions of the *Länder* federal states and the specific textual articulation of these texts formed the methodological approach according to which law ought to be conducted. This thesis had a profound impact on the normative and formative aspects of politics in the Federal Republic as it defined how politics were to be conducted and how political parties were to conduct themselves in the new republic.

The break with the state-centred tradition in German legal thought and the adoption of a constitutional - centred approach that was adopted by the Basic Law constituted an opening of the state to the influence of social and political forces, an opening whose importance for politics in Germany cannot be emphasized enough. Having been heavily influenced in the past by the work of Georg Jellinek (Tsatsos 1985), whose legal theory presented a strict distinction between state as a representative of authority, and society (Jellinek 1994), German legal theory had adopted a thesis which privileged the state and its power over society. Thus, the state and its powers were given priority over the importance of the function of political and societal forces or movements. The political and constitutional implications of Georg Jellinek's thesis legitimized authoritarian government and especially monarchical governance. With the founding of the Federal Republic of Germany, the promotion of the isolation of the state from the influence of societal and political forces was replaced by an opening to the very forces which Jellinek had insisted that had to be excluded from exercising any influence over the government and the state.

The Basic Law, by breaking with the until then predominant German legal constitutional tradition and Jellenik's thesis, and by ending the isolation of the state from the influence of Political parties, had broken with an intellectual tradition that conceptualized political parties as representatives and advocates of particular and limited interests. The most important outcome of the constitutional regulation of political parties was the establishment of the mechanisms through which political and societal forces could influence the new German state. The opening of the state to the influence of political parties and societal forces was affected by the inclusion of article 21 in the Basic Law which elevated political parties into constitutionally defined institutions (Leibholz 1967). Furthermore, by including textual references to political parties in the new Constitution, the founders of the Federal Republic contributed to the legitimization of political parties since constitutional documents have a highly symbolic value.

However important the normative and functional innovation of the Basic Law was for German legal thinking, as it established a new party-state synthesis, the presence of antecedent legal thinking and intellectual traditions could still be felt. An example of such a normative and functional understanding that contained new and old elements of legal thinking was the 1958 decision of the German Constitutional Court (BVerfGE 8, 51) concerning the state financing of political parties. In its decision regarding whether state financing of political parties constituted a breach of democratic principles, the Constitutional Court had began the examination of the case from the thesis that political parties participate in the formation of the state as well as of the people's will, a mission allocated to them by article 21 of the Basic Law.

The Constitutional court's decision stated that political parties participate in the formation of the will of the state in their electoral capacity and, as a result, when

conducting this function they constitute electoral mechanisms. Concerning the formation of the will of society, the court stated that political parties when they participate in the formation of the will of society they exercise their functions as political institutions (Tsatsos and Morlok 1982). Furthermore, the Constitutional Court claimed that during the time period that intervenes between successive elections, political parties function according to their political and societal capacity, implying that political parties during elections constitute only electoral mechanisms (Tsatsos and Morlok 1982).

The distinction made by the Constitutional Court, between the capacity according to which political parties participate in forming the will of the state and the capacity according to which they participate in forming the will of the people, derived from Georg Jellinek's theory and the strict distinction he had drawn between the state and society. Based on this distinction, the Constitutional Court decided that the financing of political parties by the state in their first capacity as "electoral mechanisms" is desirable according to the Constitution. Antithetically, the financing of political parties in their second capacity as participants in the formation of the political will of the people is not permitted according to the Constitution (Tsatsos and Morlok 1982).

Additionally, the Constitutional Court set a number of conditions and principles that had to be met for political parties to qualify for funding by the state in their function as electoral mechanisms. The most important of these conditions was that the state had to respect the principle of "equality of opportunity" that all political parties should enjoy in regard of their funding by the state. The court had distinguished between the different normative and functional characteristics that political parties have when performing the formation of the will of the people and when the will of the state. However, the Constitutional Court's decision to spread state compensation to



political parties across a longer time period and not restrict the state funding of political parties to the period prior to elections blurred the normative and functional distinction that the court itself had made.

The constitutional regulation of political parties and their incorporation within the constitutional framework of the Federal Republic constituted the way that the framers of the Basic Law had bridged the previously prominent in German legal thought strict distinction between state and society which had isolated the state from political and societal influence. The replacement of state – centered theories by constitutional – centered theories, facilitated the opening of the state to the influence of societal forces. Thus, the democratization of the state firmly established democracy in the societal level. As the legal regulation of political parties bridged state and society, legal regulation of political parties constituted the major innovation of the new normative and functional synthesis that came to characterize the Federal Republic as was expressed by the Basic Law, the public law and the case law that was produced.

### **Article 21**

The Basic Law of the Federal Republic of Germany, article 21<sup>ii</sup>, conceptualizes political parties as citizens' associations whose aim is to formulate and gain the support of the majority of the electorate and thus the majority within the institutions of representative democracy which are responsible for the formulation and exercising of the power of the state. The formulation of the political will of society as a whole or of significant segments is conducted through the mobilization of the citizens, by the increase of their awareness and by informing them over issues that constitute the public sphere. The development of political parties and their functionality, functions as a counterbalancing act and supplementing element of the way that representative democratic politics work, as political parties constitute and provide the means through

which citizens can actively participate in the formulation of the will of their societies. By participating in the internal life of political parties citizens can influence the behaviour of their elected representatives that formulate the political will of the state through their participation within the institutional settings of their state.

According to this normative understanding, political parties constitute the means through which citizens can directly participate in the formulation of the political will of their society and exercise their indirect influence over the parliamentary representatives that formulate the will of the state. Equal opportunities in the participation and formulation of the previous mentioned wills, requires political parties to function democratically in their internal life and internal procedures. Only if democratic internal procedures are available by political parties, the opportunity to influence through participating within political parties in the formulation of the will of society and the will of the state, can be made available to all citizens. As a result of this understanding of political parties the Basic Law requires political parties to function democratically and adopt democratic internal procedures. The presence of a constitutional requirement that regulates the internal procedures and internal life of political parties derives its justification from the definition that the Basic Law provides for political parties.

The fact that the Basic Law incorporates political parties in article 21 raises the question of the nature of the political party as an institution and its relationship to the state. Are political parties as they are regulated by the Basic Law, state organs? The answer is categorically no (Tsatsos 1985). Instead, political parties as they are captured by the Basic Law constitute constitutional institutions which even though are defined by the constitution they do not constitute state organs. Political parties are seen as Constitutional institutions which surpass the state - society distinction and

bridge the state with society and vice versa. As a result of the definition given to political parties by the Basic Law, political parties are defined as the single privileged institutions and political actors which belong to both domains; that of the state and that of society, simultaneously. Due to this unique nature of theirs, political parties are institutions that enjoy constitutional status but do not constitute organs of the state as for example Parliament, the Presidency, and the Constitutional court, do (Tsatsos and Morlok 1982).

Political parties' functions and normative order can be differentiated according to the normative understanding that the Basic Law has for political parties. Different functions and aspects of the normative order that political parties as institutions consist of, can be interpreted as constitutionally regulated or as in need of legal regulation, state intervention and state support. While others aspect are interpreted not constitutionally regulated and thus not in need of further legal regulation and state support. The differentiation between the various aspects that constitute the normative order of what a political party is, as well as the differentiation between the different functions that a political party performs, can permit the distinction between which of this normative aspects and functions belong to the sphere of the state and which to the sphere of civil society. With the prior functions and norms belonging to the domain of positive law and the later rendered that they should remain outside the interference of the law as they constitute norms and functions outside the domain of the state. The duality that characterises the normative and functional order of a political party, an institution that rests between the domain of the state and the domain of society, is thus resolved.

The special understanding by the Basic Law of political parties as institutions can be traced to the influence that the three interconnecting circles, mentioned earlier, have

had over the way that political parties came to be understood in the Federal Republic. Political parties do not constitute the single actor or the exclusive subjectivity which formulates or influences the development of the political will in any society. Multiple actors such as trade unions, civil associations, citizens' initiatives, perform or contribute to such functions. However, the fact that the Basic Law selects and elevates only political parties to the special status of Constitutional institution, and does not do so with any other political actor that is present in the domain of civil society, demonstrates a normative understanding of political parties as actors which address wider societal needs and have universal approaches. The distrust for particular and narrow interests that characterized the constitutional order and political order of Wilhelminian Germany is partly retained, even though political parties are now excluded from the normative understanding of what the expression of particular interests constitutes. The place that was once preserved for political parties within the normative understanding of the Wilhelminian era is now retained for trade unions, civil associations and citizens' initiatives, while this distrust has not been transformed into direct or legal oppression of such actors of civil society.

### **Elevating representative party democracy as a value**

The question that should now be addressed is why political parties became so prominent as institutions in the Federal Republic of Germany. Post War politics in the Federal Republic were heavily influenced by the experience and lessons of the Weimar Republic. The institutional structures of the Federal Republic and the architecture of each individual institution reflected and incorporated these realities within their design. The inclusion of article 21 in the Basic Law that referred to political parties as the actors that participate in the formation of the political will of the people elevated the legitimacy of political parties above any other form of

articulation, organization and expression of the political will of the people of the Federal Republic. The experience of the banning of political parties during the era of the dictatorship of the NSDAP was expressed in the inclusion of article 21 of the Basic Law. The inclusion of political parties as the actors that participated to the formation of the will of the people in the Constitution confirmed the indispensability of political parties within Germany. Any possible future attempts to oppress political parties as had happened in the past, was now legally impossible within the parameters of the Constitution of the Federal Republic of Germany. Furthermore, article 21 of the Basic Law, functioned as an attempt to re-legitimize political parties after an era of long absence, to the minds of the electorate that was negatively prejudiced or might have been sceptical towards the re-emergence of political parties in post war Germany. After all, anti-party sentiments had been highly influential within the German public opinion during and prior to Weimar and had a strong presence within German intellectual traditions (Struve 1973). Taking the interpretation of the term political party as literally representing only a part, instead of the whole of the country (Scarrow et al. 2002) intellectual currents such as expressed by the thought of Merkel (1898) had manifested the unpopularity of political parties as institutions within German public opinion and society (Struve 1973). The constitutional reference to political parties had been consciously included in the Basic Law not only as a description of the corner stone of the new political system, but as a way to increase the legitimacy of political parties as institutions within German society. In a nation sceptical of political competition and politics, due to the events of the recent past, the pretext and preference of law provided a sense of security and assurance from previous misdeeds. By utilizing the language of law to approach the issue of political parties as institutions as well as their role within the political system established by the Basic Law, political parties intermediated by the language of law, were granted

some of the high esteem that law enjoyed within German society. The legitimacy of political parties was enhanced as the use of the language of law permitted political parties to be presented as neutral and objective institutions, inconsiderate of the contents that their ideology and political message constituted. The language of law “depoliticized” political parties as institutions and presented them to the German public as constructions of law, not as simple political and subjective constructions. Consequently political parties were encompassed with the concept of objectivity and rationality that is associated with law in the public domain.

Having dealt with the consequences that politics and the misuse of law had imposed upon society and the state in Germany during the era of the two previous regimes that had government them, the framers of the Basic Law did not restrain themselves from introducing new institutional structures. They extended the institutional designing to the contents of the institutional structures of the soon to emerged Federal Republic. The framers of the Basic Law having experienced the collapse of the Weimar Republic wanted a constitution that would not be value neutral (Spevack 2002: 497). Instead they were determined to construct a constitution which, embedded with values, would encounter ideas that opposed representative democracy and/or promoted authoritarian ideas (Spevack 2002: 497 - 498). This praxis of the framers of the Basic Law might seem to have contributed to the establishment of a “restrictive democracy”. However, taken into account the historical experience of Weimar where representative democracy was threatened both from the right and the left side of the political spectrum, as well as by the civil service elites and the judiciary, it is understandable why the framers of the Basic Law wanted to use the constitution as a document that would introduce itself the values of representative democracy within the body of the German state and society. The lack of will to protect the Weimar Republic and its democratic constitutional order, that had prevailed amount the

institutions of the state, had not gone unnoted neither had been forgotten by the framers of the Basic Law. The fact that even though a *Law for the Protection of the Republic* introduced in 1922 was never utilized by the instruments of the state against the political forces of the right which were trying and had as their declared aim the overthrow of representative democracy, was an experience that was not forgotten by the politicians which emerged as the leaders of the main political parties in post war Germany.

The direct reference of political parties made in the Constitution placed political parties above any other form of articulation and expression of the political will of the people of Germany. Under the Weimar Republic political parties were placed in the same order as associations or any other form of civil society. In the Federal Republic the Constitutional reference of political parties elevated legally as well as normatively political parties above civil society as well as of any other form of expression of the political will of the people of Germany. This placement of political parties above civil society corresponded to a normative order that differed sharply from the liberal approaches to democracy, political parties, and civil society as was to be found in the constitutions and normative understandings that prevailed in countries such as Britain and the United States. Even though parliamentary democracy constituted the essence of the Basic Law, however political parties were deliberately given a prominent rank instead of parliamentarians in formulating the will of the people. Thus, the Federal Republic of Germany emerged as a democracy of political parties in contrast to the democracies of elected representatives that the British and United States of America constitutions, advocated. The influence of the Cold War and the emergence of the one - party states in Eastern Europe further reinforced the concept of the Federal Republic of Germany as a democracy of political parties or alternatively a multiparty democracy antipodal to the democracy of the councils or one - party system states.

Interestingly enough, even though the Democratic Republic of Germany constituted in practice a one - party state, this reality was not explicitly expressed in the constitutional, legal or political order of the country.

The Constitutional Court's 1966 (BVerfGE 20, 56; Kommers 1989: 205 – 212) decision encompassed a similar presupposition to the aforementioned thesis, which saw political parties as representatives of something bigger and wider than particular or individual interests. This presupposition was consistent with the premises of Gerhard Leibholz's thesis (Leibholz 1967: 58 – 62, 69 - 71). According to this thesis, political parties articulate, formulate and represent the interests of the whole of society and function bounded by the responsibility that they have towards the state. On the contrary, civil associations and all the possible actors of civil society articulate and represent only specific, narrow based interests. Civil associations of any sort are responsible and represent the interests of particular groups. As civil associations do not represent the whole of society or the state, they do not share the same responsibilities towards the state as political parties do. It is in the interest of the state thus, to make sure that political parties are not influenced or become dependent for their finances and functions on any particular group of civil society, such as big business for example. Instead, the state should intervene in order to prevent any political party from becoming dependent to any particular actor of civil society that functions as a pressure group. Only if political parties were immunized from any excessive and unwanted influence that might derive from civil society will they be free to exercise their constitutional task of formulating the political will of the people. If the state did not intervene to immunize the influence exercised over political parties by particular actors of civil society, then the state would be in danger of being reduced into a pluralistic pressure-group state<sup>iii</sup>.



### **The legacy of the Weimar tradition**

Since political parties participate in the formation of the political will it stands to reason that the state should provide them with resources that will facilitate them to fulfil their tasks. As a result political parties in the Federal Republic were granted financial assistance by the state. However controversy existed concerning a number of issues related to party financing in Germany. The legacy of the Weimar Republic again played a significant role. State funding of political parties in Germany had been suggested for the first time in May 1928 by Gustav Stresemann, the leader of the German Peoples' Party (DVP). Gustav Stresemann feared at the time that political parties were negatively influenced by their dependency on big business contributors. He had even commented that his own party the DVP had become all but a speaker for industrial capital (Wright 2004; Turner 1963). To counter this dependency he had proposed a plan that inspired to realign the party system of the Weimar Republic and reconstruct into a new political party the political forces that existed within the liberal parties (DDP, DVP) of the day, independent liberal circles and the left wing of the conservative DNVP (Wright 2004; Turner 1963). Gustav Stresemann gave equal importance to the re articulation of the political forces mentioned above in order to produce a new political party, as well as to the introduction of state funds to political parties (Wright 2004; Turner 1963) that he envisioned as being distributed on proportional bases. The funds provided by the state would have been allocated to political parties proportionally to the number of seats that each party held in parliament.

As Gustav Stresemann said at the time:

*“The parties participate... in the government with far greater responsibility than ever before and for that reason we have an interest in keeping capitalistic power from obtaining an excessive influence over the formation of the Reichstag. It is therefore worth discussing whether the parties should not have their campaign expenses reimbursed [by the state] in proportion to the number of votes they receive.”* (Turner 1963: 255 - 256; Starkulla, “Organisation und Technik”, quoted from Hallesche Nachrichten, 22. 3.1928).

However, Gustav Stresemann’s plan for the rearticulation of the liberal and pro democratic bourgeois forces never materialised due to lack of political will among the proponents of the political forces involved and the opposition of the right wing of his own party (DVP), with which he was constantly at odds with<sup>iv</sup>, while the DVP remained as an independent but in decline political party in its own right (Jones 1988). It is highly unlikely that the governing parties at the time, 1928, would have reached a consensus and introduced state funds to political parties as Gustav Stresemann had envisioned. As Stresemann’s plan was not introduced, lacking state funding, political parties were not able to increase their autonomy from their financial backers and their funding sources. His death in 1929 put an end to the attempt to introduce state funding for political parties in Germany under the Weimar Republic.

A second legacy of the Weimar Republic that exercised a decisive influence over the emergence of the financing regime of political parties in the Federal Republic had to do with the interference of “big business” in the political process in order to promote and protect their interests. Industrialists, worried by the possibility of the Communist Party coming into power, after the 1929 economic crisis, donated significant amounts of money to bourgeois political parties in an attempt to prevent the emergence of such

a possibility. This, direct interference in party politics by “big business” further exacerbated the crisis of political legitimacy of the institutional structures of the Weimar Republic. Furthermore, the help that “big business” gave to the NSDAP during this era (Leibholz 1967: 128) led to the emergence of a political consensus in the Federal Republic that saw contributions by big business to political parties as not legitimate. The framers of the Basic Law were especially sensitive over the excessive undue influence that financial donations by big business had over political parties and within political life. They were determined to prevent such phenomena from reappearing within the political life of the Federal Republic (Spevack, 2002). As a result of this historical legacy, the constitution of the Federal Republic intended to make the sources of party finance more transparent and required all political parties to account for the origin of their funds ([GG] [Basic Law] art. 91. § 1. S.4). Transparency of party finance was a Constitutional requirement.

The adoption of the 1967 party law was an important turning point for political parties as well as party finance in the Federal Republic. The 1966 decision of the Constitutional Court had contributed to the production of such a law due to the dilemmas and problems concerning party finance that it had set and created for political parties. The CDU and the SPD had benefited from state finance of political parties as they had been established since 1959 (Burkett, 1975: 136 – 137; Merkl et al. 1989: 229 – 232; Schneider 1989: 220 - 235). The CDU had come to rely on business donations and donations from wealthy individuals (Heidenheimer 1957; Gunlicks 1988; Heidenheimer, 1968; Arnim 2000; Bunn 1960: 663), while the SPD relied primarily to the amounts that it raised through its membership fees (Kitzinger 1960: 203 - 274). Thus, in 1966 and 1967, besides dealing with the pressing legal and constitutional requirements that demanded the introduction of new legislation, the CDU was interested in trying to preserve as much as possible of the previous party

finance regime from which it had benefited while the SPD had its own political calculations that determined the party's acceptance of the 1967 Law on political parties. Payment of membership fees by the members of the SPD was the main source of income of the party. At the same time the payment of membership fees played a very symbolic part in the life of the SPD and in the relationship between the party and its members. Party dues were seen as an act of public declaration of support, loyalty and dedication to a common purpose and ideology that the SPD represented and served. As the ideology and common purpose of the party had been radically changed after the Bad Godesberg conference the leadership of the SPD feared that its traditional party members would have been alienated and thus altered their attitude and loyalty towards the SPD (Parness 1991: 1 – 36, 66 - 80). These fears of the SPD leadership never materialized (Braunthal 1983; Roberts 2006: 5, 78 - 82). Quite the opposite, the SPD enjoyed an increase of its membership and of the income that derived from this (Scarrow 1996). However, in 1967 when the Law on political parties was drafted and adopted, this course of events was not anticipated neither it was certain that events would have unfold in such a pattern. Nevertheless, the ability the SPD had to influence the content of the law while it was drafted, as the party was in government for the first time since 1935, played a significant role in determining the SPD's decision to support the adoption of the 1967 Law on political parties.

The acceptance of the introduction of state subsidies for the political parties in 1968 by the Constitutional Court (Kommers 1989: 212 – 213), in its ruling over the Law on political parties that followed its adoption by parliament, reflected the court's decision to permit political parties to determine themselves the way of their funding. The autonomy of the political parties was thus reconfirmed in practice and respected by the 1968 decisions of the Constitutional court. The constitutional status of political parties, as defined by article 21 of the Basic Law seems to have functioned as a

constrain on the Constitutional court's institutional power. As a result the court granted permission to political parties to decide themselves on issues concerning their finance. The fact that the amounts of money paid to political parties after the introduction of the 1967 Law on political parties and the 1968 ruling of the Constitutional court, were exactly the same as before (Ebbinghaus et al 1996), reconfirms the will of the constitutional court not to interfere with political parties' ability to determine their finance.

The autonomy of the political parties that their financial "self-service" attitude provided them with was thus retained. This observation does not mean that the constitutional court had a limited role in determining the financing regime of political parties in the Federal Republic. On the contrary, by ruling that the denial of state funding to individual candidates that stood for elections at single member districts, constitute a violation of equality of opportunity, the constitutional court highlighted the friction that existed between article 21 and article 38 of the Basic Law. The court tacitly acknowledged that political parties, if denied state assistance, could embark upon securing financial recourses from particular interests and big business, restrained itself from intervening further (Vanberg 2005: 151). While breaking with Leibholz's thesis, which interpreted article 38, as a consignment of a previous liberal era (Leibholz 1967: 72) the Constitutional court restraining itself from exercising the full authority that the Basic Law provided it with.

By treating political parties as institutional peers, the Constitutional court demonstrated its awareness of the dangers that a more rigorous intervention within the area of party finance could create for the autonomy of political parties and the democratic function of the Federal Republic itself. Thus, the exercising of self constrain by the constitutional court, primarily rested to its understanding of political

realities and of the paradigm that the financing of political parties during the Weimar era had presented. Retaining a restrained role towards political parties within the living embodiment of the constitutional order of the Basic Law that contemporary political and judicial practise constituted, was the way that the Constitutional court found in order to help political parties as institutions and establish political parties as equal constitutional peers to the Constitutional court itself. By keeping “equality in legal status” with political parties themselves, the Constitutional court gave prominence to the institution of political parties above all other forms of political decision making and action.

The experience of the Weimar Republic came to be reinforced by the presence of the DDR and the pro unification and pro neutrality policies that the German communist movement and the USSR were promoting at the time (Jarausch et al 1994). The policies of the communist movement and the socialist states aimed to address the will for national self-determination that was prominent in Germany. These strategies created a sense of insecurity that aggravated the mistrust that the framers of the Basic Law felt towards the institutions of civil society, as well as for any version of popular referendums or elements of direct democracy. As a result, the Basic Law excluded any instruments of direct popular participation or decision making, such as Referendums.

## **Conclusions**

The resultant of the multiple factors presented above, was the emergence of a consensus in the Federal Republic, where political parties as institutions were lifted out of civil society and placed on the boundaries between state and society. Political parties were transformed from a form of civil association to something different, to a “semi – state” institution according to Gerhard Leibholz. However, this

transformation of the institution of political parties from associations to something institutionally different, was not unique in the case of the Federal Republic of Germany. Through a long history of introduction of state statutory regulations, political parties in the United States had been transformed from associations into legal organs of the state (Leiserson 1958). The difference between the USA political parties and their German counterparts, rested on the fact that in the USA political parties were elevated to legal organs of the state mainly for the purpose of organizing and conducting elections. In the case of the Federal Republic, the elevation of political parties into constitutional institutions established political parties as the prominent and sole interlocutors of power through which society could form its political will and communicate this will to the state.

The different way that political parties were legally regulated in the case of the Federal Republic of Germany and the USA represent a different normative understanding of what political parties are. However, the differences between these two distinct normative understandings of what the institution of the political party is, expressed a different understanding of representative democracy. The new version of representative democracy established in Germany was produced through the intense clashes that the elevation of political parties into constitutional institutions and privileged interlocutors between the state and society, created with traditional liberal theory.

Due to the prominence of party over individual parliamentarians or members of legislative assemblies, the decisions in a parliamentary assembly are taken in forums that exist outside parliament itself. Political parties themselves constitute the forums within which decisions are reached, to which members of parliament are bounded to. Thus, members of legislative assemblies transfer to the parliament the decisions of

their parties. Parliament becomes thus an assembly where political parties deliberated between themselves. The will of the state is formulated by the deliberation between the political parties, as they as institutions have been elevated to the highest form of political institutions due to their constitutional status that has been awarded to them. Furthermore, the decisions of political parties are taken within the political parties themselves and not within the parliamentary parties as the normative order of British Constitutionalism requires.

Political parties are of course free to decide upon their internal architecture according to the Basic Law. However, as established by the Law on political parties, there are certain values and procedures that political parties have to embed in their ideology and forms of organisation, as well as to follow. Political parties are obliged by law to perform these tasks which have to do with their normative nature, political praxis and even their formation as distinct political subjectivities. Simultaneously, decisions within parliament are taken in an area in-between state organs and civil society, with constitutional law and public law regulating and enforcing this process. Political parties reach their decisions which contribute to the formation of the will of the state, in the exact same space within the political sphere, that the constitutional provisions of article 21 of the Basic Law places them initially i.e. between state and society. As political parties constitute the joints which bridge the state with society and *vice versa*, decisions concerning their role as mechanisms of intermediation and articulation of the “traffic” that takes place through them, are also taken on the same intermediate space that exists between state and society. As a result of this normative understanding and placing of political parties by the Basic Law, the autonomy of political parties from both state and society increases significantly. Not belonging exclusively to any of these two spheres, but being elevated to privilege actors in the



formation at the will of both, state and society, political parties find themselves influenced only by law and their own decisions and praxis.

The deliberation involved and encompassed within the laws that regulate political parties, a significant amount of which derives for political parties themselves, demonstrates that through the use of law and the legal regulation of political parties, political parties have managed to augment the autonomy that they enjoy as institutions. Solidified by constitutional and public law, political parties have managed to control the content of politics and formative politics, level the political playing field that is available within a democratic polity, while placing the keys for its possible expansion or retrenchment firmly within the hands of political parties themselves. As a result of these development, the importance that law has for the *content of politics* and *formative politics* becomes the most important outcome of the Constitutional and legal regulation of political parties in the Federal Republic of Germany.

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## NOTES

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<sup>i</sup> See Gesetz über die politischen Parteien, 24 July 1967, Federal Law Gazette I, Page 773.

<sup>ii</sup> “Political parties shall participate in the formulation of the political will of the people. They may be freely established. Their internal organizations must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds”. (GG [Basic Law] art. 21.)

<sup>iii</sup> The legacy of the Weimar Republic where the particular interests of different actors of civil society came to be given priority over the collective interests of the state or society as a whole, as witnessed by the proliferation of special interests parties, becomes evident once more.

<sup>iv</sup> The DDP and some liberal and bourgeois circles progressed to a minor, compared with what Gustav Stresemann envisioned, realignment of their political forces by creating the German State Party (DStP) in November 1930 (Frye, 1985).

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