

Democracy and the Legal Regulation of Political Parties

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By the early 1950s, democracy had achieved near universal recognition as the best available form of government, or even as the ideal form of government in a more absolute sense. At that time, the commitment to democracy was in many cases more rhetorical than practical, and in any case there was considerable dispute as to exactly what democracy means in terms of institutions and practices at the practical level (McKeon 1951). Are ‘people’s democracies’ or ‘guided democracies’ really democracies at all (Macpherson 1966)? Are ‘majoritarian democracies’ and ‘consensus democracies’ equally democratic (Lijphart 1999)? What is the proper balance of functions and activities between elites and ordinary citizens (Bachrach 1967)? Does democracy require that the distribution of citizens among demographic (ethnic, cultural, gender) groups be mirrored in the distribution of political offices (Pitkin 1967)? Should or can democratic participation be limited to those who are juridical citizens, or even among those who are citizens, to those who are in some sense loyal to the state as currently constituted or who satisfy some non-trivial standard of competence?

One thing that all of these questions have in common is that at some level the answers have implications for political parties and party systems. Moreover, as the definition of democracy has been elaborated explicitly to exclude the ‘sham democracies’, and to make explicit accommodation for the various ‘democracies with adjectives’ (Collier & Levitsky 1997), it is increasing obvious that, as Schattschneider observed, ‘the political parties created democracy and that modern democracy is unthinkable save in terms of the parties’ (1942: 1)

The debate concerning the definition of democracy and its optimal institutionalization of course continues, and questions concerning the optimal nature and role of political parties have played a large role in

that debate. Increasingly over the last half century, however, the debate concerning political parties has also moved into the realm of law. As van Biezen (2008) has shown, provisions concerning political parties have become part of the constitutions of a growing number of countries. Even when parties are not explicitly recognized as having constitutional status, many aspects of their structures, finances, and practices have become the subjects of statutory or administrative regulation. Obligations concerning states' responsibilities both to foster and to regulate political parties have found increasing prominence within the corpus of international law (e.g., 'Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE', June 1990 - Copenhagen Document).

The increased legal regulation of political parties, which in earlier times were regulated, if at all, simply as another form of private association, commonly is justified on the grounds that states must protect and enhance democracy. This often has been taken to imply an obligation to regulate or constrain the influence of all organizations in which considerable social or economic power is concentrated, a category into which political parties clearly fall. Even more, however, regulation of political parties has been justified by the recognition that parties perform a number of crucial functions in the realization of democracy, with the implications that, on the one hand, regulation of parties is justified by their particular importance, and on the other hand, that regulation is justified because parties play a role that effectively makes them semi-state rather than purely private entities.¹

Among the functions of parties in modern electoral and representative democracies are the recruitment, selection, and presentation of candidates; even in the absence of formal restrictions on independent candidacies, as a practical matter a party nomination is virtually a prerequisite for election. In most countries, parties dominate political campaigns, defining the issues (both which issues will be prominent and what positions with regard to those issues will be presented to the voters), providing most of the actual propaganda, and receiving the lion's share of media attention – and even where, as in the United States, control of campaigns is vested in, and media attention is focused on, candidates as individuals rather than parties as organizations, it is still candidates *as the nominees of the major parties* that matter. Between elections, parties play central roles in the organization of government. This is, of course, particularly obvious in parliamentary systems, but it is hardly restricted to them. Between elections as well, parties provide important venues for popular discussion of political issues and the formation of public opinion, as well as structures through

which the politically engaged citizenry can communicate effectively with their elected representatives. And at election time, parties are even more prominent in providing opportunities for politically engaged citizens to act collaboratively.

This list of functions can be both extended and elaborated in greater detail. Moving in the direction of greater generalization, however, and adopting the vocabulary of the functionalist paradigm, one can identify two particularly important complexes among these functions. On one hand, parties play a central role in performing the function of interest articulation: through their manifestos and other propaganda, they do this as 'speakers' in their own right; through their organizational structures, they provide mechanisms through which interested citizens can 'speak' for themselves as well as providing 'megaphones' by means of which other interest articulators (e.g., unions or trade associations) can make their voices be heard more effectively. They express, or facilitate the expression of, the desires and demands, the aspirations and the fears, of citizens and organizations. On the other hand, parties also play a central role in performing the function of interest aggregation (putting forward comprehensive proposals in their manifestos and later crafting compromises in the process of coalition formation) and then (at least to the extent that one accepts the appropriateness of a principal-agent understanding of democracy²) acting, and being held accountable, as the agents of the electorate in the process of governing. They decide which mix of desires and demands the government will attempt to satisfy and which will go by the board; in short, they determine who wins and who loses. Neither the individual party format, nor the party system format, that is best suited to the performance of one of these complexes of functions is best suited to the performance of the other; some compromise is necessary.

In this paper, I have two related objectives. The first is to argue that evolving standards regarding the legal regulation of political parties are excessively weighted in favour of the expressive functions of parties (articulation), at the expense of their governing functions (aggregation). The second is to argue that this bias in favour of expression is based on a vision of democracy that, whether seen as a throw-back to the pre-democratic era of the cadre party in the 18th and 19th centuries or as being in the vanguard of a move to a post-partisan nirvana in the mid 21st century, essentially assumes away politics.³ Since the claim of 'excessive' weight can only be made relative to some standard, I begin with the second argument.

Models of Democracy

The relative weight to be accorded to the two sets of functions just articulated is intimately, albeit imperfectly (because neither set of functions can be emphasized to the *exclusion* of the other) related, to a complex of three other questions. First, is there, in principle even if not in easily operationalisable practice, a unitary ‘national interest’ or a ‘volonté générale’ in the Rousseauian sense? Is there a set of policies that all would accept as optimal, if only they were sufficiently rational, sufficiently far-sighted, and sufficiently informed?⁴ Or alternatively, are the only real interests or preferences the separate interests or preferences of individuals, which may be more or less directly in conflict at any given time or on any given question, which can be aggregated into a collective decision in many different ways, and which may be more or less effectively contained, but which cannot be eliminated. Second, does the primary value of democracy follow from the idea that self-government in a reasonably literal way ‘is an essential means to the full development of individual capacities’ (Bachrach 1967: 4; see also Mill 1962 [1861]: 49-52, 71-73) or from the importance of community to moral life (Sandel 1982: 179) – or from the acceptance of the unitary public interest (Barber 1984:221), or is it that democracy is a means by which what Finer (1974) identifies as the problem of politics can be resolved while respecting the principle that each individual (or at least each adult citizen) should be considered as an equal and that fundamental liberal political rights should be respected? Third, of a different order but particularly relevant here, should political parties properly be understood as organizations of citizens and as organizations within which large numbers of citizens can and should engage in politics, or are democratic parties primarily to be understood as teams of politicians acting in concert to secure election with the primary political activity of ‘ordinary’ citizens being choice among and support of parties, but as outsiders rather than as ‘members’?⁵

The single national interest, or wholistic, position is, of course, typical of the pre-party era of western political history, in which what would later be identified as parties were instead identified as ‘factions’ that were, by their very nature, inimical to the national interest (see Scarrow 2002, 2006). But it would equally apply to Edmund Burke, who in defining party as ‘a body of men united, for promoting by their joint endeavours the national interest, upon some particular principle in which they are all agreed’, accepts the existence of a national interest, even as he suggests the legitimacy of prior disagreement concerning what that interest is. But to

quote Burke further, 'Government and Legislation are matters of reason and judgement, not of inclination; and, what sort of reason is that, in which the determination precedes the discussion; in which one sett [sic] of men deliberate, and another decide; and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?' (Speech to the Electors of Bristol, 3 November 1774) The same emphasis on argumentation is obviously at the core of the more contemporary 'deliberative democracy' school, even when translated into the realm of representative institutions; better deliberation in parliament will produce better legislation, with 'better' meaning not just legislation that is technically/professionally to a higher standard, or legislation that is more effective in producing the results desired by its supporters, but legislation that is better in the normative sense of being in the public interest, which in turn is somehow exogenously defined.⁶

The holistic view has implications for the meaning of representation and the role of representatives, and thus for the nature of parties, as well as for the purpose of elections and the involvement of individual citizens. With regard to representation, it can only be an argument for representation by 'trustees', that is, by people expected to use their own judgement to decide where the public interest lies, rather than to act as conduits for the expression of the judgement or preferences of those they represent. As Burke observed, if the representative comes to parliament already firmly committed to particular positions there is not much point in holding parliamentary debates – except perhaps as propaganda aimed at the media and the next election. While in theory the 'representative' in the holistic vision might be understood to be either the individual MP or a political party delegation (Katz 2003), almost always the emphasis is on the individual, and indeed this understanding of representation is one of the roots of prohibitions against an imperative mandate, which although expressed generically are usually understood to be directed against the idea that representatives might be required to follow the instructions of their party organizations (Janda 2009). Although the Burkean argument most often is raised with regard to the relationship between the representative and his/her constituents, it is equally applicable to the relationship between the representative and any membership organization of his/her party; the representative takes part in the parliamentary debate and the members do not. Although this is an argument against strong party discipline imposed by the party-on-the-ground (the extra-parliamentary membership organization), however, it would not necessarily be satisfied simply by limiting attention to the party as an organization of elected

politicians, if only because party discipline imposed by the party leader or caucus would be equally inimical to rational deliberation.

If, as this ideal assumes, legislative assemblies are made up of rational and public spirited men and women open-mindedly seeking the commonweal, then effective representation requires that all reasonable arguments be brought to their attention. Obviously, this is most likely to occur if those arguments are espoused by individuals who are members of the assembly, but even in the absence of such members it may be reasonable to suppose, as Canadian Supreme Court Justice Frank Iacobucci did in the case of *Figueroa v Canada (Attorney General)* [1 S.C.R. 912 [2003]], that the arguments of defeated candidates and the opinions of those who voted for them will be 'taken into account by those who ultimately implement policy, if not now then perhaps at some point in the future' (para. 44). Thus, not only debate in parliament, but also debate in the context of election campaigns, and presumably also debate within a party's membership organization, contributes to the rational identification of the public interest, and so should be as free and wide-ranging as possible – and since parties are the principal articulators of contending views, the range of parties participating in a campaign should likewise be as broad as possible. Indeed, the value of elections is seen to lie at least as much in the campaign as in the ultimate choice made on election day. While equality of citizens is, of course, important, equality of opportunity or standing for the various view points to be expressed is even more important.⁷ Moreover, even if the campaign is about policy, the choice made on election day must be about popular confidence in the would-be representative and the granting to him or her of a 'general power of attorney' – to listen to and participate in debates in parliament, before using (in Burke's words) 'his unbiassed opinion, his mature judgment, his enlightened conscience' to reach a decision.⁸

The alternative view might be identified as responsible or parliamentary party government (see Katz 1986, 1987). Debate is important for identifying and testing ideas, and for informing citizens regarding the proposals of their would-be governors. While such debate may lead to changes of opinion, either among citizens or within the governing elite, however, there is no illusion that unanimity is, in most cases, either theoretically possible or indeed even desirable. There are real conflicts of interest and values that will not be obviated by either intellect or good will. Legislation ultimately is about the aggregation of preferences rather than the weighing of arguments, and parties, rather than being united by a common view of the public interest are united by sharing, or speaking for, the same bundle

of particular interests, even if each party finds it politically advantageous to call its particular bundle the 'public interest'. In contrast to the Burkean trustee, who is trusted by the electors to do what s/he decides is right after hearing the debate and evaluating the arguments, the responsible parties representative is delegated to pursue the aims that s/he, or more accurately that his or her party, promised, and on the basis of which voters made their choices of whom to support. Election campaigns are important because they inform the voters of the programmes espoused by the contending parties (and may indeed induce some voters to change their partisan preferences), not because they lead the voters to abandon their underlying interests or values in favour of a previously unrecognized common interest, or because they lead the parties to adopt 'better' (as opposed to trying to find more popular) policies. Ultimately the primary purpose of an election is the making of a choice among parties, each of which, it is assumed, will put its programme into effect (albeit modified to reflected changes in conditions over time) if it achieves a parliamentary majority, or failing a majority, will try to advance its programme to the degree possible in coalition with other parties.⁹ Simply, in the holistic view, elections are about individual expression; in the party government view they are about collective choice, and not just choice of a local representative but choice of government, and thus also of policy, whether directly through the election of a coherent single party majority or indirectly as the result of coalition negotiations among a number of cohesive parties.

In the holistic view, the juridical legitimacy of parliamentary decisions flows from the delegation of the authority to decide to members of parliament by their constituencies, but the more substantive legitimacy of decisions flows from their acceptance as being 'right' on the basis of the arguments adduced to support them. As the name implies, in the parliamentary party government vision, the representative is the party as a collectivity. The legitimacy of parliamentary decisions flows from the fact that the parties are enacting policies, that at least the broad outlines of which have been substantively approved by the voters.¹⁰ There are no 'right' or 'wrong' policies—only policies that are preferred by more rather than fewer citizens, and that are more or less effective in achieving the aims of the coalition that supports them.

In the holistic view, democracy is primarily about reason and process, because it is argued that the deliberative process will help decision makers to 'find' the common interest. For the responsible parties view, democracy is about outcomes, primarily in terms of policy. In fact, in greater detail there are two versions of what I am calling here the responsible parties

view. From the perspective of what I have called elsewhere ‘popular sovereignty democracy’, it is about maximizing the likelihood that the policies best identified as the will of the people – defined as a majority choice – are enacted; that is, the question is what policies are *enacted*. From the perspective of ‘liberal democracy’, it is about preventing the enactment of policies that will excessively work against the interests of some groups (Katz 1997); the question is what policies are *avoided*. In either case, however, both the intellectual or moral capacities, and the preferences, of citizens (at least as they exist on election day) are taken as given, and the primary focus of citizen activity is electoral choice to put the right parties in office (or to prevent the wrong parties from being in office), and secondarily to engage in activity between elections that signals to the parties what policies will be rewarded or punished at the next election. In both cases, parties are assumed to be coherent, and to be pursuing strategies that are largely dictated by the exigencies of the pursuit of office (see especially Downs 1957; Schumpeter 1950). That is, this view is associated with the idea that parties are primarily associations of office-seekers and office-holders.

In sum, then, we have two complexes. The first complex combines the primacy of the expressive functions of parties and elections with the idea of democracy as an instrument of moral, intellectual and community development; belief in a unitary public interest to be discovered through rational deliberation; and the notion that parties are appropriately understood as associations of citizens. The second complex involves the opposites: the primacy of the decisional functions of elections; a pluralist or partisan (one might even say a ‘political’ in Finer’s terms) view of interests; the idea that parties (re)present alternative comprehensive programmes; and an understanding of parties as being primarily teams of professionals.

Regulation of Parties

Against this background, what can we say about the legal regulation of political parties? At the risk of some oversimplification, these regulations can be classified under three main headings, although in practice the regulations are generally more interconnected and overlapping in intention than this classification might suggest. The first concerns the regulation of parties as organizations, and addresses questions of membership and internal structure and decision-making (in particular, the choice of party officers and candidates and the formulation and adoption of the party’s

programme and rules). The second concerns the regulation of parties as contestants in elections, and addresses questions of campaign practices (including campaign finance), the allowable content of party programmes, and qualification for a position on the ballot as well as any other rights, privileges, or obligations accorded to parties in elections that are denied to (or not required of) individual citizens or other organizations. The third concerns the activities of parties in government, and addresses questions of patronage and other possible abuse of state resources for partisan advantage, requirements for the formation of party groups in parliament (and the advantages that accrue to them), and restrictions on party switching by MPs during a parliamentary term.

Parties as Organizations

With regard to parties as organizations, legal regulations appear to be based on some combination of three models. The first, the oldest, and the most prominent in the academic literature, sees parties primarily as organizations of candidates for office or of those who already hold office and organize in some way to coordinate their activity and maximize their influence, or perhaps a bit more broadly as organizations of candidates and/or office-holders plus their supporters. This model clearly is associated with the second of the two complexes discussed above. While it may lead to regulations concerning party activities outside of formal elections, especially those regarding the raising and spending of money, in this model these generally have been directed at politicians as individuals rather than parties as organizations, which indeed the law may not recognize at all in countries using a candidate-centered electoral systems; in list PR systems, parties must be recognized in the guise of lists of candidates, but extra-electoral organizations need not be recognized. This model effectively precludes state regulation of the internal decision-making procedures of the party. While it does not preclude the party adopting rules and having them become legally enforceable in the same way as the rules of any other private association, the default would be, as Jack Brand described the traditional constitution of the British Conservative Party (analogizing to Czarist Russia): ‘autocracy, tempered by assassination’.

In the second model, rooted in the model of the mass party of integration (although not necessarily tied to all of the sociological and ideological assumptions on which that model is based), parties are understood/defined as associations of citizens who work together on a long term basis to advance their collective interests and to secure the election of their preferred candidates. In structural terms, this reverses the

dominant/subordinate roles of party members and candidates/officials. To use a sports analogy, in the first model, party members (to the extent that such a category is recognized as extending beyond candidates or elected officials at all) are the organized boosters or ‘cheerleaders’ for the party team (Mayhew 1974), or perhaps they are the equivalent of the season ticket holders; those making decisions for the team may take the fans’ preferences into account – after all, loss of its fan base can be economically costly for a team – but the fans do not decide who will play and who will sit on the bench. In the second model, the party’s members are the analog of the corporate ‘owners’ of the team, able to hire and fire the coaches and players. Because this view recognizes the electoral/governmental role of parties, it is commonly associated with explicit requirements of internal democracy – in particular, the choice of both party officials and party candidates through a process that ultimately is legitimated by a vote of the membership. Moreover, it also tends to be associated with regulations limiting the grounds on which citizens can be denied party membership, both in general (restrictions on the categories eligible to form or be members of parties) and by a particular party (for example, prohibiting discrimination on the basis of gender or ethnicity).¹¹

In both of these views, parties are still seen as essentially private entities. In the third view, most clearly exemplified by the United States at the state level, parties are best seen as semi-public entities. While they may be recognized as having some of the rights of independent organizations, they are also implicitly understood to be exercising public functions (e.g., ‘Political parties shall participate in the formation of the public will...’ [German Basic Law, art. 21])¹² or to be part of the structure of elections rather than merely being participants in them. In this case, parties are likely to be subject to even more detailed regulation – for example, rather than merely being required to be internally democratic, their entire structure may be prescribed in detail.¹³ Parties may have no discretion at all concerning their membership.^{14,15}

The first of these models is, in effect, the default position. While it may be implicit in regulatory regimes, it requires no explicit party legislation. Parties may, however, be subject to the same regulations (for example, a requirement to have a set of standing orders, or to have its accounts subject to audit) as any private association that is given legal personality

The second model, however, is increasingly prominent both in actual regulatory regimes and in the guidelines of such groups as the European Commission for Democracy Through Law (Venice Commission). First, party regulations generally define parties as associations of citizens.¹⁶

Laws regarding the official recognition or registration of parties often specify a minimum number of members as a precondition.¹⁷ Moreover, although the requirement of a minimum number of members might be narrowly understood to be no more than a threshold of support required for eligibility to receive public resources, and hence to imply nothing about the internal rights or privileges accruing to party members, in fact, regulations often require that parties be internally democratic – thus institutionalizing the idea that parties are primarily mass membership based, rather than elite based, organizations. The Venice Commission ‘Code of Good Practice in the Field of Political Parties’ for example asserts that ‘a commitment to internal democratic functioning reinforces’ the ‘good functioning’ of democracy at the national level. The article of the German Basic Law cited above goes on ‘Their internal organization must conform to democratic principles.’¹⁸ Looking to the third model, although the structure of American national parties is largely unregulated, they are federations of state parties, the internal structure of which is in many cases nearly completely prescribed by law. And those laws, generally dating from the Progressive era, were designed specifically to empower the party base – defined not as party members in the mass party sense, but as those who have chosen to register as partisans as part of the general process of voter registration or as self-professed party supporters or voters.

The specific meaning of internal democracy in these regulations is that important decisions – in particular the selection of party candidates and party officials – be made by vote of the members. A somewhat weaker sense of internal democracy, that these decisions be made by elected representatives of the members is often accepted as adequate, but still seen as inferior.¹⁹

If the objective is to maximize the opportunities for direct participation in decision-making on the part of the maximum possible number of people, then direct internal democracy is fine. If the objective is to assure that the party is responsive to its members, then internal representative democracy within the party may be no less acceptable than representative democracy at the governmental level – although one might argue that if parties are necessary to structure effective representative democracy at the governmental level, then their functional equivalent, that is organized factions, may be necessary within parties.

If, however, the objective is effective popular choice of government, internal democracy presents a number of problems, discussed by Austin Ranney for the two party American case under the rubric of the responsible party model’s ‘little civil war about “intraparty democracy”’ (1962: 156),

but generalisable *mutatis mutandis* to multiparty systems. On one hand, the idea of internal democracy invites party members to use their votes to express their personal preferences for policies or leaders, rather than to act strategically to choose the candidates or policies that have the greatest chance of success in the general election, or the greatest capacity to negotiate effective interparty agreements²⁰. While accurate reflection of the party's constituencies' preferences is desirable at the election stage, once the election is over, the party government model requires flexibility to compromise, but internal democracy threatens those who make compromises with intraparty punishment – as illustrated in the United States by the defeat of 'responsible' politicians by more ideologically 'pure' partisans in primary elections, only to have the 'pure' partisan defeated in the general election.²¹

Moreover, unless internal party democracy results in a system in which a single winner literally takes all, it must be assumed that some party officials, and presumably some party candidates and ultimately some party holders of public office, will represent the internal party minority. Why should they be expected to act cohesively with the representatives of the internal majority – any more than the parliamentary minority is expected to act with, rather than to oppose, the parliamentary majority? But if all of the candidates of a party cannot be expected to act cohesively, how can the electorate, whose choice is naturally limited to those candidates who actually appear on the ballot, make a meaningful collective decision?

Parties as Election Contestants

Particularly in the newer and the (not necessarily the same thing) less self-confident democracies, concern that some party programmes may be subversive of the regime has led to regulation of the allowable content of a party's programme. Violation of these regulations may lead to the disqualification of the party from the ballot, or even to its dissolution and/or the banning of its officials from political activity for a period of years. Least problematic among such regulations would be those that bar the advocacy of the use of violence or other illegal means to achieve the party's objectives. Appeals to or incitement of racial or other group hatred might also be barred, although there is some question as to whether incitement to hatred must also imply incitement to violence before it becomes a valid ground for sanction. Another question concerns the permissibility of advocacy of fundamental constitutional change (abandonment of democracy, secession, etc.) by constitutional means. Related to this, as well as to the question of internal party organization more generally, would

be regulations that require a party to have an organizational presence, a significant number of members, or to present candidates within a very large proportion of the national territory, effectively as a back-door way of barring separatist parties – or even parties that seek to represent territorially specific interests without challenging the territorial integrity of the existing state.²²

A second regulatory area concerning parties as contestants in elections addresses the ability of parties to gain a place on the election ballot, and in turn to gain or retain access to other public resources, privileges or standing that are accorded to parties on the ballot – or indeed to parties *tout court*. These might relate to the size or support of the party, as indicated by votes received or members elected in a prior election, by petition signatures secured in support of recognition of the party, or by the size of the party's membership.²³ The fundamental questions are the status to be accorded to small parties (parties with unpopular ideologies or simply appealing to a very narrow interest, as well as parties appealing to a highly circumscribed subset of the electorate, such as those living in a particular locality or sharing a minority ethnicity), and the height of the obstacles to be erected against the entry of new parties into the electoral marketplace. The presumption here would be that high barriers to entry will work in the same way as an electoral system with a high threshold of representation (a strong electoral system, in Sartori's terms) to discourage the fragmentation of the party system, as a result either of the entry of new parties or of the splitting of old ones, and encourage the formation of 'big tent' parties.

To the extent that small parties are allowed to enter the electoral contest (and indeed also to the extent that not all 'major' parties are of equivalent strength²⁴), a third regulatory question concerns the balance of financial (and other) resources that will be available to them. Two aspects of this question are of particular relevance. The first concerns the permissible sources of resources – particularly money, but also other potentially valuable resources, such as in-kind contributions, the seconding of staff, or the guaranteeing of loans. Potentially restricted sources might include government contractors, all (or some types of) corporations, unions, foreign entities, and possibly citizens living abroad.

The second aspect concerns the levels of resources that parties may deploy in an election, and the amount that third parties²⁵ may deploy in support or opposition to parties contesting an election. In terms of regulatory philosophy, the major distinction here is between the 'libertarian' ideal of minimizing public regulation and accepting the resulting disparities

of resources, and the 'egalitarian' ideal of seeking a level playing field by restricting the activity of third parties, by limiting spending of and contributions to parties, by providing equal time on state (and potentially privately owned but publicly licensed) broadcast media etc. Relating back to ballot access and eligibility for special treatment, implementation of the egalitarian model requires that some threshold of eligibility be established lest parties enter the field merely to benefit from public resources.²⁶ These may be identified as restrictions on 'frivolous' candidacies, but of course the definition of frivolous remains open to dispute. As well, the rules/model may not be the same for all types of resources (for example, an egalitarian regime for the allocation of broadcast time may coexist with a libertarian regime for party spending – but coupled with restrictions on the sources of the money that parties may spend).

The general thrust of regulation – and particularly of evolving international standards regarding acceptable regulation – has been toward greater freedom of access to the ballot. The Copenhagen Document (sect. 7.5, for example) of the CSCE makes explicit reference to the right of independents to contest elections. Similarly, the ODIHR 2003 summary of 'Existing Commitments for Democratic Elections in OSCE Participating States' emphasizes ease of access to the ballot both for new/minor parties and for independents. A series of Canadian court decisions have ruled barriers to ballot access such as a monetary deposit – and especially a monetary deposit required in a large number of constituencies – not to be justified 'in a free and democratic society.' The major exception to this trend is the United States, in which barriers that often are tantamount to the statutory requirement that there be exactly two parties – and that they be the Democrats and Republicans – are common. Again, the trend is to value the expressive function of political parties, so as to increase the opportunity for citizens 'and to exercise their right to vote in a manner that accurately reflects their preferences' (*Figueroa* para. 88).

The expressive function of elections has also been privileged with regard to regulations concerning the campaign activities of third parties. In contrast to ballot access, the United States, particularly after the recent Supreme Court decision in *Citizens United v. Federal Election Commission* has probably the most libertarian regime, in that so-called independent expenditures²⁷, by corporations as well as by natural persons, may not be legally restricted. While other countries generally do limit third party expenditures – and indeed the expenditures of candidates and parties on their own behalf – there is a clear trend (often imposed by courts) toward weakening those limits, even while recognizing that the limits may be

more restrictive than those applied to candidates themselves. For example, in *Bowman v. The United Kingdom*, the European Court of Human Rights overturned a British third party spending limit of £5 as violating the free speech rights of a third party because the limit was so low as to effectively ban third party spending altogether.²⁸ In the case of *Harper v. Canada*, the Supreme Court of Canada allowed a much higher limit (CAN\$150,000 per general election, no more than CAN\$3,000 used to influence the election in a single district) to stand because, while recognizing that the limits infringed on the free speech rights of the applicants, the Court also recognized the danger that unlimited third party spending would allow well-financed interests to drown out their opponents, thus undermining the expressive (free and vigorous debate) egalitarian regime otherwise established by the Elections Canada Act.²⁹ The complementary danger – that a proliferation of spending by a large number of third parties will result in confusion, with serious arguments drowned out not by a single interest but by a general cacophony – has received less attention, although one Canadian court has recognized that danger with regard to a proliferation of candidates. (*De Jong v. Ontario (Attorney General)* 287 D.L.R. (4th) 90 [2007])

Parties in Government

Once the candidates who have been elected to parliament (or other offices) have been determined, three important questions must be addressed. First, to what extent do regulations allow the parties that then form the government to use the resources of the state for their own ends. Here there are two major categories to consider – each of which may be portrayed in a positive or a negative light, with the problem sometimes described as striking the correct balance, but actually being disagreement as to what constitutes ‘abuse of public resources.’ One category concerns patronage, that is the introduction of partisan criteria into the allocation of jobs or public contracts. In a negative light, this would appear to represent the conversion of public resources for partisan advantage, and thus to give those currently in power an unfair advantage over their challengers. In a positive light, however, patronage appears as the placing of individuals who will be sympathetic to the policy aims of those in power not just into policy-making positions, but into policy-implementing positions as well, with the aim of making government more effective. The question is where placing those who will be vigorous allies in governing into office becomes primarily a reward for partisan service, and where in turn that becomes a simple bribe.

The same kind of questions arises with regard to the other category of concern, policy. Even if there are policies that can be said in some objective sense to be in the long term public interest, there are no policies that are perceived by everyone to be optimally in his or her own immediate interest. Presumably, government policy will always be skewed toward the interests of those groups that supported the parties in power. If votes are motivated by policy, then this merely represents the fulfillment of campaign pledges. Even here, however, does there come a point at which, for example, policies enacted by labour parties that favour the interests of unions over those of capitalists become partisan abuses? But policy can be far more specific: rather than favouring unions in general, it can be drafted so as to favour a particular union over others; rather than allocating money for public works projects, it can be drafted so as to concentrate the benefits of those projects in particular places.³⁰ Again, the motivation can be the pursuit of ideologically informed policy goals that happen to advantage supporters; or the policy may be ideologically informed, but shaded so as to reward identifiable supporters; or it can be a reward for party supporters; or it can be the pay-off for benefits given to (or expected by) policy makers in their private capacity. While clearly out-right bribes, and the conversion of public resources for the private use of those doing the converting (roughly, embezzlement), are illegitimate, beyond this the question largely hangs on one's understanding of politics. If it is about the discovery of the public interest, then a politically neutral administration is appropriate, and the partisan targeting of benefits is at least questionable. If, however, politics is about building coalitions among conflicting interests, then patronage, log-rolling and the targeting of club goods and side-payments may be integral to the process.

Second, and continuing the line of argument already raised with regard to the choice of an electoral system, standards for registration or recognition as a party, for ballot access and for access to public resources, what are the conditions for the formation of a recognized parliamentary group – and what advantages do such groups have? While this is often specified in the standing orders of parliament rather than in statute law, in many ways this is a distinction without a difference. Rules of this sort have an important bearing on the resources (both financial and in terms of influence on the agenda, committee positions, etc.) available to small parties, and thus on their capacity to operate as independent entities as well as on the costs to schismatics of leaving an established party group.³¹

Third, what restrictions might be placed on the freedom of MPs to switch parties during the course of a parliamentary term? This phenomenon

is relatively uncommon in the established democracies, although by no means unknown.³² In these systems, those who switch parties are often severely criticized, but rarely sanctioned.³³ In many of the newer and non-western democracies, however, party switching has been perceived to be a greater problem, both undermining the stability of governments and preventing parties from progressing beyond the stage of personal cliques always 'for sale to the highest bidder' among would-be prime ministers. In a significant number of these cases, there has been recourse to legislative action to enforce party stability.³⁴ In general, anti-party-switching laws deprive MPs who switch parties of their seats in parliament. The question is exactly what actions trigger this loss of mandate. On one hand, is it simply leaving the party for which one was elected, or is the further act of joining another party required?³⁵ On the other hand, is it only voluntary resignation from the party, or can an MP be deprived of his or her seat on expulsion from the party?

The adoption of anti-party-switching regulations appears to be the one area in which movement is toward the aggregative rather than expressive end of the continuum, in that they appear to recognize that, particularly in list-PR systems but more generally in any functioning parliamentary system, voters are generally choosing, and thus giving a mandate to, an MP *as a representative of his/her party* and not as an autonomous individual. Nonetheless, both provisions of many constitutions, and widely accepted international norms, continue to hold, for example, that the '56. Representative mandate makes a representative independent from his or her party once it has been elected....' (Venice Commission) Particularly the international organizations have tried to justify opposition to party switching by asserting that it is usually a symptom of corruption rather than of principle. But perhaps the more fundamental question is the one left unasked – whether the idea that an MP has an independent and personal mandate is itself compatible with realistic understandings of democratic government in the modern world.

Conclusion

To summarize the argument that I want to make in a single (overly long) sentence, it is that both the trend in existing party legislation and in the guidelines and guidance for future legislation emanating from such organizations as ODIHR and the Venice Commission are derived from a conception of democracy – or more properly of bourgeois liberalism –

that effectively became obsolete with the advent of mass suffrage and the associated advent of the mass party, even as they assert the centrality of parties and assume that parties should have most of the structural characteristics of the mass party. In the pre-democratic era from which that view of government is rooted, politics was a gentleman's game. Gentlemen would pursue the national interest which just coincidentally happened to be the interest of their class, the working class not having representation in parliament to tell them otherwise. Gentlemen would be independent, taking orders neither from their parties nor from their constituents; they would use their own judgement.

In the era of the mass party, this ideal was replaced by the idea of party government, which continues to be the fundamental principle both underlying and legitimizing modern parliamentary government (Castles & Wildenmann 1986; Katz 1987). In the last decades, as catch-all parties have become cartel parties, and as all citizens have become 'middle class', there has been a growing distaste for parties and partisanship (for the idea that politics has become a sport for players rather than gentlemen), and a longing for a return to a mythical age in which public spirited gentlemen – and now ladies as well – would pursue the common interest. Bi- (or multi-) partisanship, or simply consensus democracy, are preferred to party conflict and competition. One result has been a marked decline in both party membership and in electoral turnout – trends that have been widely interpreted as indicating a serious problem for democracy. And one response frequently has been legislative action intended to increase popular participation and to reduce partisan conflict – basically, to try to move party politics in the direction of articulation, deliberation and individual expression, at the expense of aggregation and collective decision.

The problem, however, is not just a kind of philosophical inconsistency between the ideals of popular expression and deliberation on the one hand and party government on the other. It is also that the rules enacted and the recommendations made for further reforms have the capacity to be positively pernicious – to undermine, rather than to support, popular government. In particular, while opportunities to 'have one's say' may be appreciated, coordination is required in large scale societies if any voice is to be heard. Reforms to 'democratize' political parties and electoral competition may have the effect of making this coordination difficult or impossible. The most obvious examples concern policies that, in the name of openness of competition or a 'level playing field', lead to such a fragmentation of competition that the legitimacy of the outcome is undermined: the 1993 Polish election of the Sejm, with over 30% of the

vote going to parties that could not clear the 5% threshold; the 2002 French presidential election, in which fragmentation led to a second round in which neither of the candidates had received as much as 20% of the vote in the first round – and one (le Pen) could not achieve 20% in the second round either; the 2000 Canadian general election (the last before 2011 to choose a majority government), in which one party won more than 57% of the seats with less than 41% of the vote. Empowering party members can have a similarly pernicious effect – punishing political leaders for the ‘crime’ of acting responsibly. Ultimately, the question is what balance is to be struck between active participation by the relatively small number of people who choose to be politically engaged, and collective decision by the far broader range of citizens for whom politics is effectively a spectator sport. Or, put another way, the question is whether ‘democracy on a large scale is ... the sum of many little democracies’, (Sartori 1965: 124) a question to which Sartori’s answer is ‘no.’

Notes

- 1 For example, although the ‘Code of Good Practice in the Field of Political Parties’ adopted by the Venice Commission in 2008 [CDL-AD(2009)021] identifies parties as non-state agencies, it continues (pp. 16): ‘Political parties are major actors in any democratic society, hence they enjoy the benefits of the guarantees of [the rule of law, democracy and human rights] by the State, and, accordingly, they must respect and promote these very same principles’, and goes on to call for regulation in a number of areas that would be unregulated for most ordinary associations.
- 2 See Blyth & Katz 2005; Katz 2006 for reasons why one might not accept the principal-agent understanding as empirically justified.
- 3 Adapting Finer’s definition of politics as what happens when ‘a given set of persons of some type or other require a common policy; and ... its members advocate, for this common status, policies which are mutually exclusive’ (1974: 8), I understand politics to be about reaching a common policy in a way that resolves or contains this kind of conflict, whereas the alternative, a-political, view would suggest that the conflict can be dissolved altogether, or be found to have been illusory in the first place.
- 4 Note that ‘Optimal’ in this sentence is stronger than ‘Pareto optimal.’ For a decision to be optimal in the first sense, it must be the unanimous first choice; for a decision to be Pareto optimal only requires that there be no alternative that is unanimously preferred to it.

- 5 I use the quotes around 'members' to emphasize that the distinction concerns the essential nature of the party, not simply whether it has formal members, in the sense of people who take out membership cards and pay dues. For example, the traditional nature of the British Conservative Party was clearly as an organization of politicians (e.g., the party leader was chosen by – 'emerged from' – the parliamentary party alone; the party conference made recommendations and requests, not decisions), although the Nation Union of Conservative and Unionist Associations was an organization with formal members.
- 6 The idea of an exogenously defined interest – that is an outcome that is 'correct' not simply because it is what the people want, but by some standard that is separate from, and superior to, mere preferences – can be illustrated by the choice of abbots and bishops in the early medieval Catholic Church. These were elected, not because election would allow the private preferences of the voters to determine the outcome, but because the votes were understood to be the medium through which the will of God would be expressed. Hence it would be possible for even a nearly unanimous electorate to 'get it wrong', and hence also the requirement of confirmation by an ecclesiastical superior to make a canonically valid election.
- 7 In this regard, it is significant that the 'egalitarian' in the contrast between egalitarian and libertarian models of election administration seems to emphasize the equality of positions rather than of citizens, for example when it calls for equal spending per candidate, independent of the size of that candidate's support (that is, independent of the number of citizens who support him or her). See Feasby (1999, 2003); Manfredi & Rush (2008).
- 8 One difficulty with this view is to reconcile the active involvement in real decision-making on the part of citizens with the exercise of independent judgement by MPs. Ideas like deliberative polls may partially bridge this gap by allowing citizens (or at least a sample of them) to participate in parliament-like debates with the purpose not only of educating themselves and whatever other 'ordinary' citizens care to observe, but also MPs and other opinion leaders. See Fishkin 2009.
- 9 'The candidate of one of the major Parties stands for a connected policy and for a certain body of men who, if a majority can be obtained, will form a Government. This is well understood by the electors. If the Member fails to support the Government or fails to act with the Opposition in their efforts to turn the Government out, he is acting contrary to the expectation of those who have put their trust in him.' British Prime Minister Clement Attlee (1957: 15).

- 10 While ideally this might be taken to require the approval of an absolute majority of the voters, which might further be taken to require a sufficiently proportional electoral system to assure that only coalitions with majority electoral support also enjoy majorities in parliament, here it can be understood only to require a duly elected majority in parliament, with the electoral system that potentially ‘manufactures’ the majority accepted as a legitimate counting and/or weighting rule for determining whether a coalition has adequate popular support. In the most obvious example, SMP elections often produce single party parliamentary majorities that were supported by less than a majority of those voting. If one were to insist that strict numerical equality of citizens as isolated and totally autonomous individuals is required, then this would create a serious problem of legitimacy. However, if one alternatively understands citizens to be social beings whose identity is partially defined by their membership in communities, then, as Canadian Chief Justice (then Chief Justice of British Columbia) Beverly McLaughlin put it in *Dixon v. British Columbia (Attorney General)* [59 D.L.R. (4th) 247 [1989]] , ‘Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.’
- 11 For example, Article 11, sec. 4 of the Constitution of Bulgaria, which prohibits parties based on ‘ethnic, racial, or religious lines’.
- 12 Very similar language is used in article 8A of the Treaty of Lisbon with regard to parties at the European level (‘4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union’) and in Article 3 of the Constitution of Hungary (‘(2) Political parties shall participate in the development and expression of the popular will’). In a quite opaque section, the Spanish Organic Law on Political Parties says ‘although political parties are not constitutional bodies but association-based private entities, they are nonetheless an essential part of the constitutional architecture; they perform functions of primary constitutional relevance’
- 13 For example, Vermont law requires that the base unit of a political party be the town committee, elected by a town caucus that must be organized in each odd-numbered year, and in which all ‘voters of the party residing in town’ may participate (17 V.S.A. §§2301-2320). The law specifies that the town committee is to elect five officers (chair, vice chair, secretary, treasurer, assistant treasurer), as well as at least two county committee members (the

number is based on the town's vote for the party's gubernatorial candidate at the last election). The county committees elect their own five officers as well as at least two delegates (one male and the other female) to form, along with the county chairs, the state committee. In the same vein, although much less detailed in its prescription, the Romanian party law specifies that (art. 13: 1) 'The general meeting of the members and the executive body, regardless of the name given in the statute of each party, are compulsory governing forums of the political party and its territorial organizations.' and that the national 'general meeting of the members of the political party or of their representatives' be 'convened at least once every 4 years' (art. 14:1). It also requires that the organization of parties be based on territory, rather than (for example) occupation (art. 4).

- 14 In Vermont, tests of party loyalty or ideological compatibility for admission to a town caucus are specifically prohibited by law, although the law does, at least, limit each voter to participation in only one party's caucus. Obviously, verification that only the voters of a party participate in its town caucus is impossible in the context of a secret ballot. The Portuguese party law prohibits denial of membership in any party 'due to ancestry, gender, race, language, territory of origin, religion, education, economic situation or social status.' (art. 19)
- 15 In the United States, partisan registration is generally regarded as the equivalent of party membership, and since it is – at least in those states that use 'closed primaries' – the criterion for admission to participate in the selection of party candidates and officials, it satisfies at least part of the Katz & Mair definition of membership. On the other hand, however, partisan registration entails no obligations to the party, is not subject to party approval, and is generally administered by the state rather than by the party.
- 16 Note that although laws often define parties as associations of citizens, at least implicitly barring non-citizens from party membership, this in fact appears to violate Article 11 of the European Convention on Human Rights and Article 3 of the (First) Protocol, and would be particularly problematic with regard to EU nationals residing in another EU state – in which they would have the right to vote and to be elected in all but national elections. In the case of Estonia, art. 48 of the Constitution specifically limits party membership to citizens, although sect. 5 of the party law allows EU citizens who are residents of Estonia to be party members.
- 17 For example, registration requires 1,000 members in Estonia; 2,500 in Bulgaria; declarations of 5,000 voters that they wish the party to be registered in Norway.

- 18 Similarly, the Portuguese party law requires that 'Political parties shall be governed by the principles of democratic organization and management and of participation by all their members.'
- 19 '36. Whether directly or indirectly, party leaders must be democratically chosen at any given level (local, regional, national and European). This means that members must be able to vote for their selection....' Venice Commission Code of Good Practice in the Field of Political Parties.
- 20 Barber (1984) raises what is effectively the same argument against state-level representative democracy with a secret ballot – that it encourages expression of private preference rather than public judgement.
- 21 An example is the 2008 defeat of moderate Republican Congressman Wayne Gilchrist (MD-1) by hard-right state senator Andy Harris in the Republican primary, only to have Harris lose what had been regarded as a rock-solid Republican district to Democrat Frank Kratovil in the general election. An analogous case from the UK would be the 1976 deselection of Labour MP Reg Prentice by his Newham North East constituency party, essentially for the 'crime' of not being sufficiently left wing. Given the stronger role of party in British electoral choice, and the ability of candidates to switch constituencies, however, this did not cost Labour the seat in the next election. Where Gilchrist nominally remained a Republican, but publicly endorsed Kratovil in the general election, Prentice became a Conservative and was elected for the party at the next election from a different constituency (Daventry).
- 22 For example, Turkish legal scholars argue that art. 68 of the Constitution, particularly as extended by the Law on political parties, would not only bar secessionist parties, but also parties calling for a more federalized structure of government. (Venice Commission Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey – CDL-AD (2009) 006.) Secessionist parties could also be banned in Bulgaria.
- 23 For example, eligibility for public subsidy is limited in Austria to parties represented in parliament or that have received 1% of the vote; in Portugal to parties with at least one seat or that received 50,000 votes; in Canada to parties that won 2% of the national vote or 5% of the vote in the constituencies in which they had a candidate.
- 24 For example, the Liberal Democrats versus the Labour and Conservative parties in the UK, the NDP versus the Conservatives or Liberals in Canada (at least until 2011), or the FDP and Greens versus the SPD and CDU in Germany.
- 25 In this context, the phrase 'third party' is derived from contract law, and refers to individuals or organizations that want to participate in, or influence,

an election campaign without themselves being/having their own candidates. It is, thus, to be distinguished from the use of the phrase in the literature of electoral systems, in which it refers to small parties – particularly those that are not expected to finish first or second in a single-member district.

- 26 For example, it was claimed that the Canadian Natural Law Party used the advantages of candidacy to advertize its philosophy of transcendental meditation, and its related fee-based programmes, rather than to participate in debate of public issues. On a more restricted level, in the 1986 Fulham (UK) by-election a London wine merchant stood as the candidate of the ‘Connoisseur Wine Party’, using the election address that his candidacy entitled him to have delivered to every house in his constituency as a cheap (the cost of his lost £500 deposit) way to advertize his business (Rawlings 1988: 182-183).
- 27 Independent expenditures are those made in support of, or opposition to, candidate (in the US) or party (more generally) without the collaboration of, and not in coordination with, that party or candidate.
- 28 On the other hand, third party broadcast advertizing is effectively banned in Italy by a provision requiring broadcasters to identify the political party paying for it; the Belgian Law of 4 July 1989 effectively barred third party campaign spending by requiring that it be included in the allowable totals for parties and/or candidates; a 2000 report by the Israeli State Comptroller identified ‘extra-party’ propaganda as falling into the category of prohibited contributions. See GRECO evaluation of Belgium, http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3%282008%298_Belgium_Two_EN.pdf; Legge 22 febbraio 2000, n. 28; Report of the Results of an Audit of the Party Lists for the Election Period of the Fifteenth Knesset and for the Prime Minister (State Comptroller Office, January 2000).
- 29 This danger is also the basis for the widespread opposition to the US Supreme Court’s decision in *Citizens United*.
- 30 Note that this can stop well short of American congressional ear-marks, which specify a particular project to be put in a particular place by instead specifying a nominally neutral set of criteria – that just ‘happen’ to concentrate spending or other benefits in areas where the governing parties are strong, or hope to become stronger. In a famous American example, Congress specified that a particular variety of olives were to be purchased for military dining facilities; it was purely ‘coincidental’ that olives meeting those requirements were only grown in the district of one influential congressman. More generally, however, public works spending can be directed to urban transport or to rural roads, to seaports or to airports, to railways or to highways, each choice favouring one identifiable interest, and potential party clientele, over another.

- 31 For example, the programme of business of the Italian Chamber of Deputies must be agreed by the conference of presidents of the parliamentary groups (rule 23), but a party must have at least 20 deputies in order to form a group (rule 14) and therefore be included in the conference.
- 32 Recent examples would include Belinda Stronach's defection from the Canadian Conservatives to the Liberals in 2005, which allowed the Paul Martin minority government to remain in office, US Senator Arlen Specter's 2009 shift from the Republicans to the Democrats, and British Conservative MP Quentin Davies's 2007 shift to Labour. Between 1996 and 2001, 'almost one-fourth of members of the lower house in Italy...switched parties at least once' (Heller and Mershon 2005: 546), but the Italian party system was at that time clearly in a state of flux. Perhaps the most famous case of party switching was Winston Churchill's 1904 move from British Conservative to Liberal parties, only to return to the Conservatives in 1925.
- 33 Shortly after Stronach switched parties, a private members bill was tabled that would have required a by-election within 35 days of an MP leaving his or her party, but the bill was never voted upon. The Ethics Commissioner of Canada was asked to investigate whether the promise of a senior cabinet post had illegitimately induced her to switch parties; he refused, saying that even if the allegation were true (she did become Minister of Human Resources and Skills Development and Minister responsible for Democratic Renewal), it would not have been illegal.
- 34 According to Janda (2009), 14% (five [sic]) of older democracies (India, Israel, Portugal, Trinidad & Tobago), 24% of newer democracies, and 33% of semi-democracies have laws against parliamentary party defections.
- 35 For example, the Portuguese Constitution (Article 160 1.c.) specifies that an MP who joins a party other than the one for which s/he was elected loses his or her mandate; this sanction is not applied, however, if the MP merely becomes an independent. Similarly, Israeli law sanctions party switchers, with the result that those who might otherwise have switched parties remain formally in their old party while coordinating action and voting with their 'new' party. (Rahat 2007: note 25). In contrast, a member of the Thai parliament who is expelled from his/her party only loses his/parliamentary mandate if the member fails to join another party within 60 days.

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