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Reform of Parties Through Legal Regulation

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Ignoranti quem portum petat nullus suus ventus est
- Seneca, *Epistolae Morales ad Lucilium*, Epistula LXXI

The twentieth century saw the triumph of democracy as a political principle. At the beginning of the century, there were relatively few countries that would have qualified as democracies by modern standards, and relatively few that apparently wanted to be identified as democracies. By the 1950s, acceptance of "democracy" as the preferred form of government was nearly universal, at least at the level of rhetoric (McKeon 1951), and by the end of the century, after "the third wave" of democratizations (Huntington 1991), the reality appeared to be catching up with the rhetoric.

Although there were, and continue to be, many competing understandings of precisely what is meant by "democracy," at a general level a reasonable consensus emerged in the academic community - and essentially unanimous agreement among politicians, governments, NGOs, etc. - that democracy means party democracy, and that, therefore, not only are political parties a *sine qua non* of democracy, but even further the health and character of the parties are among the most important determinants of the health and character of the democracy in which they are found. There is little disagreement with Schattschneider's (1942: 1) dictum that "political parties created democracy and that modern democracy is unthinkable save in terms of the parties....The parties are not therefore merely appendages of modern government; they are in the center of it and play a determinative and creative role in it."

From this, it is only a short series of steps to conclude that if there is a problem with democracy in a country, something about the parties is most likely a cause and/or some reform of the parties is most likely a cure, and thus that adopting or reforming party laws is an appropriate means to the end of improved democracy. Most obviously, if democracy is defined and assessed in institutional terms, the most direct way to improve democracy is by improving democratic institutions, of which parties are central. Moreover, of the triad of individual and group objectives, culture, and institutions that determine political practice, institutions are the most easily changed, at least in the short run, and the most direct way to change institutions is through legislation.

This, of course, oversimplifies in two important respects. On the one hand, notwithstanding the frequent use of phrases referring to the "proper functioning of democracy" or of political parties (e.g., OSCE/ODIHR & Venice Commission 2010: 7; see also *Refah Partisi (The Welfare Party) and Others v. Turkey* (40/1993/435/514) (European Court of Human Rights, February 13, 2003), paras. 87-89.) , there is far less than complete agreement about what the "proper functioning" either of democracy or of political parties means in practice. But following from the epigraph to this paper, if effective legislation is to serve as the favorable wind for the objective of improving the functioning of democracy or parties, it would be helpful to know in advance what changes would, in fact, be improvements. On the other hand, history is replete

with examples demonstrating how difficult it can be to use changes in the law to bring about desired changes in political behavior. To cite just one example, in response to "an unprecedented public orgy of floor-crossing and unseemly bargaining, with parties and individual legislators scrambling for place, preferment, and political advantage" (Ottolenghi 2001: 109) in the Israeli government crisis of 1990, in 1992 the Israelis amended their *Basic Law: The Government* to provide for selection of the Prime Minister in a direct popular vote. The intention was to weaken the small parties and strengthen the Prime Minister by conferring a direct popular mandate. Because the reform allowed citizens to vote for their preferred prime ministerial candidate without voting for his party, however, the effect was to strengthen the small parties by increasing their vote and Knesset representation, and thus actually to weaken the Prime Minister (Hazan 2000).

These two problems – the identification of the objectives that should be pursued in any effort to reform party laws, and the choice of appropriate reforms to achieve those ends – form the basis of this paper. Before they can be addressed, however, a primary question of definition must be resolved.

Although its meaning may appear on the surface to be self-evident, the term "party law" is in fact somewhat ambiguous. While an increasing number of countries have laws that are specifically identified as party laws, for example the Chilean *Ley Organica Constitucional de los Partidos Politicos* (Ley 18603 of 1987), the absence of such an explicitly named law in other countries does not mean that parties are not legally regulated. Moreover, even when there is a "party law," it never contains all of the legal provisions relevant to parties: in particular, provisions in the national constitution, in the electoral law, and in laws governing the conduct and financing of political campaigns, as well as provisions of the standing orders of parliament, all contribute to the regulatory framework in which parties operate. At the very least, any consideration of Chilean party law would have to take account not only of Ley 18603, but also of Ley 19884 (*Sobre Transparencia, Limite y Control del Gasto Electoral*) and Ley 18700 (*Ley Organica Constitucional Sobre Votaciones Populares y Escrutinios*), as well as art. 19 of the Constitution of Chile. Rather than limiting attention to self-identified party laws,[1] the scope of this paper is defined substantively. In particular, the main subjects are: the constitutional and statutory status of parties plus the rules for the formation and official recognition of parties (what does the law regard as a party generically, and what must a specific organization do to fall into the category of officially recognized parties); regulations concerning the internal organization and core functions of parties, including the recruitment of members and the selection of individuals for positions within the party organization and to be the party's candidates in public elections; regulations concerning the economic activities of parties, both with regard to their political and organizational activities in general, and the raising and disbursement of resources in election campaigns; and, finally, mechanisms for the enforcement of these regulations, for the management of elections, and the resolution of disputes concerning parties and their activities.

As the final preliminary, in considering these questions I assume that the ultimate objective of the reform of parties through the modification of party law is to improve the quality

[1] For example, the "Party Law in Modern Europe" project (www.partylaw.leidenuniv.nl/) only includes Constitutions and laws identified as Party Laws or Party Finance Laws, but not election laws, even if they address the same substance that is, in other countries, included in the Party Law.

of democracy.[2] On the one hand, this means that many judgements concerning proposed reforms will be colored by the relative emphasis placed on the various - not entirely mutually compatible - values that are involved in the definition of democracy. On the other hand, it raises the possibility that some reforms that might be capable of producing the desired results must be ruled out because they would violate more basic democratic norms. While this paper does not attempt to identify the correct balance among democratic values, it does identify some of the trade-offs that must be confronted, as well as suggesting that excessive attention to one set of values to the detriment of others can be damaging to democracy.

Parties and Democracy

Once attention shifts from "democratic or not?" to "better democracy or not as good?", the near consensus that democracy is what results when multiple political parties compete for power in free and fair elections is no longer adequate.[3] Rather, one must address a number of questions about the specific nature and purposes of elections, parties, representation, and democracy.

The first question concerns the meaning of democracy itself. Even if we accept Lijphart's (1999:1) "most basic and literal definition of democracy – government by the people, or, in representative democracy, government by the representatives of the people"– one of the most basic questions of political theory remains, glossed over, but not really addressed by Lijphart's distinction between "majoritarian" and "consensus" democracy. Is there in principle, even if not easily discovered in practice, a unitary "common interest" or "volonté générale" in the Rousseauian sense? Is there some bundle of policies that everyone would accept as optimally in the common interest, and *therefore* in their own interest, if only they were sufficiently rational, sufficiently far-sighted, and sufficiently informed?[4] Or alternatively, are the only real interests or preferences the separate private interests or preferences of individuals, which may be more or less directly in conflict at any given time or on any given question, and which can be aggregated into a collective decision in many different ways, with the conflicts more or less effectively contained, but never completely eliminated?

The second question, also glossed over in the distinction between majoritarian and

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[2] This is not to deny that many reforms have been motivated wholly or in part by a desire on the part of those with the power to impose those reforms to benefit themselves, if only by making their hold on power more secure. (See, for example, Benoit 2004: 363, which hypothesizes that "electoral laws will change when a coalition of parties exists such that each party in the coalition expects to gain more seats under an alternative electoral institution, and that also has sufficient power to effect this alternative through fiat given the rules for changing electoral laws.") Nonetheless, even when the "real" motivation for reform is self interest, the public justification is generally in terms of the public interest and the quality of democracy.

[3] This aside from the fact that the concept "free and fair" as applied to elections is itself more problematic than is generally recognized. See, for example, Katz 2005.

[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. Note also that the idea of a common interest means more than simply the possibility that those who would otherwise lose in, or dissent from, a decision might be brought around through "side-payments".

consensus democracy, concerns the underlying justification for democracy. If, as Schumpeter (1962: 242) says, democracy cannot be valued as an end in itself, but only because of the results it is expected to produce, what are the values that democracy is supposed to advance? While there are many possible answers to this question, here it is sufficient to focus in particular on two. (For a more elaborate discussion of these values, and two others, see Katz 1997). On the one hand, democracy may be expected to produce government actions that are more, and more reliably, in accord with the "will of the people" than any other political arrangements.[5] In this case, the people are directing what the government *should do*. On the other hand, because democracy gives power to the people, it may be expected to enable them – and more specifically, it may enable groups within the overall people – to protect themselves against the government. In this case, the people are *limiting what the government can do.* The contrast between these two views becomes apparent when one considers the possibility "that a majority of the whole will have a common motive to invade the rights of other citizens" (Madison, *Federalist* No. 10: 61); in that case, simply empowering the majority to direct the government offers little protection to a minority that needs to be protected from oppression by the government, whether understood as a separate and potentially exploitive interest in its own right, or merely as the instrument of a potentially exploitive majority.

The third question concerns the nature of representation, and the role of representatives, particularly in representative assemblies. This addresses the classic distinction between representatives as delegates and representatives as trustees. Delegates are expected to advance and defend the preferences of those who elected them, whether that is understood, as generally in the United States, to mean the voters in their particular districts or, as more common in Europe, the voters for their particular party. A trustee, on the other hand, is expected to use "his unbiassed opinion, his mature judgment, his enlightened conscience" to contribute to finding the national interest.[6] Within the conventions of modern electoral politics, the would-be delegate in the course of the election campaign promises to adhere to particular policy positions, and his/her election is understood to confer a popular mandate to do precisely those things. The would-be trustee, on the other hand, promises at most a general philosophy, and his/her election confers a mandate to do his/her "best for all, without fear or favour, without class or party bias, without

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[5] This statement, of course, leaves unanswered the thorny question of how the "will of the people" is defined or identified. Here, I assume first that the "will of the people" is an aggregation of the individual wills of the citizens (on the one hand, if there were to be unanimity, it would be what Rousseau would have called "the will of all" rather than the "general will", while on the other hand I specifically rule out the idea that, as in the electoral theory of Roman Catholic canon law, the individual wills of citizens (in the Catholic case, the cardinal electors) are merely a vehicle through which some higher and extrinsically determined "correct" decision (in the Catholic case, the will of God) can be found, and second that the "will of the people" is identified as the will of the majority.

[6] The phrase cited, as well as the idea that, although a trustee should be attentive to the interests of this constituents, his primary responsibility is to the national interest, come from Edmund Burke's Speech to the Electors of Bristol, 3 November 1774. It is also possible to think of a trustee as one who uses his or her own judgement, rather than their expressed preferences, to identify and pursue the particular interests of his or her constituents (whether defined by locality or by party) rather than the national "common interest". See Wahlke et al. 1962.

rancor or spite....."[7]

The fourth and fifth questions also concern the meaning of representation, in this case (fourth) the relative importance of demographic or descriptive representation versus representation based on policy preferences or ideology, and (fifth) the relative importance of proportionality in the representation of either demographics or ideology, on the one hand, versus either adequate representation of a wide range of groups and interests (which may be achieved for small groups only by numerically over-representing them[8]) or assuring an adequate share of the mandates for the majority to govern effectively (even at the expense of numerically under-representing the minority), on the other hand. To put these questions simply in terms gender by way of example, (fifth) how important is it that the proportion of women in the legislature or in the cabinet approximate women's share of the population? And (fourth) are women better represented by a pro-feminist man or by an anti-feminist woman?[9]

The sixth question concerns whether an election is properly understood as a choice of representatives or as the choice of a government. Put in the terms of the functionalist paradigm, are elections, and the competition of parties/candidates in them, primarily implicated in the function of interest articulation or alternatively in the function of interest aggregation. On the one hand, candidates and parties articulate interests as "speakers" in their own right through their manifestos and other propaganda; through their organizations, 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, groups, businesses, and so forth. On the other hand, candidates and 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 democracy) acting, and being held accountable, as the agents of the electorate in the process of governing. They decide which

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[7] Winston Churchill at the 1949 Annual Conference of the British National Union of Conservative and Unionist Associations, quoted in Beer (1969: 99).

[8] For example, if there is some critical mass required for effective representation (for the sake of argument, perhaps five members), then in a legislature of 150 members (again for the sake of argument, in this case the size of the Dutch Tweede Kamer), then a group smaller than 3% of the population could only be represented effectively if it had more than 3% of the seats. Whether this is a significant point depends on how many groups are to be represented, and how fine the categorization of the population is to be. It also depends on the size of the body in which descriptive representation is desired. In particular, if even two members of a group are required for effective representation in a cabinet of 15 members (as big as the cabinets of eight European countries), then any group that is less that 13.3% of the population would have to be numerically overrepresented in order to be effectively represented in this demographic sense.

[9] This, of course, ignores the possibility that actual membership in the demographic category that is so constitutive of personality, interests, and opinions that only descriptive representation by actual members of the demographic category themselves can achieve the purpose of the effective substantive representation of their perspective and interests. See, for example, Phillips 1995.

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. More generally, are elections and election campaigns about discussion (articulation) or about decision (aggregation)? In more concrete terms, should the choice of government (both parties and policies) be the relatively direct result of the electorates' choice on election day, or is the point of an election merely to establish the relative weights of those who will make these choices in negotiations after the election? While these functional objectives are most directly in conflict in parliamentary systems, in which a single popular vote both chooses representatives and sets the parameters for government formation, the conflict is also relevant in presidential systems, especially to the extent that presidential and legislative (congressional) votes are tied to one another.

Seventh, what is the appropriate role for citizens in the electoral process broadly understood? Should they be active participants in the contest, or rather is their role primarily that of judge and jury – listening to the arguments, perhaps evaluating those arguments in discussion with other citizens, but not trying to tell the primary interlocutors what to say. Related directly to this, and particularly relevant in the context of party reform, what is the proper understanding of "political party" in the first place? Is it best understood to be a team of politicians seeking to control the levers of power by winning elections (i.e., candidates and elected officials) supported by a penumbra of members and other supporters, or is it primarily an association of citizens, rooted in civil society, and (as the primary difference between a political party and any other societal organization) putting forward candidates for elective office? To use a sports analogy, in the first conception, party members (to the extent that such a category is recognized as extending beyond candidates or elected officials at all) are the organized "cheerleaders" for the party team (Mayhew 1974); in the second conception, they are the corporate "owners" of the team. And finally, should elections be seen as contests among parties or among candidates, or posed a bit less starkly and more realistically, are voters properly understood to be choosing among parties, each of which has particular individuals as its standard bearers, or rather are they choosing among individual candidates, each (or most) of whom are associated with political parties?

The "correct" objectives of party laws, both for the nature of individual parties and for the nature of the party system as a whole, depend on the answers to these questions. But they also depend on the assumptions that one makes about the nature of society. Moreover, they may vary with the broader institutional arrangements of the polity. In particular, in a society with deep social cleavages, it may be important to develop party institutions that will either bridge the cleavages or mitigate the conflicts and to provide checks against an over-reaching majority, whereas in a more homogeneous society it may be more important to clarify issues so that the majority can reach a meaningful choice; in a presidential system, it may be more important to guard against situations in which political deadlock in the parliament leads to excessive concentration of power in the presidency, whereas in parliamentary systems (as illustrated by the Israeli example above) it may be more important to assure a strong and effective executive.

All of these questions have been posed as stark dichotomies, but they define what are better understood as the ends of continua. In practice, neither extreme would be a satisfactory answer by itself. It is hard to imagine a society so unanimous in its interests and desires and made up of citizens so tightly bound by identification with one another, that a single national interest would be universally accepted unless agreement were imposed by force,[10] but on the

[10] The situation of which James Madison wrote that "It could never be more truly said

other hand, it is hard to imagine how a society with no common interest or bonds of affection to encourage self-restraint by those in power could long endure as a democracy. Unrestrained majoritarian democracy is likely to degenerate into populist tyranny, but excessive protection against government deprivation of rights may simply entrench private exploitation.[11] Parties in every system must both articulate and aggregate interests, although the relative priority given to these functions in the drafting of party laws may vary. Each individual representative actually plays many roles and represents in many ways, and even more the effective working of democracy requires that a mix of representative types coexist, rather than that only one predominate; etc.

Party Laws

For most of their history, political parties were understood in political theory, by political scientists, and in public or constitutional law to be external to the state. Particularly in pre-liberal states, parties were often, and accurately, seen as subversive of the political order as institutionalized in the then existing constitutional arrangements. In early liberal regimes, parties were generally seen as sinister combinations or factions, that is as groups or organizations of citizens intent on pursuing their private advantage at the expense of their fellow citizens and of the common interest, which it was the job of the state to protect. With the increase in importance of representative assemblies, on the one hand, and the expansion of suffrage, on the other, the legitimacy and necessity of the kind of organization that political parties embody both in parliament and in the electorate came to be widely accepted. But even if parties were no longer seen to be antithetical to the existing state, they were still understood to be separate from it. Parties were understood to be organizations that were firmly rooted in civil society: articulating and aggregating demands from society; channeling political participation by citizens; recruiting and certifying contenders for representative offices – but still clearly private associations. With the advent of proportional representation, parties of necessity were recognized in law, but generally only as organizations of candidates, and as such they could be assumed to disappear immediately after the results of an election were determined.

Parties came to be recognized in the practices, if not necessarily in the formal rules, of parliaments beginning in the early 19th century. For example, the "position" of Leader of the Opposition originated in the British House of Commons in the Parliament of 1807 - although the position was not recognized in law until the Ministers of the Crown Act of 1937. In the United States, party caucuses in Congress decided on presidential nominees as early as 1796, and the first of the party congressional campaign committees (the Union Congressional Committee – now the National Republican Campaign Committee) emerged by 1866 (Kolodny 1998: 17), although the first official recognition of parties in the rules of the House of Representatives does not appear to have happened until 1909 (Sarah Binder, personal communication). Even once party groupings were recognized in parliaments, however, they still were generally understood to be voluntary associations of independent MPs, answerable only to their individual consciences or

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than of [this], that it was worse than the disease"

[11] For example, excessive attention to individual property rights (limitations on public "takings" in American parlance) might prevent the government from protecting down-stream populations for the costs of up-stream dumping into rivers.

constituencies, or to the nation as a whole, rather than to their parties.

On the other hand, for parties to exist in any formal sense outside of government, they, like all associations or corporations, must have legal personality so that they can have bank accounts, contract for services, own or rent premises, and so forth. Until well into the 20th century (somewhat earlier in the United States), parties generally were regarded simply as one more class of private association, and accorded no special status or recognition – unless it was to limit them as potential sources of subversion or corruption. As van Biezen (2008) points out, for example, the constitutions of the Weimar Republic and of pre-war Austria include mention of parties, but primarily with reference to assuring the political neutrality of civil servants and judges. Constitutional prohibitions of an "imperative mandate" can reasonably be understood as negative recognition of parties.[12] Other early constitutional references to parties were essentially by-products of constitutionalizing proportional representation as the country's electoral system (e.g., article 31 of the 1944 constitution of Iceland), although the Finnish example shows that it is possible to implement PR without legally recognizing the existence of durable organizations that nominate or support candidate lists and without ever using the phrase "political party" (Törnudd 1968: 36).

Specifically identifiable party laws, that is, "laws specifically designed to regulate the life of party organizations" (Müller and Sieberer 2005: 435), were widely enacted in the United States during the Progressive era (roughly 1890-1930), although when compiled, they were generally classified under the heading of "electoral law"; in Europe, extensive party laws were adopted in a few countries in the1960s and 1970s (Germany: 1967; Finland: 1969; Austria: 1975; Spain 1978 [Avnon 1995: 287] as well as Portugal: 1977) and again in the years following the fall of the Berlin Wall (Bulgaria: 1990; Czech Republic: 1991; Estonia: 1994; Hungary: 1989; Lithuania: 1990; Macedonia; Poland: 1990; Romania: 1996; Russia: 2001, but also Israel: 1992 and the UK: 2000 [Karvonen 2007: 451-453]). Early party laws in Latin America include those of Venezuela (1965) and Argentina (1982).

As Karvonen (2007: 442-443) observes, Avnon's (1995: 296) association of the enactment of party laws with experience of democratic collapse was questionable (with two exceptions in seven cases) even when advanced, and is clearly inadequate with the rapid spread of such laws in the late 20th and early 21st centuries. While the desire to prevent (the recurrence of) democratic collapse by limiting the range and activities of political parties clearly has been one impetus for the enactment of party laws, another has been the need to rapidly build and regularize the institutions of democracy in countries with limited or no prior experience with democratic government. In established democracies, the institution of state subventions to parties, and in some cases (e.g., the UK or Canada) the decision to include official party designations on election ballots, required specifying who would be entitled to subventions or to control of the use of party names – in other words, to define party as a category distinct from other associations. Indeed, with the spreading acceptance of the general principle that important institutions should be governed by explicitly tailored legislation, party laws increasingly can be seen as part of the "normal" corpus of legislation, something that every self-respecting country

[12] From the other side, the so-called imperative mandate (Імперативний мандат) in the Constitution of Ukraine from 2006 to 2010 required members of the parliament to remain members of the parliamentary faction for which they were elected.

ought to have.[13] Agencies providing assistance to countries seeking to establish democratic regimes or to assure that their laws conform to internationally accepted standards of democratic practice have increasingly added party laws to their portfolios.

The Legal Definition and Status of Parties

The most basic element of any party law is a definition of "political party", that is the specification of the phenomena to which the law is to apply. These definitions can be seen as having two aspects. On the one hand, they either explicitly or implicitly (particularly from context) identify the general nature of party – how is the genus "party" distinguished from other types of organizations. On the other hand, they established criteria that any particular organization must satisfy in order to be legally recognized as a party and (with these criteria often more strict than those of simple recognition) to receive benefits, or to be subject to extraordinary requirements/limitations.[14]

With regard to the general nature of party, one can identify two basic dimensions. The first dimension concerns whether parties are understood to be exclusively private organizations, firmly rooted in civil society and fully separate from the state, or whether parties are, at least in some respects, state or semi-state institutions. The second dimension concerns the "elements" that make up a party – in particular, whether parties are understood, on the one hand, to be primarily associations of citizens, or, on the other hand, to be primarily associations of politicians, or even more narrowly of public office-holders plus (perhaps) active candidates. Legal definitions of party in modern democracies tend to cluster near the first alternative on each of these dimensions – the true "state party" is associated with authoritarianism, while the party of office-holders only is largely a relic of the pre-democratic era,[15] but there remains substantial variation even within this restricted range, as illustrated by the examples in Table 1.

Table 1: Dimensions Separating Species within the Genus "Political Party"

[13] For example, the "Party Law in Modern Europe" project had, in August 2011, identified either a "Party Law" or a "Party Finance Law" in 32 of the 38 countries considered (the exceptions being: Iceland, Ireland, Italy, Malta, the Netherlands, and Switzerland).

[14] This distinction can be illustrated by the case of Canada. According to the Canada Elections Act, "'political party' means an organization one of whose fundamental purposes is to participate in public affairs by endorsing one or more of its members as candidates and supporting their election. To be a "registered party" and receive, among other things, "trade-mark protection" of its name, a party must meet a number of further requirements and can lose its registered party status if, among other things, it fails to nominate any candidate in a federal general election or if its membership falls below 250.

[15] Although the contemporary Dutch *Partij voor de Vrijheid*, PVV is specifically structured to have only one "member" – its leader, Geert Wilders.

	Organizations of Politicians and Candidates – plus Their Supporters	Organizations of Citizens – plus the Candidates They Have Nominated
Purely Private (non-Governmental) Organizations	Dutch PVV	National Union of Conservative and Unionist Associations (UK) prior to 1998[16]
Substantially Public or Quasi-Public Entities	American Democrats and Republicans	German CDU and SPD

The two most telling indicators on the private/public dimension are the degree to which parties are assigned functions by law that are explicitly recognized as public, and the degree to which the internal arrangements of the parties are subject to detailed legal regulations akin to those that might be expected for fully public institutions. With regard to the first, for example, the German Basic Law (Art. 22) assigns to parties ("parties shall") the duty to "participate in the formation of the political will of the people"[17] while the German Constitutional Court has recognized them as "institutions of constitutional law" (*verfassungsrechtliche Institutionen).* The German party law goes even further to assign parties functions of

> inspiring and furthering political education; promoting active public participation in political life; training capable people to assume public responsibilities; participating in federal, Land, and local government elections by nominating candidates, exerting influence on political developments in parliament and government; incorporating their defined political aims into the national decisionmaking process; and ensuring continuous, vital links between the people and the instruments of the state (art. 1.2)

The point here is that by listing these functions, the law is not simply recognizing the importance of the things parties do, but that it is also identifying them explicitly as *public* functions. Even more, in overturning the "white primary" system of choosing party nominees, in *Smith v. Allwright* (321 U.S. 649, 1944) the US Supreme Court ruled that Texas' "statutory system for the selection of party nominees for inclusion on the general election ballot makes the party...*an agency of the State*..." (p. 663, italics added).

With regard to organization, the United States also illustrates the degree to which organizational structures may be the result of public law rather than party decision. For example, Vermont state 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

[16] The National Union was the membership-based organization of the Conservative Party. The bureaucracy ("central office") of the party was responsible to the party leader, who was chosen by the parliamentary party.

[17] Similarly, the Constitution of Austria stipulates that "One of the functions of the political parties is to participate in the formation of the political decisions".

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, not on any choice by the party). The county committees are to 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. While nowhere near as detailed, the German party law similarly specifies that parties must have, for example: regional branches (art. 7); an executive committee of at least three members, elected at least every two years (art. 11); an assembly, at least half the members of which must be allocated on the basis of membership, with the rest allocated in proportion to votes obtained at the last parliamentary election; party courts of arbitration, whose members must be elected at least every four years, and cannot be "members of the executive committee of the party or a regional branch, be employed by the party or a regional branch, nor receive regular income from them" (art. 14). At the other extreme, party organizational decisions may be left entirely to the party, which is recognized as an organization that supports candidates but that otherwise has no direct public function. Although the rhetoric of private organization remains prominent, the empirical trend is clearly toward some variant of what Epstein (1986) and van Biezen (2004) identified as a "public utilities" model, in which parties are recognized as performing essential public functions and are therefore accorded special status and privileges in exchange for increasing levels of legal regulation.[18]

With regard to the membership/politician dimension, the question is not the size of membership (although absence of any membership at all, as in the PVV or as was originally the case with *Forza Italia*[19], would certainly indicate that the party is an organization of politicians), but rather the expected balance of influence as between politicians and non-politicians. Another indicator would be whether state election subventions are given to a permanent membership-based party organization or to candidate-based committees. For example, the Austrian "election campaign contribution" is paid to the party, whereas American public presidential campaign support is paid to the candidate's committee. In legal terms, with the exception of the United States, the clear trend has been to move from an "I know it when I see it"[20] definition of party to one that explicitly identifies party as a membership-based organization. In the United States, on the other hand, perhaps because American parties do not have formal members in the sense of party membership in other countries, party as a legally recognized entity has been identified with the various national, state, and local committees, generally chosen in public elections in which any qualified voter may participate – which is to say that party committee members are as much public officials as they are party officers.[21]

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[18] One should note that Epstein and van Biezen differ quite significantly in their understandings of the phrase "public utility."

[19] Originally, there was a sharp distinction between the *Forza Italia* party, and *Forza Italia* clubs, which were organizations of supporters without any decision making authority vis-a-vis the party (Paolucci 2006). There used to be a similar distinction between the British Conservative Party (the politicians) and the National Union (the membership organization).

[20] This phrase is from US Supreme Court Justice Potter Stewart, writing about the definition of pornography. *Jacobellis v. Ohio* 378 U.S. 184 (1964)

[21] For example, in order for Central Baltimore County (Maryland) Democratic Club, a membership-based organization, but legally *not* part of the Maryland Democratic Party, to contribute money to Democratic candidates required that it form a separate political action

Registration/Recognition of Parties

Against this general background, the more particular problem for party legislation is to specify the criteria and procedures that an organization must satisfy in order to be recognized as a party, and especially to be recognized as a party entitled to access to public resources or benefits. Although the specific combinations of requirements vary enormously, most can be divided roughly under three general headings: organizational regularity; size and seriousness; and democratic commitment.[22]

The minimal requirements of organizational regularity are that the party have a constitution or standing orders, and that it have publicly identified officers. Particularly if there are any financial advantages accruing to parties, especially state subventions or preferential tax treatment for donations, or regulations concerning political finance, the party may also be required to publish its accounts, and one of the required officers may have to be identified as being responsible for them. Parties may also be required to publish a statement of their political ideology or aims. Within this category, variation among countries primarily concerns the specificity of requirements concerning the organization. Between the extremes of having no specific requirements at all, and full elaboration of the organizational structure specified by law (as in the example of Vermont, above), there may be requirements: for a territorial basis (as opposed, for example, to an occupational basis); that there be a national conference either open to all members or based on election of representatives in which all members may participate, as well as possible requirements concerning the frequency with which it must meet; setting limits on the permissible level of membership fees, or other barriers to membership; specifying how party nominees for elective office must be chosen.

Basic size requirements for initial recognition as a party may be extremely minimal – no more than a few (hundred) signatures on a petition or membership registry; the requirements of 250 members nation-wide in Canada, or of registrants equal to 5/100 of 1% of registered voters (roughly 280 in 2008) in the state of Delaware[23], are indicative of the low end of the range of size requirements. The requirements can also be quite substantial, however, for example the requirement of signatures equal to 5% of the vote cast in the last election in the state of Oklahoma (roughly 46,000 in 2006) and may be intended, either overtly or in unmistakable effect, to limit either the number of parties (especially to limit the number of parties eligible for public support) or the types of parties that can gain recognition (for example, to make it difficult or impossible for regionalist parties to gain recognition). These more substantial requirements may take several forms. One is to require an organizational presence, or a minimum number of members, in some substantial fraction of the second tier units (e.g., states or provinces) into which the country is divided; for example, parties in Turkey are required to have organizations in

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committee (PAC) in the same way that any non-party organization would.

[22] In addition, many systems impose a series of technical requirements, like that the party's name not be easily confused with the name of an existing party or that its symbol not include national or religious iconography. Although like all requirements, these may be subject to abuse, they are not considered here.

[23] Note that in the United States the recognition of political parties is primarily accomplished at the state level.

at least half the country's provinces and in at least one-third of the districts within those provinces; one clear intent is to minimize the likelihood of a Kurdish party gaining recognition. A second possibility is a requirement that the party poll a minimum percentage of the vote or at least contest a minimum number of elections/constituencies. For example, until 1999-2003[24] a national Canadian party was required to have candidates (and pay a deposit that was lost unless the candidate won at least 15% of the vote) in at least 50 constituencies in every federal general election in order to retain registered party status, and the financial benefits that registered status bestowed. Since then, a Canadian party need only have one candidate in every federal election to retain registered party status, but in order to qualify for per vote quarterly subsidies, it must have polled either 2% of the national vote, or 5% of the vote in the constituencies that it contested, in the previous election.[25] In these terms, the current Chilean requirement for initial recognition of 0.5% of the electorate in eight regions (three if they are contiguous) is near the low end of the international range (Ley 18603, art. 6), but the threat of dissolution of a party that fails to win at least 5% of the vote in those regions (Ley 18603, art. 42), while within the internationally observed range, might be considered by some to be unacceptably stringent.

Obviously, the higher the barriers to entry, the more advantaged are those parties that are large enough to clear them. The evolving consensus among international agencies involved in advancing democracy is that these barriers should be as low as possible, although by increasing the number of contenders, this can only come at the expense of electoral clarity.

When imposed, standards of democratic commitment take two basic forms. One is support of the basic principles of democratic government, sometimes coupled with commitment to the territorial integrity and/or constitutional structures of the existing state. Failure to satisfy the first of these underlies the banning of Communist parties in some American states, the banning of the Socialist Reich Party in Germany as anti-constitutional, or the sanctioning of parties that advocate revolution or other use of violence. The banning of Islamist parties in Turkey (for example, the Virtue Party, banned in 2001) as being incompatible with secular democratic government would also fall under this heading.[26] An example based on the second was the banning of the *OMO Ilinden Pirin* by the Bulgarian Constitutional Court (later condemned by the European Court of Human Rights) based on its perceived separatist demands. In some cases, the understanding of democracy is expanded, so that parties may be prohibited for advocating ethnic or religious bias (or exclusivity). There is wide acceptance that the banning of

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[24] The first year is when the 50 constituency threshold was declared void, and read down to 2 constituencies by the application court judge (*Figueroa v. Canada (Attorney General)*, 43 O.R. (3d) 728]); the second is the year in which any threshold greater than 1 was ruled to contravene the Canadian Charter of Rights and Freedoms by the Supreme Court of Canada (*Figueroa v. Canada (Attorney General)*, 1 S.C.R 912 [2003])

[25] Similarly, American federal law distinguishes among "major" parties (those whose presidential candidate won at least 25% of the vote at the previous election), "minor" parties (those whose presidential candidates won between 5% and 25% of the vote), and "new" parties (all others, whether literally new or not), with financial benefits declining as one moves down this hierarchy.

[26] Another prominent example of the banning of a separatist party is the Spanish banning of the Basque party Batasuna. In this case, however, the ban was based on the party's ties to the terrorist ETA, rather than on its secessionist program.

parties that advocate the use of violence to achieve such ends is justified; the question of whether a party that favors the destruction of democracy (or the dismantling of the state) through democratic means may also be banned is more contentious.

The other form encompasses requirements that the party be "democratic" in its internal arrangements, although this often is left undefined, beyond perhaps a requirement that party leaders be in some way elected by the party's members. The assumption is that commitment to democratic principles of government will inevitably lead to internal party democracy – so that one can conclude that the absence of internal democracy must indicate absence of commitment to democratic principles at the system level. Although this assumption is generally taken as obvious rather than supported with evidence, it is not universally accepted; Giovanni Sartori (1965:124), for example, is quite clear in his claim that "democracy on a large scale is not the sum of many little democracies." This aspect of party law is discussed more fully in the next sub-section.

Internal Functioning of Parties

Legal regulations concerning the internal functioning of parties have a variety of purposes or justifications. One purpose, as just suggested, is to require internal party democracy. Another may be described as administrative convenience. If the party is given the legal right to control the use of its name on the ballot, it may be required to identify a single official who has the authority to certify party candidates, even if the party's own rules would give that authority to a party council; similarly, the law may require that the party have an treasurer who certifies its financial reports; in both cases, however, although the identification of a single individual may appear to be an administrative convenience, it also can significantly alter the balance of power within the party, effectively giving ultimate control over nominations or over finance to single individuals even if the party would prefer greater diffusion of authority. Other such regulations might include the identification of a fixed address both for the party and for some number of officials, who may be required to reside within the country.[27]

Regulations directed at assuring internal democracy, of course, require elaboration of the definition of democracy. Some possible subjects of regulation have already been mentioned regarding organizational regularity. Most directly, the law might specify any or all of the organizational contours of the party, including for example the number and functions of party officers and committees or the composition and frequency of meeting of its national congress (or simply require that it have a national congress). Regulations may require (or encourage through selective incentives) particular means of party decision-making. For example, the Norwegian government will pay travel and accommodation expenses for candidate selection meetings, but only if they conformed to standards of proportionality (Svåsand 1994:318). Even more, the modes of candidate selection for American parties are essentially dictated by public law; in some cases, parties may have a limited range of options, but in most cases both the use of the direct primary and the qualifications for both candidates and electors in those primaries are set in state

[27] While this last requirement may be of little consequence in stable democracies, in less secure countries such a requirement might be used to de-legitimize parties whose leader has been forced into exile. For example, the founder of the Pakistani MQM (Muttahida Qaumi Movement), Altaf Hussain has been in self-imposed exile in London since 1992.

election laws.[28]

Also in the name of enhanced democracy, parties may be required to take "special measures" to promote the inclusion of women or other traditionally disadvantaged groups. One form that such measures may take is the imposition of gender quotas in party nomination decisions; while these generally are regarded as part of the electoral law rather than as part of the party law, they constrain a party's freedom of decision, and moreover they represent legislative imposition of what might otherwise be a provision of a party's own internal rules (see Krook 2009).[29] Particularly in those cases in which party offices are legally prescribed, is also possible that gender quotas may be imposed for these as well. For example the party law in Indonesia (Law 2/2008) imposes an obligation on all parties to implement a 30% quota for women in the party's decision-making structure. More commonly, parties may be legally prohibited to discriminate in their choices of candidates or party officials on grounds such as gender or race.[30]

In the same vein, parties may be legally prohibited from discrimination in their membership criteria. Clearly it makes little sense to bar parties from discriminating on ideological grounds, given that parties are generally understood to be associations of people (whether politicians or ordinary citizens) who share a common political perspective and objectives,[31] but bans on discrimination on grounds of gender or ethnicity are found in a number of countries. Particularly with regard to ethnicity,[32] the ban can be either against negative discrimination (exclusion from party membership) or against positive discrimination (the forming of an ethnic party).

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[28] Supreme Court decisions in the past decades have given parties some more influence over these questions. For example, in *Tashjian v. Republican Party of Connecticut* 479 U.S. 208 (1986), the Court ruled that a state could not force a party to use a closed primary (only previously registered "members" allowed to vote) if it wanted to allow independents to participate in its candidate selection process. More generally, of course, it must be remembered that the laws that constrain parties were written by state legislatures that are themselves composed on party members.

[29] Even if advanced as a means of enhancing democracy, gender quotas can be seen as undemocratic in that they constrain the freedom of the *demos*, in this case the party members, to choose whatever candidates they want. Recognizing this, Mexican law, for example, exempts a party from the gender quota if it chooses its candidates through internal primaries. (Htun and Piscopo 2010 :7).

[30] For example, in 2010 the Supreme Court of the Netherlands ruled that the state was obliged under the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to take effective measures to force the Political Reformed Party (SGP – *Staatkundig Gereformeerde Partij*) to accept women in as candidates, without imposing any numerical quota. See ten Napel 2011. Most recently, the Dutch cabinet has decided to take no action, pending the SGP's appeal to the European Court of Human Rights.

[31] Although to continue with the American example introduced above, in Vermont, tests of party loyalty or ideological compatibility for admission to a town caucus are specifically prohibited by law. The law does, however, 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.

[32] Although until 2006 the Dutch SGP barred women from membership

Other conditions relating to party membership may also be specified by law. For example, Art. 29 of the Greek constitution appears both to limit full party membership to citizens who have the right to vote and to require that parties have youth sections for those who have not yet reached voting age; art. 51(2) of the Portuguese constitution bars membership in more than one party; the constitutions of Ukraine (art. 36) and Estonia (§ 48) limit party membership to citizens,[33] while the same article of the constitution of Ukraine appears to bar parties from adopting their own restrictions on party membership ("Restrictions on membership in political parties are established exclusively by this Constitution and the laws of Ukraine.")

Candidate Selection and Primary Elections

In most understandings of modern democracy, the defining characteristic of a political party – the thing that sets a party apart from all other forms of political organization – is that it presents candidates at elections. The methods through which parties choose their candidates, and in list systems also the methods through which the candidates chosen are ranked on the party's list, vary enormously. Looking only at the question of who makes the choice (the "selectorate"), Hazan and Rahat (2010) cite examples ranging from the choice of all candidates by single leader, alone or in consultation with a few advisors (e.g., Degel HaTorah or Kadima in Israel; Forza Italia in Italy; the Front National in France) through cases in which voters beyond those who are party members can nonetheless select the party's candidates (e.g., the National Party in Taiwan; the Social Democrats, Progressive, and Independence Party in Iceland; the Party of Democratic Revolution in Mexico; and, of course, parties in the United States in "open" or "blanket" primary states).

In most of these cases, the choice of selectorate was made by the party, although the range of options available may be limited by law. In many cases, some form of decision or involvement by members or delegates elected by members may be required. As illustrated below, the demographic mix of allowable lists may be prescribed. Some aspects of nomination procedures may be required (for example, art. 17 of the German party law requires that nomination decisions be made by secret ballot) or encouraged through financial incentives (see the Norwegian example in the previous section).

Although there are also movements in the other direction, the trend for many systems has been to increase the scope of party selectorates, with many parties adopting procedures identified as "primaries." In fact, this term covers a range of options. The first question is whether the so-called primaries are public elections, managed by public officials in accordance with public law, as in the United States or since 2009 in Argentina, or alternatively whether they are internal party elections, managed by party officials according to rules established by each party for its own use (e.g., the 2007 choice of Walter Veltroni by the Italian Democrats). The second question concerns eligibility to vote in the primary. For primaries run by parties, the normal expectation would be that only party members would be allowed to participate, but a growing number of parties are allowing supporters (sometimes defined by the making of a small contribution in the

[33] These provisions are controversial both in terms of the general question of the political rights of non-citizen (especially ethnic Russian) residents and in particular in the Estonian case with regard to non-Estonian citizens of the EU, who under the Treaties have the right to vote in all Estonian elections except for the national president and parliament.

form of a fee to vote – what in public elections might be called a "poll tax") to participate as well. For state run primaries, it is possible that any voter will be allowed (in the case of Argentina, required) to vote, either after publicly declaring what may be identified officially as a party preference but in fact is merely a declaration of a preference to vote in that party's primary, or without making any public identification with a particular party at all. While this latter possibility seriously undercuts the idea of a primary as a way for parties to select their candidates, and in that sense also undercuts the idea that elections are contests among parties, this can go even farther in the case of so-called blanket primaries (in which voters may select different candidates of different parties for different offices) or top-two primaries (in which all the aspirants of all parties are listed together on the primary ballot with the two aspirants, regardless of party, with the most votes contesting the general election).[34] It is possible that parties may extend the right to vote in their primaries to individuals who would not be eligible to vote in the final election, for example because they are too young, while on the other hand they may restrict the right to participate to a subset of members, perhaps by requiring a waiting period during which party fees have been paid or party work done.[35] A third question is the extent to which the results of a primary are binding on the party organization. While the normal expectation would be that the primary is dispositive, in Denmark from 1970 to the beginning of the century, the central party could veto or change the decisions made by party members, while in Finland the law allows the central party to change up to one-fourth of the candidates selected by the members (Hazan and Rahat 2010: 42). A fourth question, reflecting an opportunity for the central party leadership to retain effective control even after introducing primaries, concerns eligibility to become a candidate in the primary in the first place; if the central party leadership retains a veto power at this stage, it may make relatively little difference that the primary makes the final choice – and indeed it may aid the party leadership by shifting the onus of denying nomination onto a relatively anonymous electorate.

Evaluation of primaries can take place along at least two dimensions. Although it appears natural to assume that primaries empower the party base at the expense of the party leadership (they are generally identified as instruments of "intraparty democracy"), as the last point in the preceding paragraph suggests, this may not be the case. Katz and Mair (1995) suggest that the use of direct member votes, whether for candidate or leadership selection or for policy determination, may actually be a means for the central leadership to increase its control by making coordination among the middle level of party activists more difficult (for example, replacing party meetings with postal ballots) and then flooding the vote with party "supporters" who are more likely to defer to the judgement of the party leadership.

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[34] Obviously, the top-two primary is only applicable for single-member contests, such as American members of the House of Representatives or a president. The distinction between a top-two primary and the first round of a two-round majority election is that there is a second (general election) round even if one of the candidates wins an absolute majority in the "primary."

[35] Although Canadian parties do not require a waiting period, their experience suggests why such a requirement might be desired. Canadian party membership regularly soars just before candidate or leadership selection votes, and then immediately drops off after the vote. Generally identified in Canada as "instant members", Joe Clark in running for the leadership of the Progressive Conservative Party referred to such people among the supporters of his opponent as "tourists." (Steward and Carty 2002)

The second dimension relates the ostensible justification for primary elections (the selection of "better" candidates) to the criteria that primary voters might be expected to use in casting their votes. The conventional expectation for selectorates composed of party leaders was that their highest priority would be to select "winners", that is candidates who would enhance the party's attractiveness in the general election. With primaries, and especially primaries with secret ballots, it is likely that each voter is choosing the candidates he or she would personally like to see elected, rather than those with the best chance of actually being elected. In multiparty systems in which each party's primary appeal is to its own circumscribed clientele or *classe gardée*, this may be a distinction without a significant difference, but in two party (or two block) systems, it can prevent the kind of convergence towards a moderate, median voter, position that is often advanced as one of the advantages of such systems (see, for example, Downs 1957), instead leaving each block in the hands of its uncompromising extremists.[36] Primaries may also make it more difficult for multiple parties cooperating as a single block to allocate districts or list positions in a mutually acceptable way.

Even without worrying about capture by extremists, the use of primaries, as a form of intraparty competition akin to open-list systems of proportional representation, has the danger of undermining party coherence, by, on the one hand, forcing aspirants of the same party to compete against, and thus distinguish themselves from, other aspirants (or current office-holders) of the same party, and on the other hand giving them a claim to a personal mandate that is independent of their party (see, for example, Katz 1980; Ranney 1962). An MP who depends on local supporters for renomination may find it hard to defer to his/her party's national position on any issue with which those local supporters would disagree (i.e., be in the intraparty minority). Even more, a president who achieves office by first winning a party primary may be strongly inclined to a kind of "personalismo" - as well as being particularly beholden to those interests that were instrumental in the primary election victory.

The use of primaries can also interact negatively with regulations designed to enhance diversity. Quota requirements are predicated on an outcome-based standard while primaries are predicated on an input-based standard. In particular, primaries are justified on the ground that the party's members (or an even broader selectorate) should have the candidates they want, while quotas are generally justified on the ground that without "special measures," those selectorates will not adopt members of historically disadvantaged groups (e.g., women) as candidates. One way to square this circle for multicandidate selection processes would be to use separate primaries to select male and female candidates – as is done in the selection of delegates to the US Democratic Party's presidential nominating convention; this clearly is not possible when only one candidate is to be chosen. In Mexico, on the other hand, a party is excused from adhering to the gender quota law if it selects its candidates through primaries (*elección directa*) – which has contributed to greatly increased use of primaries – although it is not clear that all of these primaries would satisfy generally accepted standards of fairness (Baldez 2004).

To return to the questions of democracy raised above, the underlying theoretical basis for party laws is the model of the "mass party" (Duverger 1954) coupled with something akin to Beer's (1969) model of "socialist democracy". Parties are defined as organizations of citizens who identify their own interests and the means through which they should be pursued through

[36] For example, the American Republican Party, apparently in the grip of its "Tea Party" activists.

intraparty processes, with politicians acting as their agents (to the extent practical – itself a subject open to dispute – as their instructed delegates). Implicit in this is a privileging of interest articulation over interest aggregation.

There are, however, three qualifications necessary. First, it is difficult to reconcile the idea that politics involves conflicts of interest that are embedded in social structure (one of the underlying premises of the mass party model) with the idea that parties should be demographically representative. Second, the delegate model of representation in the mass party model is incompatible with denials of the legitimacy of an imperative mandate, and yet that denial is sometimes explicit in constitutions (e.g., art. 27 of the Constitution of the French Fifth Republic) and in any case generally maintained by the same people arguing the importance of internal party democracy. Third, notwithstanding that the mass party model is deeply rooted in a cleavage-based understanding of society – if there is a single common interest, it is only because some interests of opinions (the interests of the bourgeoisie in the case of socialist parties or the opinions of non-Christians in the case of Christian parties) have been assumed to be illegitimate; otherwise society is seen to be divided into groups with conflicting interests – advocates of these regulations usually speak in terms of a unitary national interest that can be divorced from partisan interests.

Party Law and Party Finance

Both the oldest, and the most detailed, party regulations concern political finance. In many cases (for example the United Kingdom), these laws predate the legal recognition of political parties, and referred to candidates and their supporters as individuals. Indeed, recognition that it was pointless to regulate donations to, and spending on behalf of, candidates ("vote for Jones") while leaving donations to, and expenditures by and for, parties ("vote Conservative") unregulated was one important stimulus to the official recognition of parties in the UK in the first place.

Contribution and Spending Limits

In broad terms, regulation of party finance can be understood as an attempt to limit the possibility of two evils. On the one hand, by limiting the amount that parties or candidates can accept from an individual donor, or from certain categories of donor (in this case, the "limit" is often zero), regulations may aim to prevent the rich from "buying" undue influence over public officials. On the other hand, by limiting the aggregate amount that may be expended in support of (or opposition to) particular candidates or parties, regulations may aim to prevent better resourced parties from "buying" an election. At the same time, it must be recognized that both of these limitations – on donations and on expenditures – represent limitations on political action that may be seen to be in conflict with, or need to be balanced against, basic democratic rights of free expression.

The conflict involved here is embodied in the contrast between "libertarian" and "egalitarian" models of regulation (see Manfredi and Rush 2008; Feasby 1999, 2003; MacIvor 2004). In the libertarian model, individual freedom of expression is dominant; hence restrictions of contributions or spending are illegitimate.[37] In the egalitarian model, the dominant value is a

[37] The libertarian view is illustrated by the US Supreme Court's ruling in *Buckley v.*

"level playing field", or at least protection against an imbalance in spending such that one view could effectively drown out the others.[38] An even more general way of approaching this question is to ask the relative priority of government's obligation to protect the weak from the strong (egalitarian), as opposed to the importance of protecting everyone from the government (libertarian). In the United States, giving priority to limiting the government by fetishizing the First Amendment has subjected government imposed limitations on speech (or on the use of money as a proxy for speech) to the strictest of "strict scrutiny", making it a prime example of the libertarian model. In Canada, on the other hand, the provisions of section 1 of the Canadian Charter of Rights and Freedoms allow those rights to be "subject … to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canada is a prime example of the egalitarian model.

One obvious group of finance regulations are those limiting either the categories of individuals or entities allowed to make political expenditures/contributions or from which parties or candidates are allowed to accept contributions, or else limiting the size of allowable contributions from whatever source. With regard to acceptable sources, one of the most frequent limitations is a bar to foreign contributions. The danger of capture by foreign interests is well documented in the past and only increased by the economic power of multinational corporations. On the other hand, the multinational nature of these corporations may make the distinction between foreign and domestic difficult to define. (Is a domestically chartered but wholly owned subsidiary foreign or domestic?) Moreover, the domestic political rights of expatriate citizens or resident aliens can be endangered by blanket bans of foreign sources, as may the legality of party-building support from international "democracy promoting" agencies like International IDEA or UNDEF. A second commonly banned source of contributions/expenditures is substantial government contractors. Here the danger is the reality or appearance of "contracts in exchange for contributions" – whether the exchange is best characterized a bribery by the donor or extortion by the recipient. Closely related would be the banning of contributions from entities that are particular subjects of government regulation (for example, banks), lest the content of regulations be excessively influenced by the desire of governing parties to reward or secure the

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Valeo, 424 U.S. 1 [1976] with respect to "independent expenditures" (those made in support of or opposition to a candidate, but without the connivance of the candidate). In *Buckley* (at p. 48), the Court ruled that "Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation," and thus could not be restricted without an impermissible violation of the First Amendment rights of the third parties. More recent decisions by the Court, such as *Citizens United v. Federal Election Commission*, 558 U.S. 08-205 (2010), have put corporate funding of independent political broadcasts similarly beyond restriction.

[38] "[T]he State can restrict the voices which dominate the political discourse so that others may be heard as well. In Canada, electoral regulation has focussed on the latter by regulating electoral spending through comprehensive election finance provisions. These provisions seek to
create a level playing field for those who wish to engage in the electoral discourse. This, in turn, enables voters to be better informed; no one voice is overwhelmed by another." *Harper v. Canada*, para.62)

financial contributions of those who are the intended objects of regulation. Even more generally, all unions and/or corporations may be banned from political contributions. In the extreme, acceptable contributors might be limited to natural persons who are both residents and citizens of the jurisdiction involved. And, of course, even if contributions are allowed in principle from an entity, the permissible amount from that entity – per recipient, or in aggregate – may be limited.

One further category of donor that may be restricted or barred altogether is "anonymous" (which may have the further effect of limiting the acceptability of cash donations). On the one hand, if anonymous donations are allowed, it may be impossible to enforce any other restrictions. In particular, since the source of a publicly anonymous donation may be well know to its recipient, anonymity may simply open the door to improper influence. On the other hand, some potential donors may be discouraged from this form of political participation by fear of retaliation if their contributions become publicly known. Outright bans of anonymous donations would also bar such fund-raising devices as "passing the hat" at a speech or party/campaign social event. One frequent compromise is to allow anonymous cash donations, but subject to a very low limit.

If contributions are limited, then it is necessary to define what counts as a contribution. Checks or receipted cash are generally unproblematic, but other forms of support can be more difficult. A few of the issues involved, and one possible set of resolutions of them, can be illustrated by looking at Canadian regulations. One question concerns whether volunteer labor counts as a contribution. The Canadian answer is that it does not – with two exceptions: provision of services for which a self-employed person would normally charge, and labor provided during hours for which the person is being paid (or labor for which the person is paid by some third party) both count as contributions. A second question concerns the provision of goods or services at less than their commercial value. While these generally are considered contributions, the problem is to define "commercial value." In the Canadian case, this is "the lowest amount charged at the time it was provided for the same kind and quality of property or service or for the same use of property or money." A third set of questions concerns whether or not an expenditure is to be considered political or campaign-related. For example, is sponsorship of a speaking engagement by a political office-holder who is seeking (re-)election to office a campaign contribution? Here the Canadian answer is largely a matter of judgement regarding intent – was the event used, or may it reasonably be perceived to have been used, to promote a party or candidate?[39] A fourth question concerns the possibility of loans – given that an unsecured loan that is not repaid may effectively become an otherwise prohibited contribution. Finally, there is the question of timing. Obviously, proximity to an election increases the likelihood/perception that an expenditure is intended to influence the particular outcome, and therefore properly subject to limitation; for example, the American congressional franking privilege (intended to allow members of Congress to communicate with their constituents) is suspended for the 90 days prior to any election in which a member of the House of Representatives (60 days for a Senator) is a candidate (39 U.S.C. § 3210 sec. (a)(6)(a)). In some cases, the entire regulatory regime may be confined to a formal election period – raising the possibility of evasion by solicitation of donations or prepayment of expenses outside of the regulated period.

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[39] http://www.elections.ca/content.aspx?section=fin&dir=faq&document=index&lang=e

Also a question of income, although not directly a question of contributions, is the degree to which parties are allowed to operate (and profit from) normal businesses. One danger is that what is nominally a party may use its privileged position to unfairly advance its business interests (see below regarding the Natural Law Party of Canada). Alternatively, business interests may become a conduit for otherwise prohibited activities. In some cases, such commercial activities may be banned outright; in other cases, the proportion of a party's income that may come from such activities might be limited.

As the preceding paragraph illustrates, the regulations concerning party finance can become extremely complex and technical. One danger is that that very complexity, and the fear of being caught in a technical violation, will deter participation in the first place. This is particularly a problem for small donors and small parties – large donors or parties can amortize the cost of professional advice over a large base. One way to minimize this danger is by exempting small contributions or expenditures from regulations. For example, the Canadian rules regarding in kind or discounted contributions contain an exception – "[t]he commercial value of property or a service is deemed to be nil if it is provided by a person who is not in the business of providing that property or those services, and the amount charged is $200 or less." On the other hand, it is important to guard against the possibility of what is effectively one large contribution being disaggregated into what appear to be many small contributions as a means to avoid regulation.

Implicit in all this is the more general question of whether finance regulations apply only to election campaigns, or to all party activities. With regard to election campaigns, the further question is whether candidates and parties are both regulated, and if both whether they are regulated and held accountable as a single unit or separately. With regard to party activities, the question is whether the regulations apply only to externally directed activities (for example, inter-election propaganda) or to internal functions as well. To return to the Canadian case, for example, contributions to candidates in federal party leadership contests are included in the regulatory regime.

Much of the effect of party and candidate finance regulation may be lost if spending by third parties is not also controlled. Even if the financial positions of the formal competitors are roughly equal, one side may still effectively drown out all of the others if its external supporters can spend without limit. In the United States, "independent expenditures" – those advocating the election or defeat of an identifiable candidate, but not made in cooperation, consultation, or concert with or at the suggestion of a candidate, candidate's committee, or a political party – cannot, under current understanding of the First Amendment, be restricted.[40] European jurisprudence (e.g., *Bowman v. The United Kingdom* (ECHR 141/1996/762/959) 19 February 1998) allows third party spending to be limited, but not to such an extent as to effectively silence third parties altogether. In *Harper v. Canada* (1 S.C.R. 827 [2004]), the Supreme Court of Canada upheld a spending limit on third party election advertising of $150,000 nationwide, of which no more than $3,000 can be spent in a given electoral district (since adjusted for inflation), as well as third party registration and reporting requirements; whether lower limits would be

[40] Similarly, a candidate's personal spending for his or her own election also cannot be restricted, although candidates may be "induced" to limit their own spending – or the spending of their campaigns as a whole – by the offer of public subsidy to those who adhere to voluntary limits.

permissible in Canada remains undecided.

Particularly once the question of third party spending is raised, the important question of regulatory control must be addressed. In the context of campaign spending, it is possible to require each candidate, political party, or third party to appoint an agent who is responsible for receiving contributions and authorizing spending, *and then to prohibit all electoral spending that is not authorized by such an agent*. If this effectively bars spending that is not authorized by a candidate or party, then to the extent that the capacity to spend is equated with freedom to speak[41] it represents a strong infringement of democratic rights that could only be justified in extreme circumstances.[42] If, however, it is relatively easy for a would-be spender to become authorized to spend as a registered third party, then to the extent that the limits on third party spending still allow effective speech this may be a reasonable way to control the influence of money (or other material resources).

Depending on the structure of parties, either based on their own constitutions or on legislation, and on the legally assumed relationship between parties and their candidates, party finance regulations may also address the subject of transfers *within* a single party. In the United States, for example, because elections are regarded as contests among candidate who happen to be the nominees of parties, rather than as contests among parties that are represented by candidates, moneys spent by parties to advance the election of named candidates are regarded as contributions to the campaigns of those candidates, and subject to regulation, while generic spending on behalf of the party's candidates (the classic example being the 1980 "Vote Republican for a Change" commercial) is not; transfers "between and among political committees which are national, state, district or local committees (including any subordinate committee thereof) of the same political party" are not limited (2 U.S.C. § 441a(a)(4)). In Canada, on the other hand, not only transfers among a national party and its constituency associations, but also transfers to and from those organizations and that party's candidates are allowed without limit.

A final set of financial regulations concerns reporting: what are parties or candidates required to report, at what level of detail, at what times – and are their reports subject to public disclosure, when, and with what procedures for verification or audit? With regard to the level detail, the problem is to find the appropriate balance between allowing relevant information to be hidden in overly broad categories, and allowing it to be buried in mountains of irrelevant detail.[43]

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[41] The degree to which this is a valid equation is, of course, controversial. In the American case that set off this debate in that country, the Supreme Court equated spending with speech and therefore put it beyond limitation, but ruled that contributions were not speech in the same way, and therefore could be limited. *Buckley v. Valeo* [1976] 424 U.S. 1

[42] For example, the Quebec requirement that all spending in a referendum campaign be affiliated with one of the two official campaign committees (one for and the other against the question) was overturned because it effectively banned campaigning by advocates of abstention (*Libman v. Quebec (Attorney General)* 3 S.C.R. 569).

[43] For example, it was reported that in the days before everything was computerized and available on-line, the American Republican party attempted to subvert the requirement that donations and expenditures over $200 be reported individually by reporting *every* donation and expenditure, on the theory that it would be impossible to process so much information in time for any of it to be embarrassing to the party.

A second balance is between the objective of transparency – particularly with regard to the potential influence of large donors – and the privacy rights of donors: addressing on the one hand the philosophical question of whether donations to parties or candidates should be regarded as public acts for which the donor should be publicly identified, and on the other hand the practical danger of reprisals against those who contribute to the "wrong" side. The publication (and reliable audit) of financial disclosures has two purposes. One is to facilitate the enforcement of finance regulations. This requires reliable audits, which, given both the expense and the time involved, may reasonably take place only at the end of an electoral cycle or financial year – although particularly with regard to possible irregularities with regard to electoral finance this raises the further question of what is to be done if irregularities are discovered only after the election has taken place. Indeed, one reason for legally concentrating financial authority in the hands of a single party official is recognition that a party cannot be sent to jail for violating the law, whereas a party treasurer can be, and that the annulling of an election may be a cure worse than the disease. The other purpose of financial reporting is to inform the voters so that, even if the influence of money cannot be eliminated, at least they will know in advance who is beholden to whom. Reports that are published only weeks or months after an election clearly cannot serve this purpose as well as those made public before the balloting; the result may be a requirement of early disclosure of unaudited or provisional reports. On the other hand, publication of financial reports concerning ordinary party activities (generally required as part of the process of public support for such activities) may also be seen as empowering the base of party organizations, by giving them information necessary if they are to hold their party leaders to account – and while this purpose requires periodic publication, there are not the same kind of electoral punctuations.

Public Subsidies or Subventions

Modern democratic politics is expensive. Between the growing importance of professional services (media consultants, pollsters, etc.) in preference to volunteer labor from members (see, for example, Panebianco 1988), and the near universal decline in party membership (van Biezen et al. forthcoming), the ideal of a party as a self-sufficient entity supported by the modest although numerous contributions of its membership base is clearly a relic of the past – if, indeed, it ever existed. It is the fear that members' inability or unwillingness to satisfy parties' insatiable appetite for funds will undermine democracy that underlies legal restrictions on the amounts parties can spend and on the amounts that individuals can contribute.

An alternative or supplementary approach to the same problem is to limit the dependence of parties on private support by providing public support as an alternative. The danger, and basis for the argument that state subventions undermine, rather than support, democracy is that in freeing parties from excessive dependence on large donors such subventions will also free parties from dependence on their own social bases, and thus undercut their connection with and responsiveness to, exactly the people to whom democratic parties should be responsive (Koole 1994b).[44] One way to mitigate this danger is to limit the proportion of a party's funds that can

[44] The joint effect of the need of the party in public office for more resources than members can/will provide *and* a desire to increase their freedom to take actions that will be unpalatable to the party on the ground is what leads Katz and Mair (1995) to identify large state subventions as an indicator of the cartel party model.

come from the public purse; in Germany, for example "the total of state subsidies to a party may not exceed the sum of private contributions" (van Biezen 2003: 50). Public subventions are also justified on the ground that parties are providing public services. This has long been recognized in the provision of support for the activities of parliamentary parties on the ground that they are supporting the public legislative work of the members of parliament rather than the partisan work of their parties, although in reality this is often a distinction without a difference notwithstanding regulations intended to separate the two kinds of activity.[45] Support given directly to candidates or to extra-parliamentary party organizations is of more recent origin, but is rapidly becoming the near-universal norm.

Public support can take several forms. Perhaps the oldest is the free, or discounted, provision of goods or services, such as the use of public bill boards for advertizing or public buildings for political meetings. The most significant form of free service in the contemporary era, however, is free access to the mass media. This is most common with regard to state-owned broadcast media, although in principle any broadcaster who requires a license could be required to provide a certain amount of free air time to parties and/or candidates. Weaker alternatives would be a requirement that licensed broadcasters provide time at reduced rates (for example, the American requirement that candidates be sold time at the lowest rate charged other customers for comparable time[46]), or a fairness requirement (for example, the American rule that if a broadcaster allows a candidate to use his facilities, he must allow all other candidates for the same office use of his facilities on the same terms).

A second possible form of support is tax expenditure. By providing a tax credit or deduction for political contributions, the state reduces the marginal cost to the donor of such contributions, and thereby encourages them.

A third form of support is the direct provision of money. In general terms, this can take any (or a combination) of three forms. The most obvious is direct grants allocated according to some formula (see below); the American public funding of presidential campaigns and the Canadian quarterly grants to parties are examples of this. A second possibility is matching grants, through which the government increases the value of privately raised funds that meet some set of pre-specified conditions.[47] Finally, subsidy may take the form of reimbursement of

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[45] In principle, funds provided to MPs as individual members of the legislature might understood to be support (e.g., travel or secretarial services) for the execution of their public duties, without any partisan political implications, although given that being perceived to be "doing a good job" (or just being perceived at all) are powerful aids to re-election, this distinction may be hard to maintain. When funds are provided to parliamentary parties as groups, however, the distinction between official and partisan activity becomes even harder to maintain.

[46] There may be less to this than meets the idea, because commercial advertisers are often satisfied with "preemptable" time (the broadcaster can determine the specific day or time at which the ad will be broadcast) whereas the exigencies of political campaigns generally require the much more expensive non-preemptable time.

[47] Although increasing the value of donations (matching grants) or decreasing the effective cost of donations (tax expenditures) may appear to be equivalent, they may have quite different effects. In particular, the cost reduction resulting from tax deductibility is a function of tax rate, and so this form of subsidy benefits most those with the largest incomes whereas

eligible (election) expenses after the fact; although poor and new parties may be able to borrow (at interest, and assuming loans are permitted) against the expectation of reimbursement, this form of support is clearly to the relative advantage of parties that can pay for the campaign from current funds and then rollover the reimbursement to fund the next campaign.

A second class of question concerns the purposes or activities that are eligible for subsidy. The most common distinction is between election expenses and general party operating expenses. A third potential category is research or public education. For example, in the Netherlands public subsidies for party research institutes (formally independent, but closely linked) were introduced in 1971. With additional subsidies for educational work (1975), youth movements (1981) and (temporarily) for aid to sister parties in eastern Europe (1990), by the mid 1990s, these represented the majority of state financial support to parties (Koole 1994a). Closely related is the question of whether subsidies go to candidates (or their own campaign committees), to the parties as external organizations, to party caucuses or the equivalent in the parliament, and/or to party-affiliated foundations. Particularly with regard to the question of candidate(s) vs. party organizations, this bears on the distribution of authority/autonomy within the party – are candidates financially independent of, or dependent, on their party organizations? Moreover, even if subsidies go to the parties rather than their candidates, the question of whether they are paid exclusively to the central party or distributed among multiple levels of party organization can have a serious impact on the centralization, or not, of authority within the party.

The third question regarding public subsidy concerns the principle of allocation. Naturally, the specific questions depend on the form of subsidy. For tax expenditures, the two big questions are whether to allow tax credits (to the relative advantage of those with low marginal tax rates) or deductions (to the relative advantage of those with high marginal rates) and what, if any, cap to place on the amount eligible for preferential treatment. For matching grants, the main questions are the rate of match (e.g., one-to-one or one-to-two) and again a possible cap on the amount of each contribution that will be matched; an additional question might concern a threshold that must be cleared to become eligible for any matching funds at all. For public air time (and possibly other free services), and especially for direct grants, the primary question is whether allocation should be based on equality or on proportionality. The sub-questions then are, for equality, what criteria must be satisfied for eligibility, and, for proportionality, whether the base is to be votes or seats won in the previous (or in the current election for funds transferred only after the fact) and what, if anything, to give to new parties or to parties that won no seats in the previous election.

Particularly in the case of direct financial payments, and additional question is when the payments actually are made. Obviously reimbursements can only come after the fact, but other payments, for example the subsidies given to American presidential candidates who accept "voluntary" spending limits, could be given either before or after an election. Even assuming that loans are available (and given the possibility that an unsecured loan will turn into a post hoc illegal contribution, they may not be), the need to pay interest simply reduces the amount available for political activity - not to mention the possibility that, if the requirements for reimbursement are sufficiently strict, a party proposing to secure a loan against the expectation of reimbursement may not be regarded as credit worthy at all. If, as in the United States, established (both major and, at a reduced rate, minor) parties are given support up front, but new

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matching grants are neutral with respect to the income of the donor.

parties are supported only after the fact, that can be in effect an additional barrier to entry.

Both equality and proportionality present problems. For equality, the first major danger is the proliferation of parties or candidates interested more in the subsidy than in the opportunity to participate in the political debate. One classic example of this is the candidate of the "Connoisseur Wine Party" (John Creighton) in the 1986 Fulham (UK) by-election, who used the free delivery of his electoral address to all household in the constituency (a benefit accorded to all candidates on an equal basis) primarily to advertise his wine shop.[48] This is, of course, a danger with all schemes for public support, as illustrated on a grander scale by the allegations that the Canadian Natural Law Party used over $700,000 in public support (primarily reimbursement of "campaign expenses") to advertise its philosophy of transcendental meditation, and its related fee-based programs, rather than to participate in public debate of public issues. Less venal, but perhaps more politically significant, is the danger of spurious parties or candidacies created not to win votes but to multiply the resources available to support a particular viewpoint.[49] The second danger, particularly evident in the equal allocation of broadcasting time, is that a proliferation of candidates will make meaningful debate among those with a realistic chance of electoral success impossible. For proportionality, the danger is simply that by giving the most resources to the parties that are already strong, the status quo is entrenched and potential new competitors are denied a realistic chance to discover whether they would be popular, if only they could communicate effectively with the voters in the first place.

State subventions , and financial regulations more generally, can also be used to require or encourage desired forms of party activity. The Norwegian use of subsidies to encourage proportionality in candidate selection procedures mentioned above is an example of using money as a positive incentive to encourage desired behavior. Negative financial sanctions are illustrated by the French *Loi sur la Parité* (no. 2000-493 of 6 June 2000), which required parties to nominate equal numbers of men and women for seats in the National Assembly or face loss of a proportion of their state funding equal to half the difference between the share of males and female candidates (Krook 2009: 195). Even more directly, the 2008 gender quota law in Mexico requires parties to allocate at least 2.3% of their budgets to programs for the support of female candidates (Htun and Piscopo 2010 :11).

State subventions, along with regulations concerning party recognition and ballot access, pose the potential conflicts between interest articulation and interest aggregation as the primary goal in elections, and between free and fair as standards of evaluation, in particularly clear form. With regard to the first, interest articulation is best served by a multiplicity of parties, each able to contribute to the public debate; this would call for low barriers to recognition as a party, low barriers to receiving public subsidies, and that the subsidies be, if not necessarily equal for all competitors, then at least adequate for the most poorly resourced to communicate effectively with the voters. Interest aggregation, on the other hand, is best served by having a limited number of parties or candidates, in order "to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will" (*Bowman v. United Kingdom* 22 E.H.R.R. C.D. 13, at 18 [1996]). This calls for higher barriers to entry and receipt of subsidy,

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[48] Creighton received 127 votes (out of 38,084) and forfeited his deposit of £500, but still came out ahead in terms of advertising costs.

[49] Although not related to finance, the so-called owl lists (*liste civette)* in Italian elections in the 1990s provide an example of spurious parties being created for strategic purposes.

and for public support to be directed primarily to those parties that might be expected to play a significant role in either government or opposition after the election.[50]

As suggested at multiple points above, the problem with "free and fair" as an objective is that in a world in which different interests are differently endowed with politically relevant resources, fairness may only be achieved by restricting freedom. To say that the race is fair because the same rules apply to everyone may ring hollow if only some of the competitors can afford shoes (resolved by providing access to shoes for all competitors) – or if some competitors can afford to provide themselves with much better shoes (resolvable only by prohibiting those competitors from using their extra resources to gain an advantage). Similarly, unfair campaign tactics (unfounded character assassination too late in the campaign for effective rebuttal; bias in media coverage) may be limited only by impinging on the freedom of those who would use them. Particularly with regard to finance, fairness would call for low contribution limits, effective spending limits, equal (and free) media access, subsidies that are designed to level the playing field rather than to increase the advantages of those already advantaged. Freedom would allow unlimited contributions and spending.

Finally with regard to finance there is the overarching question of possibility. Simply, in what are basically capitalist societies characterized by enormous disparities of income and accumulated wealth, is it possible to remove or even to seriously limit the power of money? Or is the power of money, like the power of flowing water, something that may be channeled but that cannot in the long run be contained? In the latter case, excessive legal restrictions may simply drive the influence of money into the shadows, where it would be even more corrosive. In this case, effective disclosure rules may be preferable to ineffective limitations.

Parliamentary Organization and Behavior

Modern political parties originated in parliaments as a way of coping with the need for many nominally equal representatives to coordinate their activities if they were to maximize their influence. Parliaments remain important foci for party regulation – sometimes in the form of public laws, and sometimes on the basis of the parliament's own standing orders.

Most parliaments are organized on the basis of parliamentary party groups (generally *caucuses* in English, *Fraktionen* in German, "clubs" in many east and central European systems). These usually have special standing in the setting of the chamber's agenda, in the allocation of speaking time and committee assignments, as recipients of resources. The first question, then, is what criterion – most usually a minimum number of members (e.g., 5% of the members for the German Bundestag, 20 members for the Italian Chamber of Deputies) – must be satisfied in order to form an independent group. To the extent that the advantages of having an independent group are substantial, a high threshold can serve both to seriously disadvantage small parties and as a deterrent to splits within groups.

A related question concerns the distribution of such positions as committee chairmanship. In the parliaments of most countries historically tied to the United Kingdom and characterized by what Lijphart (1999) identified as the "majoritarian" conception of democracy (e.g, the United

[50] For an elaboration on this theme by the Canadian courts, see the decisions of the Ontario Court of Appeal and of the Supreme Court of Canada in *Figueroa v. Canada (Attorney General)*, 1 S.C.R 912 [2003], 43 O.R. (3d) 728,50 O.R. (3d) 161

Sates, the UK, Canada, Australia, New Zealand), these positions are monopolized by the parliamentary majority; they may also be used in cases of coalition governments to give a coalition partner that does not hold a particular ministry some standing to oversee that ministry. In many other countries (e.g., Germany, Argentina, El Salvador, Portugal), however, chairmanships may instead be allocated on a proportional basis. Particularly in the latter case, the capacity to form of an independent group can be politically significant in intraparty politics.

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.[51] In these systems, those who switch parties are often severely criticized, but rarely sanctioned legally.[52] 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.[53] 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 the one hand, is it simply leaving the party for which one was elected, or is the further act of joining another party required?[54] On the other hand , is it only voluntary resignation from the party that triggers loss of seat, or can an MP be deprived of his or her seat on expulsion from the party? Anti-party-switching regulations may be seen as recognition 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

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[51] Examples include Belinda Stronach's 2005 defection from the Canadian Conservatives to the Liberals in 2005, which allowed the Paul Martin minority government to remain in office, and US Senator Arlen Specter's 2009 shift from the Republicans to the Democrats. 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.

[52] 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.

[53] 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.

[54] For example, the Portugese 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).

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 2008) Many international organizations have tried to reconcile 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 particular, if an MP's mandate derives from party-based election (and note that this is a fundamental premiss of the idea of democratic party government, whether in parliamentary or in presidential systems), what is the basis of democratic legitimacy for decisions reached through "free" or "conscience" votes in parliament?

Regulatory Enforcement and Dispute Resolution

The state may become involved in the operation of political parties through two further routes. On the one hand, if legal regulations/obligations that are put into place are to be effective, there must be procedures for enforcement, including the investigation of alleged or suspected transgression and the assessment of penalties if found to be appropriate. On the other hand, in increasingly litigious societies, the possibility that courts will be called upon to adjudicate internal disputes – to interpret internal party rules, or at least the adherence of the party to its own rules – or disputes between parties also increases.

The primary question with regard to internal disputes, and to a lesser but not trivial extent interparty disputes, is whether public courts should get involved at all. One possible response is simply to declare such disputes to be non-justiciable – to avoid entering what US Supreme Court Justice Felix Frankfurter identified as the "political thicket," although of course the effect of the failure of courts to intervene is simply to leave the status quo in place, which is not a politically neutral outcome. Short of this, parties may be required to have their own dispute resolution mechanisms, with appeals to the public courts regarding internal party disputes allowed only after all internal remedies are exhausted and only with regard to the question of whether the party's own procedures were followed.

With regard to disputes about the application of legal regulations or alleging that these regulations have been violated, there are a number of questions that must be addressed. The first is whether (or which of) these are to be resolved in regular civil or criminal courts, as opposed to special administrative tribunals (generally "electoral management bodies", given that the role of parties in elections is the usual justification for their regulation in the first place). And, to the extent that special tribunals are employed, are they to be part of the regular state bureaucracy (e.g., a bureau within the Ministry of the Interior or the Ministry of Justice), nonpartisan (e.g., Elections Canada) or multipartisan (e.g., the American Federal Election Commission). The Mexican Federal Election Institute represents a hybrid form, headed by a General Council with 24 members, nine of whom have the right to vote and are to be separated from partisan politics (they may not have been candidates or party officials for at least four years before being selected, and must be elected by a two-thirds vote of the Lower Chamber of the Congress); registered parties are represented on the General Council, but by non-voting members. In some cases, the electoral management body can only investigate allegations brought before it by aggrieved parties; in other cases it can initiate investigations on its own initiative. If violations are found,

the electoral management body may have the authority to assess penalties (usually, but not always, subject to appeal to the courts); in other cases it can only initiate, or recommend the initiation of, prosecution in the courts.

The clear international standard is that regulations should be enforced impartially, and by an impartial body, with a strong trend in favor of the use of independent bodies – in order to avoid the dangers either of enforcement only against opponents of the current government, or of a kind of mutual protection pact among the major parties – and for judicial imposition, or at least judicial review, of all but the most minor sanctions. While it is important that enforcement be sufficiently vigorous that they do not appear simply to be "window-dressing", it is also important to remember that overly aggressive enforcement of overly complex regulations may discourage participation or undermine trust in the authorities.

Internationally accepted standards have also been evolving regarding the appropriate use of sanctions. One is that the penalty for violations should be proportional to the seriousness of the offence; technical or minor violations should not result in the dissolution of the party, for example – and indeed dissolution or deregistration should be reserved for the most serious offenses.[55] At the same time, however, the penalties should be stringent enough to deter violations, rather than merely being absorbed as part of "the cost of doing business." A second important standard is that the party as a corporate entity should not be held accountable for the unauthorized actions of one or more of its members.

Conclusions

The most obvious conclusion to be drawn from this review and analysis of the legal regulation of parties is that there are no easy answers, no one-size-fits-all best practices. While evolving international standards (e.g., OSCE/ODIHR 2010) make it relatively easy to identify some bad practices, often even these are not things that are self-evidently bad in absolute terms, but rather represent excessive attention to one set of values *at the expense of others.*

The proper balance among the many values, and means of protecting those values, is clearly situationally specific. The dangers confronted by democracies that have just emerged from authoritarian rule, for example that the party in power will abuse its powers to suppress opposition, differ from those with long established traditions of liberal rule. Societies with deep ethnic cleavages may have to be more attentive to questions of descriptive representation than those that are more socially homogeneous. Differing levels of literacy, wealth, interest group networks, differing levels of concentration of media ownership, all have relevance for the proper regulation of parties.

Even more, as suggested in the first paragraphs of this paper, the meaning of "proper" in this context in inherently political. While experts may be able to give valuable advice concerning the likely consequences of possible decisions, and warnings of non-obvious dangers to be taken into account, ultimately choosing the "proper" balance among competing values is a matter of taste. And to return to the Latin, *de gustibus non est disputandum.*

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[55] The Canadian practice of deregistering a party that fails to present any candidates in a single federal election might be seen to violate this standard.

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