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**PRIVATE ASSOCIATION AND PUBLIC BRAND: THE DUALISTIC CONCEPTION OF  
POLITICAL PARTIES IN THE COMMON LAW WORLD**

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**Abstract** This paper examines the legal conception of political parties. It does so by unearthing the history and ontology of the common law relating to political parties, in international perspective. The flexibility of the unincorporated association, in which parties are understood through the private law of contract as networks of internal rules or agreements, rather than as legal entities, has proven to be a mask. In the common law's imagination, the ideal party is a ground-up organisation animated by its membership. But the law mandates no such thing, and in its statutory and constitutional conception intra-party democracy is sublimated as parties need be no more than an electoral persona or brand.

**Keywords** comparative regulation of political parties – legal status of political parties - common law of politics – intra-party democracy – membership-based political parties - political parties as brands – freedom of association

## **Private association and public brand: the dualistic conception of political parties in the common law world**

### **Introduction: private association and public brand**

It is commonplace, to the point of triteness, to observe that democratic politics is unthinkable without parties (Schattschneider, 1942, p. 1). As Rossiter (1960, p. 1) put it, ‘no America without democracy, no democracy without politics, no politics without parties’. Orthodox political science understands the enduring roles of parties to be vehicles for political participation; to be conduits to aggregate and represent citizen or interest group values and desires at a policy level; and to be sources of personnel for government and parliament (Webb, 2000). Depending on political culture, they may also act as tribal social groupings or as distributive mechanisms, as in the patronage model. Yet whilst we have a relatively settled idea of the functions parties can serve, we rarely ask the question of what formal shape they should take. The purpose of this article is to explore the legal ontology of political parties, concentrating on the common law tradition.

Just as genetics is not destiny, so legal form does not directly determine social outcomes. An organisation could adopt a standard corporate form but, say, still seek to run as a not-for-profit body: the form would just be inapt, unwieldy and subject to slippage. My aim here is not to draft a how-to manual for any budding political entity. Rather it is to consider how political parties came to be conceived in the common law world, and by interrogating the detail of the relationship of regulation to thing-regulated, uncover the how parties are embodied in the legal imagination. What we will find is a dualistic conception: parties are private associations and public brands.

Parties evolved as unincorporated associations. The political relationships between members, in legal theory, constitute the party as the party rules form a web of agreements between, and amongst, its members. However it is only a conceit that parties thereby are member-activated. Lacking any autonomous legal shell capable of direct regulation - and unlike some

continental European countries - common law parties enjoy a very wide freedom of association, to privately order themselves as internally undemocratic, top-down and hierarchically closed organisations, as much as open organisations driven from below. In turn, statute law merely conceives of parties as electoral machines. In this conception, parties are simply publicly registered electoral brands with a minimal nominal membership, subject to some limited, political-market-oriented regulation.

To focus on the common law tradition means focusing on democracies such as the United Kingdom (UK), Australia, Canada and New Zealand. The United States (US) also has a common law heritage, but is radically distinctive for a number of reasons. First, Westminster-system history and governance structures are distinguishable from those in the US, where an independently elected executive, as opposed to responsible (party) government, is embedded. Law-making in this tradition occurs within a politically, rather than judicially driven, constitutional framework (unlike in the judicially driven US). Most significantly of all, over a century ago US legislatures - in tandem with the parties themselves - developed state-run, direct primaries to select candidates (Ware, 2002). Whilst parties in the UK and Australia are experimenting with primary mechanisms (Orr, 2011a) they are doing so in a way that maintains control and flexibility within the party structure, rather than outsourcing the process to regimes of public law.<sup>1</sup>

In short, in the US's relatively decentralised, federalist system, parties are nests of committees, with which party activists can associate through fund-raising or by helping get-out-the-vote. Compared to subscription-based membership in the rest of the common law world, US party 'membership' is a loose concept, which elides with the idea of 'registering' as a Democrat or Republican (or Independent) under primary election rules. Such registration is a unilateral public declaration of identification with a party, not a commitment akin to joining a rule-bound association (Schattschneider, 1942, p. 55).

### **A Legal Ontology of Political Parties: form and flexibility**

In organisational form, there is a common thread joining political parties in the common law world. ('Organisational form' here means the party as an entity as a whole, rather than any internal divisions and hierarchies.) They are unincorporated associations.<sup>2</sup> This means they

have no distinct legal status as such, and their rules are essentially untouched by statute law. Unlike an incorporated entity they have is no formal shell or body, existing distinctly and permanently, onto which the law can easily hang regulation. The reasons for this are partly historical convention. Westminster parties evolved from looser factions, so the party-as-a-whole remains a sometimes fudged blend between the party membership and administration on the one hand, and the parliamentary caucuses of MPs, who form their most public face, on the other.

The term ‘unincorporated association’ is a mouthful, but the concept is tolerably simple. It is an association of persons that lacks a corporate status. In the common law mindframe, its embodiment is its passing membership, from time to time. A conceit of British law is that such ‘associations are unique to common law legal systems’ (Stewart et al, 2011, p.3). In truth, people everywhere gather in groups and reduce their mutual goals to a set of agreed rules, written or not. There is nothing uniquely British about the liberty to do this; indeed the monarchical desire for control meant that, at an earlier point in history, no British group lacking a royal charter could act as a group per se (Ford, 1977, pp. xix-xxi). So the unincorporated association was as much a creature of default, as it was an intentional, juridical construct. It was just a type of group that fell below the radar of the law because it was denied legal personality. Assuming such a formless-form meant that although party officials did not benefit from the corporate veil and limited liability, the organisation was as internally free as it could be.

German parties, too, have historically been organised as *nicht eingetragener Verein*, that is, as unregistered associations (although the umbrella wing of a few national parties, including the CDU, is the *eingetragener Verein*, or registered association). However judicial developments in that country have elided the distinction between the two categories, so that either type of association is now treated as having an autonomous existence, regulated by state law. As we shall see, this befits a legal mindset in which German parties are recognised in the bedrock of the *Grundgesetz* or Basic Law, and subject to statutory-based democratic expectations that deny them any pure freedom of association. In contrast, in the common law world, political parties enjoy a very wide degree of internal freedom of association or organization: something that suits those who wield power within political parties.

What demarks the law of unincorporated associations is its flexible use of the notion of contract. An association that forms to advance shared social or political goals does not become an incorporated entity, with a distinct legal personality separate from its members. Nor does it represent a static togetherness, like a partnership or marriage, which falls apart if one of its founders dies or withdraws. Rather, the common law treats it as a floating network of agreements, with agreements subsisting between each and every member of the association.<sup>3</sup>

An unincorporated association is thus an intermediary concept. It is not a ‘legal person’ or entity,<sup>4</sup> like an individual or a corporation. Nor is it a purely fluid arrangement, like a group of friends who agree to mind each other’s children each working day, without ever intending their arrangement to be legally enforceable. Under this approach, as Morris describes, political parties in the common law were likened to gentlemen’s clubs, ‘assemblages of persons gathered together to advance their political interests ... governed by the law of contract’ (2012, p. 107).

The unincorporated association, as a legal form, offers swings and roundabouts. It is relatively cheap, since there are minimal costs in terms of initial or ongoing legal advice, or bureaucratic hurdles or accountability obligations to a corporate regulator. Groups or movements like political parties can thus form fairly easily. The law cannot easily attribute collective knowledge and hence liability to them (hence the tendency for difficult-to-enforce laws attempting to pin fines on party agents, rather than the party as a whole). Avoiding incorporation is also flexible. Provided the constitution does not embrace any illegal acts or criminal purposes, then its rules can be amended as the membership sees fit. For that matter, the rules can erect more elaborate mechanisms for their amendment, such as requiring super-majorities, or committees to draft, vet or adjudicate rule changes. Unincorporated associations are not subject to the complex overlay of statutory law that hem in other powerful collectives, like business corporations and trade unions. The malleability of their internal arrangements fits both the abstract principle of the freedom of association, and the practical politics which characterises intra-party machinations.

It is only when an association flourishes in commercial terms, such as in the property it owns or in a need to engage in complex transactions, that questions like who owns the property and who has standing to sue and be sued arise, and unincorporated status may become unwieldy. But even large political parties can transcend most of these challenges by maintaining fairly simple accounting and resource bases or, if they are wealthy enough, by hiving off assets into trusts and holding companies. Winding-up a party can be tricky in theory, but parties are more likely either to become moribund, or to split, than to become insolvent. And in the not uncommon case of a split, it is easy enough to engineer mass resignations and start a new party.

From the middle-ages through to the Georgian era, groups as diverse as barristers, scientists and insurance underwriters formed into unincorporated associations. Groups formed to do business or to play mutual financial roles came to present special challenges, and were excluded from the scope of unincorporated associations (forcing them into more formal structures such as partnerships, corporations and friendly or building societies).<sup>5</sup> Trade unions were also subject to first repressive, then more accommodative, statutory devices.

As political factions grew in size and organisation, however, unincorporated status proved suitably flexible. Take that most fundamental of questions: the admission of new people to membership. For the smallest of elite or cadre parties, the party's rule could be that an existing member had to nominate the newcomer and the group as a whole could decide to let the newcomer on board. For a larger, membership-oriented party, the rule could delegate decisions on accepting members to a sub-committee. The reverse is also true: existing members may drop out or, more significantly, be expelled, with relatively little fuss.

In addition, unincorporated status is flexible when it comes to party structure. It permits parties to be based on members nested in other, unincorporated sub-units with their own flexible rules (ie branches). Further, it permits a structure where sympathetic organisations can affiliate and be granted voting rights in the party. Obvious examples are farmers' associations or trade unions, in the case of agrarian or labour parties respectively. Finally, when it comes to the death of a party, whilst a corporate form can be terminated more neatly, via a clinical winding-up, an association can be painlessly euthanized if there is goodwill to

do so. Or, in the case of a moribund party, an ailing unincorporated association can simply drift into a permanently inoperative stasis.

Incorporated status, which comes with a baggage of complex statutory regulation, presents not only more complexity, but less flexibility. A public company structure would be radically inappropriate for a political party, both symbolically and in practice: only a mutual corporate structure would begin to approximate the political party as classically imagined. In an unincorporated association, the arrangement one joins is assumed to be ongoing and human, not transactional and impersonal: in the jargon of contract theory, the contract is ‘relational’ (MacNeil, 2001). At least as amongst individual members, one-person, one-vote is the presumed norm, unless otherwise stated.

In this theory, one is not thought to ‘buy’ membership in a party the way one buys a subscription to a newspaper. Membership is conceived of as personal and untradeable, unlike a share in a publicly listed company. The essence of corporate law is the fungibility and tradability of share, whereas the essence of a membership based party should be a mutual relation. Members do not own the party the way shareholders own a corporation. Rather, the party in the law’s mind-frame is its members, understood as the set of political relationships, mediated through the rules of the party constitution which links those members. In legal form then the membership is the party (which otherwise lacks any formal embodiment); in the legal imagination its membership is its soul; and all this mapped onto the prevailing political science ideal of the mass membership party. In this ideal, the very act of associating together may, per se, engender political obligations. That is, an association ought be seen not merely as a voluntaristic enterprise, but a mini ‘society’ necessarily carrying with it a mutuality of relations.

However, the concept of a party driven by its members – as normatively championed by scholars such as Rosenblum (2000) - is an optimistic assumption rather than a necessary presumption of the law. As with the freedom of contract (of which it was a sub-species), the understanding of a party as an unincorporated association consisting of a set of rules, forming a web woven by and binding members, is as much a legal dream as a substantive guarantee. Ideally the membership is the animating soul of a party. Yet in many parties, and particularly

in recent decades, this has come to represent a legal fiction, if not fantasy. The common law brings with it no understanding of power relationships or imbalance. Instead, a party's rules and internal workings may be open, inclusive and membership driven, or entirely hierarchical and repressive of membership involvement. This, as we shall see, is consistent with a political markets focus on trying to improve inter-party competition, to the neglect of questions of internal party affairs, such as intra-party competition and democracy.

### **Party Rules: Enforcement and Content**

It is one thing to conceive of a party as a web of political relationships between members freely agreeing to rules, which they inherit or collectively set, and to which all in theory are bound. It is another to conceive of those rules being neatly enforced in practice. Parties, especially their branches, are often run by volunteers. Rules are neither self-enforcing nor, given the inevitability of linguistic fuzziness, self-enunciating. Litigation is expensive and there is no neat tribunal or arbitral service for disputes within unincorporated associations such as clubs or parties. Unlike corporate law, there is no regulator to which complaints of internal malfeasance can be directed. And unlike administrative law - that branch of public law which regulates government agencies - there is neither an ombudsman, nor an efficient or specialist appeals tribunal, to assist resolve disputes involving parties.

For a considerable part of the last century, it was not even clear across the common law if party affairs were 'justiciable', that is, whether internal disputes were within the ambit of the courts as ultimate interpreters and arbiters of disputes about the application of the law. In the Australian State of Victoria, to cite a high-profile case, the leader of the Labor Party was expelled by the party executive, in a split over the party's response to the 1930s economic depression. The High Court of Australia determined that he could *not* resort to the courts to argue the propriety of his expulsion, even though the fate of the premiership of the State effectively rested on the expulsion. The court presumed that associations to advance social rather than property interests were formed without an intention that their consensual rules created an *enforceable* contract, as opposed to a 'gentleman's agreement'. In the terms of the lead judgment, as 'a general rule, the Courts do not interfere in the contentions of quarrels of political parties or, indeed, the internal affairs of any voluntary association, society or club'.<sup>6</sup> New Zealand judges expressed similar diffidence (Geddis, 2005).

This Pontius Pilate approach had the merit of leaving politics to the political sphere, without judges feeling they were breaching some separation of powers. It was not entirely a product of judicial purity and political ignorance: one of the Australian High Court judges, Dr Evatt, had been a State MP and would later become national parliamentary leader of the Labor Party itself. But such an abstentionist position could not hold. It trivialised party affairs. This trivialisation was apparent not just when viewed realistically from the perspective of the centrality of parties to politics, but even from the viewpoint of the ordinary party member or dissident faction. In cases in the 1960s and 1970s, therefore, British courts showed no compunction in recognising that party rules were legally binding.<sup>7</sup> (At least those rules that were not incurably vague, and that covered important affairs or principles). Australian courts fell into line from the early 1990s, formally citing the fact that parties there now register and draw some public funding. In substance, these courts were simply admitting the error of treating internal party disputes as if they were no more than a spat between members of a social club.<sup>8</sup> Canadian courts, similarly, will now enforce party rules.<sup>9</sup>

Once the question of justiciability was clarified, the way has been open for disgruntled party members to litigate questions of rule interpretation and enforcement. These particularly arise in cases involving suspension or expulsion, disputes about pre-selection of candidates or elected office-bearers, contested rule-changes and, in extreme circumstances, where rival factions claim to constitute the party executive. Partly out of solidarity, and partly out of fear that the media will scandalise routine, internal disputes, it is fairly common for party rules to purport to bar members from resorting to litigation. Whilst it is paradoxical to then pretend that the rules are meant to be legally binding, the common law courts can ignore those barriers, under old law which prevents private agreements ousting the supervisory role of the courts.<sup>10</sup> Party rules can legitimately ask members to exhaust all internal grievance procedures before resorting to litigation; but the courts reserve a discretion to waive those procedures if a case is urgent.

Parties, for the most part, have adapted to such judicial superintendence, contrary to skeptics who thought they might prefer to fly under the judicial radar or who thought that contemporary judges were simply meddling in party affairs (eg Forbes, 2010, pp. 68-72). Some internal party disputes are intractable and some rules party ambiguous, so the party as a

whole may benefit from outside resolution. In other matters, for example a dispute between two potential candidates, the wider party may be agnostic as to the result. The party hierarchy will often be able to call on party funds or cut-price legal advice, and so the party executive may have limited personal pecuniary concern about litigation. Finally, a dominant faction can lose a legal battle over procedure, yet win the war, assuming it retains the numbers. In any event, the common law notion that party rules form a contract between members does not extend any rights to non-members: a party can still repel a feared ‘stacking’ from outside, even if it has to flout its own rules to do so.<sup>11</sup>

In natural law theory, private agreements like party rules *should* be upheld, as a matter of moral agency. The freedom to assume obligations and make reciprocal promises is enough to make serious promises legally binding (Fried, 1981). There is a simpler, less private law explanation for enforcing party rules, and that is to recognise the public significance of parties (Morris, 2012, pp. 122-128; relatedly, van Biezen 2003). Morris speculates on the intriguing potential within the common law to develop a ‘quasi-public’ or administrative law status for parties, but at present that is largely just a potential. If a party member is subject to expulsion or some other serious discipline or accusation, a judge may interpolate a requirement that the party abide by fair process, where the rules are otherwise silent (Gauja, 2010, p. 105). But common law judges are steeped in the concept of respect for agreements, even if the effect of a particular agreement may seem unjust. They cannot re-write or re-make party rules. A public law/ administrative law approach to parties would indeed be radical: under that approach, not just party members, but anyone with an interest affected by party processes, would have standing to seek legal redress.

This contract law mindset reflects the general, 19<sup>th</sup> century theory of agreements, which was one of laissez-faire and upholding bargains. That theory was declared dead, some forty years ago, in a famous study of commercial law (Gilmore, 1974). The general law of contract was seen to have been subsumed into a broader law of obligations, including responsibilities in the law of negligence, which conceived of people as less atomised and more interdependent than the 19<sup>th</sup> century model. Further, the general principle of freedom of contract had come to be subjected to a thousand statutory inroads - especially for consumer protection - to take

into account power imbalances in the marketplace. But rumours of contract law's death proved greatly exaggerated.

In contrast, and with occasional exceptions due to the indirect effects of anti-discrimination law (Orr, 2011b), when it comes to interactions within political parties in the common law world there has been almost no statutory intervention to redress power imbalances within parties, eg between ordinary members and executive elites. There are isolated exceptions, but even these are weakly framed. (For instance, New Zealand law generally requires parties, in pre-selecting their candidates, to abide by some basic 'democratic procedures'; but this merely asks that parties permit some level of participation by financial members (Geddis, 2007, pp. 80-81)). Why is this so?

One reason involves the enduring myth of the mass, membership based party which is reinscribed in the common law concept of the party as an association based on free agreement between and amongst members. This relational contract presumes, but does nothing to ensure, that party members form a significant base and have meaningful power. Judicial enforcement of such agreements, at the suit of existing members, offers a modest safeguard against capricious flouting of party rules by party oligarchs. But party rules can be as complex, flat or hierarchical as they like, and judges are in no position to second-guess them. Whilst common law courts spent much of the second half of the 20<sup>th</sup> century developing restrictions on executive power within government, in the name of natural justice and democratic empowerment, there is little sign that judges will perform the same activist role in relation to political parties.

### **The statutory conception of parties in an international context**

In English speaking countries, constitutions are invariably blind to the role played by political parties (Issacharoff 2000). Constitutions in these countries tend to be negative, that is they aim to limit governmental action in the name of individual or minority rights. They lack a 'positive constitutionalism', even though constitutions are unavoidably about constituting political power (Pildes 2010). This blindness has been reinforced by the common law preference for constituency level electorates rather than party-list PR, since the law retains a formal focus on individual candidates, sublimating the reality that voters overwhelmingly

vote on the basis of party allegiances or the appeal of party leaders, rather than local candidates. In turn, the majoritarian voting systems typical in common law countries have led reformers and scholars alike to focus less on intra-party concerns, and more on means to ensure better inter-party competition to dampen the problem of cartelism, partisan lockups and other distortions of the electoral ‘market’ (eg Issacharoff and Pildes, 1998).

In contrast, the constitutions of newer democratic systems, as well as those refashioned after war, typically recognise parties (Gauja 2010, pp. 25-26); as do socialist systems, albeit their recognition is singular.<sup>12</sup> The German *Grundgesetz* or Basic Law of 1949 is famously upfront in this regard. It provides that ‘political parties shall participate in forming the political will of the people’ and accords parties explicit constitutional status and guaranteed continuance (Ipsen, 1995).<sup>13</sup> Similarly, the Constitution of France embraces parties. In its first title, about popular ‘Sovereignty’, the freedom of association for parties is proclaimed, together with their central role in the expression of universal suffrage.<sup>14</sup> Nations who have more recently emerged from dictatorships, such as Spain and Portugal, have also constitutionalised the role – and expectations – of parties.

In itself, the absence of constitutional recognition might hardly matter; the oversight might be merely historical or situational. Where parties are constitutionally recognised and affirmed, they may still be *primarily* conceived of as electoral entities (eg Byron, 2013, p. 192) as much as conceived as ‘integral units of the democratic state’ (van Biezen, 2011, p. 187). What is more telling is whether the law then goes on to insist that parties be *not merely* electoral machines, but organisations consonant with a positive vision of the democratic order. Thus, in the German model, parties are given explicit status as constitutional necessities, but in return are required to be both internally democratic and to not threaten the liberal order. In France, parties are constitutionally required to ‘respect the principles of national sovereignty and democracy’,<sup>15</sup> or risk dissolution. The Portuguese Constitution requires parties to respect ‘the unity of the State and political democracy’, and expects them, internally, to ‘be governed by the principles of transparency, democratic organisation and management, and participation by all their members.’<sup>16</sup>

European countries as diverse as Spain, Poland and Turkey also permit legally mandated dissolution of parties in the name of state sovereignty or liberal democracy (Mersal, 2006). This is explicable in light of 20<sup>th</sup> century experiences with fascism and the cold war, and in the face of a fear of theocratic Islamism. The Turkish Constitutional Court has been particularly active in banning political parties in the past 50 years, including for breaching a constitutional principle of secularism. However, as Bader (2010) argues, if courts or constitutions demand more than a commitment to an essential core of democratic constitutional values, paradoxically risks stifling legitimate political variations in the name of ‘militant democracy’.

Whilst continental European courts have been far less prone to banning parties than the Turkish court, in the name of progressive social values continental legal regimes are not shy of regulating what the common law would consider the internal affairs of parties. A recent amendment to the French Constitution declares that the law supports equal access of women and men to representative office, and that political parties must contribute to advance such gender equality.<sup>17</sup> This has spawned a statutory regime under which parties must choose and promote slates of candidates equally promoting men and women, or face deductions in their public funding. The next step, logically, is affirmative action to promote equal representation for ethnic groups. The German position in relation to internal party democracy is most developed. German parties are subject to a specific statute on political parties, the *Parteiengesetz*. Part II of that law mandates that members’ assemblies form the supreme organ of a party, that executives must be elected, that members have equal voting rights, that parties have regional branches to enable members to participate meaningfully, and that parties establish arbitral mechanisms to deal with internal disputes fairly.

Parties in this continental conception are thus bearers of obligations as well as rights and freedoms (Schneider, 1957). They are not seen purely as players in an electoral free market, but as bodies serving the public law ideal of forming and channelling popular beliefs and participation. This mindset does not merely reflect a desire to avoid sclerosis in intra-party competition for winnable positions on a party list: as we have just seen, in the case of France, it can permeate a constituency based electoral system. In contrast, common law countries have taken a more laissez-faire approach to parties’ internal freedom of association,

especially in areas such as their ideological boundaries, structure and candidate selection. This is consistent with the conception of the unincorporated association as something beneath or prior to the law. Parties can thus be simultaneously constructed as narrowly self-serving electoral machines, alongside the common law conceit that, as unincorporated associations, they might also be richly rule-governed and member-driven.

The exception in the broader common law world is the US system of statutorily mandated, publicly-run primaries, which involve popular participation in the pre-selection of candidates. US parties, like those in the Westminster model, also evolved as unincorporated associations (Mileur, 1992, p. 169). As we observed at the outset, the system of direct primary elections which spread from the late 19<sup>th</sup> century in the US is so skew to the rest of the common law party tradition that it forms a separate and exceptional system. Indeed, it is notable that even as parties in places like the UK, Canada and Australia experiment, however timorously, with more open candidate and leadership selection processes, they are doing so within their own organisational structures and maintaining control of their constitutional rules (Gauja 2012, Miragliotta 2013, Forcese and Freeman, 2005, p. 89).

The US aside, there is a remarkable degree of congruity in the statutory conception and regulation of political parties across the common law world. Parties in these jurisdictions can register with central bodies such as electoral commissions. Registration is largely a facilitative right. Parties receive benefits such as their name on the ballot, ease of nominating candidates, protection of their name or emblem and, in different ways in different jurisdictions, public funding, free air-time or tax incentives for their donors (eg Forcese and Freeman, 2005). The only correlative duty is a minimum level of financial disclosure, which ranges from moderate – UK parties must publish audited accounts – to very mild – Australian parties just give an annual statements of large donations and loans, and total receipts and expenditure (Ewing, 2007, pp. 81-85, AEC 2012).

To register a party in the common law countries, there are bureaucratic niceties such as lodging a few forms, a copy of their constitution and, in some places, an initial fee. But there are only two substantive requirements. One is to have a certain minimum size; the other is to be focused on electoral competition. Canadian federal law requires a minimum 250 members

and that ‘one of the party’s fundamental purposes is to participate in public affairs by endorsing ... members as candidates and supporting their election’.<sup>18</sup> Australian federal law requires a party to have either an MP or 500 unique members, and have as a purpose ‘the promotion of the election [of] candidates endorsed by it.’<sup>19</sup> New Zealand national law requires 500 members and that ‘the party intends at the next general election to submit a list of candidates’.<sup>20</sup> Finally, British law lacks even a minimum membership requirement. It merely requires parties to declare an intention to compete in elections.<sup>21</sup> Conversely, dipping under the membership requirements or ceasing to field candidates is the only rationale for de-registration. Otherwise, there is no minimum democratic content required of the parties’ internal structure, rules or behaviour.

This high level of legal congruity might reflect some borrowing between these jurisdictions, but only at the administrative level of drafting: the impetus for each law was local, and not a result of transplantation. The point of erecting systems of party registration was not to consciously juridify or ‘entitise’ them (to adopt a term from Ford, 1959), but to enable specific techniques of electoral governance which were deemed politically desirable. These include the disclosure of donations to parties, in the interest of deterring corruption and informing voter deliberation, and the printing of party names on ballots, to assist electors to choose between candidates. Indeed the concept of party registration builds implicitly but clearly on the unincorporated association model, by assuming each party has a constitution governing the relations between electors who choose to join that party.

Particularly striking is the fact that statutory law does not seek to define what a ‘member’ might be. This neglect is entirely consistent with the common law freedom of contract. A member may thus ‘buy’, with her subscription, only a bare minimum of membership rights; she might buy rights alongside those of more powerful affiliated organisations; or the party rules might genuinely erect a membership-run organisation. Similarly, the common law leaves to each party’s rules the question of whether potential members must await formal screening and admission to membership, or simply purchase a party ticket the way one might use one’s credit card to buy access to a gymnasium. Indeed since the definition of ‘member’ is left up to whatever contractual form the party wishes to mandate, then even in those systems which require a party to nominate several hundred members before it can register,

those ‘members’ need not pay an annual fee or possess any substantive rights or obligations. (There are minor exceptions in two jurisdictions, which prove this rule.)<sup>22</sup>

This conception is quite consistent with Schumpeter’s dictum that ‘a party cannot be defined in terms of its principles’, it is just ‘a group whose members propose to act in concert in the competitive struggle for political power’. One does not need share Schumpeter’s cynical assertion that this is ‘simply the response to the fact that the electoral mass is incapable of action other than a stampede’ (Schumpeter, 2010, p. 251). In common law countries, then, a party is not necessarily a site for democratic participation and deliberation, but a competitive electoral brand. The term ‘brand’ is obviously a market-based metaphor, rather than a richly political one. Consistent with this, statute law only enters this fray in ways that address very obvious anti-trust or anti-competitive concerns, to borrow the law and economics language of Posner (2003). For instance, to be registrable, new party names cannot be confusingly similar to established ones, and one party cannot claim false affiliation or support from another. The statutory law does not otherwise concern itself with the party as an entity, let alone its internal activities.

The only sustained legislative focus on parties in the common law world is on certain aspects of party finances, and this is quite consistent with a minimalist anti-trust or market orientation. The systems we have focused on thus require some level of financial disclosure, especially donations to parties (International IDEA, 2013 forthcoming, ch 6). The more egalitarian jurisdictions (UK, NZ, Canada) also rein in party electoral expenditure, albeit under mild caps, to address concerns about the appearance of undue market power of incumbent parties: to similar ends Australia employs a softer if more positive tool, by paying parties electoral funding directly from public coffers. But none of these laws seek to enlarge the role of parties beyond that of electoral machines. On the contrary, they reinforce that conception. Any financial disclosure, for instance, is not designed to empower the party membership, but to dampen public concerns about corruption in policy implementation.

### **Conclusion: soul versus persona**

We are left with an apparent paradox. In common law theory, the unincorporated association is a ground-up type of organisation, driven by a membership which collectively originates,

and then keeps oversight of, the very party rules which knit that membership together. The membership, ideally, is the animating soul of the party. Yet in constitutional and statutory conception, parties in common law electoral systems need be no more than marketing devices – a public persona in the form of a registered electoral brand. This paradox however melts away when one realises that the unincorporated association, as the traditional common law vehicle for political party organisation, merely imagined or hoped that parties would be membership-driven entities. It has never *mandated* any such thing.

Indeed, both by not constitutionalising the status of parties, and by deferring to a pure freedom of contract and constructing the party as just a network of such contracts - rather than as a body visible to the law and thus easily amenable to direct statutory dictate - common law systems shielded parties from regulatory tinkering. Lately, common law judges have decided that parties are not mere loose social groups whose internal rules are unenforceable. But this affirmation has not led to a judicialisation of the substance of party affairs; rather it has reinforced the contractual importance of party rules.

In turn, when electoral laws in common law systems outside the US belatedly directed their attention to the role of parties, those laws have envisaged parties in a minimalist way, subjecting them to a few financial limits and obligations consistent with a modestly regulated electoral market into which the parties project themselves as electoral brands. Van Biezen was right to say that public funding of parties may indirectly alter their internal dynamics. But her prediction that this ‘undermines their organizational autonomy and their status as private associations, turning parties into a unique type of public utility’ (2003, p. 718) requires nuancing in the common law world. Parties are public in the sense that they are inevitably constituted as creatures driven by and beholden to the electoral process. But they are not public utilities in any deeper sense of being necessarily subject to popular control, or of owing public duties such as due process or freedom of information to their membership, let alone more broadly.

Why is this so? In part, it may be a product of a deep attachment to a laissez-faire freedom of association in English-speaking democracies. It may also reflect a reform-resistant inertia on the part of the dominant parties, who are buttressed by majoritarian electoral laws which

encourage a stable, dichotomous and self-regarding party system. But, as I have argued here, the legal form of political parties in the common law tradition has also played a key role. Its statutory (including constitutional) law has contributed normatively to produce a conception of parties as little more than electoral brands. Beneath the umbrella of that brand lies a private sphere, constituted by contract, which may be mutually-regarding and vibrant, or it may be flat and dictatorial. This permits idealists, such as Teorell (1999), to dream of deliberative, intra-party democracy. Yet, in the nature of things parties are more likely succumb to Duverger's observation (1954, p. 134) that a party run on autocratic internal lines is better 'armed for the struggles of politics'; an observation which congealed into the 'rational-efficient party model' (Wright 1971).

The judicially-constructed law of unincorporated associations and contract provided the potential for the *idea* of membership based parties, where members could be the founding and driving force behind the party's rules and then, through those rules, its internal and external politicking. But any notion of the members as the soul of the party was a purely contingent one. The freedom of contract on which the unincorporated associational form rests embodies, in a day-to-day sense, the broader freedom of association inherent in the common law tradition.

If, as O'Sullivan says, 'the public realm is the most fundamental of all political concepts because it is only the shared relationship it constitutes between rulers and ruled that makes government more than mere domination', then parties in the common law remain private bodies, which surface to act as public brands in electoral competition. They do not occupy any more formal public space. From a legal perspective, the evolution of mass-parties from cadre parties (Duverger, 1954, p. 63) is easily reversible. (Note the argument here is from a legal vantage point: a prying media or a culture of open dissidence within parties could construct them differently in a social sense).

In contrast, civilian or continental law systems adapted themselves, especially post-WWII, to more substantively democratic conceptions of parties. The focus in the US has been on role of the general public in candidate selection, in a way that elides the notion – or problem - of party membership as it is understood elsewhere. But in the common law countries with a

Westminster tradition, parties are public electoral brands, shielding a private core. These parties, to borrow an alleged Bismarckism, are like sausages, which we dine on without caring to know how they are made.

## Notes

<sup>1</sup> This is not to say that party elders do not have significant clout in US candidate selection, eg, they may have a formal role in certifying who can stand in the primary election.

<sup>2</sup> This is not completely invariable: eg a few small Australian parties have formed as not-for-profit, incorporated associations, gaining the ease of dealing with the world as formally distinct entities yet still largely controlling their internal rules.

<sup>3</sup> *Dawkins v Antrobus* (1879) 17 Ch D 615.

<sup>4</sup> *Lloyd v Loaring* (1802) 31 ER 1302 at 1305: ‘this Court should sit upon [ie not decide] the concerns of an association, which in law has no existence’.

<sup>5</sup> Hence the definition ‘two or more persons bound together ... for common purposes, not being business purposes ... each having mutual duties and obligations, in an organisation which has rules...’: *Conservative and Unionist Central Office v Burrell* (Inspector of Taxes) [1982] 1 WLR 522. Curiously, in this case the Court held that the national Conservative party was too loosely structured to even be an unincorporated association, at least for tax purposes: for critique see Gauja (2010, pp. 57-58).

<sup>6</sup> *Cameron v Hogan* (1934) 51 CLR 358 at 370-71 and 384.

<sup>7</sup> Eg *Johns v Rees* [1970] 1 Ch 345, *Lewis v Heffer* [1978] 1 WLR 1061.

<sup>8</sup> *Baldwin v Everingham* [1993] 1 Qd R 10.

<sup>9</sup> *Knox v Conservative Party of Canada* [2007] 286 DLR (4th) 129.

<sup>10</sup> Eg *Dobbs v National Bank of Australasia* (1935) 53 CLR 64.

<sup>11</sup> *Baker v Liberal Party of Australia (SA Division)* (1997) 68 SASR 366.

<sup>12</sup> Eg Constitution of Vietnam article 4, establishing the Vietnamese Communist Party’s absolute leadership role.

<sup>13</sup> German Basic Law 1949 articles 20-21.

<sup>14</sup> Constitution of France (5<sup>th</sup> Republic) article 4.

<sup>15</sup> Constitution of France (5<sup>th</sup> Republic) article 4.

<sup>16</sup> Constitution of the Portuguese Republic (7<sup>th</sup> Revision, 2005) articles 10 and 51.

<sup>17</sup> Constitution of France (5<sup>th</sup> Republic) articles 1 and 4.

<sup>18</sup> Canada Elections Act 2000 section 366(2)

<sup>19</sup> Commonwealth Electoral Act 1918 (Australia) section 126.

<sup>20</sup> Electoral Act 1993 (NZ) section 63(2).

<sup>21</sup> Political Parties, Elections and Referendums Act 2000 (UK) section 28(1).

<sup>22</sup> In New Zealand, members must, either directly or indirectly, have some role in candidate selection (Geddis, 2007, p. 80). In Queensland, Australia, if members are balloted about candidate selection, no individual’s vote should count more than another: Electoral Act 1992 (Qld) Part 8A (yet no ballot is guaranteed, and affiliated bodies can have block votes which outweigh the votes of individual members).

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