

Constitutionalising Political Parties in Britain

Jongcheol Kim

Department of Law

London School of Economics and Political Science

UMI Number: U117335

All rights reserved

INFORMATION TO ALL USERS

The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if material had to be removed, a note will indicate the deletion.



UMI U117335

Published by ProQuest LLC 2014. Copyright in the Dissertation held by the Author.
Microform Edition © ProQuest LLC.

All rights reserved. This work is protected against
unauthorized copying under Title 17, United States Code.



ProQuest LLC
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106-1346

Constitutionalising Political Parties in Britain

**A Thesis Submitted to the University of London
for the Degree of**

Doctor of Philosophy

by

Jongcheol Kim (LL.B., LL.M.)

**Department of Law
London School of Economics and Political Science**

1998

THESES

F
7582

701632

Preface

When almost five years ago I came to London to study British public law, I had no specific topic in mind that might form the basis for my Ph.D. course. I came with no particular background in British law, but having studied American constitutional law, the oldest written constitution in the modern world, I have decided it would be of considerable interest to further my understanding of modern constitutionalism by looking at the oldest example of an unwritten constitution.

My knowledge of British public law was, then, extremely shallow and came almost exclusively from translating into Korean A.V.Dicey's classic work, *An Introduction to the Law of the Constitution*. While studying during my LL.M. year in London the contemporary issues concerning the UK government and constitution together with the underlying social, intellectual and legal history of Britain, I realised that the British constitution was in a state of flux and that constitutional reform would be likely to play an increasingly important part in the future of British politics and public law. The British constitution has come under attack mainly because the political conventions, which sustain it, have become both outmoded and unworkable in the pluralised society of today. Constitutional reform is an attempt to modernise the British constitution in such a way as to enhance democratic governance in both theory and practice. In studying this new trend, my interest has shifted somewhat from a model which was once widely admired to the question of how a new system of government might best be conceived, corresponding to Britain's present and future needs.

This dissertation is intended as an attempt to substantiate this new concern. It focuses on a single institutional element, which runs right through every important aspect of the constitutional reform agenda in Britain. This element is political parties. The system of parliamentary government in Britain is one of party government. Political parties are "the chief motivating force of our main governmental institutions" (Crowther-Hunt and Peacock 1973 [Cmnd 5460-I]: para.311) so that any scheme for constitutional reform must concern itself with political parties. In this dissertation, I attempt in the context of Britain to thematise a third way of democracy beyond liberalism and communitarianism and to

outline the proper nature and role of political parties in this new paradigm. It will be obvious to the reader that I try to defend the classical notion that democratic governance is unthinkable without political parties, while redefining their nature and role in the democratic process.

Just before the 1997 general election, I finished an early draft of this dissertation, concluding that there is a need for the constitutionalisation of political parties as part of the modernisation of the British constitution. Happily, since 'new' Labour's victory in that election, movement towards the constitutionalisation of political parties is gaining momentum in British politics. A series of referenda and supporting legislation confirm that there will be a separate Scottish Parliament and a separate assembly for Wales to be elected by the Additional Member System. A commission chaired by Lord Jenkins of Hillhead was set up to recommend the acceptable alternative to the present first-past-the-post system in general elections. The European Election in June 1999 will adopt the party list system. The remit of the Committee on Standards in Public Life was extended to cover a study of the funding of political parties and it is most likely that the Committee will recommend the introduction of regulation of party finances. In addition, since the debacle of the 1997 election, the Conservative Party has discarded its archaic, informal structure, which reflected the British constitution in miniature. All these changes make the constitutionalisation of political parties indispensable to the process of political modernisation of Britain.

I believe that this study of British constitutional reform will also have some significance for other democracies, especially those countries, like my homeland, the Republic of Korea, which are in transition from authoritarian rule to democracy. Lessons from another country, of course, must be seen through the prism of the political, legal and cultural specificity of the countries concerned.

I owe the greatest thanks to my supervisor, Mr. W. Tim Murphy of the London School of Economics and Political Science (LSE) for his continual support and constructive guidance since my LL.M. year in London. Indeed, his recognised command of both socio-political theory and law was the major reason for my decision to turn down a place at an equally distinguished institution and continue my studies at LSE. I am greatly happy to acknowledge that his invaluable supervision of this study and generous encouragement has proved that decision to be the right one. I should like to thank Professor Gunther Teubner for his insightful suggestions and encouragement on various occasions regarding my

project for constitutionalised democratic autonomy and its implication for the democratisation of political parties. I should also like to thank Professor Carol Harlow for her general comments on parts of an early draft of this dissertation.

I am greatly indebted to Professor Kyong Whan Ahn of Seoul National University for his heartfelt concern and encouragement, which since my LL.M. years in the Seoul Law School has been more than that of a teacher, though I suspect gratitude will not be enough. I must also express my gratitude to the Government of the Republic of Korea for funding the first three years of my research with a National Government Scholarship and to the British Government for covering my tuition fees over the first two years of my study with a British Foreign and Commonwealth Office Scholarship.

I should like especially to thank the Rt. Revd. John A. Hardy for showing me throughout this research friendship and tolerance. John also helped me edit and correct the late draft of this dissertation. In addition, Philip Chang has proofread a couple of chapters of an early draft and Neil Weston has kindly provided me with some important materials published by the main political parties. I am deeply grateful to them all.

Finally, I should like to thank my mother, my in-laws, my wife Nan Kyoung, and last, but not least, our beloved son and daughter, Tae-Hyoung and Hyojin, for all their support and patience.

Abstract

Although Britain has developed a reasonably successful model of party democracy, there is little legal recognition of political parties in the constitutional order. My hypothesis is that the legal status of political parties relates to deep-seated political and social theories subsisting in British society.

Britain's self-regulating political parties still adhere to the liberal theory of parliamentary democracy. However, there is increasing dissatisfaction with this *status quo*, which tends to ignore the pluralist reality. Therefore, demands are now being made for the creation of a new theory of democracy and for a range of constitutional reforms which such a theory requires. I propose to adopt a model of double democratisation which implies a refocusing of the liberal distinction between state and society. This model develops an equilibrium between state and society within a constitutional framework which can be called 'constitutionalised democratic autonomy'. I seek to argue that all agencies of power should be regulated within a constitutional framework which allows public scrutiny of the political system as a whole while affording, on the one hand, the greatest measure of freedom to civil society and, on the other, parity of autonomy to the state.

The fact that political parties now play a powerful role within the state adds additional urgency to the task of reformulating the democratic agenda. In connecting a new perspective on political parties to the reformulated theory of democracy, the dual relationship of political parties to the state and civil society, *i.e.*, their character both as a social sphere and as a political sphere, will be stressed.

Based on these theoretical arguments, this dissertation critically analyses British law relating to political parties and maintains that there is a need for the legal institutionalisation of political parties. It discusses various possibilities for the constitutionalisation of political parties, which are envisaged to encourage in a balanced way inter- and intra- party democracy. This constitutionalisation will require, *inter alia*, (a) intra-party democracy, (b) electoral reform and (c) the juridification of the financial affairs of political parties.

This dissertation concludes that the constitutionalisation of political parties is part and parcel of the modernisation of the British political system in the direction of correcting a divergence between the pluralist reality and the liberal constitutional ideal.

Contents

Preface [2]
Abstract [5]
Contents [6]
Legislation [14]
Cases [16]

Chapter 1 Themes and Scope of the Thesis [18]

1	"The People's Government" and constitutional reform [18]
2	Two themes: Democracy and political parties [20]
2.1	<i>Democracy</i> [21]
2.2	<i>Political Parties</i> [21]
3	Constitutionalising political parties in Britain [24]
4	Scope and limits [25]
4.1	<i>International dimensions</i> [25]
4.2	<i>Devolution</i> [27]
4.3	<i>Local democracy</i> [28]
5	Outline and points of reference [28]

Chapter 2 Modern British Democracy and Political Parties: Liberal Ideal, Pluralist Reality [31]

1	Introduction [31]
2	The dominant view of democracy in Britain: Diceyan parliamentary democracy [33]
2.1	<i>Dicey's view of democracy: A "unitary, self-correcting" representative democracy?</i> [33]
2.2	<i>Under-inclusiveness of Craig's analysis</i> [35]
2.3	<i>Dicey's vision of democracy as a 'liberal' democracy</i> [38]
2.3.1	<u>The underlying political philosophy of Diceyan vision: individualistic liberalism</u> [38]
2.3.2	<u>Dicey's rejection of radicalism and collectivism</u> [41]
2.3.3	<u>A form of liberal democracy</u> [44]
3	The maintenance of the dominant view of democracy: the collectivist content in the form of liberal democracy [44]
3.1	<i>The emergence of collectivism</i> [44]
3.2	<i>The triumph of collectivism: The establishment of the British version of party government</i> [45]
3.3	<i>A divergence between reality and ideal: Liberal form, collectivist content</i> [46]

4 Some Implications of the British version of parliamentary democracy [48]

4.1 *Reluctant recognition of political parties* [48]

4.2 *Political, not legal, constitution* [49]

4.3 *Elitist democracy as opposed to participatory democracy* [50]

4.3.1 The defeat of radicalism [50]

4.3.2 Responsible and representative government [51]

4.3.3 Party government as the continuation of elitist rule [52]

4.3.4 The supremacy of parliamentary parties over their extra-parliamentary wings [53]

(i) The Conservative Party [55]

(ii) The 'parliamentarisation' of the Labour Party [58]

5 Conclusion [61]

***Chapter 3 Towards a New Democracy: Constitutionalised Democratic Autonomy* [63]**

1 Introduction [63]

2 Participatory democracy as an alternative vision? [64]

2.1 *A minor limitation of participatory democracy: the uncertain outcome of participation* [65]

2.2 *The fundamental problem of de-differentiation of the state-society distinction* [65]

2.2.1 Schmitt's theory of a total state [66]

2.2.2 A critique of the theory of a total state: the end of holistic worldview [68]

3 Complexity of modern society and the distinction between state and civil society [70]

3.1 *Niklas Luhmann's theory of modern society:*

the complexity of society and the impossibility of representation of society as a whole [70]

3.1.1 Obsolescence of the state-society polarity [71]

3.1.2 The illogical character of the semantics of the state and civil society [72]

3.1.3 The decentring image of society and impossibility of representation of global society [74]

3.1.4 A project of "methodological anti-humanism" [75]

3.2 *A critique of an overemphasis on systemic complexity and operational closure* [76]

3.2.1 "No way out" from the iron cage? [76]

3.2.2 A disguised inclusion of the public in the political system [78]

3.2.3 An "unintended" political conservatism? [79]

3.2.4 Is systemic autonomy unaccountable self-regulation? [81]

4 Towards a new paradigm of democracy: constitutionalised democratic autonomy [85]

4.1 *Reconstruction of the state-society distinction* [86]

4.1.1 A critique of neo-conservatism [86]

(i) The basic tenet of neo-conservatism [86]

(ii) A British version of neo-conservatism: "free economy, strong state" [87]

(iii) A distorted distinction between state and society [88]

- 4.1.2 Towards a new equilibrium between state and civil society: double democratisation [89]
 - (i) The possibility of a normative paradigm of democracy:
 - the reconstruction of the political in a decentred society [90]
 - (a) Post-modern political theory: The end of a normative paradigm of the political?
 - (b) The importance and limit of a normative politics: A balanced conception of the political
 - A reflexive mode of politics
 - Dual politics
 - (ii) Democratisation as a double-sided process [95]
- 4.2 *Towards constitutionalised democratic autonomy* [97]
 - 4.2.1 The public sphere as the intermediary structure between the state and civil society [98]
 - (i) The public sphere and the state: Towards a reflexive mode of societal integration [98]
 - (ii) The public sphere and civil society [100]
 - 4.2.2 Institutional conditions of democratic autonomy [101]
 - (i) A new version of constitutionalism [101]
 - (ii) Flexible and contextual concepts of basic rights and the public [101]
 - (a) Autonomy as the end and a condition of rights
 - (b) Flexible concept of the public and the case for the public sphere
 - (iii) Constitutionalisation of the political system: the requirement of "democratic procedures" [104]
 - (iv) Democratisation of civil society: publicly responsible self-regulation [106]
 - (a) A paradox of democratic autonomy: the problem of voluntary non-participation
 - (b) Social equality as a condition of democracy
 - (c) Two-track constitutionalisation

5 Conclusion [110]

Chapter 4 A New Perspective on Party Organisation in a New Democracy: Political Parties at the Crossroads of Civil Society and the State [112]

1 Introduction [112]

2 Old perspectives on the development of party organisation [113]

2.1 *Political parties as a linkage between the state and civil society* [113]

2.2 *Characteristics of the three conventional models of political parties* [115]

2.2.1 The elite party model [115]

2.2.2 The mass party model [115]

2.2.3 The catch-all party model [116]

2.3 *The conventional perspective and the concept of democracy* [117]

3 A new perspective on the development of party organisation [119]

3.1 *The division of labour in the political process reappraised* [119]

3.1.1 Challenges to a stable and rigid division of labour in the political system [119]

3.1.2 A new paradigm of politics [120]

3.2 *Changed character of political party in a new paradigm: the advent of the cartel party* [123]

3.2.1 Cartelisation of political parties [124]

3.2.2 Party organisation in a new paradigm [126]

3.2.3 Sub-differentiation of party organisation [127]

3.2.4 The cartel party and democracy [128]

- (i) Another version of elitist democracy? [128]
- (ii) Balanced, inclusive and stable pluralist democracy [129]

4 Conclusion: Complex entity, complex status, and a need for more flexible policy [132]

Chapter 5 Law and Political Parties in Britain [133]

1 Introduction [133]

2 The legal status of political parties in Britain [133]

2.1 *Political parties as private associations [133]*

2.2 *Common law relating to the legal status of political parties [134]*

2.3 *The nature and implications of the autonomy of political parties [135]*

3 Freedom of association as a constitutional basis for the organisation of political parties [137]

3.1 *The relativity of freedom of association as a political liberty [138]*

3.2 *The paradoxical character of freedom of association [138]*

3.3 *A search for the realisation of the positive conception of freedom of association [139]*

4 Judicial control of political parties: The private law approach [140]

4.1 *Contract as the basis of judicial intervention [140]*

4.2 *The supervision of political parties under principles of good administration [141]*

4.3 *Some problems with the private law approach [143]*

4.3.1 *The problems of privity and standing [143]*

4.3.2 *The problems of consensual submission to jurisdiction [145]*

5 The negative design of statutory regulation [146]

5.1 *No general law on political parties [146]*

5.2 *Non-recognition of political parties in general elections [147]*

5.2.1 *Separation between candidate selection and nomination [148]*

5.2.2 *No regulation of national party expenditure [148]*

5.2.3 *The absence of party privilege [149]*

(i) *Political polarisation [149]*

(ii) *Partisan legislation and its effects on political parties [150]*

(iii) *A need for party privilege [152]*

5.3 *The Sex Discrimination Act 1975 : the sole direct regulation of the activities of political parties [153]*

5.4 *Some indirect restrictions [154]*

5.4.1 *Restrictions related to the existence of political parties [155]*

(i) *Restrictions on the basis of public order [155]*

(ii) *Restrictions on the basis of national security [155]*

(iii) *Comparison with the German approach: pluralist versus liberal regime [156]*

5.4.2 *Restrictions related to control of civil society having relevance for political parties [158]*

(i) *Regulation of political parties through media control [158]*

(a) *The media and the political system*

(b) *Regulation of political parties' use of television in Britain*

Broadcasting as a public service

Free party political broadcast and the ban on commercial political broadcasting

Regulation of the freedom of television political reporting

- Impartiality and political broadcasting
- Statutory requirements of reasonable standards of broadcasting
- Self-regulation and impartiality: freedom from government interference?
- Politicisation of broadcasting
- Legal powers of government to interfere in broadcasting
- Indirect government influence on current affairs programmes
- British broadcasting's bias in favour of the parliamentary model of politics
- Regulation under Section 93 of the Representation of the People Act
- (ii) Restrictions on the activities of interest groups and their relevance for parties [168]

6 Problems and an alternative: Towards the institutionalisation of political parties [169]

- 6.1 *Lack of institutional tools for reform of the British political system* [169]
- 6.2 *The usefulness of group personality of political parties in terms of their external relations* [169]
 - 6.2.1 The single-mindedness of anti-pluralist thought [170]
 - 6.2.2 The unequal political market [171]
- 6.3 *The public nature of political parties as an essential element of the political process* [172]
 - 6.3.1 Elections as a battleground for political parties [172]
 - 6.3.2 The changing function of general elections [173]
- 6.4 *Political parties as mini-collective systems of government* [174]
 - 6.4.1 The virtual monopoly of political parties in the institutionalised political process [174]
 - 6.4.2 The internalisation of political process within political parties [175]
 - (i) The meaning of internalisation and its effect [175]
 - (ii) A review of *Burrell* case: the Conservative Party as a legal entity [176]
 - 6.4.3 The required democratic control of the internal affairs of political parties [178]
- 7 **Conclusion: The nineteenth century framework at the dawn of the twenty first century** [178]

Chapter 6 The Required Democratic Procedures: the Issue of Intra-party Democracy with reference to the Modernisation of the Labour Party [180]

- 1 **Introduction** [180]
- 2 **The implications of intra-party democratic controversies in the Labour Party** [181]
- 3 **Two forms of intra-party democracy** [182]
- 4 **Is direct intra-party democracy incompatible with democratic government?** [183]
 - 4.1 *The case against direct intra-party democracy and its rationales* [183]
 - 4.1.1 The difference between political parties and interest groups [183]
 - 4.1.2 The problem of faction [184]
 - 4.2 *The case for direct intra-party democracy and its rationales* [184]
 - 4.2.1 Flexible relationships within party organisations [185]
 - 4.2.2 The usefulness of the active minority [186]
 - 4.3 *Analysis and Criticisms* [186]
 - 4.3.1 Conception of intra-party democracy as part of the whole project of democratisation [186]
 - 4.3.2 The actual meaning of the qualitative difference between political parties and other political associations [186]
 - (i) Qualitative difference between political parties and other political associations [186]

- (ii) The real implication of the pluralisation of politics [187]
- (iii) The autonomy of a political party and intra-party democracy [188]
- (iv) Constitutionalisation of direct intra-party democracy [189]

4.4 *The case of the Labour Party* [190]

4.4.1 Intra-party democracy under the Labour left's initiatives in the 1970s and 1980s [190]

4.4.2 The problems with the Labour left's reform [191]

- (i) A side-effect of the supremacy of
the extra-parliamentary party over the party in public office [191]
- (ii) The lack of discussion about manageable participation [192]
- (iii) The neglected importance of open and egalitarian systems of opinion formation [192]
- (iv) A failed crusade for intra-party democracy [193]

4.4.3 The modernisation of Labour [194]

- (i) The change in power structures [194]
- (ii) Individualisation of organisation [195]

4.4.4 Analysis of the modernising Party plan: greater democracy or more managerialism? [196]

4.5 *A need for a balanced realism: beyond individualism and collectivism* [197]

4.5.1 Qualitative change of territorial representation [198]

4.5.2 The implications of postmodern functional representation [198]

- (i) New forms of participation in the information-oriented society [198]
- (ii) Some problems with new styles of participation [200]
 - (a) A devaluation of political institutions
 - (b) Problems with the individualisation of the power structures within political parties
 - (c) A balanced democracy: beyond collectivism and individualism
 - (d) The important role of the media in a balanced democracy
- (iii) The problem of dominant interests within party politics:
the case against the Labour-Union link [204]
 - (a) The institutional link between the Labour Party and Trade Unions
 - (b) The unique history of the Labour-Union link
 - (c) Two reasons for a friendly divorce between Labour and unions
A speculative reason: the identity problem of the Labour-Union link
A result of the required publicity of political parties in a pluralised society

5 **Should party members take part in the election of their leaders?** [208]

5.1 *The importance of indirect intra-party democracy* [208]

5.1.1 The similarities and differences between our project of intra-party democracy and McKenzie's [208]

5.1.2 The necessity of indirect intra-party democracy [209]

- (i) Participation in the leadership election process [209]
- (ii) Participation in the selection of party candidate [212]

5.2 *Objections to the required indirect intra-party democracy* [213]

5.3 *The democratic nature of the electoral college* [214]

5.4 *The problem of cost* [215]

6 **Conclusion: Constitutionalising intra-party democracy** [215]

Chapter 7 Reform of the Electoral System and the Institutionalisation of Political Parties [217]

1 **The present electoral system under challenge** [217]

1.1 *Primary criticisms of the "first-past-the-post" system* [217]

1.2 *Analysis of some practical problems with the case for electoral reform* [218]

1.2.1 The reluctance of the two major parties [218]

1.2.2 No general consensus on the best alternative system [220]

2 The alternative electoral systems [221]

2.1 *List systems* [221]

2.1.1 The purist list system [221]

2.1.2 The German mixed system [222]

(i) The outline of the German system [222]

(ii) Three main objections [222]

(a) The loosen MP-constituency link

(b) The exaggerated role of the pivotal party and the hypothesis of weak coalition governments

(c) Mistrust of political parties

2.2 *Preferential voting systems* [227]

2.2.1 The alternative vote system (AV) [227]

2.2.2 The supplementary vote system (SV) [228]

2.2.3 The single transferable system (STV) [228]

(i) Outline and advantages of STV [228]

(ii) Two major objections [230]

(a) The odd implications of the complex counting system

(b) Some problems with larger multi-member constituencies

3 The implications of the alternative electoral models [232]

3.1 *The difference between STV and the German system:*

recognition of the positive role of political parties in the democratic process [233]

3.2 *The naive illusion of the advocates of STV:*

Does STV really strengthen voter's choice rather than party's choice? [235]

4 Conclusion: Matching the electoral system with the institutionalisation of political parties [237]

Chapter 8 Juridification of the Funding of Political Parties [239]

1 Introduction [239]

2 The present legal framework governing party finance [239]

3 Some problems with the present situation [241]

3.1 *Problem I - The Lacuna of legal regulation of national electoral expenditure* [241]

3.2 *Analysis of the case against national expenditure limit* [243]

3.2.1 Too radical to be planted in laissez-faire British political arrangements? [243]

3.2.2 Control of national expenditure and freedom of expression [243]

(i) Expenditure caps and the freedom of expression of political parties [244]

(ii) Effects on third-party expenditure and freedom of expression [245]

(iii) The right way to enhance informed choices of voters [247]

3.3 *Problem II - The financial disparity between political parties* [249]

3.4 *An analysis of voluntarism as the rationale for unregulated fundraising* [250]

3.4.1 Can money be one essential standard in evaluating the quality of opinion? [250]

- 3.4.2 Behind voluntarism (1): abuses of the voluntary donation system [251]
 - (i) The sale of honours [251]
 - (ii) The sale of political influence [253]
 - (iii) Foreign donations [254]
- 3.4.3 Behind voluntarism (2): Institutional dependence of the two major parties [256]
 - (i) Limited regulation of company donations [257]
 - (ii) The organisational and financial link between special interests and the Labour Party [257]
 - (iii) Some objections to the regulation of the trade unions' Labour funding [258]
 - (iv) The rebuttal to the case for a special treatment of trade union donations [259]
- 3.5 *Problem III - Secretive political fundraising* [260]
 - 3.5.1 The case for the public disclosure of donations [260]
 - 3.5.2 Objections to disclosure [262]
 - 3.5.3 The need for financial transparency vis-à-vis the public nature of political parties [262]
- 4 The rationale for state aid to political parties: the effective performance of party democracy** [263]
 - 4.1 *A project of constitutionalised democratic autonomy and state regulation of party finance* [263]
 - 4.2 *The opposition to state funding* [264]
 - 4.2.1 Does state aid for political parties necessarily encroach on their autonomy [264]
 - (i) The liberal fear of the colonisation of political parties by the state [264]
 - (ii) The realistic view of the relationship between the state and political parties and the need for state aid [265]
 - 4.2.2 Does state aid necessarily undermine the traditional base of political parties? [267]
 - (i) The fear of centralisation and bureaucratisation of political parties [267]
 - (ii) A new paradigm of participation and state aid [268]
 - (iii) State aid and extremist political parties [269]
 - 4.2.3 State aid and the theory of party decline and anti-party sentiments [269]
 - (i) The theory of party decline and state aid [269]
 - (ii) The real implication of the challenge to party politics and state aid [270]
- 5 Conclusion:**
 - the need for the juridification of the funding of political parties in a pluralist democracy [273]

Chapter 9 Conclusion [274]

- 1 Democracy and constitutional reform in Britain** [274]
 - 1.1 *Rousseau's gibe at British democracy* [274]
 - 1.2 *Three stances concerning constitutional reform* [274]
 - 1.3 *Problems with the above three views* [275]
 - 1.3.1 Problems with the "radical conservative" view [275]
 - 1.3.2 Problems with the "moderate" view [275]
 - 1.3.3 Problems with the first, "radical progressive", view [276]
- 2 Constitutionalised democratic autonomy** [277]
- 3 The constitutionalisation of political parties** [278]
- 4 The implications of the constitutionalisation of political parties for constitutional reforms** [280]

Bibliography [282]

Legislation

British Statutes

Ballot Act 1872

Broadcasting Act 1981

Broadcasting Act 1990

Broadcasting Act 1996

Companies Act 1985

Corrupt Practices Act 1883

Employment Act 1980

Employment Act 1982

Honours (Prevention of Abuses) Act 1925

Income and Corporation Taxes Act 1970

Industrial Relations Act 1971

Ministerial and other Salaries Act 1975

Ministers of the Crown Act 1937

Parliament Act of 1911

Police Act 1996

Police and Criminal Evidence Act 1984

Prevention of Terrorism Act 1989

Public Order Act 1936

Public Order Act 1986

Representation of the People Act 1918

Representation of the People 1949

Representation of the People Act 1983

Sex Discrimination Act 1975

Supreme Court Act 1981

Trade Union Act 1871

Trade Union Act 1984

Trade Union and Labour Relations (Consolidation) Act 1992

British Orders and Statutory Instruments

Police Federation Regulation, S.I. 1969 No.1787

Legislation from Other Jurisdictions

European Community

EEC Treaty – Rome 1957

European Convention on Human Rights

First Protocol to European Convention on Human Rights

Treaty on European Union 1992

Germany

Basic Law of the Federal Republic of Germany

Law on Political Parties [*Parteiengesetz*] of Germany

Cases

British Cases

Breen v Amalgamated Engineering Union [1971] 2 QB 175

Bromley L.B.C. v. Greater London Council [1983] 2 W.L.R. 62

Conservative and Unionist Central Office v. Burrell [1982] 1 WLR 522

Derbyshire County Council v. Times Newspapers Ltd [1993] 2 WLR 449

Faramus v. Film Artists Association [1964] AC 925

Fountain v. Chesterton (1968) 112 S.J. 690

Glynn v. Keele University [1971] 1 W.L.R. 487

Goldsmith and Another v. Bhoyrul and Others, *The Times*, 20 Jun 97

Hornby v. Close [1967] LR 2 QB 153

In re Grant's Will Trusts [1980] 1 W.L.R. 373

Jepson and Dyas-Elliott v. The Labour Party [1996] IRLR 116

John v. Rees [1970] Ch 345

Law v. National Greyhound Racing Club Ltd [1983] 1 W.L.R. 1302.

Lee v. Showmen's Guild of Great Britain [1952] 2 QB 329

Lewis v. Heffer [1978] 1 WLR 1061

Lynch v. BBC [1983] 6 Northern Ireland Judgements Bulletin

McInnes v. Onslow-Fane [1978] 3 All ER 211

O'Reilly v Mackman [1983] 2 A.C. 237

R v. Chief Rabbi, ex p. Wachmann [1993] 2 All E.R 249

R. v. Darlington Borough Council, ex p. Association of Darlington Taxi Owners and
Darlington Owner's Drivers' Association [1994] COD 424

R v Disciplinary Committee of the Jockey Club, ex p. Aga Khan [1993] 2 All E.R. 853
R v Disciplinary Committee of the Jockey Club, ex p. Massingberd Mundy
[1993] 2 All E.R. 207.
R v. Greenwich London Borough Council, ex p. Lovelace [1991] 3 All ER 511
R v. Home Secretary, ex p. Brind [1991] 1 AC 696
R. v. LB Tower Hamlets, ex p. Tower Hamlets Combined Traders' Association [1994] COD 325
R. v. Leeds City Council, ex p. Alwoodley Gold Club (1995) 15 September [introduced Gledhill 1996]
R. v. Tronoh Mines, Ltd. [1952] All.E.R. 697
R. v. Traffic Commissioner for the North Western Traffic Area, ex p. BRAKE [CO/1107/95; 3 November
1995

Scottish National Party v. Scottish Television plc and Grampian Television plc, in Munro 1997: 528

Verrall v. Great Yarmouth Borough Council [1980] 1 All ER 839

Webb v O'Doherty, *The Times*, 11 Feb 91

Cases from Other Jurisdictions

Decisions of the European Commission on Human Rights

X & Assoc. of Z v. UK, 38 Collection of Decisions 86

Bowman v. U.K (1996) 22 E.H.R.R. CD 13

Decision of the European Court of Human Rights

Bowman v. U.K (1996), *The Times*, 23 Feb 98

Decision of German Constitutional Court

Sozialistische Reichspartei case [1952] 2 BVerfGE 1

United States Cases

Buckley v. Valeo 424 U.S. 1 (1976)

Colorado Republican Federal Campaigning Committee v. Federal Election Commission 116 S.Ct. 2309
(1996)

Chapter 1

Themes and Scope of the Thesis

1 “The People's Government” and constitutional reform

Since ‘new’ Labour’s “historic” victory in the 1997 general election, few phrases of political rhetoric have become more popular than “The people are the masters”. The chief advocate of this mantra is the new Prime Minister, Tony Blair. He in fact claims that in the drive towards a radical modernisation of the country, it is the British people themselves who are leading the way.¹ This stance on the part of new Labour, summed up by its slogan, “People's Government”, was dramatically symbolised when Tony Blair characterised the funeral of the late Princess of Wales as the “People's Funeral”. Furthermore, in the face of the largely tabloid-inspired “people's rage”, a longstanding royal protocol was abandoned and the Union Jack on Buckingham Palace lowered to half-mast. Thus, the British people, while remaining legally the subjects of the Queen, would appear to have become the real masters of the realm.

However, the tension between political rhetoric (or theory) and legal reality has yet to be resolved. The general and almost instinctive response to this tension is embodied in the ongoing search for constitutional reform. This search touches upon a wide range of issues: a Bill of Rights; a separate Parliament for Scotland and assemblies for Wales and Northern Ireland; the direct election of a Mayor for London; Freedom of Information; reform of the upper and lower chambers; and electoral reform.

This task of resolving the longstanding tension between political theory and legal reality cannot be a one-way movement from archaic to modern constitutional arrangements, for example, by merely transplanting onto the British political scene certain formal constitutional devices, most of which have been developed in continental Europe or the

¹ E.g., Blair’s speech to his party conference in 30 September 1997. See *The Times*, 1 Oct 97, p.8.

USA. If the “People’s Government” is nothing but another alias for democracy, we need to formulate an acceptable notion of democracy, one which can, among a number of competing versions, set reasonable parameters for the modernisation of the British constitution.

The quest for a new democratic, constitutional paradigm has over the past two decades become the subject of wide-ranging debate among political and social scientists, lawyers and practising politicians. Charter 88 has played an important role in rekindling public interest in constitutional reform after nearly twenty years of relative quiescence.² Also, since 1995, the independent Constitution Unit has contributed greatly to setting out the practical aspects of constitutional reform. (See the Constitution Unit 1997; Shell 1997)

The Liberal Democrats, of all the political parties, have over the past two decades shown massive commitment to the modernisation of the British constitution and have constantly pushed it to the forefront of their political programme. (See Liberal Democrats 1990; *Idem* 1993; *Idem* 1997) Since the late 1980s, the Labour Party has abandoned its ‘historic conservatism’ in major³ constitutional affairs and now embraces a wide-ranging agenda for reform.⁴ The Labour-sponsored Institute for Public Policy Research has played an important role in advancing this constitutional debate by publishing an example of a written constitution. (See IPPR 1993) In 1996, Tony Blair agreed with Paddy Ashdown to set up a joint consultative committee on constitutional reform. In 1997, this Committee published its report in which a wide range of constitutional reforms were proposed to “renew democracy and to bring power closer to the people”. (See Joint Consultative Committee on Constitutional Reform 1997: 3) In the wake of the 1997 general election, the new Labour government has made constitutional reform, in Robert Alexander’s phrases (1997: vi), a “flagship of its plans for government”. Indeed, during the 1997-98 parliamentary session certain reforms, such as devolution to Scotland and Wales, a regional government of London and the incorporation of the European Convention on Human Rights, either have already been decided by referenda or are in the final stage of legislation. Preparation for Freedom of Information was promised in the first Queen’s speech of the new government,

² For various perspectives on constitutional reform proposed by participants in Charter 88, see Barnett, Ellis & Hirst 1993.

³ One notable exception is Labour’s persistent commitment to the abolition of hereditary peers in the House of Lords.

⁴ For a concise history of Labour’s transition in relation to constitutional reform, see Brazier 1998: Ch.2.

though its precise scope is proving controversial. Consideration of political reforms, especially ones relating to the electoral system and the funding of political parties, is currently being undertaken by individual committees. (See Committee on Standards in Public Life 1998)

Britain's old model of parliamentary democracy, once widely admired, both at home and abroad, is thus now being severely challenged. This challenge stems largely from two dimensions. On the one hand, ever-increasing external pressures from European integration and wider global economic and political trends towards interdependence all pose threats to the conventional Parliamentary sovereignty. (See, *e.g.* Harden 1997; Andersen & Eliassen 1996; Waldegrave 1995; MacCormick 1993; Held 1993) On the other hand, increasing demands for change are now being made at national level. (See, *e.g.* Brazier 1998; Alexander 1997; Oliver 1991; Wade 1989) The British people are now familiar with the criticism of "elective dictatorship" (Hailsham 1978: Ch. XX) directed against the Westminster system of government. Modern British democracy has been denounced as "a flawed democracy" in which the absolute power of the monarch prior to 1688 merely shifted into the hands of a parliamentary oligarchy. (See *Charter 88 – A Flawed Democracy* [1988] in Lively 1994: 32) What has become ever less prominent is that defense of British parliamentary democracy which assumes that it is still "the envy of the world" and that those who are losing faith in it are like "weevils in the woodwork". (Thomas 1982: 353)

2 Two themes: Democracy and political parties

The current political mood in favor of constitutional change does not guarantee the creation of a political consensus around possible and desirable alternatives. Nor has debate, though extensive, about the need for a new democracy and the resulting constitutional reform been exhaustive. Usually, it has involved either specific arguments about a particular reform package⁵ or superficial comparative studies about competing theories and practices of democracy. Cogent and consistent theoretical studies which help make sense of specific arguments or substantiate comparative studies have so far seldom been attempted.

⁵ See, *e.g.* The University of Cambridge Centre for Public Law 1998.

In particular, few attempts have been made to address the question of what the status and role of political parties should be in the new political settlement.

In this dissertation, I hope to help fill this gap in the legal literature. Two general interrelated themes will be taken into account.

2.1 *Democracy*

The first theme centres on what kind of new paradigm of democracy is appropriate as a guide for the modernisation of the British constitution. I will try to synthesise some of the strengths of the traditional liberal theory of representative democracy with those of participatory democracy, the most popular alternative system. I will begin by exploring the nature of modern British democracy as a liberal elitist democracy, with special reference to the Diceyan vision of representative democracy. I will then move on to an analysis of the theory of participatory democracy as a leading alternative to this, concluding that the former has as many defects as the latter. In particular, I will suggest that participatory democracy tends to generate a monolithic understanding of contemporary society, which cannot account for its complexity. I will also criticise the post-modern understanding of politics which places too much emphasis upon the complexity of modern society, thereby ignoring the normative significance and usefulness of the liberal distinction between state and society. My own alternative will be a model of double democratisation in which the liberal distinction between state and society is refocused in a post-modern pluralised context. In particular, I will suggest that all agencies of power should be regulated within a constitutional framework which allows public scrutiny of the political system as a whole while affording the greatest measure of freedom to civil society, on the one hand, and parity of autonomy to the state, on the other.

2.2 *Political parties*

The second theme is concerned with political parties. The study of political parties in the context of constitutional reform is significant both descriptively and prescriptively. Firstly, such a study has descriptive significance because dissatisfaction with the current system of British parliamentary democracy is centred on political parties. The problems of both elective dictatorship and civil passivity in Britain are imputed to the rigid working of the

party machine through which the government controls Parliament. (See, *e.g.*, Bogdanor 1997)

If the rigidity of the party system is at the root of the malaise of the British political system, there are two competing remedies to the problem. One is to bolster more thoroughly the liberal individualistic ideal, which has been encroached upon by the establishment of party government, by way of building up institutional barriers to the exercise of political power by political parties. This can, for example, be achieved by an electoral reform designed to maximise the choice of the voter rather than that of the party. The Single Transferable Vote System could well aid in the renewal of any political system which depends for its vigour upon strong governing parties. By contrast, the alternative remedy is to rationalise party government by legally institutionalising political parties. Underlying this approach is the belief that the actual cause of the malfunctioning of the British constitution is not a collectivist practice, which is in conflict with liberal constitutional theory, but the lack of proper control of the activities of political parties.

I am sympathetic to the second approach, believing that the first, liberal way ignores the usefulness of political parties in the democratic process. In my view, it is problematic that despite the actual power of political parties, the law in Britain largely neglects their existence given that there is little room for them in the traditional liberal theory of parliamentary democracy. Almost the sole statutory provision that assumes the existence of political parties in constitutional arrangements is the Ministerial and other Salaries Act 1975, which acknowledges the Leader of the Opposition and grants state financial subventions to the opposition parliamentary parties. Therefore, the status and working of political parties rest almost entirely on convention or merely political fact. This situation can be attributed in part to the unique but "curiously unsatisfactory" tradition of public law in Britain. The dominant idea has been that "legality is a singular and universal concept and the state and its officers are subject to the ordinary processes of law in much the same manner as all other persons are governed by law." (Loughlin 1992:1)⁶ It is also indebted to the intellectual tradition of British political thought which shows little interest in the question of the distinctive character of 'public power' or in the idea of a unitary public

⁶ With the recent establishment of judicial review of the administrative actions, the distinction between private and public law has been taken on board both in the courts and in law schools. See Harlow & Rawlings 1997: 7-9; Lord Woolf 1995; Allison 1992.

interest transcending particular loyalties. (See Dyson 1980:230. Cf. Harris 1996: 17) However, this does not mean that this unique nature of the British political tradition – an interpenetration of the public and the private – can be used to obliterate the need for the legal institutionalisation of political parties. If the modernisation of the whole system of political institutions is on the political and constitutional agenda, there would seem to be no clear reason why the rationalisation of political parties should not be included.

Secondly, the study of political parties is significant because the changed nature of political parties in a pluralised society requires further examination of their potential within a new paradigm of democracy. Political parties now play a powerful role within the state. Thus, the conventional perspective on party organisations, which highlights their origins in civil society and stresses their corollary private legal personality, should be reconsidered. In particular, in seeking for an equilibrium between state and society within a constitutional framework as our model of double democratisation envisages, I will focus on the duality of political parties which stand at the crossroads of state and civil society. I believe that our search for new perspectives on party organisations within a new paradigm of democracy will provide a theoretical rationale for the legal institutionalisation of political parties in Britain.

This position contrasts with the politics of ‘anti-partyism’, which argues that the major problems of parliamentary democracy can be traced back to one source, namely, the privileged status of political parties in the democratic process. Anti-partyism accuses the professional politicians and their instrument, the political party, of fettering or distorting the will of the people. Two interrelated trends have helped this position. On the one hand, the growing pressures of competitive individualism bring party government under strain. In the more fragmented world which is manifested in a pluralisation of forms of social life and an individualisation of life plans, the importance of single-issue groups and new social movements increases in terms of the representation of public opinion. As a result, political parties can no longer claim the monopoly of mass representation. On the other hand, the information technology revolution holds great promise for anti-partyists by providing them with the necessary technical procedures for reintroducing the ideal and practices of Athenian primitive democracy at the dawn of the twenty first century. One option is a cyber-democracy which allows the people to participate in the decision-making process by

computers. However, this new form of participation tends to undermine already fragile democratic institutions by confusing plebiscitarianism with democracy itself. I will suggest that rational will formation in which an organised public plays an important role is crucial for the healthy working of democracy and that therefore the politics of the unorganised public should be compromised by political organisation, especially political parties.⁷

3 Constitutionalising political parties in Britain

My development of the above two general themes, which run right through this dissertation, will inevitably be largely theoretical. However, I have no intention of putting forward yet another sweeping programme for the democratic renewal of the British constitution since there are, it seems to me, already enough programmes of that sort. As Martin Loughlin (1992: 258) succinctly points out, the value of any theory is revealed by how well it can be utilised rather than its innate sophistication. Therefore, we need to keep the role of theory in perspective and seek to substantiate theoretical assertions within the context of practical politics.

I will pursue this further task by critically analysing current British law relating to political parties and then stressing the need for their constitutionalisation. I believe that both our project for a new democracy, which I will call 'constitutionalised democratic autonomy', and our understanding of political parties in a pluralised society provide a fruitful programme for such constitutionalisation. The rest of this dissertation will discuss various possibilities for the constitutionalisation of political parties. These are envisaged as encouraging in a balanced way inter- and intra- party democracy. I will consequently suggest that this constitutionalisation will require, *inter alia*, (a) intra-party democracy, (b) electoral reform and (c) the juridification of the funding of political parties.

⁷ So the Houghton Committee Report was correct to assert that "effective political parties are the crux of

4 Scope and limits

Since democratic governance and the rationalisation of political parties are the themes chosen to draw together the discussion in later chapters of particular issues in the current constitutional debate, it is natural that the scope of my thesis is limited to that extent. Specifically, I will be focusing in this dissertation on constitutional reform at national level, particularly in relation to the legal institutionalisation of political parties. Inevitably, therefore, some issues which could have a significant bearing on each of our themes will only be discussed in a cursory fashion and largely in the footnotes. Such issues include international dimensions in the constitutional debate, devolution and local democracy.

4.1 *International dimensions*

As mentioned above, one challenge to the British Westminster system of government emanates from the international dimension. Debates about the British constitution and its ongoing reforms cannot be isolated from at least two international contexts. First, since its affiliation to the European Economic Community in 1973, Britain is already part of a wider system of government which is arguably more supra-national than trans-national or inter-governmental in character. (See Harlow & Rawlings 1997: 23-25; Corbett 1993: 157) Although it is far from being a centralised 'superstate', the European Union does impact on a whole range of policy areas and the policy-making process as a whole. (See Harden 1997; Harlow & Rawlings 1997: Ch.7) This inevitably raises questions about the democracy of the European Union(EU) which exercises considerable power and is of great consequence for British people. Indeed, the 'democratic deficit'⁸ in the European Community has been a source of conflict between Britain and the EU and between Euro-sceptics and pro-Europeans within British domestic politics. (See Baker & Seawright 1998)

Secondly, the working of the internal constitution of Britain is also subject to wider global economic and political trends towards interdependence. In drawing upon the growing

democratic government" (Houghton 1976 [Cmnd 6601]: para.9.1).

⁸ This is most markedly manifested in the limited and secondary role of the European Parliament in the decision-making process in the EC. (See Lodge 1996) Although the European Parliament cease to be a mere advisory and supervisory institution and is given important new decision-making and other powers by the Treaty on European Union 1992, the dominant role of the EC Council of Ministers in the legislative process is open to the criticism of the lack of accountability. (For a review of the actual conditions and problems of European democracy, see Andersen & Eliassen 1996)

importance of complex, intergovernmental and transnational power structures which are all part of what is now called 'globalisation', David Held (1993;1995a;1995b) argues for a 'cosmopolitan model of democracy'. This model goes beyond the creation of regional parliaments like the European Parliament and aims at creating a federation of states and civil societies. Above all, this model presumes that, in the era of globalisation, the conventional conception of democracy which depends on the territorial boundaries of the modern nation state is no longer viable.

However, increasing external pressures do not necessarily rule out a focussed discussion about the modernisation of the political system at national level. Although the impact of external pressures should not be underestimated, neither should it be overestimated. This growth of regional or global interdependence cannot totally obliterate the importance of the modern nation state through and in which we may realistically capitalise on the ideal of democratic government. As far as European dimensions are concerned, the European Community (EC) is still very much in the hands of its own member states. Although the major EU policies – the single market, monetary union and common European citizenship – all have centralising tendencies, the effect of the EC on national administration is still largely indirect. (See Harlow and Rawlings 1997: 25) Under EEC Treaty, Art. 3 (b), the EC can take action "only if and in so far as the objectives of the action cannot be sufficiently achieved by the Member States". The main policy making institution of the EU, the Council of Ministers, is made up of ministers of national governments, and it is normal for these ministers to maintain a margin of national manoeuvre over and above what might be deemed necessary. (See Corbett 1993: 158) Under such circumstances, the democratisation of political institutions at national level will rectify any democratic deficit at European level.

Focussing on the global arena, many of the current attempts to develop creatively the effects of globalisation are certainly deserving of our attention. Indeed, our project of 'constitutionalised democratic autonomy' has the potential for such a development since it identifies the importance of civil society, which may go beyond the boundary of the nation state in the process of democratisation. However, the other pole of constitutionalised democratic autonomy – the need for an effective and efficient power and authority centre – may be in conflict with the full adoption of the cosmopolitan model of democracy. For one

thing, the formation of an authoritative assembly of all democratic states and agencies, such as this model assumes, may be unrealistic. The present uncertain future of the United Nations verifies this claim. At any rate, since an ideal of a global democracy is unthinkable without the democratisation of all constituent states, our focus on the democratisation of the British constitution should go some way to substantiating a general theory of global democratisation.

4.2 *Devolution*

The creation of a Scottish Parliament, a Welsh Assembly and a London regional government, which was now decided by referenda, will undoubtedly change the political face of Britain. As Gerry Hassan (1997) indicates, such changes potentially mean the destruction of Britain as a unitary state. The rationale for devolution is related to our concern for greater democracy. The Royal Commission on the Constitution 1969-1973 (publicly known as the Kilbrandon Commission) concluded that the remoteness and unresponsiveness of Westminster and Whitehall is one reason for the rising demand for devolution. (Kilbrandon 1973: chs. 8-10) In fact, the British constitution is highly centralised and local government has up to now been the only elected tier below Westminster. Even the autonomy of this tier has been eroded in the last decade or so. (See Loughlin 1994) The creation of another tier between local government and Westminster raises a number of profound issues: sovereignty, a possible imbalance between Scotland and the rest of Britain, the right allocation of power among local, regional and national governments, not to mention the degree to which this process might change the structure of political parties and other political institutions. Clearly, the effect of devolution on party organisations is one that concerns both of our general themes. For example, a concern with the autonomy of regional parties vis-à-vis both national and local parties has certain implications for our attempt to institutionalise the value of political pluralism within a constitutional boundary. However, I will not here discuss this issue in any great depth but merely make use of this development as evidence for the necessary emergence of a new party model, *i.e.*, the cartel party, in Britain. The reason for this limitation is not so much theoretical as practical. My wide-ranging analysis, covering the new paradigm of democracy, the new perspectives on party organisation together with application of both to

current constitutional debate, does not allow space to consider all the issues that could be relevant to this dissertation. This analysis will focus particularly on one aspect of the modernisation of the British constitution, *i.e.* the rationale for the constitutionalisation of political parties, especially at national level. The implications of this process at lower levels will require further study.

4.3 *Local democracy*

The role and nature of political parties in local government have potential implications for our themes. Because the influence of party affiliation varies so greatly at local and national level, the approach to the nature and role of political parties at each level may well vary. However, for reasons already given in the previous section, the role of political parties in local government, which may require a different analysis from that of national politics, will not figure to any great extent in this dissertation.

5 Outline and points of reference

Discounting this introductory chapter, this dissertation has eight chapters. Chapter 2 examines the nature of modern British democracy, which underpins the British constitution. It looks at the Diceyan model of parliamentary democracy, still regarded as vital to an understanding of British public law, and the implications of this model for Britain's pluralist version of party government. My underlying hypothesis which permeates the whole dissertation and this chapter in particular, namely, that an understanding of political theory is vital for a proper understanding of public law, is inspired by the works of two public lawyers: Martin Loughlin's *Public Law and Political Theory* (1992) and Paul Craig's *Public Law and Democracy in the United Kingdom and the United States of America* (1990). I also make use of these writers' analyses of Dicey,⁹ but attempt to further develop their understanding in ways that focus on the elitist tendency inherent in the Diceyan vision of democracy.

⁹ For different conclusions that the two academics reach in this respect, see, *e.g.* Loughlin 1993; Craig 1993b.

Chapter 3 is concerned with the important but controversial question of what democratic paradigm is best suited to replace the existing elitist form of democracy. I will attempt to develop my own project, a third way of democratisation more suited to our post-modern situation, one that is geared to going beyond the traditional ideals of liberalism and communitarianism. It will be obvious to the reader that my project heavily relies on the work of Jürgen Habermas. Habermas's commitment to the public sphere and a discourse theory of democracy has greatly stimulated my intellectual development. From such seminal works as *The Structural Transformation of the Public Sphere* (1989[1962]), *The Theory of Communicative Action* (1984[1981]; 1987[1981]) and, of course, *Between Facts and Norms* (1996[1992]), I have gleaned many answers but, far more important, I have learned how to formulate questions that are at the heart of this dissertation. Apart from Habermas, a number of post-liberal theorists, including David Held, John Keane, Clause Offe, Jean Cohen, and Andrew Arato, furnished me with both a method of analysis and conceptual resources that have enabled me to develop my project of two-track democratisation. However, though indebted to the work of these theorists, I also seek to incorporate into my project a number of Luhmann-Teubner's autopoietic insights, for example, their emphasis on complexity and contingency in modern society.¹⁰

The discussion in Chapter 4 is concerned with a new perspective on political parties with reference to my project of constitutionalised democratic autonomy. It examines, in the light of both the division of labour within the political system and the "cartelisation" of political parties, the paradigmatic consequences of conventional perspectives on party organisations and the transformed nature of political parties in general. In this chapter, I rely on Richard Katz and Peter Mair's¹¹ analysis of four "ideal types" of party, in particular, the emergence of 'the cartel party', but while criticising some of the insights of these theorists, I endeavour to further develop the potential democratic value in their model.

¹⁰ My heavy dependence on German and American political and sociological theories, rather than those emanating from British intellectual tradition, may give rise to the question of whether such foreign 'grand theories' can provide a useful, practical framework within which the democratisation of the British constitution can be envisaged. Oliver (1991a: 624) maintains that British public lawyers should heed "pragmatic, incremental Anglo-Saxon attitudes", rather than the more "ideological, theoretical, abstract" American and Continental European approaches to constitutional issues. (Cf. Posner 1996) However, given the rationalisation of the British political institutions that is at present taking place, I doubt that such a sceptical view, relying on a brand of cultural particularity, can deter a general theoretic analysis of the British constitution.

¹¹ "Changing Models of Party Organisation and Party Democracy: The Emergence of the Cartel Party" (1995).

Chapter 5 is concerned with the present legal system governing political parties. It examines the legal status, the constitutional basis, and the legal regulation, of political parties. In particular, vis-à-vis the legal regulation of political parties, I consider the legal control of civil society that has direct bearing on them, including the control of the media and restrictions on the activities of interest groups. The final section of this chapter criticises the present system and, given the transformed nature of political parties generally discussed in Chapter 4, argues for their legal institutionalisation.

Chapters 6, 7 and 8 are concerned with the question of how political parties are to be legally institutionalised. In Chapter 6, I tackle the question of what internal party structural devices this institutionalisation requires. Here I consider the issue of intra-party democracy with special reference to the modernisation of the Labour Party and stress the need for the constitutionalisation of intra-party democracy. Chapter 7 considers why electoral reform is necessary and what alternative to the present first-past-the-post system best suits both the transformed nature of political parties and the British political tradition. Chapter 8 examines whether, given the constitutionalisation of political parties, their funding should be juridified and thus their finances be subject to legal control while at the same time benefiting from greatly increased public subsidies.

Chapter 9 concludes the study by reasserting its basic themes in the light of three approaches to constitutional reform that are prevalent in Britain today. It is hoped that my project of 'constitutionalised democratic autonomy' together with its concomitant proposals for the constitutionalisation of political parties can contribute to the current public law debate concerning the comprehensive modernisation of the British constitution.

Chapter 2

Modern British Democracy and Political Parties: Liberal Ideal, Pluralist Reality

1 Introduction

The British constitution, having developed gradually over centuries, does not embody any single general constitutional theory. As Colin Turpin (1990: 19) puts it, the British constitution is "the product of a long period of kingly rule, parliamentary struggle, revolution, many concessions and compromises, a slow growth of custom, the making and breaking and alteration of many laws." However, this is not to say that there is no British version of constitutionalism which manifests itself in a number of constitutional ideas and principles. Despite the origin of the diffuse, piecemeal, pragmatic process of accretion, with no revolutionary introduction of a written constitution built upon an ideological, theoretical and abstract blueprint, the British constitution has developed certain fundamental principles concerning the nature of a democratic society. Among these, the conventions and principles of parliamentary democracy have undoubtedly become the cornerstone of British constitutional order. Since the Glorious Revolution of 1688 whereby the royal prerogative became subject to the will of Parliament, the British system of government has developed the principle of Parliamentary sovereignty as "the dominant characteristic of [British] political institutions". (Dicey 1982[1915]: 3; Dicey 1940[1914]: 59) In the wake of the Great Reforms in the nineteenth century which extended the franchise, this parliamentary system has been supplemented by the principle of democracy. Indeed, in this century the idea of democracy has permeated into the foundations of the British constitution and political culture. As a result, most of the constitutional issues have related to the question of

how to accommodate effectively the idea of democracy within the existing parliamentary form of government.

This chapter will explore briefly what has generally¹² been considered the dominant theory of modern British democracy, namely, that of A.V. Dicey, and some of the implications it has shed on the development of British constitutional arrangement. Despite the growing efforts of many, if not most, commentators to distance themselves from Dicey, his terms of debate still constitute the ruling paradigm and occupy the high ground of British constitutional theory.¹³ (See Jacob 1996: 2; Harden and Lewis 1986: 3)

In taking Dicey's theory as our point of departure, it will not be our aim to canvass all the features of the British constitution elaborated by this theory. Rather, the aim is confined to the discussion of the implications of his vision as it relates to the conception of democracy and the role of political parties in British democracy. Therefore, Dicey's constitutional theory is selectively analysed to this extent. Being "selective", of course, does not mean Dicey's conceptual whole is in any way distorted. It may be useful for this narrowed purpose to utilise some public lawyers' particular analyses – especially Paul Craig's¹⁴ – of his ideas undertaken in terms of its relevancy for the theory of democracy. This approach has certain clear advantages. First, we can benefit from the valuable insights suggested in those analyses and thus, in turn, clarify the really relevant points without having to provide a time-consuming 'list' of varying critical opinions which can be found in the already enormous literature. Secondly, by accommodating certain useful aspects of these analyses while at the same time criticising their perhaps more problematic aspects, we may more easily reach a target paradigm, from which we can start to explore the main topic¹⁵ of this dissertation.

¹² See, e.g., Loughlin 1992: ch.7; Craig 1990: ch.2.

¹³ Anthony Birch (1989: 89-90) points out an interesting contrast between academia and real politics in their treatment of British constitutional arrangements. On the one hand, since the post-war period academic commentators have placed less and less emphasis on the conventions and principles of parliamentary sovereignty and the rule of law as codified by Dicey, while at the same time placing more emphasis on the operation of the political system. On the other, both the press and practising politicians have come to regard the same principles as vital to the constitution, especially in context of European integration.

¹⁴ E.g., Craig 1990; *Idem* 1993a; *Idem* 1993b.

2 The dominant view of modern British democracy: Diceyan parliamentary democracy

2.1 Dicey's view of democracy: A "unitary, self-correcting" representative democracy?

Dicey (1982[1915]: 3, 24) had made the traditional view of British parliamentary democracy "an undoubted legal fact". In his *Law of the Constitution*,¹⁶ Dicey (1982[1915]: cxlviii) elaborated three pillars of the British constitution: the legal sovereignty of Parliament, the rule of ordinary law, and the dependence of the conventions, in the last resort, upon 'the law of the constitution'. For some, this interpretation was integrally related to a particular conception of both society and representative democracy. One view of this kind which deserves our close attention is Paul Craig's (1990: ch.2). Craig identifies the Diceyan vision of the British constitution as a model of "unitary", "self-correcting", "majoritarian" democracy. Firstly, it is "unitary" because the Crown-in-Parliament is the 'sole' centre of constitutional power, with the ability to make and unmake government, and there is no "competing" legislative power. (See Dicey 1982[1915]: 4-18) By the same token, there are no validity in the allegedly "legal" limitations on the legislative sovereignty of Parliament, such as moral law, prerogative and preceding Acts of Parliament. (See Dicey 1982[1915]: 18-25)

Secondly, the Diceyan vision clearly has a majoritarian aspect. The affairs of the nation is entrusted to those approved by a majority of the House, each of whom is regarded as a representative of the whole nation rather than a delegate of either a particular constituency who elected him or the party to which he belongs. Thus, the will of a majority drawn from parliamentary debates is simply equated with the will of nation. It is well known, however, that this positivist and elitist outlook¹⁷ is compromised not only by the "self-correcting" character of representative democracy, as the third characteristic of Dicey's vision (discussed below), but by his "normativist"¹⁸ conception of law. (See Loughlin 1992:

¹⁵ Namely, the possibility of establishing a new, more appropriate, conception of democracy, the nature and role of political parties in this new framework and concomitant institutional devices which would promote this conceptual framework.

¹⁶ The first edition was published in 1885.

¹⁷ For a discussion of the relationship between English elitism and positivism in English law, see Atiyah and Summers 1987: 226.

¹⁸ Loughlin (1992: esp. 58-61) suggests that there are two styles of public law thought, normativist and functionalist. For the normativist, law precedes legislation whereas for the functionalist, legislation, as an

141,142-146; Craig 1990: 14-18) Apart from the actual limitations on the power of Parliament which is converged in the principle of representative government, in Dicey's view (1982[1915]: 268-269), two features embodied in the British version of parliamentary democracy make 'mighty' Parliament respect the supremacy of the law and "distinguish" it from other sovereign powers. The first of these is the 'consensual' character of legislation, which, to use Dicey's own terms, is both "formal and deliberate". The second is the "indirect" control of government in the sense that the executive power is in the hands of the government rather than Parliament itself. Underlying this view is Dicey's belief in the separation of powers within a sovereign Parliament. Indeed, the idea of the separation of powers is evident in the conceptual structure of this theory, for example, in his depreciation of a French-style administrative law. In comparing *droit administratif* with the English version of the rule of law, what Dicey supposedly had in mind is the historic achievement of a liberal regime, *i.e.* the principle of a limited government. According to this principle, the Crown itself came under the law, and thereby no arbitrary power could now be exercised by the government; special courts under royal prerogative were repealed, and thereby the rule of the ordinary court and the equal protection of law were established, and while the executive was responsible to Parliament for what it carried out, Parliament did not appoint the officials of the executive government. This implies that actual constitutional confrontation, especially concerning encroachment on liberty, is most likely to arise between an alliance of Parliament and the judiciary, on the one hand, and the executive, on the other, rather than between Parliament and the judiciary.¹⁹ An amiable relationship between Parliament and the judiciary was also to be found in the institutional structure of the British constitution. Indeed, Parliament - in particular the House of Lords - is part of the judicial system. (See Stevens 1979) Of course, there would be a number of cases where statutory authority, especially those seeking particular social ends in the public interest, is implemented at the expense of certain traditional liberties. However, as T.R.S. Allan (1985: 143) suggests, it is a matter of policy to decide, in the light of the needs and traditions of a

embodiment of the democratic will, is the highest form of law. He sees Dicey's conception of law as a 'conservative' variant of the normativist style, pointing to the fact that Dicey felt that "a real limit to the exercise of sovereignty is imposed not by the laws of man but by the nature of things" and views the intrinsic connection between law and morality as a vital part of the rule of law. (Loughlin 1992: 139,144,155) For a comment on Loughlin's distinction and labels, see Craig 1993b.

¹⁹ A historical fact may help explain this, Parliament and the court were allies in the seventeenth century struggles against the Crown. See Atiyah & Summers 1987: 227.

society, how to reconcile popular sovereignty and individual liberty, and in this the British approach has long been to impose "careful" limits on the role of the judiciary at the final stage in favour of the democratic demands. In other words, the British approach is one seeking a pragmatic harmony between parliamentary sovereignty and the rule of law, allowing the latter to constitute a "constraint" on, but not a "barrier" to, the enforcement of governmental schemes which "restrict" (not abolish) traditional liberties, and thus it can be characterised as liberal, as opposed to either absolutist or authoritarian.

Finally, by "self-correcting" it is meant that such a sovereign Parliament, which is duly elected on the extended franchise, is conceived to represent the most authoritative expression of the will of the nation. One implication of this is that there is no need for a scheme of external checks and balances, such as a bill of rights or constitutional review. The logic employed here is as follows. Dicey (1982[1915]: 34-35) presumes that although political and legal sovereignty should be distinguished, the former power is always reflected in the latter through the principle of representative and responsible government. The problem with the supposition that the political sovereignty resides in the hands of the electorate is that the electorate is a body which "does not, and from its nature hardly can, itself legislate, and which, owing chiefly to historical causes, has left in existence a theoretically supreme legislature". (1982[1915]: 286) Accordingly, one natural way in which legislation is carried out in accordance with this diffused will of the electorate is through a representative institution. Political conventions are supposed to play a key role in securing the conformity of this legal sovereign to the will of the political sovereign: "Our modern code of constitutional morality secures, though in a roundabout way, what is called abroad the 'sovereignty of the people' ". (1982[1915]: 286) It is explained that the principle of ministerial responsibility and the convention of the confidence vote are designed for this purpose. (1982[1915]: 210-212)

2.2 *Under-inclusiveness of Paul Craig's analysis*

It is difficult to discount Craig's analysis of the traditional Diceyan view of the British constitution as a "unitary, self-correcting, majoritarian" democracy.²⁰ However, Craig's approach neglects at least one important theme embedded in the Diceyan vision. Dicey

defined his vision of democracy as a form of government among a variety of possible polities, structured by a particular political ideology/philosophy. Craig's neglect of the ideological mark would seem to be both deliberate and the result of his problematic analytical method. It is probably deliberate, because in the later chapters of his *Public Law and Democracy* (1990), Craig tries to relocate the "neglected" idea or tradition of the English pluralism supposedly underlying the British constitution. He implies that this 'pluralist' idea has its own merit as an alternative to the 'monolithic', 'self-correcting' character of the *status quo*. In thus setting aside the liberal colouring of the Diceyan vision, Craig probably intended that the elitism inherent in both the Diceyan and the early English Pluralist vision, as analysed later in this chapter, can be masked.²¹

Craig's problematic method of analysis is also to be criticised. As Loughlin (1993: 54-55) points out, Craig's effort to carry out an objective analysis led him to an analytical method rooted in the positivist separation of fact and value.²² Ironically, this is the same method employed by Dicey in articulating the principles of the British constitution. In the first chapter of his *The Law of the Constitution*, Dicey (1982[1915]: cxxvii ff) made clear what the role of a constitutional lawyer really should be: a constitutional lawyer should be "an expounder" rather than "a critic", "an apologist", or "eulogist"²³ when dealing with constitutional resources. Dicey went on to contrast this role with those of traditional lawyers (for whom, the real factors were of less importance), historians (prone to antiquarianism) or constitutional theorists (inclined to conventionalism). In his eagerness to

²⁰ Even O'Leary's harsh review (1992: 410 ff) of Craig's treatment of Dicey agrees that Craig's key arguments are "perfectly orthodox".

²¹ Craig's real mind can be found in his review of Loughlin's *Public Law and Political Theory* (1992), which criticises Loughlin's categorisation of Dicey as one variant of 'conservative normativism'. Interestingly, Craig (1993b: 282) argues that there would be more reason to categorise Dicey as a example of 'liberal' normativism. Craig seems to be unaware that, as shall be argued in the next section, 'conservatism' in Loughlin's terms can accommodate a 'liberal' content.

²² In his review of Craig's *Public Law and Democracy* (1990), Loughlin (1993: esp. 55) points out that the method employed by Craig is rooted in the Austin's positivist approach and, more specifically, in the categorical distinction between public law, political science, and political philosophy. While exploring the coupling of political science and public law on the one hand (e.g. Dicey's view of democracy and its legal implications) and, on the other, the coupling of public law and political philosophy (e.g. liberalism and individual rights/distributive justice), Craig, in his book, neglects the relationship between science and philosophy (e.g. liberalism and a unitary democracy).

²³ It would be interesting to compare this attitude with Bentham's view that the law reformer should be a "censor" who principally devotes himself to the instruction of what law "ought to be", rather than an "expositor" who depicts what law "is". See Bentham 1990: 7-8,15.

be objective, Craig focuses only on the structure of Dicey's argument and ignores its underlying political ideology.

My argument is that the traditional vision of modern British democracy only becomes clear if we take a more comprehensive view which acknowledges that it is based on certain political ideologies.²⁴ Following Loughlin (1992: 77), one may identify the ideology underlying Dicey's vision with a particular brand of 'conservatism', namely, "an autonomous system of ideas defined in terms of universal values such as justice, order, balance, and moderation". Loughlin (1992: 76-79) argues that such an ideology differs conceptually from either "a historically specific movement" - associated with feudalism, landed interest, and in opposition to industrialism, democracy and individualism, or "a situational conception" - the passionate affirmation of the value of existing institutions. To be more specific, in Loughlin's view (1992: 148, 156-159), Oakeshottian conservatism is the political ideology which contains certain elements which can be seen to play a major role in Dicey's theory. Those elements are, firstly, epistemologically speaking, the valuing of practical experience or 'rationality' (as opposed to rationalism); secondly, in terms of the issues of authority and law, an anti-rationalist blending of 'will' and 'reason' and the prizing of tradition; thirdly, in terms of the nature of judiciary, scepticism vis-à-vis a scientific approach to adjudication; and, fourthly, in terms of the nature of liberty, a traditional negative conception of liberty as opposed to a positive, functional, one.

We must now turn our attention to the question of how these particular elements figured in Dicey's vision of government and law. Loughlin argues that Dicey's vision, despite its positivism and rejection of the vulgar Whig ideas concerning the ancient constitution, was, nevertheless, deeply suffused with the Coke-Blackstone tradition, which still lives on in Oakeshott's conservative normativist vision of politics and law. In articulating the principles of the English constitution, Dicey attempted to reconcile two seemingly competing principles, *i.e.* Parliamentary sovereignty and the rule of law. He sought this reconciliation in such a way that a positivist formalism, which is manifest in the conception of Parliamentary sovereignty, is realised not only in a process of consensual will formation but

²⁴ In writing this section, I have found Loughlin's approach very helpful, particularly in his explanation of the relationship between political theory and public law thought in which he highlights "the centrality of interpretation, of relating text to context, and of achieving understandings by relating the parts to the whole". (See Loughlin 1992: 50-51) McEldowney (1985: esp.61) and Sugarman (1983) also acknowledge the importance of political influence on the work of this Victorian jurist.

equally in harmony with practical knowledge of the common law. These elements render the conception of law dependent, though not entirely, upon tradition (or the "common" past). The importance of political conventions as a pillar of the British constitution, which is demonstrated in particular in the third regime of Dicey's concept of the rule of law - regarding the residual nature of individual liberties -, is the explicit evidence of his anti-formalist tendency.

2.3 *Dicey's vision of democracy as a liberal democracy*

However, what should be made clear here is the nature of "tradition", embedded in Dicey's conceptual structure at the time of writing *The Law of the Constitution*, and still taken as normative by many British public lawyers. What were the traditional, constitutional values²⁵ in British society, which Dicey saw? In answering this question, so far as the issue of democratic representation is concerned, we can benefit from Samuel Beer's analysis of various strands in the theory of representation which have developed over the past three hundred years in Britain. Beer claims that by and large the modernisation of British politics has taken five principal forms: the Old Tory, the Old Whig, the Liberal, the Radical, and the Collectivist. (See Beer 1982a: 3-102)

2.3.1 The underlying political philosophy of the Diceyan vision: Individualistic liberalism

In a nutshell, Dicey's understanding of 'tradition', envisaging an identity of the British constitution, is very much in the spirit of "the mid-Victorian era"²⁶ which he himself terms 'the era of Benthamism or individualism'. Ivor Jennings (1935) points out that political influence has significant effect on the work of any lawyer,²⁷ saying that

A public lawyer, like the philosopher, is the child of his age. His ideas are affected not only by his own upbringing, but also by the floating ideas of the time at which he writes. In appraising the work of Dicey, therefore, it is essential to remember the environment in which he wrote. (at 124) [It] supplies the background in which the book was written, and that it could not fail to influence the ideas which the book

²⁵ It should be pointed out that tradition in this context has a particular sense and it is, to quote W.T.Murphy (1991: 201), "a common point of orientation for the present, a common world around which community can form" or "widely shared [present] beliefs about the past" rather than a series of objective historical "facts".

²⁶ In several passages, Dicey implied that the heyday of parliamentary government and the glory of English constitutional history was the period from 1830 to 1865. For example, see Dicey 1982[1915]: cx.

²⁷ Dicey's persistent, though unsuccessful, participation in political life has been put forward as circumstantial, though not wholly convincing, evidence of this argument. See generally Ford 1985; Cosgrove 1980.

expresses. (at 127) ... [In] spite of all his efforts, his subjective notions, the product of his time and circumstances, peeped out through his principles.(at 128)

The spirit of Dicey was essentially a complex amalgam of, in Beer's terminology, the Old Tory, the Old Whig and the Liberal theories of representation. Dicey's theory of a sovereign Parliament is rooted in an amalgam of the Old British political ideologies. The Blackstonian Old Tory tradition in Dicey's theory is still traceable in the fact that Dicey adopted the conception of a Sovereign as representative of the community as a whole, which the Old Toryism ascribed to a monarch. While criticising Blackstone's distorted view of the ancient constitution by ascribing the idea of absolute sovereign to "a modern and constitutional King", Dicey himself went on simply to replace, as the sovereign, the "King" with "Parliament". Before moving on to the consideration of Old Whig's influence on Dicey, it needs to be noted that part of Dicey's conception of the rule of law was also rooted in that of the Old Tory's. Utilising Judith Shklar's two distinct conceptions of the rule of law, Loughlin (1992: 148-153) suggests that Dicey's belief in the common law tradition, especially as reflected in his third pillar of the rule of law, was rooted in the Coke-Hale-Blackstone tradition whereby the rule of law means the rule of "artificial reason" identified by the judge-made law, as opposed to the rule of the 'formalised' modern conception of law.²⁸

Dicey was indebted to the Old Whig view for his notion of the independence of MPs. MPs were regarded as representatives of the whole community as well as of its component interests. Another sign of the Old Whig influence on Dicey is his basic assumption that "parliamentary deliberation" was the best way of deciding the great question of state. Any form of "authoritative instruction" or "mandate" from the electorate was ruled out. Dicey's persistent distrust of the party machine was linked to this tradition which saw political parties as evil in the sense that, being factions, they damaged the national interest as a whole. (See Beer 1982a: 22. Cf. Robbins 1958; Campbell 1955) Dicey (1982[1915]: lx) said that "the rule of *a party* cannot be permanently identified with the authority of the nation or with the dictates of patriotism." (Emphasis added)

Yet, parliamentarism also formed part of the Liberal view of representation. (Beer 1982a: 19-20, 33) What Liberals were discontent with, under the Old Whig rule, was not

parliamentarism but the intolerable *status quo*, i.e., what has been called the “Old Corruption” of the Georgian and early Victorian period.²⁹ Therefore, the reform under the influence of liberal utilitarianism was focused on eradicating the negative side effects of what Bentham called “cold, selfish, priest-ridden, lawyer-ridden, lord-ridden, squire-ridden England.” (Bentham, *Works*, vol.x, p.595 quoted in Clark 1985: 63) Bentham’s agenda envisaged a more democratic, representative government - the crucial component of which is an “omnipotent” legislature.³⁰ The difference between the Old Whig and the Liberal lay in their differing answers to the question of who or what was being represented. While the former centred on corporate bodies, ranks, orders, or “interests”, the latter gave a new stress to the representation of discrete individuals. (Beer 1982a: 34)

Indeed, political liberalism, rooted, as it is, in individualism, was the essential part of Dicey's political ideology. Several passages from another of his principal texts, *Law and Public Opinion* (1940[1914]),³¹ clearly demonstrated Dicey's temperament, particularly inclined him to favour Mill's individualistic liberalism.³² For example, referring to Mill's *On Liberty*, Dicey (1940[1914]: xxvii-xxxii) claimed that the doctrine of *laissez faire* is the predominant opinion of the mid-Victorian era, and went on to lament that with the advent of an ever-growing collectivism, "jealousy of interference by the State which had long prevailed in England" had lost much of its ground.

Yet his liberal individualist inclinations are also to be found even in his *Law of the Constitution* which, unlike *Law and Public Opinion*, he claimed to have written with the help of an analytical method based on the separation of fact from value. The way in which he dealt with the idea of the rule of law reveals Dicey's liberal individualist inclinations at their best. Jennings (1935: 131) was quite correct in pointing out that in dealing with the general application of the rule of law in England, Dicey approached his theme from the

²⁸ This is not to deny the modernity of his conception of the rule of law. It is also important to note that Dicey's first and second pillars of the rule of law embodied the modern notion of limited government.

²⁹ For the historical significance of “Old Corruption” in this period, see generally Rubinstein 1983.

³⁰ For an illustration of Bentham's thought and its influence upon the modernisation of British government, see Ahn & Kim 1994; Perkin 1969:319-339; Perkin 1977 ; Hume: 1981.

³¹ *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*. This book is based on a series of lectures on the History of English Law in the Harvard Law School in 1898.

³² Following Cosgrove (1980), McEldowney (1985: 45,47) attributes this, among other factors, to Dicey's evangelical family and his membership of the individualistically oriented Old Mortality Society in Oxford.

“angle of limitations upon power” rather than the “angle of powers”.³³ This can be inferred from his generalisation of materials concerning constitutional guarantees of individual rights³⁴ and his conscious omission of certain governmental powers which existed even at the time of writing. David Sugarman (1983: 110) suggests that Dicey's *Law of the Constitution* was an attempt to reduce Britain's unwritten constitution to a partially written code in order to ensure the principle of a limited government which has already been achieved in the United States by way of a written constitution. In short, as Jennings (1935: 132) says, the Constitution was for Dicey an instrument for promoting liberal individualism as a fundamental doctrine.

2.3.2 Dicey's rejection of radicalism and collectivism

Leaning to individualistic liberalism, Dicey rejected the Radical and the Collectivist views that had emerged as rival ideologies to three traditional views of representation. But ironically, it was these two ideologies that, contrary to his expectations, were to become the norm in the twentieth century. The Radical and the Collectivist views had this in common: they both challenged in one way or another the view that Parliament was the best mechanism for the representation of the various interests of the sovereign people. While being sympathetic to liberal individualism, the Radicals tended to veer away from parliamentarism towards a more direct form of democracy. (Beer 1982a: 80) Interestingly, in his later years when party government was becoming an ever more irresistible trend, Dicey (1982[1915]: cxiv-cxvii) with some reservations supported the introduction of referenda mainly because he believed that it could heal the obvious defects of party government.

However, this cannot be regarded as a sign of Dicey's adopting a radical democratic view. He made it clear that his suggestion was put forward only in the hope that it might, “by checking the omnipotence of partisanship, revive faith in that parliamentary government which has been the glory of English constitutional history”. (Dicey 1982[1915]: cxvii) That is, his aim was to complement parliamentarism by employing a less problematic

³³ In his *The Republican Crown*, Joseph Jacob (1996, esp. p.24 and ch.7) confirms that the Diceyan view of the rule of law, based on “the fear of an all-powerful state”, led to the creation of a British state.

³⁴ In *The Law of the Constitution*, Dicey (1982[1915]) generalised the principle of the rule of law from such deliberately selected areas as the right to personal freedom, the right to freedom of discussion and the right of public meeting.

constitutional device, *i.e.* referenda, in order to cope with the more uncomfortable trend - that of collectivist partisan rule. Therefore, this selective adoption of certain radical democratic devices does not mean that Dicey gave up his life-long belief in Whig-cum-Liberal parliamentarism. His belief in the independence of MPs from extra-parliamentary pressures remained intact and the Radicals' demand for the mandatory instruction of MPs was rejected.

It is the Collectivist theory of representation that Dicey disliked most and always rejected. Jennings (1935: 132) suggests that his dislike of collectivism partly stemmed from the fear that the collectivist trend would break the hegemony of lawyers (highly "competitive and individualistic"³⁵ group) by diminishing the power of the courts in the administration of justice. However, there is more to it than that. Collectivist democratic thought presumes that the popular will has to be mediated by political groups, especially parties which, unlike direct democracy, were able to achieve a unity of state policy thanks to their greater authority and tighter discipline. (Beer 1982a: 70,79) It is hardly surprising that this conflicted with Dicey's political individualism and parliamentarism, which tended to base parliamentary representation on individuals and public opinion, rather than on partisan collective interests. In 1915, Dicey lamented that with the increasing rigidity of the party machine,

the authority of individual MPs who neither sit in the Cabinet nor lead the Opposition has suffered diminution. ... The spectacle of the House of Commons which neither claims nor practices real freedom of discussion, and has no assured means of obtaining from a Ministry in power answers to questions which vitally concern the interest of the nation, is not precisely from a constitutional point of view, edifying or reassuring. ... the reason for alarm is ... that our English executive is, as a general rule, becoming more and more the representative of a party rather than the guide of the country. (1982[1915]: lxxiv)

Characterising the Diceyan vision of democracy simply as a unitary and self-correcting one has a danger of leading the reader to overlook that its essential character lies in its choice of individualism as opposed to collectivism. A comparison of the similarities and differences between Dicey and Bagehot can perhaps throw some lights on this issue. In attributing the Diceyan conception of representative democracy to a conception of unitary and self-correcting majoritarian democracy, Craig appeals to Bagehot in order to justify his

assessment. In Craig's view (1990: 43-44), Bagehot was a thinker who fully aware that power did not flow in one direction only and therefore was not self-correcting in the way adumbrated by Dicey. In one sense this is true, if only because, unlike Dicey, Bagehot dealt directly with the realities of political power and, in rejecting the cause of the extended franchise due to his dislike of working class dominance, showed little concern with genuine democratic representation. But in a more real sense, it is untrue. By rejecting the separation of powers and focusing on cabinet government as a product of political manoeuvre between party political elites, Bagehot (1993: 216, 220-221) constructed a 'fused' or 'unitary' image of the English constitution: "[the English constitution] has only one authority for all sorts of matters ... the English is the type of simple Constitutions, in which the ultimate power upon all questions is in the hands of the same persons. The ultimate authority in the English Constitution is a newly-elected House of Commons".³⁶ Furthermore, by dwelling on the nation's political character, in particular the gentle spirit of the English statesmen, Bagehot portrayed the English constitution to be self-correcting. In his own words:

Indeed, the dangers arising from a party spirit in Parliament exceeding that of the nation, and of a selfishness in Parliament contradicting the true interest of the nation, are not great dangers in a country where the mind of the nation is steadily political, and where its control over its representatives is constant. A steady opposition to a formed public opinion is hardly possible in our House of Commons, so incessant is the national attention to politics, and so keen the fear in the mind of each member that he may lose his valued seat. (Bagehot 1993: 231)

Therefore, the outstanding difference between Dicey and Bagehot lay, not in their vision of the "unitary, self-correcting" English constitution, but in their differing view about the constitutional role of political parties. As was indicated above, Dicey was reluctant to accept the constitutional role of political parties as intermediaries between rulers and ruled, whilst Bagehot (1993: 160) regarded political parties as the backbone of the House of Commons.

³⁵ David Sugarman (1983: 108) recognises this aspect and suggests that the form and content of the law tends to be inherently individualised because it tends to define relevant actors for legal purposes as individuals.

³⁶ Carol Harlow (1985: 70) regards his discovery of unitary cabinet government as Bagehot's "outstanding" contribution to the study of the constitution. However, Vile (1967: Ch. VIII, esp. 213 ff) argues that Bagehot's

2.3.3 A form of liberal democracy

We have sought to demonstrate that the substance of the Diceyan version of democracy is rooted in individualistic liberalism while its institutional arrangement stems from the Parliamentary tradition linked to the Old British politics since the seventeenth century. From this perspective, it would be safe to say that his vision of parliamentary democracy can be characterised as a form of 'liberal democracy' in the sense that it is a historically specific form of democracy, defined and structured within the limits set by liberalism. To see Dicey's vision in this way is not at all insignificant because it sheds some light on the problematic nature of his vision. Craig's one dimensional approach to Dicey, focusing upon its self-correcting nature, either fails to grasp or deliberately skates over an crucial dimension of the Diceyan vision. In other words, Craig at best trivialises the fact that Dicey's view embraces the dilemma of liberalism. The central question which arises here is: how to the liberal elitism with its preference for representative government can be reconciled with the democratic principle conceiving popular participation as essential to the political process? An analysis of this question will be central to our whole dissertation. But, before moving on, we need to understand that despite a number of attempts to resolve this dilemma, the British constitution has paid little real attention to this issue.

3 The maintenance of the dominant view of democracy: the collectivist content in the form of liberal democracy

3.1 *The emergence of collectivism*

Few can seriously deny that Dicey's liberal vision of democracy has played a major role in shaping the dominant tradition relating to the British constitution, though, as Loughlin (1992: 159) warns, it is not to be equated with the tradition itself. Clearly, the conventions and principles of parliamentary democracy have survived major changes in British society which was already apparent in Dicey's time. In his *Law and Public Opinion*, Dicey (1940[1914]: 211-302) himself illustrated a passing of individualism and the emergence of a new "era of collectivism". This emergence began somewhere between 1865 – 1870 and

characterisation of English government with a negation of the separation of powers is yet another

resulted in "an extraordinary decline" of faith in parliamentary government. (Dicey 1982[1915]: cx; Dicey 1940[1914]: 440-443) Dicey pointed to two interconnected causes for this transformation: the extension of franchise and the increasing rigidity of the party system. (Dicey 1982[1915]: cxvii) Firstly, the extended franchise led to the growth of mass-oriented parties which went hand in hand with a tightening of party discipline. Secondly, the advent of the era of collectivism manifested itself in the advent of party government. Dicey argued that Palmerston was the last Premier appointed not by the party machine but as the favourite of the electorate and since his death in 1865, British government has become more and more "the representative of a party" rather than "the guide of the country". (lxxiv, cxviii) For him, the last and greatest triumph of party government over parliamentary government was the Parliament Act of 1911 whereby the authority of the House of Commons was immensely increased, while the authority of the House of Lords was gravely diminished. By increasing the power of the Commons, this Act gave rise to the present by-partisan adversarial system of government.

3.2 *The triumph of collectivism: the establishment of the British version of party government*

This trend towards collectivism was reinforced during the two world wars and became dominant in British politics subsequent to 1945, and it is generally accepted that what is called the "post-war settlement" was provided and implemented by two highly disciplined parties representing government and opposition. (See Tant 1993: 108 ff; Birch 1989: 90; Beer 1982a: 70) Samuel Beer (1982b: 10) identified this post-war settlement with a "collectivist" consensus, mainly because the political formations through which the main political forces at least until 1970s acted, stood in marked contrast to those of the individualistic nineteenth-century. In short, with mass democracy, British parliamentary democracy became one of "party" government.

One effect of this transformation was in the changed meaning and role of the general election. The election of entirely independent parliamentary representatives was no longer the sole aim of general elections. General elections had become a public choice mechanism whereby the electorate was asked to choose the government from one of main political

parties. Party dualism was strengthened both by the increased use of manifestos to present party programmes and by the consolidation of the whipping system. Underlying this particular form of parliamentary government, *i.e.* party government, is a social dynamic rooted especially in the class system, which has played a dominant role in determining the scope of public choice. It is not surprising, therefore, that in this post-war period the Liberal Party was superseded as one of the two main parties by the Labour Party, a party of working class origin. The Conservative Party, the descendants of seventeenth century Tories, has also helped establish the collectivist tradition. According to Beer (1982b: 12), the Old Tory element of the Conservative Party, by focusing on authority and hierarchy, contributed towards this trend. Its leaders encouraged an ideal of strong government, best exemplified perhaps by Disraeli's notion of a 'one nation' party, representing "all classes, all interests".³⁷ That is, the Party embraced a theory of 'functional' representation, which regards the various strata of society as collective units and looks to them for political action. This growing dependency of the party system on class cleavage was, as we have already noted, closely associated with the strengthening of party discipline. This, with its consolidated whipping system, undoubtedly undermined that independence of MPs which was the basis of the traditional parliamentary democracy. (See Ganz 1994: 24-27)

3.3 *A divergence between reality and ideal: liberal form, collectivist content*

This trend away from political individualism was, however, limited. Whatever encroachment on MP's independence by the party machine, it took place without any constitutional change. On the one hand, in theory, an MP was and remains still independent and free from any external pressures. In other words, the doctrine of mandate derived from the constituent's views and opinions was rejected. Even judicial cases have confirmed this principle. In *Conservative and Unionist Central Office v. Burrell (Inspector of Taxes)* ([1982] 1 W.L.R.522; [1980] 3 All E.R. 42), the court held that "Once elected members of the House of Commons, they become representatives of the constituency for which they have been elected, not delegates of the local constituency associations which may have put them up as candidates." ([1982] 1 W.L.R. 525) In *Bromley L.B.C. v. Greater London Council* ([1983] 2 W.L.R. 62), Lord Diplock held that "a council member once elected is not the delegate of

³⁷ For a twentieth century Tory apology of one nationism, see Macleod & Maude 1950.

those who voted in his favour only: he is the representative of all the electors." ([1983] 2 W.L.R. 107) On the other hand, the public status of political parties has not been legalised. In short, the establishment of party government has come about not as a result of legislation but as a gradual process whereby political individualism has been abandoned in Parliament.

It is worth noting that this felicitous union of the ideal of political individualism and collectivist reality has come about because of two important factors. The first factor is the relatively early established parliamentary tradition. Parliamentary leaders were fortunate in that they had to hand a workable model of sovereignty which protected from external pressures and allowed for adversarial form of party interaction. This is to say that constitutional transformation towards party government could be, and was achieved, within an existing institutional system that was constructed out of the Old Whigism and its heir, Liberalism.

Secondly, the British version of party government has gone hand in hand with a politically neutral and relatively autonomous civil service. (Turpin 1990: 203, 209) Under the constitutional principle of ministerial responsibility, it was and remains the case that civil servants advise ministers on policy and then execute it without bearing any political responsibility. (See Note by the Head of the Home Civil Service, in Turpin 1990: 208) They are therefore normally protected by anonymity and expected to serve governments of whatever political complexion. Senior civil servants, using their accumulated departmental experience and expert knowledge, are often in a position to induce ministers to follow what is called the "departmental view".³⁸ Unlike the United States, at least before the seventies, the rotation of the civil service offices with that of the governing party has been restrained. As Ralph Miliband (1982: 102, 108) points out, a supposedly politically neutral civil service, based on an "air of civilised scepticism", has been a very powerful "braking mechanism" against radical party penetration of the state administration.

An important lesson can be derived from the fact that the impact of the collectivist change on the basic ideas of parliamentary democracy was very limited. The movement towards any constitutional reform, especially that relating to political parties, should begin with an examination of the normative foundations of the British constitution.

³⁸ Thus, Nicholas Ridley has described ministers as the public and parliamentary relations officers of their departments which are under control of the civil service. See Ridley's *Industry and the Civil Service*, pp.3-5 quoted in Theakston & Fry 1994: 384.

4 Some implications of the British version of parliamentary democracy

4.1 *Reluctant recognition of political parties*

The implications of individualistic liberalism for political parties will be dealt with in detail in other chapters (See Chapters 4 and 5), but some brief mention here is warranted. Taking individuals as the basic unit of actions implies that individuals are seen as prior to society, and thereby any attempt to allow intermediaries to assume rights and duties conferred on the individual is rejected. Based on this individualistic view, the liberal theory of parliamentary democracy lacks an account of the positive role of political parties in a democratic system of government. This is not to deny that there is a strong need for political associations to facilitate the rights of individuals. But, it should be noted that political intermediaries are welcome *per se*, but they were "tolerated" merely as a useful means of achieving greater individual representation. Although the essence of liberalism is based on the diversity and autonomy of the individual life, it does not deny that individuals share several vital interests derived from their common nature. They include such things as the security of life, liberty, and property, which are often called "inalienable natural rights".³⁹ They create vital bonds between otherwise 'selfish' and unrelated individuals. 'Civil society' as the realm of interest and choice *par excellence* stands for "the totality of relationships voluntarily entered into by self-determining individuals in the pursuit of their self-chosen goals." (Parekh 1992:163) Ontologically, political parties are perceived as belonging to this realm and thereby they are regarded as private associations.

However, it is important to see that origin of political parties within civil society does not negate their public, though non-legal, duties. The reality that political parties, especially parliamentary parties, play an important role in forming government and uniting the opinion of MPs has necessitated that they behave differently to other private associations. The premise is that the activities of political parties must further the national interest. This is reflected in Burke's classical definition of a political party as "a body of men united for promoting by their joint endeavours the *national interest* upon some particular principles in

³⁹ All liberals, of course, can not be identified as advocates of natural rights. Bentham, the champion of utilitarian liberalism, is famous for his fierce attack on the themes of natural rights and natural law. See Bentham, *Anarchical Fallacies*, in Waldron 1987:46-69; Hart 1982:79-104; Rosen 1983:55-75; Craig 1989.

which they are all agreed. ... [They] will easily be distinguished from *the lean and interested struggle for place and emolument*.” (Burke, quoted from Robbins 1958:510. Emphases added) This community-wide nature of the political party is what justified the ironic title of "Her Majesty's Opposition" or "the loyal opposition".⁴⁰ The unique feature of modern British democracy, its unwritten constitution, has played a major part in bringing about this reconciliation between the organisational 'privateness' of political parties and their functional 'publicness'.

4.2 *Political, not legal, constitution*

One salient feature of the British constitution is that this requirement of neutrality on the part of political parties is conceived to be a matter of politics, and not of law. This is mainly because of an inherent fear of oppressive tendency of human organisations. The state is the only organisation that is legally constituted to maintain order by legitimate use of force. The state is thus perceived as a necessary evil. Craig (1990: 142 ff) was wrong to assume that the distinction between state and society is the unique character of the English pluralism, as opposed to the Diceyan unitary vision of representative democracy. As a liberal vision of democracy, the Diceyan vision is based on the same dichotomy. In fact, the individualism on which it is based is ontologically pluralist. Both have in common the belief that diversity or plurality of interest or opinion is an end in itself and the highest expression of human society. As a result, scepticism vis-à-vis the state is essential to both liberalism and pluralism.

By the same token, for both ideologies, democracy is a means to achieve this pluralist environment rather than the end itself. The fundamental difference between the liberal ideal and pluralist ideal can be found in the different ways they answer the question of how to achieve the goal of a limited, non-monolithic, and anti-totalitarian government. Liberalism, based on laissez-fairism or methodological individualism, believes that the best answer lies in non-recognition of the 'public' entity of private organisations in that despite their positive contribution to the ultimate ends, no public right or duties for those committed to group-specific interests are recognised. In contrast, pluralism perceives the role of such groups as essential to the realisation of its goal and its response is to endow groups with legal rights,

⁴⁰ It was John Cam Hobhous, later Lord Brougham, who styled for the first time this expression in the House

associated with an obligation to follow legal norms subject to public supervision and in some circumstances state intervention. That is, in solving any problems with political associations, liberalism prefers a political approach, finding legal constraints unattractive. Pluralism, on the other hand, relies on legal as well as political solutions. The problem of an excessive reliance on political solution, as opposed to more legal solution, will be critically analysed in Chapter 5, Section 6.1~2. Here it is sufficient to point out that if there is anything which a liberal regime can learn from the pluralist political ideology, it is the pluralist's pursuit of a realistic balance between legal and socio-political realms.

4.3 *Elitist democracy as opposed to participatory democracy*

A major feature of modern British democracy which reflects this combination between liberal ideal and pluralist reality is its elitist character in the sense that the role of the people in political decision-making is a passive, legitimising one. (See Kavanagh 1990: 61-62)

4.3.1 The defeat of radicalism

The maintenance of parliamentarism associated with political individualism within the British constitutional settlement was at the expense of the Radical view of political representation. In challenging parliamentary tradition, the Radical view was more fundamental than the Collectivist view. As was indicated earlier, the main institutional product of the Collectivist theory of representation - the British version of party government - was compatible with the concept of a sovereign Parliament, though in theory there is a tension between them. In contrast, the Radical view, by stressing the importance of popular participation, accountability and a concomitant delegatory understanding of representation, challenged the very foundation of parliamentary sovereignty. The Radical vision of political representation sought a fundamental change in the relationship between government and governed in favour of the latter. Unlike the orthodox political tradition, it demanded more than a narrow sense of democracy that relies on indirect representation of interests and collective responsibility of government. It aimed at improving the quality of popular representation in ways that would lead to the creation of institutions that, in turn, would maintain continuous accountability and responsiveness on the part of government.

of Commons in 1826. See Lively 1994:150-152.

4.3.2 Responsible and representative government

Indeed, attempts have been made to justify British democracy in terms of it being a 'responsible and representative government' rather than 'rule by the people'. L.S. Amery (1947: 20-21) described the British system of democracy as one of "Government of the people, for the people, with, but not by, the people." In clarifying this aspect of British tradition, we may benefit from Parekh's method of separating representative *government* from representative *democracy*. (See Parekh 1992:167) The basic implication of this separation is that a system can be said to be "representative" without encouraging participation. That is, liberal political theory can provide two possibilities for determining the relationship between the people and their representatives. The difference lies in the extent to which the people can take the initiative in decision-makings vis-à-vis their representatives. While in a representative 'democracy' the representatives are treated as delegates of the people, representative 'government' means a government of the people by their representatives. The former view, which was taken up by the Radicals, implies popular self-rule through the mediating agency of the elected representatives and thus requires to some extent a participatory culture. On the other hand, the central feature of the latter is that rulers should be *responsive* to an electorate but without being *accountable* to them.⁴¹ What triumphed in the history of modern British politics is the traditional view of representative government rather than radical representative democracy in Parekh's sense. The advent of the ideal of democracy encouraged English Liberals to transform the aristocratic settlements of the Old Tory and Whigs but the result was compromised by other liberal principles. Liberal fear of a majoritarian tyranny on the part of uneducated lower classes, which would threaten individual freedom - especially the right of property, played a major role in maintaining of this anti-participatory tradition.⁴² The ancient equation "democracy equals mob rule", thus, deterred liberal reformers from wholly discarding Whig parliamentarism. Indeed, English liberal individualism which inherited parliamentarism from the Old Whigs was 'middle class liberalism'. This envisaged a particular type of individual, the propertied

⁴¹ An example of representative government, as opposed to representative democracy, lies behind current arguments in defence of the second parliamentary chamber, *e.g.* the present House of Lords. Supporters of the Lords claim that the wisdom embodied in that institution is valuable in checking the "excesses" of the Commons based on the adversarial politics. But the House of Lords is criticised by many as undemocratic and privileged since its basis lies in wealth and status rather than in free election.

⁴² This desire was explicitly expressed in Madison's famous No.10 of *The Federalist Papers* (1987).

and educated middle class individual, and only such individuals were to be the basic unit of representation.

Therefore, in Dicey's (1940: 57-58) view, "democracy in England", thanks to the unique English snobbishness, "has to a great extent inherited the traditions of the aristocratic government, of which it is the heir", in that there has been no successful radical attempt to replace parliamentary government and the rule of law with the radical democratic principle. As we have seen earlier, it became the norm in the name of parliamentary sovereignty that representatives were elected by the people, but, once elected, were to remain free to manage public affairs as they saw fit.⁴³ This turned out to be a highly effective way of insulating the government against the full impact of universal franchise. In other words, liberal principles were closely tied to existing constitutional settlements, rooted in the independence and the deliberative role of MPs, the supremacy of Parliament at government level, and a passive, legitimising role for the people.

4.3.3 Party government as the continuation of elitist rule

Despite unceasing attempts towards more participatory democracy from the nineteenth century onwards, this elitist conception of democracy was reinforced by the development of the party democracy which eventually emerged in the post-war period as a result of the continuous collectivist challenge against the liberal paradigm. The establishment of party government maintained and manipulated, rather than constitutionally transformed, the parliamentary tradition and a concomitant conception of responsible and representative government. As a result, highly disciplined political parties, associated with the supremacy of parliamentary parties over their extra-parliamentary wings, have been criticised for potentially hindering the people from participating in the process of government. It has been claimed that political parties in reality became, to use Finer's metaphor, 'the sovereign King' by replacing both an absolute monarch and parliament.⁴⁴ Jack Lively (1975: 43-44, 49)

⁴³ Bentham, as a liberal thinker, provided this view with a useful theoretical base by reconciling representative democracy and the sovereignty of the people. According to his *Constitutional Code*, the 'omnicompetence' of the legislature is not incompatible with popular sovereignty. Frederick Rosen (1983:41-54) seeks to demonstrate that Bentham has a flexible view of sovereignty different with the 'classical view' of unitary, unlimited, supreme sovereignty, which has developed since Bodin and Hobbes, in that the sovereignty of the people is limited to the time of election. See also Craig 1989.

⁴⁴ In "Law and Democracy", Sir John Laws points to the ironical aspect of parliamentary sovereignty, though without highlighting the role of political parties: "The result of the constitutional settlement of the seventeenth

suggests that the British version of responsible government “depends largely upon the existence of, and free competition between, political parties.” (at 44)⁴⁵ This is in accordance with the Schumpeterian conception of democracy as an “institutional arrangement for arriving at political decisions in which individuals acquire the power to decide via a competitive struggle for the people’s vote” (Schumpeter 1943: 269) In this view, democracy is not a set of ideals which must be realised for their own sake but a method of choosing political leaders and organising governments.⁴⁶ From this perspective, Dicey (1940[1914]: 51-52) argued that “‘Democracy’ in its stricter and older sense, in which it is generally employed by English writers, means, not a state of society, but a form of government.”

This elitist model of democracy claims to be ‘realistic’ in the sense that it no longer seeks a utopia in which there is no gap between rulers and ruled.⁴⁷ The thrust of democratic elitism is that whilst a universal suffrage is regarded as the fundamental feature of democratic order, its role is limited: it functions only to legitimise the rule of competing political parties which now become recognised as essential structures for bridging the gap between state and society by means of electoral competition.

4.3.4 The supremacy of parliamentary parties over their extra-parliamentary wings

The clearest evidence of the elitist character of British democracy can be found in the primacy of parliamentary parties over extra-parliamentary bodies. Under the banner of

century ... was to establish the supremacy of Parliament over the King. ... When the government was in the possession of the Monarch personally, the ideal of Parliamentary sovereignty amounted to a claim that the ultimate political power should rest in the hands of the people’s elected representatives, not those of an unelected autocrat. But the function of Executive government has passed from the Sovereign to Her ministers, who are members of Parliament; and the very convention that requires command of a majority in the House of Commons as a condition of the right to rule has, in fact though not in name, given back the final power to the Crown, at least for most of the time; though it is exercised not by the Monarch but by others in Her name.” (Laws 1995:91)

⁴⁵ It is important to note that Lively does not say that competing parties will be an inevitable consequence of responsible government but merely the most likely outcome. See Lively 1975:44.

⁴⁶ This instrumental view of democracy is not novel. In his letter to Robert Michels in 1908, Max Weber points out that the question of democracy and its ordinances is not a matter of moral ends, presuming a political animal but rather a “state-technical” matter: “Concepts like ‘the will of the people,’ ... no longer exist for me - they are fictions. It is just as if one were to speak of the will of the purchaser of a pair of boots as being authoritative for how the cobbler ought to pursue his craft. The buyer may know how the shoe pinches - but never how to make a better shoe.” (Slagstad 1993:125-126, quoted from W.Mommsen’s *Max Weber*). Giddens (1972:55-56), unlike other recent theorists, argues that this point must not be overemphasised in an attempt to identify Weber’s political ideas with Machiavellian anti-liberalism. Cf. Slagstad 1993:125.

⁴⁷ For a useful summary of ‘democratic elitism’, see Parry 1969, ch.6.

parliamentary sovereignty, British parliamentary parties have enjoyed a privileged position vis-à-vis extra-parliamentary bodies. Even in today's radically altered situation in which government became highly complex and functionally differentiated, it is institutionally still parliament that wields a monopoly of public power within the existing constitutional framework. What Dicey had originally in mind in suggesting the separation of legal and political sovereignty was that this could fill the gap between democratic and liberal parliamentary ideas. (See Dicey 1982[1915]: 26-35). However, as already discussed, it is parliamentary parties, sheltering behind the traditional constitutional framework, that wield the very power which supposedly belongs to parliament.

In Britain, parliamentary democracy, as an amalgam of democratic and parliamentary ideas, is achieved by eliminating outside interference in the deliberations and activities of parliament. This desire to eliminate such influence has been seen as contributing to the development of a constitutional monarchy, the essence of which is either the limitation or removal of royal powers. Nevertheless, since parliament is said to represent the "national interest" and the "public good", these wider aspects of the community have, of course, never been wholly excluded from representation. British conception of democracy is a very particular and narrow one in which parliament has come to be seen as virtually the sole representative institution of democracy. As Dicey says:

The sole legal right of the electors under the English constitution is to elect members of Parliament. ... [the opinion of the electorate] can be legally expressed through Parliament, and through Parliament *alone*. (Dicey 1982[1915]:17. Emphasis added.)

Focusing on the fact that extended suffrage necessitated both an improvement and an expansion of political organisations which were called upon to mobilise votes for a particular party, Ostrogorski (1964[1902]), writing at the turn of this century⁴⁸, predicted that the extra-parliamentary centres of power, what he called the 'English caucus', would undermine the foundations of parliamentary government. On the contrary, however, all the evidence points to the predominance of the parliamentary parties vis-à-vis their supporting organisations. Thus, the general view among parliamentarians "certainly after 1832" was, in the words of

⁴⁸ His *Democracy and the Organisation of political Parties*, which originally written in French, was published in English in 1902.

McKenzie (1964:7), that "the new extra-parliamentary party organisations must not be allowed to become Frankenstein's monsters which might destroy (or at best enslave) their creators." This general view is confirmed by the actual development of the two main political parties of the twentieth century.

(i) The Conservative Party

Historically, so far as the Conservative Party is concerned, the role of extra-parliamentary organisations has always been to serve the parliamentary party rather than represent the views of ordinary members. Indeed, in the case of the Conservative Party, the penetration of party by society, *i.e.* the voluntary membership, has been relatively weak. The Party's professional component, *i.e.* the Central Office, consists of salaried officials operating under the direct control of the party leader. While certain powers were given to the parliamentary party, the most important, *i.e.* that of defining policy or appointing personnel, were vested in the leader. Until 1965, the selection of the Conservative leader was undertaken by a small "aristocratic" conclave, what Iain Macleod termed 'the magic circle', the ordinary members are being asked simply to rubber stamp their decision. (See Stark 1996: ch.2) Even the party conferences have never played a key role in determining either the party's policies or priorities, though, as Richard Kelly (1994) argues, few can seriously deny their indirect influence and growing importance since the Thatcher years. Nor have they had any executive power. Although, as we shall see in Chapter 6, the 'supreme' power of the conference cannot be seen as the *sine qua non* of democratic party rule, it can hardly be denied that a system which allows the party leadership to have almost absolute power to determine the party's policy and practice was highly elitist. Moreover, such concentration of powers in the hands of the party leadership made for an essentially authoritarian structure. The National Union too was primarily a deliberative and advisory body and the party leadership was not subject to its demands. It is plausible that informal talks between the officers of the National Union or the chairman of the Executive committee and the party leadership might have had some influence on policy making. (See Ball 1994a: 202-203) However, it would not be too wrong to say that the role of the National Union was limited to drawing the leadership's attention to an issue, and often in very general terms.

Indeed, it is scarcely surprising that the Conservative Party has reflected the elitist conception of democracy, given that from the time of its foundation by a parliamentary group, it has been without a formal, written constitution, regulating affairs of the Party (especially those between the parliamentary party and the extra-parliamentary wings). The national organisation was later set up on the initiative of the party leaders to support an already well-established parliamentary party.⁴⁹ Despite several attempts⁵⁰ to "democratise" the party, the basic relationship between the two components of the party remained almost unchanged until 1998 when the new leader William Hague launched a "root and branch" review of its entire structure.

John Barnes (1994: 315-318) suggests that, despite its pragmatic adoption of various political theories, which makes it 'the adaptable party' or party of 'creative opportunism', the most distinctive aspect of the Conservative creed is the Old Tory idea of order, authority and good government which underpins both the elitist structure of the Conservative Party and the British government. At the centre of this creed known as 'Tory democracy' are, firstly, the old fear of 'mob rule' which was believed to be synonymous with democracy, and, secondly, the equally ancient demand for autonomous, strong leadership responsible, but not necessarily accountable, to its supporting associations.⁵¹ "Etonian and Oxbrigian elitism" (Seyd 1975: 219), rather than radical democracy, has had an immense influence on the working of the party.⁵² Sir Ian Gilmour stresses, as we have already noted, that:

⁴⁹ The main national party organisations, *i.e.* the National Union and the Central Office, were established in the wake of the Second Reform Act. See Ball 1994b: 297.

⁵⁰ No proposal for party reform has ever urged that the virtual autonomy of the parliamentary party. Past proposals have included Joseph Chamberlain's "Birmingham Plan" of 1877, Lord Randolph Churchill's campaign of 1881 (See McKenzie 1964:166-173), the Maxwell-Fyfe Committee of 1949 (See McKenzie 1964: 199-231), and the Chelmer Committee of the National Union of 1970/73 inspired by the late 1960s' Young Conservative movement for intra-party democracy. (See Seyd 1975; Rose 1974:265-266) Even the most recent and comprehensive review of the party organisation initiated by the then Party chairman Sir Norman Fowler in 1993 chose not to challenge the *status quo*. It did, however, set out some proposals for building "one, integrated, Party", but showed less interest in the democratisation of party structure and largely focused on the issue of how to construct a more effective, efficient supporting mechanism for the central party. See Ball 1994b: 303; Conservative Party 1993a; *Idem* 1993b.

⁵¹ For some (See Birch 1986: 63-66; Beer 1982b: 175-180), the emergence of Thatcherism meant a decisive break with these traditional Conservative doctrines because it embraced old-fashioned liberal ideas especially in the crucial sphere of economic policy and to that extent exhibited what Beer (1982b: ch.5) called 'new populism'. It also developed what is generally termed 'conviction politics', distinct from both conservative sceptical pragmatism and Disraelian paternalistic tradition of 'one nation'. However, to the extent that this was combined with the idea of 'a strong state' alongside 'a free economy' and that its policies were implemented in a top-down fashion, it would be true to say that it remained very close to the Tory tradition.

⁵² Despite recent setback, public school and Oxbridge graduates still consists of 51% of total MPs elected in the 1997 election. See Garner & Kelly 1998: 85, table 4.2.

"Conservatives do not worship democracy. For them majority rule is a device ... The majority do not always see where their best interests lie and then act upon that understanding. For Conservatives therefore, democracy is a means to an end not an end in itself ... And if it is leading to an end that is undesirable or is inconsistent with itself, then there is a theoretical case for ending it." (quoted in Tant 1993: 114) Expressing his doubts about the onset of popular government, Stanley Baldwin also warned that "democracy's tendency is to concentrate on the immediate appeal and not on the ultimate reality". (quoted in Barnes 1994: 328)

Yet it should be pointed out that the elitist workings of the Conservative party organisation went hand in hand with the autonomy of the local constituency associations that made up the National Union. As Stuart Ball (1994b: 262) points out, this autonomy of local parties was a powerful "totem" in Conservative politics and seen as vital to the overall health of the party and the maintenance of the moral of its grassroots. Basically, this autonomy meant that the constituency parties had an exclusive say in the selection of their parliamentary candidates. Despite a power of veto by the Standing Committee on Candidates (See Blackburn 1995: 217-218), provided that the rules had been properly followed and a candidate did not publicly go against party policy, the leadership had no alternative but to give its support to the local parties' choice.⁵³ (Ball 1994b: 266)

However, this balance of autonomy between central and local parties is from a number of points of view suspect, which current moves towards reform by the Conservative Party would seem to confirm. This reform aims to create a single party by drawing together three components of the old party into a single structure. This seeks to include voluntary organisations in national party affairs, *e.g.* policy making and leadership selection⁵⁴, but in return for the central party having more control over constituency business. (See

⁵³ Despite the fact that "sleaze" played such an important and disadvantageous part in the 1997 election, the party leadership, nevertheless, recognised the power of the Tatton constituency to decide whether Neil Hamilton MP who was at the centre of "cash for question" scandal should be reselected as its candidate.

⁵⁴ As Patrick Seyd (1975: 219-220) suggests, the limited franchise implies that Etonian elitism has survived, though diluted by a spirit of meritocracy combined with the "inverted snobbery" of the masses. (The quotation is from Enoch Powell. See Stark 1996: 16) The anomalous character of this old system from a perspective of democratic governance was most dramatically illuminated in the election of William Hague as the new Conservative leader in 1997. As a result of Labour's landslide, only 164 MPs out of total 659 constituencies were eligible to vote for the new party leader. Even worse, there were no representatives from Scotland and Wales or such major cities as Liverpool, Coventry, Manchester, and Wolverhampton. This means that 495 constituencies could not have even an indirect say in the leadership election. This lack of representation raises

Conservative Party 1998a) All of this represents a major advance towards the modernisation of the party. However, whether it will also mean the abandonment of the old elitism remains, as in the case of the Labour Party, to be seen.

(ii) The 'parliamentarisation' of the Labour Party

There is a strong argument that notwithstanding their organisational, historical and ideological differences⁵⁵, both the Labour Party and the Conservative Party have been contaminated by the elitism of the modern British constitution. No better example of the prestigious status of parliamentary parties can be found than in what we may call the 'parliamentarisation' of the Labour Party. It is well known that the issue of intra-party democracy, which also forms the most practical part of criticisms of the dominant conception of democracy, has emerged largely because of the ideological differences between the left and right wings of the Labour Party. As a theoretical analysis of the issues relating to intra-party democracy, with particular focus on recent developments within Labour's modernising movement, will be dealt with in detail in Chapter 6, here it is probably enough to describe briefly those aspects of Labour practice which have been criticised as reflecting British constitutional elitism.

One may argue that, unlike the Conservative Party, the Parliamentary Labour Party (PLP) no longer has a privileged role in decision-making at least since Labour's constitutional reforms of the 1980s. First of all, in the decision-making process, Labour MPs, unlike those of the Conservative Party, are not in the dominant position.⁵⁶ The PLP, constituency parties, affiliated unions, individual members, the National Executive Committee, and the party conference are linked together by the party constitution, which is contractually binding on them all. (See *In re Grant's Will Trusts*, [1980] 1 W.L.R. 373) McKenzie pointed to an interesting, though now redundant, difference in terminological usage: "The term "The Conservative Party" applies strictly only to the party in Parliament; it is supported outside Parliament by its creation, "The National Union of Conservative and Unionist Associations". The term "The Labour Party" is properly applied only to the mass organisation of the party

questions not only vis-à-vis the problem of elitism but also, and more seriously, regarding the democratic foundation of the party. See Chapter 6, Section 5.

⁵⁵ These include their different views over the function of party and the meaning of democracy.

⁵⁶ For an illustration of the difference in organisational structure between the Conservative and Labour parties, see Rose 1974:133-166.

outside Parliament; it supports in Parliament a distinct and separate organisation, "The Parliamentary Labour Party" ". (McKenzie 1964:12 fn. 2) This different use of terminology is understandable when we consider historical origins of the two parties. While the Conservative Parliamentary Party created its mass organisation in the nineteenth century for the purpose of strengthening support for its MPs, the PLP was created by the Labour movement to represent its interests in parliament.⁵⁷ Thus, what the doctrine of free mandating means to Labour MPs is different from what it implies to Conservative MPs. Indeed, a series of constitutional reforms within the Labour Party successful resulted in achieving greater measure of control over its MPs. The ideal of collective policy-making led the Labour party to regard the conference as the "Parliament" of the party (Attlee quoted in McKenzie 1964:10), and party members are all constitutionally bound to accept and conform to party policy.

In practice, however, the Labour Party has refrained from following this ideal too strictly. At least since the 1945 landslide election victory, Labour has become one of the two major players within Parliament, which has led not only to the enhanced prestige of the PLP vis-à-vis the wider party but also to its adoption of the attitudes and stance as a governing party. For example, when the 1960 Annual Conference endorsed unilateral nuclear disarmament, Hugh Gaitskell as leader of the PLP could declare that the conference had no right to dictate to popularly elected MPs. (See Rose 1974:163) As pragmatism became more influential than ideology, the raised prestige of PLP became more and more associated with its claims to autonomy and a rapidly developing principle of leadership.⁵⁸ However, as early as 1907, a resolution was passed which recognised the autonomy of the parliamentary group in the following terms:

That resolutions instructing the Parliamentary Party as to their action in the House of Commons be taken as the opinions of the Conference, in the understanding that the time and method of giving effect to these

⁵⁷ For a general account for the origin of the Labour Party, See Wright & Carter 1997: ch.1.

⁵⁸ In this regard, it is worth noting Pizzorno's account of how new "external" parties (in Duverger's sense), representing interests that had formerly been excluded, tend to emphasise, by affirming their separate identities, the differences between them and older parties that constituted the "system". However, once recognised and accepted by other parties, they felt a lesser need to affirm their unique identities. According to Pizzorno, this trend reflects the mood connected with "the end of ideology" mood: "If ideology means differentiated proposals for long-term goals, there is no doubt that the political forces are more inclined to abandon this kind of message the longer they stay in parliament". What is inevitable in this process of parliamentarisation is an increase in conflict between inside and outside parliamentary organisations. See Pizzorno 1981:270-1. We shall thematise this fact as the emergence of a "cartel" party system in Chapter 4.

instructions be left to the Party in the House, in conjunction with the National Executive. (*1907 Labour Annual Conference Report*, p.49 quoted in McKenzie 1964: 394)

Over many years, on the basis of this formula, the PLP has successfully defeated repeated attempts by the party conference to give specific instructions to it, concerning, for example, the course of action it ought to pursue either in Parliament or in office. For instance, when Harold Laski, as chairman of the National Executive Committee, claimed in 1945 that the party organisation would expect some control over the future Labour foreign policies, Attlee, leader of the PLP, refused to accept his claim. Subsequently, Attlee, then Prime Minister, was to rebuke Laski with the oft-quoted words, "a period of silence on your part would be welcome." (K.Martin, *Harold Laski* (1953), p.182 quoted in Birch 1989:89)

The primary justification for the autonomy of the PLP is the constitutional principle of parliamentary sovereignty. In the 1960 conference debate about unilateral nuclear disarmament, Hugh Gaitskell made it clear that Labour MPs, according to the principle of parliamentary sovereignty, would have to consider what they did in the House of Commons as a matter of conscience and honour. (See Rose 1974:266-7) The main institutional device employed by the PLP to resist pressure from participatory labourism has been the "parliamentary veto". The leader of the PLP and his Cabinet can, in drawing up the manifesto, veto even the important commitments of the party conference and the NEC. In the 1977 and 1979 Clause V meetings between the parliamentary committee and the NEC, Callaghan, as leader of the PLP, effectively vetoed a number of strong proposals relating to the abolition of the House of Lords. Despite subsequent populist changes, including the extended franchise for the election of the party leader, and ongoing proposal for mandatory reselection of MPs, it seems unlikely that attempts to abolish the parliamentary veto and the mandating of MPs to comply with party policy will be implemented. From this perspective, Richard Kelly (1994: 259), adapting phrases employed by Bagehot (1993), discounts the formal supreme powers of the Labour conference as a merely the "dignified" part of the party constitution while seeing the Conservative conference which has no formal power as far more "efficient" conference. As we shall see in detail in Chapter 6, the current Labour drive towards the modernisation of its policy and organisation confirms the weakness of this formal power. In the wake of organisational reforms since 1983, the dominant role of the parliamentary leadership vis-à-vis the NEC in the party's policy-making process became institutionalised. (See generally Fisher

1996: 67) Although the formal constitutional status of the conference was left basically intact, in practice it was relegated in favour of a Policy Forum. (See Mandelson & Liddle 1996: 221) This means that the Labour Party, initially armed with a participatory or instrumentalist rationale, associated with a delegatory sense of representation, shifted to the right by assimilating liberal political culture relying on the idea of parliamentary party autonomy.

As a conclusion, from initially representing a threat to the British constitution, namely, the parliamentary sovereignty, the Labour Party has come to be one of its major guarantors by gradually opting for parliamentary principles and their elitist tradition.

5 Conclusion

British liberal democracy which denotes representative, more specifically party, government in the name of responsible government, does not exactly accord with the ideal concept of a democratic society as one in which the people participate continuously and actively in political affairs. (McLennan 1984: 245) On the contrary, the salient of this elitist model is that it has to be shielded from too much participation on the part of the electorate as a whole. This is to say that British democracy is a form of political professionalism in which there is a clear division of labour between the electorate and its representatives⁵⁹, in other words, it represents, in Weber's terms (1993: 77-128), "politics as a vocation". Thus, political disputes have been largely limited to the claims of competing elites: The role of the people has been essentially a passive, legitimising one. (See, *e.g.* McLennan 1984: 242-252) Political parties under the aegis of a sovereign Parliament is located at the centre of this picture.

Given this ongoing state of affairs, it is not surprising that there have always been efforts from opposing side of British politics to open the political process up to more people. Although, as we shall argue later⁶⁰, lack of participation *per se* is not, in our opinion, *a priori* a problem, there is no doubt that the British version of parliamentary democracy needs a critical review if it is to cope with the rapid change of modern society. The most

⁵⁹ This is a feature of the Schumpeterian elitist view of democracy. Schumpeter (1943:295) stresses that the voters must "respect the divisions of labour between themselves and the politicians they elect".

⁶⁰ See Chapter 3, Section 4.2.2, (iv) (a).

serious problem is that it is unable to create an organisational force which can adequately regulate power centres outside the traditional concept of the state. In other words, any project for constitutional reform in Britain has to realise, *inter alia*, that in reality there are power centres outside Parliament, and thereby transform a unitary conception of representative democracy into a more pluralist one. A reappraisal of the nature and legal status of political parties should, at least from the perspective of this dissertation, form the core of any such agenda.

Chapter 3

Towards a New Democracy: Constitutionalised Democratic Autonomy

1 Introduction

This chapter will have three main sections. The first will critically analyse the theory of participatory democracy as a powerful alternative to the existing elitist model. (sec. 5-2) The thrust of its main argument is that participatory democracy has as many defects as the elitist model so that the former cannot simply replace the latter. It will, therefore, be suggested that we need a third way of democratisation accommodating the merits of both the elitist and participatory conceptions of democracy. The second section will elaborate this new project, which I will call "constitutionalised democratic autonomy". My arguments underlying this project are by and large three-fold. Firstly, the liberal-pluralist separation between the state and civil society should be maintained in a constructive manner. (sec. 3-4.1) It will be argued that excessive stress on participation can expose equally important individual and group autonomy to the unstable and unpredictable ebb and flow of political negotiation. Any attempt to encourage civil society's direct encroachment on the state as well as the colonisation of civil society by the state must be cautiously avoided. Secondly, the maintenance of the state-society distinction and the recognition of limited participation do not necessarily leave the role of the people in the political process to be stuck in passivity. Constitutionally protected and regulated social autonomy could provide appropriate opportunities for anyone to become involved in the political process, thereby introducing a greater flexibility into the forms of popular participation. The enhanced focus on social autonomy is not only a reflection of the pluralisation of social life but also a key device for promoting and maintaining reasonable public participation. (sec. 4.2.1) While voluntary non-participation will be distinguished from *de facto* exclusion from the political

process, the form of participation will be diversified and multiplied to a variety of social forums at micro level. It means that social autonomy, which used to be conceived only as a private law matter among supposedly equal actors, should now be treated in the context of public law as well. This theme leads to the third limb of the proposed project. It is important to recognise that some aspects of the dynamics of civil society need to be constitutionalised. (sec. 4.2.2) This aspect of constitutionalisation aims not only to promote an ethos of civic autonomy or participation but also to regulate some negative potential effects of social autonomy.

2 Participatory democracy as an alternative vision?

The salient problem with the elitism embedded in modern British democracy is that this qualified democracy tends to encourage public apathy about politics and civil privatism. As Cohen and Arato (1992: 6) point out, the elitist model of democracy necessitates shielding the political system from “excess”, and, more importantly, presumes that the meaning of “excess” is to be determined by the elites alone. The criticism of this view centres on the fact that it potentially reduces the principles of democratic legitimacy, which should connote the ideas of self-determination and the influence of autonomous public opinion on decision making, to merely a formalistic ritual.

One obvious way, we are told, of circumventing this problem and its inherent dangers is to increase popular participation in the political process – a measure for which there is, of course, already widespread support. The argument against the elitist model assumes, therefore, that a decisive narrowing, and eventual abolition, of the gap between government and governed, is essential if polities are to be called democratic.

However, an excessive emphasis on popular decision-making, generally understood as having its roots in Rousseau’s theory of a “general will”, is also open to criticism. In what follows, we shall explore two problems - one minor, one major - of participatory democracy.

2.1 *A minor limitation of participatory democracy: the uncertain outcome of participation*

The first, less important, problem is the lack of certainty and efficiency of democratic politics. Interestingly, one argument for participatory democracy is that it would strengthen the implementation of public policy by enhancing flow of necessary information. (See Birch 1993: 81-82) However, we cannot easily discount Luhmann's (1990: 223-226) assertion that greater political participation can result in a burdensome increase of bureaucracy and unnecessary infringement of individual options rather than actual improvement of people's lives. (See also Murphy 1990: 157-158)

Considering the increasing complexity of political institutions, participation cannot be regarded as a universal panacea any more than non-participation cannot be regarded *a priori* as a problem. The legitimacy of the political system or the validity of all levels of governmental policies and private decisions should not be dealt with solely in terms of whether or not the process is "participatory" or "non-participatory". For each level performs various functions in line with its own particular standards and, thus, is too complex for decisions to be taken purely on the participatory basis. As Michael Walzer (1983: 304) argues, political inclusiveness does not alone make for democratic government, equally necessary to it is what he calls "the rule of reasons". One great advantage of representative democracy is that it can create more fruitful and predictable systems of communication. Representative bodies are subject to what Offe (1996: 94) called the "law of re-encounter": "Every participant in the parliamentary body or its committees must expect to be continually subject to the scrutiny of all the other participants with regard to all the statements he or she makes, and to be assessed on credibility, knowledge of the material, sincerity, consistency, and dedication." In addition, in representative democracy participants can not only say 'yes' or 'no' but also can rationalise the terms and conditions of the negotiative discourse as well as bring about compromises where necessary.

2.2 *The fundamental problem of de-differentiation of the state-society distinction*

The problem of enhanced participation can be most clearly explained in terms of a de-differentiation of the distinction between the state and society, which has characterised (western) modern societies. Cohen and Arato (1992: 7) point out that whatever alternatives the participation model offers - an idealised model of the Greek *polis*, the republican

tradition of the late medieval city-state, or the new forms of democracy generated within the milieu of the worker's movement such as revolutionary syndicalism, they tend to be presented as the single organisational principle for society as a whole. Carl Schmitt's theory of a total state is a good example for this holistic view of society particularly because he predicted the crisis of parliamentary democracy directly in terms of the state-society polarity.

2.2.1 Schmitt's theory of a total state

So far as the conception of democracy is concerned, there are two things worth noting in this German jurist's constitutional and political theory. First, Schmitt argues that the advent of mass democracy means the emergence of the total state. He regards the identification of the citizen's will with the state as the essence of democracy. One consequence of this is the irreconcilable tension between liberalism and democracy. In the transition from the *ancien régime* to liberal society, what was unnoticed was the contradiction between liberal parliamentarism and radical democracy, both of which confronted a common target - absolute monarchy. Once the constitutional liberal state was established, the competing visions emerged as antagonistic to each other. (Schmitt 1985a: 2) While parliamentarism, the political expression of liberalism, is the pursuit of limited government dependent upon rational reason which is produced by unrestricted discussion, democracy is understood to be based upon the principle of equality of homogeneous citizens and the sovereignty of their collective will. (See Schmitt 1985a: 9-10) Therefore even though parliament still exists in a democratic era, its function is changed. Parliament has been transformed, from a locus for the free deliberation of independent representatives seeking unity, into an arena where the plurality of divided yet highly organised social forces meet and clash. In this process, all the old claims for "publicity" (*Öffentlichkeit*) have collapsed:

Parliament is in any case only "true" as long as public discussion is taken seriously and implemented. (at 4) ...[But]The situation of parliamentarism is critical today because the development of modern mass democracy has made argumentative public discussion an empty formality. .. The masses are won over through a propaganda apparatus whose maximum effect relies on an appeal to immediate interests and passions. (1985a: 6)

One crucial issue which clearly shows the contradiction between liberalism and democracy is that of the protection of fundamental rights. For liberalism, an individual's rights to property and free speech are inalienable and essential to protecting society from any form of tyranny. Every attempt by political rulers to circumvent constitutional limits and to misuse their prerogatives to the detriment of these basic liberties is seen as *eo ipso* evil and unjust. Given, on the other hand, that Schmitt's democracy presupposes that the citizens' will, expressed by majority rule, is sovereign, a government relying on this will is free to do whatever it sees fit⁶¹: "All other institutions transform themselves into insubstantial social-technical expedients which are not in a position to oppose the will of the people, however expressed, with their own values and their own principles." (Schmitt 1985a: 16) In other words, as the people are the state, any system of law purporting to defend the people against the state is deemed both unnecessary and absurd. For Schmitt, the whole system of freedoms, such as those of speech and assembly, are derived from his essential principle of parliamentarism, *i.e.* "publicity". From this perspective, if parliament were ever to become merely a facade, such freedoms would equally become meaningless. (Schmitt 1985a: 49)

It is important to see that the exclusion theory underlies this extreme view of democracy. The first principle of democracy, as Schmitt insists *via* Aristotle,⁶² is that "not only are equals equal but unequals will not be treated equally." (Schmitt 1985a: 9) Therefore, according to this view, the eradication of heterogeneity is essential to democracy. The extension of suffrage, which appeared to provide modern parliamentarism with the democratic mask, is in fact not associated with a democratic principle but rather with a liberal idea. Universal suffrage was understood to mean no more than that "Every adult person, simply as a person, should *eo ipso* be politically equal to every other person". (Schmitt 1985a:10-11) However it is not compatible with the democratic notion of equal suffrage as the consequence of a substantial equality "within the circle of equals." (Schmitt 1985a:10-11) Schmitt's predication was that as the process of democratisation, whatever path specific countries might take, was accelerated, parliament as the sole field of interpenetration between society and the state would degenerate into "a mere facade", and thus bring about the emergence the total state. (Schmitt 1985a: 49) The total state which is

⁶¹ For an early English criticism on this view, see Barker 1942:3-7, 34-38

⁶² Aristotle, *Politics* (1280): "In democracies ... justice is considered to mean equality.... It does mean equality - but equality for those who are equal, and not for all." See Schmitt 1985a:89, note 23.

equated with the people *via* various mechanisms (referenda and elections) then absorbs civil society into its bureaucratic structures. (See Keane 1988a: 159-163) In short, in a democratic era, the state and society are fused with each other.

Interestingly, Schmitt makes the organisational change of political parties a key element in his analysis of the contradiction between democracy and liberalism. He takes England as his model. Schmitt points out that political parties in the liberal era took shape as part of the institutionalisation of parliament as the sovereign body and sphere of public opinion. They were bodies made up of well-off like-minded individuals bent on enhancing national interest. The basis of liberal parliament was supposed to be free discussion among its independent members. But with the extension of suffrage, what actually emerged was mass, highly competitive party, sociologically linked to a specific constellation of interest, and heavily bureaucratised with numerous paid functionaries. What collapsed was the liberal assumption that parliament was an area for rational debate on national policy, independent of any external pressure of private interests. Political parties in a democratic era, on the other hand, are totalistic in so far as they seek full possession of the state apparatus, which is seen as an instrument for carrying out their social goals. In the “total” state, which later became known as “totalitarian” or “unitarian”, a monopolistic, single party is placed in the centre of power which “at once animates the State and inspires the People”.⁶³ The state governed by political parties of totalistic character no longer relies on the dualism of “state and society”, which is essential to the liberal constitutional state.

2.2.2 A critique of the theory of a total state: the end of holistic worldview

It would not be wrong to claim that although current liberal democracies are certainly not on the verge of collapse, the enormous literature on both the crisis of legitimacy in recent decades and the growing preoccupation with the massive disaffection from politics indicate that the problems of parliamentary democracy pointed out by Schmitt have not yet found a solution. (See, *e.g.* Mouffe 1993: 182) It is all the more so in that, as we have seen in the previous chapter, many British public lawyers regard a unitary conception of parliamentary democracy as a given legal and constitutional fact. In other words, Schmitt’s attack on

⁶³ Sir Ernest Barker dismisses Schmitt’s defence of the total state or a single party system as a mere reflection of the particular intellectual tradition of Germany which emphasises merely certain aspect of the modern state. See Barker 1942: 289-292.

parliamentarism (*i.e.*, Parliament is no longer capable of regulating the relations of power within and between civil society and the state) can be accepted without any difficulty. However, Schmitt's view regarding the total state and its peculiar and narrow conception of democracy together with his concomitant theory of a necessary fusion between state and society is far less acceptable.

Schmitt's advocacy of unbridled majority rule is nothing but a veiled form of despotism. It is self-evidently not the case that the will of outvoted minorities can be equated with that of the majority seen as reflecting the general will. As Habermas (1992b: 445-446) points out, Rousseauian democracy of "non-public opinion" in which the general will is conceived as a "consensus of hearts rather than of arguments" cannot be warranted in our highly pluralised post-liberal society.

The simple identification of rulers with ruled at the macro level of politics *via* the negation of representative institutions is not, of course, wholly impossible. It can at the very least stimulate concern about political responsiveness to social demands, the importance of which tends to be neglected under liberal neutrality. However, excessive stress on the importance of "input" politics which regards the close relationship between governors and governed as the centrepiece of politics needs to be treated with as much caution as does the opposition standpoint which tends to ignore "input" politics altogether. In other words, any attempt to deduce organisational models solely from the democratic principle of legitimacy is just as much questionable as the elitist model which tries to dissolve normative proceduralism into procedures for winning power.

What in the end makes Schmitt's belief in the absoluteness of political will identified with that of the majority is his view that democracy depends upon the homogeneity of citizens and the restriction of equality. This ideal clearly emerged, like the most monistic ideas, within the context of the logic of identity that seeks to reduce differences to unity. Apparently, any critique of the politics of 'non-identity' leads all too easily to an obsession with the politics of 'extreme identity'. As we shall see in detail in the next section, however, the de-centring tendency of modern societies is generally acknowledged by modern scientists including the majority of socio-legal theorists. (*e.g.* Luhmann 1982; Habermas 1992b) A simplified image of society as a political totality has thus become

largely untenable.⁶⁴ It is now generally accepted that a homogeneity of background convictions cannot be assumed and thus any simple one-dimensional hierarchical model of rulers and ruled has to be ruled out. (See, e.g. Habermas 1992b: 444-445; Teubner 1993a: 555-556; Luhmann 1982)

3 Complexity of modern society and the distinction between state and civil society

As we sought to show in the previous section, a monolithic understanding of modern society hinders any theory of participatory democracy from becoming a workable model in a highly pluralised and complex modern society. A fundamental question, thus, arises: can the complexity of modern society justify any attempt to deny the usefulness of the fundamental liberal notion that the separation of the state from society must be a central feature of any democratic political order? In this section, we shall critically analyse Niklas Luhmann's systems theory which questions the feasibility of any representation of society as a whole. We acknowledge that this theory provides us with many useful points in understanding the essential nature of modern societies such as their growth in complexity, their decentring tendency and last, not least, the limitations of any purely normative paradigm of social problem-solving. However, we shall argue, *via* Habermasian critical theory, that, despite its tantalising analytical power, Luhmann's theory runs the danger of brushing aside any possibility of critical and rational reconstruction of human society and, therefore, serves in reality to maintain an undesirable *status quo*.

3.1 Niklas Luhmann's theory of modern society: the complexity of society and the impossibility of representation of society as a whole

Niklas Luhmann's attempt to understand the nature of modern society from the perspective of systems theory provides us with an important weapon with which to attack the Schmittian fusion theory. For Luhmann (1982: 232-233), the 'modernisation' of society is a process of increasing system differentiation and pluralisation. Modern societies consist not of a single social system but of many, each trying, "at the level of society", to fulfil its own

⁶⁴ This view is not new. We can find many good arguments against fusion theory in English pluralist writings

special functions. (Luhmann 1982: 236) Each system is autonomous, self-referential, and autopoietic, even though not “isolated” from its environment. (See Luhmann 1990: 39-45; Luhmann 1982: 142)

Consequently, Luhmann (1990: 38) recognises that such institutions as the welfare state do not necessarily raise the problem of “totalisation” or “dedifferentiation”. However, he is unsympathetic to those trying to revive the old semantics, central to the whole European political tradition, of “the social” and “the political”, i.e. *societas civilis*, *politike koinonia*. Thus, as Cohen and Arato (1992: 311) point out, Luhmann, rejecting the traditional concept of state and society, draws the lines of differentiation in the light of his much more complex and abstract social model. For Luhmann, such ancient terminology, notwithstanding its noble simplicity, cannot possibly correlate with the complexities of today’s multi-dimensional society.

3.1.1 Obsolescence of the state-society polarity

For Luhmann, the state-society distinction can at best claim a historical significance having played a part in the early transitional stage in the evolution of modern society. It provided perhaps a useful conceptual apparatus by means of which the shift of the dominant subsystem in the eighteenth century from politics to the economy could be thematised. (Luhmann 1982: 340) Before the emergence of this distinction, western societies were politically constituted, in that a normative style of expectation was dominant to which all sectors of society looked unquestioningly. At the turn of the nineteenth century, this power-mediated political society began to collapse thanks to the advent of a money-oriented economy. One feature of this new market economy is its cognitive style of expectation in which values can be challenged and modified in the light of experience. The cognitive critical approach meant that every social structure were now subject to “selectivity” and doubt. This evolutionary transition meant that the society as a whole could no longer be seriously seen as a “body” capable of acting in the same way as an individual. The compact, total quality of the world was dissolved by the emergence of an opposite, relative to the subject, and thereby society began to be viewed in terms of “difference”. (Luhmann 1995[1984]: xxxix) Luhmann states,

from the first half of this century, e.g., Barker 1942: 25-29.

Through the “emancipation” of the economic system and its consequences, society was fundamentally changed. It became much more heterogeneous and complex than ever before. ... The pronounced functional differentiation of society, the diversity of its special perspectives, as well as the remaining distinctions between regional cultures compelled a *possibilisation* of the world. (Luhmann 1982: 354. Original emphasis)

The real, which up until this great transition to the bourgeois society had been regarded as a perfect order established by the “Creation”, began to be regarded as a realm of possibilities. Given this new ‘possibilisation’ of the world, the old state-society distinction has lost gradually its analytical power: “The state has remained a very vague category of little analytical use; it runs the danger of being amplified and constricted by various traditions and prejudices.” (Luhmann 1982: 138)

3.1.2 The illogical character of the semantics of the state and civil society

Apart from its vagueness, leading to a loss of analytical power, what is problematic about the state-society distinction is that it is one of those “illogical” dichotomies to which functionally specialised subsystems appeal in attempting to articulate their relationship to other systems, *i.e.* what systems theory terms their “environment”. (Luhmann 1982: 236) One major problem is that there is a general tendency to exaggerate the normative value of the semantics of the state. (Luhmann 1990:143) Thus, the modern state, with an as yet not “completely trivialised concept” of positive law, was treated like a “national shrine”. Eventually, as Luhmann (1990: 143) points out, the constitutional state is seen as the guardian of freedom and thus “can require one to bring it sacrifices; to die for it.”

Underlying this value-laden theory of the state is a naive nostalgia for the old *politia* in which politics was regarded as the “essence” of society. The romantic ideal of the normative integration of human beings, usually associated with such slogans as “emancipation”, “participation”, and “representation”, is a tenacious one and allures those still intent on pursuing “man’s highest good” *via* an appeal to *zoon politicon*. For Luhmann, however, any attempt to rehabilitate “public man” in the political sphere is misdirected: “To characterise the State as the ‘self-organisation of society’ is not only false empirically; it is equally mistaken as an assumption about latent tendencies.” (Luhmann, *Grundrechte als Institution*(1965), p.14, quoted in “Translators’ introduction” in Luhmann 1982, xvii fn. 4 at

364-5.) Luhmann also warns of the totalitarian consequence saying that “another reason to reject such a definition is that it led Carl Schmitt to embrace ‘the total state’” (*Ibid.*)

Most importantly, Luhmann points out that in the state-society dichotomy, the concept of society is too diffuse. Such a simplistic polarisation runs the danger of overlooking the internally dynamic and differentiated social environment in which the political system operates. This deduction becomes apparent from a reading of Luhmann’s depiction of social differentiation, especially his emphasis on evolutionary perspectives. Functional differentiation, as opposed to other forms of differentiation, *i.e.* stratification and segmentation, provides more complex environments for subsystems than. (Luhmann 1982: 244) The transition from the political society to the bourgeois society, as we have noted above, made it possible to expand the differentiation among various social spheres such as religion, science, education, art and the like. As these spheres cannot be reduced to a single “organisation”, “collectivity” or “logic”, Luhmann argues that to lump them together and label them civil society is analytically worthless. Furthermore, Luhmann rejects the notion that one of these differentiated spheres, namely, that of politics, can in any sense be held to either represent or replace civil society, the social, or normative integration. (Luhmann 1990: 32)

‘Society’, in Luhmann’s analysis, stands only for ‘the whole’, and, occasionally, the global society: “Indeed, society is almost no longer definable in its unity and .. can no longer integrate its subsystem through shared territorial borders. From this point on, society was only possible as world society.” (Luhmann 1982: 354) According to Luhmann (1990: 30), society, in its broadest terms, is the “all-encompassing social system that orders all possible communication among human beings.” The underlying premise here is that the basic unit for analysing modern society is, not actors such as individuals, or social groups, but, the system which consists only of communication. The state as a self-description of the political system is, alongside religion, science, economy, education, law and so on, merely one of society’s subsystems. The state is nothing apart from society. (Luhmann 1990: 30) According to Luhmann, any attempt to revive the old conceptual apparatus is doomed to failure as it is simply not “abstract” enough, to hold open the future and keep its openness steadily in view, and thereby needs radical transformation. What is called for is, not “political” radicality, but “theoretical” radicality. (Luhmann 1982: 333; Luhmann 1990: 29)

3.1.3 The decentred image of society and impossibility of representation of global society

In Luhmann's view, modern society is a type of society that is relatively stable even though, thanks to a gradual process of increasing pluralisation, it has no single centre and no subsector that can claim unchallenged supremacy. (Luhmann 1990: 31-32) One of his basic theoretical arguments, the self-misunderstanding of the part for the whole, proffers an explanation in this regard. In modern society, the question facing politics is whether a part can really represent the whole. (Luhmann 1990:14-19) Luhmann's answer is in the negative. The problems of the legitimacy of political power, which some contemporary theorists pursue by counterpoising civil society against the state, are linked to this impossibility of representation. Luhmann's argument is that the capacity of the entire system to be self-representing within the system is the essence of legitimisation. But, he maintains, as the parliamentarism of particular interests acquired absolute sovereignty, the representation of difference replaced that of unity. Luhmann explained this latter change in terms of a modification of his primary principle of societal differentiation: the reorganisation of the social system of stratification into functional differentiation. Given that modern society is characterised by its functional differentiation, the logical consequence is:

All differentiated systems share the problem that they function as a unity in relation to their surroundings. But at the same time they are differentiated internally into partial systems, none of which as partial system can represent the unity of the whole system. For, as *everything* within, be it a subsystem, a process or an operative element, is *only a part*, they lack the ability to be what they are. (Luhmann 1990: 15. Original emphasis)

It is a paradox that a society cannot help but misunderstand itself by way of conceiving the whole as its own part. This paradox gives modern society its character. Modern men live in a society which cannot represent its unity within itself, in a society without a top and without a centre. (Luhmann 1990: 16) Therefore, legitimisation under modern conditions can only be self-legitimation. (Luhmann 1990: 18) In other words, no system can legitimate another.

In a centerless society, what would be unnecessary and methodologically wrong is to attempt to revitalise the public sphere which presupposes the society-state distinction and

attempts to mediate between them. The liberal model of the public sphere, relying on rational-critical discourse, is to be confined to a single historical epoch. Any proposal, based on a scheme that, under the slogan of democratisation or greater social efficiency, conceives civil society or the public sphere to be normative central, would be vain. For in a functionally differentiated society, rational communication, stemming from a functionally undifferentiated public, is a logical impossibility; "One cannot functionally differentiate society in such a way as to make politics its centre without destroying society." (Luhmann 1990: 33)⁶⁵

3.1.4 A project of "methodological anti-humanism"

It is apparent that Luhmann's basic strategy is primarily based on his critique of the subject-critical tradition of western thought, *i.e.* it represents what Habermas called "methodological anti-humanism". (Habermas 1987[1985]: 378. Cf. Luhmann 1995[1984]: 210-213) For Luhmann (1982: 325), the anthropomorphic character of western practical philosophy, with its emphasis on the subject, must be abandoned. He submits that in this tradition the subject has been largely seen as an independent, self-sufficient, episto-sociological unit divorced from an awareness of the wider social environment. Having regard to the fact that empirical individuals experience and act very differently, Luhmann sees such an independent conception of the subject as nonempirical, or transcendental. However, this is not to say that Luhmann rejects all the historical implications of the semantics of the subject. In his view, the subject was part of a semantics of transition trying to grapple with a situation which essentially defied adequate description, namely, a society moving from feudal to modern structures. (Luhmann 1995[1984]: xlii)

Furthermore, Luhmann argues that placing human beings outside society yields more humane results than otherwise; "[The] distinction between system and environment offers the possibility of conceiving human beings as parts of the societal environment in a way that is both more complex and less restricting than if they had to be interpreted as parts of society, because in comparison with the system, the environment is the domain of

⁶⁵ For the same reason, Murphy points out the problem in the appropriation of Habermas by lawyers: "[this] has taken the form of an appeal to the criteria embedded in the *lifeworld* in order to deal with, modify or regulate the disfunctionalities or pathological tendencies of the *system*." (See Murphy 1990:153-157. Quotation at 157 and emphasis added) We will critically deal with this point later.

distinction that shows greater complexity and less existing order. The human beings is thus conceded greater freedom in relation to *his* environment, especially freedom for irrational and immoral behaviour.” (Luhmann 1995[1984]: 212-213. Original emphasis) For Luhmann, therefore, the idea of “humanism” which sees human beings as the measure of society cannot continue. As the subject is nothing but “contingent selectivity”, and actions are artefacts of processes of attribution, the task of sociologists should be to refer, not to the actors in the situation, but to the foundation of all processes and systems within which “meaning” plays an essential role. Hence, the action theory, which goes hand in hand with the concept of the subject, relies on the *corpus mysticum* of the subject. (Luhmann 1995[1984]: xliv) It is apparent that this conclusion, leading to the hidden contingency of “intersubjectivity”, is indebted to the theory of deconstruction, with its rejection of any grounding metadiscourse. (See Luhmann 1993a; Derrida 1990; Teubner 1992a: 457; Teubner 1992b: 1443-1444)

3.2 *A critique of an overemphasis on systemic complexity and operational closure*

Must this radical challenge to the traditional normative conception of society be accepted? Why should society be presented exclusively as a boundary-maintaining system?

3.2.1 "No way out" from the iron cage?

Habermas and other like-minded theorists, while acknowledging the value of the systemic integration of society, persistently refuse to give up entirely the possibility of an intersubjective context of life, the lifeworld of society. To avoid the “dehumanisation of society”, it is necessary to admit, they argue, that individuals or social groups do not belong only to the environment of their social systems, but, in terms of societal integration, are also involved in “the communicative force of production”. (See McCarthy 1985: 30, 33-34; Habermas 1992b: 444) It is true that there is a commonality between Luhmann and Habermas, in that both believe that the first task of modern social theory is “management of the complexity” which may cause societal disintegration. For both of them, any crude attempt to build a monolithic image of society is unrealistic and unworkable.

However, when it comes to putting forward a workable answer to the issue of managing complexity, a serious difference can be seen between the two leading theorists. Luhmann

claims, as we have seen in his critique of the concept of the subject and action theory, that it is a vain effort or, at best, a “time consuming” strategy to focus on human beings in infinite face-to-face interactions from which sequential forms has to be abstracted. Such an approach can never attain a “stable” mechanism of societal integration because of a lack of “time” and the impossibility of “co-ordinating” the many and various communicated messages. (Luhmann 1982: 72, 143) Luhmann’s advice is to concentrate on the ‘systemic integration of society’ which takes on an objectivity that can no longer be brought into a system of interaction, as it pertains only to communication, meaning and such media as power and money. This implies that the problem of reducing “environmental” complexity while expanding systemic complexity is the sole determining feature of societal development. (See Habermas 1988[1973]: 139) Apparently, such a strategic approach is sceptical of the effects of conscious political planning and participation together with the normative definition of democracy. (See Luhmann 1990: chs. 7-9)

While drawing on Luhmann's depiction of the decentred nature of modern society, Habermas is dissatisfied with, and repeatedly opposed to, this sceptical, “anti-humanist” approach, and profounds a two-level concept of society, embracing functional systems and the lifeworld, together with a balance between two ways of societal integration, *i.e.* systemic and social (communicative) integration. (See Habermas 1987[1981]: Ch. VI)

As Habermas (1987[1985]: 353-354, 368-378) points out, Luhmann’s systems theory takes on the philosophy of the subject simply by replacing the subject with system. What is lost in systems theory is the possibility of any self-critique on the part of modernity. Above all, systems theory seeks, *via* its system-environment distinction, to avoid examining the painful, oppressive aspect of societal functional differentiation and to concentrate on a sociological analysis of system alone. Habermas argues,

Considered historically, the establishment of the status of wage-labour and the rise of an industrial proletariat, as well as the inclusion of the populace under centralised administrations, were by no means painless processes. But even if systems theory could formulate the problems connected with such processes, it would have to dispute the possibility of modern societies having a perception of crises that could not be scaled down to the perspective of a special subsystem. (Habermas 1987[1985]: 375)

3.2.2 A disguised inclusion of the public in the political system

The main concern of this dissertation is to define the political system. Luhmann (1990: 98) sees the political system as including within it all politically relevant associations and publics. Therefore, he submits that as the political system is also governed by the principle of functional differentiation, it can be differentiated into the bureaucratic administration, party politics, and the public. (Luhmann 1982: 153) The internal functional differentiation first manifests itself in the separation of party politics from administration (which includes parliamentary representation). In connection with this separation, the public takes on a number of distinct roles, which eventually becomes a third element of the political system. The fundamental differentiation of roles can no longer allow the citizen to stand as the “subject” of an “undifferentiated” authority. (Luhmann 1982: 154) The citizen begins to be conceived in terms of a number of specialised roles: tax payer, client, complaint, voter, writer of letters to the editor, the professional and the like. As a holistic being, the individual lives outside the function systems. But, every individual has to have “access” to “every function system” if, and insofar as, his or her mode of living requires the use of the functions of society. (Luhmann 1990: 35) To the extent that the comprehensive role of the public is broken down into a number of specialised fragmentary roles, the public which was once the essential element of civil society is now placed within the political system and thereby becomes subject to systemic logic or the medium of power. Luhmann states,

These roles are divided up in accord with the requirements of the political system, and especially with its channels of communication. They are roles for complementary behaviour and, as such, belong within the political system and not its social environment. Hence, the exercise of influence comes to depend on behaviour's conforming to these roles. ... Their specific function of converting experience with the results of binding decisions into new motives for decision-making can then be fulfilled largely within the system. But this will depend on the political system's being able to create enough alternatives and maintain a complexity that corresponds to that of society. (Luhmann 1982: 154)

It is apparent that this predominance of systemic logic over the intersubjective context of life is quite contrary to the critical-theoretic strand of western thought which tended to favour the public sphere closely identified by it with the lifeworld over the political system, or at least a balance between them. The critical strand of thought admits the uncoupling of the public from the administrative system, but not as a subsystem within the political system. Rather, it places the public in those particularised forms of life, lifeworlds, that are

intertwined with concrete “traditions” and “interest constellations” in the “ethical” sphere primarily “outside” the influence of systemic logic and medium. (Habermas 1992b: 444) In Habermas’s view, “public spheres” can be conceived of as “higher-level intersubjectivities”, within which identity-forming self-ascription can be articulated. Habermas believes that, through this highly aggregated public, a consciousness of the total society can be articulated; “In virtue of this common consciousness, ... the society as a whole can gain normative distance from itself and can react to perceptions of crisis” (Habermas 1987[1985]: 376-377) As we shall see later, this critical conception of the public sphere forms the basis of our new paradigm of democracy, ‘constitutional democratic autonomy’, that overcomes the scepticism raised both by Schmitt’s “decisionism” and Luhmann’s systems theory.

3.2.3 An “unintended” political conservatism?

Differing ways of defining the political system give rise to different notions of democracy. Luhmann claims that any normative idea of democracy has to be abandoned. In a highly complex society characterised by the autopoiesis of its many subsystems, as seen above, any normative style of expectations is unfeasible. The fact that the political system operates under its own timetable, its own regulative standards, with a particular function, unparalleled elsewhere in society, does not allow for any “input” in the form of generalised motivations, values, or interests. From this point of view, it is not only undesirable but also impossible to envisage any democratic control over the economic and administrative system that would increase the reflexivity of administration and market vis-à-vis civil society. One result of this view is that the political system is shielded from the critical public. The political code no longer rests merely on the distinction of government and governed but on that of government and opposition. (Luhmann 1990: 217) In this respect, not surprisingly, Luhmann aligns himself with the Schumpeterian elitist tradition.⁶⁶ According to Luhmann, the view which sees public opinion as an external reference influencing politics, the “puissance invisible” of the visible, or a centralised echo of political activity, is no longer feasible. Rather, public opinion, Luhmann argues, must serve the self-referential closure of

⁶⁶ E.g., “Stability becomes a permanent problem. Therefore, politics can no longer be conducted haphazardly, by amateurs, or on the basis of a heterogeneous status-system. It must be organised through political parties as a form of professional work.” Luhmann 1982: 96.

the political system, the reflection of politics upon itself: “[T]he mirror of public opinion, just like the system of market prices, makes possible an *observation of observers*.” (Luhmann 1990: 216. Original emphasis)

On the other side of the debate, the critical-theoretic strategy retains a normative idea of democracy in that it gives the greatest weight to the social-integrative power of solidarity which must prevail, if only indirectly⁶⁷, over other control resources such as money and administrative power, if the “practically oriented” demands of the lifeworld are to be articulated. (Habermas 1992b: 444) From this critical-reconstructivist point of view, Luhmann’s indifference to a rational constitution of society and preference for systemic integration is a fundamentally “opportunistic” world view; “universal functionalism must suppose - that is, prejudice at the analytical level - that this change in the mode of socialisation and the “end of the individual” have already come to pass”. (See Habermas 1988[1973]: 140-142) Or, more generously, its status can be viewed as “pragmatic”; “systems research itself is part of a life-process subject to the law of increasing selectivity and reducing complexity.” (*Ibid.*) Such generosity can in effect be seen in Habermas’s analysis of economic and political administration at least since the publication of his *Theory of Communicative Action*. (Habermas 1987 & 1984 [1981]; *Idem* 1996[1992]. See also Habermas 1987[1985]: 363-364.)

However, certain critics advance a number of convincing reasons for regarding this concession as an unnecessary submission, of the critical-theoretic strategy, to the “seductions” of Luhmann’s systems theory. While acknowledging the importance of the distinction between behaviours within organisational settings and outside of them, McCarthy (1985) argues that there is no reason why this distinction should pertain to one between a system and its environment. In McCarthy’s view, systems-theoretic concepts, precommitted to “comprehensive, non-participatory” political planning together with a concomitant Schumpeterian definition of democracy, are not suitable for drawing the kind of distinction that need to be made; “the ‘utopian’ idea of self-conscious self-determination must retain a regulative idea, in light of which we might at least recognise when we are

⁶⁷ According to Habermas, as we shall see, the social integrative power of communicative action must not directly carry over into democratic procedures for settling power claims on the political level because such an approach runs the danger of damaging the systematically integrated action fields. The student movements which hit the western democracies in the 1960s were criticised by Habermas for having this tendency.

compromising and why". (See McCarthy 1985: 45) One question which McCarthy raises in connection with Habermas's adoption of the theory of systemic integration in the field of political administration is: "Is interaction in the political sphere systematically rather than socially integrated?" (McCarthy 1985: 38) In McCarthy's view, as far as power needs, in the light of Habermas's theory, to be "legitimised" and therefore requires more demanding "normative" anchoring than money, and as the contrast between "normatively" authorised and "simple" imperatives is presented as a paradigm for the difference between "communicative" and "strategic" action, there is no reason why interaction, mediated by legitimised power, should be regarded as systematically and not socially integrated. (McCarthy 1985: 39) As we shall see later in our proposal for constitutionalised democratic autonomy, this possibility of social integration within systemic integration can be manifested in a "reflexive" mode of social structure that opens a way for public scrutiny of the political system while reducing it to constitutionally regulated procedures.

3.2.4 Is systemic autonomy unaccountable self-regulation?

Critical theorists also suggest, contrary to Luhmann's belief in systemic self-regulation and operational closure, that there can be no autonomy of the political system without the realisation of democracy in the critical-theoretic sense. As Cohen & Arato (1992: 316) argue, to focus on the medium-steering capacity of the political system would remove any motives for reform based on the "extension of politically consequential communication". (See also McCarthy 1985: 45) If, as systems theory proposes, "domains of action neutralised against lifeworlds" are extended to the public sphere and politics is thereby divorced from society, there would be no room for the creation of any new form of social control over state. In other words, focus on the self-referentiality of society in general and the political system in particular does not leave any room for "strategic" human action. (Jessop 1992: 242-260)

Excessive emphasis on the autopoietic aspect of the political system, with its steering capacity not only in the determination of its boundaries and tasks but also in the selection and formation of its environment, does give rise to a number of side effects. Luhmann (1990: 81) himself is fully aware of such problems and would further admit that they justify his critics in setting up normative research projects into the adequacy of objective

“indicators for the boundaries of state activity”. However, not surprisingly, Luhmann claims that more desirable way to investigate and resolve these problems is to find ways and means of better articulating the self-limiting mechanism of the political system.

In stressing self-limiting character of the political system, Luhmann persistently attempts to reduce it to the single dimension of functional differentiation with its concomitant self-referential autonomy. For him, the sole way to perceive the self-limitation of the political is to understand the historical fact that the modern political system is born of social differentiation. The implications of this fact are two-fold. The first implication is that the political system is, of necessity, more or less generally accepted by its social environment; “As a system, [the political system] must enjoy political credit, which does not rest upon its making specific promises about what its decisions will be. This credit is not created by a continued bartering, or taken back after every failure.” (Luhmann 1982: 143) Hence, the self-referential order of political communication “binds” the system to “openness” with regard to “every politicisable” theme. (Luhmann 1990: 34-39, 98) Moreover, legislation and financing, while providing the political system with premises for its decisions and transferring the binding effect of these, are essentially extraneous factors belonging to the legal and economic systems. (Luhmann 1990: 82-85, 101)

Secondly, Luhmann also sees subjective fundamental rights as a safeguard against any overextension of the political. Fundamental rights, in Luhmann’s view (1982: 96), are what make rapid fluctuations within political administration basically tolerable. However, Luhmann makes it clear that such rights cannot be deduced from highest-order principles originating from some mysteriously pregiven dimension of natural rights. Nor can a single principle such as “society against state” justify the structure of rights. Rather, it is claimed that they are simply products of the highly differentiated nature of modern society, their function being to maintain and protect this differentiation. The rights of free speech, press, assembly and association, for example, cannot, of themselves, guarantee rational will formation. Their function is to transfer the self-observation of the political system into the “reflexive mode of the observing of observers” and thus by helping prevent any suppression of societal communication. (Luhmann 1990: 217) In other words, Luhmann trivialises the societal centre of normative integration and reduces associational life to merely by-product

of the self-limitation of the political system. (See Luhmann 1990: 101-101. See also Cohen & Arato 1992: 326-341)

One might assume that as Luhmann regards the legal system as a subsystem, characterised, by nature, by a normative style of expectation, it alone, as a “differentiated residue” of the concept of civil society in the old European political semantics, can form a locus for normative integration. (See Cohen & Arato 1992: 333) However, Luhmann’s rigid conception of “operational closure” does not allow such an interpretation. Luhmann doubts any possibility of modification of ‘system subjectivity’. As the movement of legal autopoiesis is an “all or nothing” process, in his view, the recognition of any *supra*-regulation of society by law would be tantamount to conceding the primacy of the legal subsystem over other spheres. This would be incompatible with the ideal (or reality) of a centreless society and the inevitable “system relativity” of all perspectives and is, therefore, inconceivable without destroying society. (See, *e.g.* Luhmann 1992b, 1992c)

However, in Habermas’s view, this version of the single-front character of societal modernisation overlooks the fact that such media as money and power, *via* which functional systems set themselves off from the lifeworld, have in turn to be “institutionalised” in the lifeworld. (Habermas 1987[1985]: 355, 362) The colonising effects of media-steering systems has been camouflaged by the old structures of compromise, developed in advanced capitalist societies.⁶⁸ Such compromises can be conceived of as reactions on the part of the lifeworld to systemic logic, on the one hand, and growth in complexity, on the other, both of which are proper to the capitalist economic process and a state apparatus. However, as the crisis of the social-welfare state has deepened, with the advent of “risk society” in Beck’s (1992) sense, it is not only system imperatives but also lifeworld imperatives that spark new conflicts which cannot be dealt with by the existing compromise structures. The old expectation that society could exercise an influence over itself by the “neutral” means of political-administrative power has proved wrong. (Habermas 1987[1985]: 361) Therefore,

⁶⁸ Habermas depicts the background of the emergence of the old political compromise as follows: “The rationalisation of the lifeworld had to reach a certain maturity before the media of money and power could be legally institutionalised in it. The two functional systems of the market economy and the administrative state ... destroyed the traditional life forms of old European society to begin with. The internal dynamic of these two functionally intermeshed subsystems, however, also reacts back upon the rationalised life forms of modern society that made them possible, to the extent that processes of monetarisation and bureaucratisation penetrate the core domains of cultural reproduction, social integration, and socialisation. Forms of interaction shaped by

the central question today is whether a new compromise can be arranged that accords with the old rules of system-oriented politics. (Habermas 1987[1985]: 357) Habermas persuasively argues for the reconstructed concept of a public sphere as a fragile and diffuse network. Public spheres are now arena within which processes of opinion and consensus formation get institutionalised and thereby erect a “democratic dam” against the “colonialising encroachment” of “system imperatives” upon areas of the lifeworld. (See, *e.g.* Habermas 1992b: 444; Habermas 1987[1985]: 357ff, esp. 362) Yet, it should be borne in mind that the solidarity-generating energies of the public sphere, which arise spontaneously out of micro-domains of everyday practice, may not directly cross over into the self-steering mechanisms of state.⁶⁹ (Habermas 1992b: 444-445; Habermas 1987[1985]: 364-465)

More specifically, Luhmann's insistence on keeping his theoretic interests within the boundary of the horizontal relationship between sub-systems is ahistorical. One may argue that the idea of law as an autopoietic system does not exclude the middle way of societal development. That is, if one, unlike Luhmann, sees autonomy and autopoiesis as a matter of “degree”, societal guidance through the rule of law is not always unthinkable, though it could be a highly difficult, risky task. (See, *e.g.*, Teubner 1993b: ch.3; Willke 1992) If one sees the legal system not as a purely intellectual system incapable of performing functions for the rest of society but as a hinge between various subsystems, especially those of politics and the economy, and their environment (or between system and lifeworld), societal guidance through law is not always an illusion. In this regard, we can have recourse to Habermas's new version of the rule of law in his project of discursive democracy and Teubner's social regulation through reflexive law. (See, *e.g.*, Habermas 1996[1992]: esp. chs. 3-4, 7-9; *Idem* 1992b: 448-450; Teubner 1983 & 1993b) This strategy inevitably presupposes the constitutive or regulative function of law in terms of societal integration. Finally, this line of thought provides, both implicitly and explicitly, not only a justification for the reconstruction of an independent institutional context, on which autonomous law

these media cannot encroach upon realms of life that by their function are dependent on action oriented to mutual understanding without the appearance of pathological side effects.” Habermas 1987[1985]: 355.

⁶⁹ Therefore, Habermas prefers to the model of society influencing itself (*i.e.*, systems theory) the model of boundary conflicts between the lifeworld and the two far more complex subsystems of the state and the economy. These subsystems can only be indirectly influenced by the lifeworld which, however, depends upon their performance. Habermas 1987[1985]: 365.

can rely (*i.e.*, the still useful distinction between state and society), but equally a basis and orientation for the legal regulation of the political and public spheres (*i.e.* the required constitutionalisation of politics).

4 Towards a new paradigm of democracy: constitutionalised democratic autonomy

Interestingly, Schmitt's fusion theory and Luhmann's theory of a decentred society both argue that the state-society polarity is only relevant to the emergent liberalism in the eighteenth and nineteenth centuries. Both theories claim, for different reasons,⁷⁰ that the framework which this polarity provides is anachronistic. What we have argued in the previous sections, however, is that both these approaches (*i.e.* the vulgar fusion theory of state and society and excessive stress on the growth in complexity) fail, the former in not recognising the full reality of modern social development, the latter in neglecting to provide a constructive democratic paradigm in contemporary conditions. Thus, the one remaining option is to restructure the liberal system, in particular its old state-society distinction, by realigning it to the normative merits of participatory democracy. In so doing, we can focus on one central question, namely, how can popular sovereignty be accommodated within the present liberal system?

In this section, we shall try to answer this question by developing a new socio-political vision of 'constitutionalised democratic autonomy'. It will be argued that this new project can extend democracy to a wide range of social relations within existing liberal-democratic regimes by providing a coherent interpretative framework that will, against a background of growing complexity, offer a common normative fabric, linking rights, associations, and publics. Three themes are to be identified within such a constitutionalised democratic autonomy. First, the liberal separation of society from state will be restructured, stress being given to the need for an interdependent and balanced relationship between the two. This refocused state-society distinction will pave the way for a two-tiered conception of politics together with a two-track proposal for democratisation. (Sec.3-4.1) Secondly, in an attempt

⁷⁰ While Schmittian theory stresses the inevitable refusion of society and the state, Luhmannite theory concentrates, with reference to the growth of complexity in modern societies, on the logical absurdity of a grand discourse reviving the semantics of the state and civil society.

to retain the possibility of a self-critique on the part of society as a whole, we shall try to thematise the independent space, the public sphere, vis-à-vis both state and civil society. (Sec. 3-4.2.1) Thirdly, the first two themes should, it will be suggested, be constitutionalised. (Sec. 3-4.2.2)

4.1 *Reconstruction of the state-society distinction*

The recent revival of the state-society polarity among a number of political scientists and sociologists can be ascribed to two things. Firstly, this dual concept provides a useful tool for analysing the nature of modernity or modern society *per se*. Secondly, it has potential value as an ideological weapon with which those seeking an agenda either of political revolution or constitutional reform can attack the present political order arising out of modernity, while at the same time suggesting a new vision of the future. In fact, as Cohen and Arato (1992:vii) point out, this now quite fashionable usage has arisen out of “struggles” against communist and military dictatorships in many parts of the world. Yet even in Western democracies, some academics and political campaigners, whether progressive or conservative, make use of this polarity in thematising the case for reform. (See, e.g. Habermas 1992b: 454; Keane 1988a: 2-5; Walzer 1992: 89-90; Lipow 1996: 64)

Interestingly, with reference to this state-society distinction, a new paradigm embracing political policies, strategies and institutional arrangements, is being sought across the political spectrum today. On the one hand, the New Right has capitalised the centrality of this distinction in its attempt to overcome the failures of the welfare state. On the other hand, a number of New Left theorists, while acknowledging the importance of that distinction, criticise the Right's indifference to democracy as the organisational principle of society. Our new vision of democracy is sympathetic basically to the latter.

4.1.1 A critique of neo-conservatism

(i) The basic tenet of neo-conservatism

Neo-conservatism (or the New Right)⁷¹ gives prominence to the realm of freedom in attacking the interventionist welfare state. This theoretical starting point is indebted to

⁷¹ Usage varies, thus the same phenomenon may be styled neo-conservatism, the New Right, or neo-liberalism. However, these terms do, on occasion, indicate theoretical differences of opinion. Here we shall focus mainly upon the policies pursued by a particular political force, namely, Thatcherism.

certain aspects of the socialist critique of late-capitalist social formations. As Offe (1984:66) points out, the “renaissance of the conservative theories of crisis” began by taking over the Marxist assumption that bourgeois democracy and the capitalist mode of production constitute a precarious, yet indissoluble, relationship of tension. But while adopting certain positions and approaches derived from the tradition of a critical theory of advanced capitalism, neo-conservatism polemically removes from it any element of economic reductionism. Neo-conservatives try to locate the cause of the crisis within the welfare state in problems resulting from the democratic political process, such as the overload of state and the ungovernability of society. (See Dunleavy & O’Leary 1987: 66-68) Consequently, attempting to redress this situation, they redraw the boundaries between state and civil society in a way that gives priority to the latter. The first target of this strategy is an increase in efficiency, which is achieved by introducing an apolitical market system into both government and the economy, and thus reducing the political domain to a minimum. (See Offe 1985: 818) Underlying this approach is the view that political life, like economic life, is a matter of individual freedom and initiative.

(ii) A British version of neo-conservatism: "free economy, strong state"

In Britain, the New Right, which can generally be styled ‘Thatcherism’, has taken on an ambivalent character in that it embraces both state centrism and libertarianism. Andrew Gamble (1994, esp. 35ff) depicts the policies of this British New Right as a vision of a strong state alongside a free economy. John Keane (1988a: 9) points out that the neo-conservative recipe in Britain is simultaneously to restrict the scope of state and increase its power. What made this seemingly contradictory policy possible was, as David Held (1989: 140) notes, the separation of the instrumental, or performative, dimension of state from the idea of the state as a powerful, prestigious and enduring representative of the people or nation. Thatcherism may be seen as having sought to draw upon and reinvigorate the symbols and agencies of the latter while systematically attacking the former. In short, the British New Right is a mixed ideology of nationalism and capitalism, which Walzer (1992: 90, 94-97) saw as separate rival ideologies.

(iii) A distorted distinction between state and society

It could, of course, be argued that reform programmes require a strong state for their implementation. Defeating one's opponents is, after all, an essential preliminary stage of any radical reorganisation. However, for many reasons, the neo-conservative attempt to redraw the boundaries between state and civil society can be seen as misdirected.

One major contradiction resulting from neo-conservative attempts to alter the post-war political settlement can clearly be seen in the field of central-local government relations. Martin Loughlin (1989; 1994) analyses a number of negative impacts which Thatcherite policies have had over the past two decades on this area. The thrust of all these 'reforms' was to reduce the political capacity of local government to govern. This reduction has been achieved, on the one hand, by transferring a significant part of local government services to the private sector, and, on the other, by strengthening the central control of local authority finance. Loughlin argues that the juridification of central-local relations, *via* which these changes have been implemented, has resulted in an entrenchment of the hierarchical, authoritarian power of the central government. The problem with this juridification, in his view, is that it was not backed by a competent ideology that could not only fill the normative gap between administrative reality and legal ideal but adequately reflect the complexity of the political-administrative system as a whole. Furthermore, this ill-conceived juridification has, in turn, resulted in the loss of an essential aspect of the "self-correcting" mechanism of the traditional system of government, *i.e.* the co-operative pluralist central-local government relations.

Another area equally affected by neo-conservative policies is that of civil and political liberties. As Gamble (1994: 43) maintains, strong Thatcherite state did not necessarily lead to the establishment of a free market: "The authority of the state is all important and no principles or policy goals, such as the sanctity of individual rights or the need to maximise economic efficiency, can be allowed to override it." Increased emphasis on "law and order", almost inevitably, went hand in hand with the selective revival of diffuse and general symbols of the British nation-state, and thus tended to avoid general domestic confrontation.

There is ample evidence for a massive reorganisation of the state apparatus for maintaining law and order in the era of Thatcherism. This tough policy has undermined the

value of opposition by allowing greater concentration and centralisation of the state power, in such areas as the storage of information, surveillance and pre-emptive control of, among other things, industrial conflict, social movements and political dissent. (See Ewing & Gearty 1990: v-vi) A number of new laws that give greater powers to the police and law enforcement authorities, such as the Police and Criminal Evidence Act 1984, the Public Order Act 1986 and the Prevention of Terrorism Act 1989, are merely the tip of an iceberg. All this development shows that the neo-conservative strand of New Right thought cannot easily be aligned with its neo-liberal strand which stresses the value of individual freedom of choice and minimal government. Many political commentators and sociologists have noted that the neo-conservative strand, which rests upon a recovery of traditional nationalist symbols coupled with hard line policies, has made the task of preserving or creating public spheres of reciprocity and solidarity more difficult. (See, *e.g.* Keane 1988a: 9-10; Held 1989: 141-143) Therefore, the capital, which neo-conservatives have gained in their attempt to attack the plethora of bureaucracy inherent in the welfare state, was offset by the side effects of their leanings to arrogant nationalism, rampant egoism and a spirit of mistrust. Apparently, this new movement and theory is at root concerned to advance the cause of classical liberalism against democracy by limiting the potential capacity of state power to encourage social equality. (See Held 1989: 175; Fraser 1992: 133)

4.1.2 Towards a new equilibrium between state and civil society: double democratisation

The above critique of neo-conservatism does not necessarily imply advocacy of the conventional ideal of political left, which relies on the myth of monolithic collective decision-making. We have already sought to demonstrate that the growth of complexity in modern societies makes it impossible to maintain a holistic view of popular sovereignty. What is called 'postliberal political theory' tries to provide an alternative approach in that attempts are made to reconcile liberal political institutions with participatory democracy. The thrust of this postliberal theory is that both the ideal of mutual aid and the taming and restriction of state power must be sublimated in a new model of democracy, yet without prejudice to democratic accountability. This view can best be thematised in a project of double democratisation involving not only the state but also civil society. We may start with the nature of the politics underlying this new project.

(i) The possibility of a normative paradigm of democracy: the reconstruction of the political in a decentred society

(a) Post-modern political theory - The end of a normative paradigm of the political?

Neo-conservatism and systems theory are correct in asserting that the view of society as centred in the state does not fit modern societies which are functionally differentiated. However, they are wrong in denying altogether the usefulness and the possibility of rational government planning, control, and intervention. Underlying this denouncement of the state, or the central role of the political as the organising principle of modern societies, is their obsession with the societal effect of the capitalist economic development. The emergence of these effects, they believe, has changed the gravitational point of modern societies from the political (*i.e.* a normative paradigm) to the economy (*i.e.* a cognitive paradigm). Neo-conservatism argues that the failure of the welfare state can be ascribed to the failure of the interventionist belief that civil society, as a sphere of an economy regulated *via* labour, capital and commodity markets, can be controlled by the political system. Luhmann argues that in complex societies, the politically constituted society has become redundant and the state can only be viewed as the self-description of the political system, merely one subsystem of global society. In this view, politics is and should be no longer responsible for problems that concern society as a whole. The result is what is generally styled 'postmodern politics'.

In a nutshell, postmodern politics relies on two premises. First, it presupposes the impossibility of a metanarrative, or superdiscourse, that could make intersubjective discourse possible. Second, it is based on the conviction that 'society' is not the kind of holistic 'object', that is open to either representation or strategic manipulation. This post-modern stance is, therefore, characterised by a number of distinct features: the dissolution of social realities into discursivity; the closure of multiple discourse; advocacy of anti-foundationalist theories whether moral, political or legal; a preference for 'difference'; the decentred (and decentring) image of society as a whole. Taken together, these features add up to the impossibility of any meaningful rational reconstruction of social practice. What is left for the (post)modern person is only the endless, unpolicable plurality of the political and the social.

However, if we strictly follow this line, we almost inevitably end up with agnosticism or nihilism coupled with single-minded relativism. Despite the strengths of such a deconstructive analysis⁷², it lacks reconstructive power and is devoid of strategic and institutional proposals. It is the end of a story rather than the beginning of something that can be a foundation for self-governing social practices. (See, *e.g.*, Teubner 1992b: 1444-1445; McLennan 1995: 94; Jessop 1992) It confronts us with another ontological or methodological “absolute”, what McLennan called a new “big picture”, namely, the principle of difference or multiplicity: “Instead of everything always being assumed to reveal an underlying, integrated logic of totality and integration, everything is now forever to be conceived as necessarily multiple, separate and differentiated.” (McLennan 1995: 83,98) As the list of groups with an apparent claim to separate mention grows almost endless, and any concept of identity becomes self deconstructing and contingent, we now face the dilemma of what may be called the “vacuum of power”. However, the absence of any dominant metanarrative and the collapse of sovereignty and constitutionalism into an amorphous fragmentation imply the perpetuation of social inequality and put the stability of the modern state at risk. For example, we cannot ignore the risk of oppression in that large organisations or groups can seek to limit or end the very order of pluralist society itself. Criticism of normative politics and the prevailing concept of identity is, therefore, not only the strength but equally the weakness of post-modern legal and political theory.

(b) A balanced conception of the political - The importance and limit of a normative politics

A reflexive mode of politics

To avoid the weakness of postmodern politics, we have no choice but to recognise, *inter alia*, that despite being a functionally specified system, politics must nevertheless still continue to address the problems of society as a whole. However, as Habermas (1996[1992]: 385) suggests, politics should carry on such tasks only at a *reflexive* level and then only “when other action systems are no longer up to the job”. “At a reflexive level” implies that the state can no longer claim the hopeless burden of total responsibility for the entire society while continuing to establish itself as the initiating and steering through the

⁷² For example, its attack on that bureaucratic, statist conception of politics that for many years has been the

constitutionalised democratic procedures of rational will formation for settling competing interests and establishing methods of societal integration. According to Habermas (1996[1992]; 1992a), all genuine rational will formation, at the practical level, presupposes a belief in a discourse-centred approach anchoring morality, not in a set of “objective” norms, but in the “possibility” of a consensual agreement. Hence, the main focus of politics is, not substantive regulations based on norms embedded in the “non-public opinion”, but the procedural control of will formation by means of the institutionalisation of rational public debate.

The reconstruction of the political dimension in a decentred society involves two seemingly contradictory processes: a shrinkage in the power of the state and an expansion of its scope.⁷³ On the output side of government activity, the powers of the state are to be confined to designating institutional boundaries, though with a possible threat of the future intervention. Moreover, insofar as the state abandons its claim to responsibility for the entire society, the state has to hand over its institutional structures, procedures, participative competencies to hybrid agencies which while accepting certain public responsibilities, relinquish aspects of their private autonomy. Having established these changes, the state is then, once more, in a position to reclaim its role of overarching actor and capable of influencing the political and social process *via* its policies and patterned relationship to social groups.

The above programme does not necessitate any fundamental change to the nature of the state. Some socio-legal theorists argue, however, that the state no longer can be conceived, in this way, as a unitary actor. It is, in their view, merely the self-description of a loose, and essentially fluid, network made up of the governmental apparatus *per se* together with a range of para-governmental agencies, the inter relationship of which is horizontal rather than vertical. (See, *e.g.*, Teubner 1993a: 557-558, 569-570) They, basically relying on systems theory's understanding of modern societies, confine the boundary of politics to such a network that the state becomes the self-description of an autonomous, recursively closed circuit of communication working to its own code. The reduction of the state to a contingent, self-referential form of politics relieves it of the problem of legitimisation since

principal alternative of the Left to existing liberal democracy.

⁷³ Obviously, this is the opposite of neo-conservative approach which pursues the limited scope of the state while strengthening its powers.

it can draw everything it needs for legitimacy from itself. In this self-referential form of politics, the general public functions as a dependent variable within the power process operating as an autopoiesis. (Luhmann 1990: 178) This implies that politics is conceived only from the point of view of its output, that is, its chosen policies. One outcome of this is that central focus is given to steering problems and what Teubner (1987) called the "regulatory trilemma". What this autopoietic understanding neglects is the traditional input-side politics together with the concomitant problems of legitimisation. For instance, as Habermas (1996[1992]: 352) points out, this distorted view of the traditional versus the new tasks of the political system tends to ignore the importance of the state for social integration. For example, in this perspective, the state is required to distance itself from such traditionally important functions as maintaining order, income redistribution and social welfare, the protection of collective identities and the transmission of a shared political culture.

The conception of the state as a network made up of independent, private components contributes to shaking off the communitarian idea of a politically constituted global society and the principle of popular sovereignty. While denying the usefulness of the boundaries between state and society, which form the core of the liberal conception of the modern state, it exalts the non-normative connotations of the liberal model to the highest level. In the liberal model, the state is conceived as the neutral guardian of civil society. It implies, as Habermas (1996[1992]: 297) rightly notes, that the democratic will-formation of self-interested citizens has comparatively weak normative connotations and thus forms only one element along with other individual liberties in a complex constitution. Therefore, politics is conceived as the business constitutionally assigned solely to the state of taking adequate account of societal interests and value orientations. In short, the state as a series of private networks follows the liberal model in terms of this "state-centred understanding of politics".

Dual politics

By contrast, Habermas's view of deliberative democracy provides a more acceptable understanding of politics that is concerned with both the input of the political process and the output of government activities. According to Habermas (1996[1992]: 296-302, 354-356), politics should be seen as two-tiered. One tier is the politics governed by the formal

procedures of institutionalised opinion- and will-formation, the other is the politics that occurs only informally in the various networks of the public sphere. The former is related to the constitutionally organised area, which forms the core of the political system. In Habermas's (1996[1992]: 354-355) view, despite its ordered retreat from its once primary position of representing society as a whole, the core of the state still remains in "the familiar institutional complexes of administration, judicial system, and democratic opinion-and will-formation" embracing parliamentary bodies, political elections, and inter-party competition. Hybrid institutions "equipped with rights of self-governance or with other kinds of oversight and lawmaking functions delegated by the state" form a kind of "*inner* periphery" at the edges of the administration. "Inner periphery" is understood as implying two things. First, it is "inner" because insofar as the activities of such hybrid institutions involve state policies, they should be subject to direct, though mainly procedural, constitutional regulation. Second, it is "peripheral" because despite their partial incorporation in the political system, the nature of these institutions as centres of "civil" power cannot be sharply differentiated from the "outer periphery" of the political system which branches into a type of clientele bargaining insofar as the implementation of state policies and the informal opinion-forming associations are concerned.

This approach sublimates in a refined way the liberal separation of state and society by adjusting it to the principle of democracy, which is symbolised by popular sovereignty. The Habermasian discourse theory of politics distinguishes civil society, as the social basis of a number of autonomous public spheres, from public administration. This means that the liberal state-centred understanding of politics is transformed into a two-tier conception of politics involving both the state and "society"⁷⁴ as part of the lifeworld.

This connection of politics to the lifeworld is not incompatible with the image of a decentred society. The area that takes charge of society-wide problems is that of the informal public sphere which, unlike the political system, is unable to formulate decisions that are collectively binding. Thus, the state as the core area of the political system is relieved of the direct pressure of society-wide problems. But, on the other hand, for its own

⁷⁴ According to Habermas (1987[1981]: 119-152), the lifeworld has three components, which are culture, society, and personality.

sake, the state should endeavour to be as sensitive as possible to public opinion "filtered" by the governmentalised public sphere.⁷⁵

The constitutionally regulated area of decision-oriented deliberations (*i.e.* the constitutionalised public sphere) plays two intermediary roles in this dual politics. First, it functions as a major "sluice" for discursively rationalising the decisions taken by the administrative complex. It transforms communicative power, which springs from the interactions between itself and culturally mobilised publics, into political power that will be implemented only through administration. Second, it functions as a "brake" for preventing social power from directly imposing its collectively binding decisions. Only by means of this constitutionally organised democratic will-formation, can "the unorganised public" deliver political influence to the political apparatus. As we have seen, the rational democratic will formation is reduced to the institutionalisation of democratic procedures that are believed to best guarantee right political decisions. Popular sovereignty, which can no longer be conceived as a macrosocial subject, remains in discourse theory of politics as a form of "subjectless communications" and is envisaged as merely "point[ing]" the way for administrative power. (See Habermas 1996[1992]: 136)

(ii) Democratisation as a double-sided process

The implications of the dual-politics approach are profound: "democratisation ... would mean attempting to maintain and to redefine the boundaries between civil society and state through two interdependent and simultaneous processes: the expansion of social equality and liberty, and the restructuring and democratising of state institutions." (Keane 1988a: 14. See also Held 1989: 182)

It is apparent that this approach keeps its distance from the traditional Marxist orthodoxy, which is geared to the ultimate abolition of the state.⁷⁶ In the view of the proponents of such double-sided democracy, the state with its institutions is not necessarily merely an instrument of the ruling class. Rather, it is an essential device for, among other things,

⁷⁵ *I.e.* the parliamentary complex that is, in comparison with the administrative complex, conceptually the most open for "perceiving and thematising" social problems at the expenses of a more capacity to "deal" with problems.

⁷⁶ In examining Macpherson's theory of democracy and possessive individualism, Keane (1993: 118-124) makes it clear that theories of state abolitionism and expressivism (as a form of extreme individualism) must be sublated. See also Keane 1988a: 25.

enacting legislation, enforcing rights, co-ordinating new policies and containing the conflicts that inevitably arise between particular interest groups. Representative electoral institutions, including parliament and the competitive party system, must be seen as indispensable elements for authorising and co-ordinating these activities. (See Held 1989:181; Keane 1988a: 14-15, 21-24. See also Habermas 1996[1992]: 134; Walzer 1992: 102ff)

At the same time, the absorption of civil society by the state and *visa versa* is also denied. Civil society, as opposed to the state, consists of “areas of social life - domestic world, the economic sphere, cultural activities and political interaction - which are organised by private or voluntary arrangements between individuals and groups outside the direct control of the state.” (Held 1989: 181)⁷⁷ But as Keane (1988a: 14) suggests, this realm, contrary to

⁷⁷ Yet it is important to see that in reconstructing the terminology of civil society, there is among many theorists a strong bias against a two-part framework of state and civil society, such as that proposed by Keane and Held. While not denying that the liberal/pluralist state-society distinction is to be the essence of a new model of democracy, critics of the two-part model propose a further division between civil society, in the narrow sense, and a sphere of economy, which is regulated *via* labour, capital, and commodity markets. (Habermas 1992b: 453) The rationale of the three-part model is that “as we know from the history of the West, the spontaneous forces of the capitalist market economy can represent as great a danger to social solidarity, social justice, and even autonomy as the administrative power of the modern state.” (Cohen & Arato 1992: viii, 476-477) Three party theorists define civil society as “a sphere of social interaction between economy and state, composed above all of the intimate sphere (especially the family), the sphere of associations (especially voluntary associations), social movements, and forms of public communication.” (Cohen & Arato 1992: ix) This conception of civil society, they add, is “created through forms of self-constitution and self-mobilisation. It is institutionalized and generalised through laws, and especially subjective rights, that stabilise social differentiation.” (Cohen & Arato 1992: ix) It is apparent that under this definition, all of social life outside the administrative state and economic processes, in the narrow sense, cannot be identified with civil society. On the back of Habermas’s two level conception of society, they attempt to confine the scope of civil society to the extent that the systemic media of the political and economic systems cannot interfere with the normative integration and open-ended communication that are characteristic of the lifeworld. In this sense, the political role of civil society is also limited to the generation of indirect influence through democratic associations and unconstrained discussion in the cultural public sphere. In Cohen and Arato’s view of civil society is not opposed to the economy and state by definition. (See Cohen & Arato 1992: x-xi) Their notions of economic and political society refer to mediating spheres through which civil society can gain influence over political-administrative and economic processes. Antagonism arises among these spheres only when such mediations fail or when systemic institutions hinder them. However, the difference between a two-part model and a three-part model should not be exaggerated, at least as far as political modernisation (or rationalisation) is concerned. Having regard to the essential similarities between the two, the difference between them surrounding the nature of economy in modern society is trivial. It should be stressed that both criticise a single standpoint from which the totality of society is both visible and transformable. They have also a common voice in preventing the idea of a constitutional state or rule of law from being deconstructed by a far-fetched functionalist initiative for the self-organising of society. (See Habermas 1996[1992]: esp. chs.3-4; Habermas 1988; Held 1989: 182-185, ch.7. Cf. Ladeur 1997) Both sides stress the importance of formal political democracy, *i.e.* political, administrative and legal mechanisms for managing conflict, of restricting and actively reducing the bitter consequences which are generated by the multiplicity of life. The existing liberal democracy is not the target of subversion but rather the starting point for an expanded democracy.

neo-conservative presumption, is neither conceptually “innocent” or “sacred” because it cannot be simply synonymous with a non-state, legally guaranteed sphere dominated by capitalist corporations and patriarchal families. The structure of civil society itself must be reorganised to create conditions for effective participation, proper political understanding and equal control of the political agenda. As Habermas (1996[1992]: 175) puts it, “civil society is expected to absorb and neutralise the unequal distribution of social positions and the power differentials resulting from them, so that social power comes into play only insofar as it *facilitates* the exercise of civic autonomy and does not *restrict* it.” (Original emphasis) Indeed, in complex societies, the most important threat to individual freedoms is the absence of any “regulatory” mechanisms through which private power centres can be adequately controlled. Therefore, Held (1989: 182) suggests:

for democracy to flourish today it has to be reconceived as a double-sided phenomenon: concerned, on the one hand, with the form of state power and, on the other hand, with the restructuring of civil society. This entails recognising the indispensability of a process of ‘double democratization’: the interdependent transformation of both state and civil society.

That is to say that civil society and the state must furnish the condition of each other’s democratisation. As Walzer (1992: 104) puts it, “Only a democratic state can create a democratic civil society; only a democratic civil society can sustain a democratic state.” (See also Held 1989: 184; Keane 1988a: 15) In short, the ideal of “double democratisation” - what Held (1989: 182-187) called “democratic autonomy”, or what Walzer (1992: 105) termed “critical associationalism” - is basically grounded on the idea of the equilibrium of state and society, the regulated balance of the political and the social. (See Keane 1988a: 22)

4.2 *Towards constitutionalised democratic autonomy*

We now recognise that a reconstructed separation of civil society and state is a necessary condition for the successful functioning of democracy. In what follows, we shall seek to demonstrate in detail how simultaneously to achieve the demands for representation of civil society in the political decision-making process together with its autonomy vis-à-vis the state which equally presupposes its own autonomy. In so doing, we shall propose what may be

called 'constitutionalised democratic autonomy' as a desirable method of achieving such reconciliation.

4.2.1 The public sphere as the intermediary structure between state and civil society

To smoothly reconcile a demand for the differentiation of state and civil society with their interdependence, our project of constitutionalised democratic autonomy needs a conceptual resource offering a coherent interpretative framework for the state-society distinction. As we have seen above, the concept of "the public sphere", first, in 1962, thematised by Habermas and restructured in a number of his later works, can provide such a resource.⁷⁸

According to Habermas (1996[1992]: 360), the public sphere is "a network for communicating information and points of view". This means that it cannot be conceived as an "institution" and certainly not an "organisation" but a "space" in which social actors, individual or collective, deliberate about their common affairs. In the following, we shall elaborate the meaning and implications of this space in the light of its relationship with the state and civil society.

(i) The public sphere and the state: Towards a reflexive mode of societal integration

The public sphere is conceptually distinct from the state but, insofar as mediates its specialised 'public' opinion to the state, is involved in state policy making. The conceptual distinction of the public sphere from state permits the former to be critical of the latter. While this distinction provides the public sphere, and civil society as its social basis, with autonomy and legitimacy, the orientation of the state to the public sphere implies a minor loss of differentiation.

This minor loss is not only inevitable but also desirable. For it is a price we should pay in seeking an acceptable, realistic paradigm of democracy by institutionalising a reflexive learning system which can make it possible to compare the consequences of different solutions to social problems. In other words, any loss of differentiation can be camouflaged by the benefit of an intellectualising effect embedded in democratic will formation. Moreover, the indirect nature of the relationship between the public sphere and the state can minimise the effect of this loss. The public sphere is not a 'physically' present social order that can operate

⁷⁸ For a concise evaluation of Habermas's public sphere, see Nancy Fraser 1992.

with the notion of a social whole, centred in the state and imaged as a goal-oriented subject writ large. Rather, it is a loose network of communication, separate from the dense interactions of the lifeworld, and coupled with the image of a "decentred" society. Here we take heed of Habermas's suggestion regarding the legitimate role of the public sphere within the political process. Habermas (1996[1992]: 364) says, although the public is constitutive for the internal structure and reproduction of the public sphere, the political role of the public does not lie in decision-making but in political "influence" over state policy. It means that the political influence of the general public can be transformed into political power only through "institutionalised political procedures". Therefore, the democratisation of the state is, not to increase participation *per se*, but to create structures of sensitivity to the results of participation. The institutionalisation of rational democratic debate, especially in the form of constitutional norms, can serve to reduce social complexity, evident in the culturally motivated public sphere, in such a way as to prevent the 'direct' transmission of communicative power to the political system. Such institutionalisation, in this sense, constitutes what Offe (1996: ch.2) calls "brakes" or "filters", or what Habermas (1996[1992]: 170, 300) terms "sluices", which are envisaged as protecting the state from uncontrollable public pressures. With this public sphere, a realistic alternative to other democratic models could emerge, namely, a reflexive model of democratisation allowing for latent processes of "societal integration" to come forward within the political system, however, in a very limited manner.

It is important to see that this approach, unlike systems theory, does not endorse the classic liberal notion that the public functions as a dependent variable within the power process. Individual and collective actors make up the peripheral networks of the political public sphere which, in turn, provides the core networks of the political public sphere (that become arms of state) with their legitimacy as well as critical scrutiny. Furthermore, as Habermas (1996[1992]: 383-384; 1992a: 223-227) notes, the fact that given certain circumstances,⁷⁹ the 'unorganised public' can turn into a revolutionary force, seriously calls into question the systems theoretic notion that the general public is an essentially dependent entity. The assumption of potential "civil disobedience" implies that the peripheral role of the public in

⁷⁹ *I.e.* what Habermas calls "an extraordinary crisis situation" when the normal circuits of communication in the political system cease to operate.

ordinary situation is the result of its own strategies of "self-limitation". Such strategies⁸⁰ are designed to minimise those risks which would emerge were the general public to be regarded as "physically present, participating, and jointly deciding members of a collectivity" (Habermas 1992b: 451. See also Offe 1996: ch.2; Cohen & Arato 1992: 453-456.) Again, such analysis best reflects both the decentred structures of modern society and the necessary interdependence of state and civil society as different action fields, and therefore provides a theoretical basis for the kind of procedural democracy exemplified by Habermas's deliberative democracy and our own constitutionalised democratic autonomy.

(ii) The public sphere and civil society

The public sphere is also conceptually distinct from civil society. As we have seen, civil society is composed of voluntary, non-state associations and connections. The spontaneous character of civil society means that it forms the core part of the lifeworld. However, this conceptual distinction does not imply that even at a functional level, these two spheres do not interrelate. The associational network of civil society provides opportunities for the public sphere to be rooted in the lifeworld in Habermas's sense. This means that the communicative channels of the public sphere link it to those of private domains - the dense networks of social interaction in the private sectors of both the lifeworld and functional systems. It is in the nexus of voluntary or secondary associations that the connection between the two spheres becomes manifest. Civil society, as "a body of the private persons assembled to form a public", provides the social basis on which the public sphere can be conceived as a third action field of the "noninstitutional political". This informal political public sphere forms an "intermediary structure" between the political system, on the one hand, and the private sectors of both the lifeworld and functional systems, on the other. (See Habermas 1996[1992]: 373) As we shall see, the political significance of civil society persuades us to rethink the importance of its democratic organisation which forms one pillar of democratic governance.

⁸⁰ Of course, as Offe (1996: 33-37) correctly points out, the other side of such self-limitation strategies is a high "risk" that civil disobedience against the established order will impose on individual and collective actors. Habermas gently reminds us of the very strict conditions to any successful civil disobedience. The temporary, contextual, contingent character of the public sphere also imposes a form of limitation on the sovereign will. Therefore Habermas (1996[1992]: 359) makes it clear that "What ultimately enables a legal community's discursive mode of sociation is not simply at the disposition of the members' will."

4.2.2 Institutional conditions of democratic autonomy

What institutional conditions are called for in order to secure democratisation in the form of a double-sided process? Drawing on Habermas's discourse theory of democracy, the answer is a new version of constitutionalism providing for both the self-regulation of civil society and the reflexive accountability of the state.

(i) A new version of constitutionalism

Constitutionalism is a main tenet of the liberal mode of democracy. Hinging on the constitutional framework that focuses on the ideal of limited government, the liberal mode undervalues the democratic self-determination of citizens. However, this does not mean that constitutionalism is incompatible with popular sovereignty. From the perspective of constitutionalised democratic autonomy, if properly reconstructed, the liberal idea of limited government can remain fundamental to democratic governance based upon the equilibrium of state and civil society. In short, what is needed is a reorientation of the liberal version of constitutionalism that would bring it into line with postmodern conditions characterised by the image of a decentred society. There are two basic themes for reorientation: first, the nature of the basic rights and scope of the public, and, second, the meaning of the rule of law, especially in its relationship with politics. The first theme is related to the question of who is to participate in the process of will-formation while the second theme gives rise to question of how such a system of rights with the ongoing dynamic of rational debate can or should be stabilised.

(ii) Flexible and contextual concepts of basic rights and the public

One problem of liberal constitutionalism lies with its narrow, rigid conception of rights which focuses on the 'negative' freedom from external intervention and private autonomy. This problem is particularly apparent where a unitary construct of citizenship prevails. Citizenship based on liberal political theory relies upon a "logic of identity" that seeks to reduce differences to unity. The rights-oriented liberal citizenship thesis presupposes that the human subject can be conceived as a unitary agent who, being rational and autonomous, and thus inherently in a privileged position, can create criteria necessary for determining what is good or right. Whether a polity has democratic legitimacy is determined by its

respect for individual rights, which are essential if a capacity for self-realisation is to be developed. One caveat, however, is that although citizenship is conceived as pertaining to participation within the political realm, the unity of the basic structure of society can be achieved only by the exclusion of those subjects lacking political significance. Thus, in practice, a qualified construct of citizenship prevails in which citizens are regarded as "autonomous, not heteronomous; unified, not plural; static, not shifting; individual, not collective; abstract, not material." (Barron 1993: 95)

It is apparent that this unitary conception of citizenship cannot include and accommodate all perspectives and all claims which come up in complex modern societies. For example, it tends to pay little attention to the significant role of intermediary groups that provide forums by way of which citizens can more effectively enjoy their rights not merely in principle but in practice. Anne Barron points out that group rights fall victim to a unitary and qualified construct of citizenship which differentiates those who belong within the realm of politics from those who do not:

To attribute the status of citizenship to the individual rather than to the group, for example, is to refuse the notion that identity is an achievement of intersubjective negotiations: it is to represent the individual as prior to any groups to which s/he belongs, the group as, at most, the result of an act of choice that leaves the self intact, and the needs that groups take to be definitive of their shared identity as nothing more than claims of right asserted by their individual members. (Barron 1993: 96)

Habermas also suggests that in complex pluralised societies, rights cannot be primarily things individuals possess but "relations" that have their basis in a form of mutual recognition:

At a conceptual level, rights do not immediately refer to atomistic and estranged individuals who are possessively set against one another. On the contrary, as elements of the legal order they presuppose collaboration among subjects who recognise one another, in their reciprocally related rights and duties, as free and equal citizens. This mutual recognition is constitutive for a legal order from which actionable rights are derived. In this sense "subjective" rights emerge co-originally with "objective" law, to use the terminology of German jurisprudence. (1996[1992]: 88-89. Original emphasis)

This relation-oriented concept of rights has, *inter alia*, two implications.

(a) Autonomy as the end and a condition of rights

As Habermas (1996[1992]: 419) suggests, the relation-centred concept of rights assumes that, unlike the liberal paradigm of a system of rights, rights cannot be assimilated to goods that one can divide up and possess or can consume in common. Rights are conceived as "institutionally defined rules specifying what people can *do* in relation to one another". (Young 1990: 25) Basic rights based on mutual recognition are conceived as "unsaturated placeholders" (Habermas 1996[1992]: 126) in the sense that they do not exist in a determinate form over against state. The specific rights, traditionally known as the classic liberal rights, are also "context-dependent" in that they emerge as a result of interpretations of what Habermas called a "general right to individual liberties" by a political legislature in response to changing circumstances. (See Habermas 1996[1992]: 125-129) From this perspective, it is recognised that the familiar liberal notion of rights, namely, that individual liberties can restrict the scope of a citizen's public autonomy, has to be abandoned. This is not to say, however, that the individual's private autonomy has to be instrumentalised in the name of popular sovereignty. Rather, the thrust of the relation-centred concept of rights lies in the "co-originality" of private and public autonomies. While private autonomy cannot restrict popular sovereignty, popular sovereignty has to, in turn, continually redefined in the form of political rights and according to circumstances. Public autonomy is manifested in the political right to participate in processes of opinion-and will-formation, in other words, by citizen's exercising political autonomy and thus simultaneously changing and expanding both their private and civic autonomy. This is to say, therefore, that the classic liberal rights are derived from the private autonomy of citizens which, in turn, goes hand in hand with their public autonomy. The normative key in this concept of rights is not the negative autonomy of atomistic citizens from any external intervention but the positive autonomy of free and equal consociates participating in the political process which affects their lives. This positive autonomy grounds the status of free and equal active citizens, and is "self-referential" in that citizens themselves deliberate, and decide, on how to fashion rights that simultaneously define their private and public autonomy.

(b) Flexible concept of the public and the case for the public sphere

One advantage of the radical contextual conception of rights conceived as, and integral to, the very notion of democratic rule is that it does not seek the unity of citizens by virtue of homogeneous interests, their altruism or their good nature, and that thus it accepts a plurality of forms of life. Nothing is given prior to the citizen's practice of self-determination other than the discourse principle in as much as what will count as a matter of common concern will be contested and decided by discussion. (See Habermas 1996[1992]: 314; Fraser 1992: 127) One important insight which such a view offers, and from which we can learn a great deal, is the fact that in complex societies, the public and private spheres do not correspond so much to institutional spheres as to the concrete conduct of, or decisions made by, social actors, whether individual or collective.⁸¹ It implies, *inter alia*, that the political agency of the plural social subject extends beyond the boundary of state, and thus "the social" is envisaged as a "terrain of political contestation". (McClure 1992: 123) This insight helps us to rediscover civil society and the public sphere (as opposed to state) as the locus of what Habermas called "potential", as opposed to "existing", political legitimacy. (See, *e.g.* Habermas 1992b: 447-448, 452-457)

(iii) Constitutionalisation of the political system: the requirement of "democratic procedures"

We have sought to demonstrate in the previous section that a radical system of rights is required to reconstruct a workable programme of double democratisation. However, this contextual, flexible concept of rights alone cannot preserve civil society and the public sphere from deformations and cannot guarantee the permanent exercise of citizens' political rights as one core of a democratic polity. Since the self-referential act that legally institutionalises civic autonomy cannot stabilise itself, it needs to become permanent by means of the further juridification of the political order to which both private and public autonomy look for their enforcement. In other words, as we have suggested, the autonomy of both the public sphere and civil society presupposes the democratisation of the state, a goal that can be achieved only when the political system is constitutionalised. (See Habermas 1996[1992]: 132-134) The role of state in stabilising autonomy gives rise to the need for the legitimisation of the political order as well as the exercise of political power.

Yet, as we have seen, this requirement of legitimacy should not entail the kind of asymmetrical primacy of social power over political power, which was envisaged by Schmitt. Nor, on the other hand, should its potential side effects be exaggerated in the manner of certain systems theorists who seek to justify the self-reproduction of political power. Rather, we should be able to find a balanced alternative in the constitutionalisation of the sanctioning, organising, and executive powers of state itself.

If we are correct in assuming that the political has to concern in a balanced way with both the state and the public sphere, realms that are conceptually distinct and differently organised, then the resulting implication is that the political power pertaining to each area equally distinct. According to Habermas (1996[1992]: 136), political power is differentiated into “communicative power” and “administrative power”. The former springs from interaction between governmentalised-opinion- and will-formation (*i.e.*, the institutional political) and culturally mobilised publics (*i.e.*, the non-institutional or informal political). The latter stems from the state, or more specifically from the state’s power to implement its policies. Insofar as we recognise the interdependence between state and civil society, a reduction of the principle of popular sovereignty to “subjectless communications” notwithstanding, administrative power should not be allowed to reproduce itself on its own terms but should be regenerated by the conversion of communicative power. (See Habermas 1996[1992]: 150) Communicative power cannot, on the other hand, directly steer the administrative system as it is able to operate only *via* the “transmission belt” of the governmentalised public sphere. Only law formulated through this rational democratic will-formation can invest government with political power or impose limits on it. Therefore, Habermas (1996[1992]: 150) suggests that the idea of constitutionalism be construed as the requirement that “the administrative system ... be tied to the lawmaking communicative power and kept free of illegitimate interventions of social power”.

According to Habermas, this idea of the constitutional state⁸² manifests itself in the concrete principles for the juridification of the network of discourses and negotiation: “the principle of comprehensive legal protection for individuals, which is guaranteed by an

⁸¹ Two illustrative articles on the legal status of intermediary associations in Germany and Britain demonstrate this point with force and clarity. See Teubner 1993b; Black 1996.

independent judiciary; the principles requiring that administration be subject to law and to judicial review; the principle of the separation of state and society, which is intended to prevent social power from being converted directly into administrative power, that is, without first passing through the sluices of communicative power formation.” (1996[1992]: 169-170) This opens up the possibility that law can be instrumentalised for the strategic deployment of power and could, therefore, assist the state to “colonise” society. To counter such instrumentalisation, in Habermas’s view (1996[1992]: 168-169), the state apparatus must, in turn, be organised in such a way that any publicly authorised power must be legitimised by law.

However, it should be borne in mind once again that this juridification of political power cannot refer to the predetermined will of citizens but to the safeguarding of specific processes of the democratic formation of opinion and will. In complex societies, as Habermas argues, “a homogeneity of background convictions” cannot be assumed now that a presumptively shared class interest has given way to “a confused pluralism of competing and equally legitimate forms of life”. (1992b: 445) In this situation, any attempt to assume ideological hypotheses regarding “emancipation” or “progress” and to morally qualify the material results of participation runs the risk of “political repression” in the sense of “exclusion” from representation. (See Offe 1983: 234)

(iv) Democratisation of civil society: publicly responsible self-regulation

(a) A paradox of democratic autonomy: the problem of voluntary non-participation

As we have suggested, democratisation as a double-sided process means that the autonomy of civil society and the public sphere cannot be absolute and thus not immune from regulation. A paradox of constitutionalised democratic autonomy is that despite the recognition of a system of rights grounding the status of free and equal active citizens, there is no way to compel them to make public use of their communicative freedom. Even legitimate law, enacted according to democratic procedures, cannot obligate its addressees to use their rights in ways oriented to reaching mutual understanding, even if political rights call for precisely this kind of public action. This implies, as Habermas (1996[1992]: 131)

⁸² It is important to see that this idea of government by law illuminates the political side of balancing major forces of “macrosocial integration” such as money, administrative power, and solidarity. See Habermas 1996[1992]: 150.

points out, that apart from legal institutionalisation of participation, citizens' spontaneity, regenerated by "traditions" and preserved in the "associations of a liberal political culture", is still an essential part of democratisation. The ideal of self-regulation is essential to encouraging such spontaneity and maintaining the diversity of public opinion tied to the multiplicity of forms of social life.

(b) Social equality as a condition of democracy

Neither the impossibility and undesirability of compulsory participation nor the advantages of unrestricted communication can justify any attempt to negate the need for, and the possibility of, external regulation of centres of civil power, which is exactly what neo-conservatism has assumed. Nancy Fraser (1992: 118-121) shows that social equality is a necessary condition for political democracy and that there can be no "unrestricted" communication unless unequally distributed social power, which has the repressive and exclusionary effects, is tamed. (See also Held 1989: 185-186) In conceiving the informal processes of opinion-formation in the public sphere as one pillar of communicatively generated power, Habermas agrees with Fraser by saying that

The informal public sphere must, for its part, enjoy the support of a societal basis in which equal rights of citizenship have become socially effective. Only in an egalitarian public of citizens that has emerged from the confines of class and thrown off the millennia-old shackles of social stratification and exploitation can the potential of an unleashed cultural pluralism fully develop - a potential that no doubt abounds just as much in conflicts as in meaning-generating forms of life. (1996[1992]: 308)

As the public sphere should be critical of state, there is no reason to rule out in principle the possibility of a regulatory idea, in the light of which the dark side of civil society can be publicly scrutinised. The existence of a common framework of regulatory rules, envisaged to facilitate satisfactory interaction within civil society and between associations and their members, does not necessarily lead to a loss of spontaneity. Such regulatory rules can be conceived as "enabling conditions" rather than as "restricting conditions" for democratisation, encouraging both social equality and social spontaneity. Therefore, civil society, which involves the political public sphere, is required to operate within a context of constitutional values manifested mainly in constitutional rights of citizens and associations. This is to say that the formula for civil society is transformed from almost absolute self-

regulation (based on the liberal negative concept of rights) to "publicly responsible self-regulation" (based on a more flexible and contextual concept of rights).⁸³

(c) Two-track constitutionalisation

Although both the state and civil society have to be constitutionalised, the nature and degree of their constitutionalisation are distinct. This difference can be ascribed to the conceptual distinction between state and civil society and the concomitant two differing tracks of deliberative politics, that is, decision-oriented deliberation and discovery- and/or thematisation-oriented deliberation. The separation of civil society from the state presupposes that the self-imposed task of civil society is not to provide co-operative solutions to practical political problems which can be more appropriately dealt with by the success-oriented action field, *i.e.* the political system. Rather, civil society is envisaged as contributing to the discovery and thematisation of such problems in a way of mediating new ways of looking at them to the communicative structures of the public sphere as a "far-flung network of sensors". This confined role of civil society, on the one hand, means the peripheralisation in the political process of the general public - as what Fraser (1992) called the "weak" public, as opposed to the "strong", statified public sphere. On the other hand, uncoupling civil society from power-driven, decision-oriented action fields tend to allow it to be subject to a lower degree of constitutional obligations than the political system. Constitutional obligations are imposed on civil society only insofar as they can facilitate unrestricted communication and encourage an unleashed cultural pluralism. They are not envisaged to amount to strongly articulated regulation, for example, what Habermas called "democratic procedures" which are required in decision-oriented deliberations such as parliamentary procedures. Instead, the normative key in the democratisation of civil society lies in the autonomy and spontaneity of the "horizontally" associated network, based on a "mature pluralism of forms of life, subcultures, and worldviews", rather than their "vertical" mediation between the overarching state and the individual. Therefore, unlike the statified political public sphere, the focus of the democratisation of civil society should be the maintenance of its autonomy and the preservation of spontaneity in a way of securing "unconstrained" channels of communication. By "unconstrained" is meant that there is no

⁸³ Hence, even the boundary of civil society is *per se* open to public debate.

institutionalised procedural regulation of opinion-formation such as that provided by parliamentary procedures. (See Habermas 1996[1992]: 314)

As we have argued earlier, any threats to rational opinion-formation *per se* should be blocked. The greatest threat in this regard comes from the activities of the mass media and large organisations or institutions. They, like the state, and in contrast to the more loosely organised actors emerging from the public, have organisational power, resources, and sanctions with which public opinion is manipulated. Therefore, their power should be neutralised and subject to public scrutiny in order to secure "unconstrained" channels of communication that maintain the required quality of debate and represent the plurality of social life forms. What is required, therefore, is the curtailment of the power of large bodies to constrain and influence the political agenda; the restriction of the activities of powerful interest groups to pursue unchecked their own interests; and the erosion of the systematic privileges enjoyed by some social groups at the expense of others. However, the neutralisation of such power cannot be achieved in the same way as the constitutionalisation of state power. Unlike the constitutionalisation of a political order, the substantive content and degree of public regulation of civil society should refer to the concrete conduct of, or decisions made by, it rather than simply to its institutional background. The exercise of social powers does not have to be empowered by the constitution but they should, from the public's own perspective, be implemented to protect the communication rights of social actors. In particular, the rights of social actors (especially, those of small publics) to access the opinion-formation process within large organisations should be protected. This means that the legal recognition of some actors within civil society is inevitable. Such legal recognition can limit not only state power but also the power of institutions within civil society.

Naturally, this formula of 'publicly responsible self-regulation' on the part of civil society - *i.e.* the efficient and effective regulation of self-autonomy within the 'constitutional' framework, does imply a certain loss of differentiation. The state, as the core of the political system, is concerned with designing a common framework of regulatory rules that are meant to facilitate satisfactory interaction both within civil society and between associations and their members. It can also monitor the self-regulation of civil society operating within constitutional values. As we have seen before, the state in this

regime is not viewed as having only a negative, alienating, "reifying" character as traditional liberalism has presupposed but, as political pluralists⁸⁴ have seen, as possessing a positive, "arbitrating" character. This positive conception of the state owes its legitimacy to an interdependent or "reflexive" relationship between state and civil society, in the sense that state policy relies not only on the administration's preparatory work and further processing but also on the context of discovery provided by a "procedurally unregulated" (*i.e.* informal and autonomous) public sphere. (See Habermas 1996[1992]: 307; Offe & Preuss 1991: 166) A more democratic order cannot be built simply through state power, but without state power, it cannot be built. (Keane 1988a: 23, 237. See also Habermas 1992b: 444-445) To sum up, any loss of differentiation, generated by the self-limited, but interdependent, relationship of civil society and the state, is a very modest price, given that this double-sided process significantly strengthens the democratic process.

5 Conclusion

We have so far examined a reconstruction of civil society and reform of state in such a way that we can now construct a common normative fabric, linking rights, associations, and publics together within an ethos of pluralisation. This project is what I have termed 'constitutionalised democratic autonomy'.

It comprises three basic elements. First, it focuses on the autonomy of public spheres that are the institutional core of the modern lifeworld. Such social autonomy presupposes a multiplicity of social life forms in Habermas's sense. Underlying this emphasis on autonomy is the acknowledgement of the limitation of state regulation and the recognition of the importance of self-regulatory techniques.

Second, it involves the ideal of democracy founded upon such a pluralised and decentred image of society. This new democratic ideal is characterised by a balance between medium-steered action domains and communicative action domains in Habermas's sense. This ideal, in turn, requires a new conceptual framework different from that of existing liberal democracy and the alternative participatory democracy. It aims, as we have seen, to combine merits of

⁸⁴ On the English pluralist understanding of the nature of the state, see, *e.g.* Nicholls 1994; *Idem* 1974; Magid

both schemes by means of the reconstruction of the state-civil society distinction. For this, there are two preconditions worthwhile noting. First, it is admitted that non-participation *per se* is not *a priori* a problem. (Murphy 1990:155-156) Therefore, “freedom from politics” is accommodated here as an essential part of the contemporary democratic heritage. Citizens are entitled to decide that extensive participation is unnecessary in certain circumstances. (See Held 1989:185) They can use their energies more happily outside the realm of politics. Therefore, what is equal among citizens is not power but rights of access to power. (See Walzer 1983: 309) Second, at the same time, the enhanced political participation is embedded in a legal framework that protects and nurtures individuals as ‘free and equal’ citizens. In this regard, law should not be perceived, in Habermas’ terminology, merely “as a medium” but also “as an institution”. (Habermas 1985) In particular, a set of new rights is necessary, mainly addressed to the creation of new circumstances which will allow citizens to enjoy greater control of their own projects. In short, even though citizenship has no absolute primacy over other actual and possible memberships, it has a certain practical pre-eminence over them because the state is the most important instrument of the political struggle. (Walzer 1992: 105)

The final element, which is closely related to the previous two, is our project’s emphasis on the role of law in democracy. A newly reconstructed version of the rule of law plays an important role in institutionalising and stabilising the new vision of democracy. In a nutshell, all political strategies need to be constitutionalised. Such constitutionalisation depends upon a proceduralised concept of law, which is flexible, strategic and contextual. (See Habermas 1996[1992]: esp. Ch.9 ; *Idem* 1988; Teubner 1993b: esp. Ch.5; *Idem* 1992a; *Idem* 1983) It serves as an organisational principle combining social autonomy with democratic control in a way that requires a network of social actors to operate within a context of constitutional values that are indirectly and strategically implemented.

In what follows, relying upon this basic model, we shall, first, examine the nature and role of political parties which are essential elements for the new democratic paradigm, and then move on to consider what requirements are necessary for their constitutionalisation.

Chapter 4

A New Perspective on Party Organisations in a New Democracy: Political Parties At the Crossroads of Civil Society and the State

1 Introduction

The aim of this chapter is to examine what implications the project of ‘constitutionalised democratic autonomy’, developed in the previous chapter, has for the nature and legal status of political parties. To begin, I examine the ways in which the conventional theory of political parties has conceived the development of party organisation. (sec. 2) In this section, the characteristics of political parties are examined in relation to their three traditional models. Despite the dual relationship of political parties vis-à-vis the state, on the one hand, and civil society, on the other, these old perspectives have viewed them primarily with reference to their relationship to civil society. One important consequence of this is that although political parties wield para-governmental integrative power, by shielding themselves behind the principle of private autonomy, they do not have to submit to the usual responsibilities incumbent on public authorities. Therefore, there is a need for a new perspective on the status of political parties that will tackle this disjunction between political reality and constitutional ideal. This new perspective should be designed to bring about an appropriate framework in which political parties can properly be located within the ever more pluralised social order. (sec. 3) This issue will be dealt with in the light of both the division of labour within the political system and the “cartelisation” of political parties. This chapter will conclude that given the emergence of a new paradigm of politics, party organisations, which are at the crossroads of civil society and the state, are becoming ever more flexible, contingent and strategic, and this gives rise to a number of problems relating to their unitary status. (sec. 4)

2 Old perspectives on the development of party organisation

2.1 *Political parties as a linkage between the state and civil society*

As recently as 1976, the majority opinion of the Houghton Committee on proposing financial aid to political parties observed that:

Without [political parties] democracy withers and decays. Their role is all pervasive. They provide the men and women, and the policies for all levels of government - from the parish council to the European Parliament. The parties in opposition have the responsibility of scrutinising and checking all actions of the Executive. Parties are the people's watchdog, the guardian of our liberties. At election times it is they who run the campaigns and whose job it is to give the voters a clear-cut choice between different men and different measures. At all times they are *the vital link between the government and the governed*. Their function is to maximise the participation of the people in decision-making at all levels of government. In short they are the mainspring of all the processes of democracy. If parties fail, whether from lack of resources or vision, democracy itself will fail. (Houghton 1976: para.9.1. Emphasis added)

This confirms the conventional theory of political parties in that their *raison d'être* in modern liberal democracies lies in their function of enabling the governed to take part in the political process. (See, *e.g.* Schattschneider 1942:1) In liberal democratic regimes, political parties need to convince the electorate that they are uniquely suited to represent the complex interests of civil society. This suggests that current increasing distrust of existing political parties, reflected in an ever growing interest in new forms of political participation such as a cyber democracy and new social movements, is directly attributable to a breakdown of the party system as the bridging structure between the state and civil society.

For examining the conventional perspective on the development of party organisation, Britain affords the best example. In his "Reflection on the party system" (1952), Ernest Barker suggests that one of the possible ways of considering the development of the British party system is to examine the nature and role of political parties in terms of the state-society distinction. In his view, while society is the area of voluntary groups and voluntary effort, the state is that of legal rules and actions under those rules. Barker was aware of the dual character of political parties which bridge these two realms. (See Barker 1942:39) He also notes that the state-society distinction is useful in pointing up the unique aspect of British

political and legal development, which gives an important role to political parties.⁸⁵ For Barker (1952:193), these unique features of British life and history include a relatively strong initiative on the part of voluntary organisation in the formation of all aspects of life coupled with a relatively weak confrontation between “voluntary society” and “legal state”. He assumes that the absence of any legal regulation of political parties reflects a British tradition in which “collective action outside of the central state and guild-like self-regulation” were more pronounced “in the emergent modern period” than in other societies. (Murphy 1990:151) This rather crude view provides a classic perspective on the development of party organisation:

Party began in the area of society, and in that area it may already be traced as early as the Middle Ages. It was in its origin, and it still remains in its core, a social formation. A party begins as a set of connected and coherent political ideas, formed and enunciated in the process of social discussion. It becomes, in the course of its development, a body of persons permanently united in entertaining such a set of ideas: a body of persons, forming a social group in the area of Society, who discuss and clarify their common ideas among themselves, formulate them in a policy or programme, and defend that programme in discussion against other similar groups in the same social area. Finally, and in the culmination of its development, ... party becomes an organisation, with its own recognised leaders, for the purpose of carrying a programme into effect, first by securing a majority of the votes of the political electorate, and then by proceeding to turn its leaders into the political government. It thus serves as a mediator between the process of social discussion and the practice of political action. (Barker 1952:193-194)

Thus, a party is a “social formation”, the basic task of which is to present the demands of society to the state, and then to secure the responses of the state to these demands. A party, as a mediator, has to perform two distinct but complementary functions. First, it serves as a *social* sphere where individuals exchange their common interests and gather a set of integrated political ideas from social discussion. Secondly, it works as a *political* sphere where the ideas so exchanged and collected flow from the “lifeworld” into the political system. The state, with its various mechanisms (organisations and institutions), provides political measures responding to social demands. Hence, political parties are the interface between the social and the political, in the overlapping area between society and the state.⁸⁶

⁸⁵ For the background to Barker's position, which makes a serious effort to explore the Britishness of political and social structures, see Stapleton 1994.

⁸⁶ Alessandro Pizzorno suggests that the cause of emerging modern political parties can be found in a lucid change in the political thought from late nineteenth century onwards. After itemising diverse currents of political and legal thought which anticipated the advent of the pluralist and corporative system, Pizzorno states that “One common theme ... was recognition that the idea of a direct relationship between the state and individual was unrealistic; that conceptual models and institutional projects should be worked out to cope with

2.2 *Characteristics of the three conventional models of political parties*

According to Katz and Mair (1995), at least four “ideal types” of party – the elite party, the mass party, the catch-all party, and the cartel party - are feasible in the history of its development. Each type is classified in terms of how it envisages the relationship between civil society and the state. The conventional concept of political parties, as a linkage between civil society and the state, has prevailed until the advent of the fourth, cartel-party model. In particular, the mass-party model, which since the nineteenth century has been the most widely accepted model, most clearly reflects such a conventional approach.

2.2.1 The elite party model

The elite party model is that which existed before the introduction of universal suffrage. It is the model corresponding to the stage of social stratification in which party competition or conflict was based on the ascribed estate and political goals related essentially to distribution of privilege, though superficially national interests were on the agenda. In this era, since there was no clear boundary between the state and politically relevant civil society, such a question as to who was authorised to voice requests from civil society to the state was simply unthinkable. (See Pizzorno 1981: 249-250; Katz & Mair 1995: 19)

2.2.2 The mass party model

As, thanks to the widening of suffrage coupled with the constitutionalisation of monarchy, the estate system gave way to representative government, a new model of party became dominant: the mass party. According to the mass-party model, political parties were generally regarded as a vital means by which the individual participates in the political process. Therefore, most studies of political parties have concentrated on the relationship of parties to wider society and the role of parties in government. Division of interests became routinised, thereby politics became primarily about competition, conflict or co-operation between these interests. Political parties were regarded as representatives of pre-defined sectors of society and, thus, the dominant form of mass participation. (Katz & Mair 1995: 6-7) In this view, parties were assessed primarily in the light of how successfully they

the reality of more or less independent intermediate bodies, of organised interests and, in general, of groups

implement the will of the represented or how accountable they are to the people,⁸⁷ for, lying outside the state, they belong to civil society. The analytical focus was mainly on popular control of state policy *via* political parties. Organisational strength of parties was measured primarily in terms of the size of the membership, the ideological purity, and modes of internal representation and accountability. (See Mair 1994: 2; Pizzorno 1981: 250-256) Thus, this model essentially characterises political parties as ideological and collective.

2.2.3 The catch-all party model

Katz and Mair's third model, that of the catch-all party, was first thematised by Otto Kirchheimer (1966). He contended that western party politics has today become more or less "Americanised", in that "mass integration" parties seeking "surface integration" have now turned into electoral agencies. Generally, three causes for this transformation can be detected. Firstly, the changes in social stratification systems and cultural attitudes provide an explanation. Since the late 1950s, society has become ever more socially and culturally pluralised and complex, and this, in turn, has affected the complexion of political interests. Consequently, collective identities that were formerly readily discernible are no longer quite so visible and therefore not susceptible to party control. Secondly, as welfare statism, backed by economic growth, became the norm, parties across the political spectrum, to win elections, were forced to accommodate the general welfare of all the electorate rather than particularised sectional interests. As a result, parties' gravitational centre had to shift from their members to the electorate. Thirdly, the technological development of public communications has enabled party leaders to appeal to the electorate at large and, thus, to be more independent of both party members and local organisations. Noticeable in this development is the increased importance of professionals with specialist knowledge. As the party focus has shifted from mass mobilisation to the advertising and selling of its policies *via* the media to the electorate, so the role of advisers and spindoctors has superseded that of the traditional party bureaucrat. Focusing on this point, Angelo Panebianco (1988[1982]: 264) suggests that the term "electoral-professional party" would be more apt description of the new type of party rather than the phrase "catch-all party".

capable of autonomous collective action." (Pizzorno 1981:248)

⁸⁷ This is part of the reason why most British public lawyers examine the role of political parties within the context of the responsibility of government. (See, e.g. Turpin 1990: ch.8)

Yet, even though the catch-all party represents a distinct modality⁸⁸, it may be said to be in the same line as the mass party and, thus, continues to be viewed primarily with reference to its relationship to civil society. Parties no longer belong to civil society but are still regarded as lying in between the individual and an overarching state. One consequence of this is that the establishment of party government notwithstanding, political parties, as “consensus purveyors”, remain as private associations and continue to be controlled by the norms of private law. That is to say that a centre of power is almost free from public supervision.

2.3 *The conventional perspective and the concept of democracy*

The conventional models of the political party, outlined above, are connected to particular concepts of democracy. Clearly, the elite-party model, which was not based on the mediation of social demands to the state, is not tied to the modern conception of democracy. It was not until the advent of universal suffrage that the combination of parliamentarism and democracy was established. As the franchise was extended to the middle and working classes, the mass-party model became dominant. In this era, political parties were conceived as the normal channel through which people participate in the political process. It was accepted that without parties, it was unthinkable to aggregate and mediate social interests. Tight party discipline was a necessary condition for the model and the role of people in this system became a passive, legitimising one. In other words, the electorate was regarded as an object of political mobilisation. Excessive participation of people outside the party politics was regarded as a threat to democracy itself. In short, the normative conception of democracy associated with the mass-party model is at bottom an elitist one.

This elitist tendency has been reinforced by the emergence of the catch-all party, which does not need even to mobilise the electorate. Indeed, it regards such a procedure as harmful to the effective working of its organisation. Parties have become the domain of

⁸⁸ Both the convergence of party programs and growing indeterminacy in party policies differentiate the catch all party from the old form of integration party. As Kirchheimer (1966: 197) stresses, the “catch-all party will do its utmost to establish consensus to avoid party realignment” while the integration party tends to “count on majority political mechanisms to implement its programs only to find that hostile interests frustrate the majority decision by the economic and social mechanisms at their disposal”.

professional politicians and the role of the ordinary citizen is merely to accept whatever political goods they proffer.

Is, then, the elitist liberal theory of democracy alone conducive to such conventional perspectives on party organisation? Advocates of participatory democracy seeking to reform the existing “elitist”-party-centred democracy, in fact, reinforce this elitist element which, as we have seen, is inherent in all the conventional models. In the theory of participatory democracy, non-participation is considered *a priori* a problem and, thus, increased participation is, generally speaking, the primary goal of all forms of democratisation. (See Panebianco 1988[1982]: 273-274) For example, an early work of Habermas (1989[1962]), tracing the structural transformation of the public sphere within the liberal political system, tried to discern a radical democratic momentum in the constitutional guarantee of the principle of publicity and its concomitant intra-organisational democratisation. (1989[1962]: 209ff). However, recently, Habermas has acknowledged that this earlier attempt failed and criticises Norberto Bobbio’s⁸⁹ continuing attempt to anchor the cause of radical democracy in similar, and equally inadequate, premises and strategies. What Habermas now recognises is that any attempt to confine the primary function of the political public sphere to that of a conduit for demands from civil society to the political system is doomed to failure. The public sphere can, thus, never be simply characterised as a “constraint on power” because it is impossible to develop a theory of public opinion “as a medium for the potential rationalisation of power altogether”. (See Habermas 1992b: 440-441; 1996[1992]: 303-304)

It is now apparent, as Pomper (1992) notes, that the concept of the political party is both historically and logically bound up with particular norms of democracy. In other words, each conventional party model represents a particular stage within what is an ongoing dialectical process in which they interact together and, thus, stimulate further development. Thus, our task is to reconstruct the notion of party in such a way that it fully embraces the pluralism and complexity of our present situation.

⁸⁹ Habermas referred to especially Bobbio’s *The Future of Democracy* (Oxford, 1987).

3 A new perspective on the development of party organisation

3.1 *The division of labour in the political process reappraised*

3.1.1 Corporatist challenges to a stable and rigid division of labour in the political system

In traditional political and sociological theory, a stable and rigid division of labour within the political system was invariably taken for granted: “interest groups transmit ‘pragmatic specific’ demands to parties; parties aggregate these demands, integrate them into a general program, and mobilise support for them; and parliaments and bureaucracies enact them as policies and laws and implement them.” (Berger 1981: 9. See also Kirchheimer 1966: 189) It was also presumed that such a rigid division of labour was essential to the stability of the political system.

However, with the spread of corporatist patterns of representation, there is no longer any notion of a stable division of labour among parties, interest groups, and government. What is noticeable is what Claus Offe (1985: 817) calls the “fusion of political and non-political spheres of social life”, or what Luhmann (1990: 34) terms “political inclusion”. Interest groups now undertake various tasks, which were once the preserve of parties and government: “socializing citizens, organizing consensus, making policy, implementing laws, and so forth.” (Berger 1981: 10) As Suzanne Berger (1981:10) puts it, “the question of the forms of interest representation ... is reformulated ... as a question about the possible ‘trade-offs’ among parties, pressure groups, and government and about the consequences of different divisions of labour among these institutions.” (See also Teubner 1993a: 570) The more the stabilising effect of the rigid division of political labour is called into question, the more the party-parliamentary arena comes under attack, for in a highly fragmented society it is seen as either, at worst, paralysed or, at best, inadequate as the medium of interest representation. Indeed, the most important advantage that liberal democracy, based on party competition, could have is that its principle of “exclusion” is well suited to limit the demands of civil society to a manageable, if distorted, level. (See Offe 1985: 823) Therefore, it is hardly surprising that given greater political inclusion in the welfare state, a number of political and sociological commentators predict party decline.⁹⁰ However, given that the factors determining which notion of the political party is most appropriate to highly differentiated societies do not derive from changes

in civil society alone, but also from changes in its relationship with the state, notions such as that of party paralysis cannot in themselves explain the whole picture. (See Katz & Mair 1995: 15-16)

Katz & Mair (1995) argue that overemphasis on the social sphere of political parties can force us to close our eyes to their political sphere. If we accept Offe's assumption (1983) that there is real tension between the organising principles of social power and political power, then, clearly, the traditional view is obsessed with the primacy of the former over the latter. Therefore, the key theme of the new approach is to depart from this obsolete, narrow, view towards a more comprehensive, balanced, paradigm in which not only responsiveness to social demands but also the efficient and effective management of the political system have to be taken into account.

Two interrelated features of this new paradigm are notable. On the one hand, as political parties are now closely associated with the bureaucratic administration, they have ceased to be the dominant form of mass participation. On the other hand, demand articulation becomes mainly the province of interest groups. (See Katz & Mair 1995: 23; Offe 1983: 233-236) In short, the traditional one-dimensional view of the relationship between the political and social spheres has to change.

3.1.2 A new paradigm of politics

Claus Offe (1985) seeks to examine the emergence of a new paradigm of politics against the background of the socio-economic changes that have taken place since the second world war. He defines the paradigm of "old politics" as that of a "comprehensive growth-security" alliance which, he argues, has been dominant since the second world war. According to Offe, this paradigm emerged during a period in which, despite social and political conflict at regional level, there was a "post-war consensus" that avoided conflict at national level. In short, the old paradigm is the product of what Offe (1983: 228) calls "democratic capitalism" in that real tension between democracy and capitalism is, he presumes, temporarily concealed by means of two mediating principles: firstly, political mass parties with their competition, and, secondly, the Keynesian welfare state.

⁹⁰ This is most negatively dramatised in the phrase of "a refeudalised public sphere of civil society" by early Habermas (1989[1962]: 200).

As a result, all the issues, actors and institutional modes of conflict-resolution are correspondingly accommodated within the comprehensive society-wide agreement.

Overall economic growth, advances in individual and collective distributional positions, and legal protection of social status were the central concerns. Specialised, comprehensive, and highly institutionalised interest organisations and political parties were the dominant collective actors. Collective bargaining, party competition, and representative party government were the virtually *exclusive* mechanisms of the resolution of social and political conflict. All of this was endorsed by a “civic culture” which emphasised the values of social mobility, private life, consumption, instrumental rationality, authority, and order and which *deemphasised* political participation. (Offe 1985: 824. Emphasis added)

By contrast, since the end of the 1950s, a number of destabilising phenomena have emerged that are characterised by complex social issues, highly pluralised modes of conflict-resolution and collective actors of complex entity. (See Offe 1985: 824-832) This change can be seen as a shift from “conjunctural” to “structural” modes of political rationality. According to Offe (1981: 127), conjunctural policies centre on political output and social demand management, while structural policies focus on the shaping of political input and social supply. This means that the political system no longer confines its role to the maximisation of the efficiency and effectiveness of political strategies by regarding social demands from civil society as ‘given’. Rather, the political system is required to focus on “political redesign” that will establish institutional parameters determining the acceptable level of social demands vis-à-vis the available political resources.⁹¹ One consequence of this change is that the focus of democratic theory is shifted “from the macro-democracy of representative and authoritative political institutions to the micro-level of the formation of the collectively relevant will within the various contexts of civil society”. (Offe & Preuss 1991: 168)

As a result of these trends, political demands involve not only the realisation of popular will, *i.e.* representation of interests, but also social autonomy. At first glance, these two goals seem incompatible. Hence, western political thought is marked by a longstanding confrontation between liberalism and communitarianism. On the one hand, communitarianism centres on an “offensive” understanding of politics directed against the state apparatus by developing the image of society as an “ethical” community institutionalised in the state. The essence of this view lies in the citizens’ “opinion- and

will-formation” forming the medium through which society constitutes itself as a political whole. On the other, the liberal view does not deny a certain value in the democratic will-formation of self-interested citizens, but regards it simply as one element in a complex constitution. The liberal view focuses on the potential risk that an arbitrary political power can disrupt the whole system and, thus, hinder autonomous consensus formation within civil society. Therefore, the constitution, which provides rules to govern such consensus formation, is vitally important.

As we have seen in Chapter 3, the most important issue facing highly complex societies is the question of how to reconcile these two seemingly contradictory trends. Another difficulty is that this reconciliation must be achieved not only without subordinating civil society to the state but also without destroying the stability of the political system.

The new paradigm of politics, tied to our project of constitutionalised democratic autonomy, incorporates elements of both communitarianism and liberalism; it stresses the importance of public opinion- and will-formation but requires at the same time that this goal should be achieved, not by depending upon the reconstruction of a “collectively acting citizenry”, but by basing the institutional designs of modern democracy upon the “principle of reciprocity”. (Offe & Preuss 1991: 169) The goal of constitutionalised democratic autonomy is both the interplay of institutionalised deliberative processes with informally developed public opinion and the institutionalisation of the corresponding conditions of communication. Hence, we have suggested that politics should not be confined to the systemic action area but extended to civil society, the core of the lifeworld. (See Chapter 3, Section 4) This is what Offe probably has in mind when suggesting that we need to divide the universe of “action” into three spheres, *i.e.* “private vs. non-institutional political vs. institutional political”. (Offe 1985: 832) In this view, the sphere of “political action within civil society” needs to be reformulated as a space from which both private and institutional-political practices (and institutions) can be challenged. According to Habermas (1996[1992]: 354ff), this sphere can be categorised as the periphery of the political system, as opposed to the core sphere wielding formal decision-making powers and actual prerogatives, *i.e.* the parliamentary complex and the administrative complex in the political system. (See also Chapter 3, Section 4.1.2) Yet, this periphery is the “impulse-generating”

⁹¹ That is, in the new paradigm, the scope of the available resources and strategies of problem solving are

one that “surrounds” the political centre, for it affects all parts of the political system and is the essence of an extraordinary mode of problem solving when the routinised part of the political system is thrown into crisis. (Habermas 1996[1992]: 442)

3.2 *The changed character of political parties in a new paradigm: the advent of the cartel party*

For Habermas, political parties, which have their origin in civil society, have taken possession of the core areas of the political system through the conversion of public opinion into “communicative power”:

The political system, which must remain sensitive to the influence of public opinion, is intertwined with the public sphere and civil society *through the activity of political parties and general elections*. (Habermas 1996[1992]: 368. Emphasis added)

However, the role of political parties in the new paradigm represents more than mere mediation between the political system and civil society, as they are concerned with para-governmental functions. Habermas said:

[Political parties] exercise paragovernmental integrative functions, indeed in three ways: (a) through their powers to recruit personnel, powers that extend to the administration, judiciary, mass media, and other social sectors; (b) by shifting political decisions from committees with formal responsibility to the back rooms of informal agreements and interparty arrangements; and (c) by instrumentalising the public sphere to gain access to administrative positions. (Habermas 1996[1992]: 434)

Apparently, from the conventional perspective which centres on political parties’ origin in civil society, their assimilation into the state apparatus is unacceptable and has to be resisted.

However, such conservative reaction to the governmentalisation of political parties hinders us from developing an appropriate insight that would reflect the paradigmatic shift discovered in the search for a new conception of democracy tailored for complex societies, *i.e.* constitutionalised democratic autonomy. The contemporary postmodern situation does not allow political parties to function solely as catalysts of public opinion. To the extent that the parties have themselves become an integral part of the political system, two different functions that parties exercise simultaneously both as a social sphere and as a political sphere are no longer kept separate. (See Habermas 1996[1992]: 443) This does not, of

course, mean that political parties become simply “arms of the state”; the mediating function of political parties is still of central significance for a “constitutionally regulated circulation of power” within the political system. (Habermas 1996[1992]: 384, 442). In short, neither the governmental nor the communicative function of political parties can claim primacy.

The changed function of political parties in relation to the state-civil society distinction requires a new concept of party organisation. In what follows, we shall seek to demonstrate how such a new concept can be achieved with reference to our project of constitutionalised democratic autonomy.

3.2.1 Cartelisation of political parties

As political parties become largely fused with the state, what Katz and Mair (1995) called “the cartel party” as the fourth model begins to replace the conventional party types. Katz and Mair pinpoint several key characteristics of this newly emerging party type. First of all, it is marked by a high degree of self-referentiality in terms of the political goals and limited inter-party competition. (See Katz & Mair 1995: 19) The range of political aims and struggles are contained to ensure the stability of the political system, instead of being extended to achieve social change with a progressive agenda. As party politics becomes less purposive and thematises less their representative capacities, it becomes increasingly a “skilled” profession, a “job” rather than a “vocation”, which is primarily marked by the logic of administration and power. (See Katz & Mair 1995: 23)

One consequence of this is a change in the patterns of electoral competition. In the cartel party model, competition between parties becomes contained and managed in the sense that they share with their competitors a mutual interest in collective organisational survival. (Katz & Mair 1995: 19-20) This is the outcome of two noticeable trends. Firstly, the “governmentalisation” of political parties makes them relatively independent vis-à-vis their members in terms of the means of legitimisation. Secondly, the nature of party work, including campaigning, becomes ever more capital-intensive, professionalised and centralised. Indeed, the internal bureaucratisation of political parties, which is one major characteristic of Kirchheimer’s “catch-all-party”, is still more reinforced in this model. Now that differences between rival party agendas have lessened, the focus of party work has

shifted from the gathering of the political will of the people to the creation of an efficient and effective form of propaganda aimed at the dynamic political market. To deal with the almost infinite image of factors that may determine the electoral outcome, political parties increasingly rely on professional and managerial personnel. These professional advisers and spindoctors have acquired their knowledge and experience in managerial and organisational action fields such as business or public administration, advertising agencies, and the media.⁹² Not surprisingly, they are not primarily concerned with ideological coherency or purity and focus their attention on the efficient management of the party organisation and effective propaganda. Furthermore, this professionalisation creates a need for greater resources and, thus, in turn, leads parties to seek more financial support from the state. (See Chapter 8)

The implication of all these features is that the status of civil society vis-à-vis parties is viewed not simply as the source of legitimacy but also as the object of propaganda. Stressing this aspect, the systems theoretic view of the modern politics reduces the boundary of the political to the functional subsystem, uncoupled from intersubjective strategies. Luhmann (1990: 178) argues that despite “political inclusion”, the people can never be one of the two responsible forces within the political system, but merely a third force. Therefore, the public is “*le parasite*”, which can benefit from the performance of the two responsible forces but is incapable of directly carrying out its will without destabilising the political system itself. In this view, political parties are forced (or privileged) to locate themselves either as the “government or opposition” at the top of the differentiated political system. This line of thought could give the impression that underlying this cartel party model is an elitist theory of democracy. However, as we shall see later, despite such an impression, this model has a potential value in developing a notion of party, which can accord with our constitutionalised democratic autonomy. Its unique “stratarchic” modes of intra-party organisation (we shall turn to this feature in the ensuing section) provide a framework which can reconcile a demand for social autonomy with the need for efficient control of party organisation. The inner differentiation of party organisations coupled with

⁹² As far as British politics is concerned, it is enough to recall two appointments in the modernisation of the two major parties. Peter Mandelson, an architect of New Labour, was recruited from the media while Archie Norman, as the designer of the modernisation of the Conservative Party, was from the business sector.

their rationalisation is essential to overcoming the risk of elitism inherent in a cartelised party system.

3.2.2 Party organisation in a new paradigm: Stratarchy

One major feature of the cartel party model is what Katz and Mair (1995: 21) style the "stratarchic" mode of intra-party organisation. "Stratarchy"⁹³ means the relative mutual autonomy between the "organised" party on the ground (*i.e.* local office-holders) and the national party elite. Given the cartel party, the blurring of the distinction between members and non-members results in the atomistic conception of party membership, which is usually manifest in the "individualisation" of power structures of political parties. Party elites still need to legitimise their position in their relationship to members, but at the same time their autonomy is enhanced since they are no longer dependent solely on members or local activists. Indeed, with the advent of the cartel party, two contradictory trends can be witnessed in terms of the character of party membership. On the one hand, given the increased demand for intra-party democracy or participatory democracy, members are allowed to take part more directly in the process of leadership selections or party conferences so that they may enjoy even more rights than those of the conventional parties. On the other hand, individual members are more likely to exercise their rights as individuals rather than through delegates. We can see this trend, for example, in Labour's recent endeavour to modulate their, mainly trade-union, interest-group relations in such a way as not to discourage potential voters who are reluctant to identify themselves with any specific interest. (See Chapter 6, Section 4.4) This trend, combined with the increasingly blurred distinction between members and non-members, sometimes leads to a reduction of privilege and influence on the part of members in matters pertaining to decision-making. This atomisation of memberships results in making it easier for party leaderships to undercut the role of local intermediaries by preferring direct appeal to a large and formally empowered individual membership and/or the electorate at large. On the other hand, local activists also have an advantage in being allowed corresponding local autonomy, which is more likely to encourage involvement and participation on the part of local members. In

⁹³ In reviewing Katz & Mair (1995), Koole (1996: 518-519) was uneasy about this term, arguing that it tends to ignore the organisational link between higher and lower strata and proffers a more moderate term "federalisation".

short, the assimilation of parties into the state apparatus leads to the functional fragmentation of party organisation itself.⁹⁴

3.2.3 Sub-differentiation of party organisation

The changed (and enlarged) function of political parties necessitates some further changes to their internal structure. It is necessary to move away from the conception of party as a unitary actor, and especially from almost exclusive concern with the relationship between parties and civil society. Peter Mair (1994) provides a feasible framework in this regard. He suggests that party organisations can be disaggregated into at least three different elements - the party in public office, the party on the ground and the party in central office. (Mair 1994: 4ff) In his view, the party in public office means the party in government and parliament. The party on the ground means the membership organisation. The party in central office is organisationally distinct from the party in public office but forms a link between it and the party on the ground.

The conventional party models (in particular, the mass party model), emphasising the origin of political parties in civil society, tend to regard the party on the ground as the essential element. That is, both the party in public office and the party in central office are regarded as complementary elements to the party on the ground and, thus, as a means of social control over the state. More specifically, the party in central office was seen as the "voice, or guardian" of the party on the ground, and as the means by which the party in public office could be held accountable to the mass membership. However, as both the party system and individual party become cartelised, this conventional view has to change. One consequence of cartelisation is that the balance between the party in public office and

⁹⁴ It may be true, as Katz and Mair (1995: endnote 4 at 25) argue, that Britain is a "curious" case in which the behaviour associated with the cartel party model is becoming less prevalent. As Webb (1994: 130) points out, the adversarial nature of the party system, based on majoritarian alternation, tends to conceal the reality of cosy collusion. The "iron law of centralisation" across the party divide also tends to hinder party organisational change towards the cartel party model. However, it can hardly be denied that, as we have seen in Chapter 2, the primacy of the parliamentary party over its extra-parliamentary wings would appear to facilitate the formation of a cartel. For example, traditionally both Conservative and Labour parties have been reluctant to seek constitutional reform, especially electoral reform, which would inevitably change the political order. Recently, Labour has been moving towards constitutional reform but is still very cautious about changing the electoral system. More importantly, the increased relevance of parties to the state, coupled with increasing pressure for the democratisation of public institutions, will affect party organisations in such a way that their functional differentiation will become dominant. (See Webb 1994: 129-130) For example, the creation of a Scottish Parliament, a Welsh Assembly and a London regional government will inevitably accelerate the federalisation of party organisations, which is a major feature of the cartelised party system.

the party on the ground shifts in such a way as to favour the former. This, in turn, alters the role of the central office from that of the representative or guardian of the party on the ground to one seeking on behalf of the party leadership and the party in public office to mobilise the support of the electorate at large. This change explains why much of the work at central office is being carried out increasingly by professionals and consultants, rather than traditional party bureaucrats or activists. Naturally, these changes are looked on with apprehension or disapproval by theorists wedded to the conventional views of party.

However, if we look at this from a different perspective, then, we see political parties are merely changing and no overall party decline is apparent. Even the party on the ground cannot be said to be in fundamental decline. Despite some shift of power away from it, the empowerment of individual members, for example, their enhanced role in the selection of candidates for public office or party leaders, is meant to arrest any excessive centralist tendency. What the party system is losing is nothing but the image of the dominant form of mass participation. (See Offe 1983: 233-236)

The party in public office can be regarded as the institutional core of an "organised public" and belongs to the realm of the state, while the party on the ground can be viewed as an organisational link between the "core area" of the political system and its "outer periphery". Yet, the relationship between the party in public office and the party on the ground is an internal one, while both components are involved with the general public, the one at national, and the other at regional or local levels. The conventional concept of party remains mainly that of the relationship between the party on the ground and the public. The *raison d'être* of the party on the ground lies in its characteristic role as a necessary intermediary for people to participate in the political process. To that extent, the image of the mass membership party as the catalyst of public opinion is still useful even in the cartel party model. (See Scarrow 1996)

3.2.4 The cartel party and democracy

(i) Another version of elitist democracy?

At a glance, the cartelisation of the party system with its "stratarchic" or "federalist" modes of intra-party organisation gives the impression that this party type is tied to a revised form of elitist democracy, in that the essence of democracy is understood to lie in

the ability of voters to choose from a fixed menu of political parties. (See Katz 1990: 159) Parties, as recruiting machines for the political system, are dominated by “groups of leaders” who compete for the opportunity to occupy government offices and to take responsibility at the next election.

For those who regard the direct participation of citizens in the decision-making process as an essential standard for democracy, this new model is even worse than the liberal elitist one. Given this new model, political parties are far less concerned than previously about being thrown out of office by the voters. (Katz & Mair 1995: 22. Cf. Kirchheimer 1966: 187-188) This new sense of security could be construed as implying that they are less responsive to social demands. Indeed, the notion of a “cartel” of political parties presupposes that there is certain limitation in political manoeuvring on the part of the people. Even when the “extraordinary mode of problem solving” is called upon, the possibility that the people can permanently replace established parties with other channels of political activity is very low. Election is no longer regarded as an arena in which a full list of political choices is put before the electorate. Rather, it is seen as a limited political competition between political parties, among which the electorate can choose which will form the government and the opposition. Therefore, the cartelisation of political parties does not necessarily assume that electoral competitions become less fierce, for increased complexity in social formations and extension of suffrage both add to the vulnerability of parties and to the importance of their electoral campaigns. However, there is no apparent evidence that this increasingly intense party rivalry adds to the real substance of competition in a way that matters to voters. Rather, as the collective identities of political parties diminish, and their campaigns move away from contentious issues towards a programme of agreed goals, material differences especially among major parties are less discernible.

(ii) Balanced, inclusive and stable pluralist democracy

It is true that the cartel party model runs a risk of justifying an elitist democracy in the way outlined above. Indeed, despite their empirical insight, Katz and Mair (1995), who first proposed the notion of the cartel party, do not increase the normative implications of this new model but simply confine its theoretical implications to the fundamental reorientation

of parties and elections. Thus, their conception of democracy contains only one-side of the picture and accepts the same sceptical line as systems theory vis-à-vis a normative democracy by saying that:

Democracy lies in the currying of public favour by elites, rather than public involvement in policy-making. ... Democracy becomes a means of achieving social stability rather than social change To put it another way, democracy ceases to be seen as a process by which limitations or controls are imposed on the state by civil society, becoming instead a service provided by the state for civil society. (Katz & Mair 1995: 22)

The role of the people in the political system is essentially a passive one as they should be concerned with policy output rather than input.

The problem with this one-sided view was explored in the previous chapter. (See Chapter 3, Section 4.1.2) Katz and Mair's cartel party model confines the boundary of politics to the state and regards the asymmetrical dependency of civil society on the state as a prerequisite for a well-functioning democratic system. However, as this state-centred view of politics cannot fully avoid the problem of democratic legitimacy, we need a view of politics as a dual process interconnecting the state and civil society. What is required, therefore, is a new balance between system integration and social integration, *i.e.* the recognition of party politics as embracing both an organised public and a non-organised public in civil society. The cartelisation of political supply could cause what Offe (1983: 234) terms "political repression", namely, a gradual transformation of democracy into some form of authoritarianism, what Lord Hailsham (1978: Ch. XX) called "elective dictatorship". To avoid this, notwithstanding their fusion with the state, parties need to continue to perform, if only indirectly, their traditional function as channels of communication between civil society and the state. This is a normative expectation towards political parties in our project of constitutionalised democratic autonomy. In the same vein, Habermas (1996[1992]: 379) argues

Political parties would have to participate in the opinion- and will-formation from *the public's own perspective*, rather than patronising the public and extracting mass loyalty from the public sphere for the purposes of maintaining their own power. (Emphasis added)

As long as parties perform para-governmental functions, they also need to institutionalise a procedure for the purposes of democratically regulating the conditions of their common life. Only in this modified form can the cartel party model imply a fundamental reorientation of

the role and nature of political parties coupled with an acceptable democratic theory in complex societies.

Obviously, our quest for this balanced, inclusive, pluralist democracy does not support anti-partyism. Such a negative assessment of the party-parliamentary politics is as deficient as the unitary conception of parliamentary democracy which resulted in elective dictatorship. Such challenges to the cartel party as the social movements and neo-corporatism, emerging as alternative means of communication between civil society and the state, might well lead to the destruction of the political system *per se*. These transitory and somewhat strident organisations directly and adversely influence the settling of competing interests and power claims at the political level. (Cf. Schedler 1996) As we have seen, the role of non-institutional politics should be confined to the ‘discovery’ of problems at the micro-level of politics. However, different organising principles are required at the macro-level of politics where long-term political transactions involving a large number of actors take place. At this level, there is still a strong need for a class of identifiable mediators sensitive not only to normative demands for social integration from civil society but also to the formal and functional criteria necessary to operate the political system. Political parties, with their durable structure overlapping state and civil society, are not enemies of a fully fledged democratic order, as advocates of what Schedler (1996) terms “anti-political-establishment parties” would argue. Rather, they should be regarded as a kind of essential constitutional institution, which is envisaged as guaranteeing both effective political mediation and legitimate government. Based on this prospective, Lipow & Seyd (1996: 278) state, “In their need to aggregate a range of opinions and interests, parties are more likely to balance options, while elected legislative bodies which are properly resourced and able to weigh evidence in a given case may yield results more consistent with the public interest.” Therefore, the autonomy of political parties, both as a social sphere and as a political sphere, is as important as that of other social actors within civil society. Instead of replacing the party-parliamentary system by alternative *ad hoc* mechanisms, it is much more realistic to seek a new balance between these two mechanisms by reconstructing a “loose network” embracing a weak public and a strong public. It is necessary that our envisaged constitution institutionalise such a network to safeguard the autonomy of the social and political spheres rather than directly to seek a power equalisation between, and

within, these realms. In short, political parties presenting themselves in terms of the cartel party model, can still, given a new constitutional design, play an important role in democratic governance, albeit a rather different one from that which they have played up to now following more conventional models.

4 Conclusion: Complex entity, complex status, and a need for more flexible policy

It is important to see that the reformulation of party organisation, *via* the cartel party model, is nothing but a reflection of the changed division of political labour discussed in the early section of this chapter. The shift from a stable, rigid division of political labour to a more flexible and contingent one is paralleled by the “internalisation” of political processes within political parties (and other intermediary organisations). The functional differentiation of party organisation, combined with the flexible division of political labour in general, means that a political party no longer can be seen simply as a unitary actor, externally co-ordinating the political system with the social system. Rather, this requires it to be seen as a complex entity, integrating ‘within’ itself differing social demands with political decision-makings. This is what some socio-legal theorists have in mind when they suggest that in a pluralised society, intermediary associations play a fundamental role, acting not as brokers between rulers and ruled, but rather as intermediaries linking different parts of society. (See Teubner 1993a: 556ff) In other words, political parties are at the crossroads of civil society and the state.

This implies that in Britain practical and legal policies relating to political parties need to be reoriented. The starting point for this has to be a recognition that the law governing political parties can no longer solely depend upon the traditional internal-external distinction. There is a need to depart from the conventional approach which considers the legal status of political parties purely in institutional terms and to focus on the concrete role that they play in complex and pluralised socio-political contexts. Above all, the legal status of political parties, which has so far been covered by private law, needs to be reformulated in the light of the changed situation in which, performing integrative para-governmental functions, they have become a complex entity.

Chapter 5

Law and Political Parties in Britain

1 Introduction

This chapter will be divided into five main sections. First, we shall explore in what ways the present legal system sees political parties, especially in terms of their legal status. (sec. 2) What follows is an appraisal of both the constitutional basis of political parties and its implications. (sec. 3) This is followed by more specific research (secs. 4 - 5) on the regulation of political parties covering common law supervision and statutory regulation. The final section (sec. 6) will critically analyse the *status quo* based on liberal associationalism, and will argue the case for the institutionalisation of political parties.

2 The legal status of political parties in Britain

2.1 Political parties as private associations

As discussed in Chapter 2, the British version of parliamentary government lacks a theoretical account of the proper place of political parties in the constitutional order. Despite the fact that they play an important role as the centre of political power, the law makes little distinction between a political party and a tennis club. Political parties are generally regarded as “unincorporated associations” of like-minded people under private law,⁹⁵ which operate on the strength of the contractual, organisational, and economic relationships between their constituent parts.

⁹⁵ See Committee on Standards in Public Life 1998: para.9.2. This general description cannot be applied to a political party, which decides to be incorporated. The Referendum Party organised by Euro-sceptics before the 1997 general election provides this sort of exception. This party depending upon the late Sir James Goldsmith's financial donations was incorporated for the sole purpose of operating as a political party.

Yet, it is important to note that the courts have seen the constituent elements of the political parties as “separate” entities. (See *John v. Rees* [1970] Ch. 345, 389) Thus, the local and national parties are basically regarded as separate unincorporated associations in their own right. This implies that how the relationship between the national party and the local constituency party is treated in law varies according to the different rules and history of the particular party organisations.

2.2 *Common law relating to the legal status of political parties*

There have been two Court of Appeal cases dealing directly with the legal status of the two major political parties, *i.e.* the Conservative Party and the Labour Party. In *Lewis v. Heffer* [1978] 1 W.L.R. 1061,⁹⁶ the court regarded the Labour Party as an “unincorporated association”. ([1978] 1 W.L.R. 1061, 1071) Lord Denning MR compared the relationship between the national and the local parties to “a ship of a fleet”, “a regiment of an army”. That is, despite the fact that the national and local parties are “separate” entities, they are inextricably “tied” together. (1 W.L.R. 1061, 1071) He held that the legal bonds between them are as tight as rules can make them.

But, in *Conservative and Unionist Central Office v. Burrell* [1982] 1 W.L.R. 522, the court, basing its ruling on the peculiar constitutional history of the Conservative Party, refused to see the Conservative Party as a formal entity in itself. This case was an appeal by the Crown against the decision of Vinelott J, overruling the levy of corporation tax by the tax commissioners on Conservative Central Office. The Crown’s appeal alleged that the Conservative Party, as an “unincorporated association”, was within the ambit of the relevant section of the Income and Corporation Taxes Act 1970. However, Lawton LJ dismissed this appeal upholding Vinelott J’s ruling that, to be an unincorporated association, the bond of union between the members has to be “contractual”. “Contractual” here meant that an association was composed of “two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and upon what terms and which can be joined or left at will”. ([1982] 1 W.L.R. 522, 525) In the Conservative Party, it was held, there was no

such “contractual and direct” link between members of local constituency associations and members of Parliament. (*Ibid.*) Lawton LJ did not deny that there were many “political” links between the parliamentary party and both members and associations at local constituency level. In his judgement, however, these political links can be seen merely as “factual” relations which cannot be viewed as “constitutional” and are, therefore, outside the ambit of ‘legal’ regulation. ([1982] 1 W.L.R. 522, 525) One implication of this, so far as the Conservative Party is concerned, is that the relationship between the ordinary members of extra-parliamentary organisations and the parliamentary party is outside even private law and, thus, altogether beyond state intervention, whether positive or negative.⁹⁷

2.3 *The nature of the autonomy of political parties and its implications*

That political parties are basically governed by the principles of private law and thereby have no legal status apart from that of their individual members⁹⁸ raises a number of private law issues. As an unincorporated organisation, a political party, in principle, cannot enter into legally enforceable contracts and sue or be sued in its own name. It has been a general principle that no action can be commenced by or against a body which lacks legal capacity.⁹⁹ (See Gledhill 1996: 67) It may also be prohibited from owning real estate in its own name.¹⁰⁰

⁹⁶ This case was essentially concerned with a factional dispute in the local Labour Party at Newham North-East and its relationship with the national Labour Party.

⁹⁷ This does not, of course, deny that extra-parliamentary organisations and the parliamentary party are likely to be respectively regarded as unincorporated associations like the Labour Party.

⁹⁸ This was explicitly confirmed by Megarry J in *John v. Rees* when he held that a political party cannot be an artificial or juristic person unless it is incorporated and, therefore, is not a separate entity from its members. The rules of a party constitute “a contract” which binds its members to each other. (*John v. Rees* [1970] 1 Ch. 345, 387)

⁹⁹ It is noteworthy that when applying the rule of capacity to sue in cases involving unincorporated associations, the courts have reached very different decisions. Recently, four cases expressly considered whether or not an unincorporated association has the capacity to bring an action, especially by way of judicial review. The decisions were divided evenly. In *R. v. LB Tower Hamlets, ex parte Tower Hamlets Combined Traders' Association* [1994] COD 325 and *R. v. Traffic Commissioner for the North Western Traffic Area, ex parte BRAKE* (CO/1107/95), Sedley J and Turner J have held that an unincorporated association may bring an action. While in *R. v. Darlington Borough Council, ex parte Association of Darlington Taxi Owners and Darlington Owner's Drivers' Association* [1994] COD 424 and in *R. v. Leeds City Council, ex parte Alwoodley Gold Club* (1995) 15 September, Auld J and Harrison J held that an unincorporated association has no capacity to bring an action. Yet even the rulings allowing capacity to sue are based on the conventional dichotomy of private and public law. (See Turner J's ruling in *R. v. Traffic Commissioner for the North Western Traffic Area, ex parte BRAKE* (CO/1107/95) quoted in Gledhill 1996: 70) A recent report on judicial review by the Law Commission (Law Com. No. 226, para. 5.41) also took a similar position recommending that the capacity of an unincorporated association to apply for judicial review in their own name *via* their

However, what requires our attention is the fact that this state of affairs raises some public law issues. The other side of the lack of legal personality is that political parties, in reality, enjoy full autonomy in their activities. This manifests itself in the discretion of political parties over the control of admissions and expulsions and in their freedom regarding the creation of internal rules for administration. As a result, some of the internal affairs of a political party that have important political and constitutional significance, such as the selection or resignation of leaders and parliamentary candidates, are regulated purely as a matter of private law and are thereby almost free from public scrutiny, not to mention administrative or legislative pressures and controls. The *laissez-faire* approach of the courts is well illustrated in *Burrell* case ([1982] 1 W.L.R. 522), which concerned the legal status of the Conservative Party. Preoccupying himself almost entirely with the question of whether a "contractual" link existed between the parliamentary party and other party elements, Lawton LJ was able to avoid offering any normative interpretation of the role of the party in the constitutional order. For instance, the court focused on the degree of "reasonable certainty" of agreement necessary to create an unincorporated association meeting the requirement of justiciability. ([1982] 1 W.L.R., at 527) The rules and procedures for the selection of the leader of the party were taken to be outside the scope of judicial scrutiny. Therefore, the court simply held that "no member of a local constituency association, basing his claim on *contractual* rights, could ask the court to protect those rights in respect of the parliamentary party's election of a leader". (*Ibid.*, at 527. Emphasis added) In short, judicial preoccupation with the contractual basis of political parties tends to ignore the fact that they are the creatures of a public autonomy¹⁰¹ that is essential to democracy.

This approach gives rise to theoretical questions of constitutional importance. Why should "contractual" relationships be the basis for determining the legal status of political parties when, in reality, they are an essential part of British constitutional arrangements?

members should be allowed. One problem of this approach is that it deals with the issue of capacity in relation to the theoretically unrelated issue of standing. As Cane (1995: 286) observes, the question of whether an action can be brought by unincorporated bodies cannot be separated from the question of whether an action can be instituted against them and, therefore, it is important to see that such questions arise from wider problems involved in recognising unincorporated associations as legal persons.

¹⁰⁰ An interesting satire of this aspect is found in Herbert 1969: ch.10, "Which is the Liberal Party?"

¹⁰¹ David Feldmann (1990: 11) terms such rights related to public autonomy "higher order rights" as opposed to "lower order rights" that mainly concern private autonomy such as freedom of contract and property.

Why should political relations between extra-parliamentary and parliamentary wings of a major political party not be constitutional and therefore legally significant? What legal ideas and political theory, if any, would provide justification for the judicial underestimation of the constitutional significance of the political links between elements of a political party? In answering these questions, and before any critical analysis, we need to describe the rules governing political parties under the present system. That description will lead to the critical analysis in the final section.

3 Freedom of association as a constitutional basis for the organisation of political parties

In Britain, freedom of association provides the constitutional basis for the organisation of political parties. It is generally accepted that freedom of association is one of the cornerstones of modern democracies. This has been reflected in a variety of international and domestic legal documents dealing with the basic rights of the citizens of a free society. Article 11(1) of the European Convention on Human Rights provides that “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.”

In Britain, this freedom has until now not been a result of guarantees in a written constitution¹⁰² but the result of judicial decisions determining the rights of ‘private’ persons in particular cases brought before the courts. As a result, as with civil liberties in general, the nature and scope of freedom of association has depended upon the judicial attitudes of the day. In Britain, judicial attitudes towards freedom of association have been embedded in conventional liberal political theory.¹⁰³ As a result, the courts confine their role to enforcing private autonomy rather than public autonomy, ignoring the constitutional role of political parties as collective actors in the political process.

The British people will soon enjoy general protection of this freedom since the Human Rights Bill incorporating the European Convention is under reading in Parliament. (See

¹⁰² The European Convention has not so far been incorporated into English domestic law. See *R v. Home Secretary, ex p. Brind* [1991] 1 AC 696.

¹⁰³ See the previous section 2 and the later sections 4 and 6.

Secretary of State for the Home Department 1997) Given little statutory regulation of political parties, this change in terms of source of law will strengthen the role of the courts in enforcing freedom of association. The Bill makes it unlawful for public authorities to act in a way which is incompatible with the Convention so that ordinary people can invoke their rights against public authorities in normal court proceedings. Furthermore, if the higher courts consider that Acts of Parliament are inconsistent with rights guaranteed under the Convention, they will be able to issue a formal declaration to that effect so that the matters can be rectified by the government and Parliament. The vital role of the courts in determining the nature and scope of freedom of association has some institutional implications as described below.

3.1 *The relativity of freedom of association as a political liberty*

The efficacy of freedom of association, especially as a vehicle for the reform of the party system, relies upon certain constitutional ideas, political as well as jurisprudential, which the courts adopt. In other words, the idea of democracy or constitutional model adopted by the courts, and the ways in which they treat the relationship between political, legal and power relations in society, play a vital role in determining the scope and nature of any particular definition of freedom of association. Although other classical civil liberties also ultimately rely on the courts for their enforcement, the very fact that freedom of association has such a close relationship with the political process places it in a more uncertain, indeed fragile, position.

3.2 *The paradoxical character of freedom of association*

What makes the situation more complex is the “paradoxical” character of freedom of association. (See Dicey 1904: 514) Freedom of association has two dimensions, which inevitably give rise to a certain amount of internal tension. (See Ewing 1994: 240-241) The first dimension is that of the individual. Liberal political theory centres on the individual as the basic unit of conduct and, therefore, it regards the protection of the individual’s interest in self-realisation as the essence of civil liberties in general and freedom of association in particular. The second dimension is that of the collective, namely, the ‘autonomy’ of the group in securing its collective integrity to promote its common interests. The paradox of

freedom of association lies in the fact that individual liberty, which an autonomous group seeks to promote, can be undermined by the nature of collective action. There is always, for example, a danger of the persecution of individuals within the group. Therefore, the question of whether the collective dimension exists in its own right or is merely an extension of the individual, is vital in determining both the scope of freedom of association and the degree of the protection given to it. If the autonomy of the group is subject to external intervention, then, the scope of its freedom of association is, thereby, restricted, and this freedom becomes a poor vehicle for the fulfilment of individual liberties. On the other hand, it can be argued that the autonomy of the group must be constrained, for unconstrained freedom of association can lead to the manipulation of the individual rather than to greater freedom.

These concerns lead to more specific questions as to whether, and to what extent, legal personality should be afforded to an association; and, then, what legal principles should govern such a personality. These questions give rise to a very complex set of problems, which add to the contingent, vulnerable, nature of freedom of association.

3.3 *A search for the realisation of the positive conception of freedom of association*

The introduction of a Bill of Rights may, though not necessarily, provide opportunities to reassess the traditional approach regarding freedom of association. Since it is likely that constitutional reforms will include the regulation of political parties,¹⁰⁴ a question of how to strike a balance between the individual and collective dimensions of freedom of association will arise. If the British legal regime continues to adopt the conventional approach - that freedom of association, like all other civil liberties, is rooted in personal, rather than public, autonomy -, it is unlikely that freedom of association can provide an effective vehicle for reform of the party system, such as the constitutionalisation of political parties. This is because the nature or role of political parties in the constitutional order together with its legal status is defined by such narrow and negative features of freedom of association.

In a basically elitist parliamentary regime in which the constitution depends more on political than juridical mechanisms, the legitimacy of the polity relies on how open the political process is to all the political forces and actors seeking fair access to the political

¹⁰⁴ See Chapters 6 and 8.

arena. In particular, of great importance is the creation of a situation in which “groups of individuals may make their political claims and seek to persuade governments to accept them”. (Griffith 1977: 18) Yet, contrary to Griffith’s anti-rightist claim,¹⁰⁵ central to the protection of open political processes is the ‘positive’ conception of freedom of association, for example, the recognition of group rights, the public autonomy and appropriate control of political parties.¹⁰⁶ Without such substantial freedoms backed by regulation, the demand for democratic standards including the principle of publicity (which Griffith 1977), arguing for the “political constitution”, seems to have in mind) will remain nothing but an empty promise on the part of politicians and bureaucrats.

In what follows, we shall move to explore in what specific ways the negative conception of freedom of association has been applied to political parties.

4 Judicial control of political parties: the private law approach

4.1 Contract as the basis of judicial intervention

The legal status of political parties as private associations, which was touched upon in Section 2, suggests that at the most basic level political parties are subject to judicial scrutiny under private law principles and procedures. That is, the courts can intervene in the affairs of parties only to ensure that their activities are in accordance with their own rules which are regarded as a sort of contract.

The High Court confirmed this view in *John v. Rees* [1970] 1 Ch. 345.¹⁰⁷ Megarry J took it for granted that the general rules governing unincorporated associations were applicable to political parties by repeating the reasoning given in his judgement in *Fountain v. Chesterton* [1968] 112 S.J. 690.¹⁰⁸ (See [1970] 1 Ch. 345, esp. 398 ff) *John v. Rees* was endorsed by Lord Denning MR in *Lewis v. Heffer* [1978] 1 W.L.R. 1061 where it was held

¹⁰⁵ In the sense that he treats what others call “inherent rights” merely as political claims. (See Griffith 1977: 17,18; *Idem.* 1997: e.g. 301-302, 304 ff)

¹⁰⁶ See Section 6.2.1.

¹⁰⁷ This case combined three actions which arose out of political feuds between constituency party members as a result of the expulsion of an MP from the Labour Party. It was concerned, among other things, with the legal question of whether the chairperson of a party meeting has an inherent power to adjourn the meeting for disorder.

¹⁰⁸ In this case, Megarry J reviewed an avowed expulsion from the National Front.

that the internal affairs of political parties must depend on their own “rules” which are constantly being added to, or supplemented by, “practice or usage”. (at 1071,1072)

4.2 *The supervision of political parties under principles of good administration*

Despite the courts’ basic stance described in the previous section, the courts in general have applied to political parties certain principles which are similar to those applied in cases of public law, including the principles of natural justice¹⁰⁹ and the rule that the powers related to expulsion or suspension must be exercised without any abuse or for any ulterior motives.¹¹⁰ In fact, this development of common law concerning, to use Oliver’s (1987: 559) words, “a private law supervisory jurisdiction”, was not confined only to political parties. It applies equally to private decisions in areas such as private licensing,¹¹¹ expulsions¹¹², the “right to work”¹¹³ and so on. Galligan (1982: 261) called these substantive principles - which can be grouped together when the courts exercise a supervisory jurisdiction beyond the private-public law distinction - “principles of good administration”.

However, it would be wrong to suppose that the judiciary has applied the same principles to both private and public bodies. The judiciary applied these principles to political parties only as secondary sources of law. Thus a private law supervisory jurisdiction is often achieved by implying contractual terms in the rules of those bodies. So an ouster clause contained in the rules could in theory exclude the exercise by a court of its supervisory jurisdiction. Judges have sometimes attempted to examine the validity of contractual terms purporting to exclude, for example, natural justice on the ground of public policy. In *Lee v. Showmen’s Guild of Great Britain* [1952] 2 Q.B. 329, 342, Denning LJ expressed doubts about the validity of any stipulation excluding the application of the rules of natural justice to a domestic tribunal on the ground that it would probably be contrary to public policy. However, Megarry J in *John v. Rees* ([1970] 1 Ch. 345, 399) regarded Lord Denning’s

¹⁰⁹ See *John v. Rees* [1970] 1 Ch. 345, 396-404.

¹¹⁰ See *Lewis v. Heffer* [1978] 1 W.L.R. 1061, 1073 - 1074.

¹¹¹ See *McInnes v. Onslow-Fane* [1978] 3 All E.R. 211.

¹¹² See *Glynn v. Keele University* [1971] 1 W.L.R. 487.

¹¹³ See *Lee v. Showmen’s Guild of Great Britain* [1952] 2 Q.B. 329.

interpretation in *Lee* as “obiter [dicta]” which was not shared by the other members of the court.¹¹⁴

It would be misleading, however, to suggest that there exists a full-blown private law supervisory jurisdiction. The court’s supervision of the private decision making powers is very limited and the exercise of this supervision has been restrained. This judicial restraint was expressed with force by Megarry VC:

The courts must be slow to allow any implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies were far better fitted to judge than the courts. (*McInnes v. Onslow-Fane* [1978] 3 All E.R. 211, 223)

A supervisory jurisdiction in private law is exercised only if there are reasonable grounds on which a court can justify interference into the private decision making powers to prevent bias, unfairness, arbitrariness or capriciousness in the decision making process. Even where such grounds are established, the courts have not always applied principles of good administration to private bodies. The nature of the interest affected is one important standard against which the judiciary assesses whether these principles should be imposed on a decision of a private body: it is the decision to expel which attracts the greatest likelihood of judicial intervention. (See *John v. Rees* [1970] 1 Ch 345, 397) There is an obstacle to applying natural justice to cases where an applicant has been refused membership. In *Faramus v. Film Artists Association* [1964] A.C. 925, 941, Lord Pearce remarked that “cases of expulsion without a fair hearing come in a different category from cases of refusal of an application for membership”. Even in the case of suspension, the application of these rules is qualified by the courts. They do not apply natural justice to suspension of membership which is made in the cause of good administration. In *Lewis v. Heffer* [1978] 1 W.L.R. 1061, Lord Denning MR distinguished suspension which is inflicted by way of punishment from suspension of an administrative character in that the latter cannot be subject to the rules of natural justice.¹¹⁵

¹¹⁴ This does not mean that Megarry J. negated the possibility that public policy can be used at the final stage to override the rules of private associations. See *John v. Rees* [1970] 1 Ch. 345,400.

¹¹⁵ In this case, one issue was whether or not the NEC of the Labour Party unlawfully or invalidly intervened in the conflict of two factions in the Newham North-East Constituency Labour Party when, pending the result of inquiries over the conflict, it suspended the executive committee and officers of the local party from party membership. It was held that the suspensions which were made, as a holding operation, pending inquiries were not subject to the rules of natural justice; “no one has ever questioned such a suspension on the ground that it

Recently by focusing on the distinction between private and public law, the courts have consistently expressed the view that at the most basic level their supervisory jurisdiction can be exercised only if there is a “governmental” interest in the decision making power in question.¹¹⁶

In conclusion, the judicial response to the question of whether and how to regulate the internal affairs and the decisions of political parties is based on the public-private law division, thereby subjecting these decisions to the private law regime.

4.3 *Some problems with the private law approach*

This traditional approach of the courts, focusing on the private status of political parties, causes certain problems, the most important of which we have already discussed. (See Section 2.3) In this section, we shall undertake a more structured analysis of this issue in the light of a possible judicial review of the activities of political parties. The possibility of public law supervision can be looked at in two different dimensions. On the one hand, problems of standing and privity might arise if the courts continue to adopt the present private law approach in dealing with the activities of political parties. This issue touches upon the relationships between political parties and the public as non-members. On the other hand, we may question the private law regime itself. Then, a central question is whether and to what extent judicial review under public law principles can be extended to the activities of political parties viewed as private entities. This issue can also be looked at in a broader perspective which questions whether any public supervisory jurisdiction is available to contractual relations.

4.3.1 The problems of privity and standing

One respect in which public law and private law are supposedly very different relates to the rule of standing. Contractual privity in private law is much narrower than a “sufficient interest”¹¹⁷ in judicial review proceedings. As there are no contractual relationships between the public as non-members and political parties, there is, in principle, little, if any,

could not be done unless he is given notice of the charge and an opportunity of defending himself and so forth.” (at 1073)

¹¹⁶ See Simon Brown LJ in *R v. Chief Rabbi, ex p. Wachmann* [1993] 2 All E.R. 249.

¹¹⁷ See the Supreme Court Act 1981, s.31 (3).

legal basis on which, before the courts, the public can question the activities of political parties regardless of their factual or political relationship with them. This, under the old rules of the Conservative Party, was exactly the position of the extra-parliamentary wings vis-à-vis the Conservative Parliamentary Party, for, as we have seen (See Section 2-2), the court ruled that no contractual relationship existed between them. Obviously, this implies that the extra-parliamentary bodies could not apply for judicial review of the decisions of the parliamentary party concerning, for example, reform of the power structures of the Conservative Party. On this basis, the 1922 committee, which until recently was solely responsible for electing the party leader, could have blocked any reform allowing the party's rank and file to have a say in this matter.¹¹⁸ Were this to have been the case, it would have been impossible for either the National Union or individual members to seek a judicial review of such a decision.¹¹⁹

Recent changes to the rules on privity and standing in the private sphere seem to have moved in the direction of increasing the possibility that someone may raise issues about the conduct of legally private entities, even though he has no contractual relationship with them.¹²⁰ However, critics have increasingly maintained that the courts, while trying to extend judicial intervention to domestic bodies, have failed to develop any clear conceptual and policy development. (See Black 1996: 32-43) To rectify this situation, the judiciary needs to realise, as Peter Cane (1996: 59-61) notes, that standing rules, whether in private or public law, tend to be used as a mechanism for restricting the role of the courts to adjudication while leaving to the administration and the legislature the role of weighing competing interests in society. It should abandon its traditional adherence to the 'individual interest representation' view of judicial review and, adopting a more positive stance, seek a new, non-adjudicative role in the administrative process.¹²¹ (See Cane 1995; Cane 1980: 327-328; Galligan 1982: 276)

¹¹⁸ In reality, in March 1998 the 1922 Committee agreed to adjust the old procedures to the new demands from the party grassroots and *The Fresh Future* (1998), a white paper for the party reform, allowed ordinary members to have a final say in selecting the party leader.

¹¹⁹ Lawton LJ clearly expressed this possibility in *Burrell* case. See [1982] 1 W.L.R. 522, 527.

¹²⁰ See *McInnes v Onslow-Fane* [1978] 3 All ER 211; *Breen v Amalgamated Engineering Union* [1971] 2 QB 175.

¹²¹ The most radical suggestion in this regard is one raised by Cane (1995: 283 and 285) concerning public interest litigation: "it is, in my view, right as a matter of principle that if public interest actions are to be allowed at all, all members of the public of full age and capacity should be able to bring them. ... In general,

4.3.2 The problems of consensual submission to jurisdiction

The question of whether political parties are subject to judicial review arises, of course, more acutely where contractual relationships between political parties and their members pertain. As noted in the previous section, the recent recognition in British administrative law of the public-private distinction¹²² implies that there will be less room for what is called “a private supervisory jurisdiction”. Relying on a technical public-private division emanating from the Order 53 procedure, the courts tend to view the existence of a contractual relationship as a *prima facie* indication that judicial review is not available.¹²³ One theoretical rationale for this exclusion of private entities from judicial review is their political and operational autonomy. (See Black 1996: 38 ff)

However, such a rationale, like the technical position of the courts, is unsatisfactory. Both ignore, among others, the complex nature of the ‘public’ sphere and the real significance of its autonomy. As we have seen in Chapter 3, Section 4.2, the public sphere forms an intermediary structure between the state and civil society and has to be *publicly responsible* within the broader constitutional framework. Given that political parties, despite their origin in civil society, play a public (or semi-public) role in a democratic polity,¹²⁴ present rules governing judicial review of political parties should be reassessed,

the only limitation which ought to be placed on public interest standing is that the claim should not be “frivolous” and that the applicant before the court should be “sincere.”

¹²² See *O'Reilly v Mackman* [1983] 2 A.C. 237; *Law v. National Greyhound Racing Club Ltd* [1983] 1 W.L.R. 1302.

¹²³ See *R v Disciplinary Committee of the Jockey Club, ex p. Aga Khan* [1993] 2 All E.R. 853; *R v Disciplinary Committee of the Jockey Club, ex p. Massingberd Mundy* [1993] 2 All E.R. 207.

¹²⁴ Recently, in a libel case in the Queen's Bench Division, the judiciary recognised, albeit indirectly, the publicness of political parties in a democratic society. In *Goldsmith and Another v. Bhoyrul and Others (The Times, 20 Jun 97)*, the late Sir James Goldsmith and his Referendum Party jointly claimed for damages and an injunction for libel against Sunday Business Newspapers and related individuals. Buckley J. held that, so far as the Referendum Party was concerned, the plaintiff's claim should be struck out on the ground that it was contrary to public interest for a political party to have any right at common law to maintain an action for defamation. It was held, firstly, that the said party's peculiar legal status as a corporation did not affect its identity as a political party, and, secondly, that a political party, like institutions of central and local government, is one of those essential institutions in a free and democratic society, which must always be open to criticism.

The leading case cited in this respect was *Derbyshire County Council v. Times Newspapers Ltd* ([1993] 2 WLR 449) where central and local governments were denied a right at common law to bring an action for defamation on the same ground. Although *Derbyshire Council* focused upon striking a balance between freedom of expression and protection of the authority's reputation, Lord Keith of Kinkel's holding underlined two factors. Firstly, the electoral process nowadays is conducted almost exclusively on party political lines.

for, as they stand, these rules focus almost entirely on the organisational origin of political parties. Judicial control can be a means of public supervision which is required to ensure that the activities of political parties meet certain constitutional standards.¹²⁵

5 The negative design of statutory regulation

The negative approach to the nature of freedom of association in Britain is reflected in the negative design of statutory regulation. There is no general law on political parties, which are barely recognised by law, even the electoral law. As a result, there is an almost total absence not only of regulation of political parties but also of party privilege. What little regulation does exist is primarily in the form of ‘indirect’¹²⁶ control, *i.e.* it barely recognises political parties *per se*. This indirect regulation can be divided into two categories. One is primarily concerned with restrictions relating to public peace and national security, which can naturally impinge on the life of political party. The other is concerned with regulating aspects of civil society that have direct bearing on political parties.

5.1 *No general law on political parties*

One major feature of the negative conception of freedom of association in Britain is that, unlike, say, Germany, no ‘political party law’, which is the most direct form of state intervention, exists. There are several additional reasons for this state of affairs, and while we shall not attempt to list them all, some do warrant our attention. One factor that made regulation unnecessary was the introduction of a number of successful electoral reforms in the late nineteenth century. Such reforms as the introduction of the secret ballot¹²⁷ and effective

Secondly, the process of forming any governmental body should be open to uninhibited public criticism. (at 456)

Indeed, these cases show an increasing judicial understanding of the nature of political parties and the reality of the political process, regarding them as different from other types of private association and corporation.

¹²⁵ As we shall argue later in Chapter 6, the taking note of grassroots’ opinion in the election of the party leader is one fundamental requirement for the party to claim to be democratic and constitutionalised.

¹²⁶ The sole exception is the Sex Discrimination Act of 1975, as we shall see in Section 5.3.

¹²⁷ The Ballot Act of 1872.

curbs on election expenditure of candidates¹²⁸ led to a significant decline in electoral corruption. (See Ware 1987: 91; Butler 1989: 371-372)

One may suggest, as another reason why regulation did not arise, the early establishment of a parliamentary tradition. There are two basic reasons that necessitate a 'party law'. Firstly, as in the United States, the legal regulation of parties is a safeguard against any abuse on the part of the party machine. (See Epstein 1989: 244) Secondly, as in Germany, a general law on parties ensures the stable democratic development of the state itself against anti-democratic forces both within and without.¹²⁹ In Britain, however, the parliamentary tradition has successfully presented itself as a representative democracy.¹³⁰ Therefore, what is dominant is the fear that any regulation of political parties could encourage state-party relations of a sort incompatible with the practice of representative democracy. As a result, political parties, which are essential in this type of democracy, are forced to remain private. As we shall see, this fear has led Britain to adopt some piecemeal and indirect devices for the regulation of its political parties.

5.2 *Non-recognition of political parties in general elections*

As we have said, British electoral law has, as yet, not recognised the role of political parties in the legal process of election, and it, thus, almost perfectly reflects Lord Hailsham's remark (1978: 37) that "political parties are no part of our constitution, but no part of our constitution can ignore their existence".¹³¹ Present ongoing electoral reforms may change this situation. For example, the introduction of a full, even partial, party list respectively for the European elections and those to the proposed Parliaments of Scotland and Wales would make the registration of political parties inevitable. However, since a reform of general elections has yet to come, the policy of non-recognition remains mostly

¹²⁸ E.g. the Corrupt Practices Act of 1883.

¹²⁹ The German constitution has a provision (Article 21) which obliges the parties to both intra- and inter-party democracy. Lack of any cultural basis for the consensual formation of political will, coupled with an unfortunate recent political history marred by Nazism, has brought about a strong constitutional curb on the activities of political parties. For an illustration of the Finnish party system regulated by a similar standard to German's, see Sundberg 1997.

¹³⁰ However, as Murphy (1990: 151-152) notes, its consensual components can not be said to be democratic.

¹³¹ Indeed, informality and secrecy are the main features of the British political institutions, and thereby even the office of Prime Minister and the role of the Cabinet are dependent upon political conventions rather than legal arrangements. It is difficult to say that this lack of formality alone is responsible for the democratic

intact at national level. That is to say, in British democracy a divergence still remains between the idea of the non-recognition of political parties as official institutions and the reality manifest in Benjamin Disraeli's observation, "Without party, parliamentary government is impossible". (Quoted in Blackburn 1995: 4)

5.2.1 Separation between candidate selection and nomination

One result of the non-recognition policy is the legal distinction between the 'nomination' and 'selection' of candidates. According to Ranney (1981: 12), 'nomination' is the legal process¹³² by which election authorities certify that a person is a qualified candidate for public office and print his or her name on the ballot, while 'selection' is the extralegal process by which a political party chooses its own candidates. Therefore, from a legal perspective, it is not necessary for candidates to have gone through the party selection procedure. Since 1969, a change to the electoral rule allows the ballot paper to include a description of a candidate's political affiliation.¹³³ But this change does not mean that the electoral law recognises the entity of political parties as it does not require them to register for electoral purposes. As a result, political parties still remain outside the legal process of election.

5.2.2 No regulation of national party expenditure

Another consequence of the non-recognition policy is the absence of any requirement to publish the campaign expenses of political parties.¹³⁴ It is the election agents of parliamentary *candidates*, not constituency *parties*, that must provide details of campaign budgets.¹³⁵ The most striking fact is that the national campaign expenditures of parties are unregulated by the election legislation.

deficiency in the British constitution. However, it would be safe to say that such informality *per se* can justify neither the *status quo* nor any objection to the movement towards the institutionalisation of political parties.

¹³² The details of nomination procedures for candidates in general elections are laid down in Parliamentary Elections Rules, *i.e.* Rules 6-17 in Schedule 1 to the Representation of the People Act 1983.

¹³³ Each candidate is allowed to formulate this description in no more than six words. See Parliamentary Elections Rules, s.6(3).

¹³⁴ However, the main parties voluntarily publish their financial accounts each year, though there are considerable differences between these publications in their format. But this is not enough to avoid a strong demand for legal regulation of the annual auditing of accounts as well as for a common standard relating to the disclosure of large donations. See Blackburn 1995: 330.

¹³⁵ The Representation of the People Act 1983, s.81.

In fact, mainly due to the legal campaign limit, there has been no significant inequality in the expenditure of candidates of the two major parties at general elections. Furthermore, the extreme disparity in the resources of the two main parties – sharply evident in the early 1980s, in particular at elections - has been for the time being eliminated. However, there is still a great asymmetry of resources especially between the two major political parties and small parties. It is true that there is no irrefutable evidence that massive spending has any impact on the final parliamentary outcome. This does not mean, however, that money is of no importance to the election campaigning efforts of the political parties, and that there is no room for a tightening of regulation in this area. The increasing election expenditure of the two major parties is of some concern here. For example, in the 1997 general election, Labour spent £17 million, £10 million more than in the 1992 election. (See *The Guardian* 6.1.98, p.3) Over £7 million was spent on advertising in the press and on posters during the year 1996/97. (See Table 12.3 in Butler & Kavanagh 1997: 242 and Table 7.4 in Blackburn 1995: 354) Given the principle that the business of politics should be to strengthen democracy's control over money, and the fact that national expenditure tends to hugely outstrip local expenditure, this focus on individual candidates rather than national parties is no longer tenable. (See Chapter 8, Section 3)

5.2.3 The absence of party privilege

(i) Political polarisation

In the Westminster model, where no legal checks exist to avoid 'elective dictatorship' and where at the same time the judicial commitment to positive democratic rights is questionable, the autonomy of political parties, as the essence of the democratic political process, can be easily undermined. The political safeguards on which the British system depends to cope with this problem have turned out to be inadequate, at least since the 1970s when the "post-war consensus" began to crack. In his *Britain against Itself*, Samuel Beer (1982b: esp.15) argues that the post-war settlement which resulted in adversarial party politics and a relatively high level of social welfare has had paradoxical effects. Political stability, based on adversarial party politics, has deprived the electorate of a real choice between different views of the "common" good by limiting the scope of choice to a narrow range of "particular" interests with which the two major parties are aligned. The steady

growth of pressure groups has resulted in the two main parties now simply competing for group support with no other objective than gaining office. This has given the greater scope for expansive competition in the name of a Keynesian welfare state, all of which, since the 1960s, has turned what was a post-war consensus into a "swamp of pluralistic stagnation". The only political response to this situation has been yet more polarisation and an ending of consensus politics.

(ii) Partisan legislation and its effects on political parties

No one political party can, of course, be blamed for this trend towards polarisation.¹³⁶ However, in this regard, the Conservative attitude to the crisis of consensus politics has had the most deleterious effect on the party system as a whole. This is partly because the party has been in power for most of the time since the late 1970s. During her long premiership, she had attempted to substitute 'conviction' for 'consensus' politics. (See Jenkins 1987: Part I, esp. ch.3) By conviction, she leant towards the ideology of the New Right. As some political scientists¹³⁷ suggest, one tenet of the Thatcherism was its fundamental individualism, which undermined the premise of the collectivist polity and, as a result, eroded the status and autonomy of intermediary institutions ranging from trade unions to local authorities.¹³⁸ Indeed, in an interview to *The Sunday Times* in 1981, Thatcher herself made this clear:

What's irritated me about the whole direction of politics in the last thirty years is that it's always been towards the collectivist society. People have forgotten about the personal society. Economics are the method; the object is to change the heart and soul. (Quoted in Jenkins 1987: 159)

¹³⁶ For a period of some twenty years, the Labour Party suffered an ideological crisis which we shall examine later. (See Chapter 6, Section 4) For an interesting comparison of Tony Benn, a radical Labour MP, with Mrs. Thatcher in terms of their similar reactions from different political viewpoints to the post-war consensus, see Jenkins 1987: ch.3.

¹³⁷ For example, Beer (1982b: 180) and Grant (1989: 10-11).

¹³⁸ Grant's survey (1989) shows that the Thatcher government's actions against a range of intermediary bodies were not accidental or random but informed by a particular political design. It also shows that the scope of institutional restructuring was not confined to the well-known changes in relation to local authorities and trade unions but was extended to the management side of industry and the Church of England. Yet, it should be pointed out that the Thatcherite reform drives have generated a new type of intermediary institution, what is usually called the QUANGO, though this institution is somewhat different from its predecessors since it relies on public choice theory and atomistic individualism rather than collectivism.

In carrying out her radical reform of traditional British institutions, the political system itself was not exempt. In breaking the old constitutional mould, Mrs Thatcher's longer-term political objectives included a restructuring of the party system in favour of a two-party system in which the parties would be committed to economic freedom. Perceiving that it was the post-war settlement that paved the way for a socialist era, regarded by Thatcher (1993: 7) as in every respect a "miserable failure", her consistent attack on socialism aimed at bringing to an end a particular type of socialist party in the British politics:

I have always regarded part of my job as ... *killing Socialism in Britain*. ... Socialism has only one direction in which to go, and that is further left; because there is a welfare state and there will continue to be a welfare state, and the only way Socialism can demonstrate ... is to go much further left, into making people depend on government for everything: their housing, their welfare payments, everything and deny them fundamental independence. That is the kind of Socialism that I want to kill because ultimately it denies freedom. ... The new conventional wisdom is that that is not on for Britain ever, it is not British, it is outside their character ... You then get to *two parties for which that kind of thing is unacceptable* and then *you have two parties which I believe is[sic] in fundamental keeping with the character of Britain, and that is part of my role and I will not be satisfied until I have done it.*" (interview in *Financial Times*, 14 Nov 1985, p.28. Emphasis added)

The most important measures for implementing this political goal were enshrined in the subsequent trade union legislation of the 1980s, which impacted both implicitly or explicitly, on the Labour Party. The Trade Union Act 1984 (now the Trade Union and Labour Relations [Consolidation] Act 1992) introduced two significant restrictions on trade union donations to political parties. Under this law, political funds of trade unions were required to be periodically reviewed by members. (Now Secs. 73-81 of the 1992 Act) In addition, as the scope of political objects expenditure of trade unions has been considerably enlarged, more legal controls on trade unions' political activities are made possible. (Now Secs. 71-72 of the 1992 Act. See also Secs. 82-84) Although trade unions were, to be sure, the direct targets of attack, when these legal regulations was proposed, it was also generally accepted that, given the historical and organisational link between unions and the Labour Party, another target sought by such legislation was the Labour Party itself. (See Grant 1987: 59) In her autobiography, Thatcher (1993: ch. X, esp. 272 - 276) revealed that the regulation of unions' political levy was part of a political aim to "disarm" the Left. Indeed, more than 50 per cent of the Labour Party's finances were until then made up of trade union donations. In the circumstances, it was natural that the then Shadow Employment Secretary,

John Smith MP, argued that the proposed legislation "represents a transparent attempt to cause financial difficulties to the Labour Party and to undermine the Opposition's effectiveness." (*Hansard* [H.C.], Vol. 48, Col.171: 8 Nov 1983)

(iii) A need for party privilege

The impact of this legislation on trade unions and their relationship with the Labour Party was quite contrary to the Conservative hope so that the Thatcher government can be said to have scored "an own goal". (See Grant 1987: 60, 69-71; Steele, Miller & Gennard 1986: 460-464) Ballots held as required by these regulations turned out in favour of the maintenance or introduction of the political levy,¹³⁹ and the unions' organisational relationship with the Labour Party was not damaged but, on the contrary, legitimated. Indeed, these measures, combined with greater trade union democracy, including a secret ballot for union elections and ballots before strikes, are acceptable to a broad spectrum of political opinion as part of the rationalisation or modernisation of the British political system. In fact, support for such reforms was not confined to the Conservatives, for the newly formed Social Democratic Party (SDP) was even more anxious to achieve such changes. In its political pamphlet *Reforming the Unions*, SDP demanded even further change, *i.e.* 'contract-in' procedures rather than the existing 'contract-out'.¹⁴⁰ Moreover, the Labour Party has since the 1980s itself tried to reduce the power of unions over the party as part of its modernisation plan, and in the 1997 general election campaign it promised not to overrule the Thatcherite legislation.¹⁴¹ In retrospect, the Thatcherite trade-union legislation can, in fact, be seen as having provided Labour with a crucial opportunity to overhaul and modernise its power structure.

However, neither this unforeseen development¹⁴² nor other desirable aspects of such reforms can entirely diminish our concern regarding the potential dangers inherent in the

¹³⁹ For the results of trade union political fund ballots, 1985-1986, see Ewing 1987: 197-200.

¹⁴⁰ In fact, it was this SPD's proposal that the Conservative Government favoured in its green paper *Democracy in Trade Unions*, Cmnd. 8778 (Secretary of State for Employment 1983: paras. 88-98), published a year before the enactment of the Trade Unions Act of 1984.

¹⁴¹ "Key elements of the 1980s trade union reforms to stay", The 1997 Labour Manifesto – Help Create Successful and Profitable Businesses, page 3 - reproduced in <http://www.labour.org.uk/views/manifesto/britain/profit%5F3.html>. See also Chapter 6, Sections 4.4 - 4.5.

¹⁴² For an illustration of how much impact political consideration of the Thatcher government in relation to the political levy had on the final content of the Act, see Grant 1987: 60-63.

lack of party privilege. What matters here is the fact that the autonomy of a major political party was threatened by a form of partisanship, with which the present non-recognition policy was unable to cope. It is important to note that an introduction of certain measures to protect parties is essential to the good working of the party system and, thus, goes hand in hand with a modernisation of the British constitution in general and a reform of the political funding system in particular. A number of legal safeguards against partisan institutional change having bearing on the life of political parties include the setting up of an independent body, one important task of which will be to take charge of such matters, and a scheme of state funding to support their basic democratic activities. (See Chapter 8)

5.3 *The Sex Discrimination Act 1975 : the sole direct regulation of the activities of political parties*

Although in Britain legal control over the affairs of political parties is extremely limited, it does not mean that there is no statutory regulation of their activities. One statute dealing directly with their affairs is the Sex Discrimination Act 1975. The Act has been so far seen as aiming at relieving rather than imposing legal obligations. (See Ewing 1987: 6) For this Act has an exemption provision (Section 33) for political parties in order to permit “special provision for persons of one sex only in the constitution, organisation or administration of the political party”. Therefore, it has been interpreted, for example, that the special women’s sections of the Labour Party can continue in spite of the Act’s general provisions. (See Walker 1975: 133)

However, in a recent case, *Jepson and Dyas-Elliott v. The Labour Party* [1996] IRLR 116, where women-only shortlists of the Labour Party were contested on the ground of sex discrimination, the Industrial Tribunal confined the scope of this exception by holding that Section 33 is not intended to endow political parties with a “clear” general exemption from sex discrimination claims. (*Ibid.*, para. 10 at 117) In the tribunal’s view, Section 33 is intended to offer a special exception only in relation to one specific section of the Act, *i.e.* Section 29 of Part III applying to discrimination in the provision of goods, facilities, and services. The tribunal’s interpretation was that Section 29 was intended to cover “situations where persons or bodies provide goods, facilities and services to *the public*, that is to say what may broadly be described as ‘trade’ or matters similar thereto”. (*Ibid.*, para.24 at 118.

Original emphasis) As a result, it held that women-only shortlists of the Labour Party was contrary to Section 13 of the Act which makes it unlawful for a qualifying body to discriminate against applicants on grounds of sex. In short, the scope of party exemption under the Sex Discrimination Act 1975 became highly circumscribed.¹⁴³

Whatever scope of party exemption the Sex Discrimination Act 1975 envisages, however, it can be seen as having at least one constitutional significance, in that it distinguishes a political party from other voluntary bodies. Voluntary bodies are exempted from Section 29 by a separate section (S.34). Whether or not this separate treatment recognises the special status of a political party is open to debate. Walker (1975: 133) argues that over and above the exemptions granted by Section 33, a political party is also entitled to benefit from Section 34 as British law regards a political party as a voluntary association. If this view is correct, political parties can restrict membership to persons of one sex as provided in Section 34(2). However, although, as seen above, political parties can under common law be organised for almost any purpose, there is no reason why the exemption section intended to cover voluntary associations should be so widely interpreted as to enable political parties to restrict their membership to “persons of one sex (disregarding any minor exceptions)”. (See Davis 1995: 214) The Sex Discrimination Act should, on the contrary, be interpreted as recognising the special role of political parties in the democratic process, something which is rarely found in the present legal system. This interpretation accords with its definition of a political party as a body having as “its main object, or one of its main objects, the promotion of parliamentary candidatures for the Parliament of the United Kingdom”. (Section 33(1)(a)) Indeed, in *Jepson* case, the tribunal stresses the ‘public’ role of political parties by declaring that the Sex Discrimination Act aims to realise “the rights of individuals to have equal opportunities *in an area of considerable public interest*” (*Jepson* case, [1996] IRLR 116, para. 7 at 117. Emphasis added).

5.4 *Some indirect restrictions*

It should also be pointed out that some indirect restrictions have been made on the affairs of political parties. Restrictions of this kind fall into two categories. The first category is

¹⁴³ The tribunal’s stance seems to be in accordance with the rules and policies relating to sex discrimination in

related to restrictions affecting the very existence of political parties. As a result of the negative conception of freedom of association, these restrictions mostly manifest themselves in the regulation of the individual's freedom of association. They are related primarily to certain considerations of public order and national security. The second category concerns the regulation and control of those parts of civil society which are of particular relevance to political parties. It includes, among other things, restrictions on political broadcasting and the regulation of those interest groups involved in party politics.

5.4.1 Restrictions related to the existence of political parties

(i) Restrictions on the basis of public order

The Public Order Act 1936, Section 1 provides that “any person who in any public place or at any public meeting wears a uniform signifying his association (a) with any political organisation, (b) or with the promotion of any political object, shall be guilty of an offence.” It was originally intended to counter the rise of fascism in the 1930s. However, in later years, members of the Ku Klux Klan and supporters of the IRA were treated under this section. (See Ewing 1994: 244) This section does not make it an offence to be a member of any particular association or party, but it certainly does aim to restrict the activities of political associations. This Act (Sec. 2) also makes it an offence to organise and either train or equip members or supporters of any association which uses or might possibly use physical force to promote its political objectives. Thanks to a growing threat of terrorism over recent decades, legislation has been enacted which specifically limits the right to organisation. The Prevention of Terrorism Act 1989 makes unlawful not only membership but also participation in the activities of terrorist organisations, the list of which is determined by the Secretary of State.¹⁴⁴ Yet, considering the fact that, in the case of terrorism, the organisation *per se* causes public disorder, this exceptional Act cannot be construed as a change to the general policy relating to freedom of association.

(ii) Restrictions on the basis of national security

There are also restrictions for the purpose of defending the sovereignty of the state from the threat of subversion and fears for external security, though, with the end of the Cold

the European level. In this regard, see Davis 1995: 211-212.

War, most of these restrictions have become redundant. (See Bradley & Ewing 1997: 609-610) This form of restriction includes the purge and the positive vetting procedures in the civil service. (See Bailey, Harris & Jones 1995: 492-499) Firstly, members of a “subversive group” are to be transferred or sacked from sensitive civil service posts. It is for the minister to determine whether a group is “subversive”, aiming to “undermine or overthrow parliamentary democracy in the United Kingdom of Great Britain and Northern Ireland by political, industrial or violent means”.¹⁴⁵ Secondly, the positive vetting procedures seek from the start to keep members or supporters of disapproved organisations out of all posts vital to national security. These restrictions, like those relating to public disorder, are not primarily directed against organisations *per se*. But, by not allowing members the right of participation in the civil service, they are obviously aimed at curbing any association regarded as harmful to national security.

(iii) Comparison with the German approach: pluralist versus liberal regime

These restrictions relating to public order and national security are aimed at preserving the free constitutional order *per se*. Thus, they can be said to play a similar role to the provisions in the German constitution intended to prevent the subversion of free constitutional order. Indeed, they have a similar significance in terms of practical effect, though different in terms of both the direct object and source of law. In the 1950s, the German Constitutional Court banned the *Sozialistische Reichspartei* (SRP), a neo-Nazi organisation, and the Communist Party (KPD), under Article 21[2] of the German Constitution forbidding parties to “impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany”.¹⁴⁶ (See Currie 1994: 215-220) Therefore, both Britain and Germany have adopted the same policy embodied in Milton’s view that the enemies of freedom are not entitled to its blessings at least as far as freedom of association is concerned. (See John Milton, *Areopagitica*, in 4 The Works of John Milton 349 [Frank Allen Patterson et al., eds. 1931] referred to in Currie 1994: 213)

¹⁴⁴ See Secs.1-2. See also Bradley & Ewing 1997: 609, 682-688; Bailey, Harris & Jones 1995: 301-320.

¹⁴⁵ See 1985 *Security Procedures*, Prime Minister Statement, 3 April 1985, introduced in Linn 1990:59. On this widened definition of “subversive” activities, see generally Linn 1990; Ewing 1994: 245.

¹⁴⁶ For a summary of the cases and valuable notes, see Kommers 1997: 218-224.

However, despite this practical similarity regarding freedom of association, the way in which Germany treat political parties is significantly different. In Germany, the constitutional party regulation forms part of so-called 'party privilege'. In the wake of the second world war, German Basic Law institutionalised political parties as essential parts of the political process and thereby they became entitled to more privileges than other private associations. This was the result of a movement away from a liberal constitutional ideology which refused to recognise the existence of intermediary associations between the free individual and the will of the entire people.¹⁴⁷

On the other hand, given the British scenario, the organisation of a political party, even one having a high propensity to cause public disorder, cannot be prohibited unless there is a specific statute or statutory provision for that purpose.¹⁴⁸ In *Verrall v. Great Yarmouth Borough Council* [1980] 1 All ER 839, Lord Denning MR held that the fact that a party has a political objective, which could be interpreted as striving to encourage racial hatred, cannot prevent it from working as a political party. Law only begins to be concerned with such an organisation when it abuses those freedoms afforded to it as a political party, for example, when it seeks to promote violence, propagate racial conflict or undermine the structure of society itself. (See [1980] 1 All ER 839, 842 and 844-845)

Yet, it is important to note that this seemingly wide freedom given to political parties is not a result of a rational effort aimed at endowing them with particular privileges. It is a practical consequence of a liberal constitution, depending on what Waltman (1988: 121) called "faith in a genteel political style", coupled with a negative conception of freedom of association. This background, as we have seen, is also what has given rise to a policy of non-recognition of political parties. Thus, there is no requirement for parties to register, conform to democratic principles in the decision-making process (as required by the German Constitution), or disclose information on income and expenditure. Neither is there

¹⁴⁷ See the opinion of the German Constitutional Court in the *Sozialistische Reichspartei (SRP)* case [1952] 2 BVerfGE 1, extracted in Kommers 1997: 219.

¹⁴⁸ See Roskill and Cumming-Bruce LJ's opinions in *Verrall v. Great Yarmouth Borough Council* [1980] 1 All ER 839, at 848: "unless and until some political organisations are proscribed as unlawful or legislation such as the Public Order Act 1936 is extended to make their activities unlawful, it is the duty of the court to treat all political parties as equal before the law ..." (*per* Roskill LJ); "If there is a case for silencing a group which wishes to organise a political party, it is for the Crown in Parliament by statute to restrict the right of free speech or free association." (*per* Cumming-Bruce LJ)

any statutory control of party rules and programmes, or any direct restrictions on either raising or use of funds.

5.4.2 Restrictions related to control of civil society having relevance for political parties

(i) Regulation of political parties through media control

(a) The media and the political system

In modern society, the importance of political communication is rapidly increasing.¹⁴⁹ It is apparent that the modern mass media have not only a negative but also a positive influence on society. On the one hand, the media makes it possible for the public to gain access to a variety of information thus facilitating its ability to make choices in the political and social markets and thereby to investigate critically the political and social mechanisms surrounding it. On the other hand, the media tends to promote “manufactured publicity” by way of increasing selective constraints on communication and thereby forcing the public to be politically indifferent “consumers”. (Habermas 1989[1962]: 216; 1996[1992]: 376ff) It is hardly surprising that political parties, which are forced to sell policies to an anonymous public in order to gain power, are interested in what Pinto-Duschinski (1981: 253) calls “the most powerful advertising medium”.

(b) Regulation of political parties' use of television in Britain

Broadcasting as a public service

Although the effect of the media on politics is complex and not easily measurable, the system for control of the British media focuses largely on the possible negative effects of partisan broadcasting or the political manipulation of media. While the practice of newspaper partisanship continues with no dramatic change (see Seymour-Ure 1996: 214-224), what is conspicuous in broadcasting is that it is set up to be a form of public service, which serves to prevent this relatively new medium from becoming a tool for political propaganda.¹⁵⁰ This ideal has been maintained even in the face of widespread commercial broadcasting. Thus,

¹⁴⁹ See generally, Watts 1997: Introduction.

¹⁵⁰ It was John Reith, the first General Manager of the BBC, who had a crucial role in consolidating the BBC as a public service by converting the originally commercial company into an established national institution in 1927 under a Royal Charter. (See Barnett & Curry 1994: 6 ff; Briggs 1961: ch.5) For a view focussing on the importance of political and social change rather than any individual influence, see Curran & Seaton 1997: ch.8.

since its inception in 1954, commercial television has been placed under the close scrutiny of a licensing body, now under the Broadcasting Act 1990 the Independent Television Commission (ITC).¹⁵¹

The ban on commercial political broadcasting and free party political broadcast

One obvious device for the regulation of the potentially negative aspects of broadcasting is the banning of political commercials. The Broadcasting Act of 1981 banned the buying of advertising space for political purposes *via* systems of electronic mass communication. The Broadcasting Act of 1990, which replaced that of 1981, strengthened the control of the broadcasting by putting the Broadcasting Standard Council and Broadcasting Complaints Commission on a statutory footing.¹⁵² Moreover, it empowered the ITC - which had replaced the Independent Broadcasting Authority (IBA) before the 1990 Act - to ensure that a licensed service for commercial broadcasting companies must not include "(i) any advertisement which is inserted by or on behalf of any body whose objects are wholly or mainly of a *political nature* or (ii) any advertisement which is directed towards *any political end*". (See Sections 8 (2)(a). Emphasis added).

However, this does not mean that access to broadcasting for political purposes is denied altogether. Rather, air-time is made available to the parties by the broadcasting authorities on the basis of an agreement drawn up by the Government, the Opposition and the BBC in 1947. (See Ewing 1987: 109) The Broadcasting Act of 1990, Section 8(3) permits commercial broadcasting companies to allow any legal party to broadcast as part of a licensed service, and in this they opted to follow the informal practice established by the BBC. Section 36 of the Broadcasting Act 1990 requires the ITC to provide rules with respect to party political broadcasts and the ITC Programme Code provides such rules. According to the current format of the Code, the political parties represented in the House of Commons and the Scotland National Party in Scotland and Plaid Cymru in Wales may use, free of charge, broadcasting facilities under an agreement between the political parties and the broadcasting companies in

¹⁵¹ Another classical justification for the regulation of broadcasting is fact that there are a limited number of airwaves and thus inevitably they are monopolised by a limited number of broadcasting companies. See Elliott 1981: 684. With a number of cable and satellite facilities now available, that justification for rigorous broadcasting regulation becomes much weaker. See Barendt 1993: 96.

¹⁵² The Broadcasting Act 1996 merged the two bodies to one body known as the Broadcasting Standards Commission.

the Committee on Party Political Broadcasts. In the case of the annual series, which are currently at a maximum of five broadcasts per party, the number allotted to each party is determined by the number of votes cast for it in the previous general election and this reflects a long-standing convention of equality of time between the Government and Official Opposition since 1962. (Section 4.1(i)) In the case of party election broadcasts, apart from electoral support at the previous General Election, the number of candidates nominated is considered. (Section 4.1(ii))¹⁵³

The principle governing this arrangement is clearly one of impartiality and balance. The crucial issue is the distribution of time among eligible political parties. However, there have been only a handful of political or legal disputes regarding air-time partly because the established parties themselves have taken part in bargaining in an *ad hoc* Committee on Party Political Broadcasts.¹⁵⁴ As Alan Boyle (1986: 578) points out, this arrangement has the merit that it exposes the broadcasters to less risk of criticism and controversy by involving the established parties in the decision-making process. Yet, from the electorate's point of view, the outstanding demerit of this arrangement is that it can be used to prevent a free flow of communication. Boyle (1986: 574 ff) argues that this system has consolidated British broadcasting's bias in favour of the existing model of parliamentary government by confining the application of impartiality to the parliamentary model of politics and thus making the difference between parliamentary groups and political groups outside Parliament absolute. However, this party privilege in relation to political broadcasting *per se* is not a problem. As Barendt (1993: 170) suggests, the unique public nature and role of political parties in the democratic process, especially elections, provides a strong justification for such party privilege as a way of meeting their political expenses.

The fundamental problem lies in the total ban of political commercials which inevitably raise issues concerning freedom of expression. (See Barendt 1993: 169-170) Even though

¹⁵³ In January 1998, proposals to cut party political broadcasts were made jointly by television and radio chiefs. The plans include scrapping the tradition of party political broadcasts between elections (including post-Budget transmissions) and cutting the number of parties allowed to make broadcasts. They proposed that political broadcasts be made only at election time and minority parties which contest fewer than one sixth of the total number of seats would no longer be granted air-time. (See *The Times* 21.1.98, p.8) Given the ban on political commercials, these changes mean the abolition of the only opportunity for political parties to communicate with the public without editorialising by journalists. Obviously, such proposals, if accepted, would constitute a serious diminution of freedom of expression.

¹⁵⁴ Yet the right to decide how much time party political broadcasting can be allowed rests formally with the broadcasters themselves.

political commercials undoubtedly have some negative effects, such an extreme policy can encroach upon the foundation of a free society by making it difficult for minority groups with unpopular opinion to get access to broadcasting. Given that a constitutional right of access to the broadcasting media is not generally recognised,¹⁵⁵ this problem can be counteracted only if broadcasters are willing to provide the public with enough political information through balanced political programmes and news reporting.

Regulation of television political reporting

Regulation of the electronic media is not confined to commercial political broadcasting. Considering the limited time given to party political broadcasting, the most important area affecting the political pendulum is news and current affairs broadcasting which allows less room for external influence and mostly depends on the editorial judgement of broadcasters. The British regime governing this area prefers a loose regulatory device combining self-regulation and external regulation¹⁵⁶ to a more positive approach allowing the public enforceable access rights.

Impartiality and political broadcasting

Both the BBC and commercial television companies are subject to regulation, to ensure their political impartiality, although the basis and form of their regulation are different. Commercial television is subject to the principle of impartiality stipulated by the Broadcasting Act 1990. The BBC, on the other hand, has no statutory duty to act with impartiality in political matters.

Under the Broadcasting Act 1990, the ITC is required to ensure that "any news given (in whatever form) in [commercial television] programmes is presented with due accuracy and impartiality". (Section 6(1)(b)) Apart from this general principle, the 1990 Act specifies a particular requirement of impartiality in relation to political programming, in that the ITC must ensure that "all the expressions of the views and opinions of the person providing the

¹⁵⁵ The European Commission on Human Rights rejected a challenge of one British political group against the refusal of the BBC and IBA to broadcast its political programmes. See *X & Assoc. of Z v. UK*, 38 Collection of Decisions 86.

¹⁵⁶ E.g. regulation based on the principle of impartiality. See the ensuing section.

service on matters which are of political or industrial controversy or relate to current public policy" are excluded from programmes. (Section 6(4))

The BBC, on the other hand, is subject to public regulation on the basis of the Royal Charter (BBC Charter) and the associated agreement (BBC Agreement)¹⁵⁷ between that body and the government, first made in 1926 and renewed every ten years or so. Based on the requirement for impartiality in Sec. 7 (1)(f) of the Royal Charter, the present agreement¹⁵⁸ introduced¹⁵⁹ obligations equivalent to those pertaining to independent broadcasters under the 1990 Act.¹⁶⁰ This new agreement, effective until 2006, contains additional requirements that the governors establish an impartiality code giving programme makers clear guidance on the standards expected of them. (See BBC Charter, Sec. 7 (1)(f); BBC Agreement [Cm 3152], Sec. 5.3) However, this does not mean that the BBC becomes subject to an explicit legal duty to act with impartiality in political matters. Under the old agreement of 1981, Hutton J. regarded the BBC as having no legal duty enforceable by the courts to act with impartiality in political matters.¹⁶¹ Indeed, under the circumstances governors of the BBC are virtually judge and jury in their own affairs and there is little room for any external legal regulation in that respect.¹⁶²

Statutory requirements of reasonable standards of broadcasting

The broadcasters are also bound by statutory duties to ensure that programmes be fair and just in their treatment of individuals or collectives and protect their privacy. (See the Broadcasting Act 1996, Sec. 107 (1)) They are also subject to the supervision of the Broadcasting Standards Commission in relation to violence, sexual conduct and matters

¹⁵⁷ In legal theory, a Royal charter is granted by the Crown under its non-statutory powers so that it is noted to Parliament for debate but need not be approved by the latter. The associated agreement needs to be approved by Parliament but its approval is on an all or nothing basis and thus MPs are unable to move amendments to its terms.

¹⁵⁸ This was approved on January 25, 1996 by the House of Commons and came into effect on May 1, 1996.

¹⁵⁹ Even before this introduction, the BBC had a self-imposed rule, recognised by Resolutions of the Governors. (See Barendt 1993: 103)

¹⁶⁰ See BBC Agreement [Cm 3152], Section 5; *Hansard* [H.C.], Vol. 271, Col. 1172 ff: 15 Feb 1996; *Hansard* [H.L.], Vol. 568, Col. 1007: 27 Jun 1996.

¹⁶¹ See *Lynch v. BBC*, [1983] 6 Northern Ireland Judgements Bulletin.

¹⁶² Boyle (1986: 591) argues that the BBC's founding by charter is to give it a measure of political independence, not to immunise it from judicial scrutiny and therefore a way should be open for challenging the BBC in the courts. However having regard to the reluctance of the judiciary to act as censors of broadcasting, it is unlikely that this view will be taken up by the courts at least in the near future.

relating to "taste and decency". (See the Broadcasting Act 1996, Sec. 109 (2); BBC Agreement [Cm 3152], Sec. 5.1(d))

Self-regulation and impartiality: freedom from government interference?

It is important to note that the burden to comply with these duties is placed on the broadcasters rather than individual programme makers, and also that a certain amount of room is left for government interference which may bring the notion of impartiality into question. (The ITC Programme Code, Section 3.2(i)) Ironically, this responsibility may give rise to controversy over the censoring of party political broadcasting. During the 1997 general election campaign, Channel 4 refused to show a British National Party election broadcast in full on the ground that some scenes degrading identifiable black people infringed Independent Television guidelines requiring their permission to be filmed. (See *The Independent*, 25.4.97, p.11) Underlying such a technical justification for censorship is clearly an intent to censor party broadcasting promoting racial hatred. According to Section 4 of the ITC Programme Code, editorial control of the content of party political broadcasting rests with the originating political party. However, the section also provides that this editorial freedom of the party does not rule out the broadcasters' duty to ensure that the broadcasts conform with the requirements of the Broadcasting Act. The High Court held up this right (or duty) in a case brought by the Prolife Alliance challenging a BBC decision to remove almost half its five-minute party political broadcast on the ground that it would offend public taste under the Broadcasting Standards Commission Code. (See *The Independent*, 25.4.97, p.11; *The Times*, 25.4.97)

What concerns us here are the institutional implications of this system giving almost complete discretion to broadcasters. Despite its flexibility and responsiveness, there is a danger that, unchecked, this discretion could unduly limit freedom of communication. Indeed, the complex relationship of the broadcasters, programme makers, consumers and government raises a number of no less complex questions in terms of the fair and balanced provision of information. (See Barendt 1993: ch. II) On the one hand, the autonomy of the broadcasters vis-à-vis external interference is essential to the maintenance of both the credibility of political programmes and informed democracy. On the other hand, this same autonomy can lead to a serious loss of public accountability on the part of broadcasters.

Politicisation of broadcasting

The trend towards politicisation of the media can only reinforce the fear of a diminished accountability. John Keane (1991: 95) asserts that we are entering a new era of political censorship, the "age of the democratic Leviathan", in which key parts of life are structured by unaccountable political institutions equipped with old and new 'pens' of various shapes and sizes, ranging from emergency powers, armed secrecy, lying and state advertising. On the other hand, government control of appointments to both the ITC¹⁶³ and the governing body of the BBC¹⁶⁴ makes broadcasting vulnerable to manipulation by partisan politics. The traditional practice of making appointments to these bodies, which was calculated to maintain a balance of party political interests, broke down under the Thatcher government. Barnett & Curry (1994: 17-20) and O'Malley (1994: ch.8) argue that "balanced politicisation" has deteriorated into "unbalanced politicisation" since her time in office. However, potentially a greater source of fear lies with those legal powers which up to now have rarely been invoked.

Legal powers of government to interfere in broadcasting

As far as commercial television is concerned, the ITC has the right to vet programmes to ensure that they are neither biased nor offensive. Section 10 of the Broadcasting Act 1990 gives the Secretary of State or any other Minister of the Crown the power at any time to order the ITC to prohibit its licensees from transmitting any item or programme. In relation to the BBC, similar government powers are now contained in Section 8 of the agreement associated with the BBC Charter. Thus, in 1988 the Home Secretary could order the BBC and the IBA not to transmit interviews with members or supporters of Sinn Fein, the alleged political wing of the IRA but also a lawful political party. Interestingly, even after this ban was loosened, the real voices of Sinn Fein members and others covered by the order, were banned. In the case of the BBC, there is an additional power in the hands of the government to ask the corporation to "broadcast and transmit" whatever such Ministers request. (Cm 3152 [1996]: Sec. 8.1) Any

¹⁶³ The commissioners of the ITC, no less than eight nor more than ten exclusive of a chairman and a deputy chairman, are appointed by the Secretary of State. See the Broadcasting Act 1990, Sec. 1 (2).

¹⁶⁴ The Governors of the BBC who are in charge of the formulation of broadcasting policy and who undertake certain self-regulatory functions are appointed by the Crown in Council in legal sense, but in reality by the Prime Minister. See BBC Charter 1996, Sec. 8 (1).

partisan abuse of this additional power has been restricted since 1969¹⁶⁵ by the establishment of an automatic right of reply to broadcasts by the opposition.

Indirect government influence on current affairs programmes

Apart from this legal or contractual power, the use of which may be rare due to the high potential risk of such action, there is huge room for more subtle political influence on programme makers and broadcasters. In 1985, the then Home Secretary, Leon Brittan, put political pressure on the Board of Governors of the BBC to ban its programme, "At the Edge of the Union" dealing with the political and military strife in Ulster. The Board's historic decision to ban the broadcast shows that the independence of British broadcasting was open to indirect political censorship.¹⁶⁶ So far as the BBC is concerned, as Barnett and Curry (1994: 260 ff) suggest, what makes the problem worse is the arcane constitutional status of the BBC. By being constituted by a Royal Charter rather than an Act of Parliament, the BBC appears to be independent of government or political pressure. But as Viscount Caldecote argued in the House of Lords' debate on the BBC Charter, the existence of the associated agreement endowing the Secretary of State with substantial powers in relation to the workings of the BBC makes its independence somewhat "spurious". (See *Hansard* [H.L.], Vol.568, Col. 20: 9 Jan 1996) One popular solution to this problem is to construct a device to secure genuine political accountability through Parliament. This includes scrutiny by the National Heritage Select Committee rather than a simulated accountability by way of ministerial whim and the newly¹⁶⁷ introduced direct but less effective accountability to audiences. So far as the constitution of the ITC and the appointment of BBC governors are concerned, the relevant procedures need to be more open and democratised; for example, as Barendt (24 Jun 1992, *The Independent*) suggests, by allowing a variety of groups such as the churches, the CBI, the TUC and even the major political parties to take part in constituting those bodies.

¹⁶⁵ In this year, an *aide-memoire*, an agreement between the parties and the BBC in relation to this type of political broadcast, was formulated. (See Barendt 1993: 182)

¹⁶⁶ For an illustration of the case and implications, see Barnett & Curry 1994: 29-35.

¹⁶⁷ Sec. 7 (1)(e) of the Royal Charter.

British broadcasting's bias in favour of the parliamentary model of politics

Another set of problems is raised by the fact that British broadcasting is operating within the boundaries set by the parliamentary model of politics. As has been stated above, there is a danger that social and political minorities with unpopular views tend to be in a prejudiced position which makes it difficult for them to gain access to broadcasting time.¹⁶⁸ In addition, in practice, the main parties, particularly government ministers can easily secure publicity for their activities by way of press conferences or interviews on current affair programmes. How and to what extent these events are broadcast are matters for the broadcaster's discretion. This formula makes it technically difficult to secure the equally important immediate right of reply. As Barendt (1993: 169, 183) points out, these dangers are inherent in a system of broadcasting regulation preferring general principles of impartiality and fairness to enforceable access rights.

However, broadcasting bias does not always function in one direction. Apart from those criticisms relating to minority opinions, there is another criticism that the present arrangement involving the established parties in decision-making hinders the broadcasters from recruiting some worthy additions to "the arsenal of democracy" (*The Times*, leader, 2 May 97) For example, in the 1997 general election campaign, the idea of televised debates between the leaders of the two main parties was widely supported at least within the media but it never happened. One major obstacle was political partisanship. John Major as the leader of the Conservative Party dropped his initial objections because the debates would be the last chance for him to lift his campaign. For Tony Blair, on the other hand, there was no reason to risk his massive lead in opinion polls. The Liberal Democrats threatened court action if their leader was excluded, which as a *The Times* Leader (2 May 97) pointed out, the broadcasters took more seriously than a strict reading of the law might imply.¹⁶⁹

¹⁶⁸ Neither British law nor European Human Rights law provides the right of access for a political group to broadcast its arguments on television. Yet it should be pointed out that there is an exception at election time under the European Human Rights law. See Barendt 1993: 181.

¹⁶⁹ The relevant legal documents explicitly indicate that there is room for editorial judgement by stipulating that the principle of due impartiality does not require "absolute neutrality on every issue" or "detachment from fundamental democratic principles". (BBC Agreement [Cm 3152], Sec. 5.5; the Broadcasting Act 1990: Sec. 6 (6)) In fact, the 1990 Act and the BBC agreement further provided that "a series of programmes may be considered as a whole". (See the Broadcasting Act 1990, Sec. 6 (2); BBC Agreement [Cm 3152], Sec. 5.2) The recognition of broadcasters' editorial judgement was confirmed in a Scottish case where the Scottish National Party moved to seek an interim interdict in the Court of Session on the ground of the breach of impartiality if their leader were excluded from television head-to-head debates between the main party leaders. (See *Scottish National Party v. Scottish Television plc and Grampian Television plc*, introduced and analysed in Munro 1997: 528)

Regulation under Section 93 of the Representation of the People Act 1983

Section 93 of the Representation of the People Act 1983 significantly restricts political broadcasting of constituency elections. The section stipulates that before any particular programme on constituency elections is to be broadcast, the relevant television and radio broadcasters should get the consent of other candidates of the same constituency. (See Blackburn 1995: 258)

This restriction is different from other restraints, such as the prohibition of political commercials and the limitation on party political broadcasting discussed above, in that it offers a legal right of veto to a politician who wishes to prevent television coverage of his opponents while the other forms leave the initiative with the broadcasters.¹⁷⁰ However, they all have one thing in common, in that they are in accordance with the basic policy of the English legal system relating to political parties and elections, in which the focus of legal regulation is on individual candidates rather than political parties. The free use of the air-time and the absence of restrictions on both programmes about the policies of the parties and reporting the national campaigning can be interpreted as a rare reflection of the public nature of political parties. Yet a truer explanation is that such a system is a by-product of an electoral law regime which regards elections as a battle ground between individual candidates rather than political parties.

As Blackburn (1995: 258-261) argues, this regime has at least three problems. Firstly, a more comprehensive and balanced reporting of election campaigns for the benefit of the electorate is hindered by prominence being given to an insignificant candidate. Secondly, it is absurd that only programmes reporting local campaigning should be regulated. Thirdly, it can be unfair that prominent national or regional politicians may enjoy a relative privilege in easy access to broadcasting programmes during the election campaign only because they stick to party policy rather than constituency matters.

¹⁷⁰ It is true, of course, that the Committee on Party Political Broadcasts plays a role in the allocation of broadcasting time. But it should be pointed out that the ultimate responsibility for that rests with the broadcasters, especially when the existing parties fail to agree among themselves. For example, it was well known that the doubling of the election broadcasts of Plaid Cymru and the SNP in 1974 and the grant of broadcasting time to the SDP before the 1983 election were done on the initiative of the BBC and IBA. See Boyle 1986: 578, fn 76.

(ii) Restrictions on the activities of interest groups and their relevance for parties

Britain also demonstrates the relevance of the regulation of interest groups for political parties. Under the law of charities, charities are expressly forbidden from taking part in election campaigns.¹⁷¹ The Police Federation is also required to refrain from engaging in the political process to ensure public confidence in the political neutrality of the police.¹⁷²

But the foremost concern in this area is, as we have seen (See Sec. 5.2.3), the regulation of the activities of trade unions. A series of reform acts dealing with the activities of trade unions were initiated by the Conservative government after 1979. It is generally accepted that the Employment Acts of 1980 and 1982 and the Trade Union Act 1984 aimed not only to weaken trade union strength but also to regulate the relationship between unions and the Labour Party. These laws revised the Trade Union Act of 1913, which accepted for the first time that trade unions had a right to take part in the political process to secure their goals through parliamentary representation, by imposing controls on trade unions which were unprecedented in English Law since the 1913 Act. The new scheme which, as we have seen, now contained in the Trade Union and Labour Relations (Consolidation) Act 1992, requires trade unions to review periodically their authority relating to political funds by means of a members' ballot. (Secs. 73-81) In addition, it introduced certain restraints on the ways in which political activities are financed by those unions with political objects. The redefinition of political objects in wide and expansive terms imposes a tighter constraint on the scope of activity which unions used to feel free to engage in. (Secs. 71-72. See also Secs. 82-84) For example, no union without a political fund can lawfully take part in advertising or influencing an election. Under the new regime no union is to add any property to its political funds other than (1) sums representing contributions made to the fund by members or any other person, and (2) property which accrues to the fund in the course of administering its assets. (Sec. 83)

It is apparent that these trends, controlling the political activities of interest groups, matter whether or not such groups are granted an important role within the internal power structures of political parties. They may also change the mode of party competition in a way that a

¹⁷¹ See The Charity Commission, "Political Activities and Campaigning by Charities" (1995), esp. paras. 40, 49, reproduced in Picarda 1995: 1085-1093; *Webb v O'Doherty*, *The Times*, 11 Feb 91. For a general account of "politics and charities", see Picarda 1995: Ch. 14.

¹⁷² See Police Federation Regulation, S.I. 1969 No.1787, Regulation 19(1) delegated now by the Police Act 1996, Sec. 60.

particular party is deprived of the opportunity to make alliances with particular interest groups.

6 Problems and an alternative: Towards the institutionalisation of political parties

In this section, we shall examine more specifically the basic problems relating to the present laws governing political parties and argue, as a desirable response to these problems, for the incorporation of the pluralist reality within the legal framework, *i.e.* the legal institutionalisation of political parties. The first step towards such institutionalisation is to recognise their group identity, namely, that they are collective actors within the constitutional order. The ensuing parts will attempt to consolidate the case for the legal institutionalisation by exploring, first, the public nature of political parties as an essential element of the British political process, and secondly, the governmentalised aspects of party organisations. This effort is hoped to complement the rather abstract theoretical description of the advent of the new politics and its implications in Chapter 4.

6.1 *Lack of institutional tools for reform of the British political system*

The major problem inherent in present legal policy relating to political parties is that it lacks rational and coherent mechanisms for controlling their external and internal activities. This lack of legal recognition makes it almost impossible to draw a reasonable line between the autonomy of political parties as constitutional institutions and the need for legal intervention in their activities.

6.2 *The usefulness of group personality of political parties in terms of their external relations*

The liberal theory of association can seriously undermine the efficiency and integrity of political parties and consequently the totality of individual members whose interests they exist to serve. The root of this problem is no doubt traceable to an unrealistic liberal conviction that political parties cannot be viewed as organised actors within political society. Underlying this liberal view is the notion that a political party is no more than the

sum of its individual members and, therefore, its institutionalisation might cause adverse side effects. Two problems are generally cited in this regard. Firstly, such institutionalisation undermines the whole process of representation by placing a barrier between the people and government, creating artificial divisions between groups of citizens, and inhibiting the free expression of their opinions. Secondly, it threatens the autonomy of individuals to determine their own affairs for the ultimate purpose of personal fulfilment. In this line of argument, there is no room for a premium placed on the autonomy of political parties to regulate their own affairs.

6.2.1 The single-mindedness of anti-pluralist thought

One cannot seriously discount the importance of individual choice within the political market unless the political system is professed to be undemocratic. The rigid party machine can function as a means of political manipulation or effective social control rather than a catalyst of political communication. However, it is equally true that liberal associationalism not only failed to arrest the increasing party penetration of the state without increasing civil society involvement in the working of the party system but also paradoxically contributed to the consolidation of such an unexpected result by continuing its unrealistic hands-off policy. What is problematic is the single-minded preoccupation of the dominant liberal theory with both the negative conception of liberty and the market-oriented conception of efficiency (or control). On the one hand, although the legalisation of political parties has the demerits feared by liberals, it equally has certain advantages. On the other hand, even public-choice-oriented control has its limits.

On the advantage side, as even the liberal view reluctantly admits, the management of a variety of individual choices in an orderly political process is inevitable in a modern society. Well-organised political associations, in particular the party system, provide individuals with a stable mechanism for the realisation of political demands at a reasonable level, though the maximisation of those demands is not necessarily guaranteed.¹⁷³ For this functional reason, liberty of association is one of what Feldmann (1990: 11) terms "higher order rights" or what Cohen and Rogers (1995: 18) define as "the fundamental liberties in a democratic order, with a place of pre-eminence in political argument". Apparently, this

conception of high class liberties departs from the negative conception of freedom as the absence of restraint and veers toward the positive one defined as the absence of impediment. In other words, stringent protection of this high class liberty is consistent with regulations of, and restrictions on, market choice in order to ensure political equality. To make this conceptual transformation effective, as Hirst (1996: 102) suggests, such "particular liberty" should be given not only to individual citizens but also to those bodies essential to the stable workings of the political system. An additional assumption of this theory is that intermediary associations of this kind have personality, whether real or artifactual.¹⁷⁴

6.2.2 The unequal political market

As to the limits of market-based political control, it should also be pointed out that, apart from the systematic difference between the political system and the economic system, there is a theoretical defect inherent in the liberal preference for public choice and the invisible hand. Under a regime of laissez-faire which rules out the legal recognition of political parties and thereby dismisses an effective tool for rationalising political competition, inequalities, rooted in different inherited political fortunes, proliferate. Apparently, these inequalities considerably distort individual choice. Indeed, the current system is open to the criticism of failing to see that there are discrepancies between the ideas of fair competition and self-regulation among parties under equal conditions and the asymmetrical reality caused by *de facto* inequality in terms of resources and institutional barriers allowing certain parties to enjoy a privileged position compared to other political groups. Hence, in seeking an appropriate method to modify the formidable rigidity of the party system, what is of greater relevance is the unrepresentative electoral system and the substantial financial inequality between even the main political parties, which have undermined the foundations of liberal associationalism. That is, the ugly reality of the unequal political market is in

¹⁷³ In a simplest way, the stability of the system is achieved at the cost of the constant maximisation of interests.

¹⁷⁴ Whether this personality is real or artifactual partly depends on what background view is taken on the desirable relationship between the state and civil society. In suggesting a consequentially similar view of the positive role of secondary associations in democratic governance in a modern society, Hirst (1995: 111-113) criticises, with the reference to early English pluralist thought, Cohen and Rogers's view (1995: 27,31,33), saying that by stressing the artifactuality of organisations and ignoring their real personality, Cohen and Roger give excessive credit to the state as a neutral actor rather than the voluntary initiative of civil society.

tension with a fundamental ideal of democracy, itself essential to justifying the importance of individual choice which liberal associationalism values. As we shall deal with these specific issues later, it is enough here to mention that the essential prerequisite is to recognise the usefulness of the legal personality of political parties and thereby the need for their institutionalisation. The non-recognition policy is an obstacle when we wish to propose legislation which confers rights or duties on political parties as part of the political process. For example, a reform of political funding which would require the introduction of a number of measures such as a duty to disclose, a right to public funds and a spending limit in elections, would be very difficult to achieve without giving political parties a clear legal status apart from that of their individual members.

6.3 *The public nature of political parties as an essential element of the political process*

6.3.1 Elections as a battleground for political parties

It is apparent that the law in relation to political parties does not reflect the fact that the British electoral system has become almost entirely a battleground for the political parties. The great rarity of successful independent candidates would verify this reality at least at national or regional level.¹⁷⁵ No 'genuinely'¹⁷⁶ independent candidate has been elected as an MP since 1974. In addition, MPs who lost their party's whip almost invariably lost their seats at the next election.¹⁷⁷ All these facts show that electors are more concerned with parties than candidates when casting votes and, therefore, political parties play an essential

¹⁷⁵ In the local government elections, there have been some independent candidates elected. But whereas their numbers are decreasing, a considerable per cent of them were in fact members of political parties who nevertheless had chosen to fight as "independents". See H.F.Rawlings 1988: 124 - 125. For a steadily increasing party politicisation of local government, see Game & Leach 1995: 7-12, 31-33.

¹⁷⁶ It is important to note that the case of the only independent candidate returned as MP in the 1997 general election, Martin Bell, cannot be taken seriously in this context. His election resulted almost entirely from the anti-sleaze campaign against the former Tory minister, Neil Hamilton, thanks to which the other main parties withdrew in support of Mr Bell. See, for the results of elections before 1997 general election, Butler and Butler 1994: 167-168.

¹⁷⁷ Only four of the SDP defectors retained their seats at the 1983 election. (See Cowley 1996: 220). At the 1992 general election, those MPs rejected from both Conservative and Labour Parties, for example, John Browne at Winchester (Conservative) and Dave Nellist at Coventry South East (Labour) failed to keep their parliamentary seats by standing as independents. (See Blackburn 1995: 214) The 1997 general election was not an exception in this regard. Sir George Gardiner MP who after his deselection defected from the Conservatives to the Referendum Party failed to retain his seat. The fact that Alan Howarth, who crossed the floor in 1995 from the ruling Conservative Party to Labour, returned as MP for Newport East cannot be seen as an exception. This is because his defection was made to a major party, and one which was destined to win the forthcoming election and was offering him one of its safe seats. That is, both his success and Sir George Gardiner's failure are mainly due to the persistent party political line rather than their personal appeal.

role in elections. (See Blackburn 1995: 5) It is, therefore, hard to disagree with Julian Critchley's claim

the independence of MPs, their freedom to kick over the traces, has been continually compromised by the whips' office. .. Are we *the creatures of party, or the tribunes of the people?* Today it is impossible to be elected to Parliament without a ticket to ride, and it is the political parties who publish, print and sell the tickets. ... MPs are frequently torn between different notions of duty: to country, constituency and to political party. I have, I think, placed these obligations in their proper order, but it is not one that is universally agreed. (*The Times*, July 19, 1990. My emphasis)

6.3.2 The changing function of general elections

The importance of parties in elections becomes even clearer when we realise the true function of a general election in Britain. A general election is not only to elect MPs to the House of Commons. It is also to choose a government and decide which party leader becomes a Prime Minister. As Blackburn (1995: 2) puts it, in Britain "a single vote cast by each eligible elector in the country controls both the personnel of Parliament and the personnel of government".

Given this function of a general election, the essential role of political parties in electing a Prime Minister confirms their public feature. The Crown which has a legal power to appoint the Prime Minister is obliged to ask the leader of the political party which wins a majority of parliamentary seats in a general election to form a government. This is to say that with the established procedures for the election of leaders within the main political parties, the Crown's choice is compromised by the internal rules of these parties, the political influence of which is measured by a general election result as a barometer of public will.¹⁷⁸ In addition, under an adversarial political system, those who achieve political office mostly owe their position to the political party to which they belong. As Brazier (1998: 59) points out, it is the political parties that have filled a "political vacuum" which stemmed from the Burkean theory of representation freeing Members of Parliament from any threat of being mandated by their constituents.

¹⁷⁸ From this perspective, so far as the changing function of general election and the importance of political parties in the formation of government are concerned, the debate on the true nature of the British polity is irrelevant. A relevant question may be, is the United Kingdom is what Bagehot called 'a disguised republic'? Or, is the Crown, contrary to Bagehot's observation, still the "efficient" element of the British constitution? Hennessy (1996: ch.2) doubts the reality of Bagehot's observation but as he (1996: 49, 63) also admits, it cannot amount to the negation of the republican (as opposed to monarchical) character of the British constitution.

6.4 *Political parties as mini-collective systems of government*

Another problem of the current system is that it overlooks the reality that, as organisations, political parties are in effect mini-systems of collective government. As previously stated, they impose conditions of membership and expulsion. They also formulate their own rules and impose their own discipline. Furthermore, as confirmed above, political parties are distinct from private interest groups, being communitywide in orientation. From this perspective, political parties themselves are para-governmental bodies. This tends to interfere with individual members' interests in order to advance general public interests. Two particular aspects deserve closer attention.

6.4.1 The virtual monopoly of political parties in the institutionalised political process

The character of political parties as mini-systems of collective government is reinforced by the fact that in Britain the major political parties as a whole enjoy a *de facto* monopoly in recruiting political personnel. Few who wish to take a ticket to political office can achieve their objectives without the membership and support of one of the main political parties. Under such circumstances, party discipline is as powerful and effective as any obligations under public law.

Given the virtual monopoly of political parties in the institutionalised political process, our attention is drawn to a recent Court of Appeal case in which the court placed a premium on group discipline to enable intra-party groups to function more coherently. The ruling Labour group in Greenwich London Borough Council removed from the housing committee some councillors who had voted against its proposed increases in rents for homeless people. The membership of the housing committee was reduced from 24 to 18 via the successful motion by the governing Labour group and the committee was reconstituted according to the new rule. An application for judicial review of this motion on the grounds that it was *ultra vires* the council was dismissed by the Divisional Court. The applicant appealed against the dismissal, contending that standing orders of the Labour group concerned, requiring one of its members to resign from the council if he or she intended to vote contrary to group policy, are not in accordance with the principle of independent representation. Neill LJ held that

A councillor is always under some pressures from outside. The risk of not being re-elected at the next election is one obvious constraint. It seems to me however that at the present day, *when local government is organised on party lines, some additional constraints resulting from the existence of a party line or strategy on particular issues are inevitable*. Penalties by way of punishment must clearly be avoided or any action which is vindictive or malicious. But *a political party is entitled to take steps to ensure its cohesion* and I can see nothing intrinsically wrong in a decision to change a party's representation on a committee or subcommittee so as to advance the policies which the party considers desirable. In this sense 'group discipline' does not connote punishment but an attempt to keep the party group together. (*R v. Greenwich London Borough Council, ex parte Lovelace* [1991] 3 All ER 511, 523. Emphasis added)

The implications of this case become even greater if it is considered that in local politics, the intensity and scope of party whipping systems have been less extensive than those in national politics, because, as Game and Leach (1995: 39) point out, a relatively high proportion of committee business is essentially 'non-partisan' in nature and because relatively greater importance is given to candidates who are more familiar with the electors than is the case in parliamentary elections. Once we accept the necessity of party discipline, what is inevitable is a question of the legal, as well as moral or political, accountability of political parties. Despite their paragovernmental functions and their performance as a kind of mini-collective government, political parties are not sufficiently subject to the principles of public accountability under the current legal system.

6.4.2 The internalisation of the political process within political parties

(i) The meaning of internalisation and its effect

If we consider that the internalisation of the political process within political parties requires the organisation to be more sensitive to the logic of administration, then some external supervision of internal affairs is inevitable. For example, the right to join political parties and regulation of the expulsion process can be more coherently dealt with when political parties are institutionalised.

The internalisation of the political process means, *inter alia*, abandoning a conception of the political party as a 'unitary' actor while adopting the changed nature of political parties that now come to cover not only social demands but also requirements of systemic integration. The nature of the mediation which political parties provide is different from the conventional conception of mediation as an opinion linkage between civil society and the state. As discussed in Chapter 4, political parties no longer locate themselves in a vertical

framework which has the state at the top and the individual at the base. Rather, they can be seen as a network within which different social discourses interact in the logic of politics, on the one hand, and, on the other, systemic political propaganda is diffused in a organised form to attract the general public. This implies that a political party is not merely an association of like-minded people in a general sense but also a pluralised sphere where a number of groups compete with one another to achieve their own interests under relatively qualified rules. These groups within a party are not a permanent entity but highly fluid and provisional in the sense that they can be organised and dissolved as a number of single complex issues are raised and resolved.

Therefore, it is almost inevitable for political parties to perform similar activities to the government administration. As a result, there is no reason why political parties should be free from a public law review applicable to the state's governmental activities. In other words, the demand for the public supervision of political parties arises out of the need for the integration of public and private interests, which results, in turn, from the internalisation of the political process within political parties.

This internalisation poses a new problem of legitimisation. It transforms the location of such a problem from the external relationship between political parties and civil society to the internal relationship between individual members or groups and their leadership. This means that the demand for intra-party democracy or democratic procedures needs to be constitutionalised to a similar standard as that which official governmental activities are required to meet. The constitutionalisation of some operating procedures of political parties may, in turn, provide a constitutional mechanism in which individuals or groups within a political party have the right to challenge decisions taken by their party leaders. The courts may intervene in the internal order of political parties to the extent that such constitutionalised values permit.

(ii) A review of *Burrell* case: the Conservative Party as a legal entity

From the broader perspective on party organisations, suggested in Chapter 4 and briefly above, the judicial view in *Burrell* ([1982] 1 W.L.R. 522) denying the constitutional and legal - as opposed to factual - relationship between organisational elements of the Conservative Party should be open to a critical review. One may argue that in examining

the legal status of political parties, the link between elements of the party need not be both contractual and direct. Rather, evidence of functional links between them co-operating with each other, with a common purpose to win general elections is enough. Few can question the functional link between the parliamentary party and other party components, which is essential to the working of a democratic polity.

Yet this does not mean that despite the unique historical development of the Conservative Party, we should revive the conventional mass party model and seek the rigid unitary identity of political parties. Indeed, with the acceleration of the governmentalisation of political parties, the advent of functionally differentiated party organisation is inevitable. (See Chapter 4) As a result, what should be acknowledged is a rather loose internal order in which not only the party in public office (the parliamentary party) but also the party on the ground (voluntary party organisations) enjoy enhanced autonomy. But this complex entity does not provide any justification for the argument that the party as a whole no longer exists. Despite the functional differentiation of the party organisation itself, the relationship between the party in public office and other elements of the party as a whole is internal. No one doubts that there is an organic relationship between those components moving toward a common goal, for example, to win a general election. This means that the trend towards the differentiation of the party organisation goes hand in hand with the internalisation of the political process within the whole party.

One result of this is that the conventional private law perspective on political parties should be replaced by the a perspective placing party organisations at the crossroads of public and private law. The significance of this shift of perspective lies in a new style of autonomy for political parties. The autonomy of political parties as entities in their own right no longer means a lack of external interference but rather a rationalised autonomy subject to constitutionalised basic democratic procedures. In short, the regulation of political parties coupled with restrictions on their internal affairs is consistent with the stringent protection of their autonomy in order to ensure that political equality and fairness which constitute the core virtues of our version of pluralist democracy.

6.4.3 The required democratic control of the internal affairs of political parties

Taken together, the activities of political parties should be undertaken in the interests not only of themselves and their members but also of the public at large. Thus, it should be borne in mind that the rules of political parties, like governmental administrative decisions, are not merely an instrument of exchange underpinning contractual relations but constitute a device for political organisation and regulation. There is no justification for the conventional view that the activities of a major political party are outside the law or, more specifically, outside the principles of public accountability simply because no contractual relationship exists, something that would be required under the conventional law of association.

Yet this does not mean that political parties have to be subject to the principles of conventional public regulation. Needless to say, the forms of regulation can vary, depending on a wide range of factors from the nature of activities subject to regulation, coupled with the institutional arrangements surrounding them, to cultural and historical peculiarities which may affect certain types of regulation. From this perspective, of course, the judicial supervision of the affairs of political parties under the conventional rule of public law is merely one of a number of ways of pursuing good administration.¹⁷⁹

7 Conclusion: The nineteenth century framework at the dawn of the twenty first century

We may conclude that the law governing political parties is at the heart of the clear divergence between constitutional theory and practice. Such divergence can be attributed to liberal associationalism, which does not admit that a political party is more than the sum of its individual members. This idea manifests itself in the form of a political market without the incorporation of intermediary associations as collective actors. All legal mechanisms

¹⁷⁹ Hence, we disagree with Youngs' (1996: 233) view that an emphasis on the application of constitutional rights and principles can impoverish political debates and thus may leave issues which should be decided in the democratic arena to be resolved by the courts instead.

relating to the political process, especially elections, are constructed without any recognition of the role of those intermediary associations operating within it.

From this perspective, political parties are (or should be) regarded merely as social clubs of like-minded people without public status. As far as Westminster politics are concerned, the elected member is not the representative of a specific interest, constituency or association but the representative of national interests as a whole. Hence, free competition between individual candidates is the basic idea behind the current system. This backs up the principle of the independence of MPs. The principle provides, in return, a persuasive justification for some MPs' decisions to "cross the floor" of the House of Commons without resigning their seats and fighting a by-election under their new political colours. (See Cowley 1996)

However, the *status quo* is a product of the nineteenth century in which political parties could be seen from an old perspective that focused on the idea of representation rather than that of power. The political system of contemporary Britain has been restructured in such a way that the old perspective is now able to explain and control only a relatively small part of this restructured political market. A first step towards a new constitutional framework has to be the institutionalisation of political parties within a constitutionally regulated boundary.

The outdated character of liberal associationalism can be extended to the internal affairs of political parties. The realisation of governmentalised aspects of political parties and the significance of the internalisation of the political process within political parties require a new framework for the rationalisation and democratisation of their internal order.

Chapter 6

Required Democratic Procedures: the Issue of Intra-Party Democracy with reference to the Modernisation of the Labour Party

1 Introduction

The case for the legal institutionalisation of British political parties, which was suggested in the previous chapter, will affect certain aspects of conventional legal constitutional theory and practice. The liberal theory of parliamentary democracy, regarding political parties purely as private associations and denying substantial legal control of their affairs, is particularly prone to the refusal of any rational movement towards intra-party democracy. This attitude needs to be evaluated against the background of our new democratic ideal, *i.e.* constitutionalised democratic autonomy, eager not only to recognise the institutional rights of political parties as autonomous institutions but to conceive, in return, the constitutionalisation of politics.

As suggested in Chapter 3, the constitutionalisation of politics does not necessarily imply the legal regulation of political parties in any great detail. The institutional reform of the British political system in the name of greater democratic autonomy¹⁸⁰ will inevitably require the registration of political parties, and for them not only to produce more open accounts but to rationalise their *modi operandi*.¹⁸¹ However, it is wrong to assume that this legalisation will unduly curb the necessary autonomy of political parties. Rather, it is meant to bring about 'publicly responsible self-regulation' of political parties. (See Chapter 3, Section 4.2.2 (iv))

¹⁸⁰ For example, as we shall suggest in the ensuing chapters, electoral reform recognising the role of political parties as basic actors in elections and the public funding of political parties.

¹⁸¹ It may also require the creation of an independent commission on elections and political parties. See, *e.g.* Ewing 1987: 192-196.

The purpose of this chapter is three-fold. Firstly, it aims at exploring the different conventional views of intra-party democracy. Secondly, some paradigmatic problems inherent in these ideas will be examined. Finally, we shall seek to outline those internal democratic procedures within political parties, which, under our project of 'constitutionalised democratic autonomy', are not only most desirable, but to which the close attention of the law should be given. In so doing, we shall make use of the debates concerning the Labour Party's movement towards a new model of intra-party democracy, something which the party has sought to realise *via* constitutional reform since the 1970s. This is because this movement within Labour has put forward highly practical criticisms of British liberal democratic theory and practice and is now beginning to change the face of the British political system.¹⁸²

2 The implications of intra-party democratic controversies in the Labour Party

Since its formation at the turn of the century, the issue of intra-party democracy has been a long-standing and recurring theme within the Labour Party and has often led to serious internal disputes. This is understandable if we consider the party's unique history. As David Coates (1996: 68) succinctly points out, "the Labour Party has always been a broad coalition of *social reformists* (keen to subordinate the power of private capital to progressive social ends) and *bourgeois radicals* (keen to modernise the local industrial base)".¹⁸³ On the one hand, the politics of Labour's social reformists, known as its left wing,¹⁸⁴ has reflected the tradition in which collective decision-making, for example, through mandated delegates, had become well established. The politics of Labour's

¹⁸² As we shall indicate in relevant places in this chapter, the organisational reform of the Conservative Party after its 1997 general election defeat is one example of the influence of the Labour model. See, generally, Conservative Party (1998a).

¹⁸³ This categorisation would provide a more clear view, concerning the difference between the two sides, than Patrick Seyd's (1987: 1-2) 'socialist'- 'social democrat' dichotomy, which corresponds respectively to 'social reformist' and 'bourgeois radical'. The old Clause IV which enshrined 'common ownership' and which was recast at the Special Party Conference on 29 April 1995 forced the two sides to compromise in order to achieve an ambiguous unity. Recently, a wide ranging and heated debate between the two factions over constitutional reform, including a recast of the original Clause IV, the introduction of 'one-member-one-vote' and the reconsideration of the party-union link, has brought the 'moderniser-traditionalist' dichotomy to the fore.

¹⁸⁴ For a contingent but feasible consistency within the factions, see Seyd 1987: 2-3.

bourgeois radicals whose ideological tendency has been described as its right wing, on the other hand, has preferred the autonomy or supremacy of the parliamentary party over its extra-parliamentary organisations. (See Shaw 1994: 21)

However, it should be pointed out that the issue of intra-party democracy has never been simply an internal problem of the Labour Party but was also directed against British parliamentary democracy *per se*. As we have seen in Chapter 2, modern British democracy has persistently been accused of being somewhat oligarchic, elitist and authoritarian in character. Naturally, ongoing demands have been made for a balance to be struck between, on the one hand, the 'Tory' emphasis on hierarchy and the independence of government and, on the other, a new view of government encouraging both greater popular participation and discussion. In this chapter, in our search for more satisfactory notion of intra-party democracy, we shall consider both the unique character of a political party situated at the crossroads between the state and civil society and the normative implications of 'dual politics'. (See Chapters 3 and 4)

3 Two forms of intra-party democracy

There are two main forms of intra-party democracy: one indirect, the other direct. The indirect form of intra-party democracy is, among other thing, concerned with the question of whether ordinary party members should have the opportunity to take part in leadership elections and the selection of candidates. This arrangement is indirect in the sense that it does not presuppose members' direct involvement in the party's policy-making process. On the other hand, the direct, or strict, form of intra-party democracy is what is usually called the 'doctrine of the mandate'. The general idea of this doctrine is two-fold: firstly, public office holders, in particular members of Parliament, should be committed to the policies of the party as a whole since it is thanks to the party they owe their positions; secondly, any government should be committed to manifestos of the party which constitutes it. The

former is usually dealt with under the heading of the principle of mandated delegates while the latter, the most controversial doctrine, is known as the doctrine of manifesto.¹⁸⁵

4 Is direct intra-party democracy incompatible with democratic government?

4.1 *The case against direct intra-party democracy and its rationales*

In “Power in the Labour Party: the Issue of Intra-Party Democracy” (1982), R.T.McKenzie put forward once more his lifelong belief, first outlined in his masterpiece *British Political Parties* (1964),¹⁸⁶ that an ‘archaic doctrine of intra-party democracy’ is in fact incompatible with the democratic polity as a whole, *i.e.* parliamentary democracy.¹⁸⁷ (at 195)

4.1.1 The difference between political parties and interest groups

His main contention is that oligarchic control by the party leaders of their party organisation is indispensable for the well-being of a democratic polity. The basic assumption is that the function of political parties in a democratic political system is fundamentally different from that of interest groups.

The all-important distinction between political parties and interest groups lies, of course, in the fact that the primary function of the former is to sustain groups of political leaders who offer themselves as potential governors of a political community, while the function of the latter is, in Eldersveld’s phrase, to ‘aggregate, articulate and transmit group demands’. (McKenzie 1982: 195)

According to McKenzie (1982: 198), in all other forms of organisation, ‘the iron law of oligarchy’ represents a threat to the working of a democratic political system by hindering

¹⁸⁵ Dawn Oliver (1989: 126-127) divided the doctrine of manifesto into two forms: a strong and a weak form. What is more frequently identified with that doctrine is, in her view, a weak form meaning that the manifesto produced by a party for a general (or local) election is regarded as a standard legitimising the pursuit of those policies. However, so far as intra-party democracy is concerned, the strong version of the doctrine has more relevancy in that the election manifesto is regarded as a binding statement of policy by the whole party, which is both contractually and morally binding on ‘the party in public office’. This doctrine is a narrow, restricted one, which focuses only on the party platforms proposed in an election.

¹⁸⁶ It is in 1955 that this book was originally written but is still cited as an authority in this field.

¹⁸⁷ In fact, this sort of objection to intra-party democracy is not novel since it was raised on a number of previous occasions, the most oft-quoted being Winston Churchill’s during his general election campaign in 1945. See Miliband 1958: 172-173.

their appropriate functions, *i.e.* the effective transmission of group demands. On the other hand, the party in public office, particularly in government, should be accountable to the electorate rather than the wider party to which it belongs. Some commentators support this view on the ground that, in balancing a variety of domestic as well as international considerations with the doctrinal aims of their party, it cannot be reasonable for parliamentary leaders to be subject to instructions or threats from extra-parliamentary organisations which, in formulating their decisions, have no accountability to the electorate at large. (See, *e.g.* Birch 1989: 96-97) According to this view, the autonomy of the parliamentary representatives represents the sole constitutional mechanism by which policy-makers can be held accountable to the electorate. What this view presumes is that any closer tie between the parliamentary leaders and extra-parliamentary organisations would inevitably “transcend” the organs of government, as is generally the case in totalitarian systems. (See McKenzie 1982: 196) In short, it is argued that the doctrine of intra-party democracy is wholly unconstitutional because it is contrary to the British constitution under which political and legal responsibility for the making and implementing of policy decisions rests primarily with the Parliamentary government.

4.1.2 The problem of faction

This criticism of a rigorous form of intra-party democracy, as both impossible and unworkable within a parliamentary democracy, is strengthened by a further practical consideration. This is the ‘problem of faction’ or the ‘over-empowering of activists’. Some lament that only a few hundred thousand people control the overall mass organisation. (See Oliver 1989: 124-126; Kavanagh 1982: 206) Party activists are open to criticisms of blocking real grass-roots demands which, in theory, they represent. (See Shaw 1994: 16) The recent introduction of the egalitarian principle of ‘one member one vote’ and the partial abolition of the ‘block vote’ in the Labour Party, both of which will be considered later, can be seen as a response to this criticism.

4.2 *The case for direct intra-party democracy and its rationales*

One classical argument in support of intra-party democracy can be found in a concise article written in 1958 by Ralph Miliband. In relation to the supposed supremacy of extra-

parliamentary organisations over parliamentary leaders, he emphasised two points: firstly, the flexibility of intra-party democracy and, secondly, the usefulness and desirability of active minorities.

4.2.1 Flexible relationships within party organisations

It is stressed that extra-parliamentary organisations do not necessarily work on the principle of *stare decisis* and, therefore, their resolutions can be reversed as social and political situations change. (Miliband 1958: 173) As a result, the relationship between a government and its extra-parliamentary wing is not rigid and unilateral but fluid and bilateral. The commitment of a government to its extra-parliamentary organisations, in particular party conferences, is not necessarily incompatible with a democratic polity. Secondly, and more importantly, he argues that intra-party democracy is vital to securing a political “dialogue” between leaders and followers, which is the ‘essence of democracy’ in the age of mass politics.

The leaders of the Labour Party are at least required to argue the case with their followers and seek to persuade them, from reason and not from authority, that the course of action they wish to see pursued is indeed inopportune. The leaders of the Party in office carry national responsibilities; but their assumption of office does not divest them of their responsibilities to their followers. (See Miliband 1958: 173)

This defence of intra-party democracy does not necessarily imply that parliamentary leaders should be the “puppets” of their party. As Miliband (1958: 173) admits, parliamentary leaders should be allowed a certain degree of independence and initiative. For Miliband, however, the independence of leaders should not be tantamount to their supremacy over the decisions of the party to which they belong. In the Westminster model of democracy, the political sovereignty of the electorate - which is a “necessarily amorphous mass” (Miliband 1958: 173) - is dormant at least between elections. In the circumstances, some political and institutional devices are required for obstructing abuses of governmental independence. These devices are catalysts facilitating democracy and there is no reason why they should be seen as incompatible with a democratic polity.

4.2.2 The usefulness of the active minority

As to the argument that the activist minority is unrepresentative of the grass-roots, Miliband suggests a very clear counter argument. The deplorable situation that only a minority of members have taken part in the management of the Labour Party cannot justify the curtailment of the powers of its rank and file activists. (See 1958: 172) It is difficult to see why the active minority should be penalised for the apathy of the majority. (See 1958: 172) The right remedy to the passivity of the majority is, surely, to provide appropriate institutional devices for enhancing their participation without in any way limiting the scope of the active minority.

4.3 *Analysis and criticisms*

4.3.1 Conception of intra-party democracy as part of the whole project of democratisation

It is apparent that differing conceptions of democracy, and concomitantly the differing nature and role of political parties, underlie the foregoing debates. On the one hand, the theory of anti-intra-party democracy, supported by such theorists as McKenzie, depends basically upon a unitary conception of liberal representative democracy. A supplementary idea to this is that some qualitative variation exists between intermediary organisations and thereby political parties should be regarded as different from interest groups. On the other hand, the case for intra-party democracy is basically in harmony with a rational movement towards participatory democracy, though Miliband's defence for intra-party democracy is less hostile to the role of activists than that of some more radical protagonists of participatory democracy.

In Chapters 3 and 4, we have already analysed and criticised these approaches in detail and put forward our own project with an accompanying perspective on party organisation. Some essential, albeit brief, arguments backed by empirical evidence are however warranted.

4.3.2 The actual meaning of the qualitative difference between political parties and other political associations

(i) Qualitative difference between political parties and other political associations

There is a qualitative difference, as McKenzie argues (see Sec. 4.1.1), between political parties and interest groups. With modern pluralised societies, the monopoly over the political process held by political parties can no longer be maintained due to the increasing role of other forms of organisation in the political system. This blurring of the social and the political does not necessarily mean that the political system should be replaced by novel forms of representation such as new social movements. On the contrary, a new paradigm of politics, based on dual politics, recognises the equal importance of both legitimisation problems and steering problems. (See Chapter 3) Liberal institutional devices need to be cherished rather than discarded in our project of constitutionalised democratic autonomy. Whilst the state should be exposed to the political public sphere, the extent of dependence of the state on public opinion should not amount to a usurpation of the decision-making power by social power. In being transformed into administrative power, social power should be filtered through parliamentary procedures, elections and party competition. This implies that a relatively privileged position should be given to political parties (in particular, the party in office), which are essential for the proper, stable workings of such democratic procedures.

(ii) The real implication of the pluralisation of politics

We disagree with the way in which McKenzie uses the qualitative difference between political parties and other forms of organisation to bolster his argument. Apparently, he was not fully aware of the real implications of the pluralised political and social reality, which is why he was over-preoccupied with the conventional idea that government does not have to abide by any decision other than that of Parliament. In modern societies, politics can no longer be monopolised by rigidly defined conventional institutions but should open itself up to hybrid collective actors representing a variety of social discourse. (See Chapter 4) As a result, the conventional presumption that a clear division of labour exists among government, parties and interest groups is undermined and these relationships are seen to be more complex and contingent. The status and the role of political parties in this new paradigm is unique, in that their self-conscious task is not only to mediate social discourse between the state and civil society but also to become arms of the state vis-à-vis civil society. (See Chapter 4)

Hence, the qualitative difference between political parties and other forms of organisation does not justify McKenzie's assertion that a policy-making system bound by extra-parliamentary organisations is illegitimate in a multi-party system. What he presumed is that extra-parliamentary organisations are basically unrepresentative, being dominated by a single, specific interest. However, the need to transform the party organisation into a catch-all party has intensified as forms of social life have become increasingly pluralised. The presumption that a significant discrepancy exists between the electorate and the ordinary membership is thus diminished. Therefore, the unique nature of political parties, which perform certain para-governmental functions, does not necessarily imply that the party organisation as a whole should be oligarchic. On the contrary, the 'public' nature of political parties, which is the cause as well as the effect of their governmentalisation, would justify a greater democratisation of their decision-making processes. This is particularly so when one remembers that no matter how loose the relationship between 'the party in public office' and 'the party on the ground', there is an organic interaction between them even in the time between elections. (See Chapter 5, Section 6.4.2 (ii)) The whole party is constantly working together in an effort to catalyse public opinion. The party in public office should be as open to its extra-parliamentary organisations as it is to various pressure groups. This applies all the more where political parties are conceived as a network made up of varied social discourse and not as unitary actors only concerned with a specific interest. (See Chapter 5, Section 6.4.2.(i); Section 4.5.2. (iii) of this chapter)

(iii) The autonomy of a political party and intra-party democracy

Given the pluralist nature of the present socio-political reality, the transformed nature of the state (or government), and the importance of the constitutionalised autonomy of political parties, it cannot reasonably be argued that a party's voluntary commitment to intra-party democracy *per se* is incompatible with a democratic polity. On the contrary, it would be reasonable to suggest that the 'governmentalisation' and 'professionalisation' of political parties can happily go hand in hand with the democratisation of their organisations. The party functioning within the core complex of the political system has, of course, to be protected from the vulgar and capricious promptings of civil society. However, at the same time, to be democratic, it should be subject to the principle of "publicity". A practice of

rational public debate should, therefore, be an institutionalised element within the decision-making process and the party in public office should, in turn, be open, if only indirectly, to both the critical supervision of its extra-parliamentary wing and external public opinion.

In suggesting the constitutionalisation of political parties, it is immaterial whether or not parliamentary leaders are 'directly' subject to the decisions of the party to which they belong. What is material is whether procedures for opinion- and will- formation should ensure that there is no political repression or exclusion. It may be argued, as Miliband (1958: 172) does, that the active minority should not be penalised for the apathy of the majority. However, it is unlikely that power structures and organisations, permitting particular groups to wield greater political or social power than the interests, which they represent or communicate, warrant, would be stably egalitarian and democratic. This is all the more true where the policy preferences of such groups significantly diverge from those of the unenthusiastic, but nevertheless politically entitled, majorities they represent.

In conclusion, autonomy should be granted to the party in public office, at least in matters pertaining to the implementation of its policies. But, the reason why it should be afforded such independence is not that the doctrine of Parliamentary Sovereignty regards external pressure unconstitutional, but simply because such pressure would hinder, in Habermas's phrase, "systemic integration". In other words, external pressure would seriously hamper not only practical negotiations of players within the core complex of the political system but also the effective functioning of the self-regulated party organisation.

(iv) Constitutionalisation of direct intra-party democracy

We need to specify what constitutional guarantees should be introduced to secure both the autonomy and publicity of political parties. A crucial requirement is a written constitution, a binding framework, within which the workings of the whole party can be properly co-ordinated. This framework is different from a private contract between individual members because it enshrines democratic principles which cannot be overridden even by a majority of members. It should provide rules and regulations institutionalising rational debate concerning party policy and programmes. It should also make provision for a number of political forums, including an annual conference, where debate over policy issues is guaranteed. The right of minority groups to propose policy agendas should be

guaranteed to ensure that no one section or faction can dictate the policy-making process. By the same token, members (who take a different line to that of the party as a whole) are to be protected from arbitrary punishment, especially expulsion. This means that proceedings for the expulsion of members need to be institutionalised and the members concerned be allowed to appeal to independent tribunals including the High Court.

4.4 *The case of the Labour Party*

4.4.1 Intra-party democracy under the Labour left's initiatives in the 1970s and 1980s.

The 70s and 80s represent the heyday of both Labour left wingers and their endeavour to create intra-party democracy. However, to understand the Labour Party during this period, it is necessary to have a firm grasp of its underlying structure and organisation. It was organised on federal lines and had developed a unique pluralist power structure, both of which helped distinguish it from not only its main rival, the Conservative Party, but also the established British constitution. A written party constitution¹⁸⁸ distributes rights and powers to a range of institutions: the parliamentary party, constituency parties, affiliated trade unions, the National Executive Committee (NEC), and the party conference. This institutional dispersal of rights and responsibilities has created an arena in which power struggles can take place, especially between the parliamentary party and the extra-parliamentary institutions such as the NEC and Conference. The emergence of the NEC as an autonomous power in the 1970s reinforced the tension between “the party in the country” or the unions, on the one hand, and the parliamentary leadership, on the other. (See Benn 1981: 191) The political pendulum has tended to swing between these opposing camps. Between 1979 and 1983, the political balance lay by and large with the extra-parliamentary wing which, in the wake of the party's 1979 election defeat,¹⁸⁹ launched an aggressive campaign for intra-party democracy. During this time, the parliamentary leadership lost its grip over the NEC which had power to prepare policy statements for the annual conference. Conference adopted many controversial policies in this period of

¹⁸⁸ Of course, this is another sign of challenge to the *status quo* based on an unwritten constitution.

¹⁸⁹ In fact, pressure for intra-party democracy dates back to 1973 when the Campaign for Labour Party Democracy was set up by groups of grass-roots activists. However, it is clear that the general election defeat coming in the wake of a loss of confidence vote in the House of Commons in 1979 added an important momentum and pushed the issue to the top of agenda, and all of which resulted in conspicuous constitutional reforms.

confrontation, including nuclear unilateralism, withdrawal from the EC, and the extension of public ownership. It also introduced a number of constitutional reforms such as the mandatory reselection of MPs, the supremacy of the NEC over the parliamentary leadership in the drafting of the manifesto, and the extension of franchise for leadership elections. The left wing's triumph, albeit partial, in the internal power struggle caused the defection of some leading right wing figures, in particular the 'gang of four'¹⁹⁰ to form a new party, the Social Democratic Party.

4.4.2 The problems with the Labour left's reform

However, the Labour left's movement towards intra-party democracy was flawed.

(i) A side-effect of the supremacy of the extra-parliamentary party over the party in public office

In arguing the rank and file should control the leadership, the Labour left was not fully aware of the consequences of such empowerment of the extra-parliamentary wings. In fact, such empowerment is a valuable strategy for democratisation and, thus, should not be underestimated. However, this strategy must not be stretched too far. It should be borne in mind that without a right balance between the different resources for democracy,¹⁹¹ no radical reform could easily avoid a number of pathological effects. Indeed, the Labour left's reform tended to strengthen, not grass-roots democracy, but that of the activists, by redistributing power from the parliamentary to the extra-parliamentary elite. Thus, things went from bad to worse, in that so far as the extra-parliamentary elite was concerned, no constitutional machinery existed for securing the accountability of the decision-makers. In effect, what the politics of left proposed was not a workable alternative system of government but a utopian system in which neither the extra-parliamentary wings nor the parliamentary party can effectively manage the organisation. This eventually resulted in a "crisis of governance" which considerably weaken the party's electoral chances. (See Shaw 1994: 22)

¹⁹⁰ Viz., David Owen, Roy Jenkins, Bill Rodgers and Shirley Williams.

(ii) The lack of discussion about manageable participation

The Labour left's movement towards radical intra-party democracy in the 70s and 80s lacked any serious discussion about how effectively greater participation on the part of the rank and file could be managed. What matters in this regard is not whether conference should hold a supreme power in the policy-making process,¹⁹² but whether the policy-making process as a whole is fair, open and manageable. The process has to be one in which rational public debate can take place. In other words, the decision-making power has to be responsive to 'communicative power' generated by the grassroots or even the Labour electorate. Such are the standards against which the Labour left's reform should be critically evaluated.

(iii) The neglected importance of open and egalitarian systems of opinion formation

Constitutionally, conference has ultimate control of the party's organisation and procedures in that it performs the twin functions of policy-making and policy-endorsement. Until the organisational reforms, set in motion in the late 1980s, policy-making process of conference was dominated by an out-of-date mythology. This mythology developed in the tradition of unionised labourism during the late nineteenth century and had, by the early twentieth century, firmly established itself. It involved such practices as vote-buying, weighted suffrage and the block vote. Resolutions were submitted by constituency parties and trade unions and then, after the formal processes of amendment and debate, those backed by two-thirds majority were incorporated into the party programme. Votes were distributed to affiliated organisations according to the size of their membership.

However, it was always open to doubt as to whether votes taken at conference reflected the 'real' demands and opinions of the grass-roots. More importantly, it was doubtful whether decisions were arrived at by rational debate. Indeed, as conference retains the ultimate control over the party's organisation and procedures, its representative shortcomings have always been subject to bitter criticism. In the first place, excessive influence was given to affiliated trade unions. Until the 1990 conference which reduced

¹⁹¹ Namely, as we have seen, the democratisation of a political party has to consider not only the practically oriented demands of the grass-roots but also a proper systemic logic which may manifest itself in the organisational effectiveness and efficiency.

¹⁹² From a comparative perspective, it is not odd that the democratic sovereign with formal supreme right is the party congress, which is convened at regular interval. For a German case, see Poguntke 1994: 206.

overall vote of unions to a maximum of 70 per cent of the total conference vote,¹⁹³ almost 90 per cent of the voting was by union delegates. Though votes, in theory, were distributed according to the number of members, in practice, they were assessed solely on the overall fees given by an affiliated organisation. This system has been criticised not only because a considerable number of either ‘ghost’ or involuntary members exist but also because trade unions were, in fact, able to ‘buy’ votes at conference. Until 1993 when, in crucial parts of the decision-making process, the block vote was abolished, votes were cast in blocks by unions, constituency parties and socialist organisations. The block vote represented a system of winner-take-all and, therefore, did not reflect the divisions of opinion within membership. Like its counterparts the first-past-the-post electoral system and the whipped party vote in the House of Commons, as Kavanagh (1982: 212) pointed out, the block vote is likely to produce a result which is quite unrepresentative of the aggregate votes of the individual electors.

Furthermore, with the block vote, the major union leaders have been made ‘barons’ of intra-party politics who as Labour history shows, have generally been staunch allies of the non-left Parliamentary leadership. Of course, this old practice did have the merit of creating a bulwark against the far left. (See Minkin 1992: 647) However, in our highly pluralised and volatile society, such an asset can no longer be seen as outweighing the need for a greater egalitarian democracy.

(iv) A failed crusade for intra-party democracy

To summarise, there are at least two reasons why the left’s drive lost its purchase. Firstly, it failed to recognise the limitation of a separation of power strategy. Secondly, it overlooked the importance of an open and egalitarian system of opinion formation capable of reflecting the diversity of social discourse.

From this perspective, it is hardly surprising that despite such significant constitutional reforms and policy changes, the Labour Party suffered another electoral debacle in 1983, which was eventually led to two more general election defeats in 1987, 1992. The

¹⁹³ See *The Guardian*, 28.6.90, p.20 by Michael White. In 1993, the NEC was authorised progressively to reduce the union’s share of the conference vote from its present 70% to 50%, provided that individual membership reached 300,000. See Alderman & Carter 1995: 454.

movement towards the modernisation of Labour was a natural response to this unpleasant reality.

4.4.3 The modernisation of Labour

(i) The change in power structures

In the wake of the party's crushing 1983 election defeat, the newly elected young leader, Neil Kinnock, launched a number of cautious¹⁹⁴ attempts to reverse the political pendulum out of the hands of a hard left-led NEC and towards the parliamentary leadership. Soon after the 1983 election campaign, specific proposals for organisational reform came on the party agenda, which were ostensibly focused on the establishment of a process of joint policy determination between the representatives of the parliamentary and extra-parliamentary parties. A limited number of joint policy committees, consisting of an equal number of members from the NEC and Shadow Cabinet plus a few additional trade unionists and advisors, superseded the NEC's power to propose policy statements to conference. (See Kinnock 1994: 539) This meant that the parliamentary leadership secured, for the first time in Labour's history, an "institutionalised" role in the Party's policy-making machinery. (See Shaw 1994: 110)

In fact, the real consequences of this reform may well be far-reaching. Some research (See, e.g. Minkin 1992: 409) shows that by 1986, the Parliamentary leadership had largely taken charge of responsibility for policy innovation. In Shaw's words (1994: 110), the NEC was in effect transformed into an "adjunct of the parliamentary leadership". What has reinforced this shift of power since the middle of the 1980s is the growing role of party strategists and communications specialists.¹⁹⁵ What now became key vantage points in the party machine were not purely ideological, class-based social reform plans but so-called realistic alternative policies compatible with current public opinion. (See Shaw 1994: 111)

¹⁹⁴ In his presentation in the Institute of Historical Research seminar on Twentieth Century British History on 8 December 1993, Neil Kinnock explained why this attempt should be *cautious*: "[Without] long preparation and a variety of actions to push and persuade people and organisations into changed positions, the status quo - or something worse than that - would have prevailed. ... [In] the Labour Party, the leadership had no instrument for inaugurating and pursuing change on the scale and in the direction that was needed. There was no tradition of the PLP or the Shadow Cabinet instituting and processing comprehensive change and neither was there any means available for doing that. ... change of all kinds would have to be pursued by very thorough and calculated means." See Kinnock 1994: 536, 538.

This is part and parcel of the modernisation of the party machine, focusing on the importance of winning elections, which the opponents of this movement have termed a “contaminating bacillus called ‘electoralism’ ”. (Kinnock 1994: 540. See also 545)

(ii) Individualisation of organisation

After a fourth defeat in 1992, an even stronger modernisation drive was made by two successive leaders, the late John Smith and Tony Blair. The thrust of this recent modernisation may be called the ‘individualisation of organisation’. What were once central themes of liberalism, such as self-regulation and individual choice coupled with competent and accountable government, become regarded as indispensable principles which the party must embody in a reformed power structure and organisation.¹⁹⁶ Two communitarian notions supplement this move towards individualisation. Firstly, there can and should be more to politics than the aggregation of preferences given in advance. Secondly, the reduction of democratic politics to its ‘group basis’ should be abandoned. Since 1993, the block vote, which has been seen as the main cause of the unrepresentativeness of the party policy-making process, has been virtually abolished. A maximum rate of the total conference vote cast by the unions was set up and ‘one-delegate-one-vote’ replaced the ‘unit vote’ so that union delegations can split their votes.¹⁹⁷ These reforms are intended to temper the imbalance of vote strength favouring the unions as well as to curtail the influence of activists by empowering the more moderate rank and file members. (See Mandelson & Liddle 1996: 217; Shaw 1994: 117)

¹⁹⁵ See Kinnock 1994: 542. For example, Peter Mandelson, an architect of the modernisation of Labour, was first appointed as Director of Campaigns and Communications of the Labour Party under Neil Kinnock’s leadership.

¹⁹⁶ That is why, given equally noticeable change within the LDP, some political commentators hastily suggested convergence between the two main opposition parties. See, for example, Peter Kellner’s column in *The Independent* 26.1.92, p.19. Cf. Russell 1996.

¹⁹⁷ In between 1984, when the proposal for ‘One Member One Vote (OMOV)’ was defeated at the conference, and 1989, when OMOV was made mandatory, its use in the constituencies had been increasing – which, as Kinnock (1994: 543) recalled, was a key condition for the modernisation. However, the most important area in which the introduction of OMOV has a real significance is that of leadership elections. Individual members are now entitled to have a voice in the election of the leadership/deputy leadership electoral college, which is equally distributed to trade unions, constituency parties and MPs/MEPs. The selection of parliamentary candidates is now carried out by a ballot of the CLP membership on an OMOV basis. Moreover, voting rights in this selection process is accorded to a new category of ‘registered party members’ under the ‘levy-plus’ scheme, which requires the union members to pay a further subscription to the party to cast a vote.

Individualisation of the party organisation can also be traced in a change in established policy-making procedures.¹⁹⁸ Growing discontent with policy-making processes at conference resulted in the creation of a new policy-making tier: Policy Forum and Policy Commissions. Policy Forums are based not only at the national level but also at the regional level and draw membership from all sections of the Party, including MPs, unions, local government, constituencies and regional parties. Seven Policy Commissions are drawn from the membership forums and charged with the detailed examination of particular policy areas and presentation of policy statements to the forums. The creation of this tier aims at enabling greater number of members to discuss policy in a more considered way. The NEC-Shadow Cabinet Joint Policy Committee considers the statements discussed and amended by the forums. Conference is the place where such statements are voted upon without further amendment. (See Mandelson & Liddle 1996: 221)

Supporters of such reforms claim they will enhance good communication between the party in public office and the party on the ground. To maintain a “constructive two-way dialogue” between the membership and the leadership even when the party is in government, the party has already established a programme of political education and an independent supplementary organisation called ‘Progress’. (Mandelson and Liddle 1996: 223-224) Mandelson and Liddle (1996: 223-224) suggested that the purpose of this programme is “to promote political discussion, sensible debate and skills training among party members, ensuring, alongside party HQ, that the parliamentary leaders remain in close touch with the grass roots at all times”.

4.4.4 Analysis of the modernising Party plan: greater democracy or more managerialism?

The full consequences of such reform projects is not yet clear. On the one hand, it seems plausible that they will enhance participation and improve the quality of policy-formation. (See, *e.g.*, Mandelson & Liddle 1996: 216-223). On the other hand, some critics argue that

¹⁹⁸ Apart from procedural change, there have been considerable substantive changes in party policies through the policy review process which has paralleled the structural transformation towards individual empowerment. They include the abandonment of the closed shop and the ditching of the Party’s long-standing commitment to ‘public ownership’ which had been enshrined in the original Clause IV of the Party Constitution since 1918. For a comprehensive analysis of this change, see T. Jones 1996. For a debate over the political implication of Labour’s policy review, see Hay 1994 and Martin Smith 1994.

they will lead to manipulation by the parliamentary elite, as a useful means to get legitimacy of its political power. (See, *e.g.*, Russell 1996; Lipow 1996: 1, 58)

The latter, pessimistic view is supported by the fact that, despite increasing empowerment of the membership, it is parliamentary leaders and their professional advisors that generally have the initiative in the policy-making process. (See Leggett 1995: 70. Cf. Kinnock 1994: 544-545) Participation of the membership in the policy-making process rarely means real debate and discussion but rather a “one-way traffic” in ideas and policies, emanating from the central party. Moreover, a case study of the influence of this ‘new Labour’ project on the commitment and participation of members shows that it is at best uncertain whether such new leadership strategies will fuel renewed commitment and active participation. (See B. Jones 1996: 530) It can hardly be denied that, so far as the role of activists and the political influence of unions are concerned, recent reforms contribute to the strengthening of the leadership’s autonomy, in that it is now capable of gaining direct legitimisation from ordinary individual members.

On the other hand, however, this move to curtail the influence of both activists and unions might well cure the institutional problems inherent in a power redistribution strategy. This strategy has created what Habermas (1992b: 445, 451) called ‘generalised particularism’, *i.e.* a privileged status being given to local and sectional interests. Thus, there is no point in arguing against enhanced participation on the part of the ordinary membership *per se*. What matters is how to reduce the potential manipulation of the membership by the leaders, or, in other words, how to strike the right balance between centralism and localism.

4.5 *A need for a balanced realism: beyond individualism and collectivism*

Given the equal importance of enhanced egalitarian participation and coherent policy-making, the immediate question is how, in practice, to tackle the difficult, but necessary, task of striking a right balance between these two goals.

A comprehensive analysis of this issue is beyond the scope of this dissertation. However, some essential issues do need to be examined. In so doing, we may again benefit from the example offered by Labour’s recent reforms. In the case of the Labour Party, the individualisation of the party machine may, paradoxically, mean the centralisation of its

power structure. (See Webb 1994) As Shaw (1994: 120) argues, “the opportunities and incentives for institutionalised horizontal communication are being diminished and replaced by the growth of direct vertical communication between the centre and the rank and file.” In analysing this aspect, we need to separate two forms of representation or participation: the territorial and the functional.

4.5.1 Qualitative change of territorial representation

So far as territorial representation is concerned, it would be wrong to assume that increased direct connection between individual member and central authorities has forced constituency-wide organisations to atrophy and, thus, left little room for such intermediate associations within party politics. Insofar as the central control of certain activities of territorially based organisations become strengthened, their powers may actually diminish. It does not follow, however, that the role of local activism as a whole is being denied. Rather, it simply allows local parties to be more committed to their own ‘local’ affairs and, in this sphere, to enjoy much wider autonomy.¹⁹⁹ Furthermore, as Seyd and Whiteley (1992: 218) suggests, “re-energising” the party through the extension of “new” participatory incentives to “foot soldiers” or “ambassadors” is essential for the electoral future of the party.²⁰⁰ Of course, such incentives ought not to mean a return to the conventional local-activist-centred notion of party organisation. As long as nation-wide issues are concerned, a considerable part of territorial participation can be given to secondary associations dedicated to a sort of functional representation in a professionalised and fluid organisational form.

4.5.2 The implications of postmodern functional representation

(i) New forms of participation in the information-oriented society

So far as functional representation (and newly reorganised territorial participation) in party politics is concerned, we may start with some post-modern projects aimed at

¹⁹⁹ The recent constitutional reforms such as the creation of separate Parliaments for Scotland and Wales and a new Mayor of London may offer more opportunities for local parties to play an autonomous part in local politics.

²⁰⁰ The recent Conservative reform of party organisation takes the same perspective so that one major principle of this reform is the decentralisation of decision-making while allowing the centralised institution, named the Board, to control local organisations. See the Conservative Party’s *The Fresh Future* (1998).

rigorously changing forms of political participation. Geoff Mulgan put forwards an idea of 'lean democracy' as an antidote to the contemporary political crisis which is, he believes, caused by the huge gap between "democracy as an ethos and culture and democracy as a set of institutions." (Mulgan 1994b: 16) 'Lean democracy' "gives the governed more direct control over governors, and makes politics more transparent and responsive, more effective and more accountable". (*Demos* No. 3 1994) Mulgan's presumption, with which we might agree, is that the old style of representative or participatory democracy cannot meet the paradoxical social change that simultaneously requires egalitarian empowerment and self-determination, on the one hand, and professional management, on the other. However, in suggesting possible alternatives to the present representative democracy, he stresses that this contemporary political crisis stems from a democratic deficit, *i.e.* too little influence on the part of the majority of citizens over public decisions. (See Mulgan 1994a: ch.1; 1994b: 17-18; the cover story of *Demos*, No 3/1994; Adonis & Mulgan 1994: 2) Therefore, the practical side of lean democracy, with which we may not totally agree, aims at introducing rigorous direct democracy by way of a wholesale redefinition of the nature of politics and reconsideration of the role of politicians. 'Weak power' politics, relying on a decentralised, horizontal, cellular and mosaic power structure, will replace 'strong power' politics which is structured as a pyramid and depends on vertical lines of authority and accountability. (See Mulgan 1994a: ch.6) "Less deferential" but "more demanding" citizens become more active in the new model campaigns based on highly effective localised 'guerrilla' groups, loosely linked in networks, but their relationship with the state is made through 'electronic forms of decision-making'. (See Mulgan 1994b: 18) What makes this new²⁰¹ version of populism possible, for Adonis and Mulgan (1994: 7), is the advance of information technology over the past decades. The physical legislature will be replaced by "electronic forms of decision-making" in which a number of practices, in the form of referendums, rights of initiative and recall, and voter vetoes of parliamentary legislation, are adopted in order to strengthen the democratic process. (See Adonis & Mulgan 1994: 4-9) An array of new types of participation, such as deliberative polls, citizen's juries, electronic town halls and referenda, reinforces the cellular nature of a modern state. (See Mulgan 1994b: 18) In such a highly

²⁰¹ In a sense, this version is the oldest because its *idea* can be traced back to ancient Greece as we can see from the title of one of his articles: A.Adonis & G.Mulgan, "Back to Greece: the scope for direct democracy" (1994)

fragmented politics, the individual, not representative organisations, will provide moral authority. As a result, the image of politicians will shift towards “convincing story tellers”, and away from priest-like managerialists whose self-imposed task is to guide society in the light of predefined natural rules. The major role of politicians is to “stand in favour of closeness to experience, of judgement, of ecological thinking” in a multiplied network of communication. (Mulgan 1994a: 33)

(ii) Some problems with new styles of participation

One cannot easily dismiss all these measures, especially as they are focused on the pluralist tendency of modern society and the potential value of electronic forms of policy-making. Such new ideas, combined with the influence and role of the mass media provide a very useful device to explore a new trend in politics and suggest a paradigm better fitted to recent societal changes. Indeed, the changed form of political communication has a remarkable impact on the nature of political action, as Dan Clifton (1994: 85) states: “Despite the electoral value of local activists, it is incontrovertible that modern political communications are dominated by the mass media and particularly television. ... As political communication has changed, so has the popular perception of what it means to be politically active. ... In the modern world, the nature of political action has shifted away from the collective, towards the individual.” However, notwithstanding the merits of Mulgan’s post-modern projects, some real problems emerge out of his proposed styles of participation.

(a) A devaluation of political institutions

We disagree with Mulgan’s view that the individualisation of politics should be understood as “the death of political parties” and the advent of a new era of “techno-populism”. (See Lipow and Seyd 1996)

Above all, it does not recognise the value of the state-society distinction at all. Adonis and Mulgan (1994: 2) diagnosed the divorce of politics from society as one of the most fundamental weaknesses of contemporary western democracies. However, as we sought to demonstrate in Chapter 3, the problem is not the separation *per se* but the loss of balance between them. The critics like Mulgan too easily set aside Habermas’s (1992b: 444)

warning that communicative power should not be allowed to override systemic power.²⁰² As we saw in Chapter 4 and briefly above, we cannot underestimate the essential role of party organisations in politics. What techno-populists overlook is the obvious importance of organisations or what Offe (1996: 96) called the “institutional means”, in so far as they enable society purposively to influence its own development and subject it to control.

There are a number of additional, hidden, dangers in techno-populism. Firstly, Offe (1996: 96) warns that a devaluation of the “institutional means” tends to undermine rational deliberation of the political issues by subjecting the political decision-making process to “innate resentment or an individual instinct for greater wealth”. In other words, a potential danger of techno-populism lies in its tendency to over-empower the “partiality” of “private” interests and passions. Offe (1996: 100) warns

the mere possibility of a plebiscite-related procedure being available would, in the case of a series of legislative themes, immediately trigger latent wishes and provoke passions that would *in all probability* and with great *damage potential* stand in the way of well-considered decisions. (Original emphasis)

The field most vulnerable to this danger is one in which citizens' direct interests are so strongly affected either favourably or unfavourably that it is not possible to rely on their ability to distance themselves from these issues when weighing them up. One example Offe (1996: 100) provides in this respect is fiscal law. It is claimed that to subject fiscal law to plebiscites would be like granting a free license that categorically privileged the income interests of the majority vis-à-vis the minority claims to welfare support.²⁰³

Secondly, it would not be appropriate to follow the extremely atomised decision-making process in ‘temporal’²⁰⁴ institutions; because direct democracy, based on electronic decision-making, does not provide power, in particular for the marginalised in society. Lipow and Seyd (1996: 283) advise us to see what an enormous burden such direct decision-making process places on the non-wealthy and the marginalised to defend themselves against selfish decisions. They point to the American experience where popular initiatives and petitions for referendums have, almost entirely, been called for by a wealthy

²⁰² That is, communicative power should not “directly carry over into democratic procedures for the settling of competing interests and power claims on the political level”.

²⁰³ The unease surrounding the Blair government’s proposal for welfare reform, including the cutting of lone-parent benefit, can be one example of this difficulty.

²⁰⁴ As Offe (1996: 94) points out, one main advantage of parliaments as opposed to temporally assembled institutions like citizen’s jury or referendum is that they are subject to the “law of reencounter”.

minority who could afford to place costly propositions on the ballot-paper. Harlow (1985: 80) cautiously suggests that “only a centralised government with untrammelled legal power can hope to carry through a substantial programme of social change by constitutional means”.²⁰⁵

(b) Problems with the individualisation of the power structures within political parties

The same consequence can be anticipated in the individualisation of power structures within political parties. Too extreme a drive towards the individualisation of their power structures will only exacerbate the atomisation of party organisation as a whole and eventually result in what Lipow and Seyd (1996: 281) term a new form of “plebiscitarianism”. They stress that such plebiscitarianism is a prescription for manipulation rather than democracy. (1996: 283) Democratic governance needs a process of representation or discourse in which all interests have substantively equal chances of participation. In other words, competition between factions within a party organisation (*i.e.* collective interest representation) coupled with their social autonomy does not inevitably generate managerial oligarchy. On the contrary, it can help bring about the ‘democratic’ governance of political parties. The individualisation of power structures can be a necessary, but not a sufficient, condition of democratic governance. In addition, the new technologies should be harnessed properly so that processes of communication and decision-making can be undertaken in such a way that a desirable balance between ‘communicative power’ and ‘systemic power’ can be struck.

(c) A balanced democracy: beyond collectivism and individualism

What the above view suggests is no less than a new division of labour between political parties (in particular the party in public office) and other forms of organisation. As we have sought to demonstrate in Chapter 4, despite the blurring of the social and the political, the ‘non-institutional’ political needs to be differentiated from the ‘institutional’ political. The importance of public opinion- and will- formation should be balanced by the equally important need for systemic integrity or stability and, therefore, active popular participation

²⁰⁵ Corrigan (1993: 64) argues, from his personal experiences as a Labour activist, that merely propelling ideas and making instant choices on single and localised issues cannot bring about any politically meaningful social change at all, though such activities have their own merits at problem-discovery stage.

cannot justify direct empowerment of the citizen in such a form of “plebiscitarianism”. Offe (1996: 96) says that “democratisation can be effected not only from “below” through forms of participation involving plebiscites, but also ‘internally’ (participatory rights in political parties) and ‘externally’ (via public opinion)”.

We need to recognise that there are (or should be) many ‘non-institutional’ political associations, for example, single issue pressure groups such as roads campaigners, the women’s movement, Friends of the Earth, Greenpeace, and Amnesty International. People want to be part of, and active in, such associations. However, this is not to say that everyone needs to be active in the ‘institutional political’ sphere, for example, a political party. Therefore, what is vital for a party, claiming to be democratic, is not the way in which it is obliged to be subject to the predetermined will of its members or the electorate at large, but how it ensures that its decision-making process guarantees proper conditions for communication geared towards fair negotiation and free debates. In other words, the democratic nature of a party’s decision-making process has to be evaluated against how *open* it is to social discourses and thereby *porous* or *permeable* to the different demands of the ‘non-institutional’ political sphere.

All in all, therefore, the individualisation of the party machine *per se* is not necessarily a problem, but rather a condition for democratisation. But if this individualisation brings in majority rule without a practice of rational debate, an ideal precondition of which is the inclusion of all social discourses, it may bring about oligarchic and undemocratic institutions. In other words, this individualisation should be complemented and interlocked by secondary associations representing a pluralist culture of participation that is essential to the construction of a variety of personal “communal” allegiances and roots.

(d) The important role of the media in a balanced democracy

The influence of the media on any reinvention of democratic governance also provides an important justification for a balanced realism between the individualisation of organisation and a pluralist practice of participation. One cannot seriously claim that the ever increasing power, which the media has over people’s lives and choices, works solely for either good or bad. So far as the democratisation of political processes is concerned, the mass media plays a vital role in providing ordinary citizens with information relevant to their choices.

‘Political inclusion’ of the masses in a pluralised society is unthinkable without such media information. In a post-Fordian age where, as Mulgan (1994a: 117,132) stresses, authority derives from knowledge or ability rather than from position, the media, by dismantling the socially defined boundaries, enables the individual to take part in a broader everyday discourse.

However, there are obvious objections to this positive view. The media, combined with newly empowered party membership, may spread its own bias to less critical members and, thus, work to the disadvantage of the marginalised interests. Given the introduction of ‘one-member-one-vote’ as the principal method for decision-making within Labour, an understandable anxiety has arisen that the media dictate could well replace a rational choice among the membership. The obvious role played by the media in the recent Labour elections can only serve to strengthen this worry. In the party’s leadership election of 1994, the media apparently replaced the traditional party organisation, whether official or unofficial, as the forum of discourse to select a front-runner. As some commentators pointed out, judgements on the part of the media as to the popular appeal and telegenic attributes of various potential candidates appear to have influenced the early withdrawal of some promising candidates, including Gordon Brown.²⁰⁶ The historical evidence shows that few practical remedies are available to curb such media power that do not generate other equally serious problems. (See Keane 1992: esp. 123) But what is clear is that the institutionalisation of rational debate and discussion, based on a pluralist culture of participation combined with the principle of publicity, would at least moderate the negative aspects of media power.

(iii) The problem of dominant interests within party politics: the case against the Labour-Union link

How can ‘collective representation’²⁰⁷ effectively meet the problem of oligarchy which might well emerge as a result of the individualisation of the party machine? One may argue that the need for group pluralism within party organisations should be supplemented by some measure to ensure that equal conditions of participation and the free flow of

²⁰⁶ See, e.g. Alderman and Carter 1995: 452. For a comment on Gordon Brown’s resignation as leadership contender, which takes the similar line to Alder and Carter’s view, see Sopel 1995: ch.8.

communication are preserved. As far as the democratisation of party organisations is concerned, a central question is, how should dominant interest groups within the power structures of political parties be treated?

(a) The institutional link between the Labour Party and Trade Unions

Since 1992²⁰⁷ the Labour movement has been exercised by the major problem of the party's link to the unions. The uniquely powerful role played by the unions within Labour's power structure is what distinguishes the British Labour Party from its continental counterparts. What is more peculiar is, as we have seen, their powers in the decision making process of the party. Thus, the implications of this institutionalisation may well be far-reaching. Despite some attempts by the 'modernisers' to reduce the power of the unions, a considerable amount still remains in their hands. Unless there is a divorce between the party and the unions, debate about over-empowered factionalism will continue.

(b) The unique history of the Labour-Union link

The unique circumstances within which the British party system and the Labour Party in particular have developed make this issue more complex. So far as union powers are concerned, there are two contrasting aspects. In the first place, it may be an irony, as Shaw (1994: 121) points out, that the crucial role played by the unions as "powerful, organised and constitutionally autonomous" bodies represents a major barrier to a fully oligarchic system. The fact that critical voices remain entrenched within the unions can provide a braking mechanism constraining oligarchic tendencies on the part of the leadership. However, as we have seen, except for a short period between 1979-1982, the excessive power of trade unions has tended to be used to reinforce oligarchic control by supporting the PLP leadership in its attempt to control radical elements within local parties. This stabilising function, what Minkin (1992: 647) terms "the protected character of the Labour

²⁰⁷ That is, competition between factions within a political organisation plays an important role in facilitating participation and constructing a major impediment to domination by the leadership.

²⁰⁸ Although the debate over the party-union link is not entirely new, it was after the general election of April 1992 that the direct pressure for reform of the link drew increasing attention on the grounds that the defeat had been more to do with 'identity' than with policy, values or leadership. For example, the NEC established a working group on party-union links in June 1992. See Labour Party 1993a: 3. The debate on this issue began to be fully aired after that time. See, for example, *Fabian Review*, Vol. 104, No.4 (1992), focusing on the union link.

Party conflict", has been put forward as a justification for a continuing, though reformed, Labour-Union alliance. (Webb 1995a: 4) Thus, while, in theory, union powers form part of the braking mechanism controlling party leadership, in practice, they tend to support oligarchy.

(c) Two reasons for a friendly divorce between Labour and unions

Beyond this question of union support or otherwise for oligarchy, there are a number of other, more important, factors pointing to a need for a reform of the Labour-Union link.

A speculative reason: the identity problem of the Labour-Union link

The first reason is a speculative one. Some analysts take into account the electoral implications of the link. There has been a strong hypothesis that Labour's four general election defeats in a row were the result of a widespread perception of its 'incompetence' to govern, and a perception exacerbated largely by its union link.²⁰⁹ From the point of view of winning political power, the organisational bond between the party and the unions is not helpful because it can give the impression that the party cannot effectively deal with the unions. (See Walsh & Tindale 1992: 10) Indeed, the bitter memories of the 1978-1979 'Winter of Discontent' might well be responsible for many people's image of Labour as incompetent. In this circumstance, the emergence of a co-operative relationship between fraternal unions and a constitutionally autonomous party might well be an attractive alternative to present arrangements.²¹⁰

Yet, the problem remains that a 'friendly divorce' might not necessarily lead to Labour's electoral success. What needs to be borne in mind is that politics is still largely a game of

²⁰⁹ See, for example, Peter Kellner's column in *The Independent* 12.6.1992, p.19. Pippa Norris' (1994: 186) evidence shows that despite a considerable reconstruction of party organisation and shift in policy, Labour's modernisation project failed, at least until the 1992 general election, to change the electorate's image of the party, something which Kinnock, the then party leader, freely acknowledged. (See Kinnock 1994: 546)

²¹⁰ In fact, until recently, a rather successful informal relationship existed between the Conservatives and business interests. After Labour's fourth general election defeat in a row, one Labour MP commented, "The unions must realise by now that they don't need votes to wield influence with us. The CBI does not have a block vote at Tory party conference, but somehow the Tories do all right by them." (See Patrick Wintour's column in *The Guardian* 28.4.92, p.19) Prior to the rise of Mrs. Thatcher's 'conviction politics' and its recent rows on European issues, the Conservatives displayed less enthusiasm for ideological debate and arguments about social representation than the Labour Party and developed a very pragmatic approach to politics. (See Barnes 1994) Therefore, despite an undeniable link between the Conservatives and business (see Ewing 1987: ch.2), the lack of any organisational link made it possible for the Conservatives to be seen as a more competent economic manager, in particular when dealing with the unions.

resources, rather than a forum of principles. The fact that Labour relies heavily on the unions both financially and organisationally underlines the potential cost of a divorce, for the party would undoubtedly find itself greatly impoverished in both respects. But, that having been said, Donald Sassoon (1993: 33) points to a much more profound problem, namely, that “political parties, the basic institutions of a democracy, should be forced to depend so much on private interests”. He maintains that any reform Labour undertakes has to embrace a reform of British political system as a whole. Sassoon (1993: 33) makes it clear that the separation of the Labour Party from the trade unions cannot be merely “another effort to make Labour more electable” and thereby cannot be seen as a “purely internal” matter. The Labour-Union divorce is not to be taken as an endorsement for a more hidden, secretive and corrupting relationship between the party and private interests, along the lines of the old Conservative-Business relationship. On the contrary, it is to be “part and parcel of the reform of the British political system”, the crucial aspect of which is to the regulation of undesirable political ‘paymasters’. One practical alternative to the *status quo* is to introduce legislation that would provide state funding to political parties and outlaw all donations to them, over and above a certain amount. Such a mechanism could be further enhanced, were they to publish accounts in a prescribed statutory form. (See Chapter 8)

A result of the required publicity of political parties in a pluralised society

The second justification for the Labour-Union link lies in the pluralisation of British society. As society becomes functionally differentiated, a party concerned mainly with one element of social representation and autonomy cannot easily forge an identity as a competent party of government. As the boundary between the political and the social, or the non-institutional and institutional political, is reorganised, political parties need to be more inclusive in order to facilitate diverse social discourse no less important than that of the unionised interests. All of this is summed up decisively in a neat journalistic phrase, “You will search long and in vain today to find somebody who will say that Labour exists to represent Labour.” (Martin Kettle, *The Guardian*, 12.6.93, p.23) Tony Blair has explicitly endorsed this view over and over again; “I want the Labour Party to include all kinds of people in its membership. In addition to having more members, plans are in hand to give them greater say in conference decisions.” (Tony Blair, *The Guardian*, 6.7.95, p.19);

“[P]atently in today’s world [the Labour Party] must be more broadly based than [ordinary working people], especially as so many people are not in trade unions.” (Tony Blair, *The Guardian*, 27.7.95, p.13) Looked at from this point of view, any claim that reform is preferable to organisational divorce is that much less plausible. A reduction of the unions’ voting strength to 50 per cent²¹¹ within conference cannot materially alter their dominant, albeit conventionally restrained, position. The levy plus system, paralleled by OMOV, has to be seen as purely cosmetic unless the electoral college of the unions is abolished. The present party voting system makes it possible for many ordinary members to cast multiple votes as trade unionists, members of various socialist societies and constituency members.

In short, an important condition for the legal institutionalisation of political parties is that their relationship to dominant social groups has to be carefully regulated, and, practically speaking, they should be constitutionally separated from private interests.²¹²

5 Should party members take part in the election of their leaders?

5.1 The importance of indirect intra-party democracy

5.1.1 The similarities and differences between our project of intra-party democracy and McKenzie’s

Practically speaking, our advocacy of a balanced form of intra-party democracy seems, at a glance, to be very little different to McKenzie’s liberal vision, in that both regard the doctrine of mandate as immaterial to intra-party democracy. However, as previously noted, the way we arrive at our conclusion is significantly different to that of McKenzie. This, in fact, amounts to a difference in perspective, which, in turn, gives rise to a number of quite distinct ideas in relation to intra-party democracy.

In effect, we disagree with McKenzie’s (1982: 200) view that, in a competitive political system, the sole criterion on which one can judge whether or not a party is ‘democratic’ is whether it abides by the rules governing its external relationship to other parties, especially those pertaining to electoral competition. McKenzie seems to assume that even the

²¹¹ *I.e.* the unions casting just under 50 per cent as some reformists, such as the majority of the Archer Committee of the Fabian Society (1993: 10) and Minkin (1992: 385), suggest.

regulation of relationship between party and private interests is immaterial in this respect. But, as we have seen, such regulation is essential if we consider the public role of political parties and the need for their institutionalisation.

5.1.2 The necessity of indirect intra-party democracy

Our argument that the relationship between political parties and special interests has to be organisationally separate does not, however, constitute the sole difference between McKenzie's liberal ideas and our democratic paradigm. In the light of their institutional implications, the fundamental difference between them is to be found in their distinctive approaches to the indirect form of intra-party democracy. Contrary to McKenzie, we argue that participation by the membership in the selection of its leaders and party candidates should be an element of party democratisation, underwritten by law.

(i) Participation in the leadership election process

The case for greater participation in the leadership election can be argued with particular force in the context of British politics. The fact that the Prime Minister as head of the executive is accountable not only to the electorate but also to the party to which he or she belongs already furnishes an excellent basis for such open participation.²¹³

Over the past decade, the then ruling Conservative Party has had to endure three leadership elections, two of which were of considerable constitutional significance.²¹⁴ The 1990 contest, instigated by Michael Heseltine, resulted in the reluctant resignation of the then Prime Minister, Mrs Thatcher.²¹⁵ The 1995 election set a precedent, namely, that the incumbent Prime Minister, by passing traditionally recognised mechanisms of either a vote

²¹² Chapter 8 will argue that this radical transformation has to go hand in hand with a state funding system for political parties, which, as we have said, are the 'backbone' of modern democracy.

²¹³ In principle, the same practice can apply to the leader of Her Majesty's Opposition. His office has been confirmed since the enactment of Ministers of the Crown Act of 1937 which gave a salary to the leader of the opposition.

²¹⁴ Sir Anthony Meyer's challenge against Mrs Thatcher in 1989 was not only unsuccessful but also raised no significant constitutional issues.

²¹⁵ Apart from the constitutional issue dealt with below, Mrs Thatcher's fall is significant in terms of the nature the British system of government. Crossman has argued that Cabinet Government has been transformed into Prime Ministerial Government. (See Crossman 1993[1963]: 52 ff) Marshall (1991), on the other hand, argues that the Conservative leadership struggle in 1990 showed that the British Cabinet, unlike the American cabinet, still possesses the power to affect the political fate of the head of the executive. See also Hennessy 1996: Ch.3.

of confidence in the House of Commons or a general election, opted for an intra-party leadership contest to quell political opposition.

The central issue raised by these contests is whether a political party which has no constitutional status has the power to change the head of the executive.²¹⁶ Hennessy (1996: 11-14) argues that there are no problems in recognising such a power because it is fully in line with past precedent. He is here referring to Harold Wilson's resignation in 1976 to make way to James Callaghan. Brazier (1995: 525; 1991: 478-479) has a similar view. He argues that the key question is, not which body or group has the constitutional authority to remove a Prime Minister, but rather what is a politician's right to be the Prime Minister. For him, the principle is the generally accepted constitutional one: the person best able to command a stable majority in the House of Commons is entitled to be Prime Minister. Thus, he argues that intra-party leadership re-selection accords with that general principle, adding "The cohesion of party has merely speeded up the processes of parliamentary democracy". (Brazier 1991: 479) Brazier's (1988: 22) basic presumption is that, now that all the main parties have leadership election machinery, constitutional responsibility for prime ministerial selection has by and large shifted from the Sovereign to the political parties.

However, we disagree with both Hennessy's and Brazier's views. As to Hennessy's view, we argue that the existence of past precedent does not provide an adequate rationale for parties between elections to either select or change the Prime Minister. For one thing, since the conventional liberal constitutional arrangements are under radical review, past precedent *per se*, inevitably corresponding to this old system, cannot provide a convincing rationale for the constitutionality of the intra-party transfer of premiership. We need a logical justification that corresponds to the new constitutional framework in a pluralist society.

In relation to the arguments of Brazier, we argue that formal ballots for party leaders, which, in legal terms, are no different from the election process in a tennis club, do not alone provide sufficient rationale. Firstly, we suspect that, without the adequate legal institutionalisation of political parties, intra-party leadership elections could very well come to replace confidence votes in the House of Commons or even general elections. Under the

²¹⁶ For other constitutional issues, see Blackburn 1992: 36ff.

present constitutional arrangements in which little recognition of political parties exists, even in the electoral process, the intra-party reshuffle of the head of the executive deepens the discrepancy between political reality and constitutional ideal. The liberal principle of minimal regulation of political parties is based on two related presuppositions inherent in the British version of parliamentary democracy. The first is that Parliament is the only centre of political power and that this cannot be usurped by any other body. The second, which presupposes the first, is that the power to determine who will be Prime Minister is vested in individual MPs who, as representatives of the nation as a whole, are supposedly above any particular party line. However, in reality, this power of selection is wielded by political parties. In response to this *de facto* constitutional power of political parties, this anomaly should be remedied by the regulation of the leadership election process. Only when parties are legally institutionalised so that, unlike tennis clubs, their leadership contests are subject to public scrutiny, can this internal process claim to replace either the confidence vote or the general election. In short, the question whether a political party should possess the power to change the Prime Minister cannot be separated from that of its constitutional recognition.

Secondly, we argue that the regulation of intra-party leadership contests should be underpinned by the principle of democratic governance. The independence of MPs, as representatives of the whole nation, underpins a confidence vote in the Commons as an alternative constitutional device to a general election. In parallel, the constitutionality of the intra-party leadership election depends upon how democratic this election is. The constitutional power of parties to change a Prime Minister should go hand in hand with certain parallel duties. Above all, the manner in which such power is used should be subject to legal rules ensuring, *inter alia*, that the intra-party process reflects the opinions of all party components. This requirement fully accords with our vision of constitutionalised democratic autonomy. In the light of the required balance between systemic power and communicative power, the formal voice of members in the election of the leader is the only nexus linking both powers within a party. As Habermas (1992b: 452) suggests, communicative power, based on social autonomy, should not override systemic power, but should be allowed to “influence” it. The basic form of this influence is the “procurement and withdrawal of legitimisation” and the membership’s participation in the election of the

party leader for fixed periods is a vital, though not the sole, means of expressing that purpose.²¹⁷

(ii) Participation in the selection of party candidates

So far as the selection of party candidates is concerned, we need to examine the tension between the central party and the local parties. The inclusion of the electoral process within political parties means that almost inevitably this process of selection has to be subject to democratic principles and should, therefore, receive the close attention of the law. The choice of party candidates in any constituency or for a party list should broadly represent the spectrum of party opinion both at local and national levels. The proposed electoral reforms reflect this view and are designed to incorporate political parties into the institutionalised part of electoral processes. (See Chapter 7) This being the case, there is no clear reason why the candidate-selection process should be treated differently from the election of representatives of the electorate as a whole.

However, since this inclusion process goes hand in hand with the governmentalisation of political parties and the recognition of their legal personality (see Chapters 4-5), some managerial control of the selection processes is inevitable to ensure the integrity of the party as a whole. This is why, after its humiliating defeat in the 1997 general election, the Conservative Party is eager to set up a form of screening within the candidate selection process. The Conservatives realise that the almost absolute autonomy of their constituency parties prevented the leadership from coping swiftly with the sleaze allegations surrounding a number of candidates. This failure to respond quickly did great damage to the integrity of the Party.

This case for the central control of the selection process is consistent with proposed electoral reform. As we shall suggest in the next chapter, our project of constitutionalised democratic autonomy prefers a hybrid electoral system in which party machines are designed to play a constitutional role. One consequence of this would be that political

²¹⁷ As discussed in Section 4.5.2, recently the impact of political communications on the power structures of political parties has increased. As Heffernan and Stanyer (1997) suggest, such exercises in political public relations as spin-doctoring, coupled with the professionalisation of campaigning, tend to contribute to the 'personification' of politics in the sense that the party leader becomes the primary focus of the party identity. As a result, the role of the leader tends to unduly dominate other party components. The primary constraint on this centralisation is, no doubt, the possibility of change of leadership through intra-party elections.

parties played a much more active role in general elections. This would, in turn, mean that a much better balance existed between democratic autonomy and the required reasonable management of party operation.

5.2 *Objections to the required indirect intra-party democracy*

Our eclectic stance, seeking a balance between democratic autonomy and systemic integrity, may not of itself persuade either the proponents of liberal or participatory democracy to change their views. On the one hand, theorists like McKenzie (1982: 198-199) may question the importance of the formal voice of members and suggest that there are other ways in which the requirement of legitimisation may plausibly be met. However, apart from the need for more open, accountable government, the ‘political inclusion’ of the masses and the governmentalisation of political parties would make this view (which relies on secretive, informal mechanisms of legitimisation) somewhat archaic.

On the other hand, to enthusiastic proponents of participatory democracy, extended suffrage in the intra-party elections may seem merely formal, symbolic, indirect or limited. They may claim that “the choice of representative is no substitute for the choice of policy”, (Sir Douglas Wass quoted in Harlow 1985: 79) or that “[Voting] is only the thin end of the wedge of contemporary political activism”. (Adonis & Mulgan 1994: 3) However, they should bear in mind a number of factors that surround this issue. Underlying the choice of policy is an inherent ongoing tension between centralism and localism. The best, though not the only, answer to this problem is to strike a balance between them through a pluralist framework. So far as political parties are concerned, our project of constitutionalised democratic autonomy suggests that they become complex entities within a more functionally differentiated political system and, thus, become ‘stratarchical’ in form and organisation. (See Chapter 4) While diverse organisations committed to single issues and local matters are to be encouraged, at least in so far as national or supranational policies are concerned, a premium in the problem-solving process, as distinct from the problem-discovering one, needs to be placed on the central organisation.

The legitimisation of the decision-making power has to be two-dimensional. On the one hand, it depends on there being a guaranteed institutionalised practice of rational debate in the problem-discovering processes. On the other hand, the chosen policies are legitimised

by the fact that the leadership in charge of the problem-solving processes is elected *via* democratic procedures. Obviously, the first dimension is concerned with direct intra-party democracy, the second with indirect intra-party democracy. In short, the greater voice given to members in leadership elections is a constitutional device for curbing not only ill-considered radicalism on the part of activists but also managerialist oligarchic tendency on the part of the leadership.

5.3 *The democratic nature of the electoral college*

From our perspective based on a balanced realism, it would be wrong to assume that a strictly direct ballot of every member²¹⁸ would be more democratic than an indirect ballot such as that adopted by Labour in 1983. Since underlying this issue is a conflict about the nature of democracy, any attempt to arrive at a clear consensus on this issue may prove impossible. However, as we sought to demonstrate earlier, public opinion cannot be ascertained purely on the basis of numerical calculation. It is equally necessary to take an overall view of social discourse. A party's grasp of public opinion can also be severely distorted by its own power relations. There are obvious advantages for large political organisations, such as mainstream political parties, in federalising their leadership election processes by adopting a system of electoral college. For example, there are a number of good reasons why MPs and MEPs should retain a relatively greater say in leadership elections. Firstly, it should be considered that they are selected by not only party members but also the electorate at large. Secondly, the fact that their constitutional duty and right is to exercise public office under a leadership chosen by the same selection process adds obvious weight and significance to their judgement. For the same reasons, the practice of selecting the party leader from within the parliamentary party is perfectly compatible with democratic principles. However, one might, rightly, maintain that it is undemocratic for ordinary party members to be excluded from this process, as they were under the old Conservative system in which the electoral college for leadership contests consists of only MPs. How one wonders are those local parties, with no MP of their own, to voice their concerns in this matter?²¹⁹

²¹⁸ For example, the system of leadership election of the Liberal Democratic Party.

²¹⁹ William Hague will be the last Conservative Party leader who was elected by the old system excluding a formal say of grass-roots in the leadership elections. The Conservative reform adopted a new procedure in

It is also important to note that such federalisation should go hand in hand with greater individual participation. Therefore, it is necessary to ensure that within each electoral college, each individual voice counts equally. The system whereby a separate electoral college is conceded to a specific sectional interest, *e.g.* the unions, has to be seriously reconsidered. This is all the more so when we recall the possibility of multiple votes by trade unionists, coupled at the constituency level with considerable indirect influence being wielded through the levy-plus scheme. (See Alderman & Carter 1994: 333)

5.4 *The problem of cost*

Another factor, one which was raised after the recent Labour Party leadership elections, is the great expense of elections now that OMOV has been introduced. It is claimed that the individual membership ballots cost a lot of money which could be put to better use. Indeed, the high cost of such elections was offered by two unions (*i.e.* NUM and UCATT) as reason for not participating in the Labour leadership election of 1994. (See Alderman & Carter 1995: 449) This issue is closely related to the state funding of political parties. It would be an irony if the extension of democracy were to be hampered by such financial considerations.

6 **Conclusion: Constitutionalising intra-party democracy**

In this chapter, having sought to show what procedures need to be introduced to facilitate intra-party democracy and thereafter the legal institutionalisation of political parties, we arrived at two basic conclusions.

Firstly, although direct intra-party democracy *per se* is not incompatible with democratic government, the implementation of radical democratic principles within the power structures of political parties is to a certain extent limited. The democratic principle itself cannot justify attempts to in any way undermine the autonomy of the party in public office and so force it to carry out particular policies.

which the election of party leader will take place in two stages. The first stage will include only Conservative MPs, who will present a choice of candidates to the second stage, which will take place by way of one member one vote. See the Conservative Party's *The Fresh Future* (1998).

Secondly, indirect intra-party democracy, *i.e.* a greater voice on the part of the grassroots in leadership elections is a necessary constitutional device for achieving a well-balanced democracy.

Two contrasting arguments were used to justify this balanced approach. On the one hand, the need for systemic integration, reinforced by the governmentalisation or cartelisation of political parties, was suggested as a rationale for requiring a limitation of the democratic principle. On the other hand, there is also a need for legalisation covering intra-party structures, for example, to facilitate rational will-formation, to protect minority opinions, and, thus, to curb the managerialist oligarchy's ability to abuse the argument for systemic integration. In this chapter (Secs. 4.4-4.5), both old and new Labour initiatives for intra-party democracy were critically analysed from these points of view.

These conclusions should lead to the constitutionalisation of intra-party democracy. This has two aspects. One aspect is concerned with the need for a written constitution to create an internal framework. The other aspect is concerned with the institutionalisation of political parties within wider constitutional arrangements. This would be just a part of a wider programme of constitutional reform, including electoral reform, directed at the modernisation of the entire political system. As constitutional entities, political parties would be required to meet certain constitutional standards, including the protection of human rights, especially political rights, of party members. As a result, a party's written constitution would have to accord with these constitutional values.

Chapter 7

Reform of the Electoral System and the Institutionalisation of Political Parties

1 The present electoral system under challenge

A reform of the electoral system is indispensable to the institutionalisation of political parties in Britain. This is because, as Arend Lijphart (1994: 2) notes, the electoral system is the most specific manipulative instrument of politics, and the difference between various electoral systems is of special importance in determining both the nature of democracy and the status of political parties in a given country. (See also Plant 1991: 16)

1.1 Primary criticisms of the “first-past-the-post” system

The present “first-past-the-post” system (FPTP) has long been a target for attack by those seeking to reform the current constitutional settlement.²²⁰ This majoritarian system has been generally accused of producing an “unfair”, distorted representation and a “single party mandate”. (See Plant 1991: 11-14) As H.W.R. Wade (1989: 10) puts it, “If it is accepted that a democratic parliament ought to represent so far as possible the preference of the voters, this system is probably the worst that could be devised.” He lamented the absence of interest in electoral reform on the part of lawyers who, in his view, ought to take a much more serious professional interest in the idea of “justice”. (1989: 25) In other words, he

²²⁰ In fact, as Pippa Norris (1995: 69ff) points out, a movement for electoral reform emerges in the British political history whenever constitutional change forms part of the mainstream political agenda. Yet, as Gareth Smyth’s research (1992) shows, electoral reform has not always been associated with general concern for constitutional reform and some partisan considerations have also been responsible for this debate. On the other hand, it needs to be noted that the current movement for electoral reform does not solely stem from the change in the domestic political situation. As Vernon Bogdanor (1992: 2) notes, British membership of the European Community is another factor which puts pressure on Britain, the only member state not to use a proportional system in elections to the European Parliament, to conform to the Treaty of Rome, Article 138 (iii) of which

feels that lawyers ought to be among the first to recognise the unfair nature of what he terms an “absurd” and “crude” majority system. (Wade 1989: 9, 10) The most frequently cited “absurdity” is that the present system tends to give grossly exaggerated representation to the two major parties by simply focusing on who tops the poll and ignoring the size of the majority. It has become the norm that few governments are formed by the party with the electoral authority of a majority of the electorate’s vote. Robert Blackburn (1995: 364) suggests that “because of the huge number of ‘wasted votes’ of ordinary citizens in every constituency, ... it can also be claimed that the British electoral system in reality disenfranchises many millions of voters within the country.” The major victim of these wasted votes is the smaller party whose vote obtained, across the local constituencies, cannot be translated into the seats in Parliament. In particular, it is noticeable that since the 1970s the centre parties have been increasingly penalised by this majoritarian system. For example, in the 1997 general election, the Liberal Democratic Party won 17.2 per cent of the votes cast but obtained merely 6.98 per cent of the seats in Parliament.²²¹ This obviously distorts popular representation in terms of the proportionality of “national” preferences. Such a system of distortion can only operate where the essential role played by political parties in the electoral process is largely ignored.

1.2 *Analysis of some practical problems with the case for electoral reform*

In dealing with the issue of electoral reform, we need to pay attention to a number of practical factors affecting the discourse for a full and immediate reform.

1.2.1 The reluctance of the two major parties

The two major parties, upon which the success of any reform depends, have persistently defended the present system, though there has been strong support for reform from minorities in both parties.²²² The simplicity, decisiveness and political stability are seen as

requires a “uniform” electoral procedure. The Plant Report largely supports Bogdanor’s view. See Plant 1991: 11.

²²¹ See *The Sunday Times* the 1997 Electoral Map of Britain. It should be pointed out that, thanks to the so-called ‘tactical vote’, the disparity in the votes-seats ratio in the 1997 election is actually moderate, compared to that of the 1992 election where the Liberal Democrats won merely 3.1 per cent of the seats from 17.9 per cent of the votes.

²²² It is important to see that Labour has now, albeit in a rather hesitant and lukewarm way, espoused electoral reform simply because, under the present system, the Conservatives managed to secure victories in four

the main virtues of the present plurality system. As Rodney Brazier (1998: 74) stresses, these virtues appear to be implemented by “a recognition that general elections are as much about conferring power as achieving accurate representations, and the rooting of Members of Parliament in constituencies”. In short, defenders of the *status quo* prioritise the need for a “manufactured” (Norris 1995: 66) or “artificial” (Dunleavy & Margetts 1995: 48) majority, which is ‘capriciously’ created by translating a relatively small lead in votes into a much larger parliamentary majority.

The other side of the coin, so far as the present system is concerned, is that Parliament is ignored as a deliberative sphere while its legislative or governmental functions are overstressed. As early as 1915, Dicey (1982[1915]: lxxxvii) proclaimed that “the House of Commons is no mere debating society. It is an assembly entrusted with great though indirect executive authority; it is, or ought to be, concerned with the appointment and the criticism of the Cabinet.”

However, the need for the stability and efficient management of the core complex of the state does not mean that the organisation of Parliament has nothing to do with the democratic principle, in that it should reflect wider social discourse. It is true, as Dicey (1982[1915]: lxxxvii-xci) and his followers argue, that it is neither possible in practice nor even theoretically desirable that every opinion should gain a hearing at every stage of the decision-making process. Yet it is equally true that few governmental decisions, which fail to reflect wider social discourse, can be effectively implemented or produce a stable and sustainable democracy. This latter aspect would, of course, become all the more serious if, thanks to the ongoing pluralisation of society, the two main parties were no longer capable of mediating the diverse aspects of social discourse and, furthermore, tended to block the inclusion of an influential third force backed by significant electoral support. As Iain McLean (1991: 186) submits, it is hard to defend a system that makes it possible for legislation opposed by nearly five sixths of voters to be carried through. Considerations of

successive elections. (See Dunleavy & Margetts 1995: 19; Bogdanor 1992: 2) Nevertheless, as Norris (1995: 72-72) points out, Labour has benefited more from the growing disparity in the size of constituencies than the Conservatives. (See also Plant 1991: 47-50) Given this fact, it is hardly surprising that in the wake of the 1992 general election, Labour’s working party on electoral reform, the Plant Committee, merely put forward a variant of the existing majoritarian system, *i.e.* what is called a supplementary vote system. (See Labour Party 1993b: 11) For a concise review of Labour’s traditional attitude to electoral reform, see Linton 1993: esp. chs. 1-3.

this kind necessitate that a balance be struck between the demand for fair, proportional representation and efficient government.

1.2.2 No general consensus on the best alternative system

Even were there to be a consensus on the need for electoral reform, there would surely be little agreement on how it was to be achieved. However, as David Butler (1993: 79) suggests, such a consensus regarding the way forward is crucial to success of any kind of electoral reform. Indeed, as Bogdanor (1981: 129-135; 1992: 3) points out, the best chance for the introduction of proportional representation in British political history was lost in 1917-18, when the then reformers could not agree on whether to adopt the single transferable vote or the alternative vote. Reformists remain divided on which among a range of possibilities is the best, and so prospects for reform are still uncertain.²²³

Apart from this lack of unanimity, Pippa Norris (1995: 76) puts forward two other reasons why the prospect for reform is uncertain: (a) the primarily elite-driven characteristic of the movement and (b) the absence of constitutional provisions for binding referenda open to the public. However, as Lord Plant points out, the most fundamental problem is still that it seems impossible to find a theory to underpin an ideal electoral system that will attract unanimous consent across the political spectrum. (Plant 1991: 19-20. See also McLean 1991, esp. 186-189) Dunleavy & Margetts (1995: 17) claim that no electoral system has any clear-cut advantages or disadvantages and, therefore, any evaluation of these alternative systems would necessarily be “far more complex” than the “casual” justifications offered by practising politicians and the conventional wisdom of political scientists. However, despite such difficulties, the British people should not be expected to tolerate the obvious shortcomings of the existing system, which has, in Bogdanor’s (1981: 25) words, failed “to produce a government which is either representative or strong in any other sense than that of enjoying a majority in the House of Commons.”

²²³ The political mood for electoral reform could not be better than now. The Blair Government accelerates the pace of electoral change in favour of Proportional Representation (PR). The European Election in June 1999 will adopt the party list system. The new parliaments and assemblies for Scotland, Wales and London will be elected in accordance with the German mixed system. A Lab-Lib joint commission for the House of Commons on the electoral reform, chaired by Lord Jenkins of Hillhead, will recommend an alternative to the present majoritarian system. However, despite the increasing recognition of the merits of PR, the choice of methods varies. In particular, which system the Jenkins Commission will recommend in 1999 is still open to speculation, partly due to Tony Blair’s well-known scepticism of PR, at least in general elections.

Indeed, these problems have eventually to be resolved by political judgement. Therefore, although the question of which system would be most acceptable to the major political parties is doubtless important in discussions of electoral reform, academic analysis needs to concentrate on the more basic issue of which system is inherently superior, or would at least offer a clear advance on the existing system.

In what follows, we shall explore the various suggestions put forward by reformists and then assess their implications for the institutionalisation of political parties. In so doing, we shall specify which system seems most desirable in the light of our project of constitutionalised democratic autonomy.

2 The alternative electoral systems

There are basically two alternative electoral systems around which discussion revolves: list systems and preferential voting systems.

2.1 *List systems*

The essence of the list system lies in the crucial role afforded to political parties, as, in this system, voters make their choice from a list of candidates presented to them by the parties. Depending on the use made of the party list, two forms of the system emerge: a purist one and a mixed one.

2.1.1 The purist list system

The 'purist' form, which has operated in Israel since the establishment of the state in 1948, does not leave room for constituencies. Votes for each party's list are calculated on a nation-wide basis. (See, generally, Diskin & Diskin 1995) Parliamentary seats are allocated directly in proportion to a party's votes in the country. Few serious students of electoral reform in Britain would support this purist form. For one thing, they could not seriously ignore the deeply embedded tradition of British local representation with its peculiar advantages.

2.1.2 The German mixed system

(i) The outline of the German system

The German mixed system is a variant of the list system, invented in response to the weakness of the purist form, namely, its lack of territorial representation. This mixed system aims at combining the advantages of the list system with those of single-member constituencies. Half of the representatives are elected from single-member constituencies, and half from national or regional lists of party candidates. In this system, each voter has two votes. One vote is cast for the preferred candidate in a constituency. Like the present British system, a constituency candidate who gets the highest number of votes is declared elected. The other vote is cast for the party of the voter's choice. Whether or not it puts up constituency candidates, every party is entitled to present a list of candidates ranked in an unalterable order of preference. The number of non-constituency MPs returned from each party's list is determined not only by the level of support given to a party but also by the number of seats that it has already won in constituency elections, which are calculated first. The overall level of electoral support for a particular party is secondarily used to compensate the disproportionality of the constituency seats which fail to reflect proportionately regional or national party preferences. This adjustment is undertaken by allocating, from the party lists, additional seats to a party which won a disproportionately low number of constituency MPs. In response to the criticism that proportional representation tends to bring about a 'weak government' coupled with the mushrooming of small parties, there is in the German system an exclusion threshold which prevents small parties failing to secure more than 5.0 % of the votes cast for the party lists or three direct seats, from obtaining additional seats. (See Padgett & Burkett 1986: 289)

(ii) Three main objections

There are three main objections to this system.

(a) The remote MP-constituency link

If the system were introduced in Britain, it is inevitable that either each constituency would have to be doubled in size or the number of MPs doubled. The second alternative has never seriously been considered because an assembly of more than 1250 parliamentary

representatives would be unworkable both practically and financially. So far as the first alternative is concerned, it is generally assumed that the present link between MPs and constituencies would be adversely affected. One may pay attention to the fact that MPs' role as "recipient of complaints and a channel of communication for their constituents" is more comprehensive here than in Germany where such a role is limited since there is a federal system of government. (See Oliver 1983: 117; Bogdanor 1981: 225). However, proponents of an introduction of this system to Britain would claim that the scale of such an increase of constituency quota is not such that the existing MP-constituency link would be lost. (See, *e.g.* Blackburn 1995: 378) Considering the benefits from proportional representation, whatever cost such a change might entail would on balance be worthwhile. The recently accelerated move towards devolution would doubtless moderate the cost of such change, in that the role of MPs as "recipients" of local complaints would be reduced. Moreover, the degree of change would be far less than that which would be created by another widely popular system of proportional representation, *i.e.* the single transferable vote system, which requires much larger constituencies.

(b) The exaggerated role of the pivotal party and the hypothesis of weak coalition governments

The German system is, like other systems of proportional representation (PR), open to the criticism of giving unreasonable political influence to the pivotal party. Some opponents of PR maintain that while, under the present plurality system, the function of electing a government is in the hands of the voters at a general election, in a regime of PR, this function would shift to the smaller parties which, taking advantage of a hung Parliament, could alter governments between elections. (See Brazier 1998: 76-77) Underlying this argument is a bias towards strong single-party majority government, as opposed to consensus or coalition government. Most opponents of reform tend to equate PR with weak coalition government, while defending the present plurality system as the sole guarantor of strong government. However, common sense as well as historical and comparative evidence show that such a presumption is without significant foundation. Few could seriously argue that the German electoral system, based on PR, tends to return an unstable government

lacking the ability to implement necessary radical solutions.²²⁴ The conventional hypothesis of a trade-off between electoral systems and certain features of government assumes that proportional representation provides more accurate representation while the majoritarian system provides more decisive and effective government. According to Lijphart (1994), the former wisdom turns out to be true, but the latter hypothesis is proved empirically wrong, in that, countries having the plurality electoral system do not outperform the PR countries with regard to either the maintenance of order or macro-economic management. The British are patently proud of their own political culture which does not hesitate to favour coalition government in times of national crisis such as the two world wars.²²⁵

More importantly, as Robert Blackburn (1995: 407-408) points out,

The additional-member system will not preclude single party government in Britain. ... What adoption of the additional-member system will preclude, however, is one party, in isolation from others, claiming a false mandate on the electoral authority of substantially less than half of votes cast in a general election, and then being in a position to wield unlimited governmental and legislative power for a period of up to five years. ... Political circumstances vary, and under some conditions single-party rule may be preferable. But under other conditions - including where (a) no single party has anything like the support of a majority of the country for its programme; or (b) a grave national crisis requires two or more of the parties to co-operate; or (c) it is clear (and evident from public opinion) that none of the parties is fit to govern on its own - then coalition government is likely to be the popular choice and the most effective form of government.

There is, thus, no evidence to support the notion that flagrant minority rule should be maintained solely because coalitions are presumed to embody certain weaknesses. Indeed, the mixed phenomena of political inclusion, a pluralisation of forms of life, the cartelisation of party politics, and the changed role of political parties as catch-all networks, dismantle the conventional boundaries of party politics. (See Chapters 3 and 4) All political parties inevitably become political public spheres that embrace a broad spectrum of discourse, with preferential or ideological gradients that may overlap party barriers. Indeed, the uniquely piecemeal development of British politics allows the main political parties to contain within themselves many conflicting currents of opinion. (See Norton 1982: 261-294) Given there

²²⁴ From the Irish experience adopting the single transferable vote system, Bogdanor (1981: 244) puts forward the same argument.

²²⁵ During both 1915-18 and 1940-5, Britain had a coalition government drawn from across the political spectrum. (See Blackburn 1995: 408) Yet, we need to recognise, as Bogdanor (1981: 253) points out, that these coalitions were "departures" from the "political norm" and not genuine attempts at "power-sharing" by parties which fail to obtain an overall majority.

is no prior assumption that co-operation between different sections of opinion can only successfully take place within a single party, there is no obvious reason why inter-party coalitions should not succeed. (Cf. Mount 1992: 173) Furthermore, considering the recent polarisation or partisanisation of British politics, we might argue that PR is conducive to more flexible government, with more realistic policy-making-cum-implementation to achieve greater continuity in public policy in a rapidly changing society. As long as a practice of rational discussion and bargaining is guaranteed, there is no obvious reason why coalitions should be less desirable than single-party government.

(c) Mistrust of political parties

The last principal problem of the German system, raised not only among the opponents of reform but also among less prejudiced supporters of reform, is related to the role of political parties, in particular those at regional or national level. One symbolic trend, showing the deep-seated British fear of political parties, lies in the use of the title of an increasingly popular model of PR over recent decades, the additional member system (AMS). In fact, the prototype of the AMS is the German system, which entails single-member constituencies, party lists and proportional representation. But since the Blake Report of 1976 - the Report of the Hansard Society Commission on Electoral Reform -, a modified model of AMS began to be put forward as a variant of the German system. This involved replacing lists with the additional seats allocated to the "best losers", that is, among defeated candidates of the underrepresented party. It means that every elector has only one non-transferable vote. In addition, the seats are unevenly divided between the constituency members and the additional members to the effect that the number of the latter is one third or one fourth of the former. It is apparent that this modified version aims to preserve more strongly the territorial basis of representation. As a result, in Britain, AMS means this modified version which, as we have seen, deviates considerably from the German system.²²⁶ (See Bogdanor 1992: 8-13; Oliver 1983: 118. Cf. Blackburn 1995: 376-379)

²²⁶ Bogdanor (1992: 10-11) submits an interesting argument that the Hansard Society Commission's AMS is, conceptually, a "closed" list system. In his view, its assumption of sharply defined party preferences - that voters are less concerned about the personality of candidates than with the popularity of the party which they represent - leads it to assume that the 'best' losers are selected not by the electors, but by their constituency parties. However, it cannot be regarded as a genuine list system because, allowing no additional vote for the

What Sykes (1990: 55) styled “obsessive and fatalistic mistrust of political parties themselves”, which underlies general reluctance to introducing the German system, was deeply embedded in liberal political theory. Ostrogorski submitted that “the distributive justice to be realised in representation is first and foremost to the electors and not to the parties.” (Quoted in Bogdanor 1981: 207) Dawn Oliver (1983: 125) claims that the fact that the parties would be responsible for drawing up the party lists would involve a substantial increase in power of the party organisations, in particular the extra-parliamentary machine. For such theorists, the problem is that these organisations are not directly accountable to the electorate. (See Bogdanor 1992: 8)

However, this liberal view is for a number of reasons not really tenable. Firstly, the fact that the party machine is not directly accountable to the electorate is largely the direct result of liberal policy which denies political parties a public role. In addition, the meaning of ‘direct’ accountability is obscure, as Sykes (1990: 55) argues saying that “Being ‘directly answerable to the electorate’ really means no more than that if your MP presents himself for re-election you can vote either for him or against”. At any rate, if such lack of accountability is really a problem, then what is necessary is the introduction of certain measures to enhance accountability. Simply placing political parties outside of any legal regulation is not a wise strategy.

Secondly, the emergence of a cartelised party system in our pluralist society means that the conventional perspective on party organisations is not only archaic but unreliable. The governmentalisation of political parties, together with the fact that they are now responsible for major parts of the political process, clearly calls for their legal institutionalisation. As a result of this institutionalisation, parties would have to submit to legal regulation, which, in turn, would greatly improve their accountability to the electorate.

Thirdly, it is important to note that electoral reform is part and parcel of a larger process of reform since all the proposals for a new constitutional settlement in Britain are closely intertwined. As one political scientist notes, since the plurality electoral system serves to buttress the Westminster model of strong Cabinet government, with a unitary state and parliamentary sovereignty, if one element were to be changed, then the rest, as with any delicately balanced mechanism, would inevitably fall apart. (See Norris 1995: 68)

party of voter’s choice, it cannot accurately and directly reflect overall national party preferences, including

2.2 *Preferential voting systems*

Preferential voting systems are, like FPTP, based on geographically defined constituencies. They differ from FPTP, in that voters indicate their choice of candidates in order of preference, which will either ensure that the eventual winner receives more than 50 per cent of the first preference votes cast (the alternative vote system and the supplementary vote system), or produce a high measure of proportionality between seats and votes (the single transferable vote system).

2.2.1 The alternative vote system (AV)

The alternative vote system (AV) is, in effect, a majoritarian system, the principal aim of which is to elect representatives by absolute majorities. Voters are required to rank their preferences. The numbers of votes are counted in order of preference until a candidate receives at least 50 per cent of the votes cast. To do so, the lowest-placed candidates are eliminated in turn until one candidate emerges as the overall majority winner. The positive features of AV result from its realistic perspective on reform. Rodney Brazier (1998: 81) sees this system²²⁷ as the most reasonable, though interim, alternative on the ground that, being the least radical of the different proposals, it could gain, albeit hesitant, support from the main parties, and all the more because it would retain the same constituencies. Over and above embodying the advantages of FPTP (*e.g.*, its decisiveness, simplicity and contribution to stable government), it could be argued that AV would also rectify the major shortcoming of FPTP, *i.e.* governmental illegitimacy, because a successful candidate could claim to be representing the majority view of the nation. However, AV is generally²²⁸ criticised for failing to bring about national proportionality between votes and parliamentary seats because it takes no account of 'wasted' votes and there is no room for voters' regional or national party preferences.

the voter's choice of coalition partners.

²²⁷ Brazier (1998: 81) sees AV as a variant of the second ballot system.

²²⁸ See Sykes 1990: 6-7. Even Brazier, a serious supporter of AV, admits this. See Brazier 1998: 80-81.

2.2.2 The supplementary vote system (SV)

The supplementary vote system (SV) is an “idiosyncratic” (Butler 1993: 77) variant of AV, which has never been actually used to elect any legislature. Dale Campbell Savours, a Labour MP, first proposed this system to the Plant committee. This committee was divided on the issue of electoral reform but finally recommended SV as an alternative to the existing system. It is similar to AV, in that it retains the role and nature of constituency representation, and takes into account the ordering of preferences. However, under this system, instead of being able to rank the names of all candidates, the voter is required to list only first and second preferences. Another difference from AV is that the second preference only comes into play when determining which of the two highest scoring candidates in the first stage is to be chosen. Arguments for and against this system are understandably very similar to those directed at AV. However, as the final version of Plant Report (1993: 6-7) admits, SV would not necessarily ensure proportional representation overall or proportionality between parties, nor, unlike AV, would it necessarily ensure that all candidates would be elected on a majority vote in the constituency.

2.2.3 The single transferable vote system (STV)

(i) Outline and advantages of STV

Amongst preferential voting systems, STV offers a system of genuine proportional representation and has been the first choice of the majority of electoral reformists at least until AMS began to attract growing support from some political commentators and reformists.²²⁹ According to Bogdanor (1981: 232), the principal characteristic of STV lies in its liberal notion of representation, in that the task of the representative is to represent the opinions of *electors* rather than either the *community* in which they live, as in the plurality system, or their *party allegiance*, as in the list systems. Hence, STV prefers ‘personal’ representation to territorial representation and thereby introduces a minority representation system by transforming the existing constituencies into larger, multi-member constituencies to minimise wasted votes. Voters are, as in AV, asked to rank their preferences on the ballot paper. There is no limitation on the number of candidates which each political party may

²²⁹ STV is already used in Northern Ireland for elections to the European Parliament, to local government and to the new assembly set up in 1998. It, in fact, had a precedent in the university parliamentary elections

put up and each voter may indicate his or her preference even between candidates of the same party. Bogdanor (1981: 233) points out that STV aims at minimising the influence of party organisations in the interest of securing greater individual choice, a feature which distinguishes it from the rival German system which, as we have seen, makes use of the party list.

Yet, under STV, the process in which the returning officer declares the winning candidates is very complicated. There is a quota established by dividing the total number of votes cast by the number of MPs to be elected plus one. Candidates are declared elected as and when they reach this quota. As it is most unlikely that all places are filled on the count of first preference votes, the method of counting the transferred preferences is important. The next stage of counting is to redistribute the “extra” votes of candidates who have already reached the quota. These extra votes are transferred to the next best ‘continuing’ candidate but at a fraction of their value. If the second stage fails to produce the requisite number of members, the votes for the least successful candidates are eliminated in turn and then are redistributed at their full value to the next best preferences until the required number of winning candidates is achieved. If all the above stages fail to elect the requisite number of winning candidates, any candidate who has a plurality of outstanding votes is returned as MP.

The advantage of this system is that the views of the voters are more accurately reflected in Parliament due to the complicated counting method designed to minimise wasted votes. Dawn Oliver (1983: 123) points out that “with five²³⁰-member constituencies, at least 83 per cent of the votes cast would be effective - 83 per cent of the voters would have an MP for whom they had actually voted”. In addition, Bogdanor (1981: 258) emphasises that it is the instrument best designed to make British political parties more responsive to popular opinion. It is claimed that by contrast with either the existing plurality system or the German system, STV allows no candidate the luxury of a safe seat, as the choice of candidates is given to the electorate rather than the party organisation. This also means, as Bogdanor (1981: 257) says, that the voter has potentially a choice both of policy and of personnel wherever there is a multiplicity of opinion or factions within a party. As a result,

between 1918 and 1948. For many advocates of STV, the fact that it has already been tried and tested in U.K. is one of its greatest merits. See Best 1993: 80.

it is generally acknowledged that STV meets the demands both for representation of local minorities and for better proportionality between the parties.²³¹ Furthermore, as Oliver (1983: 125) notes, the legal regulation of parties would not be necessary, as STV does not, by definition, entail close involvement of political parties in the electoral process.

(ii) Two major objections

However, there are equally strong objections to STV. The two most fundamental are as follows.

(a) The odd implications of the complex counting system

It has sometimes been argued that STV raises insuperable technical difficulties and is incomprehensible to the ordinary voter. (See Plant 1991: 30-31, 100) However, the complexity of the counting system cannot in itself be sufficient reason to discount this, otherwise popular, alternative system. The Irish experience, rejecting proposals to change the voting system from STV to the British plurality system, shows that what matters is, not whether every voter can understand in what way the votes cast are counted, but whether the result accurately reflects citizen's opinion. (See Bogdanor 1981: 250)

Thus, we need to locate the less obvious, but more serious, problems inherent in STV. Leslie Sykes argues that the basic dilemma of STV lies in the fact that each voter is entitled to cast only a single vote for electing multiple-members. Three major strategies have had to be devised to make this system workable: preferential voting, transferability and quotas. Some advocates of preferential voting systems stress their efficiency by pointing out that voters do not have to return to the polls to express further preferences. (See Brazier 1998: 80) Others suggest that STV is the least manipulative system in that no voter could begin to predict the final outcome of such a complex system. (See McLean 1991: 187) However, as Sykes (1990: 5) points out, preferential voting by a single vote cannot accurately reflect voters' real preferences which are subject to a whole range of variables arising out of the process of transfer. For example, unlike 'the exhaustive ballot', STV inevitably denies voters knowledge that might influence their preferences, such as which candidates had been

²³⁰ The number of members who would be returned by each constituency is flexible, ranging from three to nine, but five is regarded as the optimum number under STV. See Sykes 1990: 1; Oliver 1983: 122.

eliminated as the first-preference candidate or how other candidates had fared at the first count. As we shall see, STV is also open to pre-election manipulation by party machines.

As to the transferability of votes, Sykes (1990: 7-8) questions whether it is reasonable for votes cast for the lowest-ranking candidates to be transferred at full value in the ensuing counts. There is no convincing answer to the question of “why preferences that are not equal in the minds of voters should be treated as if they were”. (Sykes 1990: 8)

Sykes (1990: 16-17) also seeks to demonstrate that the use of a quota in a system that perceives candidate, not political parties, as the basic player in elections, would sometimes generate self-contradictory preferences. In reallocating the extra votes, no attention is paid to parties to which candidates belong. Consequently, under certain circumstances, a lower preference can count against the highest one. Suppose that a voter were to give his first and second preferences to Conservative candidates but his third to a Liberal Democrat. It could ironically turn out that should his third preference become effective, it would be deemed to count against his initial preferences in favour of the Conservative Party.

(b) Some problems with larger multi-member constituencies

Over and above the technical problems just outlined, the main stumbling-block to the introduction of STV in Britain is the fact that it has to replace existing single-member constituencies with larger multi-member constituencies. (See Oliver 1983: 122) The primary problem with such enlarged constituencies is that they inevitably weaken the relationship between MPs and their constituents. As early as 1867, Walter Bagehot warned against Thomas Hare’s proposal for STV in this respect. Bagehot (1993: 165-172) pointed out that the fact that there are several MPs in one large constituency would give MPs the feeling that they need only represent those who voted for them and who are likely to reselect them only if their interests have been well served.²³² Secondly, it is likely that if the number of MPs were to remain at about its present level, the electoral size of constituencies would have to be increased five-fold from about 60,000 to 300,000 voters. This would mean a reduction in the number of constituencies from 651 to 130 and, thus, the

²³¹ Let alone the factual consequence that the centrist third party is the best beneficiary of STV, these advantages have led the Liberal Democrats to being the most persistent political force supporting STV.

²³² Bagehot (1993: 166) had a view that the multi-membership constituency would produce the required number of “voluntary” constituencies in the sense that voters were allowed to organise their own constituencies, as distinct from “compulsory” constituencies, defined by law.

dismantling of the now established MP-constituency link. (See Plant 1991: 29-30, 100) The fact that this system has never been used in any large advanced industrial society²³³ shows its anomalous character. One may argue that the importance of such a link should be discounted in an era of globalisation where decentralisation (or localisation) is paralleled by supra-nationalisation and where the role of territorial representation in national politics is being replaced by a new style of participatory representation, coupled with the emergence of electronic democracy. However, such changes notwithstanding, considering the “ordinary citizen’s sense of political community” which the MP-constituency link affords, this relationship should not be sacrificed in the name of proportionality. (See Chapter 6, Section 4.5.1) If a way could be found to secure such advantages without the loss of the benefits of proportionality, it would clearly be more attractive than STV. This is why the German mixed system, in the eyes of many proponents of PR, will proved to be the best option.

The need for larger constituencies creates another anomaly in the drawing up of constituency boundaries. Oliver (1983: 122-123) admits that substantial variations in size and population between constituencies would be necessary in order to ensure that an STV system could accommodate either the present parliamentary boundaries or, a situation in which each constituency was to return an equal number of members. In addition, the evidence shows that STV is very vulnerable to the temptation to gerrymandering. It is well known that Irish electoral history has witnessed a number of partisan boundary revisions transforming three-member constituencies into four-member constituencies where the governing parties are weak. (See Bogdanor 1981: 247) Thus, the flexibility of STV is the source of several new anomalies.

3 The implications of the alternative electoral models

Electoral reform must match “Britain’s own indigenous political structure and traditions, and seek to improve the efficiency of its system of parliamentary democracy”. (Blackburn

²³³ Bogdanor’s survey (1981: 233) shows that only two countries retain this system for the election of the lower chamber of their legislatures: the Irish Republic and Malta. The Australian Senate has adopted this

1995: 404) For Blackburn, the principal goals of the electoral system are governability and proportionality. He suggests that we should evaluate every proposal for electoral reform using a number of criteria including proportionality, representation of local communities, citizen participation, popular credibility, effective government, effective political parties, and an effective Parliament. (1995: 404-405) As far as these general criteria are concerned, we may argue that the German system and STV are the most suitable systems for Britain. Both systems would secure proportionality, which the present system fails to provide. Under each system, we may expect that 'elective dictatorship' would be markedly contained. However, these general similarities cannot outweigh the important differences between the two systems.

3.1 *The difference between STV and the German system: recognition of the positive role of political parties in the democratic process*

As we noted, underlying the difference between the German system - a list system- and STV - a preferential voting system - is a different view of the role of political parties in the democratic process. The former concerns the proportionality between parties while the latter concerns the proportionality of voters' views. These proportionalities are not mutually exclusive. For example, STV focuses on the views of the voters in large constituencies but may, in practice, produce a high measure of proportionality between national votes and party representation, though it does not, of course, purport to be completely proportional.

However, so far as the institutionalisation of political parties is concerned, there is a fundamental difference between these alternatives. On the one hand, the German system presupposes the legal institutionalisation of political parties. Its legitimate concern is that political parties are essential to a democratic political process and, therefore, should be incorporated as public institutions, especially in the electoral system. Another feature of the German system is its tendency towards what Rawlings (1988: 232) called the 'nationalisation' of the electoral system. That is to say that the introduction of a list system may lead to the curtailment of the autonomy of constituencies and the increasing power of the national party in the selection of candidates. Oliver (1983: 124) warns, as we have noted, that electoral reform in favour of the list system would increase the influence of the

system since 1949 but one needs to pay attention to the functional difference between the lower and upper

extra-parliamentary party machine. These considerations are inevitably linked to the legal control of political parties. In Germany, the internal affairs of political parties, in particular the basic relationship between central and local party organisations within electoral process, is subject to close legal attention.²³⁴ (See The Law on Political Parties [*Parteiengesetz*], Part II) The process of selecting candidates is also regulated by law (See *ibid.*, Part III), as are their external activities.²³⁵ For example, electoral expenditure at national level is regulated and political parties are provided with public funding. (See *ibid.*, Part IV)

On the other hand, STV is no different from the present plurality system in the sense that neither system necessarily conceives political parties as basic to the political process. This does not mean that the proponents of STV do not recognise the relevance of political parties at all. Rather, as the First Interim Report of the Plant Committee 1991 notes, even under STV, “in practice what is being represented is a political party”. (at 17) While recognising that parties remain the central vehicles of representation, Oliver (1983: 124-125) focuses on the question of how their influence can be tempered. However, since she accepts the non-recognition of political parties and a concomitant *laissez-faire* policy as given factors which can hardly be reversed, her remedy is to strengthen the initiatives of voters in choosing different candidates belonging to the same party. As Turpin (1990: 533) points out, under STV, a general election can also function as the “primary” election of those who will be a party’s representatives in the legislature. Bogdanor claims that STV would be superior to the model of primary election adopted in the USA in terms of enhanced popular participation. He provides two reasons:

The first is that where a separate primary is held, as in the United States, the winner of the primary becomes the party’s sole nominee. Supporters of other candidates, therefore, have to vote for a candidate who is not their first preference. Under STV, by contrast, the minority is not disenfranchised. In a multi-member constituency voters can still support a candidate who may not be the first choice of their party and

chambers.

²³⁴ See generally, Kommers 1997, esp. 200-217: Ch. 5; Youngs 1996; Currie 1994: 207-227; Poguntke 1994; Nicholls 1984. For a comparative analysis of political ideology underlying German law relating to political parties, see Chapter 5, Section 5.4.1, (iii).

²³⁵ Under Article 21 of the Basic Law, the Federal Constitutional Court can decide on whether the organisation and activities of political parties accord with the Basic Law. As we have seen, at an early stage in the Federal Republic’s history, the Socialist Reich Party (SRP) and the Communist Party of Germany (KPD) were declared unconstitutional under this clause. (See Currie 1994: 215-220) Article 2 of the Law of Political Parties stipulates that a party can lose its status as a party if it fails to take part in either Federal Parliament or Land Parliament elections. Recently, this article was used to deprive the National List (N.L.) and the Free German Workers Party (FAP) of their privileged status as political parties. (See Youngs 1996: 226-228)

can hope that he may win with the support of uncommitted voters or transfers from candidates of other parties. Secondly, a primary election is open only to dues-paying or registered party members, and not to the electorate as a whole. Under STV, on the other hand, the primary election is open to every elector who chooses to vote. (See Bogdanor 1984: 90)

Such a system is both attractive and adequate if, in practice, the electorate is able to evaluate the quality and views of the candidates and thereby discriminate among candidates of a particular party or those belonging to different parties.

3.2 The naive illusion of the advocates of STV: Does STV really strengthen voter's rather than party's choice?

However, we doubt that the advantages of STV would be as substantial as its advocates expect. To the extent that political parties are involved in the electoral process and a party government continues to exist even under a reformed democracy, the purposes of STV are to a considerable degree subverted to the manipulation of party organisation.

In the first place, it has to be pointed out that candidates will be chosen by a party selection process in a political culture that is basically unsympathetic to independent candidates. (See Chapter 5, Section 6.3.1) Thus, the elector can only choose between candidates that have been previously screened by the parties. In addition, under STV, as Bogdanor (1981: 246) recognises, electoral realism tends to force the party organisation to employ a number of tactical devices to secure as many parliamentary representatives as possible. One tactic is to limit the number of party candidates in an attempt to win a uniform level of first preference support for all of its candidates. (Sykes 1990: 26) Otherwise, there is a strong possibility that less popular candidates will be eliminated at the early stage of the count, thus making their votes available for transfer. This means that lower-preference votes could pass to candidates of other parties. This kind of party control in the selection of candidates implies that the choice of candidate open to the electorate is much more restricted than the advocates of STV would have us believe. Indeed, now that the election is mainly about competition between parties rather than that between factions within parties, the ideal of the so-called 'balanced slate'²³⁶ is far less realistic. It is highly likely that at least so far as elections are concerned, any manifest disunity would negatively

²³⁶ That is, the candidates of a party can be recruited from 'all' factions, thus enabling voters to choose from the full range of available options. See Sykes 1990: 27.

affect a party's image. As Sykes (1990: 37-38) points out, the true merit of proportional representation is that it can measure electoral support for "indivisible political parties" rather than support for "vaguely defined factions" within them.

In addition, as even proponents of STV recognise (Bogdanor 1981: 246), it is not rare that 'dummy' candidates are occasionally put up to ensure that the party's favoured candidates are elected. This all implies that wherever there is room for the party machine to manipulate the system, voters' choice, the most cherished aspect of STV, is seriously diminished.

This was pointed out as early as 1915 when Dicey (1982[1915]: lxxxvi-lxxxvii) warned that "The more complicated any system of popular election is made, the more power is thrown into the hands of election agents or wire-pullers. This of itself increases the power and lowers the character of the party machine; but the greatest political danger with which England is now threatened is the inordinate influence of party mechanism." Hence, the idea that STV will diminish party politics is illusory and quite out of touch with present reality. Therefore, the only remaining option for a genuinely strengthened voter's choice is to recognise the role of political parties in the electoral process and to institutionalise them to ensure that their activities can be democratically organised within boundaries determined by clear constitutional principles.

The naiveté of the ideal of the voter's choice is brought home by oft quoted but barren argument of Hare and Mill, the classical proponents of STV, that the system would improve the quality of the candidates. (See Bogdanor 1981: 248) Apparently, this argument stems from a suspicion that the list system produces an inferior class of candidates. But, the evidence shows quite the opposite. For example, in the Republic of Ireland, STV has not produced a superior class of legislator because the "spirit of loyalty" lies so deeply entrenched in "Irish cultural life". (See Bogdanor 1981: 248) Yet, it seems that it is not only this cultural peculiarity but the electoral system itself that has to be blamed. As we have seen, what Bagehot (1993: 166) called 'voluntary constituencies' would produce MPs who, regardless of competence, would put particular constituency interests before other wider interests and then reduce elections to a "trade". (Bagehot 1993: 168. See also Oliver 1983: 125-126) On the other hand, one cannot seriously argue that German party list candidates are inferior to those selected by British or Irish constituencies. In fact, in contrast to the

hopes of Bogdanor (1981: 249-250, 257-258), cross-party voting, combined with a multi-member system, may turn elections into personal popularity contests rather than competitions between policies. As Sykes (1990: 32) points out, unless voters in general become competent enough to judge the political implications of their votes in a complicated electoral system like STV, the importance of the issues and policies will diminish in favour of the photogenic qualities of candidates.

4 Conclusion: Matching the electoral system with the institutionalisation of political parties

As seen in Chapter 5 (Sec. 6.3.1), the goal of a general election is not merely to constitute the House of Commons but to form a government, and political parties are the very backbone of this important procedure. We need to be realistic enough to see, in Bagehot's (1993: 160) words, that "there never was an election without party. ... The House of Commons lives in a state of perpetual potential choice; at any moment it can choose a ruler and dismiss a ruler". Bogdanor (1981: 256-257) insists that the "decision of the elector", expressing a view on any issue which cuts "across party lines", should be guaranteed and STV provides the best chance for that purpose. We doubt that in any complex society in which there are multiple cleavages of opinion, a single vote, which is transferable at least three or four times, can reflect all the potential opinions on any given issue. A general election is not a referendum. It is not only the representation of opinions but also the representation of people. This means that so long as parliamentary democracy is not totally denied, political parties are the sole channels through which the political verdict of the electorate can be expressed. One important implication of this is that as far as elections are concerned, the right of the voter must be equated with his right to support a political party. Consequently, as Sykes (1990: 39) has it, "PR's sole concern should be with the relationship between the number of votes each party has received and the number of seats it has been awarded".

As we have sought to demonstrate, once we recognise the positive role of political parties in the democratic process, the best way to respond to the archaic *status quo* is to abandon

the antiquated liberal policy which denies them a public role. The power to select candidates needs to be given to political parties to the extent that the exercise of this power is in line with democratic requirements resulting from legal regulation. (See Chapter 6) It would be wrong to imply that this institutionalisation of political parties necessarily means giving 'excessive' weight to the party machine, as some opponents of the party list assume. (Cf. Bogdanor 1981: 250) On the contrary, it should be interpreted as a 'balanced' measure designed to reflect as accurately as possible the reality of political power. It is also important to see that the role of MPs is not confined to national politics and thus the conventional MP-constituency link is a valuable one which should be retained. Thus, the best way to do this, without sacrificing the equally important principle of proportionality, is by means of a "hybrid" system designed to strike a balance between local representation and national, or functional, representation *via* the party organisation.

Chapter 8

Juridification of the Funding of Political Parties

1 Introduction

The incorporation of political parties within constitutional and legal arrangements requires a new party funding system appropriate to their public functions. This chapter will undertake this task in three main sections.

The first section will sketch the present situation of the financial affairs of political parties and the legal framework governing this situation. The second section will critically analyse the present system by examining the liberal ideas supporting this system and their deficiencies. The basic background argument of this section will be that there is a strong need for legal regulation of certain part of party finance to ensure that money cannot distort the public's genuine choice and democratic governance. In the third section, we shall look into the pros and cons of state aid to political parties. This debate is concerned mainly with the fear of the state control of free political will-formation, which is also related to legal regulation of party finance. Our position will be based on our project of constitutionalised democratic autonomy and its concomitant principles of realistic balance between the state and civil society.

2 The present legal framework governing party finance

As Johnston and Pattie (1993: 148) notes, “the legal framework covering British party finances is the product of over a century of legislation; much of it is obsolete and marked by major anomalies.” Indeed, it may be more correct to say that no legislative framework has ever been established in Britain to regulate ‘party’ finance. Existing law on British political

finance is focused on the 'electoral' expenditure of individual 'candidates' in constituencies, not on political parties at national level.

Recently, there are some changes in the disclosure of party accounting and large donations. Major political parties make a rule to open voluntarily their accounts and promised to make their commitment to the publication of the names of donors whose donations exceed a certain threshold. However, there are still increasing demands for statutory accounting²³⁷ and the public disclosure of the sources of large political donations.

So far as state financial support is concerned, there are some legal entitlements given to the political parties. The Representation of the People Act 1918 introduced for the first time some significant indirect state aids in election campaigns. These aids in the form of subsidy-in-kind, which are now contained in the 1983 Act, include a free postal delivery of candidates' addresses, free use of public meeting rooms to candidates at election time and the provision of returning officers' fees.²³⁸ However, like expenditure limits in campaigning, these aids are, at least in theory, given to candidates, not political parties.

On the other hand, there is direct cash subsidy now made available to Opposition parties. Yet, it is important to point out that the principle that Opposition parties were entitled to state financial support began with individual office-holders. The leader of the opposition has received a salary from public funds since Ministers of Crown Act 1937. On 1993 onwards, a fund of £100,000 is also available for opposition front-bench travel, which will be uprated annually. (See Home Affairs Committee 1994: vi, fn.9) MPs have been entitled to a salary from public funds since 1911. It was as recently as 1975 that cash subsidy, which is intended to be given directly to political parties, was introduced. However, this money known as the Short money is given only for Opposition parties to assist them with their parliamentary work according to the number of seats and votes in the previous general

²³⁷ *I.e.* annual accounts are required to be drawn up in a prescribed form, fully audited and covering a similar financial year to help the public's scrutiny of party finances.

²³⁸ As the Home Affairs Committee on Funding of Political Parties (1994: paras. 11, 12) points out, the scope and form of state subsidy to political parties may vary according to different opinions over the true nature of state provisions. Other forms of state aid may include the work of local authorities in registering electors, the free policing provided at party conference and a favourable tax treatment of legacies to political parties.

election. There is still no public funding for political parties to support them with their extra-parliamentary works essential in a pluralist democracy.²³⁹

The overhaul of these arrangements is now being undertaken. The Committee on Standards in Public Life, chaired by Lord Neill of Bladen, QC, is reviewing issues in relation to the funding of political parties and will recommend possible reforms of present arrangements by the summer of 1998. In the following sections, we shall suggest in what way the reform should direct with reference to our project of constitutionalised democratic autonomy.

3 Some problems with the present situation

It is apparent that 'liberal associationalism' provides the theoretical basis for the absence of the legal framework for regulating and supporting party finance in Britain. (See Chapter 5, Section 6) However, this vacuum of relevant legal principle has given rise to some significant problems. One salient problem is a substantial financial 'inequality' between the main political parties. Financial disparities can be treated from two, though interrelated, perspectives: inequality in expenditure and gross resource disparities between political parties. The former leads to a debate about expenditure limits upon party campaigning while the latter gives rise to a number of controversies over reform of financial donations to political parties and the issue of public funding. These controversies are also related to another fundamental problem, namely, the 'inadequacy' of party funds to meet the minimum requirements for their desirable functions in a pluralist democracy.

In the following, we shall look into those problems by way of, *inter alia*, criticising the liberal ideas inherent in the present system.

3.1 Problem I - The lacuna of legal regulation of national electoral expenditure

The present regulation of election expenditure is based on concern in the later nineteenth century about the cost of elections and widespread bribery. However, although there has

²³⁹ At around the same time when the Short money was introduced, the Houghton Committee recommended the introduction of a system of state financing of political parties for their activities outside Parliament but failed to be implemented.

been considerable changes in modern electioneering, including the undeniable importance of national campaigning, the basic formula and principle governing expenditure limitation remains intact. Electoral law pays no attention to national electoral expenditure spent by political parties, which was virtually non-existent in the nineteenth century.²⁴⁰

The underlying concern about national expenditure is that it can cause imbalance in the campaigns of one major party over another. As a Conservative-led Home Affairs Committee on party finance (1994: xviii) admitted, the evidence shows that historically the Conservatives has outspent two rival parties. This inequality of political ammunition²⁴¹ may threaten the foundation of fair electoral contests between participants. This is more so if we consider the growing 'nationalisation' of election campaigns. A qualitative change of territorial representation in recent decades requires a new relationship between local and central party organisations. (See Chapter 6, Section 4.5) Despite the continuing importance of local organisation at least in the crucial area of election campaigning under the present constituency-based electoral system, it is clear, as Paul Webb (1995b: 312) points out, that local organisation is increasingly dependent upon the co-ordinating role played by the centre. This is underpinned by the organisational professionalisation of parties which manifests itself mainly in the strengthening of research, communications and campaigning structures.²⁴² Johnston and Pattie (1993: 145-147) points out that the ever-growing influence of resources from the central parties, in particular in marginal constituencies, renders the present system seriously out of date. From this perspective, it can be claimed that the absence of national expenditure limits is undermining the purpose and effect of the expenditure restrictions on constituency campaigning under the existing election law. As Blackburn (1995: 354) points out, money from the central party is used to promote the

²⁴⁰ It was only since 1970s that central election expenditure has been rapidly expanded mainly due to the increasing use of large-scale national press advertising and the development of new communications technology.

²⁴¹ It is true, as Hansard Commission's *Agenda For Change* (1991: Ch.4, esp. para. 75) stressed, that the degree of imbalance in the national campaigning has been diminished due to the introduction of the state subsidy-in-kind in the early twentieth century and, more importantly, *de facto* free party broadcasting. (For our analysis of party political broadcasting, see Chapter 5, Section 5.4.2) In addition, it is not easily deniable that the practical impact of large-scale spending on billboard advertisements and the national press is hard to quantify. However, as we shall argue later, imbalance in national election expenditure cannot be detached from a huge gap in party spending on permanent costs. The long-term impact of this gap, especially that between the two major parties and small parties, on the public's choice in political market may not be discounted, though it is still difficult to quantify the degree of the impact.

²⁴² For an illustration of Labour's professionalisation which offered the clearest example of "political marketing", see Scammell 1995: 243-247.

election of particular candidates within each constituency, by way of advertisements, direct mail and other propaganda promoting political parties.

3.2 *Analysis of the case against national expenditure limits*

Many objections have been raised to the introduction of national expenditure limits. Of them, two principal arguments continually appear.

3.2.1 Too radical to be planted in laissez-faire British political arrangements?

The first objection comes from the conventional liberal conception of political parties stressing their civil society origins. The Hansard Society report, *Election Campaigns: Agenda for Change*, presumes that the control of central expenditure entails a radical change in British political arrangements, especially electoral structures, the crucial branch of which is the regulation of political parties. (Hansard Society 1991: 37, paras. 67,68) This report implies that regulation is not in accordance with the British liberal tradition that is manifested in the lack of legal recognition of political parties. As we shall see in detail later, in suggesting reform of party finance, the dual nature of political parties and the desirable relationship between the state and society in a new democracy need to be properly taken into account and accordingly, the *status quo* which itself is part of the target of reform cannot be convincingly suggested as a reason for opposition.

3.2.2 Control of expenditure limits and freedom of expression

The second, more specific, objection is that control of central expenditure would generate a number of formidable technical and practical problems. The first problem of this kind is that such a reform tends to be circumvented by other political organisations such as campaigning groups and even by the editorial material in the Press. What bodies are to be bound by a limit on the amount that may be spent in national election campaigns? (Oliver 1992: 128) This question is related to other technical questions. What is a political party? What is political expenditure? Where can the appropriate line be drawn between purely academic or journalistic activities and politically driven campaigns?

Central to the debate is the potential harm to freedom of expression. This can be seen in three ways.

(i) Expenditure caps and freedom of expression of political parties

One may claim that control of national spending would breach the right of political parties to communicate with the electorate, which is essential for their proper operation. This argument is taken by a Hansard Commission of 1991 (at p.3), chaired by a former Conservative minister, Christopher Chataway.²⁴³

However, the right of political parties cannot be reasonably claimed if unrestrained, unbalanced party expenditure damage the democratic process. For this collective right can be justified only under condition in which political parties contribute the well workings of the democratic process. In other words, in so far as national expenditure limits are useful to strengthen the democratic process, its restrictive effect on the freedom of expression of political parties can be justified.

Based on this, the purpose of spending ceilings cannot be confined to the prevention of possible corruption and fairness in the distribution of political resources.²⁴⁴ Expenditure limits also aim for the reduction of “wasteful and excessive campaign spending”,²⁴⁵. Such spending tends to contribute to an ever-growing, mindless flood of negative campaigning propaganda rather than to the informed choice of voters. (See Scammell 1995: 261-264) As Butler & Kavanagh (1997: 240) point out, the problem of negative campaigning lies in its high dependency on a ‘knocking’ message in a sentence or slogan than a positive one. This does not go along with our democratic ideal based on the establishment of a rational will formation. In addition, as we shall see in (iii) below, despite the non-qualifiable effect of excessive campaigning, political parties cannot always resist to the temptation to rely on sensational negative advertisements, the increasing cost of which may nearly bankrupt each party. This wasteful spending raises further problems with the way in which political parties raise funds.

²⁴³ Recently, in *Colorado Republican Federal Campaigning Committee v. Federal Election Commission*, 116 S.Ct. 2309 (1996), the U.S. Supreme Court struck down a Federal Election Commission Act provision that limited political parties’ “independent” spending that was not co-ordinated with particular candidates on the ground of the violation of the right of political expression safeguarded by the First Amendment. This case extended to political party spending the same constitutional protection previously afforded independent individual’s spending since *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). For a brief comment on this issue, see Harvard Law Review’s “Leading Cases” of 1996, 110 *Harv.L.Rev.* 135, at pp.236-246.

²⁴⁴ The expenditure limit at local level since the 19th century focuses on this purpose.

²⁴⁵ J. Breyer’s opinion, *Colorado Republican Federal Campaigning Committee v. Federal Election Commission*, 116 S.Ct. at 2317.

In conclusion, despite the still difficult technical problems, including the difficulty in deciding reasonable level of expenditure and preventing avoidance, the case for capping national election expenditure is compatible with the freedom of expression of political parties and so cannot be easily discarded.

(ii) Effects on third-party expenditure and freedom of expression

It is apparent that a limit on the freedom of non-party organisations or individuals to advertise or campaign for a party or a set of ideas is a substantial inroad into freedom of speech and political activity. Obviously, arbitrary and unjustifiable limits on third-party expenditure - so-called "independent expenditure" - are not acceptable.²⁴⁶ The freedom of expression of ordinary citizens and non-party organisations is the backbone of a democratic political system so that a limitation on this freedom requires a compelling public interest.

This principle is confirmed by the European Human Rights Commission and Court in *Bowman v. U.K.*²⁴⁷. The Commission and the Court declared that Section 75 of the Representation of the People Act 1983 has violated Article 10 (freedom of expression) of the European Convention on Human Rights. Section 75 prohibits the third-party advertisements and campaigns at an election, which are not authorised by election agent. Exceptions include advertisements not exceeding £5.00 (as amended) and the media coverage. In *Bowman* case, the applicant was charged of a criminal offence under Section 7 of the 1983 Act on the ground that she distributed 25,000 leaflets in Halifax shortly before the 1992 general election, outlining the views on abortion of the three main candidates. Both the Commission and the Court ruled that having regard to the nature of freedom of expression as a "bedrock of any democratic system", £5.00 limit is not proportionate to the

²⁴⁶ In a landmark case, *R. v. Tronoh Mines, Ltd.*, [1952] All.E.R. 697, the High Court refused to extend expenditure limit under the Representation of the People 1949 (now section 75) to the third-party political advertisement at national scale. At stake was a company's political advertisement inserted in *The Times* criticising the Labour government's anti-business policies, especially a scheme of dividend restraint and calling for the election of 'a new and strong government with ministers' who are more sympathetic to business enterprise and initiative. The court held that general political propaganda was outside the boundary of the section, even if it indirectly affect "an election for a particular constituency" which is the objective of the section. Yet, it should be pointed out that this case is not based on the freedom of expression discourse but relied upon statutory interpretation, and therefore it can be differentiated from *Bowman* jurisprudence directly depending upon freedom of expression argument.

²⁴⁷ (1996) 22 E.H.R.R. CD 13 for E.H.R Commission Judgement; *The Times* Law Reports, 23.2.98 for E.H.R Court Judgement.

legitimate aim of securing equality between candidates.²⁴⁸ In particular, the Court made it clear that in viewing a limit on the unauthorised independent campaign as disproportionate, a special attention had been drawn to the fact that there is no national expenditure limit imposed on political parties. (See *The Times Law Reports*, 23.2.98)

However, few can seriously argue that this freedom is absolute so that no restriction can be allowed. Article 10 (2) of the Convention provides that a restriction on freedom of expression can be allowed, provided that it is “prescribed by law” and “necessary in a democratic society” for one or more of the legitimate aims specified. In *Bowman* case, the Commission and the Court confirmed the established essential principles underlying the application of, in particular, the “necessity” test in Article 10(2) of the Convention. This test implies that if any restriction on freedom of expression is “proportionate” to the legitimate aim and there are “relevant and sufficient” justifications for that restriction, contracting states have a certain margin of appreciation in implementing freedom of expression in domestic jurisdictions.²⁴⁹ Moreover, the Court holds that the right to free elections protected by Article 3 of the First Protocol to the Convention can justify certain restrictions on political expression so that there is the need of striking balance between two rights. It is important to see that in striking this balance, admittedly, the Court has paid a special attention to whether there are other restrictions placed upon political parties to advertise at national or regional level. (See *The Times Law Reports*, 23.2.98) This approach may imply that if there were national or regional expenditure limits placed upon parties, a limit on independent expenditure to reasonable amount would not necessarily be disproportionate to the aim of securing equality between candidates. In other words, if the whole British electoral law consistently dedicated to the legitimate aim of securing equality between candidates or political parties, there is no reason why certain restrictions may not be placed upon independent expenditure which can distract voters from the political platforms which are the basis of national party campaigns. According to Butler & Kavanagh (1997: 242), the Conservatives were helped by the press advertisements of Paul Sykes (£827,000) and Entrepreneurs for a Booming Britain (£868,000) while Labour by Unison (£1,112,000). Since these third-party expenditures at national level tend to help almost the

²⁴⁸ See (1996) 22 E.H.R.R. CD 13, at pp. CD16-18 for E.H.R Commission Judgement; *The Times Law Reports*, 23.2.98 for E.H.R Court Judgement.

two main parties, the discrepancy between them and other parties may become even worse. This would be inconsistent with the legitimate objective of national electoral system to channel currents of thought, which should not be distorted by the wealth of political forces.

In conclusion, the Court's jurisprudence expressed in the *Bowman* case should not be extended to ban all the restrictions on party expenditure and independent expenditure which can exploit any new legislation governing party expenditure.²⁵⁰

(iii) The right way to enhance informed choices of voters

The most persuasive argument raises questions about the nature and aim of the political system. Oliver (1992: 129) claims that control of national expenditure would result in the reduction of campaigns, and this would generate less public interest in the campaign and might reduce turnouts. What are the democratic political devices, in particular election campaigns, for? Oliver's answer to this question relies on an anti-pluralist view in the sense that her concern is with the "fortunes of the electors and the community", not "fairness to and the fortunes of a party or movement as such" (See Oliver 1992: 131, 134). More

²⁴⁹ In Britain, there are already some specific restrictions on political expression in the form of banned commercial broadcasting. See Chapter 5, Section 5.4.2.

²⁵⁰ A comparative concern may lead us to American Supreme Court cases. First, *Buckley v. Valeo*, 424 US 1 (1976), annulled a limit on independent expenditure. Secondly, *Colorado Republican Federal Campaigning Committee v. Federal Election Commission*, 116 S.Ct. 2309 (1996), struck down a limit on party expenditure. Both cases were based on the right of political expression safeguarded by the First Amendment. However, it would be wrong to assume that the *Buckley* rule can be transplanted into Britain. While both regimes are based on a liberal conception of democracy, there is a conspicuous difference in political reality between the U.S. and the U.K.. As Calabresi (1994: 1533) notes, the unique virtue of the American structural constitutional systems of checks and balances and federalism makes British-style "party government" almost impossible in the U.S. The American system focuses on the protection of liberty by setting governmental power against itself. Yet, the great virtue of its transatlantic counterpart lies in the well-established unitary Parliamentary system in which political parties not only play an essential role in making government accountable for what it does but also influence, as centres of political power, policy-making. In the U.S., political parties are considered mainly as a kind of electoral commission and the political fortunes of the party's presidential candidates and congressional candidates are separate. As a result, the elected representatives enjoy relatively stronger independence from not only the party machine but also government than their counterparts in Britain. Therefore, in the U.S., there is less need for the regulation of expenditure of political parties as such as well as that of individuals and other political organisations, with a view to promoting the election of a particular political party.

The second, more concrete, difference between the two regimes is that in Britain, unlike the U.S., there are already specific restraints on political expression in the form of banned commercial broadcasting. For some, this fact provides a strong justification for the existing U.K. system on the ground that by providing relatively equal broadcasting opportunities to major parties, the case for national expenditure limits to put parties on an equal footing is weakened. (See Pinto-Duschinsky 1981: 272) However, this claim is less convincing because the production costs of party broadcasts are met by each party and party broadcasting is, despite its importance, only one method of campaigning. In short, it is clear that the freedom of expression jurisprudence is less convincing in Britain which has already adopted a scheme of regulation.

specifically, so far as election campaigns are concerned, in her view, a central question is how adequately information is provided to enable voters to make informed choices about who should represent them. (1992: 131-2) From this perspective, she goes on to argue that “fairness to parties” or “fair rivalry between political parties” should not be regarded as a positive goal, which the state should have a vital role in achieving in modern societies. Rather, these are merely a consequence of a political system, which purports to ensure a flow of as much information as possible. Hence, it is claimed that to control the resources available in election campaigns is not desirable and in conflict with the national interest because it could damp down public debate and reduce public interest in electing representatives.

However, we may rebut this view in two respects. Firstly, it is naive to presume that expenditure limits would seriously affect the public interest in campaigns and the voter turnout in elections. In practice, full information about the parties and their candidates which is required for voters’ best choice is not necessarily secured by unrestrained party expenditure. It is not the question of lack of information but of “fairness” to the parties in terms of political resources available to them. As Oliver (1992: 132) stresses herself, the most serious problem of the present system lies in the two main parties’ “unresponsiveness” to new ideas and to a variety of public opinion. Apart from broader problems embedded in existing political arrangements,²⁵¹ the imbalance in expenditure between parties, especially when the expenditure of small parties is compared with that of the two main parties, contributes to the unresponsive nature of the established parties. Indeed, some less well-funded parties are not in a position to worry about the side-effects of the limit on expenditure. The privileged position of the two main parties in raising far more money than the others and in running more high-profile campaigns has enabled them to manipulate the debate on policy options by marginalising other discourses mediated by other parties. Furthermore, expenditure beyond reasonable limits would not always encourage a flow of high quality information. Rather, the imbalance in party war-chests and excessive campaign spending tend to massively distort the terms of political debate. Campaigns dominated by the two well-funded parties tempt them to conduct personal attacks on party leaders rather than policy propaganda, or to incur huge costs by making them dependent on the

‘demonstration effect’ of sensational political advertisement.²⁵² As we shall see below, voters’ free choices should be made about different political programmes and should not be excessively affected by the imbalance of wealth of party supporters.

Secondly, the case against national expenditure limits in order to ensure an unrestrained flow of information overlooks one important fact. The political process, especially election campaigns, exists not only for the representation of public opinion but also for the formation of government. The latter relies heavily on the party system. Bearing in mind that elections are a battlefield for party competition to form the next government (see Chapter 5, Section 6.3), it is clear that the provision of full information to the voter is only “one” goal of electoral campaigns and fair rivalry between political parties is another equally important goal. In short, the question of political finance should be assessed not only for the voters’ sake but also from the point of view of the political parties.

3.3 *Problem II - The financial disparity between political parties*

National election expenditure limits by themselves would not guarantee equity between parties. Unless income disparities and concomitant inequalities in the permanent expenditure involved in maintaining the central and regional party organisations are redressed, genuine financial equality cannot be achieved. Indeed, while the difference between the two major parties in general elections has narrowed in terms of the funding of the campaign itself, there remains a huge gap in party spending relating to permanent costs. A Labour witness for the Home Affairs Committee on Funding of Political Parties points out that while in 1992 the Conservatives spent £11.4 million and Labour £10.6 million on the election itself, during the whole election year, the Conservatives spent £27 million while the Labour spent £14 million. (See Home Affairs Committee 1994: xviii) It is reasonable to argue that this financial inequality tends to undermine the foundations of British democracy by preventing all parties competing on a more equal footing. In

²⁵¹ They include the absence of public rights of access to official information, a highly disproportionate voting system, and other absurd aspects of party finance as dealt with in this section.

²⁵² It is very difficult to prove that such advertisements could affect public opinion and the result of elections but it is safe to say that some politicians would believe it is true and therefore they tend to pour a huge amount of money for that purpose. For example, as dramatically illustrated in Mark Hollingworth’s *Memoirs, The Ultimate Spin Doctor*, extracted in *The Observer* 16.2.97 (at p.3), Mrs Thatcher was one of them, and benefited by advertising skills of some spin doctors like Sir Tim Bell and employed a full-time advertising

particular, in association with a non-proportionate electoral system and a significant imbalance in institutional donations, significant financial inequality between the two main parties and small parties generates a situation of unfair rivalry.

3.4 *An analysis of voluntarism as the rationale for unregulated fundraising*

The main objection to the criticism of unfair rivalry between political parties is the principle of voluntarism established in British politics. From this standpoint, it can be argued that if the gross resource disparities are a result of purely voluntary support of the membership and friendly donors, there is little point in criticising this imbalance in resource. Such a financial gap can itself be an important criterion against which the public's support for political parties is evaluated.

However, despite the superficial plausibility of this claim, it is neither persuasive nor convincing. We may suggest two primary reasons.

3.4.1 Can money be one essential standard in evaluating the quality of opinion?

It cannot be desirable that the public's choice can be influenced by the wealth of a party's supporters. It is not difficult to assume that the means of political persuasion, which has influence on the public's choice, rely upon political money. In examining the relationship between the public's choice and the wealth of a party's supporters, we need to be aware of the nature and implications of voluntarism in the context of party finance.

As the Houghton majority (1976: 62) point out, allowing the public's choice to be determined by the fund-raising capacity of the respective parties is not in accordance with a democratic ideal that money should not be the standard against which the status of the citizen and the quality of opinion are determined. The British electoral reforms of the late nineteenth century in effect were designed to ensure this principle by setting the spending cap to minimise the probable electoral advantage of a rich candidate over opponents. Herbert Alexander (1989b: 9), an American expert on political finance, points out that the emergence of mass democracy has helped mitigate the "political" effects of disparities in "economic" resources by making it possible for the human resources or voting power of one group to match the wealth of another with small membership. However, mass democracy

agency, Saatchi & Saatchi. (See also Thatcher 1993: 295, 570, 585). On Thatcher's legacy in the light of

has gone hand in hand with the ever growing importance of mass media backed up by the revolutionary development of communications technology which has, in turn, encouraged the 'nationalisation' of electoral campaigns. Such political and social changes have increased not only the role of national party organisations in the political process but also the importance of political money for the maintenance of these organisations and effective but expensive political propaganda and campaigning. Alexander (1989b: 11) points to this aspect of mass democracy: "Coincident with the extension of the franchise and the democratisation of the institutional framework, the economic element that makes for political power - wealth - has been increasingly concentrated". It is natural that under these circumstances, there is a strong need at national level for a similar legal principle to those introduced to regulate local campaigns in the nineteenth century.

3.4.2 Behind voluntarism (1): abuses of the voluntary donation system

In practice, the liberal principle of voluntary contributions has been distorted, firstly, by the abusive sale of honours in return for political donations and the acceptance of overseas donations, and, secondly, by soliciting significant institutional payments and donations.

(i) The sale of honours

Constitutionally, the power to grant honours is vested in the Crown and is an aspect of the royal prerogative. However, this power is executed on the advice of the Prime Minister, who is, in turn, advised by three Privy Councillors acting as the Political Honours Scrutiny Committee. Geoffrey Marshall (1986: 23) suggests that the existence of such an advisory committee implies that the Crown has no legal obligation to automatically accept Prime Ministerial advice. However, we may assume from Peter Hennessy's work (1996: 65) and even a century-old observation by Bagehot (1993: 233) that, in reality, so far as the general power²⁵³ to award honours is concerned, the Crown is unable to ignore Prime Ministerial advice.²⁵⁴

"political marketing", see Scammell 1995.

²⁵³ Further consideration would be necessary in the case of the "catastrophic" creation of peers to control the House of Lords. See Bagehot 1993: 233; Marshall 1986: 24-25.

²⁵⁴ This does not mean that there is no room for attempting to persuade the Prime Minister to rethink certain recommendations. Interestingly, the purpose of Hennessy (1996: Ch.2) is to suggest that the Queen's power is, contrary to common assumption, much more than "a mere gilded sponge".

Since 1979, the most of the abuse of the honours system stemmed from the Conservative Party than its rival parties.²⁵⁵ According to a study of all the honours lists since 1979 referred to by *The Guardian* (16.6.93, p.6), industrialists were ten times more likely to be awarded peerages or knighthoods if their firms gave money to the Conservative Party. In the same article, it was revealed that of the seven major donor companies, only one had not benefited from honours list. Another report (*The Guardian* 14.4.94, p.2) revealed that between the election of Margaret Thatcher in 1979 and the 1993 new year Honours, life peerages and knighthoods were given to 76 business people whose companies over the same period donated £17.4 million to the Conservative Party or to front organisations through which donations could go undeclared. Based on this circumstantial evidence, a strong suspicion has emerged that honours were given to raise partisan political funding. Recent *Observer* articles (18.8.96, p.2; 28.7.96, p.7; 21.7.96, pp.1,16,27) about exclusive Conservative Party fund-raising organisations offering meetings with Ministers in return for political donations, such as the Quota Club, the Dragon Club, the Millennium Club, the Premier Club, inflamed this speculation once again. According to *The Observer* (21.7.96, pp.1,16,27), apart from a range of benefits to members, including dinners and lunches at Westminster, “detailed briefings” on key issues, and a policy information service, ‘founder members’ of the Premier Club could attend two dinners a year with the then Prime Minister at No 10 Downing Street on payment of £100,000. While disputing the sum, the party did not deny the substance. Such private access to the Prime Minister with his considerable power of patronage might well be construed by some as tantamount to the buying and selling of influence and honours.

In fact, the abuse of the power of the grant of political honours is already regulated by The Honours (Prevention of Abuses) Act 1925²⁵⁶, which was introduced following the notorious abuse of the system by Lloyd George, the Liberal Prime Minister, though he was

²⁵⁵ Hugo Young pointed out, one reason for this accusation was that the party is in power too long. See *The Guardian* 27.10.94, p.24. Young’s assumption regarding the plausible link between donation-related honours and being the governing party has been reinforced since the formation of the new Labour government in 1997. Until then, the Labour has exploited the speculative linkage between honours and donations to the Tory party. However, since coming to power, the Labour Party has done little to disguise its gratitude to those who helped finance its 1997 election victory by awarding one fourth of new peerages to them. Michael Levy, the organiser of Tony Blair’s blind trust, was one such beneficiary. (See, *The Times*, 25.8.97, p.4; *The Sunday Times*, 24.8.97, pp.1-2)

²⁵⁶ The full title of this act is “An Act for the prevention of abuses in connection with the Grant of Honours”.

by no means the first to behave in this manner.²⁵⁷ However, any significant “coincidence” between political donations and the granting of political honours clearly undermines the alleged virtues of voluntarism. Very much more recently, a number of press allegations appeared that Asil Nadir, head of (now collapsed) Polly Peck, gave donations to the Conservative Party in the hope of securing a knighthood. (*The Guardian*, 23.6.93, p.2) A growing suspicion has emerged that donations are being made via quangos in return for lucrative government contracts. In November 1994, *The Guardian* (29.11.94) also raised the issue of the appointment of board members in return for their substantial contributions to party funds. It is surely not without significance that all these suspicions come out in the wake of the re-emergence of large personal donations which, as we have pointed out, subsided after the introduction of the Honours Act 1925 and the beginning of institutional funding in 1920s.²⁵⁸

(ii) The sale of political influence

Regarding the issue of money for influence, *The Observer* (28.7.96, p.27; 21.7.96, p.16) revealed a candid ‘sales pitch’ on the part of the Premier Club’s membership secretary, at Conservative Central Office, to a potential donor: “If there are any specific business concerns which (the member) has, you know, we will try and assist in getting that answered.”

However, no better example of such devious practice is to be found than New Labour's Ecclestone scandal. The new Labour government decided to exempt the Formula One motor racing enterprises from a tobacco advertising ban. However, shortly after it was revealed that just before the 1997 general election the Labour Party had received a £1 million donation from Bernie Ecclestone, the head of Formula One racing. (*The Times*, 12.11.97) Both Labour and Ecclestone denied any malpractice. However, Sir Patrick Neill (now Lord Neill of Bladen), the new chairman of the Committee on Standards in Public Life, with whom Labour consulted on the matter, advised that the gift should be returned.

²⁵⁷ See Blackburn 1993: 297-298. According to John Walker (1986: 2), the increasing campaign cost resulted from the extension of the franchise and the advent of mass democracy led both Liberal and Conservative parties to engage in large-scale honours-touting in the thirty years before Lloyd George became Prime Minister in 1916.

²⁵⁸ Pinto-Duschinsky (1981) identifies this development as the transition from the plutocratic period to the modern era in terms of party finance.

Another criticism in this area concerns the so-called "blind trusts" for politicians, especially those in government. These secret trusts were regarded as a legitimate way for politicians to raise finance, as they cannot be accused of responding to donations if they do not know who the donors are.²⁵⁹ Despite its formal legitimacy, this arrangement does not avert suspicions. It is possible that managers of secret trusts who, of course, know both donors and the politicians concerned can act as middle men either by securing favours or by arranging meetings.

There is a strong possibility that these well-published scandals are, as John Walker (1986: 207) maintains, merely "the tip of an iceberg", for, after all, most political donations are made in secret and subject to machinations that are almost impossible to detect.²⁶⁰ Therefore, a strong case can be made for "consistent, transparent and better rules" in this important area of fundraising, rules which will safeguard political parties from even an indirect degradation of politics. (e.g., *The Guardian* [23.7.96, p.14]; *The Times* [18.12.97], p.10)

(iii) Foreign donations

Foreign donations raise a serious question about the real nature of voluntarism. In a Home Affairs Committee, the Labour-sponsored Institute of Public Policy Research submitted evidence that around 20 per cent of Conservative Party income comes from abroad. (Home Affairs Committee 1994: xxxii) Moreover, it has been clearly demonstrated that some of these controversial donations emanated from a number of highly suspect individuals, for example, Greek shipping billionaire, John Latsis (£2 million) and Sir Yue-King Pao (£1 million), Li Ka-Shing (£900,000) and Ma Ching-Kwan (£ 1 million). There are some not implausible allegations that Li Ka-Shing had an interest in the Hongkong & Shanghai bid for the Midland Bank, and that some income tax rules in favour of foreign businesses were introduced by the Conservative government in the light of substantial donations from these businesses concerned. (See Martin Linton in *The Guardian* 18.6.93, p.22) The most notorious allegation of all is that Ma Ching-Kwan, a Hong Kong publishing tycoon, whose family wealth originates from the drugs trade proffered a massive donation

²⁵⁹ According to *The Sunday Times* (9.3.97), eighteen members of Labour's shadow cabinet benefited from these trusts.

in return for the freedom of his father Ma Sik-Chun, a suspected drugs trafficker and fugitive. (See *The Time*, 21.1.98, p.4; *The Sunday Times*, 25.1.98, p.10)

Even if we may set aside these allegations as mere speculation or political rumour, we disagree in principle that foreign businesses with interests in Britain should be allowed to make contributions to political parties. Considering the importance of political money to the domestic political process, Robert Blackburn (1995: 331) is correct in his assertion that any policy which opens the door to political influence for foreign companies, bodies, or foreign governments²⁶¹, would undermine national self-government.²⁶² This would be all the more so if foreign donations are unequally made to political parties. The Home Affairs Select Committee's extremely moderate proposal for a voluntary code of practice is inadequate primarily because that approach has been already tried by Sir Norman Fowler, the former chairman of the Conservative Party, in an attempt to excuse the abuses of voluntarism²⁶³ (See Home Affairs Committee 1994: xxxiii) Interestingly, the Conservatives have persistently opposed even moderate state aid to political parties on the ground that it would weaken the tie between central party office and the grassroots. (Sir Norman Fowler's evidence in the Home Affairs Committee 1994: xxi) However, it would seem that Sir Norman's strictures apply even more strongly to foreign donations. As any financial shortfall is a problem, the best solution, bearing in mind the public nature of political

²⁶⁰ According to John Walker (1986: 90ff), in the early 1930s only one person, Maundy Gregory, has been charged under the 1925 Honours Act, subsequent imprisonment and exile.

²⁶¹ The Conservative Party has even been accused of receiving political donations from the Saudi royal family just prior to 1992 election. See *The Guardian* 23.6.93, p.1.

²⁶² The issue of "Globalisation" or anti-protectionist international free market principles touches on this argument. All the more so, as inward investment becomes an accepted phenomenon in the global economy, the conception of national self-government itself is under challenge. The logic underlying this view is that if certain policies have an impact on those corporations with interests in the British market, then there should be no fundamental reasons why they should not be allowed to give money to the party that is likely to form a government and will decide such policies. (See Magnus Linklater's column in *The Times*, 28.5.98) However, as long as a national government exists, there has to be more justifications for foreign donations than sheer economic interests. For example, as Fisher (1997: 244) points out, whilst trade does cross national boundaries, such things as the provision of welfare services to citizens do not. Moreover, political lobbying and direct donations to political parties (which in one way or another become organs of the state) should be differentiated. If a foreign corporation can donate money to political parties, there is no reason why a foreign government with certain interests in British foreign and domestic policies should not be likewise. When with the electoral reform accelerated, the role of political parties in elections is becoming even more strongly embedded in constitutional arrangements, the basic principle of national self-government manifesting itself in a citizen-based voting system may justify certain restrictions on controversial foreign donations.

²⁶³ However, it is reported in a newspaper that the former director of the Conservatives' central board of finance, Major-General Sir Brian Wyldbore-Smith, admitted that this alleged code of practice has not been implemented properly by saying that "I don't think a cheque has ever been refused." See Martin Linton in *The Guardian* 18.6.93, p.22.

parties, is not foreign donations but public funding. From this perspective, it is quite natural that in the wake of the 1997 election, the Neill Committee is moving towards a ban of foreign political donations and, in fact, the Conservative Party is likely to agree with this reform. (See, *The Times*, 18.12.97, p.10; Conservative Party 1998: 5)

3.4.3 Behind voluntarism (2): Institutional dependence of the two major parties

The next problem of the *status quo* is the heavy dependence of the two main political parties on institutional money. Despite Labour's recent success in attracting relatively large voluntary sums from new donors, its financial dependence on the trade unions still remains high, accounting for two fifth of its central income. (See Labour Party 1998b: 6) More importantly, since these new donors include a number of sizeable businesses, their dependence on institutional money becomes even greater. (See Fisher 1997: 240-241) According to Justin Fisher's survey (1995: 183, table 2),²⁶⁴ corporate donations to the Conservative Party, the champion of voluntarism, in 1992/93 financial year made up of 37.3 per cent of its total income (individual donations amounted to just 30.5 per cent).²⁶⁵ Such large proportion of institutional donations undermines the whole basis of voluntarism and its egalitarian principle.

So far as institutional dependence is concerned, Bogdanor (1982: 373) is quite correct in his assertion that institutional interests whose political money provides a considerable part of the two main parties' income has "excessively" shaped the scope of electoral choice. He points to the fact that such high dependency on institutional donations is illustrative of a particular type of socio-political cleavage, *i.e.* class cleavage, unionised labour versus industrialist capital, which threatens to overwhelm other equally important interests. More explicitly, the victims of such bias are those seeking to represent minority interests, or mediate different discourse and visions from those of the two major parties but who are not backed by large institutional donations. New Labour's equal distance policy between business and trade unions over recent years can be seen as changing the traditional paradigm: business finance of the Conservative Party vis-à-vis trade union finance of Labour. However, this does not affect the fundamental aspect of the traditional funding of

²⁶⁴ This is based on oral evidence to the Select Committee on Home Affairs 16/6/93.

political parties. Institutional donations are mostly given to the two dominant political parties in British politics, thanks largely to the first-past-the-post electoral system.

(i) Limited regulation of company donations

Two features worsen this heavy dependency on institutional money. The first is an anomaly in the legal framework which by and large operates to the advantage of one party, *i.e.* the Conservatives. Keith Ewing (1987: 73) points out,

the law does not operate in an even-handed way with regard to the funding of political parties. Unlike many other jurisdictions, including the United States and Canada, where corporations and trade unions are governed by identical rules, in Britain company political donations are for all practical purposes unregulated by law, while trade union political expenditure is subject to detailed and restrictive legislation.²⁶⁶

Thus, one potential reform in this area should be the regulation of company donations. This should include requirement of the consent or approval of shareholders, the equivalent to the regular ballot of union members on the continuation of their political levy; and a voluntary code of practice for company directors wishing to make political donations. (See Constitutional Reform Centre 1985. Cf. Conservative Party 1998: 3-4)

(ii) The organisational and financial link between special interests and the Labour Party

The organisational and financial link between Labour and trade unions draws criticism that Labour is institutionally beholden to specific interests. John Major asserted, for instance, that “it is only in the Labour Party that donations and money buy influence”. (Quoted by Jonathan Calvert and David Leigh in *The Observer*, 21.7.96, p.16) This criticism is no mere empty gibe on the part of the then Prime Minister. A number of factors make the Labour Party particularly open to attack in this area. They include: the Labour Party receives huge donations from a relatively small number of trade unions; the actual contribution of trade unions to Labour is substantially more than the sum suggested in

²⁶⁵ It is important to note that this figure reflected an apparent growth in large individual donations from both home and abroad. That is, despite the recent decline in direct donations from companies, a large proportion of Conservative income still comes from businesses.

²⁶⁶ The most conspicuous partisan legislation, which is seen to deprive the Labour Party of its main source of income is the Trade Union Act 1984, Part III requiring trade unions to hold regular (at the moment, every ten years) ballot on the question of their continuance of a levy.

Labour's accounts thanks to, for example, union's donations in kind and their indirect campaigning for Labour; and, most importantly, the trade unions wield direct and significant power over party policy. (See Home Affairs Committee 1994: xix) As Donald Sassoon (1993: 33) states, it cannot in principle be justifiable that political parties, as the basic institutions of a democracy, are under the influence of 'paymasters' with vested interests.

(iii) Some objections to the regulation of the trade unions' Labour funding

Ewing (1987: 176) warns that any attempt to control institutional dependence on the part of political parties may undermine freedom of association which has long allowed an interest group to seek to realise its goals through representation in Parliament. The democratic and open character of trade unions, in his view, justifies reasonable institutional dependence and is not in conflict with a pluralist democracy in which a diversity of sectional interests is recognised. Indeed, the pursuit of such interests through the political process is rather encouraged. For him, what is material is the question of open, institutional accountability thanks to an extension of the duty of disclosure.

One primary reason for this rather cautious approach is that such proposals for regulating institutional donations may encounter considerable 'practical' obstacles to their implementation. Firstly, a total prohibition of institutional donations would be tantamount to throwing the baby out with the bathwater. The dissenting discussion of the Houghton Committee (1976: 79, [iv]) suggested that prohibition of institutional money need not alter a party's general policies. (See also Ewing 1987: 177) The underlying assumption here is that party policy is not directly and comprehensively subject to those providing financial support and of even greater significance is those continuing values and beliefs which underlie and inform a party. Such ideological underpinnings would remain even if institutional donations were to be made illegal. Thus, the best way to deal with the dangers of institutional donations is the introduction of quite specific measures which is designed to curb any potential abuse. For example, political donations by government contractors²⁶⁷

²⁶⁷ This issue was highlighted by the opposition parties after a newspaper revealed that one businessman short-listed in a consortium bid to buy Ministry of Defence homes being put up for sale by Michael Portillo, the then Defence Secretary, attended a private dinner party with the Prime Minister in return for donations of up to £100,000 each to the Conservative Party. See *The Guardian* 22.7.96, p.4.

might well be prohibited. In short, there would seem to be no cogent reason for introducing a crude blanket ban on institutional donations.

Secondly, as to limiting the size of individual donations, Ewing (1987: 178) argues that it would simply serve to the advantage of one party over another. Traditionally, Labour's funding has come from not more than 100 affiliated trade unions while there are around one million registered companies which are potential donors to the Conservatives. Obviously, what he has in mind is that a limitation on donations would tell most severely against the Labour Party in view of its dependence on union donations. We disagree with this particular view and discuss in the following section.

(iv) The rebuttal to the case for a special treatment of trade union donations

In reforming party finance, it is difficult to agree with the proposal that money from the unions should be treated as a special case. The autonomy of an interest group seeking to realise its goals through political representation has to be respected. But this autonomy must not be allowed to encroach on that of other less wealthy interests including political parties which cannot rely on institutional money. Clearly, such imbalance of freedom is a very real danger. Thus, institutional money should not be altogether removed, but rather, political money from corporate sources should be regulated to ensure that it cannot be used to procure special favours.

If one acknowledged that some limited regulation of institutional donations is called for, then Ewing's argument against introducing a ceiling on individual donations becomes that much less convincing. In fact, the traditional formula for political funding has recently become much more fluid, given new labour's repeated initiatives to establish new, more even-handed relationships with special interest groups, coupled with the Tory's new "open door" policy which seeks to forge closer links with unions. (See, e.g., *The Times*, 30.11.97 [by M. Prescott]; 14.12.97 [by Grice & Higgins])

More importantly, reform of financial donations to political parties should not be seen from a partisan perspective focusing on whether, in the short term, a financial advantage or disadvantage may be given to one political party over another. A comprehensive perspective is called for. As political parties become increasingly governmentalised and, as the basic "institutions of a democracy", perform various public roles in the interests of the

general public, they should come to depend much less on “private” interests. Regulation of political influence of institutional vested interests should not be partisan, rather, should seek to further the cause of a new pluralist democracy which guarantees equality in the political arena.

Therefore, if there is any reform of party finance, it should include a gradual reduction of party dependency on institutional money, combined with some kind of state aid for political parties. The concomitant argument for state funding needs to be critically dealt with in more detail and in a broader context where the feasibility of state intervention in party politics can be questioned. This will in fact be the task of Section 4 of this chapter.

3.5 Problem III - Secretive political fundraising

The third problem is concerned with the secretive practices of party fundraising. The secrecy of party funding can be attributed to the private nature of political parties and their concomitant voluntarism. There are no legal arrangements for party accounting or the public disclosure of sources of party funding. As a result, the current accounting practices of the three major political parties differ widely. Therefore, given the public function of political parties in the political process, a case can be made for statutory accounting in order to increase public understanding of party finances. However, the most essential component in any reform of party finance is a legal requirement for disclosure of the sources of party funding.

3.5.1 The case for the public disclosure of donations

Reasons for public disclosure can be advanced from both normative and practical perspectives. Normative concerns are twofold. First, secrecy in political finance can breed political corruption. Despite Britain’s relatively good fortune in respect of the corruption scandals, there is growing concern over propriety in public life, which has led to the establishment of an independent Committee on Standards in Public Life. After the embarrassing Ecclestone affair, Prime Minister Tony Blair, on 12 November 1997, asked this committee to examine party finance and to make any necessary recommendations. These recommendations are most likely to include the identification of large donors which would enhance public confidence in the democratic political process.

The second constitutional reason supporting the identification of donors concerns the principle of open government. As Fisher (1997: 242) suggests, since parties are competing for public office, the public simply has a legitimate right to know how they are financed. Therefore, disclosure is not merely a means of preventing political corruption but an essential constitutional device to ensure informed choice at elections.

On a practical level, the requirement of disclosure is not new even in Britain. In practice, MPs are required by standing orders of the House of Commons to declare their financial interests on a Register of Members' Interests. Schedule 7 of the Companies Act 1985 requires all companies to declare direct and indirect political donations over £200. What these requirements have in common is that in looking at political donations, they ignore the fact that political parties are political actors. However, in terms of size and political influence, MP's personal financial interests cannot begin to compare with those of political parties. So far as the regulation in the Companies Act 1985 is concerned, it only focuses on a company's internal²⁶⁸ relationship with its shareholders but does not impose any obligation of disclosure on political parties as its beneficiaries. Clearly, such a regulation does little to enhance public understanding of party finance.

Furthermore, the system can lead to evasion and cannot ensure the transparency of political money. In the Asil Nadir scandal, a declaration under the Companies Act 1985 had not been complied with and, instead, overseas firms with no declaration obligation were used. Indeed, *The Observer* inquiries (28.7.96, p.7) actually revealed some crucial methods of evading this declaration requirement. The membership secretary of the Premier Club, which, as we have already noted, is a secret fund-raising organisation for the Conservative Party, advised potential donors to list their donations as a club membership subscriptions which could be subsequently put down as 'entertainment' in their company accounts. The fact that there are other methods of attracting funds without donors having to disclose them as political donations reinforces the need for more transparent accounting of party finance. For example, the same *Observer* inquiries also revealed that 'parliamentary briefs', which are supplied to MPs, were abused by the Conservative fund-raising team. These papers were offered to Conservative supporters for annual sum of £1,280 per year on the pretext that they were research materials. Bearing in mind that virtually no extra costs were

²⁶⁸ Disclosure of political gifts is required to be shown in the directors' annual report to shareholders.

incurred in producing these papers, these listed subscriptions were in effect donations to the Conservative Party. *The Observer* points out that they formed a considerable part of the more than £4 million income received by the Conservative Party under the heading of sales of publications and conferences.

3.5.2 Objections to disclosure

There are a number of counter-arguments, both normative and practical. The strongest normative objection to disclosure can be found in the Home Affairs Select Committee Report of 1994, *Funding of Political Parties*. The Committee express the view that disclosure would breach the principle of the secret ballot and the right to privacy, and that a unacceptably heavy cost would be incurred in 'regulating most ordinary forms of free speech and of legitimate political activities'. (1994: xxx) The report concluded that where donations are made from legitimate and identifiable sources, *i.e.* known to the party, they should be allowed to remain private. (1994: xxx)

The Committee also pointed to a number of practical problems. In its view, there are particular and substantial difficulties about laying down disclosure rules which are not easily enforceable. (1994: xxix) Another practical problem is that a threshold beyond which donations should be declared will have a varying impact depending upon the size of the party concerned. A lower threshold, for example £1000, would be critical to a small party but not to a larger one. Given this point of view, the privacy of the small donor to a large party would be contravened.

3.5.3 The need for financial transparency vis-à-vis the public nature of political parties

Underlying all this essentially laissez-fair attitude to reform is a confused view about the nature of political parties and even the political system itself. The problem, as Justin Fisher (1994: 68-69) says, is that growing public suspicion, whether well or ill founded, may undermine the party legitimacy and even the political system itself. Objections to disclosure also ignore the difference between political parties and other voluntary organisations. Anonymous donations to charity are very different from those to political parties given that charities, unlike political parties, have no direct political power. The public has a right to know who have privileged access to ministers on the basis of their exceptional wealth,

while the same principle does not apply to charitable associations. As Robin Cook MP, the then shadow Industry Secretary, succinctly put it, “the danger to democracy of secret donations is that they put public government under private obligations”. (See Patrick Wintour’s article in *The Guardian* 17.6.93)

4 The rationale for state aid to political parties: the effective performance of party democracy

Reform of the rules governing donations to political parties is closely related to the issue of state aid to political parties. Together with the problem of the imbalance of inter-party funding, the inadequacy of party funding is further reason for reform. Indeed, since the Houghton Committee put forward its proposals for the state funding of political parties, debate has centred most fiercely on the question of the growing inadequacy of their resources. Michael Pinto-Duschinsky (1981: 286), on the other hand, doubts that such additional funding would in any way enhance party performance. Whether or not he is right depends, I would suggest, in part on one’s view of the role of parties and of the democratic system itself.

4.1 *A project of constitutionalised democratic autonomy and state regulation of party finance*

As we sought to demonstrate in Chapter 3, our own project of constitutionalised democratic autonomy envisages a pluralist democracy in which all political and social spheres enjoy autonomy within constitutional boundaries. Political parties form a distinct sphere in which the social and the political are uniquely blended. This unique quality demands a careful and complex analysis of their role and status. (See Chapter 4) In this analysis, a realistic balance between the political and the social has to be struck. The subordination of the state to society or *vice versa* is undesirable. The governmentalisation of political parties means that they have to be looked at differently from other social organisations. This unique status of parties creates the fundamental rationale for their being given extensive state aid. In other words, state aid is intended to enhance their steady public

performance. In 1974, Richard Rose (1974: 278) argued that “the case for public finance for party politics is simple enough: parties are an integral part of the British constitution”. In 1976, the Houghton Committee confirmed Rose’s view by emphasising that the expansion of the scope of governmental service in the welfare state requires not only the “finest industrial, business and commercial skills, but also the highest standard of political discussion and decision” in which the parties have a crucial role to play. (at 53) In this view, state aid is a desirable, and possibly the only, way of supporting “the minimum standards of political activity and efficiency required to maintain the vitality of our system of representative government.” (at xii)

4.2 *The opposition to State funding*

From this basic perspective, we now turn to some arguments against state aid to political parties.

4.2.1 Does state aid for political parties necessarily encroach on their autonomy?

(i) The liberal fear of the colonisation of political parties by the state

Arguments against public financing of political parties stem from a specific political value and conception of democracy, coupled with no less particular conception of the nature of political parties. According to Arthur Lipow (1996: 50), state funding is “the breaching of the barrier between political parties and the state” and a step toward an “illiberal and undemocratic political order in which society - or civil society - is permeated by the state, and the state becomes the master and not the servant of society”. The minority opinion of the Houghton Committee (1976: 49) orchestrated a similar view that state aid is “only a short step from the injection of state funds to direct demands on the party organisations for a quid pro quo in the form of radical changes in their rules and practices.” Obviously, underlying such arguments are liberalism, as a political value, and the classical conception of a unitary parliamentary democracy and a view of political parties as private, voluntary associations independent of the state. (See Seyd 1998: 202-204)

(ii) The realistic view of the relationship between the state and political parties and the need for state aid

This liberal characterisation of British Parliamentary democracy is obsolete and thus inappropriate for a highly pluralised society. (See Chapters 2,3) Despite the absence of any legal recognition of political parties, their existence as centres of political power is essential to the political process. As Blackburn (1995: 344-355) argues, a “backward-looking institutional inertia” which is manifest by a lack of legal recognition of political parties cannot obliterate the importance of these institutions to the “operation” of the British constitution. Nor does such inertia signify that they should be “immune” from “public regulation and support” when circumstances demand it. A new legal framework should not be confined to outlining the minimum legal requirements of party finance such as disclosure of party accounts. Rather, it should include measures to ensure the democratic operation of political parties corresponding to their public nature in the constitutional order, for example, the democratic election of party leaders and democratic selection of candidates for election.

The claims of the opponents²⁶⁹ of state funding tend to overlook or consciously ignore the nature of the contemporary state while exaggerating the supposed danger of it colonising political parties. These opponents overlook that in the modern political world, the fate of political parties is inextricably linked to the power of the state. The state both sets and executes the rules by which the political process operates. Few can seriously deny that there is no democracy without election laws to ensure fair rivalry. It follows, therefore, that whether those laws adopt “laissez-fairism” or comprehensive controls on party finance plays an important role in determining the parameters of political power and the destiny of political parties. As Alexander (1989b: 12) puts it, “government is not necessarily a neutral factor but becomes a player that might help or hurt certain other players”.

More specifically, we disagree with Lipow’s (1996: 51) claim that state financing is a prelude to the dedifferentiation of the state and society or the subordination of society to the state. Some opponents primarily fear what Pinto-Duschinsky (1981: 300ff) called “a danger of legal gerrymandering”. The essence of this fear is this: In circumstances in which there is

²⁶⁹ E.g., Seyd (1998) who opposes state funding and regulation of party finances while stressing the importance of political parties as intermediaries between the electorate and government in the contemporary atomised society.

a strong possibility of partisan ‘electoral dictatorship’, coupled with a lack of legal recognition or any constitutional protection for political parties, the introduction of state aid and the regulation of expenditure would serve to increase a danger of authoritarian and anti-democratic proclivities within the political system. This is because such move could open the way for the governing party to abuse its power by seeking to control the life of the rival opposition parties. In 1993, the Conservative Party submitted such an argument to a Home Affairs Committee on the funding of political parties. They argued that state funding “would give a party with a parliamentary majority control of the funding of political parties, bringing the danger of self-serving legislation”. (Home Affairs Committee 1994: xxi) It is interesting to note that the Conservative government under Mrs Thatcher did not hesitate to regulate the internal affairs of trade unions on the ground that there is a public interest element in trade union funding. (See Grant 1987; Chapter 5, Section 5.2.3. [ii]) In the same committee, Plaid Cymru warned that with state aid, parties would become “clients of the state” and their “independence” severely diminished. (Home Affairs Committee 1994: xxi)

However, we cannot agree with these claims. In the first place, the fear of ‘elective dictatorship’ or ‘legal gerrymandering’ is less convincing since all constitutional reforms are closely related to one another so that reform of party finance needs to be seen in conjunction with electoral reform designed to diminish the possibility of elective dictatorship.

Secondly, more importantly, the threat to parties’ independence is exaggerated and is based on an unjustifiable zero-sum conception of the relationship between the state and civil society. The relationship between the state and society cannot be a unilateral one that can be analysed within some Schmittian ‘foe-friend’ framework creating a zero-sum game. (See Chapter3) The state and civil society are interdependent so that boundary of each is the necessary and sufficient condition of the other. The outcome of this is more than likely a positive-sum. This argument is reinforced if we recall that the thrust of the reform of party finance we have in mind does not lie in a total replacement or abolition of voluntary finance but in a modest, secondary supplement to party finance mainly as a replacement for institutional money. All the features of modern politics²⁷⁰ (including the dual nature of political parties, their cartelisation and a new division of labour between political parties

²⁷⁰ For this, see Chapters 3 and 4.

and interest groups) cannot necessarily be traded off with the conventional voluntarism of political parties and the rights to participate financially, which are guaranteed not only to their members but also to the citizenry at large. Indeed, as Ewing (1987: 136) points out, the opponents of state funding seem to ignore or take for granted that there are a number of voluntary organisations, which accept public funds but retain their independence. It should, too, be borne in mind that as stated in Section 2 above,²⁷¹ already certain level of state interference exists thanks to several state aid-in-kind which have been set up for the benefit of political parties.

4.2.2 Does state aid necessarily undermine the traditional base of political parties?

(i) Fear of the centralisation and bureaucratisation of political parties

The second argument against state funding is that state aid would tend to undermine the nature of political parties as a social sphere by weakening the essential relationship between them and their “traditional” sources of support. (Minority opinion of the Houghton Committee 1976, at 78; Syed 1998: 204) Arthur Lipow (1996: 58) warns that the modernisation of the Labour Party, a vital agendum of which, in association with state funding, is the tempering of union influence within its internal party structure, may lead to its becoming an “undemocratic” American-style party. Michael Pinto-Duschinsky (1981: 292) expresses similar concerns claiming that state funding would reinforce the iron law of party centralisation to such an extent that the central party would become less dependent upon grass-roots’ organisational and financial support. He goes on to argue that “it would be greatly against the interests of democratic government if financial aid from public funds enabled party machines to dispense with the services of ordinary party members”. (1981: 296) Another fear expressed by Pinto-Duschinsky is the potential bureaucratisation of party organisations. He warns that with state funding, party officials would seek to gain the kind of advantages enjoyed by civil servants such as security of tenure, inflation-proof pension rights. In his view, such advantages would isolate party machines from ordinary members and thus weaken their ability to fulfil their democratic functions. (1981: 296)

²⁷¹ It is a general view that these subsidies are designed to offset the advantages enjoyed by the party in power. (European Parliament 1991: 35) *De facto* free broadcasting for the political parties is also an important benefit, which does not cost the taxpayer anything.

(ii) A new paradigm of participation and state aid

Do such plausible fears amount to decisive arguments against state subsidies? Our answer is in the negative. In the modern political world, the governmentalisation and cartelisation of certain elements of political parties are inevitable. (See Chapter 4) What we need to focus on is how to minimise the side effects of this trend and how effectively to cope with a rapidly changing political situation. Furthermore, as Justin Fisher (1995: 191) points out, even under the present system, the central collection of funds, whether personal or institutional, is the norm than the exception. Critics who warn of the effect of centralisation presuppose, and idealise, active mass parties at the constituency level. But the plausibility of this presupposition is questionable and the reinvigoration of local politics needs to look for a new style of participation different from conventional territorial representation. (See Chapter 6, Section 4.5.1) This is not to suggest the abandonment of local organisations. At least for the purpose of winning elections, the importance of local organisations cannot be underestimated. That is why there is a need for the empowerment of the local membership in the policy-making process and the election of party leaders in so far as it does not encroach on system stability and efficiency. It would be correct to say, as even some reformists like Alan Ware (1987: 231) do, that when state funding is not linked to membership or membership activity, then it “certainly” can weaken the parties “internally”. Still, the degree of weakening would not be severe enough to justify discarding a system of state funding *per se*. Irrespective of whether there is link between state subsidy and membership, as far as political parties wish to win elections, there remains a need for local organisation. If this need is combined with the democratisation of power structures which is yet another condition for the constitutionalisation of political parties, any arguments that state funding would weaken democracy are less convincing. On the contrary, public funds to political parties are essential to the democratisation of their power structures on which the success of the democratisation of the whole society, in turn, depends.

Try as we might to see political parties as nothing more than a social sphere, the trend remains for their gravitational points to shift more and more away from civil society towards the core complex of the political system. What, from a democratic standpoint, is most material, is how to control any potential abuse of power by political parties and how to provide an appropriate framework and resources to help them improve their performance.

State aid is given in the expectation that public funds can help political parties to improve the quality of public life. In a pluralist society, this expectation can best be achieved if parties are encouraged to invest more money in research and policy development with a view to enhance public access to information and debate. Only then, will political parties operate in the interests of the proper functioning of democracy itself.²⁷² (See Home Affairs Committee 1994, p.xxii; Houghton Committee 1976: 53-55)

(iii) State aid and extremist political parties

Not surprisingly, underlying this liberal fear of reform is a strong preoccupation with the legacy of the British two-party system. The minority opinion in the Houghton Committee made it clear that traditional party alignments reflect a “degree of actual conflict in society”, given that their alignments are by and large determined by class. To this extent, they presumed, any attempt to change the present system would result in instability by allowing the emergence of extremist political parties. (See p.79) However, the essential problem with the existing political system is that it fails to encompass the ever-growing plurality of society. Indeed, this failure would, contrary to the traditionalists’ hopes, tend to weaken the foundations of the political system by encouraging a general loss of confidence in it. Moreover, as a Hansard Commission of 1981 on the financing of political parties (at 45, para. 7.6) points out, the present system, based on one particular form of political cleavage - class division -, has a number of further deficiencies. It tends to strengthen not only the permanent victimisation of the smaller parties that seek to mediate other interests and social discourse but also polarisation between the two main political parties. Although state funding alone can never be a panacea that will eliminate all these negative effects, it offers at least one practical and reasonable option to bolster the foundations of a pluralist democracy.

4.2.3 State aid and the theory of party decline and anti-party sentiments

(i) The theory of party decline and state aid

The final argument against state aid is that the claims of the advocates of state aid and legal controls on party finance are based on a “fundamental misunderstanding of the

²⁷² Labour's recent move to restrict the union's finance for policy and research work can be seen appropriate

reasons for their *decline* over recent decades”. (Pinto-Duschinsky 1981: 287. My emphasis) According to this view, the real reason for party decline cannot be found in a shortage of funds or financial inequality but in a political phenomenon that manifests itself in so-called ‘anti-partyism’²⁷³. Pinto-Duschinsky (1981: 287) goes on to argue that “reforms that ignore the essence of the problem and deal only with its institutional manifestations will not provide a solution”. For him, the injection of financial help to political parties is like a drug that deals temporarily with the symptoms but fails to deal with the disease itself. (*Ibid.*)

(ii) The real implication of the challenge to party politics and state aid

Pinto-Duschinsky’s argument misreads the real cause and effect of anti-partyism. For us, the trend towards mass disillusionment with political parties would justify giving state aid to political parties, and all the more so if we recall the ambiguous or dual nature of the phenomenon. Pinto-Duschinsky may be correct in asserting that public funding would not reverse the decline of public confidence in party politics. However, as some academics point out, it is equally true that the absence of state aid will not arrest the trend either. (See Ewing 1987: 138; Fisher 1996: 201; Hofnung 1996) The questions that should be really asked are as follows: What is it that gives rise to such anti-party sentiment?; What impact will this trend have on political parties themselves?; How can the British constitution cope with this trend?

As we have seen in Chapter 6 (Section 4.5.2), anti-party sentiment is one aspect of the pluralisation of modern society. The erosion of old ideological and sociological conflicts²⁷⁴ has led to the conspicuous collapse of the conventional division of labour within the political system. This in turn implies not only the collapse of the monopoly of political representation by political parties but also a loss of confidence in them on the part of general public. As a result, other political actors and institutions have taken over some of

from this perspective. (See *The Time*, 14.12.97 [by Grice & Higgins])

²⁷³ This generally centres on popular disillusionment with party government and parties themselves, or more restrictedly refers to an academic school stressing this trend and suggesting a new model of democracy. According to some, anti-party sentiment is presented in several behavioural indicators such as declining electoral turnout, a growth of hesitancy in the electorate, declining party membership, and the growth of ‘anti-party parties’. (See Webb 1996: 367, referring to Thomas Poguntke’s research) Paul Webb’s (1996: 374ff; 1995b) research addresses that a *prima facie*, though relatively ambiguous, case for anti-party sentiment in the UK can be identified and ascribed to a number of factors, including poor national economic performance, the erosion of the class cleavage, political convergence of major parties with diverse social background.

²⁷⁴ In Britain, these old conflicts gave rise to a bipartisan representative democracy.

the functions which parties once monopolised. All of these factors, not least that of a decline in party membership²⁷⁵, are clearly visible on the British political scene. (See Webb 1995b: 304-306) For some, this trend is seen as the harbinger of new styles of political participation, in particular what Mulgan and his colleagues term 'lean democracy' which is able to replace parliamentary democracy or party government. (See the cover story of *Demos* 94/3:1; Mulgan 1994a, 1994b)

However, such new trends cannot be seen simply as a result of party dissatisfaction. Rather, they should be interpreted as another functional differentiation of the political system in general and party organisations in particular. While the former means a new division of labour among the various actors in the political system, the latter means a transformation of party organisations from unitary actors (historically and normatively conceived as merely a part of civil society) to complex actors with a dual, socio-political, identity. This gives rise to a new type of party organisation, one referred to by Katz and Mair (1995) as the 'cartel' party. This new party model is different from the old mass-membership party on which the theory of party decline is based. What Pinto-Duschinsky sees as a disenchantment with political parties is in reality no more than a transformation of party organisations adjusting to a changing political world.²⁷⁶

As far as the British party system is concerned, Paul Webb (1995b: 317) is able to draw particular attention to the possibility of adaptation of British political parties to this new trend. In the light of the increased importance of pressure groups as an alternative vehicle for the aggregation of political demands, Webb is able to point to a number of possibilities which offer parties new opportunities for political mobilisation. For instance, pressure groups and single issue groups help parties forge links with wider spectrum of social discourse. They include issues relating to the environment, women's rights and ethnic

²⁷⁵ Conservatives from 2.8 million in 1953 to "as few as a quarter of a million members" in 1994 (Butler & Butler 1994:132); Labour from a total of over 6 million to under 5 million in 1992, of whom just over 300,000 at the end of 1994 were individual members (Butler & Butler 1994:132; Webb 1994:113) As the erosion and increasing age of membership is most marked in the Conservative Party, it is natural that rebuilding the membership has become one central aim of Conservative reform especially since the humiliating defeat of the 1997 general election. See the Party's consultation paper on reform, e.g. *Our Party: Blueprint for Change* (1997: 23-26).

²⁷⁶ Yet as Piero Ignazi (1996) points out, this transformation has taken an "unforeseen" direction; a complex cohabitation of an updated version of the "cadre" party and "anti-party", "anti-establishment", "protest" or "New Politics" parties. This is complex in the sense that depending on historical and cultural mood, the protest party cannot obtain a conspicuous place in the political system, and even if it otherwise can, it could produce both left-libertarian parties and extreme right parties.

problems. Nevertheless, political parties continue to dominate the processes of recruitment of political elites. Webb's argument is reinforced by the "surprisingly low" level of anti-party sentiment in Britain, compared with other western democracies. (see Poguntke & Scarrow 1996: 261) As Webb (1996: 379) indicates in his survey on empirical partisan identification, loyalty and membership (or voluntary financial support), party penetration of society in Britain has become shallower since 1960. Party penetration of the state, on the other hand, remains high. This can be ascribed to the fact that the British version of party government remains, coupled with a continuing centralisation of party organisation.²⁷⁷ This dominance of the British politics by parties is revealed by the relatively low level of other anti-party manifestations, thus there is still stable electoral turnout²⁷⁸ and a general lack of interest in the so-called anti-party parties²⁷⁹.

All in all, it may be that a pluralist reality, which has so far hidden behind a sovereign Parliament, is beginning to move in the direction of greater complexity. But this does not mean that such a new paradigm will be able to dispense with the functionality of political parties. Despite some changes of political participation in the direction of what Justin Fisher (1996: 32) called a "healthy pluralist society" - such as the rise of single issue groups and increasing demands for broader decentralisation, only political parties can legitimately mediate social discourses into coherent governmental programme. To this extent, in examining the need for state funding to political parties, it is immaterial whether or not they are able to attract a following in terms of private financial support or membership. (Cf. Pinto-Duschinsky 1981: 292; Hansard Society 1981[*Paying for Politics*]: 35) What is germane is whether they obtain a sufficient level of electoral support to justify their quasi-governmental status. From this perspective, the Houghton majority (1976: xii) was correct in its assertion that public funding is a "desirable, and possibly only way of supporting the minimum standards of political activity and efficiency required to maintain the vitality of [British] representative government".

²⁷⁷ The most conspicuous evidence of centralisation is the recent reform of the Conservative Party. See Conservative Party (1998a;1997).

²⁷⁸ See Fisher 1996: 29-31. Even the turnout in the 1997 election, which is the lowest since 1950, is still over 70 percent (71.6%). (See Denver & Hands 1997: 721, table 1) For a different interpretation, see Denver 1994: 137-144.

²⁷⁹ The fact that in casting their votes, voters clearly pay more attention to party considerations than to appeal of individual candidates can explain something here. (See Chapter5, Section 6.3) In addition, it cannot be

5 Conclusion: the need for the juridification of the funding of political parties in a pluralist democracy

The conclusion of this chapter has to be that the problem in political finance in Britain can be attributed to the obsolete legal framework. At the dawn of the twenty-first century, the present system forces parties to operate under nineteenth century regulations that pay little attention to the implications of party organisations or electoral campaigns, especially at national level. Consequently, there is an urgent need for party funding to be modernised. Only this would bring the system of party finance into line with our new paradigm of a pluralist democracy and the changed role of political parties to which it gives rise. Thus, the traditional liberal approach of minimal regulation has to give way to a new regime of legal regulation. This new regulatory arrangement for party finance should give priority to ensuring an equality of political participation and fair elections, essential to all rational democratic governance. This new framework should also include measures guaranteeing greater transparency of party finance and state aid.

denied that the first-past-the-post system is a very real restraint that does much to account for this. See Webb 1996: 378-380.

Chapter 9

Conclusion

1 Democracy and constitutional reform in Britain

1.1 *Rousseau's gibe at British democracy*

The current constitutional debate about how to refashion the new relationship between government and governed recalls Rousseau's gibe at British democracy of some two hundred years ago: "The people of England regards itself as free but it is grossly mistaken; it is free only during the election of members of Parliament. As soon as they are elected, slavery overtakes it, and it is nothing. The use it makes of the short moments of liberty it enjoys shows indeed that it deserves to lose them." (Rousseau 1913: 83)

1.2 *Three stances concerning constitutional reform*

At one end of the spectrum, one finds people denouncing British democracy in terms similar to Rousseau's, and recommending fundamental reforms designed to enhance civic participation and at the same time strengthen the accountability of government. (See, *e.g.* Liberal Democrats 1990; *Idem* 1993; *Idem* 1997) Their stance aims at making the British people the *de jure*, not to mention the *de facto*, masters of the country, especially by supporting moves towards a written constitution. (See, *e.g.* IPPR 1993) At the other end of the spectrum, people argue that there is no need for constitutional reform since the British problem highlighted by Rousseau is not a result of the existing constitution as such, but is related to public concern with the nature of government, specifically, the "rolling back of the state". (See Gamble 1994; 236-237) They claim that the problem can be resolved by diminishing the role of the state and accelerating the privatisation of the public sector. (See King 1987: Ch.7) Then, there are those who, occupying the middle ground, argue that a number of limited reforms designed at restoring the checks and balances of the constitution, especially vis-à-vis the balance of power between the government and Parliament, would be enough. (See Ganz 1994: 137) The third position tends to focus more on politico-cultural than legal solutions, for

example, the revitalisation of MPs' independence, greater commitment to open government together with a more self-restrained approach on the part of government to controversial issues which can in practice all too easily become politicised.

1.3 *Problems with the above three views*

In this dissertation, I have sought to position myself somewhere between the first and third above views, while being mostly critical of the second approach. Let us begin with seeing what in our view is wrong with these views.

1.3.1 Problems with the “radical conservative” view

Firstly, we disagreed with the second, what we may call “radical conservative”, view, which looks for inspiration to political thinking of the New Right. On the one hand, this view is “radical” in the sense that it seeks to change the fundamental relationship between government and governed, focusing on what it sees as an “overload” of the state and the ungovernability of civil society, and thereby arguing for a transfer of power from the public to the private sector. On the other hand, this view is “conservative” in the sense that it intends to achieve this radical change without any fundamental constitutional reform. It defends the present unitary system of government, and opposes to devolution, a written constitution, a Bill of Rights, and electoral reform. (See Gamble 1994: 236-237)²⁸⁰ However, both radical and conservative aspects of this position point in the wrong direction. Its radical pole runs the risk of limiting the power of the state to bring about social equality while ignoring those problems potentially associated with unfettered social power, which the market system is unable to effectively control. More importantly, its conservative pole has already proved to have a serious danger of producing much more centralised, authoritarian rule by sabotaging those controls which the traditional system has normally provided. (See, *e.g.* Loughlin 1989)

1.3.2 Problems with the “moderate” view

Secondly, we cannot totally agree with the third, what we may call “moderate”, view, which relies heavily on genteel statesmanship, *i.e.* self-restraint on the part of government and respect for the independence of individual MPs. Such a political ethos is, of course, important for reshaping the relationship between government and governed, but is merely one of a

²⁸⁰ On some dilemmas for British conservatism concerning constitutional reform, see Johnson 1980.

number of equally important conditions. Indeed, it is naïve to assume that a restoration of politicians' independence would be enough to redress the damage inflicted by the party machine on the balance between government and Parliament. For one thing, this assumption ignores actual historical developments, namely, the fact that the Burckian representative democracy, which depends upon such liberal ideas, has in practice resulted in the present system of party government. It is also both opportunistic and unduly optimistic to imagine that the politicisation of the supposedly neutral British constitution will be suddenly arrested without any fundamental institutional changes.

Therefore, it is more realistic to believe that constitutional checks and balances could best be restored by a rationalisation of British politics grounded in certain fundamental reforms. At the heart of this movement towards rationalisation is the need for both legal recognition and regulation of political parties, given that the current rigidity of the party system is believed to be root cause of the present democratic malaise. Without this rationalisation of political parties, coupled with a reform of electoral system, any minor procedural changes in the House of Commons²⁸¹ would not be enough to guarantee Parliament the necessary power to counteract that of the government.

Furthermore, it is vital to see that the restoration of government/Parliament checks and balances constitutes merely one pillar of the modernisation of the British constitution. The reformulation of the overall relationship between government and governed requires for its success another pillar, *i.e.* a revitalisation of the role of the people in the political process. This enhanced political participation on the part of the people at various levels of the political process, other than that of a general election, is essential to the overcoming of 'elective dictatorship'. In short, the rationalisation of British politics should be concerned not only with formal procedures of institutionalised opinion- and will- formation but equally with the informal networks of the public sphere.

1.3.3 Problems with the first, "radical progressive", view

Finally, although we are more sympathetic to the first, "radical progressive", view, in so far as it assumes a purely Rousseauian view of the sovereignty of the people, we cannot wholeheartedly go along with it. Does democracy mean that all government policy has to be decided *by* the people? Although any quest for democracy should be based on faith in the

people, trust between government and governed does not necessarily justify only one way of achieving this goal, *i.e.* direct democracy. Despite the partial validity of various forms of direct democracy - referendum, recall, or cyber-democracy -, none of them should be regarded as a substitute for Parliament or its backbone, political parties. They cannot offer a panacea for the problem of the British constitution, noted by Rousseau. Indeed, this so called British problem, bearing on the relationship between representation and government, is in effect endemic to all modern societies. In such highly pluralised, complex societies, any Rousseauian attempt to fill the gap, without any intermediary, between government and governed is doomed to failure. In particular, various forms of direct democracy lack a collective structure in which people and ideas interact while novel forms of participation – *e.g.* new social movements - fail to provide a necessary power structure in which the professional politicians are made to account for their actions.

2 Constitutionalised democratic autonomy

Having critically examined and found wanting the above three approaches to constitutional reform, we are forced to conclude that the only realistic option remaining is to create a new framework that will reconcile demands for legitimate, accountable government with those for the efficiency, effectiveness, and stability of government. The realisation of this option can best be met by our project of constitutionalised democratic autonomy, seeking a model for a balanced dual form of politics, which gives equal weight to state and civil society. The state can enjoy autonomy as a subsystem of political society, which specialises in formulating collectively binding decisions. Civil society can enjoy autonomy as the social basis of the other pole of political society, the public sphere, which specialises in ‘discovering’ problems. Although new forms of participation should be welcomed, in so far as they can facilitate ‘problem-discovering’ within civil society, any usurpation on their part of the state’s decision-making power must be rigorously avoided. The positive alternative to such misappropriation is the constitutionalisation of the state which safeguards its accountability to civil society by setting clear limits to its powers, whether they be to sanction, organise, or execute. Thus, the

²⁸¹ For example, the introduction of a system of secret ballot in the House of Commons. For this point, see Ganz 1994: 27.

liberal ideal of limited government remains as a pillar of democratic autonomy, though in such a way as to accommodate a communitarian ideal of self-government, which is the other pillar.

This reformulation of the liberal ideal is to be achieved by two constitutional devices. Firstly, a written constitution is required to delineate not only the form and powers of state institutions but also those democratic procedures which are to respond to problems raised within the public sphere. Secondly, a Bill of Rights is required to safeguard the civil and political liberties of the people. Yet, this Bill of Rights should not be equated with the traditional liberal notion of individual rights, which tend to focus on the negative autonomy of atomised citizens from any external intervention. Rather, it should connote a new relation-based concept of rights, the essence of which lies in a positive autonomy which allows free and equal citizens to participate in the political process. This flexible notion of rights is essential to the furthering of democratic governance both in the state and in civil society. In other words, basic individual and collective rights are to form a counter balance to the power of both state and civil society.

Corresponding to the state's accountability vis-à-vis civil society, civil society should allow the state to intervene, whenever such intervention is based upon a compelling need to uphold free and fair competition within civil society. In the pluralised society of today, abusive use of social power tends to cause as many problems as does the administrative power of the state. To ensure fair and free will formation on the part of civil society, it too has to be incorporated and regulated within constitutional boundaries. That is to say that the autonomy of civil society should not be construed as absolute, but must be subject to public scrutiny. However, this scrutiny, rather than *restricting* civil society, has to be designed in such a way as to *enable* it to function as smoothly as possible in its problem-discovering role.

3 The constitutionalisation of political parties

This dual approach towards the democratisation of the British constitution has significant implications for the constitutionalisation of political parties. Now that the drive towards corporatism has impacted on the old, rigid division of labour within the political system, the role and nature of political parties has changed. Political parties are no longer simply a social sphere *via* which social demands flow into the state. They have become increasingly involved with para-governmental activities and form a cartel within the political system. This trend of

governmentalisation and cartelisation requires us to see political parties not only in terms of the representation of public opinion but also in terms of the logic of government. In other words, recent social change has induced the functional differentiation of party organisations, and also forced political parties to adopt a dual role vis-à-vis the state and civil society.

Therefore, in applying our basic principles for constitutionalised democratic autonomy to political parties, we need to adopt an approach that is at once cautious and complex. The constitutionalisation of political parties concerns two interrelated dimensions: inter- and intra-party democracy. Firstly, this constitutionalisation effects the ideal of inter-party democracy. Since political parties are now responsible for both the formation of government and for providing an arena in which various strands of social discourse compete to influence the making of public policy, rules governing the interaction of political parties have to ensure that fair and equal competition on which our pluralist constitution is based. One necessary condition for workable inter-party relations is the legal institutionalisation of political parties, *i.e.* their legal recognition and the setting up of a framework to regulate such matters as party funding, and the introduction of an electoral system that will reflect in a positive way their democratic nature. Secondly, the constitutionalisation of political parties centres on how to achieve intra-party democracy. In so far as political parties become organs of the state and operate as mini systems of government, they have to be constitutionalised so as to enhance rational democratic governance not only in the wider political system but equally within political parties themselves. This latter, internal, constitutionalisation should be governed by the principle of “publicly responsible self-regulation”. The constitution of a political party together with its implementation is purely a matter for internal party concern. However, given the constitutional values of the wider society, such autonomy has to be subject to public scrutiny, both legal and otherwise. Further, the nature and degree of their constitutionalisation is determined not only by their institutional terms but also by the context in which they operate. This means, given the parties’ internalisation of political processes, that the old dichotomy between external and internal party relationships, on which the traditional legal treatment of them is based, is no longer valid in a pluralised society. The conventional approach which sees parties simply as unitary actors that externally co-ordinate the social with the political systems, is no longer feasible. Political parties have now to be seen as complex entities, integrating within their own organisations varying social demands into processes of political decision-making.

Our proposal for the constitutionalisation of political power, especially that of political parties, should not be construed as ignoring the importance of both civic participation and political tolerance on the part of professional politicians, which remain essential to the smooth co-operation between the state and civil society. We do not believe that the institutional elements of our vision of democracy alone can guarantee democratic governance; a written constitution and a Bill of Rights can never *per se* ensure the democratisation of Britain. Such constitutional devices cannot directly resolve specific issues raised in the practical world and the norms which they enshrine need to be interpreted and implemented by and within the political and legal systems. Their successful working depends upon the support of the wider socio-political culture, which relies in turn on the spontaneous will of the people and that of the political elite. For instance, the functional differentiation of party organisations together with their complex institutionalisation aiming at greater “individualisation” runs the risk of being manipulated by political elites who, in the face of the “weak public”, seek to strengthen their oligarchic rule. This danger of the emergence of oligarchy can be effectively mollified only by conditions that encourage a system of the checks and balances among the political elite. In this sense, the third “moderate” position concerning British constitutional reform is more than helpful. We conclude that solutions of both a legal and non-legal nature are important for the furtherance of our ideal of democratic governance.

4 The implications of the constitutionalisation of political parties for constitutional reforms

The reasoning, which we have sought to outline above, has implications for a number of constitutional issues, more especially those of electoral reform and the funding of political parties. The present regime governing political parties is the product of nineteenth century liberalism and has yet to adjust to the comprehensive social and political changes of the twentieth century. We have suggested that this readjustment can most realistically be undertaken *via* the process of political rationalisation, especially involving the role of political parties. Firstly, the electoral system in which political parties play crucial roles should be restructured to ensure free and fair competition between them. In so doing, not only Britain’s own indigenous political traditions, enshrining a close link between MPs and their constituencies, should count but equally the positive role of political parties in the democratic

process as a whole should be taken into account. We argued that both these criteria are best met by the German mixed system, which is designed to strike a balance between local and national (or functional) representation *via* party organisations.

Secondly, to meet the demands arising out of the rationalisation of the political system, the *laissez-fairism* underlying the present system of party funding has to be abandoned and consequently strong demands are made for its juridification. Any new regulatory framework should be designed to ensure an equality of political participation and fair electoral competition among political parties. We concluded that these goals are best realised by transparent party finances, some regulation of national party income and expenditure, together with an appropriate level of state aid.

All these reforms can be justified only under conditions in which political parties are democratically organised. However, this democratisation does not necessarily require every party to institutionalise a form of 'direct' intra-party democracy. As in the project for the constitutionalisation of the wider political system, party organisation should strive to strike a balance between systemic integrity and democratic demands. While certain constitutional, basically procedural, devices for the protection of minority opinion and the facilitation of free and rational will formation in the 'problem-discovering' process are required, the autonomy of the central party in the policy-making process should be acknowledged. Ultimately, both internal legitimacy and accountability of such policy-making power have to be secured by 'indirect' intra-party democracy, *i.e.* greater grassroots participation in the election of the party leadership and selection of party candidates for public offices.

Our project of constitutionalised democratic autonomy and some practical conclusions pertaining to its effects on political parties do not, of course, claim to hold all the answers necessary for the modernisation of the British constitution. However, they do, I believe, introduce a number of original arguments and thus make at least a small contribution to the constitutional debate.

Bibliography

- Adonis, Andrew and Geoff Mulgan (1994) "Back to Greece: the scope for direct democracy" *Demos* (3): 2-9.
- Ahn, Kyong Whan and Jongcheol Kim (1994) "Bentham, Modernity and the Nineteenth Century Revolution in Government" *Seoul Law Journal* 35 (3-4): 135-55.
- Alderman, Keith and Neil Carter (1994) "The Labour Party and the Trade Unions: Loosening the Ties" *Parliamentary Affairs* 47: 321-37.
- Alderman, Keith and Neil Carter (1995) "The Labour Party Leadership and Deputy Leadership Elections of 1994" *Parliamentary Affairs* 48: 438-55.
- Alexander, Herbert E. (ed.) (1989a) *Comparative Political Finance in the 1980s* (Cambridge: Cambridge University Press).
- Alexander, Herbert E. (1989b) "Money and politics: rethinking a conceptual framework" in Herbert E. Alexander (ed.) *Comparative Political Finance in the 1980s* (Cambridge: Cambridge University Press): 9-23.
- Alexander, Robert (1997) *The Voice of the People: A Constitution for Tomorrow* (London: Weidenfeld & Nicholson).
- Allan, T.R.S. (1985) "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" *Cambridge Law Journal* 44: 111-143.
- Allison, J.W.F. (1992) *The Justification for an English Distinction between Public Law and Private Law* Ph.D. Thesis, Cambridge.
- Amery, L.S. (1947) *Thoughts on the Constitution* (London: Oxford University Press).
- Anderson, Svein A. and Kjell A. Eliassen (eds.) (1996) *The European Union: How Democratic Is It?* (London: SAGE Publications).
- Arblaster, Anthony (1984) *The Rise and Fall of Western Liberalism* (Oxford: Blackwell)
- Archer Committee of the Fabian Society (1993) *A New Constitution for the Labour Party* (London: the Fabian Society).
- Atiyah, P.S. and Roberts S. Summers (1987) *Form and Substance in Anglo-American Law* (Oxford: Clarendon Press).
- Avnon, Dan (1995) "Parties Laws in Democratic Systems of Government" *The Journal of Legislative Studies* 1 (2): 283-300.

- Bailey, S.H., D.J. Harris and B.L. Jones (1995) *Civil Liberties: Cases and Materials* (London: Butterworths, 4th edn.)
- Bagehot, Walter (1993) *The English Constitution* (London: Fontana Press).
- Baker, David and David Seawright (eds.) (1998) *Britain For and Against Europe* (Oxford: Clarendon Press).
- Ball, Stuart (1994a) "The National and Regional Party Structure" in Anthony Seldon and Stuart Ball (eds.) *Conservative Century: The Conservative Party since 1900* (Oxford: Oxford University Press): 169-220.
- Ball, Stuart (1994b) "Local Conservatism and the Evolution of the Party Organisation" in Anthony Seldon and Stuart Ball (eds.) *Conservative Century: The Conservative Party since 1900* (Oxford: Oxford University Press): 261-311.
- Barendt, Eric (1993) *Broadcasting Law: A Comparative Study* (Oxford: Clarendon Press).
- Barker, Ernest (1942) *Reflections on Government* (Oxford: Oxford University Press).
- Barker, Ernest (1952) "Reflections on the Party System" in Sydney Bailey (ed.) *The British Party System* (London: The Hansard Society): 193-202.
- Barnes, John (1994) "Ideology and Factions" in Anthony Seldon and Stuart Ball (eds.) *Conservative Century: The Conservative Party since 1900* (Oxford: Oxford University Press): 315-45.
- Barnett, Anthony, Caroline Ellis and Paul Hirst (eds.) (1993) *Debating the Constitution: New Perspective on Constitutional Reform* (Cambridge: Polity Press).
- Barnett, S. and A. Curry (1994) *The Battle for the BBC* (London: Aurum Press)
- Barron, Anne (1993) "The Illusions of the 'I': Citizenship and the Politics of Identity" in A.Norrie (ed.) *Closure or Critique: New Directions in Legal Theory* (Edinburgh: Edinburgh Univ. Press): 80-100.
- Beck, Ulrich (1992) "From Industrial Society to Risk Society: Questions of Survival, Social Structure and Ecological Enlightenment" *Theory, Culture and Society* 9: 97-123.
- Beer, Samuel (1982a) *Modern British Politics - Parties and Pressure Groups in the Collectivist Age* (London: Faber and Faber).
- Beer, Samuel (1982b) *Britain against Itself: The Political Contradictions of Collectivism* (London: Faber and Faber).
- Benn, Tony (1981) *Arguments for Democracy* (London: Jonathan Cape).
- Bentham, Jeremy (1990) *A Fragment on Government* (Cambridge: Cambridge University Press).

- Berger, Suzanne (1981) "Introduction" in Suzanne Berger (ed.) *Organizing interests in Western Europe* (Cambridge: Cambridge University Press): 1-23.
- Best, Keith (1993) "Plant: A Conservative View" *Representation* 31 (116): 80-1.
- Birch, Anthony H. (1986) *The British System of Government* (London: Allen & Unwin).
- Birch, Anthony H. (1989) "The Theory and Practice of Modern British Democracy" in J Jowell and D Oliver (eds.) *The Changing Constitution* (Oxford: Oxford University Press, 2nd edn.): 87-111.
- Birch, Anthony H. (1993) *The concepts and theories of modern democracy* (London: Routledge)
- Black, Julia (1996) "Constitutionalising Self-Regulation" *Modern Law Review* 59 (1): 24-55.
- Blackburn, Robert (1992) "Margaret Thatcher's Resignation as Prime Minister" in Robert Blackburn (ed.) *Constitutional Studies: Contemporary Issues and Controversies* (London: Mansell): 32-41.
- Blackburn, Robert (1993) "Citizenship and the Honours System" in Robert Blackburn (ed.) *Rights of Citizenship* (London: Mansell): 295-306.
- Blackburn, Robert (1995) *The Electoral System in Britain* (London: St. Martin's Press).
- Bogdanor, Vernon (1981) *The People and the Party System: The referendum and electoral reform in British politics* (Cambridge: Cambridge University Press).
- Bogdanor, Vernon (1982) "Reflections on British Political Finance" *Parliamentary Affairs* 35: 367-80.
- Bogdanor, Vernon (1984) *What is Proportional Representation?* (Oxford: Martin Robertson).
- Bogdanor, Vernon (1992) *Proportional Representation: Which System?* (London: The Electoral Reform Society).
- Bogdanor, Vernon (1994) "The Selection of the Party Leader" in Anthony Seldon and Stuart Ball (eds.) *Conservative Century: The Conservative Party Since 1900* (Oxford: Oxford University Press): 69-96.
- Bogdanor, Vernon (1997) *Power and the People: A Guide to Constitutional Reform* (London: Victor Gollancz).
- Boyle, Alan (1986) "Political Broadcasting, Fairness and Administrative Law" *Public Law*: 562-596.

- Bradley, A.W. and K.D. Ewing (1997) *Constitutional and Administrative Law* (London: Longman, Twelfth edn.).
- Brazier, Rodney (1988) *Constitutional Practice* (Oxford: Clarendon Press).
- Brazier, Rodney (1990) *Constitutional Texts - Materials on Government and the Constitution* (Oxford: Clarendon Press).
- Brazier, Rodney (1991) "The Downfall of Margaret Thatcher" *Modern Law Review* 54 (4): 471-91.
- Brazier, Rodney (1995) "The resignation of John Major" *Public Law*: 513-25.
- Brazier, Rodney (1998) *Constitutional Reform: Reshaping the British Political System* (Oxford: Oxford University Press, 2nd edn.).
- Briggs, Asa (1961) *The History of Broadcasting in the United Kingdom*, Vol. I, *The Birth of Broadcasting* (London: Oxford University Press).
- Butler, David (1989) "Electoral Reform" in J. Jowell and D. Oliver (eds.) *The Changing Constitution* (Oxford: Clarendon Press, 2nd edn.): 371-83.
- Butler, David (1993) "The Plant Report 1993: The Third Report of Labour's Working Party on Electoral Systems" *Representation* 31 (116): 77-9.
- Butler, David and Gareth Butler (1994) *British Political Facts 1990-1994* (London: MacMillan).
- Butler, David and Dennis Kavanagh (1997) *The British General Election of 1997* (London: Macmillan Press Ltd).
- Calabresi, Steven G. (1994) "Political Parties as Mediating Institution" *The University of Chicago Law Review* 61: 1479-533.
- Campbell, P. (1955) "An Early Defence of Party" *Political Studies* III: 166-7.
- Cane, Peter (1980) "The Function of Standing Rules in Administrative Law" *Public Law*: 303-28.
- Cane, Peter (1995) "Standing up for the Public" *Public Law*: 276-87.
- Cane, Peter (1996) *An Introduction to Administrative Law* (Oxford: Oxford University Press).
- Clark, J.C.D. (1985) *English Society 1688-1832: Ideologies, Social Structure and Political Practice during the Ancien Regime* (Cambridge: Cambridge University Press).
- Clifton, Dan (1994) "The death of the mass party" *Renewal* 2 (2): 82-7.

Coates, David (1996) "Labour Governments: Old Constraints and New Parameters" *New Left Review* (219): 62-77.

Cohen, Jean and Andrew Arato (1992) *Civil Society and Political Theory* (Cambridge, Mass: The MIT Press).

Cohen, Joshua and Joel Rogers (1995) "Secondary Association and Democratic Governance" in Erik Olin Wright (ed.) *Associations and Democracy* (London: Verso): 7-98.

Committee on Standards in Public Life (1998) *The Funding of Political Parties*.

Conservative Party (1993a) *Working Together to Build a Stronger Voluntary Party*.

Conservative Party (1993b) *One Party - Reforming the Conservative Party Organisation*.

Conservative Party (1997) *Our Party, Blueprint for Change - A Consultation Paper for Reform of the Conservative Party*.

Conservative Party (1998a) *The Fresh Future*.

Conservative Party (1998b) *The Funding of Political Parties [The Conservative party's Evidence to the Committee on Standards in Public Life]*.

Constitutional Reform Centre (1985) *Company donations to political parties: a suggested code of practice* (London: The Constitutional Reform Centre and the Hansard Society For Parliamentary Government).

Constitution Unit (1997) *Delivering Constitutional Reform: The Collected Briefings of the Constitution Unit* (London).

Corbett, Richard (1993) "The European Constitution" in Anthony Barnett, Caroline Ellis and Paul Hirst (eds.) *Debating the Constitution: New Perspectives on Constitutional Reform* (Cambridge: Polity Press): 157-61.

Corrigan, Paul (1993) "Don't stop thinking about tomorrow: The Labour Party and modernity" *Renewal* 1 (2): 62-9.

Cosgrove, Richard A. (1980) *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (London: Macmillan Press Ltd).

Cowley, Philip (1996) "'Crossing the floor': representative theory and practice in Britain" *Public Law*: 214-24.

Craig, Paul (1989) "Bentham, Public Law and Democracy" *Public Law*: 407-39.

Craig, Paul (1990) *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon Press).

- Craig, Paul (1993a) "Public Law, Sovereignty and Citizenship" in Robert Blackburn (ed.) *Rights of Citizenship* (London: Mansell): 307-332.
- Craig, Paul P. (1993b) "Book Review: Public Law and Political Theory by Martin Loughlin" *Legal Studies* 13: 275-83.
- Crossman, Richard (1993[1963]) "Introduction" in Walter Bagehot *The English Constitution* (London: Fontana Press): 1-57.
- Crowther-Hunt, Lord and Professor A. T. Peacock (1973) *Memorandum of Dissent to the Royal Commission on the Constitution 1969-1973*, Vol. II, Cmnd 5460-I.
- Curran, James and Jean Seaton (1997) *Power without Responsibility: The Press and Broadcasting in Britain* (London: Routledge, Fifth edn.)
- Currie, David P. (1994) *The Constitution of the Federal Republic of Germany* (Chicago: The University of Chicago Press).
- Davis, Howard (1995) "All-Women Shortlists in the Labour Party" *Public Law*: 201-14.
- Demos (1994) "Lean Democracy (the cover story)" *Demos* (3): 1.
- Denver, David (1994) *Elections and Voting Behaviour in Britain* (London: Harvester Wheatsheaf).
- Denver, David and Gordon Hands (1997) "Turnout" *Parliamentary Affairs* 50 (4): 720-32.
- Derrida, Jacques (1990) "Force of Law: The "Mystical Foundation of Authority"" *Cardozo Law Review* 11 (5-6): 919-1045.
- Dicey, A.V (1904) "The Combination Laws As Illustrating the Relation Between Law and Opinion in England During the Nineteenth Century" *Harvard Law Review* 18 (8): 511-32.
- Dicey, A. V (1940[1914]) *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (London: MacMillan).
- Dicey, A.V (1982[1915]) *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Classics).
- Diskin, Hanna and Abraham Diskin (1995) "The Politics of Electoral Reform in Israel" *International Political Science Review* 16 (1): 31-45.
- Dunleavy, Patrick and Brendan O'Leary (1987) *Theories of the State* (London: Macmillan).
- Dunleavy, Patrick and Helen Margetts (1995) "Understanding the Dynamics of Electoral Reform" *International Political Science Review* 16 (1): 9-29.
- Dyson, Kenneth (1977) *Party, State and Bureaucracy in Western Germany* (London: Sage Publications).

- Dyson, Kenneth (1980) *The State Tradition in Western Europe* (New York: Oxford University Press).
- Elliott, Mike (1981) "Chasing the Receding Bus: The Broadcasting Act 1980" *Modern Law Review* 44: 683-692.
- Epstein, Leon D. (1989) "Will American Political Parties Be Privatised?" *Journal of Law and Politics* V: 239-74.
- European Parliament (1991) *The Funding of Political Parties in European Community Member States* (Luxembourg: Directorate-General For Research).
- Ewing, Keith (1987) *The funding of political parties in Britain* (Cambridge: Cambridge University Press).
- Ewing, K and C Gearty (1990) *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Oxford: Clarendon Press).
- Ewing, K.D. (1994) "Freedom of Association" in Christopher McCrudden and Gerald Chambers (eds.) *Individual Rights and the Law in Britain* (Oxford: Clarendon Press): 239-63.
- Feldman, David (1990) "Democracy, the Rule of law and Judicial Review" *Federal Law Review* 19: 1-30.
- Feldman, David (1992) "Public Interest Litigation and Constitutional Theory in Comparative Perspective" *Modern Law Review* 55 (1): 44-72.
- Fisher, Justin (1994) "Political Donations to the Conservative Party" *Parliamentary Affairs* 47: 61-72.
- Fisher, Justin (1995) "The Institutional Funding of British Political Parties" in David Broughton, David M. Farrell, David Denver and Colin Rallings (eds.) *British Elections and Parties Yearbook 1994* (London: Frank Cass): 181-96.
- Fisher, Justin (1996) *The British Political Parties* (Hertfordshire: Prentice Hall).
- Fisher, Justin (1997) "Donations to Political Parties" *Parliamentary Affairs* 50: 235-45.
- Ford, Trowbridge H. (1985) *Albert Venn Dicey: The Men and His Times* (Chichester: Barry Rose Publishers)
- Fraser, Nancy (1992) "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy" in Craig Calhoun (ed.) *Habermas and the Public Sphere* (London: The MIT Press): 109-142.
- Galligan, D.J. (1982) "Judicial Review and the Textbook Writers" *Oxford Journal of Legal Studies* 2: 257-76.

- Gamble, Andrew (1994) *The Free Economy and the Strong State : The Politics of Thatchersim* (Basingstoke: MacMillan Press, 2nd edn.).
- Game, Chris and Steve Leach (1995) *The Role of Political Parties in Local Democracy* (London: Commission for Local Democracy).
- Ganz, Gabriele (1994) *Understanding Public Law* (London: Fontana Press).
- Garner, Robert and Richard Kelly (1998) *British Political Parties Today* (Manchester: Manchester University Press).
- Giddens, Anthony (1972) *Politics and Sociology in the Thought of Max Weber* (London: The Macmillan Press Ltd).
- Gledhill, Kris (1996) "Standing, Capacity & Unincorporated Associations" *Judicial Review* 1: 67-70.
- Grant, David (1987) "Mrs Thatcher's Own Goal: Unions and the Political Fund Ballots" *Parliamentary Affairs* 40: 57-72.
- Grant, Wyn (1989) "The Erosion of Intermediary Institutions" *Political Quarterly* 60: 10-21.
- Griffith, J.A.G. (1977) "The Political Constitution" *Modern Law Review* 42 (1): 1-21.
- Griffith, J.A.G. (1997) "Judges and the Constitution" in Richard Rawlings (ed.) *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science 1895-1995* (Oxford: Clarendon Press): 289-310.
- Habermas, Jürgen (1984[1981]) *The Theory of Communicative Action* (Cambridge: Polity Press).
- Habermas, Jürgen (1985) "Law as Medium and Law as Institution" in Gunther Teubner (ed.) *Dilemmas of Law in the Welfare State* (Berlin: Walter de Gruyter): 203-20.
- Habermas, Jürgen (1987[1981]) *The Theory of Communicative Action* (Cambridge: Polity Press).
- Habermas, Jürgen (1987[1985]) *The Philosophical Discourse of Modernity* (Cambridge: Polity Press).
- Habermas, Jürgen (1988) "Law and Morality" in Sterling M. McMurrin (ed.) *The Tanner Lectures on Human Values Vol. VIII* (Salt Lake City: University of Utah Press): 219-79.
- Habermas, Jürgen (1988[1973]) *Legitimation Crisis* (Cambridge: Polity Press).

Habermas, Jürgen (1989) *The New Conservatism : Cultural Criticism and the Historian's Debate* (Cambridge, Mass.: The MIT Press).

Habermas, Jürgen (1989[1962]) *The Structural Transformation of the Public Sphere: An inquiry into a Category of Bourgeois Society* (London: Polity Press).

Habermas, Jürgen (1992a) *Autonomy and Solidarity* (London: Verso).

Habermas, Jürgen (1992b) "Further reflections on the Public Sphere" in Craig Calhoun (ed.) *Habermas and the Public Sphere* (Cambridge, Mass.: The MIT Press): 421-61.

Habermas, Jürgen (1992c) "Citizenship and National Identity: Some Reflections of the Future of Europe" *Praxis International* 12(Special Section): 1-19.

Habermas, Jürgen (1996[1992]) *Between Facts and Norms - Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press).

Hailsham, Lord (1978) *The Dilemma of Democracy - Diagnosis and Prescription* (London: Collins).

Hansard [H.C.], Vol. 48, Col.171: 8 Nov 1983

Hansard [H.C.], Vol. 271, Col. 1172 ff: 15 Feb 1996

Hansard [H.L.], Vol.568, Col. 20: 9 Jan 1996

Hansard [H.L.], Vol. 568, Col. 1007: 27 Jun 1996.

Hansard Society (1981) *Paying for Politics: the Report of the Commission upon the financing of political parties* (London: Hansard Society for Parliamentary Government).

Hansard Society (1991) *Election Campaigns: Agenda for Change* (London: The Hansard Society).

Harden, Ian and Norman Lewis (1986) *The noble lie: the British constitution and the rule of law* (London: Hutchinson).

Harden, Ian (1997) *The European Union and Its Influence on Constitutional Reform in the UK* (London: LSE Public Policy Group).

Harlow, Carole (1980) "'Public" and "Private" Law: Definition Without Distinction" *Modern Law Review* 43 (3): 241-65.

Harlow, Carol (1985) "Power from the People? Representation and Constitutional Theory" in Patrick McAuslan and John F. McEldowney (eds.) *Law, Legitimacy and the Constitution: Essays marking the Centenary of Dicey's Law of the Constitution* (London: Sweet & Maxwell): 62-81.

Harlow, Carol and Richard Rawlings (1997) *Law and Administration* (London: Butterworths, 2nd edn.).

Harris, Jose (1996) "Political thought and the state" in S.J.D. Green and R.C. Whiting (eds.) *The boundaries of the state in modern Britain* (Cambridge: Cambridge University Press): 15-28.

Hart, H.L.A. (1982) *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press).

Harvard Law Review, "Leading Cases" of 1996, *Harvard Law Review* 110: 236-246

Hassan, Gerry (1997) "Towards a new territorial settlement: Labour's devolution plans for Scotland" *Renewal* 5 (3/4): 43-51.

Hay, Colin (1994) "Labour's Thatcherite Revisionism: Playing the 'Politics of Catch-up'" *Political Studies* XLII: 700-7.

Heffernan, Richard and James Stanyer (1997) "The Enhancement of Leadership Power: The Labour Party and the Impact of Political Communications" in C Pattie, D Denver, J Fisher and S Ludlam (eds.) *British Elections and Parties* (London: Frank Cass): 168-84.

Held, David (1989) *Political Theory and the Modern State: Essays on State, Power and Democracy* (Cambridge: Polity Press).

Held, David (1993) "Democracy and Globalization" in Anthony Barnett, Caroline Ellis and Paul Hirst (eds.) *Debating the Constitution: New Perspectives on Constitutional Reform* (Cambridge: Polity Press): 162-6.

Held, David (1995a) *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press).

Held, David (1995b) "Democracy and the New International Order" in Daniele Archibugi and David Held (eds.) *Cosmopolitan Democracy: An Agenda for a New World Order* (Cambridge: Polity Press): 96-120.

Hennessey, Peter (1996) *The Hidden Wiring: Unearthing the British Constitution* (London: Indigo).

Herbert, A.P. (1969) *Uncommon Law - Being sixty-six Misleading Cases revised and collected in one volume* (London: Methuen London LTD).

Hirst, Paul H. (1995) "Can Secondary Associations Enhance Democratic Governance?" in Erik Olin Wright (ed.) *Associations and Democracy* (London: Verso): 101-13.

Hirst, Paul (1996) "Democracy and Civil Society" in Paul Hirst and Sunil Khilnani (eds.) *Reinventing Democracy* (Oxford: Blackwell): 97-116.

Hofnung, Menachem (1996) "Public financing, party membership and internal party competition" *European Journal of Political Research* 29: 73-86.

Home Affairs Committee (1994) *Funding of Political Parties*.

Houghton, Lord (1976) *Report of the Committee on Financial Aid to Political Parties* Cmnd 6601.

Hume, L.J (1981) *Bentham and Bureaucracy* (Cambridge).

Ignazi, Piero (1996) "The Crisis of Parties and the Rise of New Political Parties" *Party Politics* 2 (4): 549-66.

Institute for Public Policy Research [IPPR] *A Written Constitution For the United Kingdom* (London: Mansell)

Jackson, P. (1979) *Natural Justice* (London: Sweet and Maxwell).

Jacob, Joseph M. (1996) *The Republican Crown: Lawyers and the Making of the State in Twentieth Century Britain* (Aldershot: Dartmouth).

Jessop, Bob (1992) "The Economy, the State and the Law: Theories of Relative Autonomy and Autopoietic Closure" in G. Teubner & A. Febbrajo (eds.) *State, Law, and Economy as Autopoietic Systems* (Milan: DOTT. A. GIUFFRÉ EDITORE): 187-263.

Jenkins, Peter (1987) *Mrs Thatcher's Revolution: The Ending of the Socialist Era* (London: Jonathan Cape).

Jennings, W. Ivor (1935) "In Praise of Dicey 1885-1935" *Public Administration* XIII: 123-34.

Johnson, Nevil (1980) "Constitutional Reform: Some Dilemmas for a Conservative Philosophy" in Zig Layton-Henry (ed.) *Conservative Party Politics* (London: Macmillan Press): 126-55.

Johnston, R.J. and C.J. Pattie (1993) "Great Britain: Twentieth Century Parties Operating Under Nineteenth Century Regulations" in Arthur B. Gunlicks (ed.) *Campaign and Party Finance in North America and Western Europe* (Boulder: Westview Press): 123-54.

Joint Consultative Committee on Constitutional Reform (1997) *Report of the Joint Consultative Committee on Constitutional Reform*.

Jones, Tudor (1996) *Remaking the Labour Party: From Gaitskell to Blair* (London: Routledge).

Jones, Bryn (1996) "Left-wing political activism in a changing political culture" *Sociology* 30 (3): 511-32.

- Katz, Richard (1990) "Party as linkage: A vestigial function" *European Journal of Political Research* 18 (1): 143-61.
- Katz, Richard S. and Peter Mair (1995) "Changing Models of Party Organisation and Party Democracy: The Emergence of the Cartel Party" *Party Politics* 1 (1): 5-28.
- Kavanagh, Dennis (1982) "Representation in the Labour Party" in Dennis Kavanagh (ed.) *The Politics of the Labour Party* (London: George Allen & Unwin): 202-22.
- Kavanagh, Dennis (1990) *British Politics: Continuities and Change* (Oxford: Oxford University Press).
- Keane, John (1988a) *Democracy and Civil Society: On the predicaments of European Socialism, the Prospects for Democracy, and the Problem of Controlling Social and Political Power* (London: Verso).
- Keane, John (1988b) "Despotism and Democracy" in John Keane (ed.) *Civil Society and the State : New European Perspective* (London: Verso): 35-71.
- Keane, John (1991) *The Media and Democracy* (Cambridge: Polity Press).
- Keane, John (1992) "Democracy and the Media - Without Foundations" *Political Studies* XL (Special Issue): 116-29.
- Keane, John (1993) "Stretching the Limits of the Democratic Imagination" in Joseph Carens (ed.) *Democracy and Possessive Individualism : The Intellectual Legacy of C.B. Macpherson* (Albany, N.Y.: State University of New York Press): 105-35.
- Kelly, Richard (1994) "The Party Conferences" in Anthony Seldon and Stuart Ball (eds.) *Conservative Century: The Conservative Party since 1900* (Oxford: Oxford University Press): 221-60.
- Kilbrandon, Lord (1973) *Report of the Royal Commission on the Constitution 1969-1973*, Vol. I, Cmnd. 5460.
- King, Desmond (1987) *The New Right Politics, Markets and Citizenship* (London: Macmillan Press).
- Kinnock, Neil (1994) "Reforming the Labour Party" *Contemporary Record* 8 (3): 535-54.
- Kirchheimer, Otto (1966) "The Transformation of the Western European Party System" in Joseph LaPalombara and Myron Weiner (eds.) *Political Parties and Political Development* (Princeton, N.J.: Princeton University Press): 177-200.
- Kommers, Donald P. (1997) *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, USA: Duke University Press, 2nd edn.).
- Koole, Ruud (1996) "Cadre, Catch-all or Cartel? – A Comment on the Notion of the Cartel Party" *Party Politics* 2(4): 507-523.

Labour Party (1993a) *Labour Party/trade union links: Interim report of the review group and questionnaire*.

Labour Party (1993b) *Report of the Working Party on Electoral Systems, 1993 (Summary version)*.

Labour Party (1997) *The 1997 Labour Manifesto – Help Create Successful and Profitable Businesses*, reproduced in <http://www.labour.org.uk/views/manifesto/britain/profit%5F3.html>

Labour Party (1998a) *Transparency, Participation, Equality: Party funding for a modern democracy [Labour's evidence to the Neill Committee]*.

Labour Party (1998b) *The Labour Party: Membership, Structures & Finances [Background Briefing to Labour's evidence to the Neill Committee]*.

Ladeur, Karl-Heinz (1997) "Post-Modern Constitutional Theory: A Prospect for the Self-organising Society" *Modern Law Review* 60(5): 617-629.

Laws, Sir John (1995) "Law and Democracy" *Public Law*: 72-93.

Leggett, Denise (1995) "From the grassroots: organising for victory" *Renewal* 3 (2): 68-72.

Liberal Democrats (1990) *"We the People ..." - Towards a Written Constitution [Federal Green Paper No.13]*.

Liberal Democrats (1993) *Here We Stand: Liberal Democrat Policies for Modernising Britain's Democracy [Federal White Paper 6]*.

Liberal Democrats (1997) *Make the Differences [General Election Manifesto]*.

Lijphart, Arend (1994) "Democracies: Forms, performance, and constitutional engineering" *European Journal of Political Research* 25: 1-17.

Linn, Ian (1990) *Application Refused – Employment vetting by the State* (London: The Civil Liberties Trust).

Linton, Martin (1993) *Labour's Road to Electoral Reform: What's wrong with first-past-the-post?* (London: Labour Campaign for Electoral Reform).

Lipow, Arthur and Patrick Seyd (1996) "The Politics of Anti-Partyism" *Parliamentary Affairs* 49(2): 273-284.

Lipow, Arthur (1996) *Political Parties and Democracy* (London: Pluto Press).

Lively, Jack (1975) *Democracy* (Oxford: Basil Blackwell).

- Lively, Jack and Adam Lively (eds.) (1994) *Democracy in Britain : A Reader* (Oxford: Basil Blackwell).
- Lodge, Juliet (1996) "The European Parliament" in Svein S. Anderson and Kjell A. Eliassen (eds.) *The European Union: How Democratic Is It?* (London: SAGE Publications): 187-214.
- Loughlin, Martin (1988) "Tinkering with the constitution" *Modern Law Review* **51**: 531-48.
- Loughlin, Martin (1989) "Law, Ideologies, and the Political-Administrative System" *Journal of Law and Society* **16** (1): 21-41.
- Loughlin, Martin (1992) *Public Law and Political Theory* (Oxford: Clarendon Press).
- Loughlin, Martin (1993) "The Importance of Elsewhere - A Review of *Public Law and Democracy in the United Kingdom and the United States of America*, by P P Craig" *Public Law Review* **4**: 44-57.
- Loughlin, Martin (1994) "The Restructuring of Central-Local Government Relations" in Jeffrey Jowell and Dawn Oliver (eds.) *The Changing Constitution* (Oxford: Clarendon Press, 2nd edn.): 261-93.
- Luhmann, Niklas (1982) *The Differentiation of Society* (New York: Columbia University Press).
- Luhmann, Niklas (1990) *Political Theory in the Welfare State* (Berlin: Walter de Gruyter).
- Luhmann, Niklas (1992a) "Operational Closure and Structural Coupling: The Differentiation of the Legal System" *Cardozo Law Review* **13**: 1419-41.
- Luhmann, Niklas (1992b) "Some Problems with Reflexive Law" in Gunther Teubner and A. Febbrajo (eds.) *State, Law, Economy as Autopoietic Systems* (Milano: Dott. A. Giuffrè Editore): 389-415.
- Luhmann, Niklas (1992c) "The Coding of the Legal System" in Gunther Teubner and Alberto Febbrajo (eds.) *State, Law, and Economy as Autopoietic Systems* (Milan: Dott. A. Giuffrè Editore): 145-85.
- Luhmann, Niklas (1993a) "Deconstruction as Second-Order Observing" *New Literary History* **24**: 763-82.
- Luhmann, Niklas (1993b) *Risk: A Sociological Theory* (New York: Aldine de Gruyter).
- Luhmann, Niklas (1995[1984]) *Social Systems* (Stanford: Stanford University Press).
- MacCormick, Neil (1993) "Beyond the Sovereign State" *Modern Law Review* **56** (1): 1-18.
- Macleod, I. and A. Maude (1950) *One Nation: A Tory Approach to Social Problems* (London).

Madison, James, Alexander Hamilton and John Jay (1987) *The Federalist Papers* (Hammondsworth: Penguin).

Magid, Henry Meyer (1966) *English Political Pluralism: The Problem of Freedom and Organization* (New York: AMS Press, Inc.).

Mair, Peter (1993) "Myths of electoral change and the survival of traditional parties" *European Journal of Political Research* 24: 121-33.

Mair, Peter (1994) "Party Organizations: From Civil Society to the State" in Richard Katz and Peter Mair (eds.) *How Parties Organize - Changes and Adaption in Party Organizations in Western Democracies* (London: SAGE Publications Ltd): 1-22.

Mandelson, Peter and Roger Liddle (1996) *The Blair Revolution: Can New Labour Deliver?* (London: faber and faber).

Marshall, Geoffrey (1986) *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press).

Marshall, Geoffrey (1991) "The End of Prime Ministerial Government?" *Public Law*: 1-6.

McCarthy, Thomas (1985) "Complexity and Democracy, or The Seductions of Systems Theory" *New German Critique* 35: 27-53.

McClure, Kirstie (1992) "On the Subject of Rights: Pluralism, Plurality and Political Identity" in C.Mouffe (ed.) *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (London: Verso): 108-27.

McEldowney, John F. (1985) "Dicey in Historical Perspective - A Review Essay" in Patrick McAuslan and John F. McEldowney (eds.) *Law, Legitimacy and the Constitution* (London: Sweet & Maxwell): 39-61.

McKenzie, R.T. (1964) *British Political Parties* (London: Heinemann).

McKenzie, Robert (1982) "Power in the Labour Party: the Issue of Intra-Party Democracy" in D.Kavanagh (ed.) *The Politics of the Labour Party* (London: George Allen & Unwin): 191-201.

McLean, Iain (1991) "Forms of Representation and Systems of Voting" in David Held (ed.) *Political Theory Today* (Cambridge: Polity Press): 172-96.

McLennan, Gregor (1984) "The contours of British politics: representative democracy and social class" in Gregor McLennan, David Held and Stuart Hall (eds.) *State and society in contemporary Britain* (Cambridge: Polity Press): 241-73.

McLennan, Gregor (1995) *Pluralism* (Buckingham: Open University Press).

- Michels, Robert (1959) *Political Parties - A sociological study of the oligarchical tendencies of modern democracy* (New York: Dover Publications, Inc.).
- Milliband, Ralph (1958) "Party Democracy and Parliamentary Government" *Political Studies* 6: 170-4.
- Milliband, Ralph (1982) *Capitalist Democracy in Britain* (Oxford: Oxford University Press).
- Minkin, Lewis (1992) *The Contentious Alliance* (Edinburgh: Edinburgh University Press).
- Mouffe, Chantal (1993) "Liberalism and Modern Democracy" in J.H.Carens (ed.) *Democracy and Possessive Individualism: The Intellectual Legacy of C.B. Macpherson* (Albany, N.Y.: State of University of New York Press): 175-91.
- Mount, Ferdinand (1992) *The British Constitution Now: Recovery or Decline?* (London: Heinemann).
- Mulgan, Geoff (1993) "Creating an Enabling Party" *Renewal* 1 (1): 62-9.
- Mulgan, Geoff (1994a) *Politics in an Antipolitical Age* (Cambridge: Polity Press).
- Mulgan, Geoff (1994b) "Party-free politics" *New Statesman & Society* (15 Apr 94): 16-8.
- Muller, Wolfgang C. (1993) "The Relevance of the State for Party System Change" *Journal of Theoretical Politics* 5 (4): 419-54.
- Munro, Colin (1997) "Party politics and the broadcasters-round three" *New Law Journal* 147 (6787): 528.
- Murphy, W.Tim (1990) "The Habermas Effect: Critical Theory and Academic Law" *Current Legal Problems* 1989: 135-65.
- Murphy, W.Tim (1991) "The Oldest Social Science? The Epistemic Properties of the Common Law Tradition" *Modern Law Review* 54 (2): 182-215.
- Nicholls, Anthony (1984) "Political Parties" in C Schweitzer et al. (ed.) *Politics and Government in the Federal Republic of Germany: Basic Documents* (Leamington Spa: Berg Publishers): 192-209.
- Nicholls, David (1974) *Three Varieties of Pluralism* (London: Macmillan Press).
- Nicholls, David (1994) *The Pluralist State: The Political Ideas of J.N.Figgis and his Contemporaries* (Oxford: St.Martin's Press).
- Norris, Pippa (1994) "Labour Party factionalism and extremism" in Anthony Heath, Roger Jowell and John Curtice (eds.) *Labour's Last Chance? The 1992 Election and Beyond* (Aldershot: Dartmouth): 173-87.

- Norris, Pippa (1995) "The Politics of Electoral Reform in Britain" *International Political Science Review* 16 (1): 65-78.
- Norton, Philip (1982) *The Constitution in Flux* (Oxford: Basil Blackwell).
- O'Leary, Brendan (1992) "What Should Public Lawyers Do?" *Oxford Journal of Legal Studies* 12 (3): 404-18.
- O'Malley, Tom (1994) *Closedown?: The BBC and Government Broadcasting Policy, 1979-92* (London: Pluto Press).
- Offe, Claus (1981) "The attribution of public status to interest groups: observations on the West German case" in Suzanne Berger (ed.) *Organizing interests in Western Europe* (Cambridge: Cambridge University Press): 123-158.
- Offe, Claus (1983) "Competitive Party Democracy and The Keynesian Welfare State: Factors of Stability and Disorganization" *Policy Sciences* 15: 225-46.
- Offe, Claus (1984) *Contradictions of the Welfare State* (London: Hutchinson).
- Offe, Claus (1985) "New Social Movements: Challenging the Boundaries of the Institutional Politics" *Social Research* 52: 817-68.
- Offe, Claus and Ulrich Preuss (1991) "Democratic Institutions and Moral Resources" in D.Held (ed.) *Political Theory Today* (Cambridge: Polity Press): 143-71.
- Offe, Claus (1996) *Modernity & the State* (Cambridge: Polity Press).
- Oliver, Dawn (1981) "The Constitutional Implications of the Reforms of the Labour Party" *Public Law*: 151-63.
- Oliver, Dawn (1983) "Reform of the Electoral System" *Public Law*: 108-26.
- Oliver, Dawn (1987) "Is the Ultra Vires Rule the Basis of Judicial Review" *Public Law*: 543-69.
- Oliver, Dawn (1989) "The Parties and Parliament: Representative or Intra-party Democracy?" in Jeffrey Jowell and Dawn Oliver (eds.) *The Changing Constitution* (Oxford: Clarendon Press, 2nd edn.).
- Oliver, Dawn (1991a) "Book Review" *Public Law*: 623-5.
- Oliver, Dawn (1991b) *Government in the United Kingdom : The Search for Accountability, Effectiveness and Citizenship* (Milton Keynes: Open University Press).
- Oliver, Dawn (1992) "Fairness and Political Finance: The Case of Election Campaigns" in Robert Blackburn (ed.) *Constitutional Studies: Contemporary Issues and Controversies* (London: Mansell): 120-135.

- Ostrogorsky, M. (1964[1902]) *Democracy and the Organization of Political Parties* Vol.I (Chicago: Quadrangle Books).
- Padgett, Stephen and Tony Burkett (1986) *Political Parties and Elections in West Germany: The Search for a New Stability* (London: C.Hurst & Company).
- Panebianco, Angelo (1988[1982]) *Political Parties : Organization and Power* (Cambridge: Cambridge University Press).
- Pannick, David (1992) "Who is Subject to Judicial Review and in respect of What?" *Public Law*: 1-7.
- Parekh, Bhikhu (1992) "The Cultural Particularity of Liberal Democracy" *Political Studies* XL (Special Issue): 160-75.
- Parry, Geraint (1969) *Political Elites* (London: George Allen & Unwin Ltd).
- Perkin, H (1969) *The Origin of Modern English Society, 1780-1880* (London).
- Perkin, H (1977) "Individualism Versus Collectivism in Nineteenth Century Britain: A False Antithesis" *Journal of British Studies* 17.
- Picarda, Hubert (1995) *The Law and Practice Relating to Charities* (London: Butterworths).
- Pinto-Duschinski, Michael (1981) *British Political Finance 1830-1980* (Washington: American Enterprise Institute for Public Policy Research).
- Pizzorno, Alessandro (1981) "Interests and parties in pluralism" in Suzanne Berger (ed.) *Organizing Interests in Western Europe: Pluralism, Corporatism, and the Transformation of Politics* (Cambridge: Cambridge University Press): 247-284.
- Plant, Raymond (1991) *Democracy, Representation and Elections - The Plant Report: A working party on Electoral Reform (Interim Report)* (London: The National Executive Working Party on Electoral Systems of the Labour Party).
- Poguntke, Thomas (1994) "Parties in a Legalistic Culture: The Case of Germany" in Richard Katz and Peter Mair (eds.) *How Parties Organize - Change and Adaptation in Party Organizations in Western Democracies* (London: SAGE Publications Ltd): 185-215.
- Poguntke, Thomas and Susan E. Scarrow (1996) "The politics of anti-party sentiment: Introduction" *European Journal of Political Research* 29: 257-62.
- Pomper, Gerald M. (1992) "Concepts of political parties" *Journal of Theoretical Politics* 4 (2): 143-59.
- Posner, Richard A. (1996) *Law and Legal Theory in the UK and USA* (Oxford: Clarendon Press)

- Ranney, Austin (1981) "British General Elections: An Introduction" in H.R. Penniman (ed.) *Britain at the Polls 1979 – A study of the General Election* (London: American Enterprise Institute for Public Policy Research): 1-29.
- Rawlings, H.F. (1988) *Law and the Electoral Process* (London: Sweet & Maxwell).
- Robbins, Caroline (1958) "'Discordant Parties' - A study of the acceptance of party by Englishmen" *Political Science Quarterly* LXXIII: 505-29.
- Rose, R (1974) *The Problem of Party Government* (New York: The Free Press).
- Rosen, Frederick (1983) *Jeremy Bentham and Representative Democracy* (Oxford: Clarendon Press).
- Rousseau, Jean Jacques (1913) *The Social Contract* (London: J.M.DENT & SONS Ltd).
- Rubinstein, W. (1983) "The End of 'Old Corruption' in Britain 1780-1860" *Past and Present* 101: 55-86.
- Russell, Conrad (1996) "New Labour: Old Tory Writ Large?" *New Left Review* (219): 78-88.
- Sassoon, Donald (1993) "The union link: The case for 'friendly divorce'" *Renewal* 1 (1): 28-35.
- Scammell, Margaret (1995) *Designer Politics: How Elections are Won* (London: Macmillan Press).
- Scarrow, Susan E. (1996) *Parties and their Members: Organizing for Victory in Britain and Germany* (Oxford: Oxford University Press).
- Schattschneider, E.E. (1942) *Party Government* (New York: Holt, Rinehart and Winston).
- Schedler, Andreas (1996) "Anti-political-establishment Parties" *Party Politics* 2 (3): 291-312.
- Schmitt, Carl (1985a) *The Crisis of Parliamentary Democracy* (London: The MIT Press).
- Schmitt, Carl (1985b) *Political Theology : Four Chapters on the Concept of Sovereignty* (Cambridge, Mass.: The MIT Press).
- Schumpeter, J (1943) *Capitalism, Socialism and Democracy* (London: Allen and Unwin).
- Seaton, Jean (1985) "Politics, Parties and the Media in Britain" *West European Politics* 8 (2): 9-26.
- Secretary of State for Employment (1983) *Democracy in Trade Unions*, Green Paper Cmnd. 8778 (London: HMSO).

Secretary of State for the Home Department (1997) *Rights Brought Home: The Human Rights Bill*, CM3782.

Secretary of State for National Heritage (1996) *Broadcasting – the Agreement between Her Majesty's Secretary of State for National Heritage and the British Broadcasting Corporation* (London: HMSO), Cm3152.

Seyd, Patrick (1975) "Democracy Within the Conservative Party?" *Government and Opposition* 10: 219-37.

Seyd, Patrick (1987) *The Rise and Fall of the Labour Left* (London: MacMillan Education Ltd).

Seyd, Patrick and Paul Whiteley (1992) *Labour's Grass Roots: The Politics of Party Membership* (Oxford: Clarendon Press).

Seyd, Patrick and Paul F. Whiteley (1995) "Labour and Conservative Party Members: Change Over Time" *Parliamentary Affairs* 48: 456-72.

Seyd, Patrick (1998) "In Praise of Party" *Parliamentary Affairs* 51: 198-208.

Seymour-Ure, Colin (1994) "The Media in Postwar British Politics" *Parliamentary Affairs* 47: 530-48.

Seymour-Ure, Colin (1996) *The British Press and Broadcasting since 1945* (Oxford: Blackwell Publishers, 2nd edn.)

Shaw, Eric (1994) *The Labour Party Since 1979: Crisis and Transformation* (London: Routledge).

Shell, Donald (1997) "Constitutional reform – The Constitutional Unit reports" *Public Law*: 66-74.

Slagstad, Rune (1993) "Liberal Constitutionalism and its Critics: Carl Schmitt and Max Weber" in Jon Elster and Rune Slagstad (eds.) *Constitutionalism and Democracy* (Cambridge: Cambridge University Press): 103-29.

Smith, Martin (1994) "Understanding the 'Politics of Catch-Up': the Modernisation of the Labour Party" *Political Studies* XLII: 708-15.

Smyth, Gareth (1992) "The Patterns, Plant and Paddy: Where the Parties Stand" in Gareth Smyth (ed.) *Refreshing the parts: electoral reform and British politics* (London: Lawrence & Wishart): 9-27.

Sopel, Jon (1995) *Tony Blair: The Moderniser* (London: michael Joseph).

Stapleton, Julia (1994) *Englishness and the Study of Politics: The social and political thought of Ernest Barker* (Cambridge: Cambridge University Press).

- Stark, Leonard P. (1996) *Choosing a Leader: Party Leadership Contests in Britain from Macmillan to Blair* (London: MacMillan Press Ltd).
- Steele, Mairi, Kenneth Miller and John Gennard (1986) "The Trade Union Act, 1984: Political Fund Ballots" *British Journal of Industrial Relations* 24 (3): 443-67.
- Stevens, Robert (1979) *Law and Politics: The House of Lords as a Judicial Body, 1800-1976* (London: Weidenfeld and Nicolson).
- Sugarman, David (1983) "The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science" *Modern Law Review* 46: 102-11.
- Sunday Times, *The 1997 Electoral Map of Britain*.
- Sundberg, Jan (1997) "Compulsory Party Democracy" *Party Politics* 3 (1): 97-117.
- Sykes, Leslie (1990) *Proportional Representation: Which system?* (Oadby: The Hornbeam Press).
- Tant, A.P (1993) *British Government: the Triumph of Elitism* (Aldershot: Dartmouth).
- Teubner, Gunther (1983) "Substantive and Reflexive Elements in Modern Law" *Law & Society Review* 17 (2): 239-85.
- Teubner, Gunther (1987) "Juridification: Concepts, Aspects, Limits, Solutions" in Gunther Teubner (ed.) *Juridification of Social Spheres : A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Berlin: Walter de Gruyter): 3-47.
- Teubner, Gunther (1992a) "Regulatory Law: Chronicle of a Death Foretold" *Social & Legal Studies* 1: 451-75.
- Teubner, Gunther (1992b) "The Two Faces of Janus: Rethinking Legal Pluralism" *Cardozo Law Review* 13 (5): 1443-62.
- Teubner, Gunther (1993a) "The "State" of Private Networks: The Emerging Legal Regime of Polycorporatism in Germany" *Brigham Young University Law Review*: 553-75.
- Teubner, Gunther (1993b) *Law as an Autopoietic System* (Oxford: Blackwell).
- Teubner, Gunther (1993c) "The Many-Headed Hydra: Networks as Higher-Order Collective Actors" in J.McCahery, S.Picciotto and C.Scott (eds.) *Corporate Control and Accountability : Changing Structures and the Dynamics of Regulation* (Oxford: Clarendon Press): 41-60.
- Thatcher, Margaret (1993) *The Downing Street Years* (London: HarperCollinsPublishers).
- Theakston, Kevin and Geoffrey Fry (1994) "The Party and the Civil Service" in Anthony Seldon and Stuart Ball (ed.) *Conservative Century: The Conservative Party since 1900* (Oxford: Oxford University Press): 383-402.

- Thomas, The Rt.Hon. George (1982) "The Changing face of Parliamentary Democracy" *Parliamentary Studies* 35: 348-55.
- Thompson, Willie (1993) *The long death of British labourism: interpreting a political culture* (London: Pluto Press).
- Tully, James (1995) *Strange multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press).
- Turpin, Colin (1990) *The British Government and the Constitution: Text, Cases and Materials* (London: Weidenfeld and Nicolson).
- University of Cambridge Centre for Public Law (1998) *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing).
- Vile, M.J.C. (1967) *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press).
- Wade, Henry William Rawson (1989) *Constitutional Fundamentals* (London: Stevens & Sons).
- Waldegrave, William (1995) "The Future of Parliamentary Government" *The Journal of Legislative Studies* 1 (2): 173-7.
- Waldron, Jeremy (ed.) (1987) *Nonsense upon stilts: Bentham, Burke and Marx on the rights of man* (London: Methuen & Co.Ltd).
- Walker, D.J. (1975) *Sex Discrimination - A simple guide of the provisions of THE SEX DISCRIMINATION ACT 1975* (London: Shaw & Sons LTD.).
- Walker, John (1986) *The Queen Has Been Pleased: The British Honours System at Work* (London: Secker & Warburg).
- Walsh, Tim and Stephen Tindale (July 1992, 1992) "Time for divorce" *Fabian Review* 104 (4): 9-11.
- Waltman, Jerold L. (1988) "The Courts in England" in J.Waltman and K.Holland (eds.) *The Political Role of Law Courts in Modern Democracies* (London: MacMillan): 108-28.
- Walzer, Michael (1983) *Spheres of Justice: A Defence of Pluralism and Equality* (Oxford: Basil Blackwell).
- Walzer, M. (1992) "The Civil Society Argument" in C.Mouffe (ed.) *Dimensions of Radical Democracy: Pluralism, Citizenship, Community* (London: Verso): 89-107.
- Ware, Allen (1987) *Citizens, Parties and the State: A Reappraisal* (Cambridge: Polity Press).

Watts, Duncan (1997) *Political communication today* (Manchester: Manchester University Press).

Webb, Paul (1994) "Party Organizational Change in Britain : The Iron Law of Centralization?" in Richard Katz and Peter Mair (eds.) *How Parties Organize - Change and Adaptation in Party Organizations in Western Democracies* (London: SAGE Publications Ltd): 109-33.

Webb, Paul (1995a) "Reforming the Labour Party-Trade Union Link: An Assessment" in David Broughton, David M. Farrell, David Denver and Colin Rallings (eds.) *British Elections and Parties Yearbook 1994* (London: Frank Cass): 1-14.

Webb, Paul (1995b) "Are British Political Parties in Decline?" *Party Politics* 1 (3): 299-322.

Webb, Paul D. (1996) "Apartisanship and anti-party sentiment in the United Kingdom: Correlates and constraints" *European Journal of Political Research* 29: 365-82.

Weber, Max (1978) *Economy and Society* (Berkeley: University of California Press).

Weber, Max (1993) *From Max Weber: Essays in Sociology* (H.Gerth & C.W.Mills, ed.) (London: Routledge).

Willke, H. (1992) "Societal Guidance Through Law?" in G.Teubner and A.Febbrajo (eds.) *State, Law, and Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective* (Milan: Dott. A. Guiffre Editore): 353-87.

Woolf, Lord (1995) "Droit Public—English Style" *Public law*: 57-71.

Wright, Tony and Matt Carter (1997) *The People's Party: the History of the Labour Party* (London: Thames and Hudson Ltd).

Young, Iris Marion (1990) *Justice and the Politics of Difference* (Princeton, New Jersey: Princeton University Press).

Youngs, Raymond (1996) "Freedom of speech and the protection of democracy: The German approach" *Public Law*: 225-34.