6

Revisiting Kelsen's Party Constitutionalism

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6.1 Introduction

Hans Kelsen was one of the most important legal thinkers of the twentieth century. His contributions to constitutional theory and the doctrine of legal positivism have influenced generations of scholars and practitioners of law, and they continue to be a major reference point in legal-theoretical debates. Kelsen's democratic theory, in contrast, has received comparatively little attention – at least in the anglophone world.[1] This is despite the fact that there is an 'intimate connection' between Kelsen's legal and democratic thought.[2] More specifically, his writings on democracy complement his legal-theoretical writings by describing how positive norms can be produced in a democratic fashion. Throughout his work, Kelsen sought to carefully differentiate between democratic *ideals* and democratic *realities*. As he noted in 1929, in the second edition of *On the Essence and Value of Democracy*, 'In arguments over democracy, a lot of misunderstanding is repeatedly created by the fact that one side only talks about the idea, while the other side only talks about the reality of this phenomenon'.[3]

[1] On the German-language debate, see the recent M. Feldmann, 'Die Parteien(staats)theorie von Hans Kelsen', *Zeitschrift für Parteienwissenschaften*, 1 (2019), 29–30. For a wide-ranging overview of the German-language literature up until around 2007, see R. C. van Ooyen, 'Neuere Forschung und Rezeption zu einer langjährigen Persona non grata der (bundes) deutschen Staatsrechtslehre', in R. C. van Ooyen (ed.), *Hans Kelsen, Wer soll der Hüter der Verfassung sein?* (Mohr Siebeck, 2008), pp. 107–17. A classic German-language text on Kelsen's democratic thought is H. Dreier, 'Kelsens Demokratietheorie: Grundlegung, Strukturelemente, Probleme', in R. Walter and C. Jabloner (eds.), *Hans Kelsens Wege sozialphilosophischer Forschung* (Manz, 1997), pp. 79–102.

[2] The best and most comprehensive discussion of this is in L. Vinx, *Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press, 2007). Also see the 'Editors' Introduction' by N. Urbinati and C. Invernizzi Accetti in the first full English translation of Kelsen's *The Essence and Value of Democracy* (Rowman & Littlefield, 2013), esp. p. 3. Note that this is the version of Kelsen's text that I cite throughout.

[3] Kelsen, *Essence and Value*, p. 35.

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One of the more central tasks that Kelsen set for himself was, then, to clarify popular confusions about the reality of democracy that arise from the dissonance between ideal and real democracy. This intellectual mission importantly involved theorising and defending *political parties*. Kelsen was one of the first major thinkers of the twentieth century to make the case that parties are indispensable to democratic lawmaking and that their participation in democratic lawmaking is legitimate. Ever the sober analyst, his view of parties was far from romantic. He certainly did not see them as public-minded agents who genuinely care about advancing the common good, as some contemporary thinkers do.[4] Instead, he simply noted that without parties that reliably represent collective interests in procedures of norm-creation, competing societal demands cannot be effectively articulated and brought to bear on decisions – at least not under modern, pluralist, mass-democratic conditions. In addition, if societal demands cannot be articulated and influence decisions, it will be all but impossible to generate positive norms that strike an acceptable balance among those demands, thus minimising the 'agony of heteronomy' that arises from being subject to another's will.[5]

In short, Kelsen thought that parties are procedurally necessary for the functioning of democracy, and he found it difficult to imagine alternative ways of making democracy work. 'Only self-deception or hypocrisy', he argued, 'could lead one to suppose that democracy is possible without political parties. A democratic state is necessarily and unavoidably a multiparty state'.[6] This was certainly not the popular view at the time he was writing, if it ever was. In 1920s legal and political scholarship, many influential figures – on both the political left and right – called for authoritarian institutional fixes to the supposed shortcomings of liberal democracy.[7] Against these antiliberal

[4] See, for example, J. White and L. Ypi, *The Meaning of Partisanship* (Oxford University Press, 2016); M. Bonotti, *Partisanship and Political Liberalism in Diverse Societies* (Oxford University Press, 2017).

[5] Kelsen, *Essence and Value*, p. 27. See Vinx, *Kelsen's Pure Theory of Law*, pp. 119–24.

[6] Kelsen, *Essence and Value*, p. 39.

[7] Kelsen reacted to a variety of different antipluralist and authoritarian theoretical tendencies of the 1920s, some of which he also explicitly mentions in *Essence and Value.* One of his targets is Heinrich Triepel, *Die staatsverfassung und die politischen parteien* (Preußische Druckerei- und Verlags-Aktiengesellschaft, 1927). Kelsen cites as paradigmatic example of what he thought was a deeply misguided conservative antipartyism. Additionally, he devotes a whole section (i.e., section V.) of *Essence and Value* to antiparliamentary corporatism, which was promoted by ultraconservative thinkers such as Kelsen's colleague Othmar Spann, as well as the Austrian Christian Social party, which in 1934 abolished

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and antidemocratic pretensions, Kelsen remained firmly committed to a pluralist vision of liberal democracy based on political parties.[8]

Perhaps because Kelsen provided one of the first (and still one of the most elaborate) defences of political parties, his writings on parties are the *one* aspect of his democratic theory that has received some attention in more contemporary anglophone political science and political theory scholarship. Influential scholars such as Adam Przeworski[9] and Nadia Urbinati,[10] for example, have drawn extensively on Kelsen's arguments for pluralist party democracy, and numerous contemporary political theorists concerned with the normative defence of parties and partisanship equally look to his work for inspiration.[11] The main text they engage with is also his major statement in democratic theory, the aforementioned

Kelsen's democratic constitution and replaced it with authoritarian-corporatist constitution. On this, see, for example, E. Tálos, *Das austrofaschistische Österreich 1933–1938* (LIT Verlag 2017). However, Kelsen also addressed the political thought of revolutionary socialists, whose democratic credentials he likewise questioned. In his reconstruction of Kelsen's democratic theory, Vinx stresses that Kelsen was in fact heavily preoccupied with constructing a theory of democracy that can 'mediate between socialists and capitalists', showing how the contradiction between the former's revolutionary ambitions and the latter's interest in retaining the existing social order can be pacified. See Vinx, *Kelsen's Pure Theory of Law*, p. 124. I thank Lars Vinx for also reminding me that Kelsen's understanding of democracy was notably influenced by his debate with the influential Austro-Marxist Max Adler. On this debate, see T. Olechowski, *Hans Kelsen: Biographie eines Rechtswissenschaftlers* (Mohr Siebeck, 2020), pp. 353–56.

[8] Versions of Kelsen's generalised defence of parties can be found in virtually all of his key political writings, in *Allgemeine Staatslehre* (Mohr Siebeck, 2019); *Das Problem des Parlamentarismus* (Wilhelm Braumüller, 1925); H. Kelsen, 'Demokratie', in M. Jestaedt and O. Lepsius (eds.), *Hans Kelsen, Verteidigung der Demokratie* (Mohr Siebeck, 2006), pp. 115–48; *Vom Wesen und Wert der Demokratie* (1929); H. Kelsen, 'Wer soll der Hüter der Verfassung sein?' in R. C. van Ooyen (ed.), *Hans Kelsen, Wer soll der Hüter der Verfassung sein?* (Mohr Siebeck, 2008), pp. 58–105; H. Kelsen, *General Theory of Law and State; The Political Theory of Bolshevism* (The Lawbook Exchange, 2007), as well as in the lengthy postwar article H. Kelsen, 'Foundations of Democracy', *Ethics*, 66/1 (1955), 1–101. In addition, as Baume notes, his argument remained 'remarkably consistent' throughout; see S. Baume, 'Rehabilitating Political Parties: An Examination of the Writings of Hans Kelsen', *Intellectual History Review*, 38 (2018), 426.

[9] A. Przeworski, *Democracy and the Limits of Self-Government* (Cambridge University Press, 2010), pp. 25–29.

[10] See, for example, N. Urbinati, *Democracy Disfigured: Opinion, Truth, and the People* (Harvard University Press, 2014).

[11] N. L. Rosenblum, *On the Side of the Angels: An Appreciation of Parties and Partisanship* (Princeton University Press, 2008), p. 414, also see the endnotes on pp. 468, 487, and 568; White and Ypi, *Meaning of Partisanship*, pp. 60, 78, 150–51, 152–53; F. Wolkenstein, 'Agents of Popular Sovereignty', *Political Theory*, 47 (2019), 338–62; F. Wolkenstein, *Rethinking Party Reform* (Oxford University Press, 2019), esp. chapter 1.

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book, *Vom Wesen und Wert der Demokratie*, which was originally published in 1929 but translated into English only in 2013.[12]

Of the many intellectual resources for theorising about parties that Kelsen offers in this book, his proposals for enhancing parties' capacity to serve their central democratic functions have perhaps attracted the least attention. Even those scholars who recognise Kelsen's distinctive theoretical contribution to our understanding of representative party democracy tend to direct their focus to other lines of argument.[13] However, there is arguably much to be learnt from the passages where the author of the 1920 Austrian constitution and 'architect' of the Austrian constitutional court assumes the role of institutional designer and devises strategies for improving existing legal and democratic institutions.

Perhaps the most interesting and visionary institutional design proposals by Kelsen appear in a number of shorter paragraphs and footnotes of the 1929 version of *Wesen und Wert*, in connection with reflections on what he saw as the main empirical challenges to the functioning of political parties in the interwar period. My aim in this chapter is to reconstruct and discuss these ideas under the term of 'party constitutionalism'. Put simply, party constitutionalism refers to the idea of subjecting party organisations to constitutional regulation in order to ensure that they internally conform to democratic principles. The concern is securing the political freedoms of those who actively engage in political parties against the oligarchical top-down rule of power-seeking party elites. Kelsen was most likely the first author to discuss this particular subject in detail.

I begin by examining the details of Kelsen's party constitutionalism and show that it dovetails with his understanding of parties as enablers of popular rule (Section 6.2). Then, I discuss the practical relevance of Kelsen's proposal, particularly highlighting that the multiple waves of party constitutionalisation that followed the Second World War did not have the effect that Kelsen had hoped for (Section 6.3). As I note in the final section, this in turn raises some doubts about the democratising force of party constitutionalism, but it also usefully reorients our thinking around the possibilities of a better, more effective party constitutionalism (Section 6.4).

[12] Some other translations were available prior to 2013. For example, Przeworski, who lists Kelsen among his 'intellectual guides' (*Democracy and the Limits of Self-Government*, p. xiv), uses the 1988 French translation of *Vom Wesen und Wert der Demokratie.*

[13] Rare exceptions are Y. Mersel, 'Hans Kelsen and Political Parties', *Israel Law Review*, 39 (2006), 158–81, as well as Baume, 'Rehabilitating Political Parties'; Feldmann, 'Die Parteien(staats)theorie von Hans Kelsen', esp. pp. 38–39; Wolkenstein, 'Agents of Popular Sovereignty'; Wolkenstein, *Rethinking Party Reform.*

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6.2 Kelsen's Party Constitutionalism

Kelsen's altogether rather 'vague'[14] reflections on party constitutionalism form a part of his broader defence of political parties that appears in the 1929 edition of *Wesen und Wert*. Specifically, Kelsen mentions the 'anchoring [of] political parties in the constitution' in connection with the 'possibility for democratizing the aspects of the governmental process that occur within the parties' sphere of influence'.[15] He draws a direct line between the constitutionalisation of parties and internal party democracy. To understand this, we need to look more closely at two parallel views that Kelsen defends: a more general *empirical argument* about the democracy-enabling structure that a democratic constitution furnishes and a more specific *normative argument* about the value of intraparty democracy.

The empirical argument about constitutions is essentially an extension of Kelsen's general understanding of the meaning and point of democratic constitutions in the realm of political parties. For Kelsen, constitutions in the generic sense are documents that provide 'the rule[s] for the creation of legal norms that form the statal order'.[16] They establish a stable structure within which constituted bodies can make laws, ensuring that laws are made in a particular way. While constitutions thus understood need not be democratic, *democratic* constitutions – such as the one that Kelsen designed for the First Austrian Republic – are accordingly meant to ensure that laws are made in a democratic fashion.[17] The point of 'anchoring' political parties in democratic constitutions is then to regulate the ways in which parties contribute to democratic lawmaking.

In making this suggestion, Kelsen was willing to go further than any of his contemporaries in defining the reach of the constitution. Several other influential legal scholars of the 1920s, notably Heinrich Triepel, indeed explicitly rejected the idea of constitutionalising parties.[18] But what

[14] E. Caterina, 'Die Ursprünge des Art. 21 GG: die Idee der Parteiregulierung in Verfassungsdebatten der Nachkriegszeit', *Zeitschrift für Parteienwissenschaften*, 1 (2019), 60.

[15] Kelsen, *Essence and Value*, p. 41.

[16] H. Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit', in van Ooyen (ed.), *Hans Kelsen, Wer soll der Hüter der Verfassung sein?* (Mohr Siebeck, 2008), p. 7.

[17] This is also why he saw the constitutional court of a democratic country as a guardian of democracy (and a political actor at that) rather than as a body that limits democracy. For an excellent discussion, see R. C. van Ooyen, 'Die Funktion der Verfassungsgerichtsbarkeit in der pluralistischen Demokratie un die Kontroverse um den 'Hüter der Verfassung', in van Ooyen (ed.), *Hans Kelsen, Wer soll der Hüter der Verfassung sein?* (2007), pp. VII–XXIII.

[18] Triepel, *Die Staatsverfassung.* See also fn. 8. Caterina suggests that Kelsen was in fact the *first* and *only* author to argue for the constitutionalisation of parties before 1945. Caterina, 'Die Ursprünge des Art. 21 GG', p. 60; also see Feldmann, 'Die Parteien(staats)theorie

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made Kelsen want to impose a stable democratic structure not only on the institutions of the state but also on parties, which in the 1920s – in contrast to today – were *not* typically seen as agents of the state?

As a first approximation, consider the following passage, where Kelsen argues that

> it is presumably the amorphous structure of the parties that allows the political processes that occur within in them take on an explicitly aristocratic-autocratic character. This is true even of parties pursuing a radically democratic program. Within the party, leading personalities are able to assert themselves much more forcefully than within the limits of a democratic state constitution. Party life is still governed by so-called party discipline, a serious equivalent of which does not exist in the interaction among parties – that is, in the sphere of parliamentary politics. Hence, the inner workings of the party offer the individual only a limited degree of democratic self-determination.[19]

The first sentence powerfully underscores that Kelsen believed that the absence of formalised rules for internal decision-making opens the door to elite domination, but there are two further things that strike me as relevant in this passage.[20] First, against the backdrop of his apparent

von Hans Kelsen', p. 38. Kelsen was arguably the most prominent scholar who made suggestions to this effect in the interwar years, and he was probably also the most explicit about his normative commitments. However, there were like-minded voices, sometimes in places where one would not necessarily expect them. In 1939, for example, the French philosopher and later *Résistance*-member Jean Gosset proposed, in Emmanuel Mounier's personalist journal, *Esprit*, that all parties should adopt the same statute to regulate their organisational form and their relationship with their members as well as the state. J. Gosset, 'L'avenir des partis', *Esprit,* 80 (1939), 278–96.

[19] Kelsen, *Essence and Value*, p. 41. Note that a similar statement was already made in the earlier work *Allgemeine Staatslehre,* p. 825. There, Kelsen mentions that when 'the political party becomes a decisive factor in the process of statal will-formation, then it suggests itself [*liegt es nahe*] to legally regulate the organisation of the party … in particular to ensure that the principle of democratic control is followed within the party, and that … the dictatorship of party leaders [*Diktatur der Parteiführer*] is limited as much as possible'.

[20] Kelsen's view of the internal life of parties was heavily by influenced Robert Michels, whose book *Political Parties* is a classic example of political sociology and early twentieth century 'elite theory', see R. Michels, *Zur Soziologie des Parteiwesens in der Modernen Demokratie* (Kröner, 1989). In the book, Michels famously spoke of an 'iron law of oligarchy', according to which any political organisation will gradually morph into an oligarchy of the powerful. Kelsen adopts Michels' view without modifying it, citing him as the only source to back up the claim about the 'aristocratic-autocratic' decision procedures within parties. See Kelsen, *Essence and Value*, p. 46, endnote 12. Note: it is plausible that Kelsen, by relying on Michels' pre-First World War analysis, exaggerated the extent to which parties were 'amorphous' and unregulated. Indeed, as historians have documented, in the aftermath of the First World War, with the introduction of republican constitutions across Europe, parties became increasingly regulated by law.

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commitment to intraparty democracy, it seems only logical that Kelsen would dismiss strong party discipline.[21] However, later in *Wesen und Wert*,[22] he puzzlingly argues that parties should be able to recall rebellious representatives who vote against the party line, effectively punishing them for their lack of loyalty. Mersel summarises this second position as follows:

> Within proportional representation the voter no longer votes for an individual but for a list of candidates formed by the party, which is … the basic unit of the modern democracy. The vote is therefore a party vote and not a candidate vote. The mandate of the parliamentary representative belongs to the party and not to the individual parliament member. Any substantial deviation or defection from the party line should therefore lead to the return of the mandate to the party.[23]

How this can be squared with Kelsen's criticism of party discipline is not entirely clear.[24] An alternative interpretation that some scholars have advanced holds that Kelsen envisages that a party's *constituents*,

Especially relevant in this connection were newly introduced electoral laws that recognised multiple parties competing against each other as the 'new normal', as was the internal orders of parliament. The reform of parliamentary orders typically involved the specification of particular rules of conduct for parties' parliamentary groups, implying that 'the institution which like no other embodied the democratic legitimacy of the state, parliament, was now explicitly and formally organized along party lines'. It remains true, however, that parties at this point were not consitutionalised, nor did parliamentary orders or electoral laws stipulate that their internal organisation should take a specific form. P. Corduwener, 'Democracy and The Entanglement of Political Parties and The State: Party-State Relations In 20th-Century France, Italy, and Germany', *Comparative Political Studies,* 53 (2020), 50.

[21] To the contemporary reader who is versed in empirical scholarship on political parties, this might appear an odd position to defend. After all, it is widely thought that party discipline is crucial for both the effective delivery of policy and the capacity of parties to present voters with clearly recognisable political alternatives. See, for example, C. Little and D. M. Farrell, 'Party Organization and Party Unity', in S. E. Scarrow, P. D. Webb, and T. Poguntke (eds.), *Organizing Political Parties: Representation, Participation, and Power* (Oxford University Press, 2017), pp. 285–307; F. McCall Rosenbluth and I. Shapiro, *Responsible Parties: Saving Democracy From Itself* (Yale University Press, 2018); U. Sieberer, 'Party Unity in Parliamentary Democracies: A Comparative Analysis', *Party Politics,* 12 (2006), 150–78.

[22] Kelsen, *Essence and Value*, pp. 60–61.

[23] Mersel, 'Hans Kelsen and Political Parties', p. 177.

[24] Lars Vinx has suggested to me that party discipline, on Kelsen's view, might be problematic only when parties are not democratically organised, while in internally democratic parties, it makes sense to commit representatives to the party line by means of party discipline. However, this is hard to square with Kelsen's aspiration that members of parties should be granted *more* than a 'limited degree of democratic self-determination', as even in an internally democratic party, democratic self-determination would potentially be circumscribed if rules of party discipline were in place. For an extensive discussion of the problems at stake, see U. Bhatia and F. Wolkenstein, 'Freedom of Speech Within Political Parties', *European Political Science Review*, 13 (2012), 431–48.

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and not so much the party leadership, should have the power to recall elected representatives.[25] This would certainly make the proposal more consistent with his apparent rejection of party discipline. However, this explanation also sits uneasily with the final sentence in the above quote, which critically observes that 'the inner workings of the party offer the individual only a limited degree of democratic self-determination'.

Second, setting this potential inconsistency aside, the latter remark about 'democratic self-determination' within parties is quite important. This is because it reveals what lies at the core of Kelsen's understanding of party constitutionalism: establishing some sort of formal assurance for members of parties that they can exercise political autonomy within the sphere of the party. However vague Kelsen's formulations are, it seems to me that he is indeed suggesting that the constitutional regulation of parties should involve equipping party members with certain powers of participation in internal decision-making.[26]

The core components of Kelsen's argument for party constitutionalism are, then, (1) the idea that the structurally 'amorphous' character of parties enables 'aristocratic-autocratic' forms of rule that are democratically problematic; (2) a critique of the imposition of party discipline by 'leading personalities' within the party; and (3) a corresponding endorsement of party members' 'democratic self-determination'. The next thing that needs to be clarified is exactly why Kelsen thought that parties should be internally democratic in the first place. To that end, I turn to Kelsen's normative argument about the point and purpose of intraparty democracy. This can be gleaned from the more general conception of parties that he develops in Chapter 2 of *Wesen und Wert*, which is tellingly entitled 'the people,' indicating that Kelsen closely linked the institution of party to the exercise of popular rule.

Recall, to start with, that throughout *Wesen und Wert*, Kelsen carefully distinguishes between democratic *ideals* and democratic *realities*. His avowed goal is to clarify the misunderstandings that may result from evaluating the reality of democracy through the lens of (some) lofty ideals that can never actually be fully realised. One of democracy's most ethereal and intangible ideals is arguably the notion of *the people*, conventionally

[25] For example, Feldmann, 'Die Parteien(staats)theorie von Hans Kelsen', p. 38.

[26] Whether Kelsen had only the parliamentary party or also ordinary party members and activists in mind here is not clear. The textual evidence suggests that he was concerned only with the parliamentary arm of parties, but there is nothing in his reasoning that logically excludes extending the argument to ordinary members and activists.

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understood in terms of a unified collective agent that rules itself. This idea of 'the people' is at once central to the modern understanding of democracy and extremely difficult to trace in the real world.[27] Kelsen emphatically rejected this view of the people as a 'fiction' but, at the same time, asked in what sense one could meaningfully speak of 'the people' in a real world constitutional democracy. Thus, we turn to political parties and their unique role in connecting citizens to government.

Kelsen begins his argument by introducing a distinction between those who actively engage in politics and those who simply accept the decisions that others make for them: 'Among those who in fact exercise their political rights by participating in government, one would have to differentiate between the mindless masses who follow the lead of others and those few who – in accordance with the idea of democracy – decisively influence the governmental process based on independent judgment'.[28]

Only the latter are, according to Kelsen, 'a ruling, and not a ruled, People' and thus give expression to the ideal of the people as a ruling subject.[29] 'Following this line of investigation,' he continues, 'we encounter one of real democracy's most important elements: the political party, which brings like-minded individuals together in order to secure them actual influence in shaping public affairs'.[30] His argument can be summarised as follows: If the people are to actively rule, then a form of association that promotes and supports the ongoing pursuit of particular political goals is essential. Political parties can provide such an association, supplying citizens with an institutional channel through which their interests can be connected to the relevant legislative and executive mechanisms.[31]

Since Kelsen ascribes to parties the unique quality of being the chief enablers of popular rule, it is no surprise that he eventually concludes that 'the "people" does not actually exist as a viable political force *prior to its organisation into parties*'.[32] To him, it is only the 'integration of isolated individuals into political parties [that] unleashes social forces that can be reasonably referred to as the "People".'[33] Meaningful popular rule in real existing democracies thus 'rests on political parties, whose importance

[27] For discussion, see M. Canovan, *The People* (Polity Press, 2005).
[28] Kelsen, *Essence and Value*, p. 38.
[29] Ibid.
[30] Ibid.
[31] Wolkenstein, 'Agents of Popular Sovereignty', p. 350.
[32] Kelsen, *Essence and Value*, p. 40, emphasis added.
[33] Ibid.

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grows the more the democratic principle is realized in practice'.[34] In other words, if we are looking for 'the people' that rules, then we must look to political parties as the collective agents through which the promise of popular rule is made real. Notice, however, that the popular *will* – and here Kelsen's view differs radically from that of the majority of democratic theorists – can never be *unified* in pluralist party politics; it is the product of compromises between rival parties.[35]

While Kelsen does not explicitly say that political parties need to be internally democratic in order to fulfil the role of enabling popular rule, his normative commitment to intraparty democracy seems to follow logically from his understanding of the role of parties. For if one is committed to liberal democracy (as Kelsen is), and if one singles out parties as those agents that can make the democratic promise of popular sovereignty real (as Kelsen does), it would make little sense to suggest that parties should *not* be internally democratic. Indeed, even if Kelsen observes that there exist 'mindless masses who follow the lead of others,' in a democratic state, those who follow the lead of others should at least have the *opportunity* to join the ranks of those 'who … decisively influence the governmental process based on independent judgment'.[36] This, in turn, means that the organisations that exercise such decisive influence – parties – must be inclusive and democratically organised rather than organised in an oligarchic, top-down fashion that excludes new members from making their voices heard.

[34] Ibid., p. 38.

[35] Compromises between rival parties, argues Kelsen, constitute 'a real approximation to the unanimity that the idea of freedom demands in the development of the social order by its subjects'. Ibid., p. 76. Now, is Kelsen, who emphatically dismissed the notion of *popular sovereignty* as a 'fiction' based on the mistaken belief in an identity of interest among all citizens, not simply offering a (radically) different conception of popular sovereignty here? My own answer to this question, as discussed in my article titled 'Agents of Popular Sovereignty' and elsewhere, is that we may well use the term popular sovereignty to describe Kelsen's position on parties as popular rule-enablers without contradicting his intentions or obfuscating the differences between Kelsen and his intellectual opponents (as Lars Vinx critically remarked in his acute comments on an earlier draft). In fact, in his excellent reconstruction of Kelsen's democratic theory, Vinx himself leaves the door open to such an interpretation, arguing that Kelsen thought that 'to believe that popular sovereignty could consist in anything other than in an identity of ruler and ruled which is brought about *under and by* the procedures determined by the constitution is a potentially dangerous autocratic fiction'. Vinx, *Kelsen's Pure Theory of Law*, p. 126. This, to me, is just one way of saying that there is nothing wrong with reading Kelsen as providing us with a theory of popular sovereignty, albeit one that is distinct from virtually all prior ones.

[36] Kelsen, *Essence and Value*, p. 38.

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To sum up, Kelsen believed that parties were essential for popular rule and that they must be organised in a democratic fashion in order to perform this crucially important role. Identifying the 'amorphous character' of parties – the fact, that is, that the parties of Kelsen's era typically took 'the form of loose associations or, often, lack[ed] any legal form at all'[37] – as the primary reason why parties were not internally democratic, he argued for imposing a democratic internal structure on parties by anchoring them in the constitution. Again, Kelsen remained quite vague about the ideal internal organisation of parties, limiting himself to a blanket emphasis on internal democratisation. However, it is nonetheless possible to discern in his writing a clear argument for party constitutionalism, one that – aside from possibly being in conflict with his argument for recalling representatives – is internally consistent.

6.3 Party Constitutionalism after the Second World War

The catastrophic Second World War and the need to re-establish democracy after 1945 created a unique window of opportunity for constitutionalising political parties. Parties themselves played a key role in the formation of democratic republics across Europe, notably in Germany, Italy, and France. Accordingly, the countries' new constitutions were largely written by people who firmly believed that parties were indispensable in a democracy.[38] The 1947 Italian constitution and 1949 German constitution in particular included an innovative specification of the democratic rights and duties of political parties. Not only were parties explicitly recognised as essential for the functioning of democracy, but their organisational structure was also regulated to some degree. The influential German constitutional scholar and judge Gerhard Leibholz rightly described this development as 'revolutionary'.[39]

The constitutional regulation of parties was most extensive in postwar Germany; some commentators have therefore called Germany the

[37] Ibid.

[38] Corduwener, 'Democracy and the Entanglement of Political Parties and the State', pp. 56–58. For an excellent study on the influence of the Christian Democrats on the Italian constitution-writing process, see B. Thomassen and R. Forlenza, 'Catholic Modernity and the Italian Constitution', *History Workshop Journal*, 81 (2016), 251–71.

[39] G. Leibholz, 'Volk und partei im neuen deutschen Verfassungsrecht', in G. Leibholz (ed.), *Das Wesen der Repräsentation und der Gestaltwandel der Demokratie im 20. Jahrhundert* (de Gruyter, 1960), pp. 71–77.

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'heartland of party law'.[40] The first European constitution to propose the extensive regulation of parties was in fact a subfederal constitution, namely, the 1947 constitution of the German state of Baden.[41] This constitution stipulated, among other things, that only associations with 30,000 or more members could claim party status (Article 118); that parties participating in a government coalition have 'a duty to prioritise the interests of the country over the interests of the party,' while parties that are in the opposition should be 'fact-oriented (*sachlich*) and constructive' when criticising the government (Article 120); and that all elected representatives must be able to follow their own conscience, rather than having to obey the party leadership (Article 121).[42] This last article is important since it goes some way in securing the political freedoms of elected representatives against the enforcement of party discipline, similar to what Kelsen apparently envisaged.[43]

While the influence of the Baden constitution on the 1949 German Basic Law was only indirect, the former's provisions concerning political parties prefigure some of the content of the famous Article 21 in the latter.[44] What is distinctive about this article is not so much that it stipulates that parties 'shall participate in the formation of the political will of the people' or that they 'may be freely established'. What is distinctive about Article 21 is that it mandates that parties' 'internal organization must conform to democratic principles' (Article 21(1)).[45] This makes the German Basic Law the first constitution to explicitly require parties to be internally democratic. Add to this Article 38 (1), which states that members of parliament 'shall … not [be] bound by orders or instructions, and responsible only to their conscience,' and the result looks very much like an embryonic version of the sort of party constitutionalism Kelsen argued for.

[40] W. C. Müller and U. Sieberer, 'Party Law', in R. S. Katz and W. Crotty (eds.), *Handbook of Party Politics* (Sage, 2006), p. 435.

[41] Caterina, 'Die Ursprünge des Art. 21 GG', p. 61. Note that this is not to say that it was the first constitution to *mention* political parties. The 1944 Icelandic constitution and the 1945 Austrian constitution (which was not a newly written constitution but a restoration of Kelsen's 1920 constitution) certainly mention parties, but they by no means propose any extensive regulations.

[42] The 1947 Baden constitution is available at Land Baden, 'Verfassung des Landes Baden', (1947), www.verfassungen.de/bw/baden/verf47-i.htm (accessed 10 October 2020).

[43] F. Wolkenstein, 'Membership Ballots and The Value of Intra-Party Democracy', *Critical Review of International Social and Political Philosophy*, 21 (2018), 435–38.

[44] Caterina, 'Die Ursprünge des Art. 21 GG', p. 61.

[45] Cited in accordance with the official English version of the Basic Law; see www.gesetze-im-internet.de/englisch_gg/ (accessed 20 December 2023).

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The internal democracy requirement of the German Basic Law is significant because it was subsequently adopted in a number of other countries. The Spanish constitution of 1978 (adopted after the fall of the Franco regime) requires parties to be internally democratic, as do the constitutions of Portugal and Croatia (after revisions in 1997 and 2000, respectively). Although these are the only constitutions to explicitly prescribe intraparty democracy, scholars have argued that in the constitutions of Greece, Italy, France, Bulgaria, Lithuania, and Poland, an obligation for parties to be organised democratically is 'implicitly present in the constitutional requirement that political parties either serve or respect democratic principles or methods'.[46] To be sure, it is not always unambiguously clear that the relevant provisions are concerned with intraparty democracy.[47] However, there is certainly a growing tendency to interpret those provisions as targeting the internal life of parties.[48] Those who favour this interpretation sometimes even resort to arguments inspired by the doctrine of 'militant democracy,' suggesting that 'if we accept the idea that there is no place for nondemocratic parties in a democracy, then we must also find that there is no place for parties that lack internal democracy. Lack of internal democracy may be seen as evidence of external nondemocracy'.[49]

While Kelsen would likely have been sceptical about a defence of internally democratic parties that depends on theories of militant democracy,[50] the constitutional prescription of intraparty democracy is, as such, no doubt in line with Kelsen's original proposals. Equally aligned with Kelsen's ideas are the more specific regulations concerning the rights of party members that are contained in many of the national party laws that have been written since the postwar era. To date, the party laws of Czechia, Germany, Latvia, Portugal, Romania, Slovakia, and Spain establish a 'right of party members to challenge internal party decisions'

[46] I. van Biezen and D. R. Piccio, 'Shaping Intra-Party Democracy: On the Legal Regulation of Internal Party Organizations', in W. P. Cross and R. S. Katz (eds.), *The Challenges of Intra-Party Democracy* (Oxford University Press, 2013), p. 33.

[47] For example, Article 49 of the Italian constitution states that 'any citizen has the right to freely establish parties to contribute to determining national policies through democratic processes', but it is a disputed question whether 'democratic processes' can also refer to the internal life of parties.

[48] Biezen and Piccio, 'Shaping Intra-party Democracy', pp. 33–34 and fn. 7; Caterina, 'Die Ursprünge des Art. 21 GG', pp. 72–73.

[49] Y. Mersel, 'The Dissolution of Political Parties: The Problem of Internal Democracy', *International Journal of Constitutional Law*, 4 (2006), 97.

[50] See Kelsen, 'Verteidigung der Demokratie' in Jestaedt and Lepsius (eds.), *Hans Kelsen, Verteidigung der Demokratie*, pp. 229–37.

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and/or 'the existence of internal arbitration boards for the solution of internal disagreements,' all of which are 'considered to be important mechanisms to ensure internally democratic procedures within political parties'.[51] While this is not party constitutionalism in a narrow sense, it arguably gives expression to the essentially Kelsenian notion that parties' internal structure can (and should) be democratised through law.

However, the question remains: has the constitutional prescription of intraparty democracy actually made parties more internally democratic? Most likely not. Although both of the two largest German parties – the Christian Democratic CDU and the Social Democratic (SPD) – adopted a formally democratic organisational structure in the immediate post-war era, their internal decision-making procedures remained, to use Kelsen's terminology, 'aristocratic-autocratic' in character. As historians have documented, the electorally strong CDU, for example, was ruled in a heavily centralised, quasi-authoritarian fashion.[52] Its leader, Konrad Adenauer, not only set the agenda on most, if not all, political issues but also routinely circumvented formalised internal decision procedures while demanding strict loyalty from the rest of the party:

> Well-known are his letters with sharp admonitions, which in terse words demanded explanations whenever he saw his line violated. Likewise, [Adenauer] often bypassed the responsible party committees (*Gremien*). He discussed many important decisions not with the parliamentary group, the party executive and the ministry concerned, but only with his advisers in the Chancellor's Office. This was especially true in the case of his foreign policy.[53]

The German Social Democratic Party (SPD) has likewise been described as a strongly leader-centred party where most decisions were made by a small number of party elites.[54]

One could object that none of this proves conclusively that the postwar constitutionalisation of parties fell short of what Kelsen envisaged. Because Kelsen remained rather vague regarding his aspirational ideal of intraparty democracy, one may even draw the opposite

[51] Biezen and Piccio, 'Shaping Intra-party Democracy', pp. 42–43.

[52] F. Bösch, *Macht und Machtverlust: Die Geschichte der CDU* (DVA, 2002), p. 79.

[53] Ibid. In his key work on the CDU under Adenauer, Bösch remarks that Adenauer was 'certainly no supporter of internal party democracy'. F. Bösch, *Die Adenauer-CDU: Gründung, Aufstieg und Krise einer Erfolgspartei 1945–1969* (DVA, 2001), p. 250.

[54] This was despite the Social Democrats, unlike the Christian Democrats, appearing to be rhetorically committed to more internal democracy. See U. von Alemann, 'Mehr Demokratie per Dekret? Innerparteiliche Auswirkungen des deutschen Parteiengesetzes von 1967', *Politische Vierteljahresschrift*, 13 (1972), 181–204.

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conclusion, namely, that he might have been content with parties' adoption of a formally democratic internal structure. Indeed, since Kelsen had few illusions about the realities of party politics, he may even have accepted the tendency of powerful party leaders to ignore internal decision-making rules on the double condition that party members (1) assented to this form of top-down leadership and (2) retained the right to replace leaders democratically.

However, this objection, while not entirely implausible, neglects the fact that Kelsen not only considered party constitutionalism necessary 'to ensure that the principle of democratic control is *followed* within the party' and not merely translated into formal decision rules that nobody abides by, but he also believed that it was crucial that 'the dictatorship of party leaders (*Diktatur der Parteiführer*) is limited *as much as possible*'.[55] Even with the most minimalist interpretation of what this could mean concretely, it is difficult to argue that these desiderata were fulfilled in the postwar parties mentioned above. Suppose, in a minimalist fashion, that Kelsen thought that the principle of democratic control is followed within parties when party members can collectively elect and unseat party leaders.[56] This requirement was hardly met. If we take the example of the CDU, it was only in 1967 that the CDU's *parliamentary group* was granted the right to directly elect potential future chancellor candidates, and the party members directly elected the party leader for the first time only in 2021![57] Previously, under the leadership of Adenauer and his successor, Ludwig Erhard, in the CDU, all key personnel decisions were taken in an informal and top-down fashion by a handful of party officials. Although it would be hyperbolic to say that Adenauer and Erhard behaved like 'dictators,' it would also be outright absurd to claim that their power was limited in any more substantial sense.

Moving beyond the postwar period, it is worth emphasising that political science scholarship has systematically documented that 'many political parties have made important and highly visible changes in the opportunities they offer members to influence party affairs' in the last four decades or so, especially by 'expanding the use of intra-party ballots for party decisions'.[58] Scholars have also observed, however, that this had

[55] Kelsen, *Allgemeine Staatslehre*, p. 825, emphasis added.
[56] I thank Lars Vinx for pushing me to clarify this.
[57] Bösch, *Macht und Machtverlust*, p. 95.
[58] S. E. Scarrow, *Beyond Party Members: Changing Approaches to Partisan Mobilization* (Oxford University Press, 2015), p. 178. Scarrow offers a very useful overview of those changes. On developments in intraparty democracy, also see R. Y. Hazan and G. Rahat,

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no substantial democratising effect on internal decision-making practices. Carty has pointed out that the kind of political participation offered by most parties tends to be 'atomistic,' in the sense that members are typically 'isolated from one another and engaged in direct communication only with the party centre, in a fashion that inhibits their ability to act in common with each other'.[59] This in turn 'provides the party in public office with the ability to manipulate a formally popular decision-making process, by ensuring that members' choices are constrained and limited to alternatives acceptable to the existing elite'.[60] The result tends to be an apparent democratisation of the party that de facto strengthens the control of party elites.[61] Again, this may be a far cry from the 'dictatorship of party leaders' that Kelsen sought to rein in, but if these social scientific analyses are true, it is hardly the case that the reality of intraparty democracy now resonates more with Kelsen's prescriptions.

Of course, the exact relationship between recent initiatives to democratise parties internally and the constitutionalisation of specific norms concerning intraparty organisation is anything but clear-cut. The causal effect of party constitutionalisation on intraparty organisation is generally very difficult to study, and systematic studies are scarce. However, inasmuch as the pseudodemocratising changes that political parties have made to their organisational structure in the last four decades *coincided* with a proliferation of party legislation in most democracies (recall, for example, the aforementioned constitutional revisions in Portugal and Croatia),[62]

Democracy within Parties: Candidate Selection Methods and Their Political Consequences (Oxford University Press, 2010) and A. Gauja, *Party Reform: The Causes, Challenges, and Consequences of Organizational Change* (Oxford University Press, 2016).

[59] R. K. Carty, 'Are Political Parties Meant to Be Internally Democratic?' in W. P. Cross and R. S. Katz (eds.), *The Challenges of Intra-Party Democracy* (Oxford University Press, 2013), p. 19.

[60] Ibid.

[61] An insightful case study of British and Spanish parties in the 1990s is J. Hopkin, 'Bringing the Members Back In? Democratizing Candidate Selection in Britain and Spain', *Party Politics* 7 (2001), 343–61. For an extensive discussion of democratising reforms in Blair's 'New Labour' party, see F. Faucher-King and P. Le Galès, *The New Labour Experiment: Change and Reform Under Blair and Brown* (Stanford University Press, 2010), esp. pp. 93–98. An excellent study of recent trends (and failures) in democratising parties by introducing online participation, see P. Gerbaudo, *The Digital Party* (Pluto Press, 2018). Theoretical contributions that discuss this issue include R. S. Katz and P. Mair, 'The Cartel Party Thesis: A Restatement', *Perspectives on Politics*, 7 (2009), 759; C. Invernizzi Accetti and F. Wolkenstein, 'The Crisis of Party Democracy, Cognitive Mobilization, and the Case for Making Parties More Deliberative', *American Political Science Review*, 111 (2017), 97–109.

[62] I. van Biezen, 'Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-War Europe', *British Journal of Political Science*, 42 (2012), 187–212.

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we may provisionally conclude – in line with the best political science research available – that the constitutionalisation of parties (and their legal regulation more generally) has made parties *formally* more democratic but scarcely placed checks on the power of party elites.

None of this is to deny that some parties have actually become more internally democratic because of the introduction of constitutional provisions (or party laws) that prescribe internal democracy or that some parties have genuinely tried to become more internally democratic. All in all, however, there are good reasons to think that Kelsen's original argument about the power of constitutions to counter the aristocratic-autocratic character of intraparty decision-making was too optimistic.

6.4 Towards Improved Party Constitutionalism

It is very easy – and hardly intellectually stimulating – to reject the ideas and arguments of earlier scholars by highlighting new facts that expose those ideas and arguments as overly optimistic. What I seek to do in this final section is thus not to dismiss Kelsen's argument about the democratising effects of constitutionalising parties as 'disproven by reality'. Instead, and more constructively, I want to reflect on what we can learn about the idea of party constitutionalism from the relative failure of post-Second World War party constitutionalisation to produce internally democratic parties. Specifically, I want to draw attention to two issues that Kelsen did not say more about in his brief mentions of the topic but that are directly relevant to the question of how party constitutionalism might succeed.

First, it is very difficult to see how *parties' (non)compliance with constitutional norms can effectively be monitored and sanctioned*. For one thing, there is a real risk that independent monitoring and sanctioning bodies might simply remain passive because, for instance, they do not consider the issue of intraparty democracy a priority relative to more weighty issues such as party finance. There is an abundance of evidence that can be cited to illustrate this point, but perhaps it suffices to point out that towards the end of the 1960s, innumerable German commentators agreed that the intraparty democracy requirement in the Basic Law's Article 21(1) did *not* lead to more democracy being practiced within parties;[63] although the German Constitutional Court affirmed in one of its key rulings the view of parties as integral units of the constitutional

[63] von Alemann, 'Mehr Demokratie per Dekret?'

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order that should be organised democratically,[64] it did little to actually promote or enforce internal democratisation using its sanctioning powers.[65] Such problems of court passivity would likely become even more pressing when Constitutional Court judges have an avowed partisan identity and corresponding loyalties.

However, even more pertinently, the monitoring and enforcement of intraparty democracy norms through independent bodies will often be complicated by the fact that we know very little about the internal life of parties, over and above what we learn about their internal decisions and procedures through the mass media. What may be called the 'real world' of internal party democracy – where informal decision-making practices and the tactical considerations of party elites often prevail over formally required decision-making procedures – remains largely hidden from the public eye and has rarely been studied in a systematic and detailed fashion, in part because it is very difficult to obtain the relevant evidence.[66] Many of those who do have access to relevant evidence, notably party elites and ordinary party members, rarely share that evidence with researchers, leaving many questions about how intraparty decision-making truly works unanswered.[67] Such evidence would be necessary, however, for building a convincing legal case for sanctioning parties.[68]

There is no answer to any of these issues in Kelsen's writings. This is not surprising given that he had very little immediate experience with party constitutionalism. In addition, if he had been tasked with writing a party law, he would certainly have paid attention to how to make it enforceable.

[64] G. Leibholz, *Strukturprobleme der Modernen Demokratie* (Müllner, 1958), p. 92.

[65] Note, though, that the Constitutional Court's ruling of 19 July 1966 concerning public party finance did set in motion the drafting process of the German party law of 1967, which includes a vast range of provisions concerning internal party organisation. For discussion, see von Alemann, 'Mehr Demokratie per Dekret?', pp. 186–202.

[66] There are generally very few in-depth empirical studies of intraparty democracy. For an enlightening study of (informal) power within political parties, see D. Rye, *Political Parties and the Concept of Power: A Theoretical Framework* (Palgrave, 2014). On the issue of party elites blocking reforms, see also Wolkenstein, *Rethinking Party Reform*, esp. Chapter 3 and the conclusion.

[67] See, for example, the methodological appendix in my *Rethinking Party Reform*.

[68] Mersel, 'The dissolution of political parties', p. 108, notes another potential problem: 'There is even a risk that … a [sanctioning] mechanism – if it rested, for instance, on criminal indictments by an administrative official – could be controlled and abused by other parties in government'. This, he argues, could 'result in the [party] law's being mocked or ignored, with attempts at enforcement leading only to an erosion of the authority of the courts that would adjudicate these matters'.

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At any rate, I suggest that we make the question of parties' compliance with constitutional norms of intraparty democracy a topic of sustained normative and legal reflection. If compliance cannot effectively be monitored and enforced parties will have only weak incentives to comply with constitutional requirements, which all but completely diminishes the point of party constitutionalism. A central desideratum for improved party constitutionalism is thus an effective strategy for monitoring parties' internal lives and sanctioning relevant norm transgressions.

The second issue that I would like to highlight concerns the question of *who is made responsible for the constitutionalisation of political parties*. I interpret Kelsen as assuming that parties are meant to, as it were, 'self-constitutionalise' by amending the constitution in parliament. To fully understand this, recall that Kelsen conceives of parties as key enablers of popular rule. This implies that parties are not only the primary shapers of 'ordinary' laws but also tasked with 'higher lawmaking', that is, constitutional amendment. Indeed, Kelsen rejects the idea of a unified *pouvoir constituant* on the basis that 'there can never be a unity of "we the people"' but only a unified legal order.[69] This leaves him with parties as agent*s* (in the plural) of popular rule and leads him to conceptualise processes of constitutional amendment as just another compromise-based decision jointly taken by multiple parties – albeit with a supermajority requirement.[70]

Therefore, the constitutionalisation of political parties that Kelsen called for was meant to be driven by the parties themselves – or at least, that was the path of reform that he had in mind in the 1920s.[71] As we saw, this is in fact how the main processes of party constitutionalisation unfolded after the Second World War. As one historian puts it, the first constitutional provisions on parties – in particular the German Basic Law's Article 21 and the ambiguous Article 49 of the Italian

[69] The quote is from J. Komárek, 'Constitutional Revolutions and the Constituent Power: A Reply to Mark Tushnet', *International Journal of Constitutional Law*, 13 (2015), 1054–58. On Kelsen's understanding of constituent power, see also H. Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', in M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism* (Oxford University Press, 2007), pp. 9–24.

[70] Kelsen's view of the division of people into parties and the point of compromise is neatly summarised in *Essence and Value*, pp. 40–41. In H. Kelsen, 'Die Verfassungsreform', *Juristische Blätter* 58 (1929), 447, Kelsen further underscores that it is crucially important that the constitution embodies a compromise between (roughly equally strong) parties. Here, Kelsen also opposes constitutional referenda as excessively majoritarian, thus undermining the meaning of the constitution as a genuinely shared document.

[71] Thanks again to Lars Vinx for pushing me to clarify my formulations here.

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constitution – were the outcome of 'parties capitalizing on their prominent role in the making of democratic institutions'.[72] That is, parties acted as constitution-makers who – empowered by the Allied authorities, as well as the electorate – defined and consolidated their own status within the constitutional order. The same is true for subsequent 'waves' of political parties' constitutional and legal codification: it was the parties themselves that were the driving force behind them. As Katz and Mair note,

> although parties were more influenced by the state, by public regulations, and so on, this did not imply that they were being influenced by something that was entirely exogenous to them. That is, the laws and rules influencing parties were those that they themselves, as governors, had been centrally involved in devising and writing. … [Parties] are unique in that they have the ability to devise their own legal … environment and, effectively, to write their own salary checks.[73]

However, the capacity to self-constitutionalise is potentially problematic because it gives parties an exceedingly powerful role that is susceptible to misuse. This is especially so in the present era, where, as numerous studies have documented, parties are largely disconnected from society and the concerns and demands of ordinary citizens.[74] Under these circumstances, it is not unlikely that parties will increasingly use their powers to legally self-regulate in self-serving ways that, for instance, reduce the costs of losing office.[75] There is, furthermore, a nontrivial link to the abovementioned problems of monitoring and sanctioning parties' compliance with constitutional norms: when parties have extensive authority in the process of writing their own laws, they can also shape the rules regarding compliance-enforcement, thus making it easier to avoid both effective monitoring and possible sanctions.

Using Sieyès' famous distinction, it may be possible to describe the self-constitutionalisation of parties as a case of *pouvoirs constitués* acting as *pouvoir constituant (constitué)*. Typically, this is considered troubling

[72] Corduwener, 'Democracy and the Entanglement of Political Parties and the State', p. 57. On Germany and Italy, see Caterina, 'Die Ursprünge des Art. 21 GG', p. 72; on the 'compromise' character of the Italian constitution in particular, see Thomassen und Forlenza, 'Catholic modernity'.

[73] Katz and Mair, 'The Cartel Party Thesis', p. 756.

[74] See, the recent P. Ignazi, *Party and Democracy: The Uneven Road to Party Legitimacy* (Oxford University Press, 2017); also see Invernizzi Accetti and Wolkenstein, 'The Crisis of Party Democracy'.

[75] Katz and Mair, 'The Cartel Party Thesis'; P. Mair, *Ruling the Void* (Verso, 2013).

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because it prevents citizens from exercising control or dramatically minimises their control over the content of the constitutional order under which they have to live. As Patberg writes, the point of the distinction between *pouvouir constituant* and *pouvouirs constitués* 'is to secure a dimension of political autonomy. It calls for a democratic mode of constitutional politics in which citizens can reorganize their political system even if the affected institutions are opposed to such change, while public authorities are not in a position to modify their own terms of operation or autonomously transfer authority to other entities'.[76] If we take these arguments seriously, it follows that parties cannot legitimately self-constitutionalise. Citizens must at least be granted a say over parties' proposals for constitutionalisation before they are ratified.

While there is arguably no need to always insist on a clean separation between *pouvouir constituant* and *pouvouirs constitués*,[77] the distinction helpfully draws our attention to the risks of party self-constitutionalisation. These risks are no doubt very real, and there is again no response to this problem in Kelsen's writings. True, in his more general reflections about constitutional transformation, Kelsen grants that 'the doctrine of the pouvoir constituent' may provide a useful way of thinking about 'making norm-changes more difficult,' by, say, introducing supermajority requirements.[78] However, he also decisively rejects as 'natural law' (a term of abuse for Kelsen) the idea that the wider citizenry should be in charge of constitutional amendment, since they are the final source of all law.[79] Thus, parties, qua enablers of popular rule, retain the principal authority to amend constitutions.

In the end, it may be possible to remain committed to party constitutionalism while accepting that parties should *not* have the authority to unilaterally self-constitutionalise. *In agreement with* Kelsen, we might

[76] M. Patberg, 'Extraordinary Partisanship in the European Union: Constituent Power and the Problem of Political Agency', *Constellations*, 27 (2020), 145. The distinction between *pouvouir constituant* and *pouvouir constitué* goes back to the French Revolution and the writings of Emannuel Sieyès. On the history of the concept and the distinction, see L. Rubinelli, *Constituent Power: A History* (Cambridge University Press, 2020), esp. chapter 1. Further useful discussions of the problem are I. Maus, *Über Volkssouveränität: Elemente einer Demokratietheorie* (Suhrkamp, 2011), esp. pp. 78–79, 126–27 and J. L. Cohen, *Globalization and Sovereignty Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press, 2012), esp. chapters 4 and 5.

[77] On this point, see A. Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford University Press, 2016), p. 34.

[78] Kelsen, *Allgemeine Staatslehre*, p. 597.

[79] Ibid., p. 598.

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therefore argue that party constitutionalism is desirable since parties still play a crucial role in making democracy work, organising campaigns and elections, structuring public opinion, and framing and passing laws in parliament. Precisely because they serve democratically important functions, we should ensure that the parties themselves are organised in a way that guarantees members and activists a level of political autonomy or 'self-determination', as Kelsen puts it, and here, the constitution remains an important regulating device. *Against* Kelsen, on the other hand, we might argue that we now know more about the practice and risks of party constitutionalisation and that the experience of the past suggests that more effective monitoring and sanctioning mechanisms must be established, and that the unilateral self-constitutionalisation of parties be avoided.[80]

Ultimately, if we want to improve party constitutionalism, we might need to look for strategies for constitutionalising parties in which multiple actors beyond the parties themselves decide how parties should be regulated in the wider constitutional order.[81] Incidentally, trying to redefine the role of parties in society together with the wider citizenry and a plurality of civil society actors might also provide a way of reconnecting parties with society. The fact that Kelsen's brief thoughts on party constitutionalism open the door to thinking about such possibilities testifies to their originality and to the persisting importance of Kelsen's democratic thought.

[80] Note that this means departing from the path of constitutional revision that Kelsen proposed in the 1920s, *not* from Kelsen's broader constitutional theory. After all, Kelsen acknowledged that the ways a constitution can be changed depend on the particular content of the constitution, which can vary in all kinds of ways and thus might include provisions that prevent parties from devising their own legal environment. I thank Lars Vinx for suggesting the inclusion of this qualification.

[81] Inspiration for such alternative modes of party constitutionalisation can be found in recent work on participatory democracy and democratic innovations, for example, M. E. Warren and H. Pearse, *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press, 2008); H. Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century* (Princeton University Press, 2020).

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