



Martin Morlok

*Professor, Director of the Institute for German
and European Law on Political Parties
University of Heinrich Heine, Germany*

A Comparative Presentation on Constitutional Courts as Guardians of Competition between Political Parties

1. Democracy means competition

1.1. Democracy as an arrangement of competition

One major feature of any form of democracy is that there is some form of competition among candidates and/or parties to come into positions that are vested with the power to make binding decisions. Behind this struggle for decision-making positions, of course, there is a competition among different interests and ideas.^{*1} This means that democratic competition is only on its surface a competition among persons and organisations. Underlying that competition and fuelling it are strong antagonisms between rival conceptions as to how society **should** be.

The use of this concept of democracy does not mean that democracy should be defined only via this competition-based approach, as Joseph A. Schumpeter does.^{*2} Democracy means more than just an electoral method; it has to do with certain degrees of freedom, with the emphatic idea of individual and collective autonomy and self-determination. In any case, competition is an indispensable element of any modern form of democracy.^{*3}

¹ M. Morlok. *Parteienrecht als Wettbewerbsrecht* – P. Häberle, M. Morlok, V. Skouris (eds.). *Festschrift für Dimitris T. Tsatsos*, 2003, p. 408.

² J. A. Schumpeter. *Capitalism, Socialism and Democracy*. 1st ed. 1942 (reprinted in 1962), Chapter 22.

³ For a fine expression in a constitutional context, see Ústavní soud České republiky (Constitutional Court of the Czech Republic), Decision Pl. ÚS 26/94, which states: “The Constitution of the Czech Republic is based on representative democracy, in which the creation of political will and formation of state power is the result of free competition of political parties (Art. 5 of the Constitution) within a democratic state based on the rule of law” (Translation of the Court). See also Ústavný súd Slovenskej Republiky (Constitutional Court of the Slovak Republic), Decision PL. ÚS 15/98 as cited by E. Bárány, L. Orosz. *The Institution of the Political Party in the Slovak Republic*. – D. T. Tsatsos, M. Morlok, D. Schefold, C. Grewe (eds.). *Parteienrecht im europäischen Vergleich*. 2nd ed. 2008 (forthcoming), Fourth Part, section I.

1.2. Functions of competition

Competition is associated with several advantages.^{*4} It stimulates the development of ideas and problem-solving methods^{*5}; the rivalry among those making different proposals enhances their efforts; by means of competition for voters or votes, the interests and convictions of the voters are best served; and — last but not least — open competition serves as a device acting against the misuse of power: The democratic competition keeps the persons who are actually in power in fear of the sovereign: the people.

1.3. Legal framework for competition

Any competition needs a framework in which to take place^{*6}, even more: without a set of rules and institutions, there can be no effective competition, at least not over longer periods of time. An unregulated competition will develop unfair practices, cartels, and obstacles against new competitors, thereby eliminating the above-mentioned advantages of competitive structures of decision-making systems.^{*7} In the long run, an unregulated competition is likely to see a change from its originally democratic character. Therefore, there is a need for a legal arrangement that ensures lasting free competition.

1.4. Elements of a legal arrangement for competition

Let me specify some of the elements of such a legal arrangement for lasting and effective competition among political parties. The basic functional prerequisite is the equality of rights and chances of all participants. Further on, there should be precautions against unfair competition or fraud and also rules that prevent settlements or agreements among competitors against other competitors, especially new ones. Of course, measures to ensure the openness of the competition are of importance.

We learn from economic theory that the effects of competition result not only from the competition itself but also from the reactions of the actual competitors to potential new competitors. They strive to keep new competitors out by preventing them from appearing attractive. Therefore, tendencies to turn an open competition into an oligopolistic one should be given serious consideration. This means there must be realistic chances to enter into competition; the obstacles to entering the market should be as low as possible.^{*8}

Finally, there should be means of control and enforcement of these rules safeguarding competition.^{*9}

2. The law of the political process as competition law

2.1. Law regulating political competition

If it is true that competition depends on a particular legal arrangement, then in a stable democracy there must be a set of legal rules that functions as competition law. The law regulating the political process — which is a competitive one — may be considered a special form of competition law. This holds true for the law of political parties and for voting law, but also for the law regulating the parliamentary process. It might be helpful to conceive of these legal matters as a kind of competition law. It is only by means of these legal rules that a fair, effective, and sustained political competition is maintained.^{*10}

⁴ E. Kantzenbach. Die Funktionsfähigkeit des Wettbewerbs: Weite Oligopole als Wettbewerbsbedingung, – K. Herdzina (ed.). Wettbewerbstheorie. 1975, p. 196 ff.

⁵ F. A. von Hayek. Die Verfassung der Freiheit. 3rd ed. 1991, p. 46 ff.

⁶ B. Ackermann. Wettbewerbsrecht. 1997, p. 4 ff.; G. Speckmann. Wettbewerbsrecht. 2000, p. 1; O.-F. von Gramm. Wettbewerbsrecht. 1987, p. 7 ff., p. 49 ff.; H. Berg, D. Cassel, K. Hartwig. Theorie der Wirtschaftspolitik – D. Bender et al. (eds.). Vahlens Kompendium der Wirtschaftstheorie und Wirtschaftspolitik 2003 (2), p. 199; C. D. Edwards, Die Erhaltung des Wettbewerbs: Das Ziel – K. Herdzina (Note 4), p. 215 ff.; M. Morlok (Note 1), p. 415.

⁷ R. S. Katz, P. Mair. Changing Models of Party Organisation and Party Democracy: The Emergence of the Cartel Party. – Party Politics 1995, p. 5 ff.; R. S. Katz, P. Mair. How Parties Organize. 1994.

⁸ M. Morlok (Note 1), p. 432 ff.; BVerfGE 111, p. 404 ff. See also, referring to the latter, M. Morlok. – NVwZ 2005, p. 157 ff.

⁹ M. Morlok (Note 1), p. 416.

¹⁰ *Ibid.*, p. 417.

2.2. Elements of political competition law

Let me enumerate some of the elements of such a political competition law. In their basic structure these are the same elements as associated with any competition. We need freedom of action for all participants, enshrining the freedom to compete. This freedom is guaranteed by the usual fundamental rights; here I shall name only freedom of expression and the freedom to assemble and to associate. Perhaps the most striking element of a legal framework for political competition is the guarantee of equality of the rights of all competitors.^{*11} A special aspect of this equality of chances concerns the funding of political activities — namely, the financing of political parties and of election campaigns. Here we do need an elaborate system of rules to deal with public financing as well as financing from private sources.^{*12} The legal regime for the financing of political activities has to do justice to parties with a rich base of funding but also to parties the members of which are on the middle or lower rungs of the income scale.^{*13}

Again, it is important that there is open access to political competition^{*14}; thresholds for entering the market may have different forms. Of course, there are legal thresholds in the voting law but also prerequisites for registration as a political party. Access to the mass media is important, and, as always, the financing regime is crucial. If there are public subsidies for political parties, parties should qualify for these by achieving a rather low percentage of votes; otherwise, newcomers will not have an equal opportunity to enter the competition. All of this holds true also regarding **potential** rival parties.

2.3. Control and enforcement

All legal regulation is of little value as long as obedience to the existing rules is not controlled and compliance with the norms not enforced. This is even more true in fields where there are strong motives not to comply. This is the case in the political arena where the struggle for power takes place. To come into power is a very strong motivator, which endangers abidance by the law. Therefore, the legal arrangement that guides the political competition needs institutions of control and law enforcement.

There may be special agencies for controlling political parties and voting campaigns — for instance, special committees such as the United Kingdom's Electoral Commission^{*15} — or it may be the task of general institutions to control the behaviour of political actors in whether they obey the law. Of course, there also is need for a system of sanctions in case of violation of the legal competition rules. The courts, of course, play an important role in the enforcement process for the law of the political process.

3. The particular task of constitutional courts

Constitutional courts play a special role in this context. As the highest of all courts, this level possesses clear importance and — it is hoped — enjoys supreme prestige. The importance of constitutional courts stems from their unique function of interpreting authoritatively the uppermost layer of legal rules. To use Montesquieu's terms^{*16}, the constitutional court is *la bouche de la constitution*. As — due to the hierarchical structure of legal systems — every other national law has to follow the guidelines supplied by the constitution, the only source of binding constitutional interpretation wields great power, also, as often is overlooked, concerning everyday legal matters, such as divorcements, sureties, and the possibility to deduct donations given to a political party from one's taxes due.

This can be explained by the fact that the legal mainstays of a well-functioning political competition — such as the rules for financing of political parties — usually can be deduced from constitutional principles such as the equality of all political competitors. A constitutional court thereby is empowered — and indeed has the duty — to control the compliance with the constitution of every sub-constitutional legal norm dealing with political competition. To put it another way, even the parliament as legislator can distort the free and equal

¹¹ BVerfGE 111, p. 382 ff.; M. Morlok. Konkurrenz belebt das Geschäft. Jura 2006, p. 701; A. Kießlinger. Das Recht auf politische Chancengleichheit. 1998, p. 87 ff.

¹² M. Morlok (Note 1), p. 418 ff.

¹³ BVerfGE 8, p. 51 ff.

¹⁴ BVerfGE 111, p. 382 ff.

¹⁵ Consult K. Ewing. The Institution of the Political Party in the United Kingdom. – D. T. Tsatsos et al. (Note 3), Fourth Part: Party Financing: Controls and Sanctions.

¹⁶ See Montesquieu. De l'esprit des lois. 1748: "Le juge est la bouche qui prononce les paroles de la loi" Book XI, Chapter VI, 'De la Constitution d'Angleterre'.

competition of the political antagonists.^{*17} Normally the only remedy against such distortion is to appeal to the constitutional court, which in most legal systems is the only court vested with the powers to repeal a law passed by the parliament. Since the members of Parliament themselves usually are deeply involved participants in the political competition that Parliament was intended to regulate, the constitutional court occupies a central position in controlling the legislator.

4. Some comparative findings

This thesis according to which constitutional courts function as guardians of competition of political parties can be confirmed by a comparative look at the activity of constitutional courts in different countries, especially in the member states of the European Union.

4.1. Differences between countries

The findings from the various countries differ from each other as a result of different conditions of context. This goes without saying for countries that do not know a constitutional court. In those countries that do have such a court, its role is defined by its legal powers and its institutional design. But, of course, other factors, of a purely cultural and social nature, are of eminent importance too. One has to reckon with the history and tradition of each country and the political culture that has evolved from these. For long-established and stable democracies, such as the UK or the Netherlands, with deeply rooted traditions of an open and fairly balanced political competition, it may be viable to reduce juridical controls to a minimum.

Important constitutional court decisions that are closely related to the rules of political competition can be found in considering a number of countries, among them Germany, France, Spain, Hungary, Slovakia, Slovenia, the USA, and the Czech Republic.^{*18} Reportedly of lesser consequence with regard to the competition between political parties is the role of the constitutional court in Austria^{*19} and Lithuania.^{*20} The same holds true for Malta.^{*21}

4.2. Subjects of constitutional control

a) I now come to the various issues that have been the objects of constitutional court decisions. By way of summary, one could describe them as cases centred on the two great questions of the law of political competition — i.e., freedom of political activity and equality of the participants in that competition.

b) As far as **freedom** is concerned, the protection of political parties and candidates against being arbitrarily put at a disadvantage by the authorities is at the centre of jurisdictional attention. Obviously, opposition parties are more likely than others to become the target of repressive measures by state authorities, but that is not necessarily so, as, for example, Turkish history over the past two or three decades shows. In general, all political parties, their candidates, and their supporters profit from a special legal status at a constitutional level that ensures their freedom of action against such discriminatory measures.

c) This leads us to the core of the rules of political competition — namely, the principle of equality of opportunities. That principle has been expounded upon by the constitutional courts, thereby developing into different, subsidiary branches of law as follows.

The first of these areas is **electoral law**. Quite a few questions lie in the realm of electoral law, among them those related to gerrymandering, electoral thresholds, franchise, eligibility, and (of course) the financing of election campaigns.^{*22}

Furthermore, there is a specific field of **law of election campaigning**. Court decisions in the latter realm deal with the transmission times the political parties are given for their campaign advertisements by the broadcasting

¹⁷ Consult A. von Brünneck. *Verfassungsgerichtsbarkeit in den westlichen Demokratien*. Baden-Baden 1992, pp. 81–82.

¹⁸ Consult the various reports in D. T. Tsatsos et al. (Note 3); A. von Brünneck (Note 17), p. 80.

¹⁹ M. Stelzer. *Die Institution der politischen Partei in Österreich*. – D. T. Tsatsos et al. (Note 3), Second Part, section III, 4; H. Schäffer. *Landesbericht Österreich*. – C. Starck (ed.). *Grundgesetz und deutsche Verfassungsrechtsprechung im Spiegel ausländischer Verfassungsentwicklung*. 1990, p. 70.

²⁰ E. Sileikis. *Die Institution der politischen Partei in Litauen*. – D. T. Tsatsos et al. (Note 3), Fifth Part, section II.

²¹ H. Frendo. *Die Institution der politischen Partei in Malta*. – D. T. Tsatsos et al. (Note 3), Second Part, section II.

²² Consult the work of A. von Brünneck (Note 17), pp. 81–84.

stations and the parties' right to have these spots broadcast uncensored and unchanged.^{*23} Directly touching on constitutional questions are the issues of the government's right to influence public opinion via its public relations bodies during an election campaigning period.^{*24} Another problem that frequently arises is that of access to public facilities such as city halls and the like.^{*25}

Political party law deals specifically with political parties as organisations. First of all, one should name the freedom of founding a new party as a means of entering the political competition.^{*26} That freedom usually is guaranteed, but differing registration requirements may exist. The equality of opportunities of political parties forms, as I mentioned above, the core of the regulations on political competition.

Apart from that, the internal life of political parties is regulated as well. The paramount importance of parties for the political competition and the fact that this competition to a large extent takes place *within* the parties means that the internal proceedings of these organisations have to be seen to by the legislator and in consequence by the (constitutional) courts. The rules of internal competition must ensure that the internal life of political parties complies with the principle of democracy.^{*27} The focal point of these rules will be the process of nomination of candidates for public offices.^{*28}

Another area of focus is **political parties' financing**. As usual, questions concerning money are of utmost importance. That applies to both public and private financing of political parties.^{*29} In order to guarantee equality of opportunities, private financing has to be subject to regulation.^{*30} There are two main reasons for this. First, political parties with a well-to-do following (i.e., with financially stronger social interest groups behind them) are likely to obtain disproportionately great private financing. Second, the regulation of private financing is necessary to prevent particularly rich persons or interest groups from 'buying' a political party. Political power must come not from the briefcase but from the ballot box.

Yet it still must be considered that the control of the financial management of political parties by state authorities, like the Audit Office, is a sensitive question.^{*31}

Lastly, the **principle of protection of competition** itself has been developed, to an especially great extent by the Constitutional Court of the Czech Republic^{*32} and the Constitutional Court of the Slovak Republic.^{*33}

As a summary we can formulate a conclusion that — with all things taken together — there is well-developed jurisdiction of the constitutional courts in serving protection of the competition between political parties.

²³ An example is found BVerfGE 47, p. 225 ff.; for further material, see BVerfGE 67, p. 169 ff.; BVerfGE 69, p. 368.

²⁴ BVerfGE 44, p. 125.

²⁵ On this, see Bundesverfassungsgericht, Decision 2 BvR 447/07.

²⁶ Constitutional Court of the Republic of Slovenia, Decision No. Up-301/96 (1998) as cited by M. Cera, I. Lukšič. Die Institution der politischen Partei in Slowenien. – D. T. Tsatsos et al. (Note 3), First Part, section II.

²⁷ Consult Ústavný súd Slovenskej Republiky, Decision PL. ÚS 15/98 as cited by E. Bárány, L. Orosz (Note 3), Fourth Part, section I.

²⁸ Tribunal Constitucional (Constitutional Court of Spain), Decision STC 160/1989 as cited by J. M. P. Ramírez. Die Institution der politischen Partei im Königreich Spanien. – D. T. Tsatsos et al. (Note 3), Second Part, section A).

²⁹ Conseil constitutionnel (Constitutional Council of France), Decision No. 88-242 DC, 10.03.1988 as cited by M. Fromont. Landesbericht Frankreich. – C. Starck (ed.). Grundgesetz und deutsche Verfassungsrechtsprechung im Spiegel ausländischer Verfassungsentwicklung. 1990, p. 70.

³⁰ BVerfGE 8, p. 66.

³¹ Ústavní soud České republiky, Decision Pl. ÚS 26/94.

³² Ústavní soud České republiky, Decision Pl. ÚS 26/94: "In order for democratic state bodies to be created at all, they must be preceded by the free competition of autonomous political parties independent of the state, because it is only in the results of this competition that the political contours and dimensions of the state are formed. In this basic function, political parties move in a sort of foreground of the state, and therefore intervention by state bodies, whose composition is a product of this process, in the process itself is undesirable if it can politically affect the course of free competition of parties — e.g., by describing the actions of particular parties as uneconomical or unpurposeful" (translation of the Court).

³³ Ústavný súd Slovenskej Republiky, Decision PL. ÚS 15/98 as cited by E. Bárány, L. Orosz (Note 3), Fourth Part, section I.

5. Conclusions

5.1. Different legal options for the constitutional court in addressing political competition

a) Political competition, just as any other competition, needs a legal framework. This set of legal norms must be enforced by institutions of the state. The constitutional courts in quite a number of states do play an important role in carrying out this task.

The importance of constitutional courts in different countries depends on a range of factors. The stronger the constitutional safeguards against any infringements of political parties' rights, the greater the (potential) role constitutional courts may play in safeguarding equality of opportunities in the political competition.

The design of the relative procedural law is of great importance also. A constitutional court in a legal system that includes remedies via which the individual citizen may claim his constitutional rights usually plays a much more active role, also in matters of the political process.

b) Institutions have their own traditions that contribute to their attitudes. These attitudes of constitutional courts and their justices are also important for the measure and the way in which constitutional courts function as guardians of the political competition. For instance, the courts having a solid reputation may help them to take decisions against political groups that are in power.

There are good reasons for a constitutional court to take an attitude of self-restraint — in order to preserve wide discretion for the democratically elected parliament and not to put the court's decision in the place of decisions of Parliament. But in the field of political competition things are different. Here the actual majority might be tempted to modify the legal framework of the competition — the terms of competition, as it were — in the direction of a more favourable pattern for their own party or parties. In relation to this danger it becomes obvious that one pivotal task of a constitutional court consists in safeguarding political competition. This constellation brings about good reasons for an attitude of judicial activism — because there are no other means to be applied against distortion of competition by the legislative majority.

5.2. A new frontier for defending democracy

Typically, rights to democratic participation are endangered by an authoritarian or undemocratic state. Under such circumstances, the law and the courts have to defend the citizens' rights. In well-functioning democracies, another problem is more prominent: minority rights have to be defended against the majority that has the power to create or change the law. The defence of fair rules of political competition against the democratic legislator is the main task of constitutional courts within a democratic system.^{*34}

5.3. Conditions for the justification of unequal treatment

A necessarily superficial overview of the jurisdiction of constitutional courts seems to confirm a tendency toward stricter standards of judgement as far as the protection of equality of political opportunities is concerned. Any deviations from the principle of equality of the political competition seem to be much harder to justify than, for example, encroachments on economic rights such as property rights or the free choice and practice of one's profession.^{*35}

5.4. Law and the standards of political culture

The law is not the only factor determining human behaviour. Purely social norms, traditions, and personal convictions are at least equally important. We can therefore observe that in old and long-established democracies law has a much lesser role in protecting the democratic process than in younger democracies, especially in countries with an undemocratic or even totalitarian history. So it came to pass that Germany after 1945 emphasised legal instruments very strongly to protect the newly established democratic system. A similar phenomenon can be observed in other states.

At the same time, there is a contrary or rather a converging tendency. The UK as the classical democratic and parliamentary state, one that traditionally did not rely much on legal instruments to protect its political

³⁴ A. von Brünneck (Note 17), pp. 88–89.

³⁵ *Ibid.*, p. 88.

system, has done so increasingly in recent years. New laws have been enacted to protect competition among political parties. Regulations concerning political finances come to mind.^{*36} Legal guarantees for the freedom and equality of the political competition seem to be indispensable.

However, to become effective, these legal norms must be transformed into and accepted as social norms that determine individual and collective behaviour. This leads to a new aspect for consideration: the regulations concerning political competition may initiate an improvement and further refinement of the standards of political culture. The rulings of constitutional courts may thus serve as catalysts for such development.

³⁶ Consult K. Ewing (Note 15), Third Part: The Financing of Political Parties.