Comparative Gatekeeper Provisions in Party and Electoral Law: Sustaining the Cartel?

Anika Gauja

Department of Government and International Relations

University of Sydney

anika.gauja@sydney.edu.au

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Comparative Gatekeeper Provisions in Party and Electoral Law: Sustaining the Cartel?[1]

Abstract: *This paper presents a comparative analysis of the legal regulation of political parties as competitors in, and as new entrants to, the electoral contest. The paper focuses on laws that regulate both ballot access and the registration of political parties as 'official' electoral actors. It explores the ways in which these laws are used as 'gatekeeper' provisions to control the degree of party competition in any given electoral system, and how specific laws (although applying equally to all parties) might privilege some parties (for example, incumbents) over others. The paper does not address the design of electoral systems, but rather ancillary provisions such as the minimum number of members required to register a party, levels of public support needed to gain ballot access and other structural requirements (for example, accounting rules) that political parties must provide for before they may contest elections. On a theoretical level, the paper explores the justifications for the regulation of party competition and whether such laws may contribute to the creation and maintenance of political cartels, and the role of the courts in this process. The paper examines the regulation of parties in Australia, Canada, New Zealand, the UK and the US.*

Introduction

The legal (or state) regulation of political parties is gathering sustained interest from comparative party scholars, as it is increasingly being acknowledged that the institutional regulatory environment within which political parties operate is an important determinant of both their structure and behaviour (see for example, Orr 2010; van Biezen 2008; Karvonen 2007; Gauja 2008; Janda 2005; Casas-Zamora 2005). Party politics is played out within a set of rules, which, although changeable, influence parties conduct. Of these rules, legal regulations are the most direct form of state intervention in party politics, requiring parties to fulfil conditions that relate to the content and form of their organizations, in addition to indirectly influencing parties' priorities through the design of electoral systems.

How party scholars conceive the institutional regulatory environment within which political parties operate is also expanding, from early studies of the political consequences of electoral laws, to the parameters set by political finance regulation, to constitutional, administrative and judicial regulation. In this paper I continue the approach of conceptualizing party regulation from a wider perspective, drawing not only on what may be described as the body of party law (which may or may not exist as a coherent set of regulations in any given democracy), but also electoral,

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administrative, associational and corporate legislation as well as norms of regulation (or precedents) created by the judicial interpretation of these statutes.

The focus of this paper is the laws that regulate ballot access and the registration of political parties as 'official' electoral actors in five liberal democracies based on the common law legal tradition: Australia, Canada, New Zealand, the United Kingdom and the United States. The paper explores the ways in which these laws are used as 'gatekeeper' provisions to control the degree of party competition in each system, and how specific laws (although applying equally to all parties at face value) might privilege some parties (for example, incumbents) over others. The paper does not address the design of electoral systems or finance regulations, but rather ancillary provisions such as the minimum number of members required to register a political party, levels of public support needed to gain ballot access and other such criteria that political parties must fulfill before they can contest elections. On a theoretical level, the paper explores the legal justifications for the regulation of party competition, whether such laws might in fact contribute to the creation and maintenance of political cartels, and how the judiciary (through its interpretation and adjudication of gatekeeper provisions) balances the competing considerations that lie behind party competition and the relationship between political parties and the state.

The first part of the paper presents a discussion of some of the theoretical considerations in the debate: the relationship between politics and the law, the public/private dichotomy and the normative character of legal regulation. The second surveys the requirements for registration and ballot access in each of the five democracies and analyses how they burden parties, and in turn, could be said to benefit incumbents and sustain party cartels. The final section of the paper considers the judicial interpretation of these regulations, and in so doing analyses the role that courts play in shaping the contours of party competition based on constitutional freedoms, effective elections and governance, and particular normative conceptions of the role of political parties in modern societies.

The legal regulation of political parties and the cartel party thesis

Political parties are particularly fascinating to explore as subjects of legal regulation not only because of their importance in the functioning of representative democracy, but their unique adaptive and fluid characteristics. Parties are constantly evolving in their organizational forms, they are multi-leveled and multi-layered institutions with several centers of power and by their very nature as aggregators of citizen opinion they embody significant disagreements between and within members, supporters and party activists. With this in mind, when it comes to analyzing the legal regulation of political parties it is appropriate to adopt a theoretical perspective that acknowledges that the regulation of political parties through the public law is inherently connected to lawmakers' own normative visions of representative democracy and the place of parties within it. Who the lawmakers are then becomes a key consideration. As lawmakers within the legislative arena are typically also party members, these normative visions might also embody a particular regard for partisan interests.

The factors that make the analysis of the legal regulation of political parties so interesting – parties' organizational dynamism, the inherently normative underpinnings of party law, and the conflict of interest that arises when legislators are

also partisans – intersect closely with the theoretical and empirical comparative party scholarship on the relationship between political parties and the state, and in particular the cartel party thesis.

For almost all of the twentieth century, it was taken for granted that political parties had their base in civil society and in this respect were 'private organizations', or more accurately – organizations that did not form part of the state apparatus. However, since the mid 1990s, Katz and Mair's 'cartel party' thesis (2009; 1995) has provided one of the main catalysts for re-examining the relationship between political parties and the state. The main argument these authors make is that amidst a climate of growing public disengagement with conventional political institutions and weakening partisan attachments, in order to ensure their long-term survival political parties (traditionally characterized as mass or popular associations with strong links to civil society) have become increasingly dependent on the state to provide material resources and legitimacy in lieu of those once provided by civil society. Driving this fundamental organizational shift is the 'ascendancy of the party in public office' over the other two faces of the party organization, the party on the ground and the party in central office (Katz and Mair 2002; 1993). This dynamic in the relationship between the faces of the party stems from a combination of factors: the increasing financial resources associated with public office, the location of party staff and the centralization and professionalization of electoral campaigning. The cartel thesis sits alongside a more generalist political science scholarship that sees political parties becoming, more and more, organs of the state and less of civil society (see for example Epstein 1986, 157; van Biezen 2004, 705).

The public/private dichotomy is particularly important in terms of state regulation as the distinction goes to the fundamental question of whether or not such regulation is desirable, the extent to which the state and the public law should intervene in the activities of political parties, and which of these activities it should regulate. If we categorize political parties as public organizations, regulating both their internal activities and the way in which they compete for political power may be normatively desirable, perhaps in order to implement particular democratic principles (for example, intra-party democracy) or outcomes (for example, gender or minority group quotas in candidate selection contests). If political parties are characterized as private bodies, state regulation (especially measures relating to candidate selection and the application of anti-discrimination law to such processes) may be seen as an undesirable intrusion upon the autonomy of these independent political entities and an unnecessary interference with the political expression of citizens.

As noted, one interesting yet potentially problematic aspect of the legal regulation of parties is that the design of electoral systems and the legislation governing their conduct is initiated, debated and implemented by the parties themselves. Hence, there is opportunity for governing parties to reinforce pre-existing patterns of dominance, or to privilege their own positions in the design of particular legal regimes. In recent years, studies of party organization (and in particular varying interpretations of the cartel party thesis – see Smith and O'Mahony 2006, 95) have been concerned with this possibility, and it has also been noted by legal scholars (Feasby 2007; Geddis 2007a, 20; Carothers 2006, 194; Pildes 2004). As Carothers (2006, 194) argues, we need to be circumspect of both the underlying rationale and the potential consequences of electoral legislation:

> Even when changes in party law are the cooperative project of all of the main political parties in a country, both those in government and the opposition, some part of the underlying motivation may not be democracy strengthening, no matter how the project is billed.

In other cases, legislation that is enacted may reflect or favor, more blatantly, the interests of the governing party, or privilege the interests of those parties currently represented in the legislature.

The key questions which then arise are (1) whether these regulations contribute to, or sustain, the development of cartel parties and party systems, which are 'characterized by the interpenetration of party and the state and by a tendency towards inter-party collusion' and by 'the structuring of institutions such as…ballot access requirements…in ways that disadvantage challengers from outside' (Katz and Mair 2009, 755, 759); (2) is it possible to measure or observe this objectively; (3) can we distinguish between legal regimes that have the legitimate aim of regulating party competition to avoid an infinite number of parties, and those that create or sustain the necessary conditions for cartel parties; and finally (4) what implications (both normative and practical) does this have for the legal regulation of parties and electoral competition?

Nevertheless, despite recognizing the partisan and office-seeking motivations of the key actors involved in the process of formulating electoral law, viewing the legal regulation of elections and political parties from a 'rational choice, interest-group analysis misses an important aspect of what is involved' (Geddis 2007, 20). Not least is the fact that electoral law is arbitrated and interpreted by the courts, which in their own right become important political actors. This has been readily acknowledged in the context of American legal scholarship, where the political nature of the courts is critically debated. Persily and Cain note that reading the case law on political parties that has emerged from the US courts reveals 'unforseeable results', which can more satisfactorily be explained by the 'worldview that judges and lawyers bring to these cases and particularly their differing philosophies as to the function political parties play in American democracy' rather than adherence to or reconciliation with existing precedent (2000, 777). Similarly, in cases involving democratic issues Pildes (2004, 126) observes that the US Supreme Court has 'acted out of concern that judicial review is needed to ensure that democracy remains stable, orderly, and properly restrained'. These concerns reflect the 'implicit visions of democracy with which all judges must necessarily work: visions that reflect empirical assumptions, historical interpretations, and inherited understandings of democracy. Cultural sensibilities of this sort inevitably inform and influence how judges approach any specific case'.

Hence the decisions of the courts in cases concerning political parties bring the normative views of the judiciary as to the place and function of political parties in representative democracies to the table. In this paper I illustrate the role of the courts in either upholding or invalidating laws that establish barriers of access to the electoral contest in contrasting two decisions – that of the Canadian Supreme Court in *Figueroa* (pertaining to the requirement that a party field a minimum number of candidates) and the Australian High Court in *Mulholland* (that a party have a minimum number of members). In relation to the cartel party thesis I examine whether the decisions of the courts in these cases might sustain or provide protection against the development of a party cartel.

Controlling Access to Elections: Why is it Necessary to Have Gatekeeper Provisions?

While there is a crucial formal distinction between the freedom of citizens to associate and form a political party, and the requirement to register it; the harsh reality of electoral competition in the current climate is that party registration is almost essential to contesting public elections. If the ultimate aim of a political party is to contest public office (a definition agreed upon by both legislators and political scientists alike); then registration is necessarily tied up with the effective ability to associate to pursue an organization's aims and ideological principles. Therefore, despite the constitutional freedom of citizens to associate, there remains a fundamental normative question regarding the ability and ease with which new competitors and political parties should be able to enter the electoral arena. As Müller and Sieberer (2006, 437) argue, there are two issues that must be considered in this debate: the need for effective and open electoral competition (achieved by placing relatively few restrictions on the freedom of the electoral marketplace), traded off against the potential problem of the fragmentation of the party system and its consequent inability to coherently structure issues and interests.

Placing registration requirements on political parties in order to contest elections is one legal mechanism by which the state can attempt to control the effective number of parties that participate in elections. It is these provisions that I term *gatekeeper provisions.* A higher registration threshold, which for example could be achieved by placing a minimum membership requirement upon parties or the lodgment of a deposit, might be expected to reduce the number of competitors, whereas a lower threshold would potentially see more political parties enter into the electoral contest. Another means by which the number of competing political parties can be controlled is through the nature of the voting system that is adopted in any given election, and there is a vast literature that analyses this.[2]

Why should the state seek to impose requirements for registration that may reduce electoral competition? Intuitively, unrestricted competition between political parties may seem desirable for democracy. However, an atomized party system (with a large number of smaller parties) would likely result in government instability and 'insufficient political problem-solving capacity' (Müller and Sieberer 2006, 437) as there is no incentive for individuals and smaller parties to seek collective solutions, aggregate multiple opinions and organize on a larger scale. Müller and Sieberer also argue that given the infrequency of elections and the fact that citizens will only have limited opportunities to vote during their lifetime, 'eliminating 'loony' parties or candidates and forcing the others to demonstrate some level of support before they are allowed to contest elections is legitimate and beneficial to voters' (2006, 437). For these authors, the law cannot guarantee an 'optimal', or correct number of parties, but it can be used as a tool with which to cut back excessive supply. However, the same questions arise again: is it possible to distinguish this argument from the cartel thesis? How can we ascertain or measure the difference between legal requirements and

[2] For an overview of the main debates in a comparative context see Gallagher and Mitchell (2005); Norris (2004); Blais and Massicotte (2002).

regulations that seek to legitimately enforce an optimal number of political parties, and the motivations behind cartelization and collusion?

The Requirements of Registration

Regardless of whether or not regulating the effective number of political parties contesting elections is viewed as normatively desirable, all the democracies surveyed in this research impose some registration requirements upon political parties, although there is variation between them. However, as a general point of comparison, the requirements that a party must meet in order to be registered are an important determinant of the ease of entry into the political system, and the structure of party competition within a democracy.

In Australia, parties registered for the receipt of public funding under the *Commonwealth Electoral Act* 1918 (Cth) must be established on the basis of a written constitution, have a minimum of 500 financial members or one Member of Parliament, and are required to submit an annual disclosure of the sources of party funding. The benefits of registration include the use of the party name beside individual candidates on ballot papers, public funding provided that the party's endorsed candidates poll at least four per cent of the primary vote, and a copy of the Electoral Roll containing the postal contact details of all enrolled electors, which parties can make use of for campaigning purposes.[3] Although registered political parties require a formal written constitution under the provisions of the *Commonwealth Electoral Act*, the structure and content of the party constitution (including the terms and conditions of membership and intra-party decision making) are essentially regarded as internal matters for individual political parties to determine.

The situation is similar in the United Kingdom. Under the *Political Parties, Elections and Referendums Act* 2000 (UK), party registration is not compulsory, but is open to any party that declares its intention of contesting one or more elections (see Bradley and Ewing 2003, 155-8). Under the current regime, only candidates representing a registered party may be nominated for election; other candidates must be nominated as independents or without description.[4] Although a party must provide details of its financial structure and a copy of its constitution upon registration, again, there are no formal requirements as to what it should contain. Those wishing to register either a political or minor party in the United Kingdom must pay a lodgment fee of £150.

In an application for registration under the *Canada Elections Act* 2000, a political party must provide the details of its leader, party officers, agent and auditor. It must also provide the names, addresses and signatures of 250 electors and their declarations in the prescribed form that they are members of the party and support the party's application for registration.[5] Finally, the party must also submit a declaration from its

[3] *Commonwealth Electoral Legislation Amendment Act* 1983 (Cth).
[4] *Political Parties, Elections and Referendums Act* 2000 (UK) ss 22, 28. This provision was inserted to overcome the problem of candidates adopting similar names to the parties to confuse electors. For example, in one instance a candidate stood as a Liberal Democrat (*Sanders v Chichester* (1994) SJ 225).
[5] *Canada Elections Act* 2000, ss 366, 380.

leader that one of its fundamental purposes is to participate in public affairs by endorsing one or more of its members as candidates and supporting their election.

Under Part 4 the *Electoral Act* 1993 (NZ), a political party must register with the New Zealand Electoral Commission before it can contest the party vote at general elections under the MMP system.[6] New Zealand is the only democracy of those surveyed that requires a party to formulate and provide a copy of the party membership rules upon registration that show what is required for current financial membership and that detail candidate selection rules that provide for the democratic involvement of members in the process.[7] The party rules and candidate selection procedures then become a public document available for inspection and displayed on the Elections New Zealand website, thereby encouraging transparency in internal management. In addition, the *Electoral Act* also imposes a minimum membership threshold of 500.

Table 1: Requirements for Party Registration in Australia, Canada, New Zealand and the United Kingdom

State	**Rules/constitution**	**Minimum Membership**	**Registration fee**	**MPs**	**Minimum Candidates**	**Financial/Accounting**
Australia	Yes (no detail)	500	$500	Yes	No	Yes
Canada	No	250	No	No	Yes	Yes
New Zealand	Yes (detail)	500	No	No	No	Yes
United Kingdom	Yes (no detail)	No	£150	No	No	Yes

Table 1 summarizes the requirements for party registration in the four Westminster-style democracies. They all require their registered parties to provide detail of or implement certain financial/accounting arrangements (for example, audits) and all but Canada require a political party to be established on the basis of written rules or a constitution. However, the detail of the governance arrangements is left for the party to determine. Only the United Kingdom does not require a minimum number of members of its registered parties – all other democracies require some measure of popular support, whether this be a membership threshold, minimum number of candidates (Canada) or, in lieu of a membership, a current parliamentarian (Australia).

Unlike the other democracies analyzed in this research, the United States has no truly 'national' system of elections, with congressional elections better thought of as state events that are run simultaneously (Katz 2007, 59). Consequently, within constitutional limitations, each state is free to choose its own electoral system, party registration regime and ballot access laws. The registration and official recognition 'or qualification' of political parties is inherently connected to the act of participating in elections and the popular support gained at the polls. However, there is considerable variation in the registration requirements in each of the States. For example, in California a political party must have polled at least 2 per cent to retain their place on

[6] *Electoral Act* 1993 (NZ), ss 62-71B.
[7] *Electoral Act* 1993 (NZ) s 71.

the ballot paper, or in the lead up to an election, one per cent of registered voters must have declared their affiliation with that particular political party. A new party can also qualify for ballot access by petition, in which case the signatures of ten percent of registered voters are required.[8] In other states, political parties must gather a minimum number of signatures of support, which can range from 1,000 (Colorado) to 50,000 (New York). Many states also declare or confirm the status of political party *retrospectively* based on previous election performance.

Registration imposes annual reporting obligations upon a political party, but also brings benefits that are commonly seen as indicators of cartelization. For registered parties in all the democracies surveyed, the name of the party can appear alongside the candidate's name on the ballot paper,[9] and registered parties are usually given access to electoral rolls for campaigning purposes.[10] More importantly are the financial benefits that accrue to registered parties. Canada and Australia introduced public subsidies to underwrite election costs and limitations on expenditure relatively early: Canada in 1974 and Australia in 1984. In Canada, a registered party is entitled to free broadcast time, the right to purchase reserved broadcast time, the right to the partial reimbursement of election expenses subject to receiving a certain percentage of the vote, the right of a candidate to transfer unspent election funds to the party (rather than returning them to the government),[11] and lastly, the right to issue tax receipts for donations received outside the election period.[12] New Zealand and the UK do not provide for the direct public funding of parties' election expenses,[13] although a system of party registration and financial regulation was introduced in New Zealand in 1993 and the UK in 1998. Hence the incentives for political parties to register with their respective electoral authority are significant, and arguably begin to blur the line between association, formation of a political entity and its registration. In what is a unique provision amongst comparable common law liberal democracies, registered political parties in the UK are eligible for policy development grants from the Electoral Commission, with a total pool of £2 million each year to be divided among eligible registered parties.[14] In order to be eligible for this financial support, political parties must have gained parliamentary representation.

A few interesting observations can be made with respect to these provisions and the cartel party thesis. All these regulations were introduced from the 1970s onwards, the period that it thought to correspond with the development of the cartel party system. For the most part, they link with tangible benefits (such as public funding) that are provided by the state, and which for the most part, benefit incumbents and parties with existing parliamentary representation – see Young and Tham 2006). Not all were introduced with bipartisan support (for example, the Australian and Canadian systems of public funding – see Gauja 2010), yet the fact that they have not been repealed by opposition parties indicates a level of acquiescence that is consistent with the expectations of the cartel party theory. There is also a significant discrepancy in all of

[8] California Elections Code, Division 5, section 5100.
[9] See for example *Canada Elections Act* s. 100; *Commonwealth Electoral Act* 1918 s 214(1),(2).
[10] *Commonwealth Electoral Act* 1918 s 90B.
[11] *Elections Act*, s. 232.
[12] Provided for in s. 127(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp).
[13] Nonetheless, the state provides other important benefits that amount to significant subsidies such as free postage to candidates, tax credits and broadcasting time.
[14] *Political Parties, Elections and Referendums Act* 2000 (UK) s 12. This provision is discussed further in Chapter 8, 'The Public Funding of Election Campaigns'.

the regulatory regimes surveyed between the internal and the external – whereas the law is quick to establish certain thresholds for participation and legislate for the activities of parties in elections, it is more reluctant to explicitly control the internal activities and structure of political parties, leaving parties free to adopt whatever organizational form they see fit.

A Peculiar Case Study: Parliamentary Parties as the Basis for Registration

The principle behind registration is that a political party needs to demonstrate sufficient levels of popular support to be recognized as a qualified or 'official' electoral actor. This can be demonstrated in several ways, such as previous electoral performance, a minimum number of members or candidates, minimum fundraising efforts or a threshold level of voters pledging support or petitioning for the registration of a particular political party. Australia has a unique provision amongst the democracies analyzed in this research, which enables a political party to be registered if it has one parliamentarian present in either house of the federal parliament.[15] Prior to the *Commonwealth Electoral Amendment Act (No 1)* 2000, political parties could also be registered federally on the basis of representation in one Australian State or Territory.

At first glance, it is plausible that a political party that has had one of its members elected to parliament would by virtue of that fact, have demonstrated significant levels of public support. However, the provisions of the Act do not exclude parliamentarians resigning from the political party under which they were first elected to parliament to begin another. For example, this occurred in the Australian State of New South Wales when upper house MP Franca Arena left the Labor Party and after sitting as an Independent, created the Franca Arena Child Safety Alliance. The Alliance polled just 0.4 per cent of the popular vote at the 1999 election. Second, under the electoral system that is used to elect Senators to the Australian Senate (the upper house of the Australian parliament) – a variant of proportional representation – it is possible for Senators to be elected with a very small percentage of the popular vote. The reforms to the *Commonwealth Electoral Act* enacted in 2000 that removed the ability of members of a State or Territory parliament to register a political party federally were, in part, motivated by the desire to stop former One Nation leaders from registering 'sloganistic' parties with the Commonwealth Electoral Commission. Concerns were expressed that these political parties, registered without popular support, could have been used to channel voters' preferences to other parties, or to earn a profit for their leaders through the public funding scheme if more than four per cent of the vote was achieved (Orr 2000, 43). The motivations for these reforms could be interpreted in two ways: to encourage legitimate political competition, or conversely, to create barriers to the entry of challenger parties.

Therefore, the definition of a 'parliamentary party' for the purposes of party registration under the *Commonwealth Electoral Act* 1918 is very expansive and arguably allows the registration of parties (or more accurately individuals) that have not necessarily demonstrated significant levels of public support. Indeed, the opposite situation exists in New Zealand, where the House of Representatives introduced the requirement that a new party must first register with the Electoral Commission before

[15] *Commonwealth Electoral Act 1918* (Australia), s 123.

it is able to receive parliamentary recognition as a parliamentary party (Standing Order 34(2)(b); see Joseph 2007, 352). Recently the Australian Government's Green Paper on Electoral Reform, in light of a submission made by the Democratic Audit of Australia, has suggested that the *Electoral Act* be amended to disallow parliamentarians who have resigned from the party under which they were elected to use this opportunity to create and register a new party (Australian Government 2009, 120).

What does this case study demonstrate with respect to the cartel party thesis? First, it highlights the difficulty of judging motivations for legislative actions – are electoral laws enacted to fashion a 'legitimate' system of political competition, or to sustain existing cartels and privilege incumbents? One the one hand, the registration provisions challenges the cartel thesis by illustrating the ease by which some new parties can be created and immediately access the resources associated with parliamentary representation. However, on the other hand this opportunity is restricted to individuals who have already been elected to public office.

Challenging gatekeeper provisions in the courts: protection against the cartel?

Given the importance of the financial and other benefits given to political parties through registration it is imperative to appreciate the practical consequences of the eligibility requirements for registration. The registration requirements of a minimum number of members and a declaration to contest elections impose 'gatekeeper provisions' upon the electoral process in that only groups meeting threshold requirements may participate fully in elections. In this section of the paper I examine how the courts' interpretation of gatekeeper provisions shapes the character of party competition in a democracy, and in doing so either fosters or hinders the development of the cartel party system.

Case Study 1: A Minimum Number of Candidates – Canadian Courts Breaking up the Cartel?

Until 2003, the *Canada Elections Act* required a political party to run candidates in at least 50 electoral districts in order to qualify for party registration, thereby imposing an additional threshold requirement not seen in any other common law liberal democracies. This provision was struck down by the Canadian Supreme Court in *Figueroa v. Canada (Attorney General)* [2003] I S.C.R. 912 (hereinafter *Figueroa*) as violating section 3 of the *Canadian Charter of Rights and Freedoms*, which provides for 'the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein'. The action seeking a declaration of unconstitutionality was brought against the Attorney General by Miguel Figueroa, who was at that time the leader of the Communist Party of Canada. The Communist Party was founded in 1921 and had been registered as a political party under the *Canada Elections Act* since party registration began in 1974. In the 1993 federal general election the party lost its registered status and the associated benefits when it failed to field 50 candidates. Consequently, the party was forced to liquidate its assets, pay its debts and remit the outstanding balance to the Chief Electoral Officer.

The Court held the requirement that parties field 50 candidates in a general election to be eligible for the benefits of registration was too restrictive and not reasonably and demonstrably justifiable in a free and democratic society (Forcese and Freeman 2005, 90).[16] In defending the legislation, the Attorney General of Canada submitted that the objective of the threshold was to 'enhance the effectiveness of Canadian elections, in both their process and outcome', and to advance three separate goals. First, to improve the effectiveness of the electoral process through the public financing of political parties. Second, to protect the integrity of the electoral financing regime. Third, to ensure that the process is able to deliver a viable outcome for the Canadian form of responsible government.

In holding the 50 candidate threshold set by the *Elections Act* unconstitutional, the Court emphasized the importance of political parties in the Canadian system of democracy:

> Political parties enhance the meaningfulness of individual participation in the electoral process for reasons that transcend their capacity (or lack thereof) to participate in the governance of the country subsequent to an election. Irrespective of their capacity to influence the outcome of an election, political parties act as both a vehicle and an outlet for the meaningful participation of individual citizens in the electoral process.[17]

In making its judgment, the Supreme Court constructed a particular vision of political parties, how they fit into the Canadian form of democratic politics, and how they provide for 'effective representation' as guaranteed by section 3 of the *Charter*.[18] The Court rejected the view that parties that provide 'effective representation' are only those that possess the capacity to aggregate interests on a national level and can participate in the governance of a country subsequent to an election. Rather, parties (large or small) that allow citizens to 'play a meaningful role in the electoral process' through participation in party activities and the dissemination of a broad range of ideas and opinions should not be precluded from the benefits of registration under the *Electoral Act*.[19] The Court noted that:

> All political parties, whether large or small, are capable of acting as a vehicle for the participation of individual citizens in the public discourse that animates the determination of social policy. For example, marginal or regional parties tend to dissent from mainstream thinking and to bring to the attention of the general public issues and concerns that have not been adopted by national parties. They might exert less influence than the national parties, but still can be a most effective vehicle for the participation of citizens whose preferences have not been incorporated into the political platforms of national parties. It is better that an individual citizen have his or her ideas and concerns introduced into the

[16] In order to justify the infringement of a *Charter* right under s. 1, the government must demonstrate that (1) the object of the legislation is sufficiently substantial and pressing to warrant violation of a right; and (2) the infringement is proportionate.
[17] *Figueroa v. Canada* [2003] I S.C.R. 912, at para. 39.
[18] *Figueroa*, at para. 21; *Reference re Provincial Electoral Boundaries (Sask.)* [1991] 2 S.C.R. 158 ('Saskatchewan Reference'); *Haig v. Canada* [1993] 2 S.C.R. 995; *Harvey v. New Brunswick (Attorney General)* [1996] 2 S.C.R. 876; *Thompson Newspapers Co. v Canada (Attorney General)* [1998] 1 S.C.R. 877.
[19] *Figueroa*, at paras 28, 40, 41.

> open debate of the electoral process by a political party with a limited geographical base of support than not to have his or her ideas and concerns introduced into that debate by any political party at all.[20]

Therefore, in the Supreme Court's view, the function of political parties as the means by which policy preferences are expressed is of just a great value and importance as their ability to win seats in general elections. Irrespective of the outcome of an election, a vote for a political party or candidate is not merely about the selection of parliamentary representatives, but is also an expression of support for a particular policy approach or platform. The Court also noted the importance of regional political parties and the fundamental role they played in representing the opinions of citizens along geographic lines in a federated nation, and found that the 50 candidate rule conflicted with the principle of regional representation because of its disparate impact on different provinces and the regions of the country.[21] More importantly, the court's conception of party competition and policy difference appears to be at odds with the characteristics of the cartel model.

The Supreme Court suspended its judgment for 12 months, enabling parliament to re-examine and legislate again on the issue. However, it failed to do so until just before the June 2004 election, rushing through legislation that merely required parties to run one or more candidate(s) in a single electoral district, and maintaining the requirement that political parties have a minimum number of members, although this was increased from 100 to 250.[22] Both the government and opposition parties supported the bill in principle, and it was passed by both Houses on 13 May 2004 – only three months after it had been introduced into parliament. The thresholds for registration (one candidate and 250 members) set by *An Act to Amend the Canada Elections Act and the Income Tax Act* S.C. 2004, c.24 remain in force today and have not yet been revisited in parliamentary debate or challenged in the courts.

It is unclear from the Supreme Court's judgment in *Figueroa* whether the candidate threshold needs to be as low as one. The majority decision appears to indicate that a court would be suspicious of any attempt to increase the threshold (Forcese and Freeman 2005, 91): it 'may well be that the government will be able to advance other objectives that justify a 12 candidate threshold. But suffice it to say, the objectives advanced do not justify a threshold requirement of any sort, let alone a 50-candidate threshold'.[23] However, Justices Gonthier, LeBel and Deschamps were more sympathetic in their concurring judgment towards the idea of a threshold set above a single candidate, arguing that 'a requirement of nominating at least one candidate, and perhaps more, in order to qualify for registration as a party would not raise any serious constitutional concerns'.[24] In making this argument, they acknowledged the possibility that groups or individuals could potentially abuse the party registration regime. Even though

[20] *Figueroa*, at paras 41-42.
[21] *Figueroa*, at paras 162-169, 174.
[22] *Elections Act* ss 366, 370 and 385. The requirement that parties have a minimum of 250 members was amended by cl. 3(3) of Bill C-3*: An Act to Amend the Canada Elections Act and the Income Tax Act* (2004).
[23] *Figueroa*, at para 92.
[24] *Figueroa*, at para 149.

> Many of the registration benefits are virtually meaningless outside the context of electoral competition…some, such as tax credits to contributors, could be attractive to groups that do not seriously intend to compete in elections. Making them available to such groups as well as genuine parties could undermine the purposes of the registration scheme...Nominating candidates and competing in the electoral process is fundamental to the nature of parties as opposed to other kinds of political associations, such as interest groups.[25]

Commentators (for example, Forcese and Freeman 2005, 91-2) have expressed concern that the low registration threshold could make it easier for interest groups to form into political parties to gain the financial benefits offered under the *Elections Act*, and in order to circumvent the caps currently in place to restrict third party advertising expenditures.

In their concurring judgment, Justices Gonthier, LeBel and Deschamps highlighted what they saw as another important consideration in the formulation of electoral gatekeeper provisions: the need to balance the right of each citizen to play a meaningful role in the electoral process against other democratic values, for example the aggregation of political preferences and the promotion of cohesiveness over factionalism.[26] In suggesting this balancing exercise, LeBel J looked to the form of the current electoral system as reflecting the prevailing majoritarian political values in society; 'because our FPTP electoral system is one of Canada's core political institutions, it is reasonable to conclude that this virtue remains consistent with certain values of our democratic culture'.[27] Consequently, Justice LeBel concluded that political aggregation as a core democratic value should be taken into account when determining the meaning of 'effective representation' under s. 3 of the *Charter* and the constitutional limits that this provision sets upon electoral choices open to the government.[28]

Looking back to the context within which the 50 candidate threshold was adopted, the Lortie Commission regarded a breadth of appeal and a high level of commitment to participate in the electoral contest as two of the main indicators of a party suitable for registration:

> A political party that nominates candidates in 50 constituencies would demonstrate serious intent to engage in the rigors of electoral competition at a level that indicates relatively broad appeal for its program and ideas. Moreover, experience since 1974 shows that this level is neither unduly onerous nor too lenient for registration. We believe that this threshold should continue to serve as a benchmark in determining which parties may be registered under the *Canada Elections Act*.[29]

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[25] *Figueroa*, at para 148.
[26] *Figueroa* per LeBel J at para. 151. However, see the contrary view of the majority judgment, paras. 36 and 37.
[27] *Figueroa*, at para. 157.
[28] *Figueroa*, at para. 159.
[29] Canada. Royal Commission on Electoral Reform and Party Financing. *Reforming Electoral Democracy: Final Report*, vol 1. Ottawa: The Commission, 1991. Vol. 1 at p. 249.

Nevertheless, this deference to mainstream and majoritarian values as expressed by the structure and operation of the current electoral process was rejected by Justice Iacobucci (writing the majority judgment):

> …the fact that our current electoral system reflects certain political values does not mean that those values are embedded in the *Charter*, or that it is appropriate to balance those values against the right of each citizen to play a meaningful role in the electoral process. After all, the *Charter* is entirely neutral as to the type of electoral system in which the right to vote or to run for office is to be exercised. This suggests that the purpose of s. 3 is not to protect the values or objectives that might be embedded in our current electoral system, but, rather, to protect the right of each citizen to play a meaningful role in the electoral process, whatever that process might be.[30]

Justice Iacobucci's rejection of the argument that thresholds are appropriate because they reflect the status quo, and his return to the values of the *Charter* indicates that the courts might indeed be willing to invalidate legislative provisions inconsistent with their conception of electoral competition and meaningful participation. In this way, the courts could also provide a potential safeguard against cartelization if such provisions were found to benefit incumbents and established parties to the extent of hindering the participation of citizens in the electoral process.

Case Study 2: A minimum number of members – Australian Courts Aiding the Cartel?

The Australian requirement that a political party have at least 500 financial members for the purposes of registration was challenged by the Democratic Labor Party (DLP) in the High Court in *Mulholland v Australian Electoral Commission* [2004] HCA 41 (hereinafter *Mulholland*). The DLP faced deregistration on the grounds that it could not prove that it had 500 current financial members to the Australian Electoral Commission. Originally, the regulatory scheme was adopted following a report of the Joint Select Committee on Electoral Reform, delivered in September 1983. The report recommended that a system of public funding for election campaigns necessitated the registration of political parties, the adoption of a list system for Senate elections, and the printing of the political affiliation of candidates on ballot papers,[31] which was designed to 'assist voters in casting their vote in accordance with their intentions'.[32] The membership threshold of 500 was agreed upon after lengthy discussions, although the Committee's exact reasons for selecting this figure are not known.[33]

Unlike the Canadian Supreme Court's approach in *Figueroa* with respect to fielding a minimum number of candidates in an election, the High Court of Australia held that the '500 rule' did not infringe the Australian constitutional requirement of direct choice in elections. A common theme emphasized by the majority of the Court in *Mulholland* was the flexibility of these constitutional arrangements, and the necessity

[30] *Figueroa*, at para. 37.
[31] Parliament of the Commonwealth of Australia, Joint Select Committee on Electoral Reform, *First Report*, September 1983, at para. [3.43].
[32] Parliament of the Commonwealth of Australia, Joint Select Committee on Electoral Reform, *First Report*, September 1983, at para. [12.1].
[33] *Mulholland v Australian Electoral Commission* [2004] HCA 41 per Gleeson CJ at [2].

that they respond to developments in public opinion and changing democratic standards.[34] The Court reiterated the right of Parliament to legislate for its own affairs and determine the structure of the electoral system, and as Justice Kirby noted: 'the Constitution does not impose rigid limitations on the power of the Federal Parliament, in enacted electoral law, to respond to changing attitudes concerning the conduct of elections'.[35]

Despite affirming Parliament's broad power to legislate to regulate the conduct of elections, the Court also noted that it is subject to certain express and implied constitutional limitations;[36] most importantly the express requirement that members of the parliament be 'directly chosen by the people'. However, the Court held that in this instance, the requirement was not breached. Evaluating the objective of the laws, Justices Gummow and Hayne required a 'consistency' or conformity with the objectives of a system of representative government. For Justices Callinan and Heydon, there was no indication that the discrimination was *irrational* or *unreasonable*.[37] Therefore, unlike the Canadian Supreme Court's more proactive judgment in Figueroa, the Australian High Court was much more willing to defer to the parliament to set the standards to control access to the electoral process, despite working with two very similar constitutional safeguards/freedoms. Provided that the legislative provision does not interfere with the principle that parliamentarians are 'directly chosen by the people', gatekeeper provisions in Australia may legitimately favour incumbent parties (thereby creating an environment conducive to cartelization) if this is what the parliament so chooses.

Conclusion

This paper sought to demonstrate that certain aspects of the legal regulation of political parties, in particular, the requirements for registration and ballot access, have an important effect on the character of political competition and the party system in any given democracy. Laws that require parties to meet minimum thresholds (for example, candidates, members or signatures) as well as they payment of deposits in order to contest elections and receive state subventions have a particular resonance with aspects of the cartel party thesis that highlight the collusive behaviour of incumbents in limiting or restricting entry to the political arena and the spoils of the state. I also sought to highlight the very fine line between electoral provisions that sustain or create a cartel party system, and those that might be said to legitimately restrict party competition. Whether or not it is possible to draw such a distinction is not clear, particularly since we can never be completely sure of the true motivations of the legislators (and indeed the parties). Thus adopting a measure or characterization of state regulation and gatekeeper provisions that rests on an assessment of whether or not this regulation intends to *exclude* outsiders is problematic. It may indeed be the case that motivation plays no role in the development of cartel party systems, but then where does this leave restrictions on competition that aim to achieve legitimate aims and where do we draw the line between the two? For electoral regulators, is it possible

[34] McHugh J at [63]-[65]; Gummow and Hayne JJ at [154]-[155]; Kirby J at [212]-[213]; Heydon J at [344]; Gleeson CJ at [9], [14].
[35] *Mulholland*, per Kirby J at [213].
[36] *Mulholland*, per McHugh J at [61]; Kirby J at [214]; Gleeson CJ at [61].
[37] *Mulholland*, per Callinan J at [332]; Heydon J at [351].

to achieve one without the other? Further, is the cartel party arrangement normatively defensible?

In this paper, I also sought to emphasize the role of the judiciary in the interpretation of gatekeeper provisions, and the courts' consequent role in sustaining or removing what might be considered cartel-like provisions. The approaches of the Canadian Supreme Court and the Australian High Court were contrasted to show that courts are important political actors and the effect of their decisions can either uphold or strike down laws that might exclude new entrants to the party system. However, even working within similar constitutional parameters, both these courts came to very different decisions, illustrating the very fluid and normative nature of electoral law and that so much hinges on individuals' conceptions of representative democracy. Nonetheless, their potential influence should not be discounted in analyses of party regulation and its consequent impact upon cartel party systems.

References

Australian Government (2009) *Electoral Reform Green Paper: Strengthening Australia's Democracy* (Canberra: Commonwealth of Australia).

Blais, A. and L. Massicotte (2002) 'Electoral Systems', in L. LeDuc, R. G. Niemi and P. Norris (eds.) *Comparing Democracies 2* (London: Sage).

Bradley, A.W. and K.D. Ewing (2003) *Constitutional and Administrative Law*, 13th Edition (London: Longman).

Carothers, T. (2006) *Confronting the Weakest Link: Aiding Political Parties in New Democracies* (Washington: Carnegie Endowment for International Peace).

Casas-Zamora, Kevin (2005) *Paying for Democracy: Political Finance and State Funding for Parties* (Colchester: ECPR Press).

Epstein, L. D. (1986) *Political Parties in the American Mold* (Madison: University of Wisconsin Press).

Feasby, C. (2007) 'Constitutional Questions About Canada's New Political Finance Regime', *Osgoode Hall Law Journal* 45: 513-570.

Forcese, C. and A. Freeman (2005) *The Laws of Government: The Legal Foundations of Canadian Democracy* (Toronto: Irwin Law).

Gallagher, M. and P. Mitchell (eds.) (2005) *The Politics of Electoral Systems* (Oxford: Oxford University Press).

Gauja, A. (2010) *Political Parties and Elections: Legislating for Representative Democracy* (Farnham: Ashgate).

_____(2008) 'State Regulation and the Internal Organisation of Political Parties: The Impact of Party Law in Australia, Canada, New Zealand and the United Kingdom', *Commonwealth and Comparative Politics* 46(2): 244-261.

Geddis, A. (2007a) *Electoral Law in New Zealand: Practice and Policy* (Wellington: Lexis Nexis).

Janda, K. (2005) 'Adopting Party Law', Political Parties and Democracy in Theoretical and Practical Perspectives, (Washington DC: National Democratic Institute for International Affairs).

Karvonen, L. (2007) 'Legislation on Political Parties: A Global Comparison', *Party Politics* 13(4): 437-455.

Katz, R. (2007) *Political Institutions in the United States* (Oxford: Oxford University Press).

Katz, R. and Mair, P. (2009) 'The Cartel Party Thesis: A Restatement', *Perspectives on Politics* 7(4): 753-766.

_____(2002) 'The Ascendancy of the Party in Public Office: Party Organizational Change in Twentieth-Century Democracies', in R. Gunther, J. Ramon-

Montero and J. Linz (eds.) *Political Parties: Old Concepts and New Challenges* (Oxford: Oxford University Press).

_____(1995) 'Changing Models of Party Organization and Party Democracy: the Emergence of the Cartel Party', *Party Politics* 1(1): 5-28.

_____(1993) 'The Evolution of Party Organizations in Europe: The Three Faces of Party Organization', in W. Crotty (ed.) *Political Parties in a Changing Age*, special issue of the *American Review of Politics* 14: 593-617.

Müller, W. and U. Sieberer (2006) 'Party Law', in Richard Katz and William Crotty (eds.) *Handbook of Party Politics* (London: Sage).

Norris, P. (2004) *Electoral Engineering* (Cambridge: Cambridge University Press).

Orr, G. (2010) *The Law of Politics: Elections, Parties and Money in Australia* (Sydney: The Federation Press).

_____(2000) 'The law comes to the party: the continuing juridification of political parties in Australia', *Constitutional Law and Policy Review* 3(2): 41-49.

Persily, N. and B. Cain (2000) 'The Legal Status of Political Parties: A Reassessment of Competing Paradigms', *Columbia Law Review* 100(3): 775-812.

Pildes, R. H. (2004) 'The Supreme Court, 2003 Term', *Harvard Law Review* 118(1): 25-154.

Smith, R. and J. O'Mahony (2006) 'The cartel parties model and electoral barriers', in I. Marsh (ed.) *Political Parties in Transition* (Sydney: The Federation Press).

van Biezen, I. (2008) 'State Intervention in Party Politics: The Public Funding and Regulation of Political Parties', *European Review* 16(3): 263-269.

_____(2004) 'Political Parties as Public Utilities', *Party Politics* 10(6): 701-722.

Young, S. and J. C. Tham (2006) *Political Finance in Australia: A Skewed and Secret System*, Focused Audit No. 7 for the Democratic Audit of Australia (Canberra: Australian National University).