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Legitimizing Elections Through the Regulation of Campaign Financing: A Comparative Constitutional Analysis and Hope for South Africa

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LEGITIMIZING ELECTIONS THROUGH THE REGULATION OF CAMPAIGN FINANCING: A COMPARATIVE CONSTITUTIONAL ANALYSIS AND HOPE FOR SOUTH AFRICA

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Abstract: Actual or apparent corruption can seriously undermine any democratic system. This Article examines two approaches to tackling this problem in South Africa. The libertarian approach, used in the United States, embodies a strong presumption against regulation of campaign financing on the basis that it is a violation of the constitutional rights to free speech and association. The weak regulations that result from this system do little to stem the influence of a powerful few on the outcomes of national elections. A better approach for South Africa is the egalitarian model, used in both the United Kingdom and Canada. This model focuses on leveling the playing field for participants. Under this model, rights are subject to greater regulation so long as the government can provide sufficient justification. South Africa's current system, by requiring proportional national funding of political parties, but leaving private financing largely unregulated, has resulted in a virtual one-party state in which private funding dominates. To solve these problems, South Africa should embrace the egalitarian model by implementing spending caps and increasing transparency.

Introduction

Elections are at the center of politics in democracies. A problem confronted by many democratic nations concerns how the activities of the candidates, interest groups, and individual participants in an election are financed. Candidates and interest groups must have the means to pay for the activities associated with a successful electoral campaign, such as advertisements. The electorate and the nation as a whole, however, are concerned with the appearance of undue influence or out-

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right corruption, which if present may detract from the public's confidence in the democratic process. The rules that govern financing must therefore strive to achieve a balance that both allows candidates and interest groups access to the funds necessary to participate in the political process, and yet does not detract from the integrity of the elected government.

Corruption and undue influence can take many forms,[1] but this Article focuses on efforts to curtail these factors in democratic elections. In the countries discussed in this Article, finance rules revolve around constitutional provisions. In the United States, political parties and candidates must abide by contribution limitations designed to prevent corruption and that the U.S. Supreme Court has endorsed as constitutional.[2] In Canada, both candidates and interest groups are required to abide by expenditure limitations,[3] despite the freedom of expression provision guaranteed by the Canadian Charter.[4] South Africa takes these systems one step further and explicitly requires non-exclusive public funding of political parties in its constitution.[5] However, unlike Canada and the United States, South Africa currently does not require contribution disclosure and, despite its progressive constitutional provisions, has a largely unregulated political financing system.[6]

This Article is organized in three parts. Part I reviews South Africa's political history and the current status of its election finance regulation system in order to highlight the need for comprehensive and transparent regulation of campaign financing. Part II explores the legal framework regarding campaign financing in the United States, the United Kingdom, and Canada. This Article concludes by comparing these systems, and offering general recommendations as to how

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[1] *See generally* Jarmila Lajcakova, *Violation of Human Rights Through State Tolerance of Street-Level Bribery: Case Study, Slovakia,* 9 Buff. Hum. Rts. L. Rev. 111 (2003) (examining corruption of Slovakian government at multiple levels); Okechukwu Oko, *Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria,* 31 Brook. J. Int'l L. 9 (2005) (describing effects of corruption on Nigerian judiciary).

[2] *See* McConnell v. FEC, 540 U.S. 93 (2003); Buckley v. Valeo, 424 U.S. 1, 25–27, 28–29, 143–44 (1976).

[3] Canada Elections Act, 2000 S.C., ch. 9 (Can.).

[4] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 § 2(b) (U.K.) [hereinafter Canadian Charter].

[5] *See* S. Afr. Const. 1996 § 236.

[6] *See* Nico Steytler, *The Legislative Framework Governing Party Funding in South Africa, in* The Politics of State Resources: Party Funding in South Africa 59, 64 (Khabele Matlosa ed., 2004) (the limited public funding in South Africa is regulated but private contributions are not) [hereinafter The Politics of State Resources].

South Africa may implement a regulatory system consistent with its constitution that inspires confidence in elected government.

I. South Africa: A Brief History of the Franchise

South Africa's history and its system of apartheid are well documented and need not be discussed in detail here.[7] To begin to appreciate the need for transparency in South African elections, however, it is necessary to have a basic understanding of the effect of racial politics on the franchise. The earliest Boer settlers defined the franchise as "one white man, . . . one vote."[8] As a result, race and politics were linked from the very moment European immigrants arrived and created an environment in which the right of non-Europeans to vote was routinely circumscribed.[9] Even in Cape Colony (the Cape), the only colony in which non-whites could vote prior to the formation of the Union of South Africa in 1909,[10] there seemed little doubt that universal suffrage for non-whites was undesirable, leading to economic qualifications that ensured only those "who, in point of intelligence, are qualified for the exercise of political power" were eligible.[11] After 1909, South Africa's history of racially-biased voting was further institutionalized and "placed the political future of all citizens other than the whites in the hands of the white voters. . . . [Furthermore] it ensured that additions of non-white voters to the voters' list would occur only if the predominantly white electorate agreed."[12]

From 1909 through 1994, the voting rights of non-whites became increasingly restricted and the rights already in place in the Cape were undermined.[13] For example, in 1930, white women twenty-one and older were unconditionally granted the right to vote,[14] thus diluting the voting strength of non-whites. The Natives Representation Act of 1936

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[7] *See generally* Nancy L. Clark, South Africa: The Rise and Fall of Apartheid (2004) (providing general history of apartheid era); Nigel Worden, The Making of Modern South Africa: Conquest, Apartheid, Democracy (2007) (same).

[8] Eric A. Walker, *The Franchise in Southern Africa,* 11 Cambridge Hist. J. 93, 94 (1953).

[9] *See generally id.* (detailing early history of South Africa and efforts to restrict vote to white citizens).

[10] Peggy Maisel, *Lessons from the World Conference Against Racism: South Africa as a Case Study,* 81 Or. L. Rev. 739, 752 (2002).

[11] Walker, *supra* note 8, at 97.

[12] Kenneth A. Heard, General Elections in South Africa 1943–1970 1 (1974).

[13] *See generally* Ian Loveland, By Due Process of Law? Racial Discrimination and the Right to Vote in South Africa 1885–1960 (1999) (detailing history of voting rights in South Africa).

[14] *See* Heard, *supra* note 12, at 2. Similarly, the voting age for whites was reduced from twenty-one to eighteen in 1958. *See id.* at 3.

eliminated the single, multiracial voting roll in the Cape.[15] In its place, the Act created two separate roles, one for whites and one for non-whites.[16] Non-whites, however, could only elect three *white* representatives.[17] Because of these separate voter rolls, a 1939 census revealed that of all registered voters, ninety-seven percent were white Europeans.[18]

Although "native" voters had some marginal representation in Parliament,[19] legislative enactments repeatedly undermined this representation until its elimination in 1968.[20] Furthermore, the system of apportionment counted only the number of white voters in each province,[21] resulting in a dramatic under-representation of regions with large non-white populations.[22] As a result of this systematic eradication of the non-European franchise, by 1977 not only was eighty-four percent of South Africa's adult population ineligible to vote, but these South Africans would likely have been indifferent to the results of the election: regardless of the outcome, a pro-apartheid Nationalist majority would emerge.[23]

Universal suffrage put an end to South Africa's minority government. Government corruption, however, persisted, which likely had significant effects on voter confidence.[24] The corruption of apartheid governments was no secret.[25] Even after the much-heralded 1994 elections, in 1996 forty-four percent of the public felt most officials were corrupt, and a further forty-one percent believed corruption was increasing.[26] Even in 2007, charges of corruption reached the highest

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[15] *See* Leonard Thompson, A History of South Africa 161 (3d ed. 2000).

[16] *Id.*

[17] *Id.*

[18] *See* Walker, *supra* note 8, at 110 (stating that 1939 census revealed 1,083,685 voters, of which 1,053,555 were classified as European and 30,130 as non-European).

[19] S. Afr. Const. 1983 § 32. In 1983, the South African Constitution created houses in Parliament for non-whites (including "coloureds" and Indians); however, the President's Council (composed primarily of whites) was authorized to pass legislation without the consent of these parliamentary bodies. *Id.*

[20] *See* Heard, *supra* note 12, at 3 (describing variety of acts Parliament implemented that undermined non-white voting).

[21] *Id.* at 8.

[22] *Id.* at 5.

[23] Matthew Midlane, *The South African General Election of 1977,* 78 Afr. Aff. 371, 371 (1979).

[24] *See generally* Lajcakova, *supra* note 1; Oko, *supra* note 1.

[25] *See* Tom Lodge, *Political Corruption in South Africa,* 97 Afr. Aff. 157, 165–69 (1998) (documenting multiple examples of corruption in apartheid government).

[26] *Id.* at 157.

levels of government.[27] For example, former Deputy President Jacob Zuma along with his aide Schabir Shaik were charged regarding payments made to secure a 30 million rand defense contract.[28] Despite these and other charges, Zuma was recently elected head of the ANC and is considered the favorite to succeed Thabo Mbeki as President of South Africa in the next election.[29]

Corruption affects much more than campaign finance regulation.[30] It also weakens a nation by decreasing public confidence in election results. One important step toward cleaning up the government's image and ensuring the public's continued confidence in election results would be to force political parties and politicians to disclose the sources of their campaign funds to public scrutiny.

II. The Constitutional Foundations, Evolution, and Current Status of Selected Countries

There are two decidedly different models by which the countries compared in this Article attempt to regulate campaign funding. These models provide a context in which the judicial decisions of each country may be considered. Comparatively speaking, the United States uses a libertarian model in which regulations will not be allowed that in any manner violate constitutional rights. Canada and the United Kingdom employ a more egalitarian model in which rights are not absolute and even the most fundamental rights may be infringed if sufficient justification exist. As will be seen, these two models provide decidedly different regulatory atmospheres.

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[27] *See, e.g.*, Toni Hassan, *Turbulence Ahead for South African Democracy*, Canberra Times (Aust.), Dec. 22, 2007; Chris McGreal, *Report Attacks S African Crime and Corruption*, Guardian (London), Jan. 29, 2007, at 16; *South Africa: Curbing Bribery and Corruption*, Afr. News, July 21, 2003.

[28] *See* Vicki Robinson & Stefaans Brümmer, Institute for Security Studies, SA Democracy Incorporated: Corporate Fronts and Political Party Funding 12–13 (2006), http://www.whofundswho.org/pubs/studiespubs/isspaper129.pdf; *see also* Alex Eliseev, *Zuma Stands Accused of a Decade of Corruption*, Mercury (S. Afr.), Dec. 31, 2007, at 1 (providing details of scandal surrounding ANC President Jacob Zuma); Mpumelelo Mkhabela & Wisani wa ka Ngobeni, *Zuma Probe was the Beginning of the End*, Sunday Times (S. Afr.), Jan. 27, 2008, at 4 (same).

[29] Patrick Laurence, *Zuma: Man of Many Faces, but Nobody's Fool*, Sunday Indep. (S. Afr.), Feb. 24, 2008, at 8.

[30] *See* Lodge, *supra* note 25, at 158 (providing various explanations of what constitutes corruption).

A. *The United States*

Prior to the Watergate scandal, there had been relatively little regulation of campaign contributions or expenditures.[31] In the wake of abuses by the Nixon Administration, however, Congress enacted the Federal Election Campaign Act Amendments of 1974 (FECA).[32] FECA created four requirements aimed at controlling the influence of money in politics and increasing the transparency of elections.[33] These requirements included: (1) disclosure of contributions; (2) limits on the size of campaign contributions; (3) limits on campaign expenditures; and (4) public financing of presidential campaigns.[34] Yet, as will be seen, every effort to plug the proverbial hole in the campaign financing dam seems only to have created a new hole elsewhere.[35]

1. FECA and *Buckley*

FECA was immediately subjected to a legal challenge on the grounds that it infringed multiple constitutional rights guaranteed by the First Amendment.[36] In *Buckley v. Valeo*, the Supreme Court generally upheld mandatory disclosure of campaign contributors while rejecting, for the most part, an argument that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[37] The Court also rejected plaintiffs' argument that the requirement infringed associational rights.[38]

The Court in *Buckley* also recognized there could be limited situations in which disclosure could be harmful,[39] and stated that to qualify for an exception, a group must show a "reasonable probability that the compelled disclosure of a party's contributors' names will subject them

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[31] *See* Bryan R. Whittaker, *A Legislative Strategy Conditioned on Corruption: Regulating Campaign Financing After* McConnell v. FEC, 79 Ind. L.J. 1063, 1069 (2004).

[32] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

[33] *Id.*

[34] *Id.*

[35] *See* Ivor Sarakinsky, *Political Party Finance in South Africa: Disclosure Versus Secrecy*, 14 Democratization 111, 119 (2007) (quoting R. Austin & M. Tjernström, Funding of Political Parties and Election Campaigns 189–91 (2003), *available at* www.idea.int/publications/funding_parties/upload/full.pdf).

[36] Buckley v. Valeo, 424 U.S. 1, 1–3 (1976).

[37] *Id.* at 64.

[38] *Id.* at 84 ("In summary, we find no constitutional infirmities in the recordkeeping, reporting, and disclosure provisions of the Act.").

[39] *Id.* at 71 ("There could well be a case . . . where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied.").

to threats, harassment, or reprisals . . . ."[40] *Brown v. Socialist Workers '74 Campaign Committee* applied the *Buckley* criteria and found compelled disclosure would have a chilling effect on the Committee's freedom of association, thereby exempting it from reporting requirements.[41]

The *Buckley* Court's analysis of both contribution and expenditure limitations focused on "whether the specific legislation that Congress has enacted interferes with First Amendment freedoms or invidiously discriminates against nonincumbent candidates and minor parties in contravention of the Fifth Amendment."[42] In applying a strict scrutiny analysis to the contribution limitations, the Court found Congress's interest stemmed from "the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions . . . ."[43] Upholding the contribution limitation, the Court wrote the "weighty interests served by restricting the size of financial contributions to political candidates [were] sufficient to justify the limited effect [the restriction had] on First Amendment freedoms . . . ."[44]

Yet, unlike the contribution limitations, the various expenditure limitations of FECA were struck down because "Congress' interest in preventing real or apparent corruption was inadequate to justify the heavy burdens on the freedoms of expression and association that the expenditure limits imposed."[45] In considering the general limitation on campaign expenditures, the Court reasoned FECA's disclosure requirements sufficiently addressed the government's concerns, thus depriving the government of any justification for this further limitation.[46]

The Court also restricted much more specific expenditure provisions.[47] For example, Congress attempted to restrict third-party spending in section 608(e)(1) of FECA, which created a $1000 spending limitation relative to a clearly identified candidate.[48] The Court, however, curtailed its applicability due to constitutionality concerns[49] and re-

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[40] *Id.* at 74.

[41] *See* 459 U.S. 87, 87 (1982).

[42] *Buckley*, 424 U.S. at 13–14.

[43] *Id.* at 26.

[44] *Id.* at 29.

[45] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 121 (2003).

[46] *See id.*

[47] *See Buckley*, 424 U.S. at 39.

[48] *See id.* ("[N]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.").

[49] *Id.* at 44 ("[I]n order to preserve the provision against invalidation on vagueness grounds, [it] must be construed to apply only to expenditures for communications that in

stricted the $1000 limitation to only those independent communications that engaged in "express words of advocacy."[50] The Court also struck down restrictions on the amount of personal funds the candidate could expend, finding serious flaws in Congress's logic that this restriction would help effectuate "the prevention of actual and apparent corruption."[51] In summary, the Court found these expenditure limitations created "substantial and direct restrictions [on political campaigns] that the First Amendment cannot tolerate."[52]

Turning to FECA's implementation of a public financing scheme for presidential election campaigns, the Court again rejected plaintiffs' claims of First and Fifth Amendment violations.[53] It stated "the Constitution does not require Congress to treat all declared candidates the same for public financing purposes," and upheld the provision that allowed presidential campaigns to voluntarily submit to restricted public funding.[54]

2. BCRA and *McConnell*

The *Buckley* framework was subject to intense criticism,[55] particularly with respect to the undermining effect of loopholes.[56] This led to the enactment of the Bipartisan Campaign Reform Act (BCRA).[57] As with FECA, BCRA was subject to an immediate court challenge. *McConnell v. Federal Election Commission* focused on whether the regulation of "soft money" (a contribution restriction) and "electioneering communications" (an expenditure limitation) infringed on First Amendment rights.[58]

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express terms advocate the election or defeat of a clearly identified candidate for federal office.").

[50] *Id.* at 50.

[51] *See id.* at 52 ("The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election.").

[52] *See Buckley*, 424 U.S. at 58–59.

[53] *See id.* at 90.

[54] *See id.* at 97.

[55] Justice Stevens' concurrence in *Nixon v. Shrink Missouri Government PAC* highlighted a fundamental criticism of the *Buckley* framework. *See* 528 U.S. 377, 398–99 (2000) (Stevens, J. concurring). He argued that "[m]oney is property, it is not speech." *Id.* at 398. As such, Justice Stevens stated that "[t]he right to use one's own money . . . certainly merits significant constitutional protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases." *Id.* at 389–99.

[56] *See, e.g.*, 148 CONG. REC. S2096-02 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold).

[57] *See* Pub. L. No. 107-155, 116 Stat. 81 (2002).

[58] *See* 540 U.S. 93 (2003).

The first section of BCRA attempted to eliminate the well-documented problem of "soft money."[59] FECA had defined "contribution" only to include donations made for the purpose of influencing an election for federal office.[60] This led to a Federal Election Commission (FEC) ruling that contributions to *state* parties were not only unlimited and unregulated, but could also be used for a variety of purposes in mixed state and federal elections.[61] This created a loophole through which donors could make unrestricted donations to state parties.[62] The Court found "[t]he solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections."[63]

Plaintiffs argued BCRA's contribution restrictions facially violated the First Amendment and other constitutional provisions.[64] In rejecting this argument, the Court upheld its precedent, which had stated contribution limits were unconstitutional only where they prevented the "amassing [of] resources necessary for effective advocacy."[65] The Court also stated unequivocally that "the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits,"[66] thus reaffirming the standard by which contribution limits are to be tested.[67]

Plaintiffs also alleged Congress's attempt to regulate "electioneering communications" was unconstitutional because it did not respect the delineation drawn in *Buckley* between express and issue advocacy.[68] The Court noted, however, that this section of the *Buckley* opinion had been a statutory construction, not a constitutional interpretation.[69] Finally, the Court stated that none of the vagueness concerns raised in *Buckley* that prompted the "express advocacy" restriction were in issue with the statute as drafted by BCRA, thereby rejecting plaintiffs' argu-

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[59] *See id.* at 122–26, 129 (noting that Senate investigation concluded "the 'soft money loophole' had led to a 'meltdown' of the campaign finance system").

[60] 2 U.S.C. § 431(8)(A)(i) (2000).

[61] *See McConnell*, 540 U.S. at 123–24.

[62] *See id.* at 126.

[63] *See id.*

[64] *See id.* at 134.

[65] *Id.* at 135 (citing *Buckley*, 424 U.S. at 21).

[66] *McConnell*, 540 U.S. at 143.

[67] *See id.* at 143–56.

[68] *Id.* at 190.

[69] *Id.* at 192.

ment.[70] The Court did not address the constitutional issues and may have opened a door to Congressional regulation of other forms of "electioneering communications."

BCRA and *McConnell* did not solve all campaign financing problems. "527s," named after the section of the Internal Revenue Code under which they are organized, seem to have become the conduit through which wealthy donors are able to contribute unlimited amounts of money.[71] 527s are regulated by the IRS, not the FEC, and although they must publicly report contributions exceeding $200, 527s are not required to abide by federal contribution limitations, resulting in large contributions to these groups.[72]

After the 2004 election, the FEC rejected proposals for a rule change that would have subjected 527s to the limitations of FECA.[73] A strong argument was made, in vain, that 527s fulfill the major purpose test of *Buckley,* and are therefore subject to FEC regulation.[74] This argument was rejected despite almost $400 million in 527 spending during the 2004 election alone and the fact that the vast majority of donations originated from "wealthy" contributors.[75] In fact, during the 2004 election, $106 million or forty-four percent of all money raised by Democratic-leaning 527s came from just fourteen donors.[76] Republican-leaning groups raised $40.45 million, (forty-percent of their total) from just eleven donors.[77] Despite the Supreme Court's explicit ruling in *McConnell* that Congress may legislate to prevent circumvention of the rules, 527s remain beyond regulation. Thus 527s undermine the regulatory scheme because soft money that once flowed to the state parties now flows to them.[78]

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[70] *Id.* at 194. The Court found FECA's definition of an "electioneering communication" to be "both easily understood and objectively determinable." *Id.* at 103. FECA defined "electioneering communication as: (1) a broadcast; (2) clearly identifying a candidate for federal office; (3) aired within a specific time period; and (4) targeted to an identified audience of at least 50,000 viewers or listeners. § 304(f)(3).

[71] *See* I.R.C. § 527 (2000).

[72] David M. Peterson, Note, *Do the Swift Boat Vets Need to MoveOn? The Role of 527s in Contemporary American Democracy,* 84 Tex. L. Rev. 767, 774–75 (2006).

[73] Political Committee Status, 69 Fed. Reg. 68,056, 68,064–65 (Nov. 23, 2004); *see also* Shays v. Fed. Election Comm'n, 508 F. Supp. 2d 10, 71 (D.D.C. 2007) (attempting to force FEC to issue rules subjecting 527s to FECA limitations).

[74] Trevor Potter, McConnell v. FEC: *Jurisprudence and Its Future Impact on Campaign Finance,* 60 U. Miami L. Rev. 185, 196–98 (2006).

[75] Peterson, *supra* note 72, at 777.

[76] Potter, *supra* note 74, at 195–96.

[77] *Id.*

[78] *See McConnell*, 540 U.S. at 223–24.

B. *Canada*

The basis of modern Canadian election regulation began with the passage of the Canada Elections Act (CEA) in 1974.[79] The Act was comprehensive: it imposed spending limits on both parties and candidates; created contribution disclosure requirements; and set forth criteria for the partial reimbursement of campaign expenses incurred by candidates and parties.[80] Until the passage of the Canadian Charter in 1982, however, the judiciary was restricted to interpreting the Act's implementation and could not interpret its "constitutionality."[81] One of the most fundamental differences from the U. S. approach is the use of proportionality review, premised on the notion that rights are not absolute and the government may curtail them in a narrow manner with sufficiently serious justification.[82]

1. The Alberta Cases

The development of Canadian election law after constitutional jurisdiction was established in 1982 begins with the decision of an Albertan trial court, which, although only binding in Alberta, was nonetheless applied nationally.[83] In *National Citizens' Coalition v. Canada (A.G.)*, an Albertan trial court struck down the CEA provision "prohibiting anyone, other than registered parties or candidates, from incurring election expenses as defined during an election campaign . . . ."[84] The court first held that the limitation was a prima facie infringement on the freedom of expression provision in section 2 of the Charter.[85] It then applied the second step of the proportionality review of section 1 of the Charter, and explored whether it was reasonable and "demonstrably justified in a free and democratic society."[86] In holding the limitation was unjustified, the court found Parliament had enacted the limitation based on concerns that harm *may* occur under the current

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[79] Canada Elections Act, R.S.C., ch. 14 (1974).

[80] Lisa Young, *Regulating Campaign Finance in Canada: Strengths and Weaknesses,* 3 Election L.J. 444, 446–47 (2004).

[81] Andrew C. Geddis, *Democratic Visions and Third-Party Independent Expenditures: A Comparative View,* 9 Tul. J. Int'l & Comp. L. 5, 86 (2001).

[82] *See, e.g.*, Libman v. Quebec (A.G.), [1997] 3 S.C.R. 569 (Can.); Nat'l Citizens' Coal. v. Canada (A.G.), [1984] 32 Alta L.R.2d 249 (Can.).

[83] *Id.* at 89.

[84] [1984] 32 Alta L.R.2d, ¶ 12 (quoting Canada Elections Act, R.S.C., ch. 14, § 70.1 (1970)).

[85] *Id.* ¶ 55.

[86] *Id.* ¶ 14 (quoting Canadian Charter, § 1).

regime and stated that an "actual demonstration of harm or a real likelihood of harm [should be shown] before a limitation can be said to be justified."[87]

This remained the state of the law until the 1993 passage of CEA amendments that sought to place a $1000 limit on third-party spending.[88] In *Somerville v. Canada (A.G.)*, the National Citizens' Coalition once again filed suit in Alberta challenging the statute's constitutionality.[89] The government acknowledged the provisions were in breach of section 2's freedom of expression protections, but argued it satisfied the proportionality clause in section 1.[90] The government also stated the Act's goal was to level the political playing field by ensuring "that the spending limits on parties and candidates [were] not undermined," and to guarantee "a 'fair' and 'equitable' electoral system."[91]

The Alberta Court of Appeal was not persuaded and termed the limit "an effective muzzle"[92] and "in its effect, a ban on third-party national advertising . . . ."[93] The court held the ban was a prima facie breach of the Charter's right to free expression and that the government failed the proportionality test of section 1.[94] It concluded that even if the legislation had been of substantial importance sufficient to justify the infringement of certain rights, the $1000 limit was too extreme "to be [justified] as a 'reasonable' limit on . . . core democratic rights."[95] Again, the Chief Election Officer chose to apply the Alberta ruling to the entire nation, effectively deregulating any third-party spending.[96]

2. The Canadian Supreme Court

The Supreme Court of Canada first had occasion to address this topic in *Libman v. Quebec (A.G.)* when a challenge was brought against a third-party spending restriction in Quebec similar to the statute struck down in *Somerville*.[97] The court initially found the Act violated both the freedom of expression and the freedom of association provisions of the

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[87] *Id.* ¶ 53.
[88] Act to Amend the Canada Elections Act, 1993 S.C., ch. 19 (Can.).
[89] [1996] 184 A.R. 241 (Can.).
[90] *Id.* at 247.
[91] *Id.*
[92] *Id.* at 268.
[93] *Id.* at 260.
[94] *Somerville*, [1996] 184 A.R. at 245.
[95] *Id.* at 271.
[96] Geddis, *supra* note 81, at 91–92.
[97] [1997] 3 S.C.R. 569 (Can.).

Charter.[98] It then concluded the objectives of the Act were: (1) "to promote a certain equality of access to media of expression"; and (2) to promote the goal of informed voters.[99] The goal of equal access to political communication was found to be of "pressing and substantial importance in a democratic society,"[100] despite the fact, as the court noted, that this conclusion was different from that of the *Somerville* court.[101]

The court then applied the proportionality test of section 1 and found there was a rational connection between the goal of Quebec's legislature and the means by which it chose to pursue that goal.[102] The court, however, then decided the statute failed the minimal impairment requirement. It proceeded to describe the Lortie Commission's recommendation regarding third-party expenditures as a less burdensome alternative.[103] Ultimately, although the court invalidated the restriction, it completely reversed the logic of *Somerville*.[104]

In 2000, Canada enacted amendments to the CEA.[105] These amendments restricted third parties from advertising on polling day prior to the close of polling stations,[106] and from spending more than a total of $150,000 per election or more than $3000 per district.[107] The amendment further required third parties to identify themselves on all advertising materials.[108] The CEA was also challenged, and the Canadian Supreme Court found that although the restrictions Parliament enacted infringed on the freedom of expression as guaranteed by section 2(b) of the Charter, they satisfied the proportionality requirements of section 1 and were accordingly upheld.[109] In its analysis, the court stated that "[t]he current third party election advertising regime is Parliament's response to this Court's decision in *Libman*," and thus "is con-

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[98] *Id.* ¶¶ 35–37.

[99] *Id.* ¶¶ 40–41.

[100] *Id.* ¶ 42.

[101] *Id.* ¶¶ 55–56.

[102] *Libman*, [1997] 3 S.C.R., ¶ 57.

[103] *Id.* ¶¶ 77–84. The Lortie Commission attempted to strike a balance between individual expression and party funding. *Id.* ¶ 77. The Commission recommended that those "not connected with a political party or candidate" be prohibited from "incurring election expenses exceeding $1000 and from pooling these amounts." *Id.* The court reasoned that this provided independents with the opportunity to express themselves while simultaneously discouraging parties from Balkanizing in order to evade CEA restrictions. *Id.* ¶ 78.

[104] *See generally* Libman, [1997] 3 S.C.R. 569.

[105] Canada Elections Act, 2000 S.C., ch. 9 (Can.).

[106] *Id.* § 323.

[107] *Id.* § 350.

[108] *Id.* § 352.

[109] Harper v. Canada (A.G.), [2004] S.C.R. 827, ¶ 147 (Can.).

sistent with an egalitarian conception of elections and the principles endorsed by this Court in *Libman*."[110] Given the similarities, the court upheld the Act, concluding that although all but one of the Act's sections infringed on the freedom of expression, all sections satisfied the proportionality test of section 1.[111]

C. *The United Kingdom*

The United Kingdom lacks a single written document detailing the structure of the government and the rights of the citizenry. Rather, Parliament is supreme and thus, by definition, statutes cannot be challenged as unconstitutional in the British judicial system. Nonetheless, under *Bowman v. United Kingdom*,[112] British electoral law may be open to attack on human rights grounds.[113] Britain's status as a signatory to the Convention for the Protection of Human Rights and Fundamental Freedom[114](Convention on Human Rights) gave Phyllis Bowman the right to bring suit alleging a British law restricting third-party expenditures in an election violated her rights under the Convention on Human Rights.[115]

The crux of the *Bowman* case focused on a British statute that limited third-party expenditures to five pounds. That statute defined third parties to include anyone unauthorized by a candidate to assist in an election campaign.[116] The logic behind this restriction originated in the overall expenditure limitation imposed on British candidates.[117] As noted with respect to other countries, spending limits can be rendered moot if third-party participants are not similarly handicapped.[118] Thus, as with candidate restrictions, the goal of this restriction was to equalize the electoral playing field.[119]

Bowman attacked this provision as infringing on her right of free expression as guaranteed by article 10 of the Convention on Human Rights, which provides in part:

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[110] *Id.* ¶ 63.

[111] *Id.* ¶ 147.

[112] 26 Eur. Ct. H.R. 1 (1998).

[113] *See* Keith D. Ewing, *Promoting Political Equality: Spending Limits in British Electoral Law,* 2 Election L.J. 499, 507 (2003).

[114] November 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention on Human Rights].

[115] *Id.* art. 25.

[116] Representation of the People Act, 1983, § 75(1) (Eng.).

[117] *See, e.g.,* Ewing, *supra* note 113, at 501 (detailing various limits imposed on candidates).

[118] *See id.* at 503.

[119] *See* R. v. Jones, 2 Cr. App. R. 253 (1999).

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . .
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such . . . restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights or others . . . .[120]

The European Court of Human Rights easily found "there can be no doubt that the prohibition contained in section 75 amounted to a restriction on freedom of expression, which directly affected Mrs. Bowman."[121] The court then proceeded to apply the proportionality test of section 2.

Although the court found the statute addressed a legitimate aim,[122] it also found that "the restriction in question was disproportionate to the aim pursued."[123] It rejected the contention that because the restriction only applied during the campaign cycle, Bowman was therefore free to campaign at any other time. The court stated the obvious: the most effective time to discuss political issues and seek support is during an election campaign, not during the indeterminable amount of time beforehand.[124] The court also rejected other methods of communication the government offered as alternatives, finding they were not sufficiently demonstrated as viable options or were not part of Bowman's objective.[125] As such, the five pound restriction was declared a violation of article 10 "as a total barrier to Mrs. Bowman's publishing information with a view to influencing the voters . . . ."[126]

The British Parliament considered several proposals in response to the *Bowman* decision. Many focused on greater disclosure of contributions and increasing the level of public funding for political parties.[127] The ultimate result was an increase in the restriction from five to five-

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[120] Convention on Human Rights, *supra* note 114, art. 10.

[121] *Bowman*, 26 Eur. Ct. H.R. ¶ 33.

[122] *Id.* ¶ 38.

[123] *Id.* ¶ 47.

[124] *See id.* ¶ 45.

[125] *Id.* ¶ 46.

[126] *Bowman*, 26 Eur. Ct. H.R. ¶ 47.

[127] Joanna R. Joplin, Recent Development, *Pushing the Limits of Democracy: U.K. Campaign Expenditure Restrictions Held to Violate the Right to Free Expression under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in* Bowman v. United Kingdom, 7 TUL. J. INT'L & COMP. L. 459, 475 (1999).

hundred pounds before the approval of the candidate is required.[128] The limit was created as a compromise that would allow third parties sufficient resources to participate meaningfully without requiring a drastic increase in the spending limit enforced on candidates.[129] It remains unclear, however, whether this increase will satisfy the demands of the Convention.[130]

III. South Africa: The Future?

In the ten years since ratification of the South African Constitution, there has been only one case that has explicitly dealt with the issue of money in politics.[131] During the same time, Parliament has only met the bare necessities of section 236 of the South African Constitution, which mandates public funding of political campaigns, by providing limited public financing to political parties.[132] Finally, there is little to no regulation of private funding in South Africa.[133] This begs the question: "[W]hat form should the various legal ground rules required to control a society's election process take, so as to best guarantee that the outcome of that procedure will be regarded within that society as a legitimate means of apportioning political and legal rule making power?"[134] As previously discussed, the U.S. and European systems (as implemented in Canada and Britain) provide opposing models.[135]

A. *Competing Models*

1. The Libertarian/U.S. Model

The libertarian model focuses on the right of each citizen to participate in the electoral process with the maximum amount of freedom possible.[136] The result is a strong presumption against regulation unless

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[128] Political Parties, Elections and Referendums Act, 2000, c. 41, § 131 (Eng.).

[129] *See* Ewing, *supra* note 113, at 506.

[130] *Id.*

[131] *See* Inst. for Democracy in S. Afr. (IDASA) v. Afr. Nat'l. Cong. (ANC) 2005 (10) BCLR 995 (Cape of Good Hope Provincial Div.) (S. Afr.).

[132] S. Afr. Const. 1996 § 236. In 1997, Parliament passed the Public Funding of Represented Political Parties Act. *See* Act 103 of 1997 (S. Afr.). Although the Act purportedly satisfies the requirements of section 236, its provisions are minimal at best.

[133] *See* Steytler, *supra* note 6, at 64.

[134] Andrew Geddis, *Liberté, Egalité, Argent: Third Party Election Spending and the Charter*, 42 Alberta L. Rev. 429, 433–34 (2004).

[135] *See supra* Part II.

[136] Geddis, *supra* note 134, at 434.

an exacting burden of proof can be satisfied.[137] In the United States, this is embodied by the "strict scrutiny" standard, or variants thereof, employed by the Supreme Court in its campaign financing decisions, and by the Court's advisement that only those measures that seek to stem corruption or the appearance of corruption will meet constitutional muster.[138] This feature is well-suited to emphasizing the rights of the individual.

There are, however, drawbacks to this system. Although the U.S. system allows limitations on contributions to parties and candidates, it does not allow for the limitation of expenditures.[139] This permits candidates, political parties, and third parties to spend unlimited amounts of money in pursuit of electoral victory. Prior to enactment of BCRA in 2002, the most common method of circumventing the rules designed to restrict candidates and political parties was the use of "soft money."[140] Even with the passage of BCRA and the supposed elimination of soft money, the funding pipeline was diverted to other sources, such as 527s.

In this respect, the U.S. electoral system reflects the American culture of individualism enshrined in its constitution. The focus is on the individual and the right of that individual to participate in the electoral process in largely whatever manner he sees fit. In order to protect the right of individuals to participate, attempts to restrict the voice of an individual through expenditure limitations will be struck down as an unconstitutional abridgement of core political speech.

Yet, this principled stance undermines any attempt to regulate spiraling campaign expenditures. As the British and Canadian systems recognized, unlimited third-party spending merely serves to undermine the limits imposed on candidates and political parties. The only comparable equivalent in the United States is the system of public funding for presidential campaigns. While BCRA fundamentally revised nearly all aspects of private campaign financing, it did not modify the provisions concerning matching public funds available to presidential campaigns.[141] Thus, despite the myriad of changes to the presidential nominating process since the system's inception in FECA, the funding

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[137] *Id.*

[138] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 96 (2003); Buckley v. Valeo, 424 U.S. 1, 1, 39, & 143 (1976).

[139] *See Buckley*, 424 U.S. at 23.

[140] *McConnell*, 540 U.S. at 121.

[141] Michael J. Malbin, *A Public Funding System in Jeopardy: Lessons from the Presidential Nomination Contest of 2004,* 5 Election L.J. 2, 2 (2006).

system remains a relic of 1974.[142] The inevitable result was that candidates were increasingly able to raise more than the limits imposed by the acceptance of public funding. Increasing numbers of candidates have thus chosen to reject public financing,[143] again increasing the cost of campaigns and undermining campaign regulation. Thus, the balance in the U.S. system is slanted toward the individual's right to participate, generally without regard for how this may affect the perceived legitimacy of election results.

2. The Egalitarian/European Model

The model Britain and Canada employ focuses not on the rights of individuals in a vacuum, but on those rights relative to the rights of others.[144] This system explicitly attempts to equalize opportunities for participation so as not only to limit the temptation to circumvent funding limits, but also in part to help legitimize the electoral result.[145] To accomplish this goal, the British and Canadian systems not only limit candidates and political parties, but limit third parties as well.[146] This levels the playing field and attempts to guarantee each participant an *equal* opportunity to participate rather than simply *an* opportunity to participate, as in the United States.[147] The Canadian Supreme Court stated that this model prevents the wealthy "from controlling the electoral process to the detriment of others with less economic power."[148] It addresses the goal of equalizing the power of all participants by subsidizing certain actors and restricting others to achieve a level playing field.[149]

The egalitarian model, however, is not without problems. Despite its thoroughly regulated campaign system, the British electoral system suffered from low public confidence in the 1990s.[150] This skepticism

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[142] *See id.* at 3–4.

[143] *See generally* Malbin, *supra* note 140 (discussing candidates' decisions to reject public funding). Steve Forbes was the first to opt out of public financing in 1996 and 2000, followed by George W. Bush in 2000. Democrats Howard Dean and John Kerry joined Bush in opting out in 2004. *Id.* at 2; *see* Nelson Polsby & Aaron Wildavsky, Presidential Elections 58 (12th ed. 2008).

[144] *See* Harper v. Canada (A.G.), [2004] S.C.R. 827, ¶ 62 (Can.); Geddis, *supra* note 134, at 452.

[145] Geddis, *supra* note 134, at 452.

[146] *Id.*

[147] *Id.* at 435.

[148] *Harper*, [2004] S.C.R. ¶ 62.

[149] *Id.*

[150] Navraj Singh Ghaleigh, *Expenditure, Donations and Public Funding Under the United Kingdom's Political Parties, Elections and Referendums Act 2000—and Beyond?*, *in* Party Fund-

was reinforced by a scandal involving a suspicious one million pound donation from Formula One magnate Bernie Ecclestone to Britain's Labor Party.[151] This demonstrated that despite going to great lengths to minimize opportunities and motivations to cheat, regulations do not absolutely guarantee the integrity of the system. Furthermore, as highlighted by the *Bowman* case, it can be difficult to draft a statute that strikes the appropriate balance to satisfy the proportionality test employed in Canada and Europe.[152] Canada struggled for nearly two decades before a definitive doctrine was established in *Harper.*[153]

B. *South Africa's Current System*

Constitutions may provide more than just the skeletal necessities for the ordering of government or the grouping of rights such as those embodied in the U.S. document. Constitutions "may also operate as a symbol . . . of the values . . . which [a] society aspires to foster."[154] The South African Constitution is such a document. At the end of the long nightmare of apartheid, the country sought to redefine itself through its constitution. When reality falls short of aspirations, however, charges of hypocrisy will not be far behind, perhaps endangering the legitimacy of the entire document.[155] For South Africa to live up to the high ideals of its organic document regarding electoral funding, it must drastically reform private party financing.

Not only is reform needed to meet the equitable goals of its constitution, South Africa's status as a nearly one-party state creates an environment in which regulation is necessary. As noted by Ivor Sarakinsky, an expert witness for the African National Congress (ANC) in *Institute for Democracy in South Africa v. African National Congress*, as of 2004 the ANC enjoyed a majority in excess of sixty-five percent.[156] As such, the proportional distribution of public campaign money further entrenches the ANC, and smaller opposition parties are left "rely[ing] on

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ing and Campaign Financing in International Perspective 35, 35–36 (Keith Ewing & Samuel Issacharoff eds., 2006).

[151] Lisa E. Klein, *On the Brink of Reform: Political Party Funding in Britain,* 31 Case W. Res. J. Int'l L. 1, 6–7 (1999). Prior to Ecclestone's donation, Labor had steadfastly opposed an exception for Formula One to an EU ban on tobacco advertising. *Id.* After the donation and election of a Labor majority, the party changed its position. *Id.*

[152] *See generally* Bowman v. United Kingdom, 26 Eur. Ct. H.R. 1 (1998).

[153] *See generally Harper*, [2004] S.C.R. 827.

[154] Walter F. Murphy, *Civil Law, Common Law and Constitutional Democracy,* 52 La. L. Rev. 91, 118 (1991).

[155] *Id.*

[156] Sarakinsky, *supra* note 35, at 113.

private donations to fund the bulk of their expenses."[157] Sarakinsky further illustrates the perception of the one-party state, acknowledging that such private donations are difficult to obtain, as donors fear retaliation from the governing ANC.[158]

The South African Constitution directly addresses electoral financing.[159] Section 236 reads: "To enhance multiparty democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis."[160] This provision was first used during the 1999 elections following the passage of legislation that explicitly implemented section 236.[161] Under the implementing Act, a party must be represented in either the national or provincial legislature, or both, in order to qualify for public funding.[162] The Act also outlines examples of both acceptable[163] and unacceptable uses of public funding.[164] It further requires parties to render accountings of how the money was spent,[165] and to return certain amounts of unspent money[166] or money that is determined to be improperly spent.[167] Despite the Act, it remains unclear whether the mandate of section 236 has been satisfied. This makes future litigation more likely,[168] as the case detailed below reveals.

Although public funding is seemingly well-regulated, private financing remains largely unregulated in South Africa.[169] During the 1999 elections, a total of 53 million rand in public payments were made to parties, but it was estimated that 300 to 500 million rand was spent in total.[170] It is impossible to formulate a more specific estimate due to the lack of regulation and disclosure. It is nonetheless obvious that parties received the majority of their funding from private sources, perhaps

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[157] *Id.* at 112–13.

[158] *See id.* at 120–21.

[159] S. Afr. Const. 1996 § 236.

[160] *Id.*

[161] Public Funding of Represented Political Parties Act preamble; Clarence Tshitereke, Institute for Security Studies, Securing Democracy: Party Finance and Party Donations—The South African Challenge 4–5 (2002).

[162] Public Funding of Represented Political Parties Act s. 5(1)(a).

[163] *Id.* s. 5(b).

[164] *Id.* s. 5(3).

[165] *Id.* s. 6.

[166] *Id.* s. 9.

[167] Public Funding of Represented Political Parties Act s. 7.

[168] Steytler, *supra* note 6, at 59.

[169] Judith February & Richard Calland, Institute for Democracy South Africa, What Measures and Actions Have Been Taken to Combat Corruption in the Political Sphere and with What Results? 3 (2005), *available at* http://www.idasa. org.za.

[170] Tshitereke, *supra* note 161, at 5 tbl. 2 (providing breakdown of funding by party).

undermining the intent of section 236.[171] For fiscal year 2004, the situation changed little as public financing was projected to reach 74.1 million rand while election costs were still projected to be 300 to 500 million rand.[172]

Despite the hope that mandatory disclosure of private party financing would follow the passage of the public funding law, no such system has been realized. Such a system would help shed light on the amount of money actually spent in South African elections.[173] In what appears to be the only reported case in which the parties litigated the issue of private financing, a South African trial court concluded political parties were not required under current law to reveal their private fundraising records.[174] This decision was not appealed, in part due to the belief that the political parties involved would begin to enact party funding regulations.[175] As of November 2006, however, more than a year after the decision, no action had been taken by any of the political parties to regulate private donations.[176]

1. Judicial Treatment in *Institute for Democracy in South Africa v. African National Congress*

Plaintiffs brought this case under section 32(1) of the Constitution,[177] suing the four largest political parties "to establish the principle that political parties, or at least those who hold seats in the national, provincial and local government legislatures, are obliged . . . to disclose particulars of all the substantial donations they receive."[178] They claimed disclosure was required under section 32(1) so that they might

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[171] *See id.* During the 1999 elections, parties received between eighty-three and eighty-nine percent of their funding from private sources. *See id.*

[172] February & Calland, *supra* note 169, at 5–6 (detailing projected payments made for fiscal year 2005–06).

[173] Steytler, *supra* note 6, at 64.

[174] IDASA v. ANC, 2005 (10) BCLR 995 (Cape of Good Hope Provincial Div.), ¶ 57 (S. Afr.).

[175] Press Release, Inst. for Democracy in S. Afr., Democracy & Political Funding: Pursuing the Public's Right to Know The Next Stage (May 9, 2005), *available at* http://www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=1316.

[176] Robinson & Brümmer, *supra* note 28, at 2.

[177] S. Afr. Const. 1996 § 32(1) ("Everyone has the right of access to: any information held by the state; and any information that is held by another person and this is required for the exercise or protection of any rights.").

[178] *IDASA*, 2005 (10) BCLR, ¶ 1 (quoting Plaintiff's founding affidavit).

exercise their rights under a multitude of constitutional provisions,[179] including the protection of political rights in section 19, which reads:

> Every citizen is free to make political choices, which includes the right—
>
> to form a political party;
>
> to participate in the activities of, or recruit members for, a political party; and
>
> to campaign for a political party or cause.
>
> Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
>
> Every adult citizen has the right—
>
> to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
>
> to stand for public office and, if elected, to hold office.[180]

The court found, however, that section 32 could not provide an independent basis for suit, and the plaintiffs could not invoke it as an independent cause of action unless the action was directed at the constitutionality of the Promotion of Access to Information Act.[181] Because the plaintiffs had not raised any constitutionality challenges, they were unable to "seek their remedy within the four corners of [the] statute," as the court required.[182]

In its discussion of the constitutional aspects of the claim, the court found sections 41(1)(c), 152(1)(a), and 195(1) inapposite to the ultimate issue and dismissed them from consideration.[183] The court also summarily dismissed the claim that the lack of access to the donation records somehow infringed on the rights contained in sections 16 and 18, stating, "[T]here is no rational connection between the respondents' donations records and the rights derived from sections 16 and 18."[184]

The court did analyze the claims brought under section 19, examining "whether the applicants reasonably require the respondents' donation records" to exercise the rights contained therein.[185] It con-

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[179] *Id.* ¶ 36 (claiming information was necessary for exercise of no less than seven constitutional rights under §§ 1(d), 16, 18, 19(1), 19(2), 41(1)(c), 152(a)(1), & 195(1)).

[180] S. Afr. Const. 1996 § 19.

[181] *IDASA*, 2005 (10) BCLR, ¶ 17.

[182] *Id.* ¶ 19.

[183] *Id.* ¶ 40.

[184] *Id.* ¶ 41.

[185] *Id.* ¶ 42.

cluded that the plaintiffs failed to demonstrate with sufficient specificity how the lack of access to donation records infringed on their rights under section 19.[186] Accordingly, the court found disclosure was not a requirement for free and fair elections, and denied the requested relief.[187] Yet, in closing, Judge Griesel offered a glimmer of hope, stating:

> [This] does not mean that political parties should not, as a matter of principle, be compelled to disclose details of private donations made to their coffers. It merely means that, on my interpretation of existing legislation, the respondents are not obliged to disclose such records.[188]

IV. The Next Step for South Africa

Of the countries surveyed, South Africa is the only one with an explicit provision in its governing document calling for public funding of political parties.[189] Why does this provision appear there but not in the Canadian Charter, another relatively recent document? The answer may partially lie in the history of the two countries. On the one hand, Canada's political system has been comparatively stable and descends from the British system, which has produced regulations regarding political spending since 1884.[190] On the other hand, modern South Africa inherited a history of regulatory repression.[191] Given this history, the framers of the South African Constitution would have been keenly aware of the need for reliable funding and the drastic effects its absence could have on the political expression of various factions.

The most glaring differences between the countries reviewed herein center on the use of proportionality review outside the United States. As discussed, this review holds that rights are not absolute and may be infringed if the government interest is sufficiently serious and legitimate, and its means minimally impair the right.[192] Campaign restrictions in Canada were thus upheld by its Supreme Court, despite the fact they blatantly infringed on the right of free expression, because the infringement was sufficiently minimal in light of the importance of

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[186] *IDASA*, 2005 (10) BCLR, ¶ 48 (S. Afr.).

[187] *Id.* ¶ 52.

[188] *Id.* ¶ 57.

[189] S. Afr. Const. 1996 § 236.

[190] Representation of the People Act, 1884, 48 & 49 Vict., c. 3 (Eng.).

[191] *See supra* Part I.

[192] *See* Harper v. Canada (A.G.), [2004] S.C.R. 827, ¶ 147 (Can.) (outlining Canadian courts' approach to proportionality review).

the government objective.[193] Conversely, the United States is much more absolutist in its "strict scrutiny" jurisprudence.[194] The "narrowly tailored to meet a compelling government interest" test, as applied to political speech, is perhaps the most difficult of all to pass.[195] The Supreme Court rejected the implementation of expenditure limitations in *Buckley* as an overbroad infringement on core political speech.[196] South Africa has explicitly incorporated the proportionality standard into the text of its constitution, thus providing a substantially more flexible framework within which to structure a regulatory system.[197]

Given South Africa's status as an emerging democracy, it is vitally important that citizens continue to have confidence in the electoral machinery's capacity to produce a fair result. Corruption, or even the mere appearance of corruption, can result in severe erosion of public trust and confidence in the government.[198] Since 1994, a number of corruption scandals have surfaced in South Africa.[199] If left unchecked, these scandals could lead to a downward spiral in which distrust of government results in lower voter turnout. This, in turn, would only foster more discontent.

Because corruption flourishes in a lax regulatory environment,[200] South Africa's reform package needs to address several points. First, Parliament must choose between at least two models of campaign finance regulation.[201] Considering South Africa's oppressive past and the presence of the proportionality standard in its constitution, it seems reasonable to assume the egalitarian model would be the better choice. One significant advantage to this model is that it addresses the imbalance of wealth between the races—one of the surviving vestiges of apartheid.[202] This means the relatively poorer black population is protected against the possibility that wealthier whites would simply drown out the voice of blacks.

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[193] *See id.*

[194] *See* Buckley v. Valeo, 424 U.S. 1, 1, 39, 143 (1976).

[195] *See id.*

[196] *See id.*

[197] S. Afr. Const. 1996 § 36.

[198] *See* February & Calland, *supra* note 169, at 10–11.

[199] *See* Robinson & Brümmer, *supra* note 28, at 3.

[200] February & Calland, *supra* note 169, at 11. *But see* Sarakinsky, *supra* note 35, at 115–18 (arguing corruption does not flourish in lax regulatory environment).

[201] *See, e.g.,* Dirk Kotzè, *Public Funding Regulatory Measures to Prevent the Abuse of State Resources, in* The Politics of State Resources, *supra* note 6, at 91, 99–100.

[202] *See* Robinson & Brümmer, *supra* note 28, at 3–4 (detailing corruption difficulties experienced in implementation of Black Economic Empowerment program).

The egalitarian model will fulfill both South Africa's interests in protecting the integrity of its electoral process and the flexible nature of its constitution. But what does this egalitarian model mean? The Council of Europe promulgated seven general principles with respect to political financing that, if adopted in South Africa, would both define the regulatory system and make great strides toward protecting the electoral process from the taint of corruption.[203] The following principles will each be addressed in turn:

- A balance between public and private funding;
- Fair criteria for public funding;
- Strict rules governing private donations;
- A maximum allowable amount to be spent by each actor;
- A flow of money that is transparent and available to public scrutiny;
- An independent agency with auditing authority over all actors who are required to file; and
- Meaningful sanctions for those who violate the rules.[204]

The current "balance" between public and private funding in South Africa can best be described as skewed. The level of public funding compared to the estimated expenditures reveals that public funding accounts for only a small percentage of the parties' overall spending.[205] Although not discussed as comprehensively in this Article, modern Germany has encountered many of the same issues as the United States, United Kingdom, and Canada.[206] Like these three nations, it has thoroughly litigated the issue of how to balance public and private funding under its egalitarian framework.[207] The German system thus offers a convenient model for South Africa. In 1992, the *Bundesverfassungsgerichts* (Federal Constitutional Court) struck down the previous balance that had reimbursed political parties for campaign costs.[208] The new balance stated that the level of public funding to which each

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[203] Council of Europe, Resolution 1516, Doc. 9077 (May 4, 2001), *available at* http://assembly.coe.int/Documents/WorkingDocs/doc01/EDOC9077.htm.

[204] *See* Kotzè, *supra* note 201, at 98.

[205] *See* Tshitereke, *supra* note 161, at 4–5; February & Calland, *supra* note 169, at 6–7.

[206] *See* Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 200–15 (2d ed. 1997).

[207] *Id.*

[208] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr 9, 1992, 85 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 264 (F.R.G.).

party was entitled was directly proportional to the amount of private funding the party was able to raise independently.[209]

Under the German balance, the "marketplace of ideas" is still able to function, albeit in a much more limited manner than in the United States.[210] Parties are still only as viable as their ideas and their candidates. This prevents a situation in which the State is forced to grant equal funding to a fringe party.[211] Furthermore, this balance moderates the infringement on the right of free association by allowing parties to still raise private funds.[212]

Regarding eligibility for public funding, South Africa's criteria are quite clearly set forth by the Funding Act and appear to have been equitably applied.[213] The Act only requires that a party receive 50,000 votes to receive a seat in Parliament, which is one of the methods to qualify for public funding.[214] Parties may also qualify for funding if they are elected to seats in provincial legislatures.[215]

Despite the low thresholds for public financing, there are no restraints when competing for private funding in South Africa. Parties are permitted to receive unlimited donations from both domestic and foreign sources.[216] The availability of foreign donations has led to a series of occurrences involving foreign nations that may be legal, but could hardly be deemed proper.[217] Domestic contributions can be equally scandalous, as evidenced by the British scandal involving a waiver on tobacco advertising for Formula One.[218] If South Africa wishes to avoid corruption and pursue an egalitarian model in which the money of no South African or foreign citizen may drown out the voice of a poorer South African citizen, then limits must be imposed.

The control of private funding would be greatly enhanced by placing a spending cap on actors.[219] This cap, however, must not be placed

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[209] Kommers, *supra* note 206, at 215.

[210] *See supra* notes 206–09 and accompanying text.

[211] *Id.*

[212] *Id.*

[213] February & Calland, *supra* note 169, at 4–5 (listing multitude of parties that have qualified for public funding).

[214] Public Funding of Represented Political Parties Act s. 5(1)(ii).

[215] *Id.*

[216] Tshitereke, *supra* note 161, at 4.

[217] Kotzè, *supra* note 201, at 94–96 (detailing three examples where foreign investment may have led to favorable treatment).

[218] Keith Ewing, *The Disclosure of Political Donations in Britain, in* Party Funding and Campaign Financing in International Perspective, *supra* note 150, at 57, 57–59; *supra* Part III.A.2.

[219] *See* Sarakinsky, *supra* note 35, at 125.

solely on parties and candidates, or it will merely serve to promote circumvention of the rules through the creation of third-party entities to which the rules do not apply,[220] as seen in the United States. Rather, South Africa must follow Canada's lead in restricting the spending of third parties in addition to other political actors. This method may actually increase competition and creativity as parties seek to stretch their funding to its maximum limit. Furthermore, when combined with the public/private funding balance previously discussed, a cap would successfully end the arms race of campaign fundraising. Because all actors would be capped at a maximum amount, the pressure to continually raise the fundraising ante would be relieved.

Transparency and accountability in financing is a universal step toward reinforcing the integrity of any electoral system. Although worthy of praise, voluntary disclosure, such as seen during the 2004 South African election cycle,[221] is simply not enough. When drafting the mandatory disclosure system, the Parliament must be certain the regulations are comprehensive, or it too could promote circumvention such as that which occurred with 527s in the United States.[222]

Yet, as recognized by the U.S. Supreme Court, transparency and disclosure can also be used as a weapon against fringe parties.[223] For example, it may be possible for a pro-apartheid party in South Africa to demonstrate before the courts that the forced disclosure of their benefactors would effectively serve to muzzle their associational rights.[224] Finally, as argued by IDASA, public disclosure allows voters to make an informed choice when deciding how to cast a ballot.[225]

The Independent Electoral Commission (IEC) is South Africa's governing agency for public funding.[226] Supervision of public funding, however, is the absolute limit of the IEC's authority, as it has no power to promulgate rules or regulations regarding private funding. The IEC's powers under the Funding Act, as already noted, seem to be for-

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[220] Kotzè, *supra* note 201, at 97.

[221] February & Calland, *supra* note 169, at 7.

[222] *See supra* Part II.A.2.

[223] *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 95 n.11 (1982).

[224] This important exception is a partial solution to one of Sarakinsky's main arguments in favor of secrecy. Sarakinsky argues that forced disclosure could actually hurt smaller parties as their donors would refrain from contributing due to fear of ANC retaliation. As implemented in the United States, however, the exemption would protect those truly at risk for political retaliation. *See* Sarakinsky, *supra* note 35, at 119–22.

[225] IDASA v. ANC, 2005 (10) BCLR 995 (Cape of Good Hope Provincial Div.), ¶ 42 (S. Afr.).

[226] *See* Independent Electoral Commission Act 150 of 1993 (S. Afr.).

midable.[227] The natural solution to this problem thus seems to be the expansion of the IEC's authority to all political funding.[228]

Along with this expansion of jurisdiction should come an expansion of disciplinary authority. If the agency is only able to monitor and disclose funding without effective punitive measures available, the motivation to obey is lessened. The U.S. FEC is a prime example of an ineffective agency, as a majority vote is required of its six-member board to initiate a disciplinary proceeding.[229] The board, however, is divided between three Republicans and three Democrats, usually resulting in a tie vote—and thus inaction—on many matters.[230]

Conclusion

Despite the problems inherent in overcoming decades of repressive government and international isolation, the transition to democracy and equality in South Africa has gone as well as may be realistically expected. If South Africa wishes to continue to make gains, however, it must take strides to ensure that its electoral machinery remains free from the taint of corruption. By implementing reforms now, as opposed to waiting for a national scandal to erupt, the country can make progress toward the goal of ensuring legitimate, stable governments.

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[227] *Id.*

[228] Of course this suggestion is not without its detractors. Sarakinsky proposes at least two alternatives that do not involve government oversight. He first suggests internal party structural reform to create centralized fundraising, thereby limiting the opportunity for corruption on the theory that local politicians will not know who donated. The second suggestion is based on a Swedish model where each political party can examine the others audited accounts, but no information is made public. *See* Sarakinsky, *supra* note 35, at 124–25.

[229] *See* About the FEC, http://www.fec.gov/about.shtml (last visited May 11, 2008).

[230] *See, e.g., Hearing Before S. Comm. on Rules & Admin.*, 107th Cong. (2004) (statement of Trevor Potts, Former Commissioner of the FEC), *available at* http://rules.senate.gov/hearings/2004/071404_potter.htm. A former FEC Commissioner testified that the FEC

> frequently deadlocks on the most important issues the agency confronts. Historically, these deadlocks have usually reflected a partisan, 3–3 split . . . . The cause of the agency's deadlocks, however, is not as important as the result. What matters is that the agency charged with issuing advisory opinions, implementing regulations and enforcing the law has been unable to do so on a number of important instances, in a complete abdication of its only statutory obligation: to interpret and enforce the laws Congress makes . . . . [T]he agency's inability to act is neither infrequent nor unimportant.

Id.