



The regulation of political finance

Choppier waters ahead?

Justin Fisher

IfG–Bennett foreword

In February 2022, the Institute for Government and the Bennett Institute for Public Policy launched a Review of the UK Constitution, to offer an evidence-based and non-partisan analysis of the strengths and weaknesses of the constitution, and where necessary make recommendations for change.

To address the bold scope of this project, we have complemented our own in-depth research with a breadth of perspectives from some of the UK's foremost constitutional experts. In this series of expert guest papers, we publish the views and proposals of academics and practitioners, who take a range of stances from constitutional conservation through to major reform. While these papers respond to the pressing constitutional questions of the day, they all also look to construct long-term solutions that will inform political decision making as well as public debate.

Given the range of views expressed, we do not necessarily endorse all of the ideas found in these papers, but we can commend the rigour with which the arguments have been constructed and sincerely thank the authors for their thoughtful contributions.

Hannah White

Director
Institute for Government

Michael Kenny

Co-director
Bennett Institute for Public Policy

Introduction

Political parties are central to the operation of parliamentary democracy in the UK.* Indeed, they are the principal actors at all levels of government. Even at the local level, where there are isolated examples of large-scale non-party representation, following the 2022 elections approximately 99% of councillors in Great Britain were elected under a party label, with 88% elected from one of the six principal parties (the Conservatives, Labour, the Liberal Democrats, the Scottish National Party, Plaid Cymru and the Greens).

Political parties cannot operate without income and, as a consequence, matters of political finance are of great importance to the quality of democracy and also a functioning constitution. Yet, somewhat ironically, political finance in the UK was effectively unregulated until 2000. Indeed, parties were not even recognised in electoral law before the introduction of the 'party list' electoral system for the 1999 European elections. Before that, there were only three areas that were subject to legislative control: the regulation of candidate election expenses; the declaration of expenditure of trade union political funds to the Certification Office; and the declaration of corporate political donations in company reports. Beyond that, there was no regulation.

Compared with other European democracies, this meant that the UK was something of an outlier in terms of regulation until the passing of the Political Parties, Elections and Referendums Act in 2000 (hereafter PPERA).¹ But if the UK became more like other European democracies in respect of its political finance regulation at the turn of the century, it has retained its exceptionalism in respect of any public funding for parties, which unlike many other European democracies has been at a consistently lower level.²

PPERA has been largely successful. Despite introducing a comprehensive regulatory structure,³ the principles of transparency, restrictions on who may make donations to parties, national campaign spending limits and the establishment of a regulatory body (the Electoral Commission) to implement and oversee the operation of the legislation have become broadly embedded. There have been reviews of broader political finance regulations since PPERA, but these have achieved little of substance.⁴ However, whether the independence of the regulatory body is able to withstand the challenge to its autonomy in the Elections Act 2022, with the requirement to create a strategy and policy statement for the Electoral Commission – a requirement strongly criticised by the relevant parliamentary select committee⁵ – is not yet clear.

Yet, despite the broad success of PPERA, there are clear indications over the past decade that the effective regulation of political finance may become more difficult to deliver, in part because of technological change, internationalisation and the significant emergence of non-party actors.

* Professor Tim Bale has explored the role of political parties in constitutional issues – see Bale T, 'Britain's political parties and the constitution', Institute for Government, 2023, retrieved 29 March 2023, www.instituteforgovernment.org.uk/sites/default/files/2023-02/Britain%27s%20political%20parties%20and%20the%20constitution.pdf

The establishment of regulatory structures inevitably reflects the period in which these structures were drafted. The Corruption and Illegal Practices (Prevention) Act 1883, which introduced candidate spending limits at elections, reflected the fact that there were no national campaigns of which to speak at the time.⁶ Equally, PPERA was introduced before innovations such as social media and digital campaigns. Almost inevitably, regulations periodically need to play 'catch-up'. But digital developments do not tell the whole story of why difficulties may arise.

Alongside digital, two other trends are testing the ability of legislation and regulators to regulate political finance effectively: globalised citizens and businesses; and the growth of non-party activity. These pose a risk to two factors that are central to the effective operation of political finance in the UK. First, political finance legislation is a country-level endeavour and the jurisdiction of those rules exists only within the nation state. Second, British political finance regulations have been sustained by people following the rules, or at least the spirit of those rules. Indeed, one of the things that has marked the UK out from many other countries has been the comparatively low level of genuine scandal in respect of political finance.⁷ This approach to the expectation of following the spirit of the rules was encapsulated beautifully by the Committee on Standards in Public Life's inquiry into political finance in 1998, which preceded PPERA. It recognised that spending limits on campaign activity were not completely watertight. But it drew an analogy with speed limits, such that a 30mph speed limit will not prevent drivers from travelling at 35mph, but it is likely to prevent speeds of 50mph.⁸

Essentially, this captured the dichotomy of trust versus rules.⁹ Thus, there is an acceptance that actors will play by the spirit of the rules – they are trusted to do so because there is a broad consensus on what the rules entail. Actors may, on occasion, breach the letter of those rules, but all are trusted not to abuse the spirit. This is not unique to political finance and in many ways reflects the 'good chaps' approach to the constitution. As Blick and Hennessy highlight,¹⁰ this approach relies on self-restraint and trust that actors will behave themselves.

However, that approach has come under increasing strain. For example, the referendum on the UK's continued membership of the EU in 2016 proved to be a key factor in parties and campaign groups discovering new tactics, which – while legal – tested the effectiveness of the intended rules, in effect through a lack of self-restraint. In particular, it revealed that despite the extensive regulation introduced by PPERA, some of the effectiveness of electoral regulation in the UK has in places been based on a fragile consensus between the actors concerned. Equally, the growth of companies working across borders and the numbers of citizens resident in different countries suggest a significant and growing potential for foreign money to enter into domestic politics, unless those actors show restraint.

The following sections explore these challenges to the current regulatory system for political finance in greater depth and then discuss how the systems may need to develop to deal with those challenges.

Technological changes – digital

The growth of digital campaigning represents a relatively new challenge to political finance legislation, although not an entirely negative one. On the positive side, the costs of digital campaigning can be relatively modest compared with more traditional modes such as printed matter.^{11,12,13} This means that financial disparities between political parties need not potentially be so striking in terms of the ability to campaign effectively. And, the reach of digital techniques means that many more people can become involved in promoting party messages and a larger number of people may see them. These are arguably real positives since they open up campaign activities to a greater number of people, and involve more people in the democratic process. And, if more citizens are reached with communications, this has potentially positive effects for both wider political discourse and participation. Campaigning, after all, tends to boost turnout.^{14,15}

However, for all the positives of digital campaigning, there are regulatory challenges, particularly in respect of activity that may fall outside the jurisdiction of UK law. Legislation has finally sought to catch up with the digital world with the introduction of digital imprints via the Elections Act 2022. Imprints are a means by which the producer and the funder of the election material are declared on the material itself, thus generating transparency in respect of the origin of the material and an ability to audit the cost so as to be able to enforce expenditure limits. This new requirement will put digital communications on a par with the imprint regulations on printed communications, leading to greater transparency in terms of party and candidate (and non-party campaigner) spending.

What is more challenging, however, is that the enforcement of digital imprints can only occur within the UK's jurisdiction. This is true of all campaign techniques, of course. But the key difference with digital campaigning is the ease of distribution across national borders. Other modes of communication have a great deal of difficulty operating outside the regulatory jurisdiction. Posted matter is traceable via the charges made to deliver the items. Messaging via broadcast media is also confined to national borders, particularly since all broadcasters, whether terrestrial or satellite, are bound by electoral law; for example, forbidding paid political advertisements and not reporting campaign activity on polling day. Of course, some voters could receive programming and communications from beyond the UK's borders if they use specialist equipment. But that is likely to be a minor issue.

With digital communications, however, the ability to transmit messages widely from outside national borders is far greater. It is unlikely that political parties would exploit this possibility since they would be liable and would pay both a legal and a political penalty for doing so. However, non-party campaigners – those who campaign in an election without putting up any candidates, known in law as 'third parties' – may not face such penalties. If a third party was registered in the UK, then similar legal penalties would apply as they do for political parties. However, it is entirely possible that a third-

party campaign, which endorses a party and/or attacks another, could operate online from outside the UK without the consent or even the knowledge of the benefiting political or third party. Such campaigns would not be subject to regulation, since they would be based outside the UK.

This is not an entirely hypothetical situation. Concerns have been raised about Russian online campaigning in UK electoral events, for example.^{16,17} Equally, the electoral impact of any such activity has not been demonstrated. Notwithstanding, it illustrates that with the development of online campaigning techniques, the regulatory reach of any election law has limitations. Of course, such a problem is not confined to the UK. It can occur wherever electoral regulations seek to deliver transparency and/or limits on campaign expenditure, to try to ensure that wealthier parties or other election participants are not disproportionately advantaged. Limitations do not necessarily imply ineffectiveness. But equally, it is important to recognise what can and cannot be regulated.

Foreign money

Keeping foreign money out of domestic politics is a recognised issue in most democracies, and many seek to ban such money from political finance. In the UK, this was first legislated on by PPERA in 2000. Before this, there were no restrictions on where donations to any political party could come from. This became particularly apparent in the 1990s when the Conservatives received a number of donations from overseas.¹⁸ PPERA introduced two key reforms in this area. First, citizens were permitted to make political donations only if they were registered to vote in the UK. Second, companies were permitted to make donations only if they were incorporated in the UK.

While undoubtedly welcome, these two measures are unlikely to be wholly effective as interdependence and internationalisation grow. Indeed, a challenge to the Act's provisions occurred just a few years after it was passed, in the run-up to the 2005 general election. The Liberal Democrats had received donations in excess of £2.4 million from 5th Avenue Partners Ltd, a company whose registered address was in London and from whom no accounts had at the time been filed. No breach of the law had occurred, yet the benefactor was actually resident in Majorca, thus challenging the principle of the ban on overseas donations. Moreover, according to *The Times*, the company had been bought only a year previously, had yet to file accounts and used a law firm as its registered address.¹⁹

In effect, it was argued that the company had been bought 'off the shelf' and had enabled individual donations to be made anonymously. The benefactor was subsequently found guilty of fraudulent activity (*in absentia* on the grounds that he had absconded), yet following an investigation, the Electoral Commission eventually accepted that the Liberal Democrats had made appropriate steps to check on the legitimacy of the donations and were permitted to keep the money (or more accurately, not repay it).^{20,21}

Notwithstanding, the permissibility of any institutional donation (such as from a company) means that it may be difficult to definitively say what part of that donation is domestic and what is foreign. Many corporations operate across several borders. Even if a company's headquarters are in one country, a major client may be abroad and the meaningful differentiation between domestic and foreign money for the purposes of regulation becomes near impossible. In effect, so long as institutional donations are permitted, there will always be a route for some foreign money to enter into domestic politics.

A question that arises therefore is whether institutional donations should be banned to prevent foreign money from having an impact on the electoral process. While a presence or absence on the electoral roll is an ostensibly neat distinction for individuals in terms of what constitutes foreign money (although as we shall see below, it is not itself without difficulty), the distinction for corporate donations is far less so, not so much because of an inherent weakness in the legislation, but more because in an increasingly international and interdependent environment, it is much more difficult to define either a British company or what proportion of any money donated is domestic in origin. One solution, therefore, is similar to that which was employed in Canada, such that only individuals on the electoral roll are permitted to make political donations, thereby banning donations from institutions.*

Such a move would have a simple appeal. Institutions (unlike citizens) do not have the vote, so it is not unreasonable to bar them from the possibility of influencing electoral outcomes by banning any donations from them. In addition, the risk of foreign money entering domestic politics would be lessened. But there are also possible downsides. First, a barring of institutional donations would not only affect companies. Trade unions and other voluntary bodies would also be barred from making financial contributions. That may not, of course, be a concern. But, equally in the UK context, trade unions (or at least some of them) are closely linked with the Labour Party, enjoying a formal organisational status within it. Such historic links may be potentially threatened by a bar on donations from these institutions.

Second, trade union and company donations are important financially. In the 2019 election campaign period, the Conservative Party received 31% of its declared** cash donations from companies, while 95% of Labour's declared cash donations came from trade unions over the same period.²² Unless donations from individuals increased very substantially (a highly unlikely scenario based on past practice), parties would be left in significant financial trouble unless an alternative source of income, such as financial support from public funds, was available.

Given the historic reluctance of either main party to introduce significant public funding for parties,²³ such a move would be far from certain. As a consequence, there is a trade-off between the risk of foreign money entering domestic politics via institutional

* The financial impact of the ban on institutional donations was softened by an extension of public funding for political parties.

** Declared donations are those that exceed the reporting threshold of £7,500.

donations and the financial viability of political parties. This is a common problem across many democracies, but one that has not been solved. Thus, there is a case to be made that the importance of the financial viability of parties means that the risk of foreign money entering domestic politics via this route is a price worth paying. The problem is not currently an acute one. But it may become so as internationalisation and interdependence grow.

Ironically, however, perhaps the greater risk in terms of foreign money currently stems from individuals, where as we have seen, the permissibility for making donations – a presence or absence on the electoral register – is clearer than for institutions. PPERA included a requirement for citizens to be registered to vote in order to make a permissible donation but also stipulated that British citizens resident overseas for up to 15 years were eligible to register to vote so long as they had been registered to vote before they left the UK (unless they were too young to register when they left). This meant that overseas electors could quite legitimately make political donations to British parties using money from outside the UK for up to 15 years, so long as they had renewed their registration at the time of making a donation.

That risk of foreign money (or at least money emanating from outside the UK) legally entering domestic politics has therefore existed for some time. However, the risk was mitigated somewhat by the numbers actually registering to vote. Before 2015, that figure never exceeded 35,000.²⁴ However, at the 2015 general election, it increased to 106,000, rising to 285,000 at the 2017 general election and 233,000 (of an estimated 1.4 million eligible citizens) registered in time for the snap 2019 general election.²⁵ The scale of registration since 2015 arguably presents significant risks for money from overseas entering domestic politics (albeit entirely legally).

This potential problem is amplified by provisions in the Elections Act 2022. This Act removes the 15-year limitation and there will no longer be a requirement for citizens to have been registered to vote at the time of leaving the UK. In addition, registration will ultimately be required only every three years as opposed to the annual registration requirements that were previously in place. The *potential* impact is significant. Government estimates put the number of eligible British citizens resident overseas as being 3.2–3.4 million and that, by 2029, the number registering would be around 302,000.²⁶

However, were registration to be at the level of the 2017 general election (just over 20% of eligible voters), this would be around 692,000 (based on an eligible population of 3.4 million). Regardless of which figure is more accurate, that would still represent a significant potential issue in respect of overseas money entering domestic politics. This would be entirely legal but arguably raises problematic issues in respect of the sources of party income. The removal of the time limitation on the right to register to vote in the UK has the potential to lead to significant sums of money feeding into British domestic politics from abroad (even though the donors are, themselves, British citizens).

One solution to this would be to restrict the ability of citizens who are resident overseas to make political donations. This would protect their right to vote, but help prevent money from overseas from entering domestic politics. Certainly, there is a good case to make that the ability to give money to a political party is not a fundamental citizenship right like the franchise, and thus it could be argued that it was legitimate to deny the ability to donate, while still maintaining the fundamental right to vote. Yet equally, such a move would run the risk of creating a two-tier citizenship between those British citizens resident in the UK and those resident overseas. This conundrum neatly illustrates the dilemmas of regulating national elections in an internationalising world and suggests that the removal of the time limit for citizens living abroad to be eligible to register may well have unforeseen consequences in respect of political finance, particularly as the pool of potential donors has grown substantially.

Third parties (or non-party campaigners)

Perhaps the most difficult area to regulate in political finance is that of third parties (or as the Electoral Commission refers to them, 'non-party campaigners'). A third party is a person or organisation that campaigns in an election without themselves standing for election. Thus, a third party could be a pressure group, a business organisation, a trade union or an individual, for example. Such campaigns have been part of elections for many years and were regulated at the constituency level under the Representation of the People Act 1983, such that third parties could not spend more than £5. This was challenged and upheld in the European Court of Human Rights in 1998 – the *Bowman* case. The court ruled that the limit of £5 was so low as to make third-party expenditure effectively illegal, which constituted an unjustifiable restriction on freedom of expression.²⁷ However, what was critical was that it was the level of spending that was ruled against, rather than the principle of restricting third-party activity. In response to this ruling, PPERA raised the threshold one hundredfold to £500.

Third-party activity was not regulated at the national level, however, until PPERA. The potential scale of the issue was well illustrated in the 1992 general election, where the public sector union NALGO mounted a strong anti-Conservative campaign, taking out more press advertisements than the Conservatives and Liberal Democrats combined.²⁸ The union was not affiliated to the Labour Party and its campaign did not explicitly endorse any party. Thus, while no party was positively endorsed by this advertising, its message was designed to damage the electoral prospects of one party – in this case the Conservatives. PPERA introduced the regulation of third parties by both requiring registration and introducing spending limits. Registered third parties could now spend up to 5% of the maximum limit set for any political party – in effect nearly £1m – while unregistered third parties were limited to £25,000.

The regulation of third parties highlights some important questions for electoral law, not least whether it is legitimate to restrict campaign activity by those not standing for election. On the one hand, elections by definition heighten awareness of, and interest

in, issues among voters, so there is a case to argue that such periods are ones where campaign groups are most likely to be able to deliver effective messaging. Restricting them may be seen as privileging political parties over pressure groups and potentially restricting their freedom of expression, precisely at the time when their quite legitimate campaigns may be most effective with a receptive electorate.

Equally, there is a strong argument that those who stand for election (and who are therefore accountable to the electorate) should enjoy clear primacy during regulated election periods. Failure to regulate third parties would present a situation, as illustrated in 1992, where a party must devote significant resources to fighting a campaign against other political parties and also against third parties (in this case a trade union) pursuing a campaign where any impact will be asymmetric since, in this case, it was pursuing an anti-Conservative stance. Importantly, unrestricted third-party campaigning could adversely affect any party. It would not, therefore, be unreasonable to legislate such that third-party spending may be regulated during campaign periods (but unregulated at other times).

This principle of restrictions on third-party expenditure has been tested in the courts. The Bowman case (referred to above) ruled that the level of restriction should not be so low as to in effect make non-party campaigning illegal. In 2013, this was further tested in the European Court of Human Rights where the provision in the Communications Act 2003 continued the ban on political advertising through broadcast media. Since the advent of commercial television in the UK in the 1950s, there has been a ban on political advertisements through broadcast media limiting political parties' communication on television and radio to an allocated number of party political broadcasts where the time (but not the production costs) is provided by the broadcasters. A challenge by Animal Defenders International, where the group sought to air a political advertisement via broadcast media, was rejected, confirming that proportionate restrictions on third-party activity are legitimate.²⁹ Had these cases been upheld, there is the danger that there would have been the potentially damaging growth of third-party campaigns that occurred in the US following *Buckley v. Valeo*, which effectively rendered expenditure limits in elections meaningless.*

However, the existence of restrictions on third-party activity does not imply that there are no further regulatory difficulties. First, the distribution of third-party activity may be asymmetric. In other words, third-party campaigns may not affect all parties equally, with multiple third parties, for example, campaigning against one political party. That eventuality cannot be regulated on – no legislation can seek to generate balance in third-party campaigns. Second, while third-party campaigning in elections has generally been modest, the lessons of the 2016 EU referendum are such that campaigners are becoming more cognisant of the possibilities of extensive third-party activity.

* *Buckley v. Valeo* was a decision in 1976 by the US Supreme Court, which held that limits on election expenditures were unconstitutional, because they would contravene the First Amendment provision on freedom of speech on the grounds that a restriction on spending for political communication reduces the quantity of expression.

Critically, this can have significant implications for campaign spending limits. In 2016 this concerned what are known as 'registered participants'. Campaigners at the referendum wishing to spend more than £10,000 were required to register with the Electoral Commission. Once registered as permitted participants, these campaigners were required to comply with the rules on spending, donations and loans under the relevant legislation, with a spending limit of £700,000 – 10% of the spending limit of a designated lead campaign of £7m.

The status of registered campaigners is analogous to that of third parties, such that they are not the designated lead campaign (analogous to political parties), but can still engage in campaigning. What is critical here is not the principle of alternative campaigners, but the level of registered campaign activity – the lack of restraint. In the 2016 EU referendum, there were fully 123 registered campaigners, compared with only 12 in the alternative vote referendum of 2011 and 42 in the Scottish independence referendum of 2014. Of these, 15 registered participants spent in excess of £250,000, with registered campaigner expenditure totalling £9,309,588 on the Remain side and £4,744,534 for Leave.³⁰

To contextualise this, the spending limits of the two designated campaigns were £7m each (with both sides spending around £6.75m). Thus, registered participant spending (analogous to third parties) outspent the combined total of the designated campaigns (analogous to political parties) by nearly £620,000. And, of course, the spending of the registered participants was not balanced. On the Remain side, registered participants spent over £2.6m more than the designated Leave campaign.

What this illustrates is that a growth in the number of third parties can render the spending limits of the principal election actors to be virtually meaningless – especially if the distribution of third-party campaigns is asymmetric such that they are overwhelmingly negative towards one party or campaign. Of course, a referendum campaign can accentuate the asymmetry since there are only two sides – Yes or No, Remain or Leave. But, the example from 2016 is such that campaigners became alert to the possibility of higher spending limits by virtue of registration and, in some cases, spent significant sums. Given that one cannot (and should not) eliminate third-party activity, regulate its symmetry or control for its popularity, this does suggest that there is a case for tighter restrictions on the volume of individual third-party activity. One way to do this is through lower limits on third-party spending. Another is through the regulation of third parties working together.

Restrictions on joint campaigning were originally introduced by PPERA, essentially to ensure that spending limits were not evaded by a joint campaign between different third parties claiming to be separate campaigns. This was amended by the Transparency in Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014, which required any third parties engaged in joint campaigning to nominate a 'lead campaigner', who is responsible for reporting the joint campaign spending on behalf of all the third parties involved, as well as accounting for all the expenditure of all the third

parties in the joint campaign. Similar amendments were included in the provisions for the 2014 independence referendum in Scotland and the 2016 referendum on the UK's membership of the EU.

While well intentioned, these rules have proved to be very challenging for participating third parties. The Hodgson Review of third-party campaigning at the 2015 general election reported that many third parties found the regulations to be extremely complicated.³¹ Of the respondents, 76% found the rules in relation to joint campaigning either difficult or very difficult to understand and 71% found the rules difficult or very difficult to comply with.³² Moreover, the rules were described as having “a ‘chilling effect’, restricting joint campaigning by organisations on important issues”.³³ Indeed, while the amendments were designed to reduce the administrative and regulatory burden for smaller organisations, third parties reported the reverse as a result of the new rules potentially requiring them to register with the Electoral Commission, even if they themselves contributed only a modest sum.³⁴

Similar concerns were echoed in the 2016 EU referendum.³⁵ The ‘Working Together’ rules proved to be the most challenging for registered participants in the referendum. Relatively few campaigners worked together formally with others and significant proportions decided not to work together after initially considering the option. Overall, 79% did not work with the lead campaigner and 72% did not work with other campaigners. This reluctance to work together is partly explained by the perceived complexity of the rules. Fully 56% found the rules difficult to understand while only 16% found the rules to be easy. Only 19% found it straightforward to comply with the rules.

Interviews with referendum campaigners confirmed the difficulties with the regulations, with participants arguing that the Working Together rules effectively blocked official co-ordination as they presented too much of a risk in respect of compliance. For example, one designated group said: “We ended up having to send our legal director along to each meeting to make sure that, and report back to the responsible person, that there was no co-ordination happening.”³⁶ In compliance terms, there was a concern from a designated group that they would not know if a non-designated group had claimed to have worked with them until after the non-designated group had submitted its return.

In sum, the rules were very challenging for designated participants in particular, as it was very difficult for them to control the activities of other groups. In effect, the complexity of the rules and the uncertainty about compliance meant that formal co-ordination was minimised and actively discouraged. Suffice it to say, the rules, though well intentioned, would appear to be creating some unintended consequences as well as unforeseen behaviour.

Despite these difficulties, the Elections Bill originally included additional provisions to regulate joint campaigning between political parties and third parties. These provisions were eventually dropped at the report stage, ostensibly to protect historic links between

third parties and political parties (effectively the Labour Party). However, the provision in the Elections Act 2022 remained to prevent political parties also registering as third parties. On the one hand, this was a logical step to close an unexpected loophole and also prevented spending limits from being artificially inflated through the combination of third-party and political party spending. However, it was arguably a disproportionate response. This problem was by no means widespread. From 2014, there had been only one instance of an organisation registering as both a political party and a non-party campaigner (at the 2019 general election). Furthermore, in that single case, the organisation only reported spending against the political party limit.

Discussion

There are clearly potential issues for the regulation of political finance. Some of these are a consequence of broader trends, like technological change and the internationalisation of business and citizen residence. But equally, some issues may be exacerbated either through unforeseen consequences (extending the franchise to those citizens resident overseas for life) or by the conscious pushing of the boundaries in terms of what may be regarded as the accepted rules of the game, both by political parties and by third parties, where there are clear signs of the volume of activity growing. Regulatory problems are not new, but in these three areas (digital, foreign money and third parties), there is clear potential for the way in which elections are conducted to be altered.

One solution may be much heavier regulation – barring any corporate donations, banning donations from those registered to vote but resident overseas and dramatically reducing the spending limits of third parties. But, the problem with that approach is that excessive regulation can make the situation worse. Any regulation must be capable of being implemented effectively, or else the regulatory system can fall into disrepute. In France, for example, corporate donations were banned for a period, but in practice, continued in a clandestine manner.³⁷ Equally, the joint campaigning rules for third parties have also generated unintended consequences.

Over-regulation can also create perverse incentives for actors, meaning that all actions become acceptable unless they are explicitly prohibited. Such incentives may create an environment where unethical behaviour is pursued because, at any one point in time, it is not illegal to do so. And, with behaviour resting on the basis of legality or illegality, comes the prospect of greater involvement of the law in political life. In the US, for example, there is clear evidence that the level of election litigation has steadily risen, in terms of both the number of cases and the amounts spent on those cases.³⁸ Hasen argues that, in and of itself, electoral litigation may not be undesirable.³⁹ However, the other side of that coin is that persistent legal challenges may have the effect of undermining confidence in the electoral process. Over-regulation creates a more conducive environment for such litigation since, in effect, the morality of actions is determined primarily by legality.

Political finance legislation is more likely to be effective if there is an element of trust involved, based on a shared understanding of how elections should be conducted. Under these circumstances, the morality of actions is driven by this shared understanding rather than the strict interpretation of legality. Yet, trust will work only if all involved play by the rules. As we have seen with the potential for increased third-party campaigning, such a consensus can be broken. And it is not just third parties that challenge the consensus. The experience of the 2015 general election also demonstrates that political parties can push against the boundaries.

This is related to the case of the Thanet South constituency and the 2015 election.⁴⁰ Specifically, it relates to the reporting of the Conservative candidate's election expenses during the short campaign (post-dissolution). The Crown Prosecution Service concluded that there was sufficient evidence to authorise charges against three people: the candidate, his election agent and a Conservative Party official. In the end, the candidate and agent were found not guilty of making a false election expenses declaration. However, the Conservative Party official was found guilty of encouraging or assisting in an election offence. The judge noted that the overspending of the candidate's permitted election expenses was substantial, and that the official had created dishonest documents and presented them to the candidate and his agent for signing. By so doing, she had "placed them at grave risk of conviction".⁴¹

In addition, the judge ruled that the Conservative official had worked for at least 50% of her time as the candidate's campaign manager and agent (in all but name) but that these salary costs had not been ascribed to the candidate's expenses. He said: "There appears to have been a belief that Central Headquarters staff salaries and accommodation of staff employed by Central Headquarters were a central party expense, even if those staff were living temporarily in a constituency for the duration of the election campaign."⁴² He added that the official "was not alone in that she worked in a culture which tolerated some of what she did" but "that there is no evidence that anyone other than [the official] was aware of the dishonest calculations and concealment of invoices".⁴³ The judge concluded that: "This case should operate as a warning to those involved in future elections that prison is the usual consequence of deliberately corrupt practice on a significant scale."⁴⁴

So, heavier regulation is not without difficulty, but at the same time, if there is evidence that actors are prepared to push the boundaries of acceptable behaviour, what is to be done? One solution, paradoxically, is lighter regulation, not because there is a strong case to reduce the regulatory burden, but in recognition that the application of regulations is increasingly difficult to accomplish – in part because of changes that are ostensibly unrelated to political finance. Regulations that cannot be implemented are problematic not only because they cannot be applied, but also because their failure threatens the credibility of other regulations. Faced with these problems, regulation may retreat into what can reasonably be delivered.

As a result, transparency may become the principal form of party finance regulation.⁴⁵ In such circumstances, the actions of parties or candidates may be judged not by regulators but solely by public opinion. This may have some advantages. The virtue of transparency is that it should provide a safeguard against inappropriate behaviour, in effect through self-censorship. Ideally, parties may avoid receiving monies from certain sources, for example, not because the rules forbid that to happen, but because transparency may expose them to criticism, which may ultimately be reflected at the ballot box.

Yet, a reliance solely on transparency is more likely to deliver unsatisfactory outcomes if the purpose of party finance regulation is to help deliver free and fair elections. This is so for two principal reasons. First, unless all activity is reported in 'real time', then the electorate may not be able to reward or punish candidates or parties until after an election where any inappropriate behaviour may have taken place. The check on behaviour would, therefore, be effectively lost until a subsequent election (if voters' memories were that long). Reporting donations in real time is theoretically possible (although it would add significant administrative costs to parties), but reporting expenditures in real time would be almost impossible. The second reason is that, as van Heerde-Hudson and Fisher show,⁴⁶ there is considerable public ignorance about matters of party finance, despite relatively high levels of transparency, and party finance remains a low-salience issue. As a consequence, public scrutiny by either the electorate or indeed non-governmental organisations (NGOs) may be neither a particularly effective nor a consistent means of helping to deliver free and fair elections.

So, with these potential difficulties ahead, there are no 'off the shelf' solutions for the effective regulation of political finance. Over-regulation (a rules approach) risks unreasonable restrictions on legitimate political activity, the perverse incentives to judge actions solely on the basis of their legality, and a reduction of the credibility of other regulations through an inability to implement particular ones. Trust in participants risks being discredited by new actors such as third parties threatening the credibility of existing political rules as they exploit the perfectly legal campaigning avenues available to them in increasing numbers. And deregulation risks creating a system based only on transparency whereby scrutiny is effectively contracted out to often partisan NGOs.

Yet none of these imply that the regulation of political finance is broken. The fundamental rules are still effective. What the issues outlined in this paper suggest is that just as when extensive rules were first introduced by PPERA, the legislation and regulations cannot cover every eventuality. Regulation in any walk of life is always playing 'catch-up' to some extent. And as with digital campaigning, regulations do have the ability to catch up in terms of imprints, even if in this case it has taken many years to do so. The question of foreign money has become more of a concern largely through the removal of the time limit on overseas residence. And, in the case of third parties, it is a function of these groups becoming cognisant of the rules, rather than the possibility being a new phenomenon.

Small adjustments can be made to guard against these problems – perhaps a limitation on the ability to donate by overseas voters and a reduction in the spending limits for third parties. But fundamentally, regulators, parties, campaigners and the public need to accept that no system is watertight. There are trade-offs that need to be considered. Is it better to bar institutions from making donations (to try to exclude foreign money) and lose that income for political parties, or to introduce a replacement source of funds from the state? And is it better to further restrict the activities of third parties, risking the ‘chilling effect’ of which charities have spoken, or risk party expenditure limits being rendered meaningless by third-party activity, as has occurred in the US?

The developments outlined in this paper make it clear that no system can effectively eliminate foreign money, foreign campaigning or challenges to parties as the principal campaigners in elections without embarking on wholly unreasonable levels of restriction. Equally, legislators can recognise the potential for growing problems and make plans at least to protect the integrity of elections.

Justin Fisher is professor of political science and director of Brunel Public Policy at Brunel University London. He has published extensively on party political finance, campaigning and elections.

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