



CENTER FOR TRANSITIONAL and  
POST-CONFLICT GOVERNANCE

# ENFORCING POLITICAL FINANCE LAWS

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# TIDE

Training in Detection and Enforcement



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**Political finance** encompasses formal and informal—both financial and in-kind—political income and expenditures. Further, these transactions may occur within or outside of the campaign period, or they may not be directly related to a campaign at all.

**Campaign finance** refers to transactions that are related to an electoral campaign. Transactions may include formal financial or in-kind donations or expenditures. Formal transactions that occur within the scope of the law may be augmented by public financing of campaigns. Informal transactions occur outside the scope of the law and range from vote buying, to unaccounted in-kind support from private and government enterprises, to abuse of public resources.

**Political party finance** refers to non-campaign financial or in-kind donations to political parties, organizations and associations, and expenditures made by these groups. Political parties may receive public financing, often as the result of garnering a certain percentage of the vote in an election.

**Enforcement agency** refers to a body overseeing and controlling the operation of a political finance system. It ensures that parties, committees and candidates comply with the limitations, prohibitions and disclosure and reporting requirements. The agency has the duty to enforce obligations arising out of political finance regulations.

**Disclosure** refers to the reporting of political finance accounts to a government body. Effective disclosure works when these accounts are detailed and made available for public scrutiny.

**Campaign expenditure** refers to expenditure incurred by or on behalf of a registered political party or candidate to promote the party or candidate at an election or in connection with future elections, including expenditure that has the aim of damaging the prospects of another party or candidate.

**Third-party contributions and expenditure** refers to goods or services paid for, or expenditure incurred on behalf of, a political party or candidate by a different entity.



## *Introduction*

IFES has produced this handbook as part of its Training in Detection and Enforcement (TIDE) program with funding from the United States Agency for International Development (USAID). The program promotes the enforcement of political finance laws through written and electronic resources, training and follow-on technical assistance for political finance regulators active in developing and enforcing laws and regulations.

This training program responds to a need that has become increasingly acknowledged by political finance enforcement agencies in many transitional countries. Weak enforcement in political finance and election campaign finance, in particular, has been a major problem. Over the last few years, IFES has advocated reforms to enhance enforcement, increase the effectiveness of enforcement agencies, and reduce opportunities for corruption related to political finance.

The IFES handbook on *how* to improve political finance enforcement is the product of extensive research conducted by a team of leading political finance experts and practitioners. It represents the first comprehensive effort to consolidate the experience and knowledge that are currently available. The handbook is a tool that offers options for the enforcement of political finance laws, which enforcement agencies can apply to the challenges they face.

It is *not* the aim of this handbook to provide a monitoring method that is applicable in all contexts, nor to answer the question of how to regulate political finance in all countries. Rather, it is a collection of lessons learned and best practices in both established and transitional democracies, organized in the form of practical guidelines and discussions of key concepts. IFES hopes that the handbook will assist enforcement agencies in carrying out effective supervision of political finance in their own countries.

The handbook corresponds to training provided by IFES and is available with supplementary materials on a CD-Rom and on the IFES political finance website ([www.moneyandpolitics.net](http://www.moneyandpolitics.net)).

The handbook is divided into two major parts:

Part One introduces the terminology of political finance enforcement and the institutions involved, including interactions among these institutions. Chapter I presents definitions, problems and laws. Chapter II discusses the basic issues pertaining to enforcement. Chapter III addresses the causes of non-enforcement, and Chapter IV explores the challenges of implementing different types of political finance regulations and subsidies.





Part Two addresses each step in the enforcement process. Chapter V focuses on establishing and strengthening political finance bodies; Chapter VI looks at violations of laws and regulations, dispute resolution, prosecution and sanctions. Chapter VII discusses various enforcement techniques, with a particular focus on disclosure, audits and maintaining proper internal controls; Chapter VIII covers investigative techniques. Chapter IX focuses on the relationship between enforcement agencies and the courts, while Chapter X warns of the dangers of biased enforcement. Chapter XI examines the role of civil society organizations, the media and academics in the process of enforcement.

This handbook is not the final word on the subject; its role is to promote serious discussion on what can or cannot be done in transitional countries to address a new challenge—“too many regulations, too little enforcement.” Used together with IFES training and assistance, the handbook and CD-Rom are tools to facilitate meaningful change that adds credibility to a country’s electoral process and political finance regulators.

The training offered by IFES is designed to complement each part of this handbook in a way that encourages political finance regulators to assess their own enforcement systems by identifying strengths and weaknesses. The training presents best practices and accepted standards and identifies strategic approaches to enhancing enforcement.

Assistance efforts seek to build on areas in need of strengthening that are identified during training. IFES does this by matching up experts and practitioners specializing in each of those areas with the key personnel from the relevant enforcement body and by providing useful sample materials from other enforcement bodies around the world. In short, IFES is here to help you design and implement the methods, techniques and systems that you choose for your country.

IFES invites all political finance regulators to suggest new lessons and insights and to continue building knowledge together. This is a global challenge, and there is no single blueprint on how enforcement should be undertaken. However, there are some best practices and accepted standards that can be shared. It is our hope that you will be able to use this information as you advance your country’s political finance laws and procedures and implement and enforce them.

# Part One





## **Financing Politics: Definitions, Problems and Laws**

### **1) Definition of "political finance"**

---

What is “political finance”? The narrowest definition is “money for electioneering.” This money may be spent by candidates for public office and also by their political parties or by other individuals or organized groups of supporters. It is used specifically to compete in an election and to pay the costs of complying with the applicable laws governing political finance. Money for electioneering is often known as “campaign finance.”

Since political parties play a crucial part in election campaigns in many parts of the world, and since it is difficult to draw a distinct line between campaign costs of party organizations and their routine expenses, party funds may reasonably be considered “political finance,” as well. Party funding includes not only campaign expenses, but also the costs of maintaining permanent offices; carrying out policy research; and engaging in political education, voter registration and other regular functions of parties. The term “party finance,” which refers to the financing of these activities, is used in two main ways: sometimes it refers to party financing of both routine and campaign activities, and sometimes—especially in the United States—it is used to refer more narrowly to the finances involved in routine, non-campaign activities alone. <sup>[1]</sup>

For the purposes of this handbook, “political finance” will be understood to mean campaign finance and party finance. However, it is important to note that “political finance” actually has even wider meanings.

Other types of “political finance” arguably include the following:

- 1) Financing of bodies such as party “foundations” and other organizations that, though legally distinct from parties, are allied with them and advance their interests;
- 2) The costs of political lobbying;
- 3) Expenses of newspapers and other media that are incurred and paid specifically to promote a partisan line;
- 4) The costs of litigation in politically relevant cases; and
- 5) Third-party or “independent” expenditures. <sup>[2]</sup>

That “political finance” consists not only of campaign and party funding, but also of these related types of expenditures poses a problem not merely of definition. It also creates a problem for those attempting to enforce laws designed to control the funding of political parties and candidates for public office.



## 2) Political finance: a fundamental problem of democracy

---

Democratic elections and democratic governance involve a mixture of high ideals and, all too often, dubious or even sordid practices. Election campaigns, political party organizations, and politically active pressure groups all cost money that must be found somewhere. The financing of political life is a necessity—and a problem.

The frequency with which new laws concerning campaign and party finance are enacted is testimony to the failure of many existing systems of regulations and subsidies. Hardly a month goes by without a new scandal involving political money surfacing in some part of the globe. These scandals are frequently the signal that existing political finance regulations are not working properly. Either the laws are inadequate, or they are not being enforced.<sup>[3]</sup>

When regulations are enacted to control the campaign costs of political candidates and the finances of political parties, the effect is to divert money into related but uncontrolled forms of political activity. For instance, what happens when money spent on policy research is subject to disclosure and to other forms of financial control if it is conducted under the aegis of a party organization but not if it is under the aegis of a party-linked "foundation"? The expected result is that a "foundation" will be created as a device to escape the legal controls over the political party.

Drawing a boundary line between "political" and "non-political" finance is not the only problem, however. It is necessary also to define the meaning of "finance." This is an issue of definition that also has practical ramifications. A "financial" payment arguably may not be limited to money alone but may involve resources with a monetary value. A political donor who gives a gift of US \$1,000, and another individual who donates a computer to a political party, thereby saving the party the expense of purchasing a computer for US \$1,000, have both given an equal financial advantage to the recipient party. "Political finance," therefore, includes the financial value of gifts-in-kind. Indeed, such gifts may include the free provision of professional services to a political party or candidate.

Although it is sensible to include "in-kind" donations and payments which are clearly a substitute for money under the definition of political "finance," not all forms of political support may be measured in financial terms. A religious leader who encourages his or her followers to support a political party in a sermon may bestow a significant advantage on that party. But it would stretch the definition of "political finance" to regard the sermon as equivalent to a gift of a specified amount of money.<sup>[4]</sup>

Overall, there is no single political finance system that will work in every political environment. There are many choices for regulating political finance in democratic systems throughout the world. Ultimately, the country's political,



economic and social circumstances will determine the successful operation of a political finance system.

### **3) Main types of political finance laws**

---

The main provisions of political finance laws, some of them defined in the glossary, usually include:

- 1) Prohibitions against corrupt and illegal practices (such as vote buying);
- 2) Financial deposits for candidates for public office;
- 3) Disclosure rules;
- 4) Spending limits;
- 5) Contribution limits;
- 6) Bans on certain types of contributions (such as foreign contributions, anonymous contributions, or contributions from business corporations);
- 7) Bans on certain types of spending;
- 8) Auditing bodies and their powers;
- 9) Public subsidies;
- 10) Tax relief and subsidies-in-kind;
- 11) Political broadcasting rules;
- 12) Rules concerning financial representatives and financial discipline;
- 13) Rules concerning the funding of internal party contests;
- 14) Rules concerning the funding of referendums;
- 15) Rules concerning the declaration of assets by candidates for public office;
- 16) Measures to control the use of public resources for campaign purposes;
- 17) Rules concerning the use of government resources by incumbents; and
- 18) Other ethics and conflict-of-interest rules.

Such provisions sometimes are contained in laws dealing specifically with party finance or election finance. Often they are included in broader laws about elections, political parties or the prevention of corruption. Media laws and laws concerning voluntary associations and organizations may also contain provisions about aspects of political financing. In addition, laws that do not directly regulate the funding of political parties and election campaigns may also be relevant. It is important to acknowledge the warning contained in the French submission to the Council of Europe's study on "Trading in Influence and Illegal Financing of Political Parties":



[I]t is impossible to combat illegal financing of political parties purely by means of regulations on party funding. What matters is to clean up the whole environment surrounding party funding ... This places the illegal financing of political parties in the wider context of misappropriating procedures relating, for example, to town planning ventures, commercial development, public procurement, public service provision, use of local semi-public corporations or semi-public non-profit-making organizations, etc. <sup>[5]</sup>

Because of the range of provisions concerning aspects of political finance, there are usually a number of different laws in any one country dealing with the topic. The existence of a variety of separate laws often complicates the task of the regulatory body or bodies responsible for enforcing the laws.

#### **4) Prevalence of political finance laws**

In recent decades, there has been a general trend toward more political finance regulations and more subsidies. The rapidity with which legal changes relating to political finance occur in various countries makes it difficult to keep abreast of the changes. Therefore, the review of political funding laws in the following table is somewhat dated already. However, it provides a good impression of the situation in 104 countries in 2000-2001.

**Table 1:** *Political Finance Regulations and Subsidies in 104 Countries*

<b>Regulations</b>	<b>Percentage</b>
Disclosure rules (any)	62 %
Disclosure of individual donors (partial or complete)	32 %
Ban on foreign donations (partial or complete)	49 %
Campaign spending limits (any)	41 %
Contribution limits (any)	28 %
Ban on paid election advertising on television	22 %
Ban on corporate political donations (partial or complete)	16 %
Free political broadcasts	79 %
Direct public subsidies	59 %
Subsidies in kind (apart from free political broadcasts)	49 %
Tax relief for political donations	18 %

Source: *Pinto-Duschinsky, 2002, p. 75.*



**Enforcement: Basic Issues**

**1) Definition of “enforcement”**

---

Political finance enforcement is the act of giving force to and executing political finance regulations. The narrow definition is “control exerted by an enforcement agency which gives force and authority to a political finance system.”

However, an ideal enforcement system includes not only a controlling body, but also all the components found in a comprehensive judicial system, namely: investigation, prosecution, adjudication and sanctions. Such a system also depends on the cooperation of various stakeholders and relies on the monitoring mechanisms provided by financial agents, auditors, banking institutions, anti-corruption watch-dog organizations and the media.

In a wider context, “enforcement” can be defined as a complex institutional arrangement that combines a variety of instruments and actors, which may be classified as follows (see Chart 1 below):

- 1) Internal control (doctrine of agency, accounting standards, banking system);
- 2) Financial reporting and audit;
- 3) Control by an enforcement agency supported by investigation mechanisms;
- 4) External monitoring (civil society, the media, competing parties, voters); and
- 5) Prosecution and sanctions (administrative, criminal and political sanctions).

The enforcement of political finance laws is particularly important, since a regulatory scheme is only as effective as the consequences for violating it. In practice, the political finance enforcement agency can detect possible law violations through three processes:

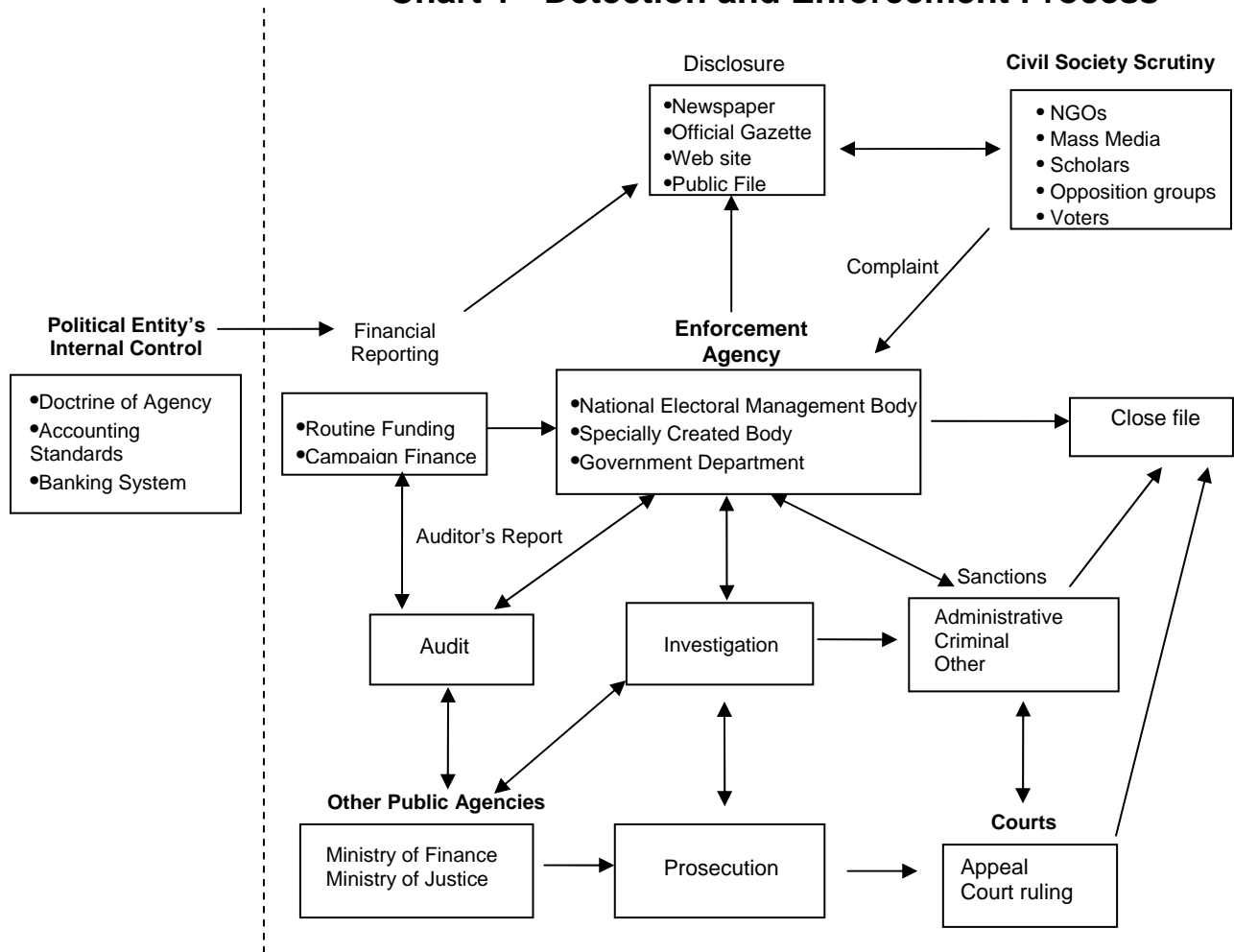
- 1) Monitoring: potential violations are discovered through a review of financial reports or through an audit.
- 2) Complaint: an individual or an organization may file a complaint, which alleges violations and explains the basis for the allegations.

- 3) Referral: possible violations are discovered by other agencies and referred to the main political finance enforcement agency.

**Internally generated cases** include those discovered through reviews of financial reports and audits and those referred to the primary enforcement agency by other government agencies (e.g., ministry of justice).

**Externally generated cases** result from complaints made by all interested participants of the political process.

**Chart 1 - Detection and Enforcement Process**







## 2) Stages of enforcement

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Two scholars have described how political finance reform works, as follows:

No campaign finance reform, however attractive, can ever work like a magic bullet. The proposals all have many provisions; the provisions aim at more than one goal; and the paths to those goals go through many intermediate steps. ... [A] failure at any one of the intermediate steps will mean a breakdown. Metaphorically, therefore, instead of a magic bullet, we suggest thinking about links in a chain, any one of which may snap. <sup>[1]</sup>

Similarly, Alonso Lujambio, the Mexican academic and former member of the country's electoral commission, IFE, has used the notion of a "chain" to characterize political finance enforcement. <sup>[2]</sup>

It is appropriate to describe enforcement as a **process** with different stages. It is also important to note that the different stages of enforcement are likely to be the responsibility of separate bodies. Thus, a clear specification of responsibilities is vital to enforcement success.

- Stage 1:** Legislation and implementation planning
- Stage 2:** Preparation and training
- Stage 3:** Administration
- Stage 4:** Assuring compliance
- Stage 5:** Administrative fines, criminal investigation and prosecution
- Stage 6:** Trial and conviction
- Stage 7:** Appeal process
- Stage 8:** Review process

### **Stage 1. Legislation and implementation planning**

The effectiveness of enforcement depends greatly on the steps taken even before a law is enacted. There are several distinct tasks at this stage. First, it is necessary to consider carefully whether the proposed legislation is clearly written and whether it is over-ambitious. <sup>[3]</sup> If the wording of legislation is flawed, this is a recipe for non-enforcement. To the extent possible, research should be conducted to understand the existence and extent of the political finance problems and which need to be targeted. Sometimes legislation is enacted without a meaningful factual basis. Research to discover what other jurisdictions have done regarding the political finance issues in question can also be extremely helpful. It is unsatisfactory to wait until after a law comes into force before making plans for its implementation.

### **Stage 2. Preparation and training**

When a new law is enacted, the authority responsible for implementing it will need to make some special preparations, including the preparation of forms to be submitted by parties and candidates, guidance materials, and training. Training



should be provided for members of the regulatory body and for key officials of political parties. It is also useful to provide briefings for journalists and representatives of some non-governmental organizations (NGOs).

### **Stage 3. Administration**

This consists of routine tasks to ensure that forms reach the relevant candidates and party officials, that those with obligations under the laws are aware of them, and so forth. Administration often involves devoting a considerable amount of time to a large number of very small political parties and to fringe candidates.

### **Stage 4. Compliance**

This stage of the process involves all the tasks of ensuring that laws are obeyed, short of initiating criminal investigations and legal proceedings. Typical activities at this stage include issuing reminders to parties and candidates who have failed to carry out their legal obligations on time, making spot checks on the accuracy of information received, initiating audits, and imposing administrative fines. The capacity of regulatory bodies to ensure compliance depends in part on the powers they possess to examine documents and premises.

### **Stage 5. Administrative fines, criminal investigation and prosecution**

If the regulatory body has reason to believe that there has been a serious breach of the law and that there may be grounds for prosecution, the next stage is to turn over the evidence to the police or to the authority responsible for initiating prosecutions.

### **Stage 6. Trial and conviction**

In an ideal world, any enforcement agency's primary goal would be to close files, settle cases and to conciliate, as it is usually less expensive and time-consuming than making referrals to the court. However, when it comes to trial and conviction, this may be the responsibility of the ordinary courts or, in some jurisdictions, cases may be assigned to special election courts.

### **Stage 7. Appeal process**

Appeals can be one of the checks and balances on decisions made by an enforcement agency or administrative review of complaints. Each system handles its appeals differently, according to its legal and institutional frameworks, but it is important to have a user-friendly system that can review lower decisions in a systematic, neutral and timely manner.

### **Stage 8. Review process**

Concerns about political finance enforcement are well expressed by a former Canadian MP, Flora MacDonald:

The history of successful violations of many important features of income tax legislation, or in the field of industrial relations—and notably by the more powerful and affluent sections of the population—suggests that the best legal and accounting minds could be utilized to enable those who can afford them to



ingeniously evade the intent of this legislation. It is therefore essential, if we are really serious about this undertaking, that we create at once a mechanism for the automatic, continuous and free review of the implementation of these measures.<sup>[4]</sup>

Indeed, there should be constant review of the enforcement process to monitor its effectiveness, to build support for it, and to identify new problems as they arise. Following an election, the relevant facts of the political finance situation, statistical as well as anecdotal analysis, should be examined, and any need to update the laws should be pursued. An enforcement agency should also be interested in any studies, surveys, research, or other empirical data that might support changes in its enforcement procedures. Further, there should be an effective response to these problems to ensure that the underlying goals of the enforcement system continue to be met. Finally, there must be a commitment and desire to enforce the legislation from all the main players in the electoral game. Without such a commitment, even the best-designed system can be obstructed.

### **3) Enforcement agencies**

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The status of the body entrusted with overseeing a political finance system clearly has an impact on effectiveness of control as well as on public confidence in the procedures. However, there is no easy answer to the question: What type of political finance enforcement agency should a democracy have? Comparative research has shown that in over 36 percent (n=40) of the 111 countries studied, there was no body responsible for administration and enforcement of the regulations.<sup>[5]</sup>

Moreover, the type of political finance enforcement agency will depend greatly on the primary duties of the agency. In 63 percent of the countries that have agencies responsible for enforcement of political finance, most of them rely on National Electoral Management Bodies (See Table 2). An additional 28 percent of the countries employ various government departments such as the ministry of the interior, the ministry of labor and administration, the ministry of justice, the tax office, or the attorney general's office. Other bodies responsible for political finance enforcement might include parliaments, parliamentary speakers, constitutional courts, tribunals, etc.<sup>[6]</sup>

**Table 2: What Body is Responsible for Administration and Enforcement of the Regulations?**

National Electoral Management Body	Regulatory Body Specially Created for this Purpose	Government Department	Other
45 countries (63%)	9 countries (13%)	20 countries (28%)	19 countries (27%)
<b>TOTAL = 71 countries</b>			

Source: Reginald Austin and Maja Tjernström, eds., 2003, pp. 185-187

The special tasks exercised by the above agencies can include:

- 1) Designing reporting forms and reporting procedures;
- 2) Receiving audited or non-audited reports;
- 3) Publishing financial reports and auditors' reports;
- 4) Initiating inspection and public inquiries; and
- 5) Executing sanctions.

The responsibility for administration and enforcement of political financing can be performed by a single body or can be shared among several bodies. [7] The effective implementation of political finance legislation is made more difficult when different bodies are dealing with various aspects of the same subject. According to Karl-Heinz Nassmacher, evidence from established democracies indicates that only the approach where “there is one law regulating money in politics and only one agency to implement it” is likely to work well. International IDEA (2003) has reported that of 71 countries studied, 51 have a single responsible body, while 20 countries have two or more bodies administering and enforcing political finance regulations.

In most cases, financial reports submitted by the parties and auditors will be subjected to some review by an enforcement agency, although the agency's scope of work, specialization and degree of independence will often determine how comprehensive such a review can be. Recent recommendations made by the Council of Europe “On common rules against corruption in the funding of political entities and electoral campaigns” [8] clearly stipulate that monitoring with respect to the funding of political parties and electoral campaigns should be done by an independent body. Such independent monitoring should include supervision over the accounts of political parties and the expenses involved in election campaigns, as well as their submission and publication. Furthermore, the Council of Europe recommends that its member-states should promote the specialization of the judiciary, police or other personnel in the fight against illegal funding of political parties and electoral campaigns.



#### 4) Non-enforcement of political finance laws: a serious issue

In determining the form of effective enforcement, there are four essential ingredients:

- 1) The laws themselves must be capable of enforcement. Ease of proof is an essential requirement for a workable enforcement scheme.
- 2) The controls should be enforced vigorously, without bias or favoritism.
- 3) The agency charged with enforcement should be independent and non-partisan, free from influences of partisan political considerations.
- 4) The penalties should be effective, proportionate and dissuasive.

There is broad agreement that the non-enforcement of political finance laws is a serious problem in many countries. All too often, not the slightest effort is made to ensure that laws on the funding of parties and election campaigns are obeyed. The following table gives examples from 14 countries.

**Table 3:** *Snapshots of the Non-Enforcement of Political Finance Laws*

Country	Description
<b>Cambodia</b>	"Indicative of the government's inability to monitor party finances [as required by the Party Law] ... a senior government official stated, 'We do not even have the parties' addresses.'" [9]
<b>France</b>	"...the published statistics of party finances contained in official accounts—in France like elsewhere—are works of fiction." [10]
<b>Germany</b>	<p>The Flick Affair, revealed in 1981, involved serious violations of political finance laws by all the main parties. The scandal led to a parliamentary investigation, to a presidential commission on party funding, to a new parties law and, finally, to a trial. In 1987, a senior Flick official received a two-year suspended sentence. Two former economics ministers, who had resigned from office, were fined on minor charges.</p> <p>They were found not guilty on the main corruption charges, though the judge announced that "the chamber continues to maintain considerable suspicion" that some of the allegations had been justified.</p> <p>"The judge described the so-called Flick case ... as 'extraordinary' since ... almost all the 80 witnesses had suffered a "conspicuous loss of memory." [11]</p>

**Table 3: Snapshots of the Non-Enforcement of Political Finance Laws**  
(Continued)

<p><b>Ghana</b></p>	<p>The 1992 Constitution required parties to declare their revenue and assets and to publish annual accounts. Yet, according to a leading Ghanaian scholar,</p> <p>“Six years into the 4th Republic and after two elections, the inadequacies and imperfections of the provisions of the 1992 Constitution and other laws regulating parties have become manifest. The provisions in the Constitution...have been honoured only in the breach. ... [T]he...requirement to state all sources and assets of the political party...has simply not been applied... The picture emerging from newspaper reports and academic studies on the financing of political parties in Ghana is ... that many of the laws covering political financing in Ghana today are flouted with mock derision.”<sup>[12]</sup></p>
<p><b>India</b></p>	<p>According to the official Wanchoo Committee (1985), “The huge expenditures incurred by candidates and political parties have no relationship to the ceiling prescribed under the law.”<sup>[13]</sup></p>
<p><b>Indonesia</b></p>	<p>“...most political parties did not have an appropriate bookkeeping system. Accountants familiar with the audit process described the [financial] reports [of the political parties] as likely constituting only a fraction of political financial activity conducted by or associated with many, if not most, of the parties.”<sup>[14]</sup></p>
<p><b>Israel</b></p>	<p>“The legislature is ... the representative of the parties which enjoy financing under Israeli law. In this capacity, the legislature was retroactively able to amend the provisions of the law by either raising the ceiling of expenses allowed which might be spent or by minimizing the sanctions for deviation from the ceiling allowed by law. In H. C. 141/82, <i>Rubinshtein et al. v Chairman of the Knesset</i>, the Court criticized such retroactive legislation which not only removes the deterrence implication of the law but also nullifies its basic and moral purpose.”<sup>[15]</sup></p>
<p><b>Italy</b></p>	<p>“...any private contribution which exceeds the amount of 10 million lire must be reported jointly by the donor and the recipient to the Speaker of the Chamber of Deputies, but ... this hardly ever happens.”<sup>[16]</sup></p>
<p><b>Malaysia</b></p>	<p>“Campaign finance limits ... are routinely violated.”<sup>[17]</sup></p>
<p><b>Philippines</b></p>	<p>“Philippine law restricts candidate spending to one year's [salary] for the office sought, but the custom of ‘buying’ votes simply makes the controls [laughable].”<sup>[18]</sup></p> <p>“Laws on financial contributions refer specifically to elections ... They are ... virtually impossible to implement ... these are dead letter laws.”<sup>[19]</sup></p>
<p><b>South Korea</b></p>	<p>“The NEC [National Election Committee] compiles the fiscal reports submitted by party headquarters, district offices and politicians, as the Political Funds Act requires them....[T]here is widespread skepticism about the validity of the reports.”<sup>[20]</sup></p>



**Table 3: Snapshots of the Non-Enforcement of Political Finance Laws**  
(Continued)

<b>Taiwan</b>	“...in practice limits on campaign expenditures and contributions have not been respected.” <sup>[21]</sup>
<b>Tanzania</b>	“...the enforcement of the Political Parties Act, S. 14 has been elusive. S. 14 (1) provides that every political party which has been fully registered shall maintain proper accounts of the funds and property of the party and submit to the registrar an annual declaration of all the property owned by the party. This statutory requirement is not adhered to and some parties have never accounted for their funds for four consequent years without any measures being taken against them.” <sup>[22]</sup>
<b>Ukraine</b>	“Officially documented campaign expenditures may be irrelevant, as they often do not reflect the real cost of the campaign ... While the law stipulates mandatory disclosure of campaign funds, no penalty is specified for violation of the disclosure provisions.” <sup>[23]</sup>

### 5) Blatant disregard versus subtle avoidance

The various methods of avoiding political finance regulations call for different solutions. Violations that involve subtle money laundering schemes, fancy methods of side-stepping laws, and using the advice of clever lawyers requires enforcement skills similar to those needed to detect and prosecute serious white-collar crime and fraud. In contrast, political finance regulations often are disregarded blatantly and grossly; there is no attempt to conceal the fact that the law is being broken.

Blatant disregard of political finance laws is probably the most common problem in many countries today. The enforcement methods required to deal with this are fairly simple in themselves, but they require administrative capacity and political will, which frequently is lacking (see Chapter III). Once the more glaring forms of law-breaking are tackled, more subtle ways of avoiding laws are likely to be devised. At this stage, political finance regulators must develop more sophisticated methods of investigation.

The training required to assist regulatory bodies will vary according to whether they are confronted with blatant or subtle violations. This handbook will deal with both types, but will focus on the ways to tackle the most common, blatant violations. Brazen and consistent violations occur in advanced as well as developing democracies, as demonstrated by various examples in this handbook. However, it is probably true that such blatant violations are particularly common in low-income nations and in unstable, violent political systems.

Here is an example of blatant violation taken from an internal IFES report concerning an African country:



[Less than a quarter of the parties] have submitted audited accounts for [the last financial year] and/or a statement of election expenses. None of the erring parties has been sanctioned. Neither has the Commission published the audited election expense [returns] as required by law. ...The problem [the Commission] faces at the moment is the fear of reprisals. For example, a government contractor who funds an opposition party might not want to be disclosed as supporting the opposition for fear of not getting contracts from the government anymore.

[The official responsible for compliance said] that it is difficult ... to monitor the parties because the Commission is yet to put in place an effective mechanism to monitor [party] finances. And the fact that our economy is a cash economy might be a hindrance to parties making proper accounts. [The compliance officer has] asked questions that are never answered: What will happen if the defaulting party is in the government? Have the ... major parties spent more than [permitted] in the elections [held over one year ago]? How do you enforce the laws on such parties and how do you check the books of such parties?

Elections held in the Philippines in 1998 and 2001 presented even clearer examples of outright disregard for the legal requirements concerning submission of political party campaign accounts:

[T]reasurers from all political parties are required to submit ... itemized statements of all campaign contributions and expenditures within thirty days after the day of the election ... In the 1998 elections, only four political parties submitted their statements of election contribution and expenditures, and in the 2001 election, no party submitted a financial statement ....<sup>[24]</sup>

Two American scholars, Michael J. Malbin and Thomas L. Gais, have reported on the more subtle forms of avoidance of political finance laws in the United States. Their book analyzed the enforcement of a series of laws and subsidies involving disclosure, contribution limits, spending limits and public funding, introduced at the state level starting in the 1970s. (In the United States, federal election laws are the responsibility of the US Congress, and state elections and their financing are subject to laws passed by the 50 separate state legislatures.) One of the chapters is titled "Slipping and Sliding: How Interest Groups Have Adapted to Regulation." In a section of the chapter called "Tactical Responses: Getting Around the Law," the authors noted:

We were consistently impressed in our interviews by the remarkable and growing range of political tactics used by major interest groups in the states that we visited. Many of our respondents saw this resourcefulness as a direct response by the groups to the particular restrictions written into the laws of their state. As a party attorney in Florida said, the state's recent [political finance] reforms have "made people in the fund-raising community get a lot more creative."<sup>[25]</sup>

The system of "adaptation" to new political finance laws described by the authors is rather like the "tax planning" industry in some countries. Those with sufficient wealth to employ economic advisors and corporate lawyers are best able to devise strategies to sidestep tax obligations without actually disobeying the rules.





Since those with substantial wealth are able to pay for complex advice, and since the government agencies responsible for tax collection often are understaffed, these tactics often prove successful.

In the field of political finance law, the meaning of terms such as “political party,” “donation,” “expenditure,” and “campaign” may be ambiguous. Lawyers are able to exploit such ambiguities to argue that what is in reality a donation to the election campaign of a political party is neither—technically—a “donation,” nor has it been given to an election “campaign,” nor to a political party. For instance, the gift may have been in the form of an advertisement in a party journal (supposedly an ordinary business cost of the donor). It may have been given to a “party foundation” (a body legally separate from the political party though, in practice, closely connected to the party). It may have been given for purposes which arguably are not directly related to the “campaign.”

A study by Michael Pinto-Duschinsky of the German “party foundations” showed how these foundations were used at certain periods as devices to side-step laws relating to the funding of German political parties.<sup>[26]</sup>



**Non-Enforcement: The Causes**

Many countries, and especially developing and transitional democracies, have great problems in enforcing party finance regulations. This should not be a surprise since there are so many factors contributing to the failure of enforcing political finance laws. As early as 1966, the Canadian Barbeau Committee <sup>[1]</sup> reported that “(1) the established parties have been unwilling to initiate action against each other; (2) the trouble and cost of contesting an election suit about election expenses is prohibitive to the private citizen; (3) no organized, non-political group has ever undertaken to bear the cost of a suit; (4) no governmental agency has felt itself responsible, or been made responsible, for prosecuting candidates violating the law on election expenses.” <sup>[2]</sup> This chapter attempts to explain the failure of some enforcement systems by examining the main causes of non-enforcement.

**1) Legal loopholes**

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Candidates and leaders of political parties are frequently prepared to break the law if this enables them to gain votes. Yet, they find it even more attractive to circumnavigate political finance laws without directly breaking them. Lawmakers must face up to the reality that any loopholes in the laws they enact will be discovered and exploited.

**2) Ambiguous laws**

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Terms typically used in political finance laws such as “donation,” “election campaign,” “political,” and “political party” are sometimes ill-defined or undefined.

For example, if a political finance law requires the disclosure and the limitation of donations to an election campaign, it will be difficult to enforce the law if there is ambiguity about what constitutes a “donation.” (Some laws fail to specify whether loans count as “donations” or whether in-kind services count as “donations.”) Equally, the law will prove difficult or impossible to enforce if there is uncertainty about what constitutes a “campaign” cost as distinct from a routine cost of a party organization.

**3) Ambitious laws**

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Legislators and their advisors frequently underestimate the inherent difficulties involved in implementing legislation in the field of political finance. Under conditions where major corruption seems to result from high spending on political campaigns, it may seem obvious that the remedy is to impose limits on contributions or on political expenditures and to ban certain undesirable sources



of funding. As argued below, a number of these supposedly "obvious" legislative solutions turn out to be laden with problems.

Polish, Russian, and Ukrainian examples (see Table 4) show that spending limits have proved in practice to be irrelevant, having been introduced at unrealistically low levels. Not only have they failed to curb the political finance "arms race," but this failure undermines confidence in the entire system of political finance regulation. During the 1993 election campaign in Russia, national blocs officially spent \$3.7 million; two years later, spending limits were imposed, allowing individual candidates to spend no more than approximately \$100,000, and electoral blocs no more than \$2.4 million. The *officially reported* campaign spending figures naturally decreased in line with the new regulations. In the 1999 elections to the Russian Duma, individual candidates were allowed to spend only the equivalent of \$65,000 and electoral blocs \$1.6 million. Not surprisingly, the press reported that, in fact, national blocs spent considerably more than the allowed amount, which politicians were unable to declare without opening themselves to prosecution.

Another indication of the problems involved in political finance regulation in a considerable number of countries is the risk of contravening constitutional guarantees (especially concerning freedom of expression). The task of contesting cases on political finance laws before constitutional courts saps the energies of many regulatory bodies.

**Table 4: Financing a Presidential Election Campaign: Major Candidates' Official Spending in Russia, Ukraine and Poland**

Figures for expenditure are in US\$ million

Russia		Ukraine		Poland		Russia		Ukraine		Poland	
Presidential Elections 1996*		Presidential Elections 2000**		Presidential Elections 1999***		Presidential Elections 1990		Presidential Elections 1995		Presidential Elections 2000****	
Candidate	Exp.	Candidate	Exp.	Candidate	Exp.	Candidate	Exp.	Candidate	Exp.	Candidate	Exp.
Lebed	2.83	Zyuganov	0.869	Moroz	0.214	Mazowiecki	0.597	Kwasniewski	1.373	Kwasniewski	2.29
Zhirinovskiy	2.72	Titov	0.866	Tkachenko	0.195	Walesa	0.581	Walesa	1.121	Krzaklewski	2.31
Yavlinskiy	2.72	Yavlinskiy	0.840	Kuchma	0.154	Tyminski	0.351	Pawlak	0.544	Olechowski	0.42
Yeltsin	2.42	Putin	0.451	Vitrenko	0.125	Cimoszewicz	0.192	Kuron	0.535	Kalinowski	0.46

**Notes:**

- \* Official spending limit US\$2,850,000.
- \*\* Official spending limit US\$920,000.
- \*\*\* Official spending limit US\$385,000.
- \*\*\*\* Official spending limit for 2000 US\$2,600,000. Not applicable for 1990 and 1995.

**4) Unsuitable penalties or failure to specify penalties**

Surprising as it may seem, laws sometimes set out offenses but fail to specify any penalties for them. For example, there is little value in specifying that parties or candidates must disclose donations if no penalty is imposed for the failure to disclose.



If penalties for relatively minor transgressions are disproportionately severe, regulatory bodies may be reluctant to impose them. For example, Michael Svetlik of IFES has reported the absence of civil penalties in Georgia for failure to obey the country's laws concerning disclosure of political finances:

...[N]o candidate or party has been found guilty of violating existing political finance laws in Georgia...In discussing with our staff lawyer the punitive measures in place for violators of political finance regulation, we concluded that the lack of civil penalties results in candidates and parties viewing the regulations as flexible ...[T]he only penalty for not meeting the existing disclosure requirements is disqualification from future electoral contests. This penalty, perhaps due to its draconian nature, has yet to be exercised by judicial authorities.<sup>[3]</sup>

### **5) Collusion between opposing political parties and between opposing candidates**

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In many countries, the authority responsible for enforcing political finance regulations does not attempt to launch its own investigations into possible contravention of political finance laws. It is assumed that candidates and political parties who have been on the losing side will bring allegations against their political opponents and that this adversarial system will ensure that the laws are obeyed.

The chairman of the United Kingdom Association of Electoral Administrators, John Turner, reported in 1998 on the prevailing British practice in his evidence to the Committee on Standards in Public Life. He was questioned by one of the Commissioners, Professor Anthony King, about campaign spending limits on parliamentary candidates: “[H]ow does the present system work? What happens? You are the returning officer [that is, the electoral administrator]. What do you do? What are your responsibilities or lack of them?” Mr. Turner replied, in part:

Certainly they are not onerous, in the sense that we have no statutory duty other than to receive the returns as to election expenses at the appropriate time. We do not even have the burden of having to vet them, in terms of their arithmetic accuracy. Having received the return, save for a parliamentary election—when one must also publish a notice—that is about the limit of the duty that falls on a returning officer. Any vetting is left to opponents of, in particular, successful candidates or to anyone else with an interest in the matter and who takes the opportunity for public inspection.<sup>[4]</sup>

In practice, opposing candidates and parties cannot be relied on to report each other's wrongdoing. In many countries, the laws are broken by most of the parties and candidates, and this deters them from making accusations against each other. In addition, it often costs a great deal of money for candidates and parties to collect evidence and to bring legal action.



The British Broadcasting Corporation reported in 1997 that:

...the reason for the lack of [prosecutions against parliamentary candidates for contravening legal limits on campaign spending] is not necessarily that no malpractice occurs but rather the opposite. In their study of the 1959 [British] general election, Butler and Rose quoted one senior party figure as saying: 'If we lost a seat by one vote and I could clearly prove illegal practices by the other side, I wouldn't try. It would perhaps cost [GBP] 5,000 and they might be able to show that our man had slipped up in some way. But worse than that, it might start tit-for-tat petitions and no party could afford a lot of them. On the whole we're both law abiding and it's as well to leave each other alone.'<sup>[5]</sup>

## **6) Lack of administrative capacity in a regulatory body**

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In many countries, laws concerning political finance have become far more extensive and complex in recent years. However, frequently there has been a failure to provide regulatory bodies with the additional financial and human resources needed to carry out their additional functions.

In their study of state governments in the United States, Malbin and Gais found that the financial resources given to bodies responsible for administering campaign finance laws at the state level usually had not increased to keep pace with new complex laws and subsidies. Moreover, a short period of enthusiasm for legal reform was typically followed by a loss of interest and pressure on the budget of the regulatory body. In the face of such financial pressure, the normal response of the regulatory body was to cut its expenditure on enforcement.<sup>[6]</sup>

These researchers also reported that:

Agencies typically seem to have two kinds of budget problems. In some states [of the United States] we heard stories about agency budgets being slashed after the agency had investigated a legislator or a legislator's ally. But the more common stories we heard were about inattention or neglect.

Administrators in several agencies, for example, described what had happened to their agencies during the last economic recession, when state and local budgets were tight. During a recession, tax revenues are down and entitlement spending [for example on unemployment benefits] is up. Agencies with discretionary budgets suffer the consequences ... discretionary projects are bound to be cut most heavily. These blows will be felt more strongly in small agencies than in large ones. One agency's chief counsel described the effects of a 10 percent budget cut in his ... agency. Because [priority was given to routine administration of the rules concerning disclosure of candidates' accounts], ... the only way to cut the agency's budget by 10 percent was to cut the investigative staff in half—from two to one. ... It took a full decade to restore the lost staff position.<sup>[7]</sup>

A principal argument in this training program is that the lack of administrative capacity of the regulatory body does not occur by accident. It can often result



from the failure to plan and provide the funds for administration of new laws during the period when those laws are still under consideration.

### **7) Lack of capacity in judicial bodies**

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It is not enough for the bodies responsible for administering political finance regulations to do their work internally. Once they find preliminary evidence of malpractice, it usually is necessary for them to turn to law enforcement agencies to conduct the further detective work (backed by legal powers of subpoena and access to documents that political finance regulators do not normally possess). If police authorities obtain sufficient evidence, the authorities responsible for public prosecutions must decide whether to bring a case to trial. Finally, the courts conduct the trial, and higher courts deal with appeals.

In many countries, the court systems are extremely slow-moving. Moreover, there is little enthusiasm to give priority to cases involving leading members of the governing political party.

### **8) Confusion of roles in different regulatory bodies**

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In view of the normal reluctance of political finance regulators to build cases against prominent politicians for contravening the laws, they will typically try to pass the responsibility to some other regulatory body. Thus, if there is any confusion about the responsibilities of the electoral commission, the anti-corruption commission, the income tax authorities, the government auditors, the legislature, and so forth, the normal result will be that each body will make the excuse that some other body should be implementing the law.

### **9) Constraint against prosecuting governmental bodies for legal infringements**

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In 1979, the Chief Electoral Officer of Canada pointed out that:

Under a departmental policy going back to 1962, the federal Department of Justice has declined to become involved in investigations or prosecutions under the *Canada Elections Act* because of the sensitive political position of the Attorney General of Canada in whose name any prosecutions would have to be conducted.<sup>[8]</sup>

In many countries, one of the most significant forms of legal infringement of political finance laws is that committed by governmental bodies on the orders of politicians of the ruling party. Typically, governmental resources (personnel employed on the public payroll, publicly owned vehicles, office equipment and telephones, and public information services) are used for partisan campaign activities. When this occurs, it is usually impossible for the political finance regulators to take action against the government—for both political and legal



reasons. Governmental bodies often enjoy legal privileges which render them immune from prosecution.

The former Electoral Commissioner of Australia has written about this problem:

In addition to natural and [legal] persons who ought to be treated identically, there are 'government persons' who may escape regulation. Where there is a doctrine of Crown or state privilege, it will be necessary to make provision (if this is constitutionally possible) to regulate state instrumentalities as well as private actors. At the very least, internal guidelines for Ministers and their departments need to be developed to promote ethical, i.e. non-partisan, conduct within the executive branch.<sup>[9]</sup>

## **10) Political constraints and lack of authority in regulatory body**

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Electoral commissions typically are reluctant to go out of their way to enforce political finance laws for two reasons. First, electoral commissioners, because of the methods by which they are appointed, are sometimes political loyalists or are otherwise beholden to the president of the country or to other leading members of the government. Second, even if the electoral commissioners have a spirit of independence, they may be reluctant to challenge the government or the legislature due to the fear that the commission's budget will be cut in retaliation for any prosecutions for political finance offenses.

These two constraints on enforcement are difficult to resolve. There are a number of alternative methods of appointment of commissioners designed to assure independence and professionalism, but none of them are ideal. With regard to the financial independence of the electoral commission, a balance needs to be struck between independence from political retaliation and lack of financial accountability.

In some cases, the regulatory body lacks authority to enforce the laws. Important powers needed for effective enforcement include subpoena power, power to assess penalties, and power to conduct audits.

## **11) Bad habits**

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It is reasonable to suggest that the assumptions and habits prevailing in a society are more important than any of the specific reasons stated above for non-enforcement of political finance laws. Both good and bad habits have a strong tendency to be accepted as normal when it comes to standards of electioneering.

The history of the United Kingdom during the 19th century illustrates the power of existing assumptions about what is or is not acceptable. In the early 19th century, electoral corruption was rampant. Laws were routinely broken. It was standard practice for the government of the day to use secret-service funds for electioneering, which usually meant bribery of voters. Vote buying and the



dispensation of large amounts of liquor made polling a loud, rowdy affair and involved candidates in huge expenses. Half a century passed before electoral habits changed, and the reasons for the change are not altogether clear. New electoral laws played a part; increase in the size of the electorate also was important. Equally important was the development of a new set of understandings on the part of candidates and the public about what was and was not acceptable behavior. Many countries, especially developing and transitional democracies, have great problems in enforcing party finance regulations. But this is not surprising because their capacity to enforce other kinds of laws and regulations is also weak. Where governance capabilities are limited, the enforcement of party finance regulations is rarely a high priority.<sup>[10]</sup>

Such a shift in perceptions is evident in present-day South Korea and Thailand. These countries have made a major effort to implement rules about vote buying and campaign expenses. These official efforts have been accompanied and spurred on by political elites, pressure groups and the press.

## **12) Unknown or excessively complex laws**

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Finally, the expectation that the norms of law be obeyed is premised on knowledge of the law. However, individual candidates cannot comply with laws and standards if they are not aware of them. Known and understood laws and procedures are self-executing for the vast majority of actors. Thus, public education and awareness are particularly critical elements of any serious enforcement strategy. One should also recognize that detailed financial regulations can impose disproportionate administrative burdens on political players and may deter involvement in a political process that relies predominantly on volunteers. Legislation that is extremely complex can act as a disincentive to political participation.





## **Political Finance Regulations and Subsidies: Administration and Enforcement**

Legal provisions concerning political financing may be separated into four main types: **(1)** financial conditions governing candidacy for public office, **(2)** subsidies, **(3)** prohibitions and **(4)** regulations. In general, the easiest provisions to administer and enforce are those in categories (1) and (2), while the most difficult to enforce are those in categories (3) and (4).

### **1) Financial conditions governing candidacy for public office**

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In a number of countries, candidates for elections must meet either or both of the following conditions: (1) declaration of assets by candidates and, sometimes, by members of their families, and (2) financial deposits for political parties and individual candidates.

- 1) Rules concerning the declaration of assets are easy to enforce because the electoral authority may simply refuse to accept the nomination of a candidate on the ground that the requirements have not been met. If the electoral authority rejects the nomination of a candidate on the ground that his or her asset declaration is unsatisfactory, it is then up to the candidate to initiate a legal appeal against the decision.
- 2) A system of financial deposits—found especially in countries with majoritarian electoral systems—deters frivolous candidates and political parties. Some regimes introduce refundable or non-refundable application fees for independent candidates and political parties. The argument against such fees is that they can discriminate against poor or even average-income candidates. Such fees will have virtually no effect on a wealthy person, but if one wishes to support the right of political participation in practice, such fees may represent a gross inequality. Non-refundable fees, in fact, introduce a tax on political participation and impose direct and substantive restraints on the ability to stand for office. In case of refundable fees (financial deposits), the deposits are returned to entities that receive a certain percentage of the votes cast. In recent years, deposits have been used in a number of countries for purposes other than deterrence of casual candidates. The deposit, if high enough, can be an incentive for candidates and political parties to abide by regulations relating to the timely disclosure of campaign accounts. Legal prosecutions of candidates and their agents for failure to complete their accounting obligations on time involve paperwork, expense, and a considerable amount of time for election administrators. By contrast, the incentive of the return of a



financial deposit as the reward for obeying the laws on disclosure is far less burdensome for election officials and, arguably, more effective.

## 2) Subsidies

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Subsidies consist of some or all of the following:

- 1) Public funding subsidies to political parties and/or candidates;
- 2) Free or subsidized media broadcasts by political parties and candidates; and
- 3) Tax relief and subsidies-in-kind (apart from political broadcasts).

Once legislation about public funding of parties and candidates has been enacted, the implementation of a subsidy scheme should be relatively simple. The same applies to agreements about free political broadcasting. It should be easy to monitor whether the sums of money allocated by law to each political party are in fact given. It should be equally simple to determine whether parties and candidates receive their due shares of time for political broadcasts.

Because they are relatively easy to administer, subsidies are sometimes especially recommended for countries where elections must be held amid conditions of political instability and violence.

However, several caveats are necessary. First, the relative simplicity of administering subsidies may not be a decisive argument in favor of using them. In all likelihood, there may be several alternative formulas for allocating subsidies or free broadcast time among different parties and candidates. Each formula may arguably be determined by a distinct notion of “fairness,” and it may be impossible to reach a common, objective agreement about what constitutes a just formula. In practice, rival parties and political interests are likely to advocate whichever notion of “fairness” produces an outcome that benefits them.

Second, in a number of countries, especially in Africa, laws on financial subsidies to political parties and candidates merely allow the legislature or the government to *propose* such payments but do not oblige them to make the payments. Thus, the government may decide only shortly before the date of the poll to appropriate funds for this purpose.

Third, there have been examples of countries in which the government of the day has failed to give the public subsidies mandated by law at the set time. This happened recently in Zimbabwe.

Fourth, though the allocation of free broadcasting time to political parties and candidates is relatively simple to monitor, it is far more difficult to ensure that a media channel obeys rules concerning “neutrality” and political balance in news



bulletins and other broadcasts in the period before an election. Responsibility for enforcing regulations on the reporting of election campaigns in news broadcasts is normally the responsibility of a specialized broadcasting agency and not of the electoral authority.

The regulation of broadcasting, especially of publicly owned media, has important implications for political financing. Though it is normally difficult to establish the precise financial value of a certain number of minutes of favorable reporting on a news program, it is clear that such exposure has effects at least as important as political advertising paid for by parties or by candidates.

### **3) Prohibitions**

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In general, banned activities include corrupt and illegal practices, such as vote buying and abuse of state resources. In addition, some countries forbid certain sources and types of contributions, for example: foreign contributions, anonymous contributions, contributions made in the name of another person, contributions from business corporations, and contributions from government contractors.

Political finance laws that incorporate prohibitions are probably the most difficult to enforce, although regulations (considered in the next section) also present serious problems.

Corrupt practices are present both at a high level and at street level. At a high level, corruption normally consists of some agreement to give a reward (such as a government contract) in exchange for a political contribution. The problem for the enforcement agency is to obtain evidence for what is normally a highly secret transaction. Some of the most celebrated examples of such dirty dealings have emerged as a result of press investigations and of secret recordings of conversations between political fundraisers and contributors. An example is the scandal unearthed in 2001 by the Indian Internet newspaper Tehelka.com.<sup>[1]</sup>

At a lower level, vote buying and similar illegal forms of political spending may be so widespread that they cannot be kept secret. The problem for the enforcement agency here is similar to problems involving the detection of other forms of street crime, e.g., the sale of drugs, illegal gambling, and illegal activities related to prostitution. First, the enforcement agency needs to catch those involved in the illegal transaction. Second, when those involved—normally junior criminals—have been caught, the enforcement agencies must establish that these "small fish" were acting under instructions from a group of top people. Finally, the courts must be prepared to impose penalties sufficiently severe to act as deterrents rather than merely as irritants.

When it comes to prohibitions against particular types of donor and donation, there are different, but no less severe, difficulties. These are illustrated by the



problems of bans on foreign donations and on corporate contributions. These bans may simply be ignored or circumvented through various “money laundering” techniques. Corporations, labor unions and wealthy individuals may engage in such activity for several reasons: to evade contribution limits, to enhance eligibility for public funds or to conceal the identity of the actual donor. Illegal, secret donations are sometimes attractive to the donor because they place the politicians in the donor's debt and increase the donor's leverage when it comes to demanding corrupt privileges in return for the clandestine gift. But, if a corporation or a foreign donor wishes to obey the letter of the prohibition, there are several ways to achieve this.

- 1) If such bans apply to gifts to political parties, they can often be evaded by setting up "off-shore islands" of political parties—bodies such as "party foundations," think-tanks, or "political education" organizations, which are legally distinct but, in practice, are closely connected to a particular political party.
- 2) Bans on "foreign" donations may sometimes be evaded because the term "foreign" is not tightly defined in the relevant legislation. For example, a "foreign" donation may be given through a branch of a foreign company located within the relevant country.
- 3) Bans on corporate donations may be evaded in a scheme whereby a number of partners of a company each give a donation to a particular party or candidate and are rewarded by a salary bonus equivalent to the amount of the political payment.
- 4) A business corporation may release employees on paid vacations on the understanding that they will work for a party or candidate.
- 5) A corporation may employ a politician as a "consultant" in order to disguise what actually is a political gift as a payment-for-service. Alternatively, a company may provide employment at a generous rate to a member of the politician's family.

#### **4) Regulations**

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Regulations about political financing include the following:

- 1) Disclosure rules;
- 2) Spending limits;
- 3) Contribution limits;
- 4) Measures to control the use of public resources for campaign purposes;
- 5) Rules on personal use of candidate funds;
- 6) Political broadcasting rules;



- 7) Rules concerning the funding of internal party contests; and
- 8) Rules concerning the funding of referendums.

Such rules invite evasion, especially when they are unduly strict. According to a leading American scholar, Herbert E. Alexander,

[E]xpenditure limits are illusory in a pluralistic system with numerous openings for disbursements ... [W]hen freedom of speech and association are guaranteed, restricting money at any given point in the campaign process results in new channels being carved through which monied individuals and groups can bring their influence to bear on campaigns and officeholders.<sup>[2]</sup>

The problems of spending limits are explained further in the following extract from the IFES study on political finance in Nigeria:

- 1) Since parties and candidates do not wish to be punished for breaking laws on spending limits, they will often disguise spending above the limit. Thus spending limits make disclosure provisions harder to enforce.
- 2) Spending limits may make life harder for opposition parties and candidates. But this depends on what the limits are and whether they tend to keep the playing field as level as possible. Ruling parties are able to take advantage of public resources available to members of the government for partisan purposes. In the period before a general election, government information services often produce what is effectively party propaganda in the guise of "public information." Government employees may be released from their public duties in order to perform services for the party instead. Government telephones, vehicles and the like may be used for political campaigning.
- 3) Since spending limits apply only to the "campaign," it becomes tempting to disguise what are effectively "campaign" expenditures as routine, non-campaign items. For example, if spending is defined as "campaign spending" only if it is incurred during a set period of time before an election, it will be possible for a party to prepare campaign broadcasts and to conduct policy research and the like in advance of the set period.
- 4) It is the experience in a number of countries that, where opposing political parties all flout the laws concerning spending limits, "non-aggression pacts" are likely to occur. No party will bring accusations against another party for fear of being accused itself of disobeying the law.
- 5) Activities that have the effect of assisting the cause of a particular party may be conducted by an independent interest group or lobbying organization. For instance, in the United Kingdom, an organization that opposed abortion claimed the right to campaign against particular candidates whose views on the subject of abortion were in conflict with their own.



The only way to ensure that only candidates and political parties participate in campaigning and campaign spending is to restrict the freedom of expression of interest groups and lobbying organizations. Constitutional courts in the United States, Canada and Europe, however, have confirmed to varying degrees the rights of such interest groups to participate in public discussions during election campaigns. In order to provide for freedom of expression, in accord with decisions of the European Court of Human Rights, the British Parliament carefully crafted the new electoral legislation of 2000. This legislation for the first time introduced a limit on campaign spending by national party organizations. In order to avoid a challenge against the law in the European Court of Human Rights, the law permitted a limited but significant amount of election spending by independent bodies (usually known by the technical term “third parties”). These activities suggest that, even if a limit on spending by political parties proves effective, the result may be to re-channel such spending through lobbying organizations.

A recent study of political finance in Taiwan refers to the problem of limits mentioned above: “Taiwan is considering lifting some of the penalties for breaking limits on campaign spending and donations because it is recognized that limits have, in fact, reduced transparency.”<sup>[3]</sup>

In other contexts, transparency need not suffer from the imposition of spending limits. This is a balancing act in which meaningful audits can probably reduce the degree to which spending limits are undermined.

With regard to regulations on the disclosure of political donations, these can be avoided through several common techniques: donations may be disguised as commercial payments (for example, advertisements in a party publication), as loans (of money or equipment), or as voluntary services (for example, leave given by a corporation or government agency to employees to enable them to carry out work for a political party or candidate).

The range of opportunities for evasion, especially of prohibitions and regulations, provides a good reason for legislators to be careful when they are considering new political finance laws. For political finance regulators, who are obliged to deal with existing statutes, the possibility—indeed likelihood—of such evasion means that considerable care and resources need to be devoted to the enforcement process.

# Part Two





## **Strengthening Political Finance Regulatory Bodies**

### **1) Clarifying responsibilities of enforcement bodies**

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In the United States, federal campaign finance violations are subject to three types of enforcement actions:

- 1) Civil enforcement proceedings brought by the **Federal Election Commission**;
- 2) Criminal prosecution by the **Department of Justice** as FECA (Federal Election Campaign Act) misdemeanors; and
- 3) Criminal prosecution by the **Department of Justice** as felonies. <sup>[1]</sup>

In fact, most violations of the Federal Election Campaign Act are handled by the Federal Election Commission (FEC) through civil and administrative enforcement proceedings. Civil enforcement is clearly appropriate for FECA violations that involve small amounts of money, or that are committed openly and in obvious ignorance of the law. Civil enforcement can be useful also when proof of criminal intent is weak.

Shared responsibilities require the effective coordination of enforcement efforts, which is most likely to occur where there is a cooperative attitude of mutual respect and support. Numerous and uncoordinated requests for assistance between the agencies have the potential to jeopardize the willingness to cooperate effectively.





**Case Study – United States Federal Election Commission and  
the Department of Justice**  
*United States*

In the United States, the Public Integrity Section of the Criminal Division, Department of Justice, has developed a working relationship with the Federal Election Commission and its staff, and can help agents and prosecutors quickly obtain the information they need from the FEC. The Public Records Division of the FEC has also been a resource in developing election crime cases. In fact, most FECA violations either are not federal crimes, or, if they are, do not warrant criminal prosecution. The Department of Justice may refer all but the most aggravated campaign finance violations to the FEC. Early consultation with the Public Integrity Section helps the Department of Justice, the United States Attorneys' Offices and the FBI to avoid unnecessary expenditure of departmental resources by encouraging the referral of appropriate matters to the FEC. Such consultations also enable the department to discharge its obligations under its Memorandum of Understanding with the FEC. Finally, providing the FEC with information on closed criminal FECA matters in a timely manner has contributed significantly to the Commission's helpful approach to shared enforcement responsibilities.

Formalizing agreements through memoranda of understanding should be considered a best practice. There are, however, lessons to be learned from the experience of the United States. The memorandum of understanding that was adopted in 1977 is currently being revised by both parties. Two issues stand out. The first is the timely forwarding of cases to the Department of Justice by the FEC. In the past, some of the cases that would fall under the Department of Justice's jurisdiction were forwarded after the statute of limitations had expired. The second concern is the ability of the FEC to continue to conduct an investigation while the case is open with the Department of Justice. The conduct of parallel investigations and the terms under which information is shared should thus be clearly addressed. Finally, the US experience highlights the need to revisit such agreements as relevant legislation and the enforcement body itself evolve over time.

## **2) Consultations with different stakeholders**

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In the course of addressing its obligations, the enforcement agency should periodically review its programs and examine its enforcement practices and procedures. It should also give the regulated community and representatives of the public an opportunity to bring general enforcement policy concerns before the agency. Those who directly interact with the agency, witnesses, other third parties, and the general public can provide valuable information on how the political finance system operates in practice. By inviting a constructive dialogue concerning its enforcement procedures, the enforcement agency can seek general comments on the effectiveness of the procedures in working through enforcement cases. The enforcement agency can also benefit from hearing about practices and procedures used by other law enforcement agencies.

A further important component of the enforcement mechanism relates to the degree of trust that political parties and candidates feel in their political finance regulator and in each other. Trust is also an important condition in coordinating the efforts of different enforcement agencies.



### 3) Assuring public confidence in the process of making appointments to independent political finance enforcement bodies

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Which procedure is most likely to lead to the choice of political finance regulators who are well qualified and in whose political neutrality political leaders and the public will have confidence?

If the head of government or head of state has the sole dominant influence over the appointment of electoral commissioners (or members of other independent bodies responsible for administering and policing political finance regulations), appointments may well prove to be controversial. Recent reports by foreign election observers and local scholars frequently criticize members of electoral commissions as governmental pawns. Although no judgment is intended about the accuracy of such reports as cited below, the purpose of these quotations is to demonstrate that appointment by the president is liable to lead to argument and to lack of trust. A comprehensive study for the United Nations Development Programme on Electoral Management Bodies as Institutions of Governance cited Malawi, Niger, Togo and Slovakia as examples of “movement backwards.”

What is the alternative to a selection process dominated by the head of the ruling party?

#### Case Study - Dangers of the Appointment of Electoral Regulators by the Head of the Governing Regime *Malawi and Niger*

In June 1998, President Muluzi of **Malawi** appointed a new nine-member Electoral Commission ...He dissolved the former Commission ... four months before the expiration of its constitutional term, amid protests from human rights groups and opposition parties. He also moved the new Commission closer to the executive and away from Parliament, by legislation stating that the President may appoint an undetermined number of commissioners at his discretion, to be confirmed by the Public Appointments Committee...

Although Parliamentary elections were held in **Niger** under a National Independent Electoral Commission in 1994, the President dismissed the Commission during the 1996 presidential election while it was counting ballots on the first day of a two-day vote. A new Commission was appointed for the counting on the second day, which was conducted at the barracks with favorable results for the incumbent...<sup>[2]</sup>

- 1) **Political balance.** One approach is that of the United States. Here the goal of political neutrality in the body responsible for administering political finance laws is viewed as impractical. Instead, the method of appointment is designed to achieve a political balance. The United States Federal Election Commission consists of an equal number of Democratic Party and Republican Party nominees.

Such a bipartisan system has been attacked on the ground that it is a recipe for compromise and inactivity. Also, the system of appointing party nominees as commissioners is especially suited to a country where politics is dominated by two major parties.

However, some scholars have argued that political balance is necessary in many developing democracies because these countries normally (though not always) lack a tradition of political independence among civil servants. Politicians, practitioners, analysts and consultants increasingly state that, especially in transitional politics, party-based electoral commissions play a key role in consensus-building and good governance. An electoral authority can be party-based and still operate neutrally and independently. When there is no other tradition or existing body of widely-respected and independent civil servants, multi-party composition may guarantee a balanced approach better than executive or judicial appointment. Multi-party electoral commissions can effectively contribute to establishing mutual confidence, transparency and neutrality...<sup>[3]</sup>

- 2) **Non-partisan appointees.** A second approach is that of the United Kingdom. Here, people who have been identified with a political party are virtually excluded from consideration for appointment as members of the electoral commission. A senior civil servant heads a group that is given responsibility for reviewing applications for appointment to the electoral commission. Leaders of the principal parties are consulted only at a late stage and only to ensure that they do not have strong objections to the proposed appointees.

Such a system of appointment of “the great and the good”—as they are called in the United Kingdom—may work if the neutral civil servants and public figures designated to make appointments are genuinely independent. This system presumes that the civil servants and other figures appointed by the current government to make the nominations will act in a genuinely neutral manner. It relies also on the assumption that the “non-political” appointees actually are non-partisan.

Certainly there have been supposedly “independent” commissions in the United Kingdom that have been independent in name alone. Notorious for its partisanship was the so-called Independent Commission on the Voting System of 1998.

A system where the government in power designates senior civil servants or other esteemed personalities to make nominations or appointments to the regulatory body will work only in certain political cultures. There must be confidence in the genuine neutrality and capacity of those chosen by the government to be the selectors.

- 3) **Divided responsibility for appointments.** A third approach is to divide the responsibility for making nominations and/or appointments. For example, the Central Election Commission of the Russian Federation has 15 commissioners, a third of them appointed by the president of the



Federation, a third by the Duma (legislature), and a third by the Federation Council. <sup>[4]</sup>

- 4) The judicial approach.** A fourth approach is to attempt to ensure independence by requiring electoral commissioners to be senior judges and to appoint them for relatively long terms of office. In Poland, the National Electoral Commission is composed of three judges of the Constitutional Tribunal (designated by the President of the Constitutional Tribunal), three judges of the Supreme Court (designated by the President of the Supreme Court), and three judges of the High Administrative Court (designated by the President of the High Administrative Court).

#### **4) Ensuring the financial independence of regulatory bodies**

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If political finance regulators do their jobs too diligently and initiate inquiries into the alleged illegal campaign financing of leading members of the government or of the legislature, they will often find that their operational budgets are threatened as a means of warning or retaliation. Officials of the US Federal Election Commission have reported the perception that diligent enforcement of political finance laws invites retaliatory scrutiny of the Federal Election Commission's budget by the Congress.

Clearly, it is desirable to protect political finance regulators from threats to their budgets by powerful politicians. However, it is also necessary to ensure that the staffing levels, salaries, and other costs of enforcing political finance rules are adequately controlled to ensure that money is not wasted. Electoral management bodies have the same tendency as other bureaucracies to seek to increase their budgets. As Lopez-Pintor has put the issue,

[I]t is important to avoid using the electoral administration as an employment program. The system should be devised with a view towards sustainability and therefore should correspond to the limited financial capabilities of the national government. <sup>[5]</sup>

The ideal solution requires that the political finance regulatory body be subject to some form of financial discipline and accountability but that the financial stick not be wielded by the government or by the legislature. These considerations are similar to those applied to the funding of the judicial system. How to best achieve this combination of financial independence and accountability will vary according to the institutions and culture of each country. The 1998 recommendations of the United Kingdom Committee on Standards in Public Life recommended that the budget of the proposed electoral commission (which was set up shortly afterwards) “should be set in such a way as to preserve its impartiality and independence.”



One of the main prerequisites of the independence of the Commission is the independence of its budget. A body whose budget is determined by a government department and which subsequently has to fight for resources against competing priorities in government could never be perceived as truly independent. We therefore believe it is essential that a mechanism should be developed for setting the commission's budget which stresses independence while at the same time retaining a degree of accountability to parliament for the proper exercise of public funds.

One model that might be considered is the mechanism for setting the budget for the National Audit Office (NAO). The NAO's budget is proposed by the NAO to the House of Commons Public Accounts Commission (which is distinct from the more familiar Public Accounts Committee). This body of MPs (Members of Parliament) examines the proposed budget before formally submitting it to the Treasury. By convention, once the Public Accounts Commission has approved the budget, there is no further interference.<sup>[6]</sup>

The complexity of this proposed arrangement and its reliance on “convention” is a sign of the difficulty of achieving impartiality and financial accountability at the same time. It also indicates that the particular solution proposed relies heavily on informal understandings (“conventions”) rather than on legal guarantees.



## **Sanctions and Tactical Issues for Regulatory Bodies: Administrative Penalty Versus Prosecution**

One of the challenges that most countries face in launching an effective enforcement program is weak leadership in the regulatory body. A serious enforcement program cannot be imposed from the outside, but requires committed leadership from within. Ideally, this leadership should exist in a determined political finance enforcement agency with the clout and resources to execute sanctions in its area of responsibility. The second challenge is finding an appropriate entry point for punishing violations in a case of systemic corruption. Given the magnitude of the tasks, it is critical to begin at a point where the goals are feasible and tangible results can be realized within a timeframe that builds support for further reforms. Small gains can provide essential levers to sway public and official opinion. Entry points should be chosen in order to tackle high profile problems such as lack of disclosure, submitting false information, or funding from illegal sources. As Craig C. Donsanto argues:

A fair, flexible, yet workable enforcement process is the core of any campaign finance law's effectiveness. Most violations of the FECA are committed as a result of ignorance, negligence, misunderstanding or mistake. Those offences are customarily pursued by the FEC administratively, with the usual penalty being that the offending transaction is 'backed-out,' the missing information added to the public record, and the parties to the transgression required to pay a small monetary penalty and agree to mend their ways. On the other hand, purposeful and financially large violations of the Act committed by offenders who know what the law requires or forbids and flout notwithstanding that knowledge are subject to prosecution under Section 437g's criminal penalty.<sup>[1]</sup>

This chapter offers some practical recommendations concerning the imposition of administrative penalties and criminal sanctions.

### **1) Violations and sanctions**

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One of the first steps for any agency is to outline clearly what types of violations and sanctions exist and who is to be held accountable for which infringement of the law. Illegal political finance usually refers to contributions or uses of money that contravene existing laws on political financing, and the concept is based on legalistic criteria assuming that a political act is corrupt when it violates formal standards of behavior set down by a political system. However, laws are not necessarily consistent in interpretation or application across different countries. Some illegal acts are not necessarily corrupt (foreign funding of democratic opposition), and some corrupt acts are not necessarily illegal (campaign contributions from organized crime). Illegality is crucial to many political finance violations; however, some legally sanctioned, dubious uses of state resources



might not be covered by political finance regulations and will have to be addressed by other provisions. Thus, the same violations might not be sanctioned in the same way or with the same severity in different states.

Violations of political finance law can range from very minor infringements, such as the slightly late submission of financial reports, to major fraud. Political finance enforcement agencies should clearly specify particular violations, such as: **(1)** over-the-limit contributions, **(2)** prohibited contributions, **(3)** failure to file reports, **(4)** submitting false or incomplete information in reports, **(5)** late filing of reports, **(6)** conducting political finance activity outside of the reporting account or through cooperation with surrogates, **(7)** failure to maintain adequate documentation, and **(8)** prohibited expenditure.

Another important issue is self-correction of financial reports. Nicole Gordon suggests that corrections should not be treated as violations. For instance, the New York City Campaign Finance Board will not assess penalties for acceptance (which means deposit of a check) of a prohibited contribution if the campaign returned it before the agency notified the campaign that this violation was discovered, even though the deposit of the check itself would be technically a violation. Such a case would be noted as a “VNP”—violation no penalty—without assessing a monetary fine, but making it part of the public record.

In general, enforcement of political finance regulations requires the imposition of effective, proportionate sanctions serving as deterrents to violators. Political finance regulations can identify different types of offenses and provide for a range of penalties and sanctions depending on the seriousness of the offense. An analysis of the sanctions stipulated by the various laws reveals these main categories:

- 1) Financial sanctions including modest administrative fines;
- 2) Larger fines for serious violations;
- 3) Criminal sanctions for significant violations that undermine the integrity of the elections;
- 4) Loss of reimbursement for election expenses, withdrawal of public funding, ineligibility for future funding;
- 5) Financial benefits transferred or accepted by a party in violation of specified prohibitions are forfeited for the benefit of the state treasury;
- 6) Loss of parliamentary seat, disqualification from standing for future elections, and ineligibility for appointment as public official;
- 7) Dissolution of party; and
- 8) Cancellation of election.



Furthermore, it is important that the law establish sanctions in proportion to the gravity of the offense. The problem with overly severe penalties is that they may disproportionately damage new and relatively inexperienced single-issue or small local political parties. Taking into account the essential role of political parties in any democracy, the prohibition or dissolution of political parties as a particularly far-reaching measure should be used with utmost restraint. Based on the provisions of the European Convention for the Protection of Human Rights, the Council of Europe has stated that “enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order.”<sup>[2]</sup>

Sanctions can be directed against both the party and the individual party official or candidate personally involved in the illicit transaction. In some cases, it is impossible to determine who should be held accountable for violations of the law. If the political party were held responsible for every unlawful action related to political finance, it would risk being penalized for actions over which it had little or no control (for example, in the case of political provocation, whereby a supporter of one political party makes an illegal donation or buys votes *on behalf of* another party that he wants to be penalized). According to the Council of Europe recommendations, a political party as a whole should not be held responsible for the individual behavior of its members, including candidates, who are not authorized by the party but who engage in party activities. This could include illegal fund-raising activities or expenditures by an individual candidate.

There must always be *someone* who is accountable for violations, whether it is an individual or an organization that has placed responsibility with someone. Violations may also be found against “agents” of the candidate or party. It is common for liability for violations to be shared by the candidate, the candidate’s committee and the treasurer; in specific cases, an “agent” of the campaign can also be held liable.

If responsibilities for violations are clearly understood and it is clear who is accountable for which type of infringement of the law, prosecution will be more likely. Yet, when personal responsibility is assigned to an individual financial agent, any adverse publicity surrounding convictions will not threaten immediate voter reaction at the polls, which is supposedly the most effective deterrent to improper conduct. Because prosecutions will almost always occur after the election, the candidate who has benefited from violations act may well be in office by the time his aides are prosecuted.<sup>[3]</sup>

Experience in many countries shows that more effective enforcement can result from monetary fines and the possibility of limiting public funding than from severe criminal penalties. In fact, as some experts argue, “Some of the penalties are too severe for the circumstances and might discourage enforcement.”<sup>[4]</sup> In post-communist countries, the statute book contains a relatively harsh enforcement





regime for offenses involving the funding of election campaigns and political parties. Yet the practical value of these sanctions may well be reduced, “as the infringement of the law seems to be a commonly accepted practice, both among politicians as well as wider sections of civil society.” [5] The difficulty of using criminal sanctions effectively is related to the fact that many prosecutors are reluctant to regard political finance offenses as suitable for criminal law. According to Keith D. Ewing:

At the end of the day, however, effective and severe sanctions are not the province of the criminal law only. Potentially more significant would be powers to prevent individuals from standing for election, to prevent them from taking their seats when elected, and to have a political party deregistered. Although the last is unlikely ever to be used in the case of the large parties, there are no doubt other sanctions which could be employed, such as the refusal of election expense rebates or the denial of income tax credits for contributions to their funds. [6]

In fact, the Administrative Conference of the United States (ACUS) has advocated the use of administrative penalties since 1972, when it stated that, “federal administrative agencies should evaluate the benefits which may be derived from the use (or increased use) of civil money penalties as a sanction.” [7] Furthermore, in its report on the use of civil penalties under the Federal Aviation Act, ACUS writes, “The Conference believes that administratively-imposed sanctions are generally faster, less expensive, and more effective in enforcing regulatory schemes than is reliance on judicial enforcement.” [8] Thus, the authority to impose administrative penalties seems to be fundamental to any agency's effective enforcement.

A clear system of sanctions should be established for any party or candidate that fails to meet disclosure requirements by failing to file a declaration, filing incomplete or false information, or failing to present the financial report in a timely manner. Case studies of Poland and Georgia offer good examples.

**Case Study - Sanctions for Non-Compliance with Disclosure Requirements**  
*Poland and Georgia*

After the 1993 parliamentary elections in **Poland**, dozens of committees failed either to submit an “election expenses return” within the time stipulated by the law or did not write one. The most controversial case was that of the Solidarity Trade Union, which managed to win nine Senate seats and later created its own Senatorial Caucus. Solidarity submitted its election expenses return two days after the stipulated time and subsequently lost a substantial state subsidy equivalent to approximately US \$68,850.

In a **Georgia** election, subjects who do not submit a report on the election campaign fund are banned from taking part in elections, including any relevant upcoming elections. Moreover, in terms of legal sanctions, the Central Election Commission might not take into account the votes received by those violators of campaign finance regulations. After the 2004 General Elections, only 12 of 16 parties registered with the Central Election Commission submitted their financial reports. As a result of the CEC decision, four parties—Union of Democratic Revival, National Democratic and Traditionalists Party, National Alliance of United Georgia, and National Revival—were not allowed to take part in subsequent elections

## 2) Financial sanctions and administrative penalties

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Political finance regulatory bodies are faced with hard policy decisions about how they should deal with minor, but often very common, infringements. If they initiate legal cases for small offenses, a great deal of time, money and energy will be spent pursuing these cases, and this may distract them from chasing the major culprits. However, if the regulatory body permits parties and candidates to infringe with impunity rules about the deadlines for submission of financial accounts and other such minor transgressions, the whole system of electoral administration will fall into disrepute. A disadvantage of such a soft approach, if applied broadly, can be that the costs of paying a small administrative fine may be less onerous than complying with the law. Moreover, “minor” infringements may be a convenient cover for major ones.

### Case Study – Core Provisions of the FECA

*United States*

In general, to warrant criminal prosecution, a FECA fraud must have subverted one of the FECA's principle, substantive or “core” provisions.<sup>[9]</sup> These provisions, and the principles underlying them, are:

- 1) **Limits on contributions from persons and groups.** The FECA puts quantitative limits on the amounts that potential contributors can give to candidates seeking federal elective office and to political committees supporting federal candidates.
- 2) **No contributions from corporations and unions.**
- 3) **No contributions from federal contractors.** Persons and firms that are signatories on contracts to provide material, equipment, services, or supplies to the United States Government, or who negotiate for such contracts, should not seek to influence federal officials through political donations.
- 4) **No contributions from foreign nationals.** Persons who are not citizens of the United States or lawfully admitted for permanent residence may not contribute to any political campaign, whether at the federal or local level, in this country.
- 5) **No disguised contributions.** To prevent circumvention of the above limits and prohibitions, and to secure the accurate public reporting of all significant campaign finance data, contributions to federal candidates that are laundered through conduits to disguise the real source of the funds are prohibited.

Political finance regulators in Canada and the United States have resorted to small administrative fines as a method of punishing minor infringements and encouraging voluntary compliance with the law. This system, similar to the system of specified fines for illegal parking in many cities, has the great advantage that it is easy and inexpensive to administer. In the United States, in determining which cases should be retained by the Justice Department for criminal prosecution, two main factors are considered: the dollar amount involved in the illegal activity and the level of criminal intent it reflects.<sup>[33]</sup> While matters are considered on a case-by-case basis, the following guidelines have generally proven useful:



- 1) A violation of a core provision of the FECA which substantially exceeds the \$2,000 statutory floor and is accompanied by evidence of criminal intent should be considered for prosecution.
- 2) Illegal activity involving less than \$10,000 should be charged as an FECA misdemeanor, absent special circumstances which would warrant felony charges.
- 3) Illegal activity involving over \$10,000 should be considered for felony prosecution.

### 3) Prosecutions

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Prosecuting cases of political finance corruption is always difficult as the issues are highly politicized and involve well-known politicians and wealthy sponsors. Indeed, administrative action or some other measure might be a better alternative to prosecution, but there are certain political finance violations that should be defined as criminal acts and regulated by criminal law. Also, many recently passed laws regulating political finance (election laws, political party laws, etc.) define further crimes and harsh punishments.

Depending on the complexity of a political finance system and the framework of criminal law, certain types of offences will call for prosecution. Prosecution is a necessary part of a comprehensive enforcement process, ensuring that candidates and financial agents suspected of crimes are tried in a court of law and sentenced if convicted. Prosecuting and sentencing the most serious political finance offenders should serve as a deterrent for those who might be considering illegal activities.

Prosecution in most cases is carried out under the criminal law system and is conducted by the government against individuals (who also represent political entities, such as political parties or candidates). Criminal acts require a decision to prosecute, which is usually made by the prosecution agency. Such an agency is usually an office or institution separate from the political finance enforcement agency, with its own staff, policies and procedures. This arrangement can lead to a number of problems, as in many transitional countries the decision to prosecute is not always made objectively and is seldom based on a detailed review of the case.

In the 1998 Cambodian elections, observers noticed that:

...the National Elections Committee's (NEC) efforts to deal effectively with violence and election-law violations were largely a failure. Because the NEC had no law-enforcement or judicial capabilities, cases had to be referred to the government authorities. We had hoped that a few highly visible prosecutions would serve as a deterrent, but these never took place.



In retrospect, we should have realized that a legal system that had never dealt successfully with human-rights cases in the past would not suddenly “snap to” and salute in response to requests by the NEC. In the future, the NEC might consider a different approach to election violence, such as having its own election police, prosecutors and even judges seconded to it as a special election-enforcement unit.<sup>[11]</sup>

In other transitional countries, such as Poland, prosecutors use a determination of what is “in the best interest of the public” in their determination of whether a case will be prosecuted. In theory, a review of the complaint file and findings results in an objective determination of whether a prosecution is warranted and is in the best interest of the public. Yet, this can be a subjective decision, as the case of the Polish prosecution of campaign finance violations illustrates. After the 1993 parliamentary elections in Poland, dozens of committees either failed to submit an “election expenses return” within the time stipulated by the law or did not write one. Committees, which were not entitled to state subsidies, often did not submit their financial reports and ended up facing prosecution. However, the Prosecutors’ Office decided to discontinue proceedings in 58 cases because breach of the act was virtually harmless socially.

According to Sue Nelson, In deciding what cases to prosecute, prosecutors usually undertake a thorough and objective review of the case. This review can take the following factors into consideration:

- 1) What laws were broken?
- 2) Were the allegations substantiated by the facts and by credible, reliable witnesses who are willing and able to testify in court?
- 3) Did the evidence collected link the suspect to the crime, and is it admissible in court?
- 4) Was the intent criminal in nature? and
- 5) Is there a reasonable prospect of conviction?<sup>[12]</sup>

She rightly points out that, in some systems, a prosecutor can be an elected official, very aware of public opinion and the politics of particular cases—especially election fraud cases that might involve high-profile individuals.

In more established democracies, for example in Canada, a decision to prosecute takes account of:

the seriousness or triviality of the alleged offence, the significant mitigating or aggravating circumstances, the suspect’s alleged degree of responsibility for the offence, and the effective alternatives to prosecution, the prosecution’s likely effect on public order or public confidence in the integrity of the Acts, the need for general and specific deterrence, the limits on available resources, the time limit to prosecute has not expired, and where a section of the Acts is found



unconstitutional in a province, the appropriateness to apply the decision uniformly across the country. <sup>[13]</sup>

### In the case of the United States:

Prosecutors should keep in mind that our society tolerates behavior in election campaigns that it does not tolerate in commercial, personal or government relations. Thus, as a general rule, the federal crime of 'voter fraud' embraces only organized efforts to corrupt the election process itself: i.e., the registration of voters, the casting of ballots, and the tabulation and certification of election results. This definition excludes all activities that occur in connection with the political campaigning process, unless those activities are themselves illegal under some other specific law or prosecutorial theory such as stealing opponents' campaign property, breaking into opponents' headquarters...or illegal acts under campaign finance laws...most things that candidates do or say about each other on campaign trail are not appropriately remedied through criminal prosecution. <sup>[14]</sup>

Indeed, even in established democracies, political finance corruption is always politically sensitive. It is particularly difficult to obtain a fair trial in a case involving corruption related to political finance. First, the defendants in such cases are likely to be politicians or their agents. Second, prosecutors (who are usually themselves nominated by politicians) either (1) shy away from prosecuting as they don't want to get involved in a politically sensitive case that has the potential for severe repercussions, or (2) become involved for the wrong motives. Finally, in some circumstances, usually involving political interference and the lack of a legal and judicial infrastructure, enforcement can easily become selective.

All these issues need to be taken into consideration when discussing effective cooperation among different enforcement agencies. It is equally important to decide which agency should prosecute political finance corruption cases and under what circumstances to ensure that the prosecution is carried out with integrity.



## **Some Procedures for Detecting Violations and Enforcing the Law**

Effective enforcement requires both strong authority and procedures that work. The agency's enforcement authority is the extent of its ability to detect and punish violations of the law. In addition to its official authority, the enforcement agency should formulate procedures that promote efficiency in the agency and a sense of fairness for those who deal with the agency. This chapter summarizes major recommendations in this area.

### **1) Prioritization System**

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The long list of causes of non-enforcement can create a false impression that proper enforcement is almost impossible. Yet, one must realize that an enforcement agency will never be able to enforce 100% of its cases for many different reasons. Thus, an agency should adopt a system to objectively analyze cases to decide which warrant the use of limited resources.

After recognizing that they do not have the sufficient resources or ability to pursue all of the enforcement matters that come before them, some agencies use a prioritization system to focus limited resources on the most significant enforcement cases. Such a system can aid the management of a heavy caseload and complex financial transactions. It allows the agency to focus on what it views as the most significant cases; such a system introduces an objective rating system and allows for prompt dismissal of those cases viewed as less significant. Under such a system, the agency can use different formal criteria to decide which cases to pursue.

The Federal Election Commission introduced its own prioritization system in 1993. <sup>[1]</sup> Under this system, the Commission ranks enforcement cases based on specific criteria, and assigns only the more significant cases to staff. The FEC uses the following criteria:

- 1) The intrinsic seriousness of the alleged violation;
- 2) The apparent impact the alleged violation has on the electoral process; and
- 3) The topicality of the activity and the development of the law and the subject matter.

If the agency decides to adopt such a mechanism, it should continually review the system and its criteria to ensure the best use of its limited resources.



## 2) Promoting internal control

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As Anderson (1977) explains:

[W]ith the best of intentions, most people make mistakes. The mistakes may be end results of their work, needless inefficiencies in achieving those end results, or both. And sometimes, without the best of intentions, a few people deliberately falsify. Any organization wishing to conduct its business in an orderly and efficient manner and to produce reliable financial accounting information, both for its own and for others' use, needs some controls to minimize the effects of these endemic human failings. When such controls are implemented within the organization's systems they are described as internal controls....<sup>[2]</sup>

Internal control of a political organization can be broadly defined as a process, put into operation by an entity's personnel, designed to provide reasonable assurance regarding the achievement of objectives in the following categories: (1) reliability of financial reporting, and (2) compliance with applicable laws and regulations.

The first category relates to the preparation of reliable published financial statements, including interim and condensed financial statements and selected financial data derived from such statements. The second deals with complying with those laws and regulations to which the political entity is subject.

Party accounts provide an essential element in bringing greater openness and transparency to the finances of political parties. In general, any political finance system should encourage political parties to comply with requirements for professional and accurate bookkeeping. Maintenance of proper accounting records will help ensure that the party/candidate is not unnecessarily exposed to avoidable financial risks and that published financial information is reliable. Accurate bookkeeping can also contribute to the safeguarding of assets, including the prevention and detection of fraud. However, it is important that the accounting requirements reflect the size of the political entity and its accounting unit. Thus, when considering the level of detail required for smaller parties and individual candidates, it should be recognized that accounts are often produced by volunteers rather than professional accountants.

In addition, effective internal financial controls should include the “doctrine of agency.” An ideal system would require each political party (or candidate) to appoint one specific official—“financial agent”—who has the following responsibilities:

- 1) Keeping complete and accurate records of the political finance activity of the reporting entity;
- 2) Submitting reports about financial activity to the relevant bodies;



- 3) Approving all contributions and expenditures by the entity for compliance with legal restrictions; and
- 4) Following accepted accounting procedures in performing record-keeping and reporting duties.

Most importantly, the system based on the “doctrine of agency” foresees that all funds should be channeled through the agent and that all expenditures must be authorized by the agent. In addition, the agent must check incoming donations and expenses to ensure that they are in conformity with the rules. This system of internal control can impose serious and continuing duties on the agents: to monitor donations received, to report some and to decline others, and to submit proper accounts. Such an internal body must oversee compliance with these requirements and institute action (using intra-party discipline and codes of conduct) when necessary. The political parties’ financial agents have a clear responsibility for the management of financial resources. The institution of a “financial agent” as an internal enforcement body can be a significant change to party structures, decision-making procedures and financial management practices.

Additionally, a political finance regulator can require political parties and the entities connected with political parties to keep proper books and accounts. It can also prohibit anonymous contributions and state that donations over a certain amount must be made exclusively by bank check, wire transfer or bank credit card. The idea is to identify every single donor through the banking system. Thus, all payments over a certain limit to or by a political entity should be made through a bank account. Further, credit card use or advances to the campaign for personal payments for campaign activities should be strictly controlled. During an election campaign, the electoral committee and its candidates should also consolidate all existing accounts and funds into one centralized Electoral Fund. Regulations can also force parties to maintain separate accounts for routine activities and campaign activities, and to conduct and report all party financial activities through relevant accounts.

Instances of “self-correction” should not be treated as violations. For example, in the United States there is no penalty for acceptance (i.e., deposit of a check) of a prohibited corporate contribution if the campaign returns the donation *before* the regulator notifies the campaign of its discovery. Although the deposit of the check is a technical violation, it is simply noted as VNP (violation no penalty) as part of the public record.

### **3) Disclosure as a necessary condition for effective enforcement**

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Disclosure is a necessary condition for any system of public control of political finance, and a variety of disclosure requirements can be adopted. Political parties are required to submit routine or periodic financial reports to public officials. In





most systems, electoral committees and candidates are required to file special reports during or immediately after election campaigns.

Disclosure is a prerequisite for the enforcement of expenditure ceilings and contribution limits, and also for the allocation of public subsidies. The most typical mechanism of disclosure is employed in many European countries, where political parties or candidates are required to submit declarations containing their income, spending or both. These declarations are offered for public scrutiny by publishing them in official media or making them available to commercial media. However, financial information about political parties or candidates can also be disclosed indirectly, for example when a party reveals information about its political opponent.

An important issue to be stressed is the timing of disclosure reporting or, rather, the delay in reporting. Reports can be submitted and published one week to 10 days before an election following an election (usually 30 or 60 days after the election). With the technology available today, information can be sent to the regulatory body in “real time” and then posted on its website. In jurisdictions ranging from the United States to Lithuania, computer software is provided to parties and/or candidates for ease in submitting financial reports. Before an election, some disclosure should be made daily, especially for expenditures or contributions of a significant amount. These reports should be formatted in a way that facilitates further statistical studies or audits.

Reporting enhances the accountability of political parties and provides monitoring and enforcement agencies with all the information necessary for proper verification. For this to be achieved, political finance reports should fulfill these 10 criteria:

- 1) Reports should provide for the full accounting of assets and liabilities for the reporting entity (‘Baseline’ financial statement – required just once or on a cyclical basis);
- 2) Reports should be prepared by the independent body as a result of consultations with parties and candidates and should be supported by manuals and guides;
- 3) Reports should be based on a calendar timeline, such as annual, biannual or quarterly reporting schedule;
- 4) Reports should be introduced before the beginning of the reporting period;
- 5) Reports should be publicly accessible (e.g., Internet, newspapers);
- 6) Reports should be reasonably detailed and comprehensive and should reflect conventional accounting standards;



- 7) Reports should include, in addition to contributions and expenditures, information about in-kind donations, received loans and credits, as well as debts;
- 8) Reports should be unified for routine operations and campaign finance;
- 9) Reports should be prepared in such a way as to be easily understood by the general public;
- 10) Reports should be available for future reference.

Public disclosure of information about income and spending by political parties and candidates is currently seen as a critically important component of a detection and enforcement process. The law in some countries requires that violations be publicized. For example, final audits can be placed on the regulatory body's website, and candidates' names can be posted when attempts are being made to collect overdue penalties or public funds payments. This kind of publicity has a very strong deterrent effect, reducing the need for litigation.

Disclosure may help accomplish a number of tasks:

- 1) Financial disclosure contributes to an overall transparency of the electoral process, offering voters an opportunity to learn more about political contenders in order to make an informed decision at the polls.
- 2) Requirements to disclose their sources of funding gives parties and candidates an incentive to raise and spend their funds in ways that are acceptable to a majority of voters and do not provoke political scandals.
- 3) Disclosure is an obstacle to corruption and trading in influence, which are likely to be greater when the financial transactions between political parties and companies are hidden from the public eye. Therefore, disclosure strengthens the observance of the principle "one person, one vote."
- 4) Publicly available information about the flow of money to parties and candidates serves as a deterrent to a risk-free use of funds from illegal or criminal sources. Therefore, disclosure can serve the purpose of dignifying politics. Public disclosure can serve as a barrier to excessive campaign spending in particular countries or cultures where money in politics is viewed with suspicion.

**Case Study – Small Parties and Reporting**  
**Is there a need for a two-tier regulatory framework for political parties?**  
*United Kingdom*

Of the nearly 300 political parties on the register of parties for Great Britain and Northern Ireland, not all operate at a level that requires quarterly submission of donation returns, weekly donation returns, and detailed year-end accounts. During the 12 months between April 2001 and March 2002, over 90% of the quarterly returns submitted to the UK Electoral Commission were “nil” returns. Smaller parties have consistently informed the Commission that they would be happy to report any relevant donations, but that they rarely receive gifts that breach the £200 threshold, let alone the £5,000 reporting threshold.

The commission argues that there is little benefit in imposing the comprehensive regulatory framework on parties that repeatedly submit “nil” returns to the agency. A potential administrative burden on smaller organizations can be alleviated through a system of lighter controls for smaller parties. Parties should be able to choose either to register to participate in local government elections only, in which case they will be subject to a lighter regulatory framework (including the submission of annual accounts and an annual nil-return if no reportable donations are received during the year), or to participate in elections at all levels in the UK, in which case they would be subject to the current controls.

After reviewing the party statements of accounts, the UK Electoral Commission recommended that a two-tier regulatory framework be created in which parties could register in one of two different categories. The first category would entitle them to contest only local elections (including parish and community elections). The second would entitle them to contest elections at all levels in the UK. The new accounting and reporting requirements would reflect the level at which the party and its accounting units operate.<sup>[4]</sup>

However, requirements for disclosure do not necessarily lead to accurate and complete reporting. Political parties and individual candidates may be tempted to avoid reporting or to report a distorted picture of their finances for a number of reasons. One reason is the receipt of larger donations in cash. In some cases, these may be so-called “kickbacks” from contracts with public institutions or other contributions of an illegal character. Alternatively, some donors may be excessively concerned with preserving their privacy and require no reporting as a precondition for a contribution. Another reason stems from the requirement (introduced in some countries) to reveal not only finances of a party or candidate but also resources spent on their behalf. Thus, imprecise and incomplete reports may be intentional to hide financial supporters or to decrease the overall amount of money reportedly spent on an election campaign. Additionally, unrealistic “ceilings” set in the legislation may encourage a party or candidate to report lower than actual income in order to comply with the maximum amount of donations allowed by the legislation. This discussion highlights how illegal practices and even certain laws and regulations designed with the best of intentions may discourage compliance with disclosure provisions.

While disclosure is an important element of a fair democratic process, its significance is reduced in the absence of effective audit mechanisms. Many scholars and practitioners have admitted that while an excellent legislative framework for political or campaign finance disclosure is necessary, it is not sufficient to provide meaningful control over money in politics.

Nicole Gordon from the New York City Campaign Finance Board argues that,



Meaningful enforcement for many aspects of campaign finance reform must take place during the campaign season. If the Board did not take action during the campaign against certain kinds of potential violations, the public might not receive accurate and timely disclosure... Furthermore, penalties for substantial violations of the Act may otherwise come too late to ensure the integrity of the elections process. The Board is charged to publicize violations of the Act, and, indeed, media attention to violations is a far more potent deterrent than any monetary penalty the Board might assess.<sup>[3]</sup>

#### **4) Verifying the accuracy of financial reports**

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The authority to review financial reports and audit records is absolutely necessary in monitoring compliance and detecting violations. Random checks on the accuracy of financial reports, in particular, can be a powerful deterrent against violations and have been used successfully by many enforcement agencies.

Indeed, in many cases, the failure of enforcement does not result from the existence of highly complex schemes of disguise and evasion on the part of those wishing to give and receive illegal political donations. The failure reflects the fact that no attempt is made to enforce the rules. Those involved in illegitimate political financing know this and take few precautions to hide what they are doing. A report by a senior official at IFES on the elections held in Georgia in 2004 describes the damaging effects of the perceived lack of scrutiny of financial reports submitted by candidates and political parties:

... Another defect to note is the lack of effective analysis and verification of the disclosure filings made by election contestants. People I spoke with during my trip concede that until candidates and parties think that the information they provided is actually being scrutinized for accuracy and completeness, the contents of the filings will be suspect. In short, the fact that candidates and parties know that the information they are providing isn't being properly checked means that they will continue to make filings for the sake of making filings without rigorous regard for accuracy.<sup>[5]</sup>

It follows from such reports that, as a minimal measure, political finance regulators need to check the accuracy of at least a random sample of financial accounts submitted for compliance with legal requirements. In addition, candidates and parties should be warned in advance that such spot checks will be made and that penalties are liable if significant, deliberate errors and omissions are discovered.



## 5) Audit

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One method to assure the accuracy and integrity of financial accounts submitted by parties and candidates is to require examination and certification by professional auditors. This is similar to the requirement that applies in many countries to the annual accounts of business corporations. Auditing is a systematic, objective process of gathering and evaluating evidence about actions and events reported by the individual or organization being audited. The auditor will ascertain the degree of correspondence between the reported activities and established criteria, and communicate the results to users of the reports.

An audit is an examination of an entity's financial statements, financial records and banking information prepared by the entity's financial agents for other interested parties outside the entity, and of the evidence supporting the information contained in those financial statements. Several levels for audit reviews are possible:

- 1) Field audits and simple visits to campaign offices (to establish for example that an actual campaign is being conducted and that records are being properly maintained);
- 2) Statement review (looking for violations that appear on the face of statements filed by a campaign);
- 3) Review of back-up documentation (Are copies of checks from contributors available and do they match reported contributions in the filed statements?); and
- 4) Evaluation of overall campaign information (How does this particular campaign compare against an "average"? Is rent reported? Are certain expenditures unusually high?).

Audits also look at internal controls to ensure compliance with the legal and regulatory requirements, and internal controls for financial reporting and safeguarding assets. The timing of any audit review can be very important. In a jurisdiction that offers public funds to campaigns, an early field audit/visit can help the campaign correct errors early on, saving it from problems later on, and helping regulators uncover activities that are prohibited before any future public funds are disbursed.

An audit is a precondition for any serious enforcement system. The agency requires the authority to review all reports to determine whether they are in compliance with the rules and to conduct field audits, including random audits, of the entities required to file financial reports. In some cases, agencies do have random audit authority, although they rarely have the resources necessary to conduct them. Auditing requirements are a significant feature of the systems of routine control over reporting of political party finances in many countries



including Germany, Poland and the United Kingdom.

## 6) Program

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Effective audit procedures must address the following questions: Who will conduct the audit? When will the audit be conducted? What will be audited? Which parties and candidates will be audited? Who will pay for the audit? Once the enforcement body has decided on the direction it wants to take, it should either develop an auditing program itself with input from political entities or instruct political entities to establish their own auditing programs. In the latter case, the program should be drafted in accordance with guidelines set forth by the

enforcement body in order to ensure consistency. Grounded in existing laws and procedures and international auditing standards, the audit program should begin by clarifying how the audits will be undertaken. Auditing of political party and candidate accounts can be done (1) by a professional and independent auditor selected by the political parties and candidates themselves or by the enforcement body, or (2) directly by a government agency such as an enforcement body, tax authority, or auditing agency within the government. Should the former apply, the services of professional auditors can be paid for in one of three ways: (1) the political party can be required to pay for the auditor out of its own funds, (2) the political party can be required to pay for the auditor out of its own funds and then be reimbursed from public funds, or (3) the enforcement body can pay for the auditor directly out of public funds. While all three are accepted standards, a public fund-payment system may be preferable.

In such a case, it is clear that the auditor's fee does not depend on the findings, and there is less room for accusations of political pressure.

Clear guidelines should be established that detail what is being audited and how the audit is to occur. These guidelines should take into account the laws and regulations of the country, accounting and reporting requirements of political parties and candidates, and international auditing standards. Those who may be audited should be included into this process in order for them to better understand the issues they face and to better ensure compliance. These guidelines should be clearly defined in a manual for auditors, and the enforcement body should conduct regular training and provide legal and

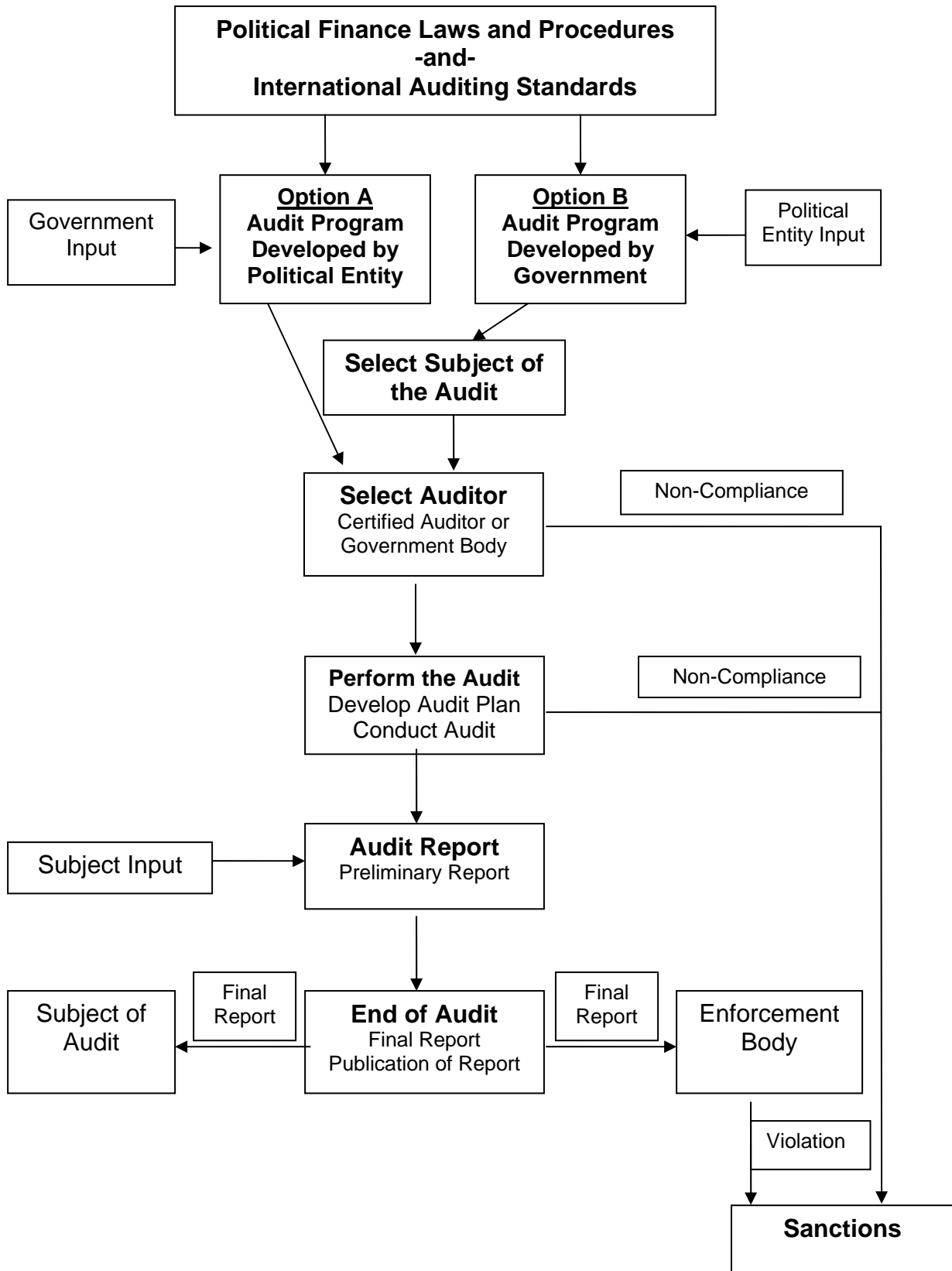
### **Case study – Audit** *United Kingdom*

The Political Parties, Elections and Referendums Act 2000 (PPERA) introduced a requirement for parties and accounting units with accounts of more than £250,000 to subject their accounts to audit (this requirement can also be applied to other parties where the commission considers it desirable). In addition, parties whose campaign expenditures exceed £250,000 and parties that receive policy development grants are required to engage an independent auditor. A number of larger political parties have expressed concern over the cost of these audit requirements: one party paid over £50,000 in additional audit costs under the requirements of the PPERA. After an initial review, the Commission recognized that the requirement for multiple audits had imposed a financial burden on parties and considered streamlining the current requirements.



procedural updates to certified auditors.

**Chart 2 - Political Finance Audit Flowchart**







## **1) Selecting the Subject of an Audit**

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The enforcement body may want to audit only select political parties and candidates in order to ensure the best use of limited resources and to ensure that no excessive burden is placed on these parties and candidates. In this case, clear criteria should be used to select which parties and candidates are to be audited.

Random checks are of primary importance to an effective enforcement agency. To ensure the usefulness of random audits, the entities to be audited should be selected randomly from a pool of parties or candidates that meet established criteria, such as a specific threshold of financial activity. Expertise in statistical techniques (method of selecting “random” entities, measures of statistical significance) should be sought when conducting random audits. While random checks and audits are part of the regular apparatus of control, political finance regulators need to recognize signs of irregularities that warrant closer scrutiny.

Such criteria could include those parties and candidates against which a credible complaint has been lodged or those that the enforcement body has “reason to believe” may have committed violations. Campaign history can also be helpful, especially if a candidate, treasurer or committee has had violations in the past. In a jurisdiction that offers public funds, political parties or candidates receiving such funds are highly likely to be audited.

Other selection criteria include parties or candidates that exceed a given threshold of gross income or total expenditure in any financial year. Even when a party or candidate does not exceed the threshold, the enforcement body may consider it desirable to require those accounts to be audited by a qualified auditor.

## **2) Selecting an Auditor**

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If a political party or candidate is required to select an auditor, clear criteria should be set for how and when the auditor is appointed. For example, the criteria may require that an audit be carried out by the end of a six-month period following the end of the financial year in question. However, if a special audit is required by the enforcement body, it must be carried out within three months of the date of the order. Further, in order to ensure an accurate and credible audit, the enforcement body should prepare a list of certified auditors in campaign and party finance that can be used to conduct such audits.

## **3) Performing the Audit**

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The audit should be performed according to international auditing standards by auditors who have a clear understanding of the subjects they are auditing. The



auditor should present a plan that has been approved by the enforcement body and reviewed by the subject of the audit, and that conforms to the guidelines set forth in the audit program and manual for auditors.

#### **4) Auditor's Report**

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The auditor should complete at least two reports—preliminary and final—that cover the complete scope of the audit as set forth in the audit program and defined in the manual for auditors. The preliminary report should go through a peer review prior to release to the enforcement agency and the subject of the audit. Following comments made by the subject of the audit, the auditor will revise the report where necessary and issue a final report. Once the audit report is completed, all findings should be presented to the enforcement body and can be made available to the public.

#### **5) Sanctions**

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Should the report find discrepancies or violations of the law or procedures, or should the subject of the audit not comply with the decision to audit, the enforcement body should then decide whether to pursue an administrative or criminal investigation as discussed earlier.

#### **6) Challenges Facing the Audit**

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It is important to note some of the challenges that arise through the use of auditors. These problems should be taken into account when designing the auditing program.

First, it is unwise to assume that the professional standards of auditors are sufficiently high to be immune from political or commercial influence. A crucial aspect of the Enron scandal in the United States was the discovery of questionable conduct on the part of the internationally reputed firm of auditors employed by Enron to certify what turned out to be misleading accounts. There are ways to reduce the danger of appointing politically biased auditors. In Poland, for example, this is done by a system of selection of auditors (paid from public funds) by lottery.

Second, professional audits are costly. It is necessary to determine, therefore, whether the political parties and candidates whose accounts are to be examined must pay or whether the costs are to be met with public funds. Both of these payment options pose problems. If political parties are obliged to pay for professional accountants, this forces them to divert money from electioneering to meet the requirements of complying with the legal controls over their funds. It is arguably unreasonable to impose onerous and expensive duties on parties in the



form of complex laws. If the costs of auditors are to be met out of public funds, this creates other difficulties. In view of the reality that political finance regulatory bodies in many countries have insufficient funds and staff to carry out their compliance and enforcement duties, it may be better to provide extra money to them rather than to professional auditors.

Third, a stipulation that their accounts must be professionally audited imposes a particularly heavy burden on small political parties. Highly developed systems of control intended to detect sophisticated fraud are unsuitable for small-scale political organizations. Indeed, such requirements make it virtually impossible for such organizations to exist. In the United Kingdom, under the terms of legislation enacted in 2000, this issue is addressed by setting different auditing requirements for small, medium and large political parties.



## Investigative Techniques

The proper enforcement of the law requires responses to acts of non-compliance, including: **(1)** investigation of suspicious contributions or expenditures or incomplete financial declarations; **(2)** prosecution of improper activities; and **(3)** adequate, proportionate and dissuasive sanctions effectively applied in cases of proven violation or of non-compliance with the law.

### 1) Complaints

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Any enforcement agency will be able to detect only a fraction of all the violations if it relies exclusively on its internal monitoring of financial reports submitted by obliged entities. Thus, an effective agency should also rely on external complaints of suspected wrongdoing. In an ideal system, any civil society organization, journalist or even individual who believes that a violation has occurred should be able to file a complaint with the agency. Press reports can be a particularly good source of information.

The complaint process can require a formal, written document satisfying specific criteria for a proper complaint, or can have a more liberal character, with the enforcement agency taking action based on press articles or informal allegations. Some political finance systems also give the enforcement agency the discretion to act on information it receives anonymously.

An interesting example comes from the Ukrainian 2002 elections, where a local watch-dog NGO conducted a campaign finance monitoring program. The results of the monitoring were sent in an official letter to the Central Electoral Commission. While the Ukrainian CEC ignored the complaints made by this group, claiming some procedural issues, the example highlights the role that civil society organizations can play.

In addition to complaints, the enforcement body should have the authority to act on (i.e., investigate) information received from other sources, including other public bodies (e.g., tax authorities, ministry of justice), the media and anonymous individuals, as well as the authority to offer whistleblower protection to these sources.

In transitional regimes, and particularly in post-conflict societies, voters who are in the best position to observe questionable campaign practices may be the most reluctant to come forward with a formal complaint, since they often fear reprisals. Therefore, in order to encourage individuals to share information with the enforcement agency, it is recommended that complainants be given whistleblower protections against reprisals.



## 2) Investigation

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Before discussing investigative mechanisms, a clear distinction should be made between an audit, which is administrative in nature, and an investigation. As a necessary part of the audit process, auditors should have extensive communication with candidates, official agents, etc. Actions taken during an audit do not necessarily suggest that an offense has taken place. Some actions are administrative in nature and do not require, for example, an official cautionary measure aimed at formally advising suspects of their rights against self-incrimination. Thus, the main feature that separates an administrative audit from an investigation is the existence of an adversarial relationship. Furthermore, investigation in most cases is not automatic, while an audit can be.

Nevertheless, the administrative audit can, at some point, become similar to an investigation, and an adversarial relationship can arise; moreover, the results of random audit can lead the agency to do a full investigation.

While random checks and audits are part of the regular apparatus of control, political finance regulators need to watch for signs of irregularities that warrant closer scrutiny. In general, the legal burden of proof should always be on the political party or the candidate to show compliance with political finance regulations; otherwise, the enforcement agency will be in an impossible situation.

The tendency in a number of democratic countries is for the political finance enforcement body to have the power, either on its own initiative or in response to complaints, to make inquiries concerning all aspects of political finance. The enforcement agency can investigate, for example, any allegation or suspicion that a political party or candidate failed to disclose the names of substantial donors or illegally accepted foreign donations. In many systems, anonymous requests are not considered; however, in some countries, a citizen may file an application for investigation if he/she has strong proof that the party or candidate acted illegally.

In many countries, irregularities are investigated by the state enforcement bodies (such as police). Sometimes, for example in Poland, the tax authorities, involved at the direct request of the National Electoral Commission, can be very efficient. At the same time, some concern has been expressed about a mechanism whereby an independent enforcement agency is empowered only to report suspicious transactions to other public bodies (e.g. attorney-general, tax inspection, ministry of justice, etc.), which then decide whether to investigate. This allows too much opportunity for law enforcement to be influenced by partisan political considerations.

If permitted, following receipt of a complaint or acting on its own initiative, an enforcement agency may conduct an investigation into possible violations of rules. Regulators may also undertake a full investigation when information from



a random audit warrants further action. An agency may use its investigative powers, and an investigation may include, but is not limited to, field investigations, desk and field audits, the issuance of subpoenas, the taking of sworn testimony, the issuance of document requests and interrogatories, and other methods of information gathering. In general, an investigation process can be divided into the following stages: **(1)** information gathering stage, **(2)** preliminary assessment stage, **(3)** decision to investigate, **(4)** investigation stage, and **(5)** compliance agreement or prosecution.

**Case Study - Request for an Investigation**  
*United States*

Any person may request that the Office of Campaign Finance (OCF) in the City of Washington, D.C., undertake an investigation by submitting a complaint in the form of a signed written statement setting forth an allegation that constitutes a potential violation of the Campaign Finance Act or the Standards of Conduct. The written statement should be as specific as possible, identifying the full name and address of the complainant and the respondent, plus a clear and concise statement of facts. The statement should also be verified by the complainant under oath and include supporting documentation, if any. A request for investigation should be forwarded to the Director of the OCF.

Within 10 days of receipt, the Director will acknowledge a written request for investigation with a notification as to whether the allegation will be investigated. If the Director determines to open an investigation, the matter will be referred to the OCF Office of the General Counsel. The General Counsel will have 90 days to investigate the matter and submit a recommendation to the Director. Upon request to the Board of Elections and Ethics with a showing of good cause, the investigatory period may be extended no more than 90 days. At the conclusion of an investigation, the General Counsel will submit a recommendation to the Director which may include: dismissal of the matter, a call for a supervisor to take action with regard to an employee for a violation of the Standards of Conduct, or the imposition of civil penalties for a violation of the Campaign Finance Act. Upon receipt of the recommendation of the General Counsel, the Director may agree and so order or disagree and order a different remedy. A party affected by an OCF order may appeal to the Board of Elections and Ethics within 15 days of the issuance of the order by the Director, in accordance with the rules of the Board of Elections and Ethics. If a fine is imposed by the Director, it shall become due on the 16th day following the issuance of a decision and order, if the respondent does not request an appeal of the matter. OCF also initiates investigations as a result of information gleaned from the media and staff review of reports and other documentation filed with OCF. <sup>[1]</sup>

When enforcing the political finance regulations, however, the agency should respect all safeguards available to an individual under the law. It is imperative that auditors and investigators working with them during an inquiry clearly state to a suspect that they are carrying out an investigation. In some cases of suspected non-compliance, an investigation may lead to the presentation of information before the courts, and the courts can rule that individuals are entitled to the appropriate protection available to someone suspected of a criminal offense.

According to the Center for Responsible Politics, “the method by which investigations of potential violations are initiated should allow for timely action on complaints filed, assure due process to respondents and allow for a system of prioritizing cases which is neither arbitrary nor partisan.” <sup>[2]</sup>



In the United States, criminal campaign finance fraud investigations at the federal level involve:

- 1) Initial coordination with the Public Integrity Section of the Department of Justice;
- 2) Determining whether a core prohibition of the FECA was violated;
- 3) Determining whether there was an effort to conceal the illegal contribution;
- 4) Identifying others involved in the scheme;
- 5) Determining whether criminal prosecution is warranted;
- 6) Initiation of a grand jury investigation or FBI full field investigation;
- 7) Non-prosecution of straw donors, or conduits; and
- 8) Prosecution of persons making or receiving the illegal contribution.

### Case Study - Investigation "Threshold Test and Standards" Canada

In Canada, the recommendation to initiate, continue or terminate an investigation is based on the "Threshold Test and Standards." When the Commissioner believes, on reasonable grounds, that an act or omission constituting a specific offense under the Canada Elections Act (the Act) has been committed, is about or likely to be committed, the Commissioner may direct an investigation to be conducted according to the circumstances. All relevant circumstances and factors must be considered when a recommendation is made to initiate, continue or terminate an investigation; they include the following:

- 1) Reasonable grounds to believe that the allegation deals with an alleged offense committed by an Election Officer or a specific offense committed by anyone under the *Act*;
- 2) Reasonable grounds to believe that the allegation is founded on specific and verifiable leads, facts, information or physical documentary evidence, and deals with an act or omission that could constitute a specific offense under the *Act*;
- 3) Reasonable grounds to believe that the public interest relating to the act or omission constituting an offense under the *Act* would justify committing investigative resources;
- 4) Reasonable grounds to believe that the act or omission constituting an offense under the *Act* requires applying for an injunction, and whether sufficient grounds exist to believe that there is a reasonable prospect of identifying the suspect and obtaining sufficient information to apply for an injunction;
- 5) Sufficient grounds to believe that the alleged offense was committed and that an investigation would provide sufficient, substantial, admissible and reliable evidence;
- 6) Sufficient grounds to believe that there is a reasonable prospect of identifying the suspect and obtaining compelling information or evidence to prove that an offense was committed by the alleged offender;
- 7) Reasonable grounds to believe that substantial, reliable and admissible evidence may be obtained from available avenues of investigation such as the complainant, access to public records and documents, inspection of election documents, and interviewing election officers and witnesses;
- 8) Reasonable grounds to believe that suspects would agree to cooperate and provide information and evidence, whether self-incriminating or against other individuals;
- 9) Whether all reliable, substantial, available and admissible information or evidence on which to reach an informed decision have been collected;
- 10) Whether an assessment of the credibility of the information, the weight of the evidence and the reliability of witnesses has been assessed on objective indicators or factors;
- 11) Whether any consideration should be given to any possible effect on the personal circumstances of anyone connected to the investigation;
- 12) Whether the inherent operational expenses associated with a more selective or comprehensive investigative approach (referral to other investigative agencies) to the various categories of offenses would be warranted and justified under the circumstances; and public interest factors to be considered.<sup>[4]</sup>





## Enforcement and Court Rulings

Enforcement of political finance rules is dependent not only on existing laws, the willingness to comply, and the determination of the regulators to detect violations and punish offenders. In a legal system that gives the last word on political questions to judges, enforcement may face an additional hurdle, namely the courts' decisions. Karl-Heinz Nassmacher rightly suggests that enforcement will also depend on such basic questions as: who is to sue?, what are the issues to be deliberated?, and which principles will a specific court favor in its ruling—political equality or political freedom? <sup>[1]</sup>

Scholars and practitioners dealing with political finance agree that “more and more election-related financing is deemed to fall outside the purview of the regulation as it is interpreted by agencies, amended by legislators or restricted by court rulings.” <sup>[2]</sup> In his critical evaluation of the American system, Keith Ewing observes that any legislation dealing with political finance will “almost certainly lead to a conflict between the legislative and judicial branches.” He suggests that the constitutional protection of freedom of expression as a core value will lead to very restrictive interpretations of the statutory language. Ewing argues that:

The courts are thus, in effect, validating and encouraging the exploitation of loopholes and the development of additional evasive devices. (...) [I]n order to deal with possible threats from the courts, important compromises may have to be made, which although appearing reasonable, nevertheless may be far removed from the original intentions of the legislators. Not only will such compromises eventually destroy the legislation, they may also lead to abuses as great as the abuses which the legislation was designed initially to address. <sup>[3]</sup>

Court involvement in electoral politics in general and in enforcing political finance rules in particular is a relatively new, although growing, phenomenon. The saliency of courts in the electoral process is a combination of three factors:

- 1) Since the late 1940s, West European, East European, Asian and Latin American nations have gradually established strong judicial institutions and equipped them with more powers than ever before.
- 2) The introduction of public funding of parties and candidates was accompanied by disclosure requirements that carry with them legal sanctions for violations.
- 3) There is a growing public demand for political accountability and increasing uneasiness with a situation in which corrupt politicians are allowed to retain their posts untouched when a cloud of suspicion and mistrust hangs over their actions.



Courts have neither purse nor sword and are prohibited from engaging with other major political institutions. Therefore, courts remain in a vulnerable situation when intervening in the political process. This is especially so when court decisions affect the careers of elected representatives in legislative institutions. A court decision is more likely to become a political issue when it has invalidated, rather than upheld, a policy choice made by the political branches. This general observation applies to disclosure cases as well.

When a court clears a politician or party of a charge of violating electoral rules, the losing side may be disappointed,<sup>[4]</sup> but their wrath tends to be pointed toward the political body that allegedly has not complied with the prescribed norms, rather than the court. On the other hand, when the court decides against an elected official or party, it becomes the chief offender. Furthermore, in exercising judicial review, the court takes a position at odds with the political majority in many cases.

Nevertheless, as Table 5 demonstrates, court involvement in enforcing disclosure requirements is becoming common practice not only in established Western countries but in developing countries as well. The entire field of comparative judicial involvement in enforcing political finance rules is a relatively virgin terrain, but it seems that more and more data is becoming available as courts are more willing than before to exercise their authority and intervene when disclosure requirements are circumvented by parties and candidates.

**Table 5: Political Finance and Court Cases: Disclosure of Financial Reports**

Country	Court Cases
<p><b>France</b></p>	<p><b>Facts:</b> Investigating judges attempted to interview President Chirac on alleged extortion of tens of millions of pounds of kickbacks from municipal public works and printing contracts during his tenure as mayor of Paris.</p> <p><b>Decision:</b> The Cour de Cassation ruled that President Chirac was immune from criminal prosecution and could not be called as a witness. As the head of state directly elected by the people and guardian of the state’s “continuity,” he could not be subject to the ordinary law. A president could be tried only by a parliamentary high court and only on the ground of high treason (October 2001).</p>
<p><b>Georgia</b></p>	<p><b>Facts:</b> Four plaintiff parties asked the court to issue a judgment prohibiting several other parties from participating in the coming elections for not submitting financial reports during the local elections of 1998.</p> <p><b>Decision:</b> The Krtsanisi-Mtatsminda Regional Court of Tbilisi dismissed the claim as it found the four plaintiff parties to be incompetent plaintiffs. The competent plaintiff, the Central Elections Committee of Georgia, refused to replace the original plaintiffs and the case was dropped. <i>Union of Democratic Revival of Georgia et al. v. All-Georgian Political Organization LEMI et al. (July 1999).</i></p>
<p><b>Israel</b></p>	<p><b>Facts:</b> A Deputy Minister was charged with making false entries in the documents of a corporation, attempting to obtain something by deceit, and making a false declaration on an election finance report. He did not resign his post.</p> <p><b>Decision:</b> Taking the right of silence while charged with being involved with false party election reports with the intent of misleading the state comptroller must result with the firing of a deputy minister. <i>H.C. 4267/93 Amiati v. Prime minister, 47(5) PD 441.</i></p> <p><b>Facts:</b> The three respondents were indicted with filing false reports of the Shas party general elections campaign in 1988 and local elections of 1989. They did not report cash payments to party activists of 1 million NIS (about \$600,000 at that time). The intent of filing the false reports was to avoid fines for violations of campaign spending regulations.</p> <p><b>Decision:</b> As a result of a plea bargain, the respondents received suspended jail terms. <i>Tel Aviv Magistrate Court 8074/96 State of Israel v. Pinhassi</i></p>

**Table 5: Political Finance and Court Cases: Disclosure of Financial Reports  
(Continued)**

<p><b>New Zealand</b></p>	<p><b>Facts:</b> The requirement of submitting reports by political parties was put into question.</p> <p><b>Decision:</b> The Court of Appeals upheld the need for adequate financial reporting by political parties. Detailed disclosure assists the supervising body, ... to be satisfied that the statutory limits have been complied with. Disclosure is also of value in itself in that it increases public confidence in the political system and enables the electorate to make informed choices about which party or candidate to support.</p> <p><i>Electoral Commission v. Priscilla Tate (1999).</i></p>
<p><b>United Kingdom</b></p>	<p><b>Facts:</b> Mrs. Fiona Jones, Member of the House of Commons, was convicted at Nottingham Crown Court of making a false declaration of expenses for the 1997 General Election. The conviction automatically cost her the Newark seat.</p> <p><b>Decision:</b> The conviction was quashed by the Court of Appeal. The court found that although some election expenses were questionable, there was no evidence to conclude the non-disclosure was dishonest.</p> <p><i>R v. Jones and R v. Whicher</i>, judgment dated 22 April 1999</p>
<p><b>United States</b></p>	<p><b>Facts:</b> The Hall-Tyner Election Campaign Committee supported the campaign of the candidates of the Communist Party in their drive to be elected president and vice president of the United States, respectively, in the 1976 national elections. The Federal Election Commission (FEC) asked that the Committee reveal the names and maintain records of contributors to its campaign coffers. District court Judge Gagliardi dismissed the FEC's complaint, holding that the recordkeeping and disclosure provisions of FECA are unconstitutional as applied to the Committee. He recognized that the ultimate question to be answered is whether the record establishes a reasonable probability that compelled disclosure of the names of contributors "will subject them to threats, harassment, or reprisals from either Government officials or private parties?"</p> <p><b>Decision:</b> There is a paramount public interest in maintaining a vigorous and aggressive political system which includes even participants whose ideologies are abhorrent to that system. The undisputed evidence demonstrated that mandatory disclosure and recordkeeping would discourage numerous individuals from contributing to the Committee on the basis of the reasonable probability that they would later be subjected to governmental or private harassment and rebuke. The court declined to apply the recordkeeping and disclosure provisions to the Committee for such requirements would violate the First Amendment of the Constitution.</p> <p><i>FEC v. Hall-Tyner Election Campaign Committee</i>. 678F 2d 416; No. 963, Docket 81-6229.</p>

Source: *Political Finance and Court Cases prepared by Dr. Menachem Hofnung*

**Table 6: Political Finance and Court Cases: Contributions**

Country	Court Cases
<p><b>Canada</b></p>	<p><b>Facts:</b> The case concerns a claim challenging the constitutionality of s. 33(1) of the Public Service Employment Act, which prohibits public servants from "engag[ing] in work" for or against a candidate or a political party .</p> <p><b>Decision:</b> The Federal Supreme Court decided that those restrictions apply to a great number of public servants who in modern government are completely divorced from the exercise of any discretion that could be in any manner affected by political considerations. The need for impartiality and indeed for the appearance thereof does not remain constant throughout the civil service hierarchy. Section 33, therefore, is over-inclusive and, in many of its applications, goes beyond what is necessary to achieve the objective of an impartial and loyal civil service .This section should be redrafted by the legislature. <i>Osborne v. Canada</i> (1991). Files Nos. 21201, 21202, 21203.</p>
<p><b>Federal Republic of Germany</b></p>	<p><b>Facts:</b> Former German Chancellor Helmut Kohl was indicted for accepting at least \$1 million in cash donations for his political party, the Christian Democratic Union.</p> <p><b>Decision:</b> In a deal approved by a District Court in Bonn, Kohl acknowledged a "breach of trust" for illegally accepting cash donations and paid a fine of \$143,000 in exchange for a drop of the fraud investigation (June 2001).</p>
<p><b>Israel</b></p>	<p><b>Facts:</b> The Labor party has made an agreement with the Shas party, stating that Shas would not compete in Trade Union elections and Labor will reimburse Shas as if Shas won a certain number of votes. Labor gave Shas 1.5 million NIS before the 1992 general elections. The State Comptroller defined this transfer as an illegal contribution donated by corporate legal entity and slapped Shas with a heavy fine.</p> <p><b>Decision:</b> A party may not accept payments for political support of another party. The petition was denied. HC 911/93, <i>Shas Party v. State Comptroller</i>, 54 Dinim Elyon 464 .</p>
<p><b>United States</b></p>	<p><b>Facts:</b> The Missouri contribution limit, adopted by the state legislature in 1994, was challenged by a former candidate for state auditor and a political action committee that supported him. The candidate argued that the limit was so low that, as an insurgent, he could not exercise his First Amendment right to mount an effective campaign.</p> <p><b>Decision:</b> In upholding the contribution limits, the US Supreme Court said in a majority opinion that the relevant test is not any fixed or indexed dollar amount, but whether a contribution limit was so low "as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." Missouri's cap met this test without "running afoul of the First Amendment," the court said. The court also drew a line between expenditures and contributions, treating expenditure restrictions as direct restraints on speech, which nonetheless suffered little direct effect from contribution limits. <i>Nixon v. Shrink Missouri Government Pac</i>, 528 U.S. 377.</p>

**Table 6: Political Finance and Court Cases: Contributions**  
(Continued)

<p><b>United States</b></p>	<p><b>Facts:</b> The Reader's Digest Association (RDA) sued to enjoin the Federal Election Commission (FEC) from proceeding with an investigation into whether RDA violated certain sections of the Federal Election Campaign Act of 1971 "by making expenditures to disseminate to other media outlets video tapes of a computer re-enactment of Senator Kennedy's accident at Chappaquiddick...."</p> <p><b>Decision:</b> The US District Court for the Southern District of New York adopted a two-step procedure that recognizes the FEC's need to conduct an inquiry, while at the same time strictly limiting the inquiry in order to minimize harm to First Amendment values. Under this procedure, the initial inquiry is limited to whether the press entity is owned or controlled by any political party or candidate and whether the press entity was acting as a press entity with respect to the conduct in question. If the press entity is not owned or controlled by a political party or candidate and it is acting as a press entity, the FEC lacks subject matter jurisdiction and is barred from investigating the subject matter of the complaint. In the Reader's Digest case, the court allowed limited investigation to determine whether dissemination of the tape was part of Reader's Digest's press function as a magazine publisher. The motion was denied.</p> <p><i>Reader's Digest Association v. FEC</i>; 509F. Supp. 1210</p>
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Source: Political Finance and Court Cases prepared by Dr. Menachem Hofnung

**Table 7: Political Finance and Court Cases: Issue Advocacy**

Country	Court Cases
<p><b>Canada</b></p>	<p><b>Facts:</b> The appellant challenged the Referendum Act, which governs referendums in Quebec. He argued that if he wishes to conduct a referendum campaign independently of the national committees, his freedom of political expression will be limited to unregulated expenses. Conversely, if he wishes to be able to incur regulated expenses, he will have to join or affiliate himself with one of the national committees .</p> <p><b>Decision:</b> The Federal Supreme Court, in rejecting the appeal, said that the spending limit system would lose all its effectiveness if independent spending were not also limited. The Act promotes an informed vote by ensuring that some points of view are not buried by others... [T]he objective is to ensure the fairness of a referendum on a question of public interest. In this light, the regulation of referendum spending pursues one of the objectives underlying freedom of expression, namely the ability to make informed choices .</p> <p><i>Robert Libman v. Attorney General of Quebec (1997)</i>.</p>

**Table 7: Political Finance and Court Cases: Issue Advocacy**  
(Continued)

<p><b>United Kingdom</b></p>	<p><b>Facts:</b> Before the British Parliamentary elections in April 1992, Mrs. Bowman arranged to distribute in constituencies throughout the United Kingdom, thousands of copies of a leaflet calling for voters “to check on Candidates’ voting intentions on abortion.” Mrs Bowman was charged with an offence under the Representation of the People Act 1983 which prohibits expenditure of more than five pounds sterling ("GBP") by an unauthorized person during the period before an election on conveying information to electors with a view to promoting or procuring the election of a candidate. The case was brought before the European Court of Human Rights.</p> <p><b>Decision:</b> The Court found that the Act sets a total barrier to publishing information with a view to influencing the voters of Halifax in favor of an anti-abortion candidate. It is not satisfied that it was necessary thus to limit her expenditure to GBP 5 in order to achieve the legitimate aim of securing equality between candidates. It accordingly concluded that the restriction in question was disproportionate to the aim pursued. <i>Bowman v. The United Kingdom</i> (141/1996/762/959 ).</p>
<p><b>United States</b></p>	<p><b>Facts:</b> An action against several statutes—attacked primarily as violating First Amendment speech and association rights and Fifth Amendment equal protection principles—that (a) limit political contributions by individuals or groups to any single candidate for a federal elective office to specified sum; (b) limit independent expenditures by an individual or group advocating the election or defeat of a clearly identified candidate for federal office.</p> <p><b>Decision:</b> Contribution limits could constitutionally be imposed, but expenditure limits could not; disclosure of contributions and expenditures could be required. Only speech containing "express advocacy" is political enough to be deemed a "contribution" or "expenditure" as those terms are used in federal election laws. <i>Buckley v. Valeo</i> 424 U.S. 1 (1976 ).</p>

**Table 7: Political Finance and Court Cases: Issue Advocacy**  
(Continued)

<p><b>United States</b></p>	<p><b>Facts:</b> In 1980 while Senator Edward Kennedy was a candidate for the Democratic Presidential nomination, Phillips Publishing Inc. sent a mailing to regular and potential subscribers soliciting subscriptions to the Pink Sheet on the Left (a conservative, anti-communist publication)... The mailing included a one-page letter from the publisher, several promotions, and a "Teddy Kennedy Opinion Poll." The mailing appealed to political conservatives and strongly emphasized The Pink Sheet's opposition to Senator Kennedy. The Federal Election Commission asked for court enforcement of two Commission orders to answer written questions. The questions sought detailed information about the personnel and operations of Phillips Publishing.</p> <p><b>Decision:</b> There must be some threshold showing wrongdoing on the part of respondent if the press exemption is to serve the purpose for which it was intended. Here the FEC has not challenged the representation by Phillips Publishing that it is not owned or controlled by any political party or candidate, that it frequently sends material through the mail soliciting subscriptions to The Pink Sheet, and that the materials at issue were sent as promotional materials to seek new subscribers . Since there is a danger that further FEC inquiry would impinge upon First Amendment freedoms, the FEC's petition was denied . "This opinion should not be read to imply that FEC enforcement requests should always be denied where a press entity is the subject of a 'reason to believe' finding and the FEC seeks further information. Clearly further investigation would be warranted ... if the FEC had some evidence linking The Pink Sheet with a political organization or candidate." <i>FEC v. Phillips Publishing Inc.</i> 517 F. Supp. 1308; United States District Court for the District Of Columbia, No. 81-0079).</p>
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Source: *Political Finance and Court Cases prepared by Dr. Menachem Hofnung*

**Table 8: Political Finance and Court Cases: Third Party Expenses**

Country	Court Cases
<p><b>Israel</b></p>	<p><b>Facts:</b> The petitioners, who represent a faction in a city council, established a non-profit association. The association conducted election operations with volunteers. After the elections, the association asked the faction to cover its expenditures (out of the election funding granted by the state). The faction asked that these costs be regarded as election expenditures. The request was denied by the State Comptroller.</p> <p><b>Decision:</b> The Supreme Court turned down the petition. The court said that if the association had paid the volunteers then it could have asked to regard those expenses as election expenditures. But when the association did not have real expenses and intended to use the money for its future activities, those expenses could not and should not be regarded as election expenditures. <i>H.C. 823/90 Bat Yam 1 v. State Comptroller</i>, 44(2) PD 692.</p>





**Table 8: Political Finance and Court Cases: Third Party Expenses**  
 (Continued)

<p><b>United States</b></p>	<p><b>Facts:</b> A Michigan statute prohibited corporations from using corporate treasury funds for independent expenditures in support of or in opposition to any candidate in elections for state office. The statute allowed corporations to make such independent expenditures only from segregated funds used solely for political purposes. The validity of the statute was challenged by the Michigan State Chamber of Commerce, a non-profit corporation with 8,000 members, three-quarters of whom were for-profit corporations.</p> <p><b>Decision:</b> The United States Supreme Court in a split decision held that the statute, as applied to the Chamber, did not violate the First Amendment, even though the statute burdened expressive activity. The statute was supported by a compelling governmental interest in preventing political corruption in connection with immense aggregations of wealth that are accumulated by corporations with the help of the state-conferred corporate structure and that have little or no correlation to the public's support for a corporation's political ideas. The statute was sufficiently narrowly tailored to achieve its goal, in that it permitted speech that accurately reflects contributors' support for a corporation's political views.</p> <p><i>Austin, et al.v. Michigan State Chamber of Commerce</i> 494 U.S. 652</p>
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Source: *Political Finance and Court Cases prepared by Dr. Menachem Hofnung*



## Dangers of Biased Enforcement

Almost as serious as the problem of non-enforcement is the practice, in some countries, of partisan enforcement. Parties and candidates opposed to the government may find themselves the subject of serious pressures from law enforcement agencies for minor or non-existent breaches of campaign finance laws. By contrast, parties and candidates that support the government are virtually free to disregard the rules.

A Bulgarian scholar has given a clear example of the damaging perception that the government of the day is, in practice, above the law: “Enforcement is a serious question ... It is true that the first party law did envisage the confiscation of party assets for the use of the state in cases of non-compliance. This provision, however, has never been enforced and it would be unthinkable that it could be enforced against a governing party, for example.”<sup>[1]</sup>

Biased enforcement is especially serious in countries where there is a high level of violence. Indeed, it may be argued that in such countries it is desirable that political finance laws not be enforced. In practice, the enforcement of rules, for example on disclosure of political contributions, will result in the harassment of those discovered to have supported opposition parties and candidates. In countries where there is a dominant ruling party, the enforcement of disclosure rules also may have the consequence of making it very difficult for any opposition party to attract the support of potential contributors.

Mass media can be an important tool in preventing biased enforcement of political finance laws. It can be critical of politicians and parties for unseemly behavior that does not necessarily violate the laws. Unlike the regulatory body, media can delve into the “political” aspects of political finance.

Another form of undesirable enforcement, differing from that derived from political bias, is corrupt enforcement. Corruption is liable to arise when those in charge of administering polling booths are rewarded for turning a blind eye to vote buying or to ballot stuffing. The award of lucrative contracts for electoral equipment and services presents temptations to higher level officials and to members of electoral authorities. Officials who have been bribed are subject to exposure or blackmail; for this reason, they are unlikely to carry out duties relating to enforcement, including the enforcement of political finance regulations.

There have been independent reports of bribery of election officials in countries ranging from Cambodia<sup>[2]</sup>, Nigeria and Sierra Leone, to the Philippines and the United States. The mention of these countries is not meant to signify that such reports were proven or that these countries have special problems concerning the integrity of their electoral management. However, it is important to keep in



mind that the integrity of those responsible for ensuring that election and party financing laws are properly enforced cannot be taken for granted. Any enforcement agency has the weighty obligation to exercise its powers in a manner harmonious within a system of free expression; this results from the fact that a political finance regulator controls very delicate matters such as core political speech matters and a right to participate in public life.

Concerns about biased enforcement policies are not new. In fact, in 1985 the Chief Electoral Officer of Canada suggested that:

Complaints received during an election alleging that a candidate has committed an offence must be handled judiciously, as that candidate's chances of being elected could be adversely affected if it became known that he or she was under police investigation. The same care must be taken outside the election period to protect the reputation of individuals. The possibility that the investigation may prove the complaint to be unfounded adds to my concerns.<sup>[3]</sup>

Thus, an important component of an enforcement mechanism relates to the degree of *trust* that political parties and candidates feel in their enforcement agency. Trust is also an important condition in coordinating the efforts of different enforcement agencies.

### Case Study – Non-Enforcement *Canada, Macedonia, Russia and Ukraine*

Though non-enforcement is the most common shortcoming, politically biased enforcement is a second, significant problem in a number of countries. The following cases are examples of biased enforcement.

Between 1962 and 1974, as many as one-quarter of all candidates in **Canada** did not submit statements of expenditure in the relevant general elections. *Johnson v. Yake*, the only case during this period that used regulations to punish improper payments and incomplete disclosure. While the defendant in this case was a member of a newly formed political party; no prosecution was initiated against members of the established parties.<sup>[4]</sup>

According to the Law on Political Parties in **Macedonia**, supervision over party finances is carried out by the Bureau for Internal Revenue, a body subordinate to the Ministry of Finance. The Manager of this Bureau is a government appointee; thus, the Bureau is hardly free from political influences. Despite the fact that financial scandals have concerned mostly the ruling parties, the Bureau is not active in exercising control over the ruling party's finances. As a rule, it spends most of its energies against companies that are well-known supporters of opposition political parties.<sup>[5]</sup>

A detailed assessment by IFES of the parliamentary and presidential elections in **Russia** in 1999 and 2000 refers to the "exceptional difficulties and scrutiny of which the LDPR (Liberal-Democratic Party of Russia) and (its presidential candidate, Vladimir) Zhirinovskiy was an object in particular."<sup>[6]</sup>

The law governing the nomination process in the presidential election required candidates to submit detailed information about their income, assets, property and material liabilities, as well as the same information for all members of their immediate families. If there was a "serious inaccuracy" in the information, the candidate's nomination could be rejected by the Central Election Commission.

When it was discovered that Zhirinovskiy's son had failed to disclose his ownership of an apartment in Moscow, the Central Election Commission rejected Zhirinovskiy's candidacy. In his appeal to the Supreme Court, Zhirinovskiy pleaded that Article 39(3) [of the election code] gives the Central Election Commission the power to reject a candidate if the information submitted is "essentially" inaccurate. He argued that this omission could not be considered "essential" since the apartment represented less than one percent of the total amount of property disclosed. However, the court upheld the CEC's original decision. In response, Zhirinovskiy appealed to the Cassation Court. In the meantime, it came to light that [Acting President and Prime Minister, Vladimir] Putin had also failed to disclose ownership of a country house owned by his wife ... The CEC dismissed allegations concerning the Putin case because the house in question was not completed, and as such did not have to be reported ... Ultimately, Zhirinovskiy won at the level of the Cassation Court, and he was added to the ballot. In spite of his victory, however, valuable time was lost in his campaign.<sup>[7]</sup>

In **Ukraine**, "[T]he government of President Leonid Kuchma continued to harass opposition leaders and their supporters in the run up to the 2002 parliamentary elections. Opposition activists were detained, and the offices of [news]papers that gave positive coverage to the opposition campaign were raided on the grounds they allegedly had evaded taxes. For instance, Borys Feldman, a business partner of former deputy prime minister Yuliya Tymoshenko, received a nine-year prison sentence for tax evasion and financial mismanagement."

One concern is that violations of campaign finance provisions may entail selective application of the legislation to remove opposition parties and candidates from the electoral process. One of the most evident examples of selective enforcement was witnessed during the June 2002 by-elections involving the famous anti-corruption activist and the former head of the Rada inquiry commission on the Gongadze case, Oleksandr Zhyr. The election authorities in Dnipropetrovsk Oblast revoked Zhyr's candidacy a day before the election, arguing that he had engaged in improper campaign spending.<sup>[8]</sup>

If biased enforcement results from bias in the procedures for appointing members of the political finance regulatory body, these procedures must be amended. However, in some circumstances, such bias may reflect deep-seated political problems and the absence of political liberties and the rule of law. In such conditions, no enforcement may be better than biased enforcement. For example, in extreme conditions where those known to have contributed to an opposition party expose themselves to violence and intimidation, there is good reason to not apply laws concerning the full disclosure of political finances.



## **The Role of Civil Society in the Enforcement Process**

This chapter sets out four straightforward ways in which non-governmental organizations (NGOs) can play positive roles in the enforcement process. It has become a common assumption of international development agencies and of international financial institutions such as the World Bank that civil society organizations are capable of playing important roles in checking poor or corrupt performance by public bodies. Several well-known NGOs have monitored spending on election campaigns and, thereby, shown whether political parties and candidates are obeying the relevant political finance laws and whether the regulatory bodies are enforcing them properly. Transparency International (TI), the Open Society Justice Initiative (OSJI), and the Carter Center have all carried out such exercises.

It is often argued that such civil society organizations have a legitimate and important role to play in promoting good government because they are politically neutral, have expertise and represent society at large. Because they do not contest elections themselves, civil society organizations are able—it is argued—to raise special issues and bring pressure to bear on politicians and governmental authorities. NGOs and civil society organizations vary greatly in their technical expertise and in the number of people they represent; however, in most cases, they have significant and positive parts to play in improving the quality of enforcement of political finance laws. In particular, they may help to focus the attention of the press and of the public on the shortcomings of enforcement, thereby providing an incentive for improved performance.

In general, NGOs have for main roles in detection and enforcement:

- 1) Promoting greater disclosure and transparency;
- 2) Searching for evidence of illegal and corrupt political finance;
- 3) Evaluating the effectiveness of funding regulations; and
- 4) Creating public pressure and providing support for reform in political finance.

Pressure from non-governmental organizations, contributors, and—first and foremost—the mass media is necessary in order to create an atmosphere that promotes stronger and more effective enforcement. Recent examples from Britain, Lithuania, Latvia, Poland, Romania, South Africa and Ukraine demonstrate the significance of civic society's role in the fight against political corruption and confirm that the involvement of mass media continues to be a necessary condition for serious political finance reform. Non-governmental organizations and independent media emerge as very reliable watchdogs of party and campaign finance in many contemporary democracies. These groups



can best act in the interests of society at large by monitoring election campaigns and scrutinizing financial records of parties and candidates.

## **1) The implementation diary**

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Using an implementation diary is relatively simple (and inexpensive). It involves keeping records of how and when parties and candidates adhere to political finance regulations. The implementation diary should be considered part of the “tool-kit” of NGOs that wish to play a role in the enforcement of political finance laws.

Such a diary is especially useful in countries where **(1)** parties and candidates are entitled to free advertising time on television and radio and advertising space in newspapers, and **(2)** parties and candidates are required to file financial accounts by a particular date. In the case of entitlements to free political advertising, a group seeking to keep an implementation diary needs to arrange for members to monitor all relevant broadcasts and newspapers and to record the time and length of the free broadcasts or newspaper advertisements. In the case of submission of financial accounts, the NGO should arrange for a member to make the relevant inquiry on the day the reports are due and ascertain at regular intervals thereafter whether the reports were actually received. A separate note needs to be kept for each political party and for each candidate.

Once financial reports have been filed, the NGO should review the reports and check whether the required information has been submitted. (This normally will not include a check on the accuracy of the information.) While this is a simple and crude procedure, it may prove highly effective in some countries where parties and candidates blatantly disregard the legal reporting requirements, and regulatory bodies fully expect them to disregard the law. By establishing and publicizing the fact that parties and candidates have failed to meet their disclosure obligations, the NGO will put pressure on both the regulatory body and on the political actors to ensure that the relevant reports are submitted.

The mere fact that required information is submitted will not, of course, guarantee its accuracy, but it constitutes a useful first stage in compliance with the law. It permits the regulatory authority to move to the next stage, which is to check that the information submitted is correct.

## **2) Analyzing, interpreting and simplifying information**

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In jurisdictions where political parties, candidates or donors are obliged to disclose financial information, the reports of such information are frequently detailed and boring. Long lists of names of individual or corporate donors to political campaigns or detailed party accounts may mean little to members of the general public. Apart from a few items of information that may appeal to their



readers, newspapers also have the tendency to avoid the time-consuming task of analyzing the published accounts (unless there is a whiff of scandal).

Malbin and Gais have reported on the situation in the United States that has resulted from the increasing quantity and complexity of the financial information disclosed under the terms of modern legislation. They argue that political finance disclosure, if it is to be truly effective, needs to reach members of the public before they vote in an election. Access to information on the financial backers of each party and candidate may influence their voting choices:

This [volume of reported financial information] raised two problems. First, the sheer complexity of the reports means that it takes a greater staff commitment [by political finance regulatory agencies] to interpret them...It has also become a problem for newspapers and other media outlets. In most of the states we visited [for purposes of research into political finance enforcement], very few newspapers allocated even one reporter's time to analyzing campaign finance documents. Newspapers that once made [a commitment to reporting on political finance] are now cutting back. From a journalistic perspective, absent a scandal, the [material] seems complex, repetitive, and less of a news story. As a result, newspapers are giving less space to reporting disclosed information at a time when the increasing volume and complexity of the reports would require more of an effort, not less, if the public is to get the relevant information in time for an election decision.<sup>[1]</sup>

NGOs, therefore, may play a significant role by undertaking the job of analyzing the data in official reports on party and candidate financing. In the United States in particular, several specialist NGOs have undertaken such a task. They include the Center for Responsive Politics, the Center for Public Integrity, Common Cause, and the Campaign Finance Institute. In the United Kingdom, the New Politics Network carries out a similar operation. Information extracted by these groups from an analysis of official documents frequently is much more user-friendly than the raw data and is frequently reported in the media.

### **3) "Money and Politics" (MAP) program**

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The role of NGOs as intermediaries between officialdom and the public can be particularly valuable. The IFES "Money and Politics" (MAP) program is an example of this role. The program uses the Internet to solve one of the main problems concerning public access to official information about political financing. In the past, it was difficult, time-consuming and costly for citizens to gain access to official information about the accounts of political parties and candidates.

Even in countries where parties and candidates were required to submit such information, and even when they complied with the law and made their submissions, members of the general public and even journalists faced the practical problem of gaining access to the information. The documents were held in government offices that had limited hours of operation. Charges often were imposed for making photocopies of the information, or the information needed to



be copied by hand. The information was sometimes kept in a large number of different local government offices. It was then destroyed after a relatively short period of time.

At the center of the MAP Program is a user-friendly Internet database of political funding information. Housed and maintained by the enforcement agency, the MAP database serves a number of purposes. It provides free and immediate access to information on political finance and functions as a rich source of information for media and analysts following the trends in financing of election campaigns. It helps inform voters about the incomes and spending of different candidates and parties and helps them make decisions at the polls. It promotes a more transparent conduct of election campaigns and contributes to improving the climate of political financial transactions.

By assisting election management bodies to place such information on the Internet and by encouraging debate among political parties, NGOs, journalists and members of the public, IFES tries to make political finance disclosure more effective. Following the money trail through disclosure of political and, in some cases, personal accounts gives voters the opportunity to make educated electoral decisions that hold candidates and political parties accountable. The MAP database is designed to provide a vehicle through which political parties, candidates, media, NGOs and voters can access and analyze information.

#### **4) Litigation**

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A potentially significant tool for voluntary organizations is the sponsorship of court cases bearing on important matters of election law and party law. The aim of such litigation may be to close some legal loophole and, thereby, make it possible to implement an otherwise ineffective law.

In India, the strict limits on campaign spending by candidates were virtually unenforceable because expenditures made by political parties and by a candidate's supporters did not count against the limit unless they had been authorized by the candidate, even when made with the candidate's knowledge. Proof was required that the candidate had specifically authorized the expenditure—a standard that was almost never possible to meet.<sup>[2]</sup>

The intent of the law was clarified in a 1996 judgment of the Supreme Court in a key case brought by Common Cause (*Common Cause v. Union of India and Ors*, AIR 1996 SC 3081). Henceforth, when a candidate knew that campaign spending was being incurred in his support, the onus would be on the candidate to demonstrate that the expenditure was unauthorized. Otherwise, such spending would normally count against the legal limit. The Supreme Court gave the following judgment:





[The] expenditure ...in connection with the election of a candidate to the knowledge of the candidate or his election agent shall be presumed to have been authorized by the candidate or his election agent. It shall, however, be open to the candidate to rebut the presumption ...<sup>[3]</sup>

Following this case, the Election Commission “called on all political parties at national and state levels to submit for its scrutiny the details of expenditure incurred by them both on the general party propaganda and also on the election campaigns of individual candidates in every general election.”<sup>[4]</sup> The basis of this request was that party expenditures on the election campaigns of individual candidates would be presumed to have been authorized by the relevant candidates unless the relevant party accounts were submitted and showed evidence to the contrary.

It is beyond the scope of this handbook to assess the practical effects of this judgment. However, it is presented as an example of the potentially important role of public interest lobbies in the field of political finance law.<sup>[5]</sup>

A further example of political finance litigation is the case brought in 2003 by the Institute for Democracy in South Africa (IDASA – see [www.idasa.org.za](http://www.idasa.org.za)) against five major South African parties (the ANC, DA, NNP, IFP and ACDP). The objective of the case, brought before the High Court of South Africa in Cape Town, was to establish that political parties are obliged under the terms of a law on freedom of information (Promotion of Access to Information Act POATIA) to disclose the identity of those making donations of at least SAR 50,000.

IDASA has been calling for reform of the law to require disclosure of substantial donations since 1997, the year that the Public Funding of Represented Political Parties Act was passed. In August 2002, IDASA made a submission to Parliament on this issue in the context of the Prevention of Corruption Bill. In addition, IDASA also made a written submission to the Private Members' Bill Committee of Parliament. IDASA asserted in its court papers that because of the receipt of public funding and the public role that political parties play in a representative democracy, that they are “public bodies” for the purposes of the right to access information enshrined in section 32 of the Constitution of South Africa. IDASA’s litigation against the country’s major political parties to reveal their sources of funding is part of its campaign to bring about transparency and accountability with respect to private donations. It will be heard in the Cape High Court in the first half of 2005.

## **5) The role of academic experts**

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Individual scholars who concentrate on party and election funding and networks of such scholars are also capable of making valuable contributions. Experts are especially valuable if they live and work in the country where reforms are being considered, but foreign advisers may also have a role. Outside experts may be



influential because they have greater prestige than local ones. As the ambassador of a country in francophone Africa explained, leading politicians in his country were unlikely to accept advice about political finance rules from someone who lived in the country but would be impressed by official visitors from abroad.

However, in the medium and long term, there is no substitute for local experts. Visiting consultants normally will not be able to stay long enough to make a lasting impact. They will rarely have the determination or the legitimacy of specialists with a permanent stake in the country.

Political scientists and legal experts have regularly had key roles in assisting and advising parties and governmental authorities. Academic publications also have led to increased press coverage of political financing. In the medium term, the training of a small number of scholars specializing in political financing within each country, especially in newly emerging democracies, is a high priority. A useful model of an organization devoted to a technical study of issues relating to money in politics, which includes experts from different political parties as well as specialist lawyers and election administrators, is the Campaign Finance Institute of Washington, DC. Its publications and activities are less mass-media newsworthy but more authoritative than those of most "public interest" lobbies. The Institute seeks to find areas of consensus among specialists from political parties.

## **6) Political finance monitoring by NGOs**

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The term "political finance monitoring" may refer to any attempt to review and detail the operation of a political finance system. It is a diagnostic tool that captures how systems operate in practice, as opposed to how they are designed to function through a given regulatory framework. Monitoring by NGOs can be used as a basis for assessing political parties' and candidates' sources of funding and campaign costs. Such assessments can then be used to challenge the accounts submitted by parties and candidates to the political finance regulatory body.

The first method of political finance monitoring was developed by Poder Ciudadano.<sup>[6]</sup> The main feature of the Transparency International-Argentina model was its focus on total expenditure by parties and candidates on national election campaigns. In particular, the number of minutes of advertising on television and radio, the number of column-inches of advertising in certain newspapers, and the number of posters using commercial poster sites in a particular geographical area were recorded. The commercial value of such advertising was estimated, and on this basis, the overall cost of the election campaign was calculated.



Where there are strict legal limits on spending on electioneering, such an exercise may establish beyond reasonable doubt that some of the parties and candidates are spending more than is allowed. However, the TI-Argentina method of monitoring was open to criticism because it concentrated solely on campaign spending and on national and metropolitan politics. Also, it focused on estimated spending on mass media; the method thus assumed (and stated) that mass media spending accounts for the bulk of total political spending in many countries.

This simple methodology has been modified and improved gradually by NGOs in Armenia, Latvia, Romania, Russia, Slovakia and the Ukraine, among others. More recently, a comprehensive monitoring methodology has been developed by the Open Society Justice Initiative.<sup>[7]</sup> Its “Monitoring Election Campaign Finance – a Handbook for NGOs” provides a methodology that helps NGOs monitor different types of campaign expenditure, contributions to political parties and candidates, and the misuse of state or public resources for election campaign purposes. Its approach takes into account all election costs of political parties and candidates and main sources of funding. The authors also suggest evaluating enforcement records:

Assessment of the legal framework is not complete, however, without an evaluation of the observation and enforcement of existing provisions. Seemingly sound legal provisions may be dysfunctional in practice, or be poorly observed or enforced. It is important to identify the root of the problem and to determine whether the existing provisions are: (a) too vague to allow for effective enforcement; (b) too complicated to allow for effective enforcement; (c) too restrictive to be observed in practice; (d) adequate but lacking an effective enforcement framework; (e) adequate but enforced in a discriminatory fashion. Where the legal and institutional framework has shortcomings, monitoring should provide evidence of this. Where it is more-or-less sound, monitoring should assess the extent to which relevant provisions are effective in practice and highlight any problems with their implementation. In both cases, the findings should then be used to advocate targeted reforms.

The OSJI initiative is the first systematic effort to consolidate the experience and knowledge of a wide variety of campaign finance monitoring efforts. It should allow NGOs to carry out more comprehensive campaign finance monitoring and reform programs.

## **7) Dissemination of monitoring results**

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NGOs can effectively detect and highlight funding patterns or suspicious correlations, but these findings have to be communicated effectively to wider audiences to provoke public discussions or condemnation by voters that are likely to affect the political fortunes of the parties or candidates involved. Frequently, the threat of loss of public support is what prevents politicians from entering into dubious political or financial transactions. It should be noted, however, that the use of media to publicize information about campaign finance



may backfire if certain conditions are not met. Despite the deficiencies of official reports, only the use of the complete documents can divert complaints about selectiveness of empirical information. Also, analysis must be carried out in a balanced way, looking at the same issues across all relevant political organizations or candidates. Editorial boards of newspapers can be more influential in this regard than individual journalists. Such a non-partisan approach will only strengthen the credibility of the conclusions and contribute to a wider circulation of the report.

NGOs in countries where campaign expense monitoring projects have been carried out have faced criticism of bias because they have been vague on the methodology of the project. It is of utmost importance, for the success of the endeavor, that indicators and criteria of evaluation be clearly defined and also made public prior to the launch of the project. A consistent application of these criteria throughout the project will add to the seriousness of the effort even if the conclusions reached do not conform to political sympathies of the funders and authors of the endeavor.

Better publicity for monitoring efforts can be achieved by presenting the project results to the media in an effective manner. It may be useful to split all information into two parts: main report and executive summary. The latter ought to be concise, analytical and easy to read. Visual representation of the main trends and major problems or issues raised by the inquiry will help communicate the research results. A convenient way of disseminating the main report is to publish it on the Internet, creating additional publicity for the institution. A different approach to publicizing the findings might be a series of commentaries or analytical articles describing the problems detected, examining their likely causes and outlining possible solutions. These articles are perfectly suited for incorporating and drawing on the experience of other countries in the sphere of political or campaign finance. This approach would help maintain the public's interest in issues surrounding money in politics.

## **8) The role of mass media**

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Over the last few years the mass media in all democracies have published a great deal of materials disclosing irregularities in the funding of politics and exposed cases of political corruption. To illustrate the importance of investigative journalism, IFES has collected many examples of articles related to corruption in political finance, which can be viewed in the media section of [www.moneyandpolitics.net](http://www.moneyandpolitics.net). Involvement of the mass media continues to be a necessary condition for the ongoing fight against political corruption. In fact, examples from both established democracies and transitional countries show that the public receives information about political finance-related corruption mostly from the media rather than from the institutions directly responsible for monitoring political finance.



In this context, the role of the media as a political commentator comes to prominence. Among various activities devoted to encouraging greater transparency and accountability of political finance, investigative journalism is one of the most effective anti-corruption tools. Yet, the general characteristic of transitional countries is that the knowledge of political finance and conflict-of-interest issues and access to information are limited; some journalists and activists either possess information that they cannot verify and publish, or they have a vague understanding of the problems. Furthermore, in most cases, public control over political finance is conducted only by a narrow group of journalists.

Lack of the necessary expertise, knowledge and methodology in investigative journalism can become a major obstacle for the mass media dealing with political finance-related corruption in the early stages of democratic transition. The Council of Europe Parliamentary Assembly, in its recommendation adopted in 2001, remarked that: "Citizens are showing growing concern with regard to corruption linked to political parties' gradual loss of independence and the occurrence of improper influence on political decisions through financial means."<sup>[8]</sup>

The mass media have become increasingly active in addressing issues related to political finance and political corruption. They make an important contribution to anti-corruption reforms by describing in detail particular cases of conflict-of-interest or political finance-related corruption. Well-balanced pressure from the mass media seems to be necessary in order to create an atmosphere that promotes anti-corruption initiatives and serious enforcement.



## Part One

### Chapter I

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1. See also Pinto-Duschinsky (2002), p. 70.
2. For an example of a wide definition of "political", see the Common rules against corruption in the funding of political parties and electoral campaigns, adopted by the Council of Europe Committee of Ministers on 8 April 2003. According to Article 6, "Rules concerning donations to political parties, with the exception of those concerning tax deductibility referred to in Article 4, should also apply, as appropriate, to all entities which are related, directly or indirectly, to a political party or are otherwise under the control of a political party."
3. Pinto-Duschinsky (2002), p. 69; See also Walecki (2004), p. 19.
4. Thus, the definition of a political "donation" given by the Council of Europe is probably too broad. Article 2 of the Common rules against corruption in the funding of political parties and electoral campaigns reads: "Definition of donations to a political party: Donation means any deliberate act to bestow advantage, economic or otherwise, on a political party."
5. van Ruymbeke (1998), p. 84.

### Chapter II

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1. Malbin and Gais (1998), p. 5.
2. Lujambio (2004), p. 56.
3. See Chapter IV for more details.
4. House of Commons Debates, 1<sup>st</sup> session, 29<sup>th</sup> Parliament, vol. V, 12 July 1973, p. 5564.
5. International IDEA, "Matrix on Political Finance Laws and Regulations," (2003).
6. In Spain, a tribunal is endowed with the task of supervising financial performance of Spanish parties both generally and in the course of election campaigns. The *Tribunal de Cuentas* has the power to ask the parties for information about the source of donations. However, it is not obliged to publish this information.
7. For example, Nassmacher points out that "In Italy three different agencies are in charge and have to deal with different kinds of financial reports. Italian parties are required to file annual reports of their financial routine operations to the speaker of parliament. The election campaign donations and expenditures of all parties have to be declared to the Corte dei Conti (state auditor) following each election. Candidates have to declare their expenses to the Collegio Regionale di Garanzia Elettorale, the regional administrative agency in charge of elections." See Nassmacher (2002).
8. Rec. 2003[4]
9. Kovick and Thornton (2003) p. 48.
10. Doublet (1999).
11. Keesing's Contemporary Archives (1987).
12. Gyimah-Boadi (2001), pp. 304-5.
13. Wanchoo Committee (1985).
14. Dahl (1999).
15. Levush (1995).
16. Bianco and Guardini (1999).
17. Thornton (2003b)
18. K. Z. Paltiel (1981)
19. Rocamora (2001), pp. 9-10.



20. Jaung and Mo (2001). Also Thornton and Kovick (2003), pp. 281-282, give a similar assessment: "...violations of the law are rampant...breaking the law, rather than adherence to the law, is the norm in Korean politics."
21. Hsia and Johnson (1995). Likewise, Kovick (2003), p. 332, reports: "It is widely recognized and acknowledged that nearly all politicians submit false reports of their campaign expenditures to the Central Election Commission."
22. Unpublished study by Peter, cited in Pinto-Duschinsky (2001).
23. Unpublished study by Pidluska, cited in Pinto-Duschinsky (2001).
24. Arlegne and Coronel (2003), pp. 231-2.
25. Malbin and Gais (1998), p. 79.
26. Pinto-Duschinsky (1991).

### Chapter III

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1. An advisory committee established by the Canadian government in 1964 to "inquire into and report upon the desirable and practical measures to limit and control federal election expenditures." For more details, see Ewing (1992), pp. 46-52.
2. Barbeau (1966), p. 23.
3. IFES Internal report, 14 May 2004.
4. Committee on Standards in Public Life, Fifth Report (1998). The Funding of Political Parties in the United Kingdom, London: The Stationery Office, Cm 4057, Volume 2, #2075-2076.
5. [www.bbc.co.uk/election97/background/procedure/courts.htm](http://www.bbc.co.uk/election97/background/procedure/courts.htm).
6. Malbin and Gais (1998), p. 29.
7. Ibid, p. 29.
8. Chief Electoral Officer of Canada, 1979°, p. 22, quotation after Ewing (1992).
9. Hughes (2001), p. 214.
10. See Robert Williams, "Conclusion: Problems and Prospects," in R. Williams (ed.), Party Finance and Political Corruption. Basingstoke and London: Macmillan Press Ltd. (2000), p. 201.

### Chapter IV

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1. For more details, see <http://www.tehelka.com/home/2004/operation/investigation1.htm>.
2. Cited in Pinto-Duschinsky (1997): file on "Spending limits."
3. Thornton (2003a), p. 18.

## Part Two

### Chapter V

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1. For more details, see Federal Prosecution of Election Offenses, 6th edition (1995).
2. Lopez-Pintor (2000), pp. 49-50.
3. Ibid, pp. 63 and 123.
4. Lopez-Pintor (2000), p. 210 and Nadeau (2000), p. 22.
5. Lopez-Pintor (2000), p. 125.
6. Committee on Standards in Public Life (1998), Volume 1, 150.



## Chapter VI

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1. "Campaign Financing Laws in the United States." Paper by Craig C. Donsanto, p. 10
2. The Council of Europe, 'Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures', Adopted by the Venice Commission at its 41<sup>st</sup> plenary session CDL-INF (2000) 1.
3. Adamany and Agree (1975), p. 103.
4. Interview with representatives of the National Electoral Commission, Warsaw 06.2002.
5. Nassmacher (2001), p. 152.
6. Ewing (1992), p. 230.
7. Administrative Conference of the United States, "Adjudication of Civil Penalties Under the Federal Aviation Act," Recommendation Number 72-6, November 1991, p. 67; Quotation after the Centre for Responsible Politics study, "Discussion of the Model of Enforcement Agency," see [www.opensecrets.org](http://www.opensecrets.org).
8. Ibid., p. 3.
9. See Federal Prosecution of Election Offenses, 6<sup>th</sup> edition (1995), p. 114.
10. See Federal Prosecution of Election Offenses, 6<sup>th</sup> edition (1995), p. 96.
11. Neou, Kassie and Jeffrey C. Gallup, "Conducting Cambodia's Elections," Journal of Democracy, Vol. 10.2 (1999), p. 157.
12. Sue Nelson for ACE Project, <http://aceproject.org/main/english/ei/eih01g.htm>.
13. Elections Canada, Special Investigators Manual, Chapter 14, p. 4, quotation after Nelson for ACE Project.
14. Donsanto, Craig, "The Federal Crime of Election Fraud," Third Annual Trilateral Conference on Electoral Systems, IFES, May 8-10, 1996, p. 1.

## Chapter VII

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1. See FEC 1995 and 2002 Annual Reports
2. Anderson, R.J. (1977) The External Audit. Toronto: Cropp Clark Pitman, p. 143.
3. See Gordon, (1997), p. 86
4. The Electoral Commission, "Political Parties, Elections and Referendums Act 2000, Recommendations for change," (2003).
5. Michael Svetlik, TIDE diagnostic assessment, Georgia: background notes, 14 May 2004.

## Chapter VIII

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1. <http://ocf.dc.gov/index.shtm>
2. Center for Responsive Politics, "Discussion of the Model Enforcement Agency" report.
3. "Mexican judge orders capture of former oil company chief in election finance scandal" by JOHN RICE (The Associated Press), 5/9/02
4. Elections Canada, "Investigators Manual," January 2004.

## 9) Chapter IX

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1. Nassmacher (2003), p. 154.
2. Ibid., p. 154.
3. Ewing (1992), p. 200.





4. Ewing argues that, "It is of course paradoxical that legislation designed to improve the quality of representative and accountable government should be frustrated by people who are neither representative nor accountable." Ewing (1992), p. 231.

## Chapter X

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1. Kanev, forthcoming.
2. "[M]any observers contend that the ruling party controls the NEC [the Cambodian National Election Commission] by illegally influencing independent appointees through bribery." (2003), p. 49.
3. Chief Electoral Officer of Canada, 1985a, p. 5, quotation after Ewing (1992), pp. 225-226.
4. Ewing (1992), p. 40.
5. Renata Treneska (forthcoming). 'Party Funding and Campaign Finance in Macedonia.' Edited by Daniel Smilov. Budapest: Central European University Press.
6. Nadeau (2000), p. 125.
7. Ibid, pp. 41-42.
8. Walecki, forthcoming (b).

## Chapter XI

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1. Malbin and Gais (1998), p. 46.
2. Devi and Mendiratta (2000), p. 840.
3. Cited in Devi and Mendiratta (2000), p. 840.
4. Devi and Mendiratta (2000), p. 842.
5. E. Sridharan summarizes the judgment as follows: "On April 4, 1996, just before the last date for withdrawal of nominations and the beginning of the 1996 election campaign, the Supreme Court, in a ruling, upheld the validity of Explanation 1 of Section 77 (1) of the RPA, but subject to the filing of audited accounts by all political parties. In the absence of the latter, party spending would be clubbed with candidate spending for the purposes of expenditure limits. These two rulings will force political parties, henceforth, to file tax returns and audited accounts of some kind, in all likelihood doctored. However, it will force them to go through the exercise and with a vigilant media, will force some degree of transparency of political fundraising and election expenditure, or at least, make fudging more difficult than it has been so far." Sridharan, (2001).
6. This is the Argentinian chapter of the Berlin-based anti-corruption organization, Transparency International (TI)
7. See [www.osji.org](http://www.osji.org).
8. Council of Europe Parliamentary Assembly, *Recommendation 1516 (2001) on Financing of political parties*.



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## 2) Interviews and Personal Information

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