Monitoring, Control and Enforcement of Political Finance Regulation

KARL-HEINZ NASSMACHER*

The scope of rules on political finance and the procedures for their implementation depend on the details of the regulation to be applied. If the regulation is vague there is neither a need nor a real possibility to enforce it. If the regulation is too strict the regulated parties, candidates and citizens will feel burdened by the rules or will regard them as a threat to their freedom. Political procedures normally require compromise and thus the final legislative outcome often produces problems which are likely to make enforcement difficult.

It must be noted first that all political finance regimes face a "magic quadrangle" – **transparency** for the general public, professional **accounting** by volunteer campaign and party workers, administrative **practicality**, and the possibility of **sanctions** in the event of violations. None of these can be ignored; none of them can stand alone in any effort to frame and implement rules to regulate the flow of money into politics. Practicality is essential in order to avoid bureaucratic red tape, but any legal framework requires proper administration. Sanctions have to be in place, but their real use is as a deterrent. Transparency is the most important requirement, but can never be achieved completely. Professional standards of accounting will facilitate external monitoring, but most of the original bookkeeping will be done by amateurs.

This chapter tries to explain *why* enforcement of political finance regimes is so difficult. Among other issues it will explore the methods political parties, candidates and citizens use to find ways around spending and contribution limits as well as disclosure and reporting rules. It will discuss why parliaments, administrations and other agencies are reluctant to apply controls and why judges are either unwilling or unable to investigate alleged infractions.

1. The Basis and Contents of Rules

When, in 1976, the leading Canadian scholar Khayyam Z. Paltiel stated that "enforcement demands a strong authority endowed with sufficient legal powers to supervise, verify, investigate and if necessary institute legal proceedings" (emphasis added), many people did not believe him. The intervening 25 years have proved that he was perfectly right. This chapter brings together information relating to each of the four elements mentioned above. Evidence on the process of monitoring, control and enforcement can be found in many countries, some of which have been studied more closely than others.

The major general problems to be emphasized before we embark upon details are the basic requirements for public control and the key elements of any regulation.

1.1. Basic Requirements for Public Control

Monitoring of party funding and enforcement of financial controls are the final steps in a long process leading to the regulation of money in politics. Many democracies have ignored the issue until a scandal provoked political action, eventually leading to legislation on the subject. Some statute laws are an expression of the political will to solve the real problem; others are not. The latter simply indicate that a need for political action was felt and that some essentially symbolic action was taken. Laws of the latter kind will never be implemented because nobody meant them to be. But even laws designed to solve real problems may fail to do so because there is no support for the law among those who are subject to it.

The **USA** has created the most impressive enforcement agency but its success in achieving compliance with the law has been frustrated largely by details of the regulation and by court rulings which have undermined the efficacy of important rules. **France** has created a highly independent agency to enforce the regulation but given it very little power to monitor the actual flow of money and to audit the financial reports filed. Moreover a variety of laws has to be enforced which contain some unresolved contradictions. The **UK** has only recently enacted more comprehensive rules and instituted an Electoral Commission, which seems to have made a promising start. Thus **Canada**, **Australia** and perhaps **Germany**

* In the preparation of this chapter I have drawn on papers by Yves-Marie Doublet (on France), Ron Gould (on Canada) and Lisa E. Klein (on the USA). Further information was provided by Joe Baxter, Kevin Casas-Zamora and Patrick Henry. All their contributions are most gratefully acknowledged.

currently provide the most lasting and most effective examples of the monitoring of political money and the enforcement of political finance regulation.

1.1.1. The Rule of Law and the Free Flow of Information

The application of statute law must be embedded in social and legal routines, most of all the rule of law. A society without real practice in applying the rule of law will be incapable of implementing any political finance regime. In all established democracies the rule of law has preceded popular, responsible government. People in a supposedly democratizing world frequently take the rule of law for granted, which it often cannot be. Laws and regulations are of little value if they are widely disregarded and if offences go undetected and unsanctioned. In the field of political financing, enforcement has proved an especially severe problem.

Where disrespect for laws, institutions and the courts is the prevailing attitude, no one can hope to enforce a political finance regime. If the mindset of politicians allows for electoral fraud, why should they respect disclosure rules? Where frequent litigation is the prevalent pattern in dealing with legal matters, a multitude of court rulings will probably transform any detailed political finance statute into a set of loopholes. A mix of national and regional legislation frequently creates a confusion of overlapping and even contradictory laws. The intended objects of such laws will exploit such a patchwork by indulging in selective observation of the rules in order to avoid effective regulation. Between these extremes there is room for countries where the objects of the law will by and large be willing to observe new rules and a vigilant society or its agents will be able to oversee their implementation.

Special note must be taken not only of the rule of law but also of civil liberties, especially the freedom of information and expression. Without such freedom there will be no articulate public opinion and thus no basis for specific requirements on the part of the voting public as to the financial conduct of parties and candidates. A free press is the most obvious indicator of public debate. The Solidarity trade union in Poland hit upon the very substance of freedom when it insisted on publishing a newspaper of its own during the transition process. Nevertheless independent media which are free of government influence and control are not necessarily a fact of life in many emerging democracies.

These absolute prerequisites must be seriously considered in any attempt to apply the lessons gathered in this *Handbook*. Does the country have a well-founded tradition of the rule of law and a free press? How might any deficiencies in these two prerequisites impact on the enforcement of even the "best" political finance regulation?

1.1.2. Determination to Control Political Money

The determination to address political finance issues varies over time and between democracies. In the world of politics, where good intentions compete with conflicting interests, hard choices and inconvenient demands tend to be avoided. A lack of political will to control the flow of money often hinders either regulation or enforcement. Legacies from the past and elements of political culture have frequently delayed and distorted political finance rules.

Experience from many countries sends a clear message to regulators: If you want to have limits you have to **enforce** them. Unenforced limits are worse than no limits because some day they will produce a scandal which will damage people's trust in democracy as a form of government and in democratically elected leaders who do not live up to their own laws.

In the past the rules for political competition traditionally neglected political parties, but this is now on the retreat. Parties are mentioned in modern constitutions, and this offers the opportunity to establish the principle of public accountability which may be put into practice in years to come. In post-communist countries well-intentioned regulations which require financial reporting are not necessarily effective. Political parties have a fundamental problem in dealing with accountability. Their organizational weakness is one of the reasons: Parties which drifted into existence during the first stage of the democratic transition, fragmented, collapsed and then re-emerged cannot be expected to be accountable. The enforcement machinery can be used by the regime to deprive opposition parties of their right to participate effectively. Selective, partisan enforcement of political finance regulation may serve to reduce electoral competition (see chapter 5). Thus, the **link between elections, parties and transparency** is still missing in many post-communist countries. As parties recognize the weakness of that link they are not interested in providing and promoting accountability. Greater involvement of civil society, however, may produce a more demanding public opinion in the future.

Democracies which use single-member constituencies have developed rules for such contests and concentrated their legislation on candidates. For a long time Anglo-Saxon countries neglected the fact that parties were raising and spending increasing amounts of money. For many decades **donations** to British political parties were ignored on the basis of respect for privacy. **Canada** was the first country to move ahead in 1974; **Australia** followed in 1984 and finally in 1999 the **UK** introduced new rules for political contributions, party spending and public subsidies. Although the French Constitution of 1958 recognized political parties, rules for their financing were not introduced until 1988. In Germany 18 years elapsed before the 1949 constitutional requirement for transparent party funding was cast into legislation in 1967, and another 16 years went by before the current rules for transparency of political funds were introduced in 1983.

In some smaller European countries the **freedom of organization** has been the main basis for the rejection of public controls of political parties. A reluctance to interfere with the operation of voluntary associations has strongly influenced public policy on political financing. Sweden is the best-known example. Because of deep concern for the internal autonomy of political parties, first expressed in a royal commission report of 1951 and respected ever since, **Sweden** has not introduced any statutory control or restriction regarding party funds. This policy, based on ethics rather than legislation, now entails voluntary agreement among the political parties on the reporting of political funds. Only the appropriation of public subsidies is based on statute law. The distribution of this support, given without a quid pro quo, is a technical problem without any need for monitoring and enforcement. Of the other European democracies, **Denmark** and **Ireland** observe similar principles.

The **Netherlands** has moved away from this position since 1999 and transformed a rather vague party agreement on disclosure into statute law. Enforcement, however, is not yet an issue. Where parties are completely self-supporting, public controls still seem to be superfluous. Parties in **Switzerland** are treated as voluntary associations of civil society and transparency of their financial activity is not stipulated in any regulation. Although the issue of public subsidies and public controls is debated occasionally in Switzerland, the basic reluctance to regulate still prevails.

In **France**, **Italy**, **Portugal** and **Spain** as well, political parties are legally considered as private associations. Nevertheless there are detailed statutory provisions on party financing, which to a certain degree undermine the formal status of parties as private and autonomous.

More importantly, these conflicting concepts of political party have produced a tension between legal requirements and actual political practice. Strict rules on the statute book were introduced not to infringe upon the financial autonomy of parties but to demonstrate some action in response to a public opinion which was demanding measures against corruption. This preference for **symbolic action** has resulted in political finance regimes which appear strict but are in fact inconsequential. In these countries, and indeed elsewhere, such regulations will not be enforced because of the inherent contradiction that the politicians subject to them are also those most likely to be guilty of infringements.

Special problems of controlling political funding will occur if parties benefit from influence peddling, organized crime or drug trafficking.

A quite different example is offered by the **USA**. There, after years of inaction, the Watergate scandal forced Congress to do something about the abuse of the unlimited amounts of money spent on presidential campaigns. Congress agreed on the 1974 Federal Election Campaign Act (FECA), an almost perfect piece of legislation which included reporting and disclosure provisions, contribution and spending limits, public subsidies and an enforcement agency. Acting on the basis of a contradictory set of objectives, another important political actor, the Supreme Court, in 1976 (*Buckley v. Valeo*) struck down compulsory spending limits because it saw them as infringing upon the freedom of expression. Spending unlimited amounts of money for a political purpose was considered to be protected by the constitution: "money is speech". Congress had to amend the law accordingly and so from the start the FECA has combined contradictory objectives – to exercise a limiting influence on large contributions while protecting freedom of speech, even for "fat cats".

1.2. The Key Elements of Regulation

Legislation which sets up rules for the financial conduct of parties and candidates has to establish a **minimum set of requirements** before the enforcement of the rules can even be considered.

1.2.1. Stipulate Responsibility for Political Funds

Public **responsibility** for political financial activity starts with a legislative answer to the question: Who is responsible for doing what and how?

The Anglo-Saxon orbit provides two different options to identify either a person or body responsible for the movement of political money. The British doctrine of "**agency**" holds an individual person responsible for all financial transactions on behalf of a candidate. Canada was the first country to extend this doctrine to include political parties and non-party groups participating in an election. Each of these must appoint an agent – parties a Chief Agent, candidates an Official Agent and "third parties" a Financial Agent. Among other obligations it is their responsibility under the law to file a financial report annually and/or after each election. Similar rules apply in Australia. Even France has – via Canada – imported the British doctrine of agency: All donations to candidates and parties must be given via a financial agent (*mandataire*), being either an individual or an association (*association de financement*). Both have to be approved by the public agency in charge of political finance (the Commission Nationale des Comptes de Campagne et des Financements Politiques – CCFP) in order for such donations to qualify as tax-deductible. Each candidate and each party may have only one *mandataire*. There may, however, be local support committees, whose donations are not the responsibility of or accounted to the party or the candidate. In Japan there seems to be a similar problem with the proliferation of local candidate support groups (*kôenkai*).

This proliferation of "responsible" bodies was first understood and dealt with in the USA, where the concept of the **political action committee** (PAC) seems to be the most comprehensive: Anyone who intends to solicit or spend other people's money for political purposes has to set up a PAC, register with the Federal Election Commission (FEC: see Box 8) and report to it regularly.

In other jurisdictions the responsible person is usually the **party treasurer**. This is a reasonable approach if competing parties are responsible for implementing a political finance regime. In **Germany** the national party committee is responsible under the law. In practice the permanent staff of the finance department of each federal party organization, under the supervision of the federal party treasurer, is responsible for reporting and disclosure for all party branches – national, regional and local – in close cooperation with a certified accountancy firm which is commissioned and paid by each federal party individually.

Requiring the official **registration** of parties, their regional and local branches, candidates and non-party political organizations ("third parties") is a legislative measure to ensure that all entities which raise and spend political money are identified. This is to enable their financial activities, especially the sources of their funds, to be monitored. Apart from the US practice the **Canadian** approach is the most comprehensive, although local party associations, leadership campaigns and nomination processes are not yet included. Registration of a party in Canada requires the submission of the name of the party, the names and addresses of the leader and officers of the party, and the signatures of 100 electors who are members of the party. The party must also submit the names of its appointed auditor and its chief agent. Without the need for formal registration, legislation in **Israel** and **Germany** obliges parties to include all branches in their financial reports. This, however, leaves loopholes for individual candidates, the party "penumbra" of parliamentary groups, party institutes or foundations and other organizations such as youth groups, and "third party" activities.

1.2.2. Provide for Transparency (Disclosure, Reporting)

Restrictions on contributions and expenses (bans and limits) are frequent, but in Western democracies most of them are not effective. There is evidence from many of the countries studied here that restrictions are evaded by setting up new organizations (e.g., PACs) or by finding persons to act on behalf of those banned from making contributions. In order to circumvent the rules, donors (and/or recipients) have resorted to splitting their contributions into several smaller amounts. Recipients try to split corporate donations between subsidiaries of big companies, which may be perfectly legal but is sometimes reported in the media in terms of scandal.

Reporting and disclosure of information is the cornerstone in assuring transparency of political funds and providing the basis for public monitoring. However, the pursuit of transparency has various aspects. The flow of funds used for political purposes is the subject of all **reporting** procedures. Summarized

data on the income and expenses of parties and candidates is filed for public inspection or published regularly. Major donations to parties and candidates are identified to the public by giving names and amounts (**disclosure**). Carried to an extreme, the voting public's right to know who supports candidates and parties would mean that even the smallest amount would have to be disclosed, giving the name, address and occupation of the donor. There are, however, expenses involved in providing transparency: first, administrative expenses, connected with professional bookkeeping at all levels of political activity; and second, the expenses of political actors and public agencies in preparing and processing unnecessarily detailed information. Thus a realistic concept of transparency has to be a search for the optimum balance.

The experience of various post-communist countries shows that **legislation providing for transparency can be counterproductive.** Disclosure rules are the norm in Central and Eastern Europe (and in the former Soviet Union in general) and are more common there than in most other parts of the world. The problem of disclosure lies in the lack of enforcement. While local media have shed light on many suspicious cases, official inquiries or investigations are rare. On the other hand, if donors give to a party in opposition, disclosure may have the dire consequence that the government (or its secret service) will go after them. Selective application of the law becomes a major threat to the non-partisan impact of the political finance regime. The delicate process of democratization requires a certain degree of privacy and, above all, freedom from harassment. Thus a realistic concept of transparency has to be a search for the optimum and, once again, has to balance conflicting demands.

Since small donations can be seen as either a substitute for personal participation or an occasional expression of partisanship, the right to know should not be overextended. A compromise has therefore been reached in most Western democracies which is acceptable as well as practicable: Disclosure starts at a threshold above which an individual contribution may be considered to be "interested" money.

In the **USA** disclosure is the keystone of the public monitoring of political finance. US regulation emphasizes the right of the public to know, i.e., to judge the candidates' sources of support. All PACs must be able to demonstrate that they have made their "best efforts" to disclose the name, mailing address, occupation and employer of each individual contributor who gives more than USD 200 in one year. However, some critics argue that it is impossible to process all the information that is made available.

In **Canada** contributions over CAD 200 (Int'l $ 160) have to be disclosed, giving the name and the amount donated (for an explanation of the use of International Dollars, please see *Methodology*). Neither the address, the employer or occupation of the individual donor, nor the date of the donation is required to be disclosed, mainly for the protection of privacy. If the threshold for disclosure established as CAD 100 (Int'l $ 300) in 1974 had been indexed to inflation, it would by now probably be closer to CAD 400 (Int'l $ 320).

Australia has a much higher threshold. The party's agent is required to give names and addresses of individuals and organizations contributing an aggregate of AUD 1.500 or more (Int'l $ 1.000). Non-financial donations, such as the loan of company cars or business jets, have to be disclosed, stating the equivalent market price. Compared to other party finance laws, the Australian rules are made fairly simple in order to avoid raising too many questions in the field of grass-roots financing.

In other democracies the claim to transparency is much more limited. Austria and the Netherlands illustrate a reluctant approach to the transparency of political funds. In **Austria** one major party refused to disclose small and medium-sized donations. Thus the disclosure threshold was finally set at ATS 100.000 (Int'l $ 7.400), but the parties need only report total annual amounts by type of donor – individuals, interest groups or corporations. No donor's name need be disclosed. In the **Netherlands** the 1999 Law on State Subvention to Political Parties requires the date and amount of a donation and the name of the donor to be published in the annual financial report of each party. If a donor objects to the publication of his or her name, a description of the category of donor has to be given (e.g., business, union or non-profit organization, although the law does not mention any specific categories).

Under the former **Japanese** Political Funds Control Act of 1976, donations of up to JPY 1 million (Int'l $ 10.910) to factions (*habatsu*) or candidate support groups (*kôenkai*) went undisclosed. The same applied to tickets for fund-raising events collecting less than JPY 1 million per event. Since 1994 the names of all

donors, individuals, corporations and organizations contributing JPY 50.000 (Int'l $ 332) or more to parties or to financial support groups have to be disclosed. The same applies to individuals and corporations buying tickets for fund-raising parties in excess of JPY 200.000 (Int'l $ 1.330) per event.

In **Germany** the desire to avoid bureaucracy and administrative cost has led to much higher thresholds. In their annual reports all German party treasurers must publish the names and addresses of big donors and the annual total amount of their donations. Disclosure of donors' identity starts at DEM 20.000 (Int'l $ 10.000) per donor per year. This has remained basically unchanged since the 1970s. An increase to DEM 40.000 (Int'l $ 28.000) in 1988 was struck down by the German Supreme Court in 1992.

Summing up experience with transparency of political funds in Western democracies, there are two major indications. First, full disclosure can place an administrative burden on the parties without really improving openness and accountability. Second, in order to be effective disclosed information should be accurate, publicly available and comprehensible to potential users. An essential prerequisite is **timely information** which attracts the attention of the media and public debate, and has a potential impact on voting behaviour. However, under current disclosure provisions it is possible for 18 months (in Canada) or even 21 months (in Germany) to pass between the time a contribution is made and the time it is disclosed. By then the information is of little use. (In Germany an amendment to the law is currently being considered by parliament which would ensure that major donations, of DEM 100.000 (Int'l $ 51.000) or more, are disclosed within three months.)

The relevance of all this may become clearer from the example of a political finance regime which neglects transparency provisions: Although **Zimbabwe** adopted British regulations on constituency campaigns (agents, spending limits, disclosure of expenses, etc.), two important aspects were not included in the constitution (sections 84–92) or the Electoral Act. In neither document is there any reference to the auditing of expenses or provision for publication of expenses incurred.

1.2.3. Identify an Implementing Agency

Some democracies have decided to give **responsibility for the implementation** of political finance rules to a government department, for instance, the Ministry of the Interior, the Ministry of Justice (as is the case in Ghana, Liberia, Nigeria and Sierra Leone) or the Attorney General. Somewhat detached from the government of the day is the speaker of the legislature, for example, the President of the Camera dei Deputati in Italy or the German President of the Bundestag. An intermediate option is to make the audit office or state comptroller, for example, the Spanish Tribunal de Cuentas, the Italian Corte dei Conti, or the Israeli State Comptroller, responsible for enforcing rules on the financial conduct of political parties. Other democracies have created a specific agency with administrative and enforcement functions intended to be an impartial body, independent of government as well as parliament, although technically it may report to the speaker of parliament. Where such a separate agency exists, the legislation on the political finance regime usually determines:

- the procedure for the appointment of its members, including their term of office and safeguards for their independence;
- the definition of specific powers, such as the interpretation of relevant laws, the checking and publishing of information on funding and the investigation of suspected violations of the rules;
- the definition of situations that demand specific activities of the agency, such as preparing a report, publishing information, investigating incidents or applying sanctions;
- the details of breaches to be sanctioned and the procedure for enforcement of relevant laws; and
- the procedure for appeals against decisions of the agency.

Agencies at work in Australia, Canada, France and the USA provide useful precedents. In **Canada** implementation of the political finance regime rests with just one person, the Chief Electoral Officer (CEO). The CEO is assisted by two other independent officials, the Director of Financing for compliance and monitoring, and the Commissioner of Canada Elections for investigations and enforcement. In **Spain** the Juntas Electorales and in **Italy** the Collegio Regionale di Garanzia Elettorale are similar bodies. The controlling agencies in **Australia**, the **USA** and **France** are headed by a board of three, six or nine persons. Members of these commissions (see box 8) represent

the majority and minority parties in parliament, the court of auditors, the elections administration and other judicial or non-judicial persons with non-partisan approaches to the subject. The composition of the new British Electoral Commission is similar. Naturally political finance regimes shape the rules for the operation of the controlling agency in a way that conforms to the administrative patterns for supervising agencies, for example, the audit office, the ombudsman or the supreme court in the specific country.

Most democracies have provided their controlling agency with the powers to **sanction** in one way or another financial misconduct by a party, candidate or other person or organization subject to the regulation. Potential sanctions include publicity, investigation and refusal of public funds. Sanctions can be incidental, temporary or permanent, as required by the legislation. Often they are safeguarded by excessive "due process" rights for respondents and subject to a specified right of appeal. Such appeals have to be tried by a court, usually the highest court in the country. None of the existing agencies is entitled to take violating parties to court itself.

The special tasks of the agencies are:

- to receive audited or non-audited reports;
- to provide published compilations;
- to initiate confidential inspection and public inquiries; and
- to execute (mostly administrative) sanctions.

The most important question is whether an agency with a completely impartial position can be created. That would mean that it was totally free from influence from those who should be controlled. This is difficult to achieve. However, some agencies have more safeguards favouring non-partisan action or more control against potential conflict of interest situations than others.

Safeguards against partisan influence, especially from governing parties, are:

- public expectations or a long tradition of independence of similar bodies;
- the status of a judge of the supreme court, auditor or ombudsman;
- bipartisan or multiparty membership of the commission, where members have to include the minority or the opposition;
- no reappointment of commissioners (lifetime or one-term appointments only);
- absence of budgetary strings (on an agency which has become awkward for the government); and
- absence of political pressure or government or party intervention on staff appointments.

Once again the example of Zimbabwe indicates major problems. The chairman of the Election Directorate is appointed by the president, the registrar-general is an ex officio member, and the other members of this supervisory board are appointed by the minister of justice, legal and parliamentary affairs (National Democratic Institute 1998). There is no institutional provision which ensures adequate participation of the opposition in the Election Directorate.

2. Application of the Rules

The effective implementation of political finance legislation is made more difficult where different laws exist dealing with different aspects of the same subject. It is therefore appropriate to distinguish between countries that have:

- one law regulating money in politics and only one agency to implement it;
- various laws and/or various agencies for different aspects of political finance; and
- no enforcement agency to implement the political finance regime.

Evidence from established democracies indicates that only the first approach is likely to work well. This can be demonstrated by contrasting the cases of Italy and the UK. In the UK, under the Political Parties, Elections and Referendums Act of 2000 the recently created Electoral Commission has exclusive powers to register political parties and to supervise donations to parties and politicians as well as party spending on national election campaigns. This means that individuals and organizations intending to spend significantly during election campaigns and political parties are obliged by statute to file their financial reports with the Electoral Commission for monitoring, further consideration and publication. (Unfortunately, jurisdiction over constituency campaigns continues to fall under the purview of the local election authorities.) In Italy three different agencies are in charge and have

BOX 8.

FOUR AGENCIES IN DETAIL

The Federal Election Commission (FEC) in the **USA** has six voting members (three Democrats, three Republicans), who are appointed for six-year terms by the president after consulting the congressional leadership of both major parties and with the advice and consent of the US Senate. The commissioners elect two members each year to serve as chair and vice-chair. There are some doubts as to whether the members always act independently because they may seek re-election, and therefore depend on their party leadership for reappointment. The FEC had a budget of USD 38.278.000 and a total of 352 personnel in 2000. As experience shows, the FEC is dependent on Congress: If displeased by decisions of the commission, Congress may limit its funds.

As an independent regulatory agency charged with administering and enforcing the FECA, the FEC has four major responsibilities:

- providing public disclosure of funds raised and spent at federal elections;
- ensuring that candidates, committees and others comply with the limitations, prohibitions and disclosure and reporting requirements of the FECA;
- administering the public funding of presidential elections; and
- serving as a clearinghouse for information on election administration.

The **Australian** Electoral Commission (AEC) is an independent national authority which organizes the entire election process as well as the implementation of the political finance regime. The commission is appointed by the governor general on the recommendation of the government and is composed of:

- the chair, who must be a judge or former judge of the Federal Court;
- the Electoral Commissioner, who works as the Chief Executive Officer; and
- another part-time, non-judicial member, who so far has always been the Australian Statistician.

There is a clear social expectation that the members of the AEC act independently. The AEC can rely on its own apparatus, consisting of offices and staff; a permanent staff of some 650 and a temporary staff of ca. 110 people.

The Electoral Commission for the **UK** is the newest body. It became operational on 16 February 2001. It is an independent statutory authority accountable to parliament, set up under the Political Parties, Elections and Referendums Act of November 2000. The commission has six voting members (one of whom is the chair), working part-time, who serve five-year terms and may be reappointed. The first commission was appointed by the Queen on 19 January 2001 following an open, advertised competition, consultations between the prime minister and the leaders of the opposition parties, and a vote in parliament.

The commission's main responsibilities under the law include:

- registration of political parties and third parties;
- monitoring and publication of significant donations to parties and office holders;
- regulation of national party spending on election campaigns;
- voter education; and
- local government boundary revisions in England (other boundary revisions to be transferred later).

Its annual budget is GBP 11 million (Int'l $ 15,4 m.). The numbers of permanent staff for the commission and the financial monitoring section are not available.

In **France** the Commission Nationale des Comptes de Campagne et des Financements Politiques (CCFP) was set up to control campaign expenditures and other issues of political finance. The nine members of the commission are appointed for a period of five years by the government upon recommendation of the vice-president of the Conseil d'État, the president of the Cour de Cassation and the first president of the Cour des Comptes (each nominates three candidates). The CCFP employs between 30 and 40 staff. It approves, rejects or amends the reports which candidates submit regarding their campaign spending, as well as the annual reports by political parties.

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.

As the legal provisions are described in other chapters of this *Handbook*, this chapter presents those findings that are critically important for implementation and impact as they relate to compliance (section 2.1), monitoring (section 2.2), control and investigations (section 2.3), and enforcement and sanctions (section 2.4).

2.1. Compliance: Promoting Voluntary Compliance

In some countries the will to comply with the rules governing political finance is not very strong. Let us start with an example. In Italy the disclosure rules are set out in detail. All contributions of more than ITL 5 million (Int'l $ 2.900) must be disclosed, not only by the beneficiary but also by the donor. Although the law expressly demands documentation of a corporate contribution in the donating company's annual report and the recipient party's balance sheet, the political practice is not to obey such disclosure rules. Other countries, among them newly democratized ones, have similar problems.

If this were an example of general practice there would be no point in making rules. It seems more reasonable, however, to assume that people by and large are willing to obey laws. As new and complicated rules demand a change of attitude and behaviour, implementation has to begin with **information and assistance**. Voluntary party workers may not know the details of the current rules. Special efforts to encourage compliance with legal requirements will therefore be helpful, as has been shown by the **US** and **Canadian** examples:

- providing education and training to address some needs of the community to be regulated, that is, all persons involved – party officials, candidates, agents and auditors. Seminars and round tables for them are publicized in the media and on the Internet. The result of this also benefits the agency because it improves the quality of the information filed in financial reports;
- providing support services, such as toll-free information telephone services, published guidelines and newsletters. The goal is to clarify any questions immediately, give interpretations of the law and thus assist with compliance. An example from the US FEC demonstrates how far support services may be extended for the mutual benefit of those regulated and the agency. The FEC has created an electronic filing program and provides computer software to help committees file their reports electronically. If Congress requires committees which meet a certain threshold of financial activity to file reports electronically, the FEC receives, processes and disseminates the electronically filed data more easily and efficiently than hard copies. Information in the FEC's database is standardized for the major committees, thereby enhancing public access to campaign finance information. Committees using the electronic filing program find it easier to complete and file reports;
- encouraging moral incentives, which may result from public opinion, peer pressure, or the anticipated reaction of those regulated to effective monitoring; and
- material incentives, such as reimbursements, subsidies and tax benefits. The Canadian experience is that reimbursement of part of their election expenses for candidates and parties is a strong incentive to comply. In France half of the donors do not claim the tax benefit for fear that their identity might be revealed – an unwarranted fear since confidentiality is assured.

Not all democracies will have the financial and technical resources to use all these options. Nevertheless it is helpful to assume that citizens and politicians need support for voluntary compliance. However, it would be naive to believe that moral incentives or technical assistance on their own can do the trick. Monitoring, control and enforcement are steps which will have to follow.

A foreign observer who commented on articles 33–37 of the Mozambique Election Law of 1999 insisted that the National Electoral Commission (Comissão Nacional de Eleições, CNE) needed capacity to train people and educate the parties as to

obey the rules. To track, record and account for the public subsidy an accounting regime, which had been lacking, had to be introduced and properly staffed.

2.2. Monitoring

The basic philosophy behind the reporting of party income and expenditure is to make party accounts a subject of public debate. Public debate is expected to produce a more careful selection of donors and a more responsible use of funds.

In general, public debate about political issues is dominated by institutions acting on behalf of the general public, such as competing political parties, pressure groups, NGOs and the mass media. As political money has become an issue of public policy, agencies for the enforcement of regulations, such as the FEC in the USA or the Financing Division with the CEO in Canada, are expected to support the general public and the politically interested media by providing information for publicity on the flow of money in politics. Effective publicity requires that reports be readily available to the public and the media. For the agency this offers an opportunity to monitor financial activities and to challenge any part of a report. As candidates, parties and other organizations file financial reports, the agencies monitor timely filing, check for the adequacy and accuracy of the contents of the reports, and provide access to and publicity for the reports.

Reports are published in different forms. Public access is provided in the USA and Canada, as reports are available on the Internet or open for public scrutiny at the offices of the agency in charge. Most of the European countries do not have similar agencies and do not offer sufficient information for public debate, nor is there monitoring by the agencies to support critical use of the information. In Germany financial reports are published in a parliamentary paper (Bundestags-Drucksache) and on the Internet. More frequently reports are published in an official paper – the *Amtsblatt zur Wiener Zeitung* in Austria, the *Journal Officiel* in France, the *Gazzetta Ufficiale* in Italy, the *Boletin Oficial del Estado* in Spain and the *Diário da República* in Portugal. In Australia reports are not published but they are available for inspection at the Australian Election Commission (AEC) offices.

However, the mere availability of the reports, whether on the Internet at a specific web site, in a parliamentary paper or at the office of an agency, is not sufficient to ensure a public debate. Reports have to be comprehensible to potential users. Public concern with issues such as receipts for tax benefits may widen the public interest. The agency's press office could serve as a resource base for reporters and the public. Special analyses which sum up tendencies in funding are appropriate because the media do not have the time to do their own investigations. It is also very important that everyone is able to contact the agency regarding problems of implementation and alleged violations of the regulations. This would mean that investigations into violations can start before the election and preliminary findings can be available sooner.

The additional services mentioned above require financial resources and qualified personnel. This seems to be no problem in rich countries (see box 8), but agencies in other countries are unable to process and critically analyse the financial reports which have been filed with them. The Election Commission of India (ECI) is an example of the constraints inadequate resources can create for the effective monitoring of campaign expense reports. Although it has powers equivalent to those of a civil court (oversight, investigation, prosecution and sentencing), it has minimal impact on campaign spending limits because of lack of staffing.

The major **aim** of monitoring financial reports submitted by parties, candidates and non-party organizations which collect or spend funds for political purposes is to improve the **accountability** of those who file reports and the reliability of those reports. People intent on cheating will not disappear completely, but effective monitoring can reduce their number and increase their risk of detection. If the regulation stipulates personal responsibility (see section 1.2.1 above), the task of monitoring will be much easier. If the regulation allows for ambiguities as to who is responsible and what is to be reported, monitoring cannot hope to make up for such inadequacies.

Requiring contributions to a party or a candidate to be made to a treasurer or a special agent who is personally responsible for all political income and expenses is crucial to monitoring. As cash transactions cannot be followed up afterwards, monitoring is further supported if major contributions and expenses are required to be routed via bank accounts. If the regulation does not stipulate that all political funds have to be administered using a specially designated bank account, monitoring is difficult. (Cash economies as Ghana, Liberia, Nigeria and Sierra Leone provide

obvious examples.) An agency must try to convince each agent individually that it is easier to balance the books and to track the flow of funds under his or her responsibility if most of the transactions, especially larger amounts, avoid the use of cash. Obviously, if a treasurer is party to shady dealings then it will be impossible to persuade him or her to adopt such a procedure.

Routing money through bank accounts can also improve **identification of contributors**, which is important for the monitoring of limits as well as for the disclosure of sources. If wealthy donors in the **USA** want to evade the limits they may look for persons to donate on their behalf. The US statute (the FECA) prohibits donations in the name of another person. Thus a wealthy person cannot evade the disclosure of his or her name by giving the money to another person to donate or by using several family names. The monitoring agency must check details, such as address, employer or occupation. If the occupation stated is "student" or "unemployed", this may suggest that the rules are being circumvented. Frequent donations from the same address may suggest irregularities. The appearance of many senior employees of the same corporation among the donors to a specific committee may indicate that salaries have been increased to create room for a "routed" corporate donation, which is prohibited.

Explicit limits on the amount of money that can be contributed to political committees have led to a proliferation of PACs, which has simply created more reports and the need for additional monitoring effort. Moreover, recent experience in Germany with former Chancellor Helmut Kohl's "slush fund" (see chapter 7), indicates that bank accounts may also be used to hide the origin of funds if a party finds someone who is willing to do the "dirty work". The major lesson to be drawn from these examples is that no monitoring effort can eliminate grey areas and shady dealings. Nevertheless verification can help to reduce such problems and to provide moral support for law-abiding citizens.

Germany since 1984 provides a good example of **how to shape the reports**. The parties' financial reports include income and expenditure, and debts and assets of the entire party organization at all levels (local associations, state branches and federal headquarters). Reports are organized according to a common format prescribed by law. Both features – **comprehensive reporting** and a **common format** – provide additional devices for monitoring over the years and across parties. Plausible controls are much easier if the data provided has to balance. Common formats are not yet used by all countries, but there is a tendency in this direction; even the least publicity-minded countries, the Netherlands and Sweden, have now set their minds to developing common formats for party reports.

Canada and **Australia** provide good examples of **how to handle the reporting**. The chief agent of a registered party must, in both countries, submit annual returns of the party's receipts and expenses, other than election expenses, to the authorized agency. In addition, within a few months of a general election the chief agent must also file a return of the election expenses incurred. Whereas timely disclosure of donors before an election is necessary, it does not seem appropriate to require separate reports on routine operations and additional reports on campaign expenses. Nevertheless many countries still require separate reports, which causes problems in Italy and Spain, and even in Canada.

2.3. Control and Investigations

Any system of public control is only as strong as the legislation permits. Each and every loophole built into the rules or created afterwards weakens the ability of the system to meet its objectives. Some types of regulation seem to be harder to implement than others. Moreover, adequate material resources for the implementing agency and the availability of qualified staff, especially auditors, are important if the flow of money in politics is to be supervised.

In **Japan** the regulation of political finance (since 1976) emphasizes transparency. Publicity for the financial situation of political parties and public debate are expected to keep abuse of power and corruption in check. However, Japanese regulation does not provide for an enforcement agency empowered to control malpractice or infringement or to apply or demand sanctions. The national and local election agencies which administer the process of reporting and disclosure are not empowered to verify financial statements or investigate financial transactions by parties or politicians.

The most obvious subject of public control is the **appropriate use of public subsidies**. **Belgium** and the **Netherlands** demand public **auditing** for subsidies to party-affiliated bodies. Subsidies to "party academies" in **Austria** and "political foundations" in **Germany** are audited in detail by the federal audit offices. In

principle the same applies to public funds provided for parliamentary groups and caucuses. After decades of subsidization, federal and state auditors in Germany have only recently started to take their auditing responsibilities seriously.

In addition to this, since 1975 Austrian parties have had to prove to the federal audit office that they have spent the public subsidies received according to the purposes laid down in the law. However, this control is implemented by an external chartered accountant who is appointed by the recipient party. A similar procedure applies to the annual financial reports filed by parties in Austria, Germany, the Netherlands and **Italy**. Before filing, reports have to be audited by a certified or chartered accountancy firm of the individual party's choice. To demand that all reports are audited before delivery is an obvious device to improve the accuracy of the information submitted. The external accountants provide a written opinion, in line with the standards of their profession, that the report represents a fair account of financial transactions by the reporting person, body or organization. This procedure means little more than that a minimum of professional standards is applied when political parties prepare their financial reports. No regulation in Western Europe provides for cross-checking of details by an independent enforcing agency, so the procedure cannot be expected to yield any other result and it does not provide a check on the effect of the prevalent funding strategy.

A different approach results from a legal prescription which is intended to highlight offences against campaign finance laws and initiate investigations by the enforcing agency. If the law gives any citizen the right to file an individual complaint which must then be investigated by a public agency, this offers political competitors and other observers an opportunity to raise questions about possible violations. Members of the press can scrutinize reports regularly. Critical information is helpful for the agency in charge; it may even be from anonymous sources. The British experience, however, should caution us against over-optimism. Parties and politicians prefer not to use this opportunity because they expect other parties and politicians to reciprocate by exercising similar restraint in due course.

Without any specific legal stipulation, the administrative staff of the speaker of the German Parliament (i.e., the enforcing agency which may withhold public subsidies in full or in part) investigate any potential infringement of the law to which they have been alerted by **investigating** a party's financial report, **by following up** media coverage of party finance scandals, or through questions asked by (loyal or disloyal) party workers. The results of such investigations (including a party's response to individual incidents) are reported in a parliamentary paper (e.g., most recently Bundestags-Drucksache no. 14/4747, 2000:16–35 and no. 14/7979, 2002:7–27).

The educational impact of such efforts notwithstanding, the controlling body needs the statutory authority to conduct **random audits**. The audit programme resulting from such authority will serve to detect non-compliance and to list any abuses found. Critical information of this kind will enhance enforcement. **Public access** to records kept by the parties, as is the practice in **Canada** and **Israel**, is therefore crucial in order to verify, if necessary, the information presented by parties and candidates. If the monitoring agency lacks resources and is unable to audit every report filed it may increase its in-house auditing capacity by **systematic sampling** and partial probing. As some reports are checked more precisely than others, all who report will use their best efforts to submit a report which they feel can stand up to cross-examination. For example, the AEC has developed a three-year audit cycle to cover all state branches of the registered parties. Other strategies might be to pick a 10 per cent random sample or to give specific attention to reports which deviate strikingly from the average.

However, in some countries politicians have been reluctant to grant auditing authority. The **US** FEC had such control over candidate committees, but Congress has now withdrawn this and replaced it with limited authority to conduct audits "for cause". The procedure starts when the Reports Analysis Division (RAD) of the FEC examines all committee reports for accuracy, completeness and compliance with the law. Committees are informed of all deficiencies and are invited to provide additional information. If a committee fails to comply the RAD may refer the matter to the FEC Office of General Council for enforcement action. If the committee fails to achieve substantial compliance with the law, the RAD may recommend that it undergo an audit by the commission's Audit Division. In **France** the CCFP is not authorized to rule on whether expenses were appropriate or to investigate party accounts. France is therefore in reality another case where controls

of party and candidate finance are mostly formal.

A more promising option is an **independent official** who is free to investigate cases of suspected non-compliance. This seems to be the case in **Canada**, where the Commissioner of Canada Elections, appointed by the CEO, can initiate investigations and appoint her or his own personnel to conduct them.

In all other countries irregularities have to be investigated by the state or national **police**. Sometimes, for example in **India**, the **tax authorities**, which may become involved upon request, are even more efficient. In none of the countries studied here is there an independent official who is responsible for instituting prosecutions.

A guide to the relative difficulties of the different control measures may be helpful. Comparative research has found bans and limits to be the most frequently evaded. Attempts to circumvent them occur regularly. Depending on the political culture, "quasi-evasions" are often tolerated, for example in Italy. In addition, outright violations are sometimes not detected at all. Most European countries apply less than efficient strategies to enforce public control of political money. Spending limits for national parties are also notoriously open to evasion (for details see Cordes and Nassmacher 2001:280–282).

Moreover, **information overload** and a lack of resources may cause additional problems. Different reporting obligations may exist while reports are not collated in a single report, as happens, for example, for companies in Italy. In India there are so many candidate reports that the Election Commission of India is unable to check all the information submitted.

Problems may be resolved through informal methods, such as conferences, **conciliation** and **persuasion**. For example, in **Germany** an abuse that occurred frequently in the early years of German disclosure practice was terminated after 15 years as a result of informal interventions of the administration in charge and media criticism of an illegal practice. The Political Parties Act of 1967 stipulates that the identity (name and address) of large donors has to be disclosed. Nevertheless one party (the Christian Democratic Union, CDU) "disclosed" donations for the years 1969–1975 totalling ca. DEM 6 million (Int'l $ 7,4 m.) under the names of two well-known party fund-raisers ("bagmen"). For the years 1972–1973 it disclosed 33 donations amounting to DEM 7,8 million (Int'l $ 9,5 m.) as "anonymous". In 1982 the Social Democratic Party (Sozialdemokratische Partei Deutschlands, SPD) "disclosed" donations of DEM 7,65 million (Int'l $ 5,8 m.) in the name of a deceased former party treasurer. In 1984 a third party, the Free Democrats (Freie Demokratische Partei, FDP) initially reported that the donor of DEM 6 million (Int'l $ 4,3 m.) was "unknown". Scandal-raising by the media only calmed down when, within a month, the party treasurer officially informed the speaker of the Bundestag that a well-known German "mogul", the former owner of a department store chain living in Switzerland, "had been the donor" (Bundestags-Drucksache no. 10/2366). No such blatant attempts to ignore a precisely phrased stipulation of the law have occurred since.

The examples not only prove that informal conciliation helps; they also indicate that parties react to bad publicity. Whenever political money is made a subject of public debate, parties will try to improve their standing with the voting public. Another message of this example is perfectly clear: To implement legal stipulations, the emphasis should be placed on initiatives to **foster compliance** during the reporting pro-cess rather than on threatening penalties.

However, these instruments lack efficacy without the threat of **sanctions**.

2.4. Enforcement and Sanctions

Enforcement is a matter of keeping a delicate balance between legal rules and political impact, public interest and media publicity, impartiality and partisanship. However, sanctions or adequate penalties for specific offences have to be stipulated by law. The independence, persistence in dealing with different offenders, and constant vigilance of the enforcing agency in applying the instruments available to it are extremely important. Unless these conditions are met there is no effective machinery for enforcement.

A distinction must be made between **administrative** deals and sanctions, on the one hand, and **criminal prosecutions** leading to fines and indictments, involving a judge or a court, on the other. The Commissioner of Canada Elections is the only official who can initiate prosecutions for offences under the act regulating (elections and) political finance. By contrast, the Central Election Management Committee of Korea has to pass every investigation and prosecution of offences against spending limits and reporting provisions to the criminal investigation authorities,

who have to decide if imprisonment or fines are the appropriate sanction.

Criminal prosecutions result from substantial violations of political finance rules. An unresolved problem is allegations of violations in the critical final weeks of an election campaign which cannot be dealt with by due process of law before the election date. Appropriate sanctions may or may not be available and have different impacts. A tax penalty, for example, withdrawing tax benefits for donations or a party organization's tax-exempt status, can be imposed by government and may easily affect an opposition party. A cut in the public subsidy entitlement can be imposed to enforce compliance with transparency rules, as in Germany, or with spending limits, as in Israel. Administrative fines are an option that is often available to enforcement agencies. Their impact will depend on the maximum set by law, because some parties will prefer to pay a relatively small fine and thus get away with violating the rules. Therefore stricter laws will provide for imprisonment or disqualification of a politician from standing for election or taking his seat in parliament.

Such punishment looks convincing on the statute book. The real problem arises when a case has been taken to court.

If accounting rules or deadlines for reporting and disclosure are violated in **Japan**, the person responsible can be fined or imprisoned. Before 1992 no member of the Japanese Parliament was prosecuted for violation of spending or contribution limits or any forgery intended to conceal such malpractice. Since the 1994 reforms (see chapter 4) the number of cases of politicians being taken to court for violations of the political funds control law and sentenced has increased.

In **Israel** parties must keep accounts to show all their income and expenditure. The State Comptroller (state auditor) may inspect these accounts not only for campaign expenses but also for operating expenses. If inspection reveals any suspicion of a criminal act, the State Comptroller must refer the matter to the Attorney General. Violations of the law concerning bans and limits on contributions may result in prison terms. However, enforcement of the restrictions on party financing was initially less strict than the letter of the law indicates.

For the 1984 and 1988 elections, the State Comptroller reported campaign expenses by various parties, including Labour and Likud, the major parties, in excess of the spending limit. According to the law, these parties were to be denied 15 per cent of their campaign subsidy. To avoid this, the Parliament (Knesset) Finance Committee retroactively increased the public subsidy and the spending limit. Minor parties which had exceeded the limit after this were nevertheless subjected to the sanctions prescribed by the law. This practice was frequently criticized in the State Comptroller's reports during the 1980s and in two Supreme Court rulings during the 1990s (Levush 1997:119, 125).

During the 1988 election campaign, four parties did not comply with the State Comptroller's guidelines in the registration of their accounts and in receiving contributions from corporations. They were sanctioned by being denied payment of part of the public subsidy. Because their accounts were deficient the State Comptroller also required two other parties to return 15 per cent of the public subsidy they had received as an advance according to the law. After the local elections campaign in 1989 some parties failed to present their accounts to the State Comptroller, probably because their expenses were lower than the advance payment of the public subsidy. Although they were denied the 15 per cent final payment, not having reported their accounts, they escaped the demand for the balance to be returned. Clearly it is quite possible for local parties to get public funding without reporting and to be "left with substantial extra sums, especially after a retroactive increase of the financing unit" (Kalchheim and Rosevitch 1992:225). (The financing unit is an amount per Knesset seat used to calculate both the public subsidy and the spending limit.)

Misuse of funds given under the party financing law and illegal campaign practices was prosecuted, leading to convictions in the 1970s (Shmuel Flatto-Sharon) and the 1990s (Rafael Pinhasi). Heavy fines have been very common. Because it had raised and spent campaign funds illegally, One Israel (Labour) was fined ca. USD 3,5 million in January 2000.

In many reports the State Comptroller has suggested amendments, most of which have eventually been incorporated into the law. Another avenue for improvements to the political finance regime runs through legal complaints, the High Court of Justice, the Attorney General and the parliament.

The existing regulation makes the parties accountable for all their financial activities and they comply. Parties no longer ignore the legislation,

because on the few occasions when they did they were fined heavily. Politicians and parties intent on circumventing the regulation are sometimes ready to pay the fine. There are no other penalties. However, criminal violations may be reported to the police, who will conduct an investigation, as in the recent case of the son of Ariel Sharon, the present prime minister.

At present the **Canada** Elections Act can only be enforced through the criminal courts and not through the civil courts. Offences are therefore always resolved with punitive rather than remedial measures. Elections Canada has developed a policy of imposing light sentences for many offences. The reason for this is that relatively small fines will often be easy to impose. "Nuclear weapon-type" penalties, such as imprisonment or loss of a seat in parliament, will lead to such protracted legal battles that the law will rarely be enforced.

Thus, an arsenal of sanctions of varying degrees of severity is needed to back up political finance rules. **Senegal** provides a telling example of this. Here parties which do not submit their annual reports on income and expenditure are liable to be dissolved by the president. Dissolution has to be recommended to the president by the General Affairs Department (DAGAT) of the Ministry of the Interior. As the administrative staff in the DAGAT devoted to enforcement of legislation on parties is very small, and not even the ruling party abides by the transparency obligation, the DAGAT has been more or less reluctant to implement these rules. There has not been a single dissolution of a party as a result of violation of the rules on party financing. The lack of any alternative sanction other than dissolution is critical. The introduction of public funding is expected to end the need for more gradual sanctions and to provide the DAGAT with a tool to enforce the law.

3. Development of the Rules (Interpretation and Amendments)

The opportunity for legislators to change the rules of the game, which happens to be their competition for political power, is embedded in the principles of democracy. Successive amendments and rulings will influence the practical operation of political finance regimes for better or worse.

If a set of political finance regulations tries to provide strict **definitions** someone has to determine the exact scope of such legal terms. An enforcing agency will try to broaden that scope, but those being regulated will work to narrow the definitions in order to create some leeway. Finally the courts, the legislators or both will be forced to decide. Immediately following any such decision the race for interpretations will be reopened.

3.1. The Impact of Regulators

Loopholes arise from very different causes. They may be the result of the very complex and sometimes contradictory nature of legal stipulations, or of the independence or neglect of local organizations, or of issues which are unregulated or are subject to poor control. In federal systems there may be differences between the laws at the state (or provincial or regional) and the federal levels in a single political system. Any of these may enable political actors to evade the rules.

As each loophole weakens the law's ability to achieve its objectives – openness, transparency, a "level playing field" and the prevention of fraud – the best way to avoid problems seems to be to pay attention to definitions. Some key legal terms need interpretation. What constitutes a political contribution? How are loans without interest, services provided free of charge or volunteer labour to be treated? Who is entitled to make or to collect a contribution?

In France public-law corporations are prohibited from making donations of money. The legality of benefits in kind is a matter of interpretation: everything hinges on individual circumstances. Special requirements for contributions of goods and services may lead to evasion and can only be safeguarded by special restrictions. In the USA corporations and unions are banned from contributing cash to political parties or candidates, but corporations and unions are free to communicate with people on any topic. It is very difficult to establish a difference between political activities and other communications.

What is a campaign expense? What is the demarcation between an expense on current operations, spending before the writ for an election is issued, election-day expenses, government advertising or independent expenditures, and third-party advertising?

Canada has tried to define campaign finance in the law as directly promoting or opposing, during the election, a particular registered party or the election of a particular candidate. An Accounting Profession Working Group has proposed a more comprehensive

definition, including all expenses for goods or services during the campaign. Neither clarification works satisfactorily. Volunteer labour is traditionally excluded from the calculation of campaign expenses. However, this can be an avenue for undue influence.

What does the legal term "political party" cover? What does the unregulated party "penumbra" include?

Whatever definition a regulation itself provides, sooner or later the need will arise for an **interpretation**. At some time the interpretation may fall within the jurisdiction of the enforcing agency and its decision, like any other decision by a public agency, may be challenged in court and the court will determine the binding definition.

3.2. The Involvement of the Courts

The enforcement capacity of specific bodies, such as election agencies and administrative tribunals, depends on the potential role of the courts. The involvement of the courts may be a nuisance, but it is a necessary element of the rule of law. Germany (see chapter 7), the USA and Canada (see chapter 3) and Israel (see above) provide a variety of examples of the ways in which constitutional courts, ordinary courts, civil as well as criminal, and administrative courts can influence the development and application of political finance regulations. The major conclusion to be drawn from this involvement is that the enforcement of rules is not only dependent on the drafting of the laws, the willingness of those regulated to comply and the determination of an agency to enforce them. It also depends on the whim of accident. Who is to sue, what are the issues to be deliberated, and which principles will a specific court prefer in its ruling? The German Supreme Court has emphasized equality of opportunity among parties and citizens; the US Supreme Court and the Canadian courts have favoured freedom of expression as a core value in dealing with political finance issues.

One dire consequence of various decisions has been 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. As a result large amounts of money are entering the electoral process without being controlled. An example is the "soft money" for party-building activities and "independent expenditures" under the FECA in the USA, political spending by *comités de soutien* in France or *kôenkai* in Japan, or the proliferation of local lists for municipal elections in Israel.

Whether an Election Commission (as in South Africa) can recover public funds which have been spent irregularly by instituting a civil claim against the offending party depends on the efficiency of the court system.

Some useful routines and provisions have evolved over a period of time. Nevertheless, even where much has been achieved, as in **Canada**, **Germany**, **Australia** and the **UK**, problems still remain to be resolved.

References and Further Reading

Primary Sources

Australian Election Commission Internet site www.aec.gov.au

Canada. Elections Canada On-line, www.elections.ca

Germany. "Bericht über die Rechenschaftsberichte 1996, 1997 und 1998 sowie über die Entwicklung der Finanzen der Parteien gemäß § 23 Abs. 5 des Parteiengesetzes" [Report of the Speaker of the Bundestag on the financial reports of the political parties 1996, 1997 and 1998 and on the development of the financial situation of political parties pursuant to chapter 23, section 5 of the Parties Act]. Bundestags-Drucksache [Parliamentary Paper] no. 14/4747, 21 November 2000

– "Bericht über die Rechenschaftsberichte 1999 sowie über die Entwicklung der Finanzen der Parteien gemäß § 23 Abs. 5 des Parteiengesetzes" [Report of the Speaker of the Bundestag on the financial reports of the political parties for 1999 and on the development of the financial situation of political parties pursuant to chapter 23 section 5 of the Parties Act]. Bundestags-Drucksache [Parliamentary Paper] no. 14/7979, 10 January 2002, available on the German Parliament's Internet site at www.bundestag.de

UK Electoral Commission Internet site, www.electoralcommission.gov.uk

US Federal Election Commission Internet site, www.fec.gov

Books and Reports

National Democratic Institute for International Affairs. *The Public Funding of Political Parties. An International Comparative Study.* Jobert Park and Washington, DC: National Democratic Institute, 1998

Paltiel, Khayyam Zev. *Party, Candidate, and Election Finance: A Background Report.* [Ottawa]: Royal Commission on Corporate Concentration, 1976, available from Print.ing and Publications, Supply and Services Canada

Articles and Chapters

Cordes, Doris and Karl-Heinz Nassmacher. "Mission Impossible: Can Anyone Control the Unlimited Increase of Political Spending?" In *Foundations for Democracy: Approaches to Comparative Political Finance*, edited by Karl-Heinz Nassmacher. Baden-Baden: Nomos, 2001:267–286

Hughes, Colin A. “Electoral Bribery.” *Griffith Law Review* 7(2) 1998:209–224

– “Election Finance Controls: Is There An End Game?” In *Foundations for Democracy: Approaches to Comparative Political Finance*, edited by Karl-Heinz Nassmacher. Baden-Baden: Nomos, 2001:206–221

Kalchheim, Chaim and Shimon Rosevitch. “The Financing of Elections and Parties.” In *Who's the Boss in Israel: Israel at the Polls*, 1988–89, edited by Daniel J. Elazar and Shmuel Sandler. Detroit, MI: Wayne State University Press, 1992:212–229

Levush, Ruth. “Israel.” In *Report for Congress: Campaign Financing of National Elections in Selected Foreign Countries*, compiled by Ruth Levush. Washington, DC: Library of Congress, Law Library , LL 97-3, 97-1552, May 1997:111–127