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Policy Position

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TRANSPARENCY INTERNATIONAL
the global coalition against corruption



Political Finance Regulations: Bridging the Enforcement Gap

Many democracies have passed political finance regulations, hoping to promote fair political competition and 'clean up' politics by limiting the influence of money over policies. But all too often political party and campaign finance laws are breached with impunity, in the face of enforcement agencies that are constrained by cumbersome legislation, insufficient independence, and a lack of resources or political will. The failure of candidates and parties to disclose donations adequately has also inhibited greater and more effective public oversight. When violations of political finance regulations go unpunished by enforcement agencies, a political culture based on patronage and corrupt transactions may flourish. In addition, public trust in democracy is eroded when elected leaders fail to comply with the laws they have designed and respect the oversight institutions they have established.

Transparency International (TI) has been advocating for more effective political finance regulations to be enacted and enforced around the globe to:

- **Reduce demand for funding** and limit the comparative advantage of wealthy parties through the provision of public funds to political parties.
- **Curb the influence of corrosive money** through caps on individual donations or donations from corporate, foreign or trade union sources.
- **Make political parties more accountable to the electorate** by increasing transparency of political funding.[3]

Elf Aquitaine and French Politics

Starting in 1994, French magistrates began investigating allegations of political corruption tied to the activities of the former state oil company Elf Aquitaine (now known as Total).[4]

The trials uncovered many instances of corruption, including bribery of foreign public officials, 'revolving door' practices and the use of politically-networked intermediaries to win lucrative oil deals.

One of the main activities that was essential for the survival of the corrupt Elf 'system' was the covert financing of France's main political parties.

Corruption started to escalate in 1989 when then President François Mitterrand was unhappy to see Elf Aquitaine mostly funding right-wing political groups and demanded a bigger cut for his Socialist Party.

Rivalries within French politics and the secret service led to leaks about Elf Aquitaine's practices and a series of allegations that contributed to exposing the case.

While wider practices within the Elf system were brought to light, senior French politicians have largely been able to escape legal punishment.[5]

1. Ten principles for effective enforcement

The monitoring of campaign expenditure has provided evidence of the undue influence that moneyed interests can have over political processes and the unfair advantage provided to incumbent powers when they abuse their access to public resources.

Monitoring efforts have also shown that even when political finance regulations and enforcement agencies are in place, they do not work adequately. Formal checks are flouted by parties and candidates who present balance sheets that are blatantly false or doctored. This can involve the use of accounting tricks such as channelling donations through satellite branches of the party, or splitting donations into amounts just below the threshold requirement for disclosing them.

Despite the importance of regulations and the agencies tasked to enforce them, these issues are not adequately dealt with in international conventions and standards.[1] Given this gap, TI advocates that countries adhere to the following **ten principles** to ensure that political funding regulations are enforced.[2]

Effective enforcement depends on respect for the rule of law.

The political culture within any particular society or country has an enormous bearing on whether laws governing political finance will be enforced. If it is generally not the practice for laws to be followed and enforced in a country, then political finance regulations are unlikely to prove the exception.

Also relevant is whether a strong rights-based culture operates within a country since there may be a clash between the aspirations of election law and the fundamental rights that are protected in a particular society. For instance the US Supreme Court has battled with attempts to limit third-party spending on the grounds that it violates freedom of expression: the freedom to donate money has been equated with freedom of speech. However, some principles may prove malleable in the face of financial pressure. In France, for example, the argument that parties should be considered civil society organisations, immune from any kind of state regulation, was sidelined when business funds dried up and public funds were needed.

Effective enforcement depends upon clear, realistic and accessible rules, regularly updated.

It is impossible to enforce vague legislation properly. Similarly, if loopholes are introduced into the law, its impact will be minimised. And if the law is too detailed, parties and candidates may feel that it threatens their freedom.

There needs to be a political consensus that the regulation in question is fair among the parties. It must not be perceived as giving one party an advantage over another. As a result, it is important that all parties, non-governmental organisations (NGOs), monitoring bodies, lawyers, press and academics are involved in the law-making process.

Finally, legislation needs to be relevant to country circumstances and give political parties and candidates a fair chance to conduct activities. If spending limits are unrealistic, for example, all candidates may be in breach of them.

There is a need for effective and independent internal auditing by the parties.

In order to enforce bans or limits on political donations, the sources and amounts of money entering and leaving the campaign coffers of political parties and candidates must be transparent. Any monitoring effort must start with the financial statements produced by the political parties and candidates themselves. These must be produced annually as well as after each election and include receipts and expenses. In addition, reports on donations should be presented before each election. Statements must be independently audited and provided to the authorised monitoring agency.

The authority for producing accurate and timely reports must rest with a committee or an individual, usually the party treasurer or special agent who is personally responsible for all political income and expenses. In South Africa, during the submission of audited accounts to the Independent Election Commission, political parties are required to provide the name of an accounting officer who is personally liable for the validity of the report. Standard reporting formats can be helpful and monitoring is easier if transactions have to be routed through bank accounts.

Yet such skills and standardised processes are often lacking within parties. An examination of political parties' internal book-keeping was done as part of Transparency International's CRINIS project, which studied the overall level of transparency among political finance systems in eight Latin American countries (see side bar). The project found that gaps were associated more with developing the capacities of political parties rather than the creation of additional legal regulations. For example, many parties struggled to build a team of professionals to adequately manage book-keeping, a weakness which is primarily present during elections.

Regulations must not be disproportionate so that they discourage ordinary party activities; a balance should be struck between the need to regulate and the need for effective supervision.

Regulations must include a mix of sanctions and preventive measures that facilitate oversight, strengthen transparency and reduce the undue influence of private interests on public policy. Regulations need to consider a wide range of funding channels otherwise they can be easily circumvented. If they are too cumbersome, however, public authorities will find them impossible to implement and parties and candidates will find it difficult to comply. Despite the need to keep regulations manageable, it should be noted that so far accounting rules for political parties have rarely been as detailed as those that apply to companies.

Some countries have introduced different requirements for smaller parties, for whom reporting requirements are more onerous than for better-resourced parties. In Germany, for example, smaller parties that fail to win enough votes to qualify for public funding can have statements inspected by certified accountants and not the more expensive chartered auditors.

One difficult area to regulate is third-party funding. This concept refers to local party branches and satellite organisations that channel money to a political party or carry out services that could be conceived as in-kind donations to the party but which remain off the balance sheet. The United Kingdom has had varied success in their regulation by requiring parties to classify third party foundations as

The Crinis Project

Crinis, a joint project between TI and the Carter Center, has meticulously evaluated the levels of transparency built into current political financing legislation and has looked at the practices of political parties and candidates during campaign and non-election years.[6]

Eight Latin American countries were involved in the project: Argentina, Colombia, Costa Rica, Guatemala, Nicaragua, Panama, Paraguay and Peru.

The results were used to put together the Crinis Index, which assessed the transparency of political financing and the accountability of political parties in each of the countries.

The Crinis project found that in five of the countries, sanctions were inadequate when violations in existing laws were recorded. In Guatemala and Panama, there was not even the option of cutting government subsidies as a form of punishment.

Only in Colombia, Costa Rica and Panama did the electoral oversight bodies have a right to review the bank accounts and transactions of political parties and candidates.

Overall results from the project indicate that there are severe shortcomings both in the regulatory framework and in its application in practice. While reform efforts tend to concentrate on regulations, the Crinis project found that there also must be processes put into place for their implementation.

Consequently, the challenge of reforming political finance systems is not limited to simply reforming laws but overcoming the obstacles to their enforcement.

Disclosures of Political Party Financing in Ghana

Ghana stands out in the region for its peaceful transition of executive power through popular elections in 2008, a reflection of its relatively well-functioning electoral system.[7] The country is also unique for having some of the strongest political financing regulations on the books when compared to its neighbours.

By law, a political party in Ghana is required to provide funding details to the Independent Election Commission each year, within six months from the end of the calendar year.[8]

The report must include the sources of funding, membership dues paid, contribution or donations in cash or in kind, properties of the party and the details of acquisitions. Audited accounts of the party must be filed with the commission at the same time. The Commission has the power to order the accounts to be audited at any time.

While these conditions are mandated by law, there have been concerns about how well they are being applied in practice. For example, some civil society groups have signalled that regular party reporting is not commonplace and the Commission has flagged broader issues of non-compliance.[9]

'accounting units' in their organisational structure. All accounting units spending over a certain threshold must submit independent statements. Smaller units are included in the global party accounts.

A second grey area for regulators is the enforcement of laws governing the use of public funds by individuals seeking re-election or a new elected office. A few phone calls made from a government phone line by a candidate in support of his or her election would probably not result in a penalty. But the question that must be answered is whether it should trigger an investigation given that the candidate's actions might be just the tip of the iceberg of more serious violations of the country's campaign financing laws. Incentives for increased transparency can help in overcoming such dilemmas. For instance, jurisprudence generated by the French *Conseil d'état* indicates that if the offender pays the public entity the money back, the case will be dropped. This good faith principle should not be granted too readily, however, or it risks being abused by parties that regularly infringe the law.

The violation of party finance regulations must be effectively sanctioned.

The ability to impose penalties in cases of violations of the law is central to the effective functioning of any political finance system.

When it comes to sanctioning, two questions must be asked. Firstly, is the penalty appropriate and, secondly, to whom should the sanction apply?

If a sanction is too harsh, the judicial authorities will err on the side of caution because the cost of a wrongful ruling is high. Punitive measures range in severity and type. They can be financial, administrative or criminal, and can entail incurring political penalties. Where non-compliance involves improperly spending government subsidies, the parties and candidates involved should be confronted with the possibility of losing public subsidies. However, political sanctions such as electoral disqualification and suspensions of parties and candidates should be considered with caution to ensure these measures are not abused for political purposes (i.e. to harass political opponents). When any statements that are submitted are deliberately falsified or incomplete, regulations should also explicitly establish criminal liability.

In terms of applying sanctions, the culpability of both the donors and recipients of funds should be considered. Liability should also be attached, not just to the party, but to the individual officers within it who are responsible for financial matters. This approach tends to be more efficient since the fear of individual criminal proceedings acts as a more effective deterrent than a broad censuring of the party.

The timing of court rulings also has a bearing on the efficacy of sanctions. In France, the results of the presidential elections are declared before the campaign accounts are scrutinised and cannot be challenged. In the case of a breach of regulations by the winning candidate, the sanctions provided for in law are unlikely to ever be applied.

Regulatory agencies must be independent in terms of appointments, security of tenure and funding, and should themselves be independently supervised.

There is no simple answer to the question of which type of body is likely to be the most suited to enforcing political finance laws. Different countries have opted for different types of bodies, such as electoral commissions, government ministries or anti-corruption agencies.

Regardless of the type of structure chosen, success in enforcing laws depends on the body's independence. In some Latin American countries — such as Argentina, Costa Rica and Paraguay — state oversight bodies form part of the judiciary, while in other countries they possess an even greater degree of independence. Their legal status, however, does not guarantee that their decisions will always be free of political interference.

Based on practice, there are three conditions for a regulatory agency's independence:

- appointments must be made independently of the government;
- those appointed to the regulatory body must be given security of tenure; and
- the body must have secure funding.

The work of regulatory agencies in scrutinising party accounts for irregularities is time consuming and labour intensive. Control bodies have extremely varying capacities. The committee in France that oversees campaign accounts and political funding hires 170 temporary rapporteurs during the election period — in addition to a permanent staff of 33 — to scan newspapers for evidence of campaign spending that is not included in the declared accounts. In Germany, by contrast, the same task falls to a team of six, though they do not audit accounts.

In practice, opposition parties tend to be the most interested observers of party funding and many investigations begin with their complaints. The existence of a free press and a dynamic civil society is important, since it is often the cases uncovered by these groups that trigger investigations. Voters should also be able to file complaints. For example, the US Federal Electoral Commission is charged with investigating and prosecuting violations of national campaign finance laws, although investigations are typically initiated by complaints from members of the public as well as other candidates, parties and watchdog groups (see side bar).

As the case from the US shows, enforcement is more effective when a single agency is in charge. This has been the successful model in other countries, including Australia (see side bar). Dividing up political finance regulations between two or more bodies tends to leave parts of the puzzle to fall between their jurisdictions. In Italy, for example, different bodies monitor candidate and party accounts, with little coordination between them.

The regulatory authority must have adequate powers to supervise and investigate accounts and to refer irregularities to the criminal justice authorities.

Very often control is limited to investigating the procedural irregularities in the accounts provided by candidates and parties, without probing behind the figures that the candidates and parties declare.

The US Federal Election Commission

The Federal Election Commission (FEC) in the United States is an independent regulatory agency, charged almost exclusively with the administration of federal campaign finance laws.[10] The commission is made up of six members, appointed by the president (after consultation with the congressional leadership of both parties) and confirmed by the senate.

By law, no more than three commissioners can be members of the same political party and at least four votes are required for any official commission action. This structure is created to encourage non-partisan decisions. The commission provides public disclosure of funds raised and spent on federal elections, enforces limitations and prohibitions on contributions and expenditures, and investigates and prosecutes violations.

Enforcing Political Finance Regulations in Australia

Australia's Electoral Commission (AEC), is an independent body in charge of organising the entire election process and monitoring the implementation of the country's political finance legislation.[11]

The AEC is composed of the chairman who is either an acting or retired judge from the Federal Court, the electoral commissioner and a non-judicial member, which is usually a statistician. The positions of the chairperson and a non-judicial member are held on a part-time basis.

The AEC posts returns of financial disclosure forms on the website thus making them available for public inspection.

Political Influence in South Africa

While South Africa has a good level of regulation over how state funding is used by political parties, there are no laws yet that control private monies donated to parties — including any disclosure of where the funds come from.

This lack of regulation in South Africa underscores the need for such legislation in light of a series of scandals and alleged abuses by key political leaders.

One of the largest political corruption scandals in South Africa dates to a 1999 arms deal worth US$ 4.8 billion. One of the bidders sought compensation for having lost the defence procurement contract and allegations were made that at that time President Jacob Zuma (then deputy president in the government) tried to solicit a bribe in exchange for protecting Thomson — the defence company eventually awarded the government contract — from an investigation.

The Director of Public Prosecution decided not to charge Zuma, which created suspicions of the influence held by the African National Congress, the ruling party in South Africa, over the prosecutor's office.[12]

In response, South African civil society groups have voiced concerns and raised awareness about the links between the secret private funding of political parties and corruption.

Opponents against greater accountability of private donations have argued that the right to privacy outweighs transparency while others have signalled that if businesses are found to be supporting opposition parties, they may be punished during bidding processes and in their other interactions with the state.

There is even some speculation across all parties that private funds will dry up if new regulations ensure that there are fewer opportunities to buy political influence.

Constitutional safeguards sometimes protect parties from scrutiny of their reports, but even some of the oldest democracies have revised these protections in recent years. In 2000, the United Kingdom opted to examine party accounts, which for decades had been protected on the basis of respect for privacy. German parties, on the other hand, continue to be sheltered from direct scrutiny by the state. Instead, it is independent auditors that verify accounts, which are then presented to parliament.

Public subsidies are an important source of public control and supervision since receipt of public funds can be made conditional on reporting. For example, in South Africa, in a few cases of problematic financial reporting on public funds, the Independent Election Commission (IEC) has withheld the next installment to the parties until all outstanding issues have been resolved. However, the IEC can only supervise reporting of public funding, whereas non-state party financing remains unregulated and a number of scandals have drawn media attention in recent years (see side bar).

Where there are no public subsidies, enforcement bodies have to find another way to control finances. In the United Kingdom, for example, political parties cannot have their names on ballot papers until they register with the Electoral Commission, bringing them under the scope of enforcement.

Yet oversight and investigative powers are only one part of the equation of implementing regulations. Enforcement bodies need to be backed up by functioning courts staffed with independent judges who have the means to conduct in-depth investigations. Care needs to be taken to delineate the scope of judicial action in the sphere of political financing, as minor errors in reporting, for example, are not necessarily acts of corruption.

The regulatory body must respect human rights, particularly the rights to due process and those found in international and regional humans rights conventions.

The goal of curbing corruption in the electoral financing should not run counter to the goal of respecting human rights and personal freedoms. Many regulatory bodies have been created in the aftermath of scandal, and there is a tendency towards symbolism — either establishing bodies that are in practice weak and ineffective, or giving them overarching powers that contravene due process rights.

For example, the UK Electoral Commission has the power to require a relevant person from any organisation that falls under its supervision (political party or third-party organisation) to produce documents, books or other records related to the income or expenditure of the organisation. It can also require that the individual provide an explanation of the information in question. Failure to do so is a criminal offence, even when the information is self-incriminating. Furthermore, it can enter an organisation's premises, inspect books and take copies of any documents found there, without any prior judicial authorisation or warrant. The powers have never been used, however, and are unlikely to be enforced except in the most egregious of cases.

A less independent enforcement body based in a country with weaker democratic traditions could abuse such powers. Indeed in a number of post-communist countries, selective partisan enforcement of political finance regulation has served to reduce electoral competition by intimidating supporters of opposition

parties. Political interference of this kind can limit the resources available to opposition parties and undermine, or ultimately hinder, healthy political competition.

The regulatory body should be subject to legal accountability, either through administrative law or by other means.

An important safeguard against ineffective or selective use of the enforcement machinery is to make sure that the regulatory body is scrutinised.

In Germany, for example, the speaker of the Bundestag, its national parliament, is responsible for enforcing political finance laws, but is overseen by the federal audit court. This court makes sure that laws governing the distribution of public funds are not breached, and that the speaker does not favour the parties with which he or she is aligned.

The regulatory body should provide accessible information, produced in a timely manner and published on the internet.

When it comes to disclosure of the sources of political donations, three things are important: the frequency of publication, the extent of the information published, and the accessibility of reports. Some countries require parties and candidates to submit reports to oversight bodies, without public disclosure. Others may make the reports available, but only allow their partial publication. For example, political finance regulations in Panama explicitly state that reports including the individual identification of donors may not be disclosed to the public. In Colombia, the electoral body discloses the financial reports of parties and candidates, but the annexes, which hold the details of donations and donor identification, are not made public and are only provided following a written request.

Yet the timely disclosure of reports empowers the electorate to make an informed choice on election day. In the cases of Argentina and Brazil, candidates have to submit reports on electoral finance during the election period. In Peru and Costa Rica, parties have to render accounts regularly, both during and outside of election periods. Still in some countries, a year or two may pass between a contribution being made and its public disclosure.

This mix of inconsistent practices requires that a standard be put in place for when and what type of information is disclosed. Enforcement bodies should post reports online before elections, and ensure that information is presented in a way that is easy to use and understand. For example, the Supreme Electoral Tribunal of Cost Rica, which oversees political financing in the country, grants the public access to the reports through the internet, even though the country's electoral law makes no specific reference to data disclosure.

TI's Ten Principles: Summarised

1. Effective enforcement depends on respect for the rule of law.
2. Effective enforcement depends upon clear, realistic and accessible rules, regularly updated.
3. There is a need for effective and independent internal auditing by the parties.
4. Regulations must not be disproportionate so that they discourage ordinary party activities; a balance should be struck between the need to regulate and the need for effective supervision.
5. The violation of party finance regulations must be effectively sanctioned.
6. Regulatory agencies must be independent in terms of appointments, security of tenure and funding, and should themselves be independently supervised.
7. The regulatory authority must have adequate powers to supervise and investigate accounts and to refer irregularities to the criminal justice authorities.
8. The regulatory body must respect human rights, particularly the rights to due process and those found in international and regional humans rights conventions.
9. The regulatory body should be subject to legal accountability, either through administrative law or by other means.
10. The regulatory body should provide accessible information, produced in a timely manner and published on the internet.

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