



# INTERNATIONAL ANTI-CORRUPTION CONFERENCE (IACC)

Programme

Papers

Organisers

Sponsors

8th INTERNATIONAL ANTI-CORRUPTION CONFERENCE

## The Papers

### Combating Corruption: Regulating the Funding of Political Parties

[Lima Declaration](#)

#### Outline of a Presentation by

**Professor David P. Shugarman**  
**Department of Political Science**  
**Master of McLaughlin College**  
**York University**  
**Toronto, Canada**

An important way of combating undue influence on political parties - and thus the corrupting power of money on decision-makers - is to institute a regulatory regime which limits and monitors campaign funding.

**Goals** of election campaign regulations:

In general, regulations to limit campaign spending and activity by third parties are to **support and strengthen democratic values and processes**, especially those associated with **freedom of expression, mutual respect and equality**.

More specifically, regulations should promote

1. **Fair participation** in the formation of government
2. **An Open arena** for public dissemination of information and opinion on political issues  
 Openness requires
  - a. easy access and exit
  - b. transparency . . . actors are identifiable, their affiliations, interests, objectives, resources set out publicly
    - i. prevents party front agencies
    - ii. constrains undue influence
    - iii. lessens the likelihood or at least reduces incidents of patronage
    - iv. sheds light on patronage appointments
3. **Protection of a level playing field** for the exercise of political speech  
 which includes:
  - a. The right to hear and be heard:
    - listening to public debate of political issues
      - i. requires avoidance of saturation of airwaves
      - ii. concern w/ problem of only one message getting through
      - iii. avoidance of problem of multiple messages being broadcast simultaneously at loud volume, making it impossible to hear any particular message clearly.
  - b. The right to voice opinions on issues and candidates - opinions which have a fair chance of being heard.
4. **Encouragement for citizens** to exercise a public function and become informed, active voters.
5. **Protection of the Right to freedom of expression**, understood as a **DEMOCRATIC right**, and as a democratic right that contributes to the individual's involvement in robust political debate.

- a. democratic rights, i.e., rights that are integral to democratic processes and practices and which reflect democratic values, should not be confused with libertarian, laissez-faire principles. The idea that any restriction on a person's or group's wish to broadcast their views or advertise as they please is an infringement of basic liberties is actually at odds with the democratic free political speech right, and substitutes a libertarian approach to freedom of expression for a democratic one.  
The libertarian approach sees the state as the threat to rights. The democratic perspective recognises that the state may at times be the defender and promoter of citizens democratic rights against those who would seek to privatise them.
- b. various social and political practices and functions may require regulations to make sure the average, non-wealthy individual's right to expression is not constrained or drowned out:
  - i. as Owen Fiss, Sterling Professor of Law at Yale University puts it, (see The Irony of Free Speech, Harvard U. Press, 1996) there can in some instances be a silencing dimension to speech (which is understood by every professor who has had one or two overly talkative students in a tutorial monopolise discussion time if not asked to give way to other less garrulous, or shy students):  
"unlimited Political expenditures not only perpetuate the unequal distribution of wealth and put the poor at a disadvantage in the political arena but also may have the effect of silencing the poor. The rich may, for example so dominate advertising space in the media and other public domains that the public will, in effect, hear only their message." (Fiss,p.16)  
  
Fiss adds that the need for state intervention in areas such as campaign finance is based "not on a view that the activity to be regulated is inherently a violation of freedom of expression but only on the theory that fostering full and open debate - making certain that the public hears all that it should - is a permissible end for the state ... [By enacting curbs on campaign spending] the state is merely exercising its police power to further a worthy public end, as it does when it enacts gun control or speed limit laws. In this case, the end happens to be a conception of democracy which requires that the speech of the powerful not drown out or impair the speech of the less powerful." (Ibid., p.17).
- c. analogy w/need for lights to permit movement through an intersection:  
the individual's freedom of movement is subject to regulation in order to *practically* protect the individual's exercise of his freedom (from interference by, or collision with, other motorists) and to secure what would otherwise be only a precarious right understood as a *theoretical* and formal freedom. No regulation would mean that the exercise of secure freedom of movement would be left to those who could afford large trucks and tanks.
- d. John's right to scream out his views as loudly as he can is not balanced by Doe's right to do the same. Neither will be heard clearly by the other or by others. The solution to the problem of noise is not to wait for the person with the strongest vocal chords, or greatest amount of patience, to prevail. That loudspeakers could be set up on every street by those who could afford it would clearly interfere with citizens' privacy as well as their ability to hear other messages. Clearly, we ought not to confuse loud roar with robust political debate. The latter's purpose is public communication and persuasion, the former's is individualistic pique masked as expressiveness which is counterproductive of, harmful to , communication. Fiss adds that "Sometimes we must lower the voices of some in order to hear the voices of others." [Ibid., p.18]. In seeking to set out rules governing public debate the province is trying to find a way to further the democratic process by, as Fiss argues in relation to the First Amendment of the US Constitution, trying to protect the interest of the audience - the citizenry at large - in hearing a full and open debate on issues of public importance. [Fiss, Irony, p.18.] (Ronald Dworkin's notion of equal treatment and his arguments in his New York Review article and the rationale of U.S. Supreme Court judgements in American Reapportionment Cases are similar to those of Fiss).
- e. as a democratic right, freedom of expression assumes equal opportunity to speak and be heard in order to contribute to political debate by providing information and opinion that will persuade.
- f. it isn't a right that is to be enjoyed by a minority with the wherewithal to exercise it at the expense of those who cant afford to do so.
- g. it is a right whose exercise is believed to be integral to democratic values and processes less because of any presumed or demonstrable effectiveness with respect to desired outcomes but rather because it is understood as emblematic of political equality, openness to others judgements and attempts at persuasion, human fallibility and mutual respect.
- h. the citizenry's trust in the principle of equal opportunity to participate in political processes is crucial to the maintenance of respect for politicians and political processes. Where the principle, is belied in practice the foundations of a democratic society will be weakened.

6. Points a to h (above) ARE INDICATIONS/ARGUMENTS that regulating campaign activities is an illustration of the

importance of invoking a **Public Harm Principle** which justifies limitations on rights on the ground that otherwise there would be impairment of institutional and regulatory practices that are in the public interest of a free and democratic society ... and this public interest is neither an abstract nor utilitarian consideration but rather one that is directly related to the values of a free and democratic society insofar as what is being protected from invasion is the collective and individual right of equal opportunities to participate in the election process with the chance of equally influencing the outcome.

The following points bear on arguments that elaborate, and supplement the case for accepting the goals of a regulatory regime for campaign spending activities:

7. Do efforts to support equality of opportunity undermine or lessen freedom of expression? Put another way, does equalising free expression lead to a diminishment of free expression?

Democrats argue no (in contrast to libertarians who argue yes) on the grounds that, *inter alia*, the abstract notion of an individual, natural right (freedom) to do or take anything one is able to do or take unconstrained by external checks (as in Hobbes's absence of external impediments to motion), which is focused on a fear of interference with an individual's allegedly natural and pre-political right to movement, should not be confused with democratic, political rights (freedoms) of expression and voting - rights which are *integral* to democratic processes and principles. (see Norman in Stewart ed. *Readings in Social and Political Philosophy* Oxford U. Press, 1986. And Dahl, *Democracy and its Critics*, at e.g., 86 and 326; Macpherson, *Democratic Theory*, *passim* and Rawls [See below]. Additional Refs.: Bruce Landesman "Egalitarianism", *Canadian J. Philosophy*, 13, 1983. Kai Nielsen, "Radical Egalitarian Justice; Justice as Equality", *Social Theory and Practice*, 5, 1979. Cass Sunstein, *Free Markets and Social Justice*, 1997, and Sunstein, *Democracy and the Problem of Free Speech*. 1993.)

8. Harvard philosopher John Rawls' discussion of the fair value (equal worth) of political liberties [Sec 7, p-327, *Political Liberalism*] emphasises *inter alia* the need to link means and ends, process and substance in the construction of a regime of rights. If each citizen does not have a full and equally effective voice in a fair scheme of representation (Rawls, *Political Liberalism*, p.361) the value of the right to vote is weakened. Rawls argues there can be regulations on campaign contributions of a financial nature which are compatible with free political speech and press provided that 3 conditions are met:
  1. restrictions must not be of content. Legislation that places limits on campaign contributions and regulates third party election activity is not a matter of prior restraint of content, but rather of trying to insure that freedom of expression does not become the expensive preserve of a wealthy, politically sophisticated minority, reserved in practice for those who can afford it (thereby draining the freedom away from expression), that it is rather something whose exercise is open to each and every citizen on a relatively equal basis.
  2. regulations must impose no undue burdens on any particular group or groups; constraints on activity must affect all groups in an equitable manner. (Rawls, *Political Liberalism*, p-357.)
  3. regulations of free speech must be for the purpose [rationally designed is how Rawls puts it] of according the fair value of other fundamental political liberties. Where justice as fairness within a liberal democratic order prevails each citizen has the same *formal* equal basic liberties, "But the *worth*, or usefulness, of liberty is not the same for everyone" [Rawls, p.326] because of the considerable difference in wealth and income that allow some to have greater opportunities (means) to achieve their ends. "A way of reconciling the gap between merely formal designations of liberty and protecting the worth of liberty is to combine the equal basic liberties with a principle for regulating certain primary goods viewed as all-purpose means for advancing our ends. Appreciating the difference between formal liberty and the worth(or usefulness)of liberty is a first step in combining liberty and equality into one coherent notion." [p.326-327].

In criticising the *Buckley v Valeo* decision (a U.S. Supreme Court decision overturning American law limiting campaign spending, which seems to have been highly influential on the Alberta Court of Appeal's decision to strike down Canadian federal legislation limiting third party campaign activity and contributions), Rawls notes that what is fundamental to insuring that all citizens enjoy, and perceive that they enjoy, the fair value of a basic liberty like freedom of expression

"is a political procedure which secures for all citizens a full and equally effective voice in a fair scheme of representation. Such a scheme is fundamental because the adequate protection of other basic rights depends on it. Formal equality is not enough. It would seem to follow that the aim of achieving a fair scheme of representation can justify limits on and regulations of political speech in elections, provided that these limits and regulations satisfy the three conditions mentioned..."[p. 362.]

9. As one of his five criteria for a democratic process the American democratic theorist Robert Dahl emphasises the importance of **Effective Participation**:  
"Throughout the process of making binding decisions, citizens ought to have an adequate opportunity, and an equal opportunity, for expressing their preferences as to the final outcome. They must have adequate and equal opportunities

for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another." [Dahl, Democracy and its Critics: p.109]

10. The point of campaign finance regulations is not aimed at suppressing individual self-fulfilment, nor the search for truth (two of the three principal purposes of freedom of expression according to the Canadian Supreme Court is a series of judgements);

they are aimed at restricting some forms of participation in decision-making (the third principal purpose acknowledged by our courts) in order to promote other forms;

they are designed on the one hand to lessen the incidence of some people's greater opportunities to exert undue influence, stemming from substantial financial resources which others don't have, on voter opinions and, on the other, to promote public debate that is reflective of foundational values of a democratic society. In *R. V Oakes* (1986) Dickson C.J. provide examples of these values:

"respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society" [1986]SCR 103, 136.

Recently, Greene and Shugarman (Honest Politics, Lorimer, 1997, pp.3-38) have set out a theory of democracy that is closely related to Dickson's points and which also draws on the work of Dworkin, Rawls, Dahl and Macpherson.

In our recent book we have emphasised the value of mutual respect as foundational to democratic politics and have also underlined the importance of -social equality, deference to the majority, minority rights, freedom of expression and integrity. We argue in the book that two of the most effective methods of preventing corruption in party financing developed by the Canadian system so far are public disclosure and limits on campaign contributions (Honest Politics, pp. 97-128). Measures taken to prevent corruption should reflect as well as promote democratic practices.

Attempting to provide a level playing field for citizens to participate in elections is quite consistent with these values. This is not a matter of prior restraint of content, but rather of trying to insure that freedom of expression does not become the expensive preserve of a wealthy, politically sophisticated minority, practised only by those who can afford it (thereby draining the freedom away from expression), seeing that it is something whose actual exercise is open to each and every citizen on a relatively equal basis.

11. There is a danger to be avoided, one that unwittingly opens the door to political corruption: those who accept the paramount importance of freedom of expression to democratic values and processes may, by focusing on the former, undermine the latter. This is what, in my opinion, the Alberta Court of Appeal did recently when it struck down federal limits on third party campaign contributions and activity, because it too readily connected a perceived private harm to the interests of minority groups and concerns (third parties) with that of a harm to the public interest in democratic communication and debate.

What the Alberta Court of Appeal failed to appreciate was the public harm that is risked when the health and trust of our public institutions and processes are weakened, as they will be when wealthy, well organised minorities arrogate to themselves the rights to speak and be heard (rights it may be said everyone has but few will exercise), and when candidates' attention is diverted to the interests and resources of these minorities.

It is important to note in this context that there has been a marked shift in the importance of political parties as formal conduits for campaign funds in the U. S. Through the 19th and the first half of the 20th century parties were the principal source of campaign funds. By the late 1980's party contributions amounted to only about 6% of the funds spent by candidates for the House. (G. McKenna, The Drama of Democracy: American Government and Politics, Dushkin, 1990, p.483.)

12. There is a very real danger that, as elections become more expensive and campaign spending increases considerably, in response to the increased importance and spending practices of unregulated third parties, **effective participation** in Dahl's sense will be absent from electoral campaigns.

What this means is that average citizens, and, more probably still, the poor, who are already less involved in elections than middle-class Canadians, will lose both faith in their political institutions and representatives, and a sense of efficacy regarding their own contributions to democratic processes. The moral to the story here is that just as justice must not only be done but be seen to be done, so putatively democratic processes must not only be fair and democratic, they must be seen to be fair and democratic.

It would be hard to believe that the average voter in a democratic society in Canada or elsewhere would be prepared to accept that the fundamentally egalitarian democratic principle that each one only counts for one can be squared with political processes that follow the libertarian view of free expression in the political realm, that the practice of an individual or group of individuals buying a hundred thousand dollars worth of advertising in a matter of weeks in order to

influence voters and candidates is perfectly fair and consistent as a mark of political free speech with the silence of someone who may have less than \$100.00 in disposable income over the entire year.

13. There is a further danger involved in a laissez-faire approach to party and election financing: when fundraising becomes the major concern of politicians and their principal organisers attention to public policy and the duty of politicians to perform their function as trustees of the public interest are consciously set aside or unwittingly neglected. The result is to open the doors wider to unethical conduct and the erosion of democratic principles and practices.
14. In sum, these are arguments that connect regulations on campaign contributions with the promotion of democratic values. In Canada such arguments would figure in a justification for limiting or overriding rights guaranteed in the Charter of Rights and Freedoms in accordance with Section 1 of that Charter, namely that the regulation/legislation in question 'provides reasonable limits for the promotion and protection of democratic values, that such promotion and protection indicate that there is a worthy, substantial and pressing purpose for the regulations, which are, therefore, quite consistent with what is prescribable by law for a democratic and free society.

return to [table of contents](#)