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# ARTICLES

## CONFRONTING THE "PROBLEM" OF THIRD PARTY EXPENDITURES IN UNITED KINGDOM ELECTION LAW

*Andrew C. Geddis\**

### I. INTRODUCTION

The role that elections play in a liberal-democratic polity is one that is too often assumed without being closely examined. Elections are often considered to be simply a way of finding out what the majority of the voters want, and apportioning public decision-making power in accordance with that choice. As such, what is thought to be important is that the outcome of the election process be an unmediated reflection of the voting public's desires and preferences. In order to ensure that the election process is accomplishing this end, the government ought to refrain from interfering in the voting process, lest its actions result in a distortion of the free choice of those casting their votes. But this picture of the election process as

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representing a kind of "spontaneous order,"<sup>1</sup> to be kept safe and secure from the meddling hand of the state, is too simplistic. A prerequisite for the holding of any election is the existence of some framework of governmental regulation to provide the various electoral contestants with a set of "ground rules" to govern the competition between them. If such a set of ground rules did not exist, issues such as who may run for election, how they may go about competing for votes, and even the way in which the victor will be decided would remain unresolved. Absent some sort of clear and certain answer to these types of issues, the competition for public power will likely be less an exercise in divining the majority's views, and more a fulfillment of Hobbes' dicta on the state of nature.<sup>2</sup> So, the general point may be simply summed up as follows: "There can be no election process in the absence of election rules, and there can be no election rules without governmental action."<sup>3</sup>

However, accepting the *necessity* of governmental intervention in the democratic process tells us little about the *desirability* of any particular rule that may be laid down to regulate a particular nation's electoral system. This is to say that it remains true that for a government in a liberal-democratic polity to be able to claim legitimacy, that government must be able to source its claim in the support of the majority of the voters, as expressed through a competitively contested election process. Whilst the government must be involved in creating a framework of rules that enable this election process to exist in the first place, if it were to use that rule-making role to somehow substantively affect the outcome of the vote, then the very basis for the legitimacy of governmental authority would be cast into doubt. Thus, the truly difficult issue arises not when it is asked whether the government should be involved in the election process, for it cannot

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1. John O. McGinnis, *Against the Scribes: Campaign Finance Reform Revisited*, 24 HARV. J.L. & PUB. POL'Y 25, 31 (2000).

2. Hobbes famously describes life in the state of nature, when "men live without a common power to keep them all in awe," as being "solitary, poor, nasty, brutish, and short." THOMAS HOBBS, *THE LEVIATHAN* 66 (Prometheus Books 1988) (1651).

3. Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 HARV. J.L. & PUB. POL'Y 91, 93 (2000).

help but be so involved. Rather, the trouble begins when we consider the precise content or form that the governmental regulation of the electoral processes of a given society ought to take. What set of election ground rules are the best, or most appropriate, ones for a nation to adopt to regulate the competition amongst its political actors in a way that ensures the winner at the ballot box can then claim to govern with a presumption of legitimacy?

The establishment of controls on what is known as "party funding" in the United Kingdom, or "campaign financing" in the United States, provides an instructive example of the problems associated with answering this question. Money plays an important role in facilitating the transfer of resources and the coordination of individual actions, and as a consequence some form of expenditure will inevitably accompany the undertaking of almost any form of public political activity.<sup>4</sup> Spending on matters political is thus an unavoidable part and parcel of civic engagement, which in turn is an indubitable good in a liberal-democratic polity. But money also has the potential to detrimentally affect political decision-making, as when those with the power to make such public decisions choose to exchange the exercise of their decision-making authority for a cash payment – when politicians choose to accept a bribe. An additional problem arises in the case of political systems that are founded on liberal-democratic principles, as this form of governance is premised upon the idea that a certain degree of political equality should exist amongst the participants in its public life.<sup>5</sup> Yet, the distribution of wealth amongst the members of any given society will always be unequal, which may then translate into inequality in the political power that each member possesses.<sup>6</sup> So the close relationship between money and political influence has a Janus faced character, forcing any

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4. A truth that was understood even in the days of Aristotle. See ARISTOTLE, *THE POLITICS* 186 (Carnes Lord trans. & ed., Univ. of Chicago Press 1984) (350 B.C.).

5. See JACK LIVELY, *DEMOCRACY* 27-29 (Basil Blackwell ed., 1975); RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 26-29 (1996).

6. See J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (1990); Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 900-01 (1998).

liberal-democratic society to confront the extent to which the desire to promote equality between participants in its election processes should constrain the liberty of each member to use his or her resources to promote political views as he or she would otherwise choose.<sup>7</sup>

Trying to put in place a set of legal rules that achieve a desirable equilibrium between these two values of liberty and equality is, as a brief glance around the world will attest, a task of almost Sisyphean proportions.<sup>8</sup> In part, these difficulties have resulted from a general failure to agree on what the proper sphere of influence for money should be in the public political life of a society.<sup>9</sup> The introduction of a particular set of legal rules designed to bring about some specific outcome may also result in unintended consequences, which may in turn create a new set of problems for the political process.<sup>10</sup> So, given the universality of the troubles experienced in drawing up legal rules to regulate political spending, it is not surprising that the United Kingdom has also faced a variety of difficulties in endeavoring to accomplish this task. Despite the fact that there have been legislative measures to control the use of money in the U.K.'s electoral process in place for well over a century, the ever-changing nature of political competition has raised constant challenges to these legal rules.<sup>11</sup> Recently, the Parliament of the United Kingdom has responded to these challenges by passing the Political Parties, Elections and Referendums Act 2000 ("PERA").<sup>12</sup>

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7. See K. D. EWING, *MONEY, POLITICS, AND LAW: A STUDY OF ELECTORAL CAMPAIGN FINANCE REFORM IN CANADA* 26-31 (1992).

8. See, e.g., *THE FUNDING OF POLITICAL PARTIES: EUROPE AND BEYOND* (K.D. Ewing ed., 1999); *COMPARATIVE POLITICAL FINANCE AMONG THE DEMOCRACIES* (Herbert E. Alexander & Rei Shiratori eds., 1994).

9. See Andrew Geddis, *The More Speech – More Competition Solution: Campaign Finance Reform After McCain-Feingold*, 19 J.L. & POL. (forthcoming 2001).

10. See Andrew Geddis, *Hide Behind the Targets, In Front of All the People We Serve: New Zealand Election Law and the Problem of "Faceless" Donations*, 12 PUB. L. REV. 51, 63-64 (2001).

11. K. D. Ewing, *The Funding of Political Parties in Britain: Prospects for Reform*, 7 GRIFFITH L. REV. 185, 186-88 (1998).

12. Political Parties, Elections and Referendums Act, 2000, c. 41 (Eng.) [hereinafter PERA]. The full text of the legislation may be viewed on

This new legislation will have a major impact on the ways in which political participants in the U.K. may use money to attempt to influence the outcome of the electoral process. In light of these changes, this Article examines one particular aspect of the recent legislative move. It focuses on how the new legislation regulates "third parties" that make expenditures on public messages designed to sway the outcome of the ballot. The participants in the United Kingdom's electoral process that fall under this "third party" label come in a variety of shapes and sizes. They range from a single individual with a liking for, or grudge against, some particular local candidate; through groups of like-minded individuals who are motivated by some particular policy issue that they want addressed by central government; up to trade associations, large companies or trade unions that have nationwide clout, and are concerned with advancing the economic well-being of their members. The outcome of some particular electoral contest may be of great importance to such third parties, giving them a strong interest in independently using their resources to try and convince the voters to cast their ballot for or against one of the primary contestants in the electoral race.

This Article further focuses on how the United Kingdom has endeavoured to regulate such third party spending on electoral matters, because this kind of electoral activity most perfectly encapsulates the dilemma posed by the use of private wealth in a democratic political process.<sup>13</sup> At one level, decisions about how to regulate this type of spending have proven to be problematic because they involve fundamental questions relating to the relationship between liberty and equality amongst participants in the electoral process, and to the role that various electoral participants ought to be allowed to play in competing for the voting public's attention.<sup>14</sup> So, one set

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line at <http://www.legislation.hmso.gov.uk/acts/acts2000/20000041.htm> (last visited Oct. 10, 2001).

13. See Andrew C. Geddis, *Democratic Visions and Third Party Independent Expenditures: A Comparative View*, 9 TUL. J. INT'L & COMP. L. 5, 6 (2001).

14. Compare Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761, 1763-65 (1999) (examining the implications of "a negative conception of liberty" for the regulation of third party expenditures), with Richard Briffault, *Issue Ad-*

of challenges arise when determining the extent to which such rules should limit third party speech, as well as who these rules should apply to, in a properly functioning, legitimate electoral process. But the issue of third party expenditures also brings into play a second-order question – namely, who should have the final authority to determine what limits are appropriate? In the U.K., this second-order question of “who decides” brings the relationship between the legislature and the judiciary into sharp focus. Traditionally, the United Kingdom’s political and legal systems have hewn closely to the theory of “Parliamentary Sovereignty,” according to which Parliament has been regarded as having “the right to make or unmake any law whatsoever, with no person or body having the right to override or set aside enacted legislation.”<sup>15</sup> Because it consists of the directly elected representatives of the voters, Parliament has long been seen as the institution with the strongest claim to represent the will of the general public.<sup>16</sup> But political spending is so closely connected to political speech that any attempt to control campaign expenditures inevitably implicates individual expressive rights. With the passage of the Human Rights Act 1998 (“HRA”),<sup>17</sup> the courts in the United Kingdom have been given a greater role in interpreting, and if necessary, defending such rights against legislative encroachment.<sup>18</sup> What is more, as the elected representatives who passed PERA owe their very decision-making position to the operation of the electoral process that they are now seeking to regulate, there may be reasons to believe that they will craft rules that will best serve their own interests. As such, the review of these measures by

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*vocacy: Redrawing the Elections/Political Line*, 77 TEX. L. REV. 1751, 1776-80 (1999) (arguing the need for stricter regulation of third party advertising so as to “enhance the central purpose of elections: the aggregation of popular preferences into a government.”).

15. Nicholas Bamforth, *Parliamentary Sovereignty and the Human Rights Act 1998*, [1998] PUB. L. 572, 572.

16. See *Case of Proclamations*, 77 Eng. Rep. 1352, 1353 (K.B. 1611); *Bill of Rights*, 1688, 1 W. & M. c. 2, § 2 (Eng.).

17. Human Rights Act, 1998, c. 42 (Eng.) [hereinafter HRA].

18. See *infra* notes 119, 123-27, 129-31 and accompanying text.

the courts may provide an external, "neutral" check on such legislative self-interest.<sup>19</sup>

In light of the above discussion, this Article attempts to do two things. First of all, it investigates how the new controls on third party spending contained in PERA came to be adopted, and explains the way in which these rules act to regulate third party expenditures on the U.K.'s electoral process. Secondly, it considers how the development of the law in this area illuminates an unfolding relationship between the various branches of the British government when it comes to determining the ground rules under which election competition occurs in that country. The Article begins these twin tasks in Part II by examining how the United Kingdom regulated third party spending prior to the introduction of PERA, and by discussing some of the shortcomings of this historical system of regulation. It then moves to illustrate the way in which the content of the new legislation has been shaped by the public's reaction to various recent scandals relating to political fundraising and spending. Part III then looks at the influence of the European Court of Human Rights ("ECHR"). Part IV addresses the deliberations of the Neill Committee on Standards in Public Life ("Neill Committee" or "Committee"). In doing so, the Article traces the variety of different factors that have impacted upon Parliament's decision as to how third party spending should be regulated by the new PERA. The restrictions contained in this legislation are then briefly outlined.

In Part V the Article questions how this new legislative framework might be applied in the future, and the role that the courts may take in this process of application. Here, it considers the impact of the introduction of the HRA, and the new powers that this legislation gives to the courts in deciding whether the spending restrictions on third parties act as an impermissible abridgment of the right to free expression. It then more fully considers how the new provisions in PERA might be applied to a hypothetical example of third party spending, and the potential conflicts that these provisions may raise with the HRA. It uses the hypothetical example to illustrate how the response of the courts to the uncertainties in the regu-

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19. See Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).



latory schema will be crucial in deciding the role that third parties may play in the U.K.'s electoral processes. As such, in Part VI the Article concludes that the recent "domestication" of individual rights in the United Kingdom will result in a flow of decision-making authority over the shape of that country's electoral process away from the legislature and towards the courts.

## II. THE REGULATORY HISTORY OF PARTY FUNDING IN THE UNITED KINGDOM, RECENT "SLEAZE SCANDALS" AND THE IMPETUS FOR REFORM

In order to explain the genesis of the new restrictions contained in PERA, it is necessary to first give a brief *précis* of the history of the regulation of party funding in the United Kingdom.<sup>20</sup> Prior to the passage of the new legislation, the regulation of party funding was predicated on an assumption that dated back to the Victorian era, and which became increasingly obsolete as the 20<sup>th</sup> century progressed.<sup>21</sup> Because of an illusory notion that the primary campaigner in any electoral contest was the individual candidate rather than the political party they represented, until the end of the 20<sup>th</sup> century the legal regulation of party funding continued to be aimed at the local constituency rather than at the national level.<sup>22</sup> Thus, individual parliamentary candidates faced restrictions on what they could spend on seeking election. By contrast, no limits were placed upon contributions to, or spending by, the national political parties, nor was there any requirement for political parties to disclose the source

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20. For a more complete account, see generally CORNELIUS O'LEARY, *THE ELIMINATION OF CORRUPT PRACTICES IN BRITISH ELECTIONS 1868-1911* (1962); MICHAEL PINTO-DUSCHINSKY, *BRITISH POLITICAL FINANCE 1830-1980* (1981); Ashley C. Wall, *The Money of Politics: Financing American and British Elections*, 5 TUL. J. INT'L & COMP. L. 489, 501-08 (1997).

21. See David Butler, *Elections: Legislation and Litigation*, in *THE LAW, POLITICS, AND THE CONSTITUTION: ESSAYS IN HONOUR OF GEOFFREY MARSHALL* 172, 175 (David Butler et al. eds., 1999).

22. See H. F. RAWLINGS, *LAW AND THE ELECTORAL PROCESS* 133 (1988); R.J. Johnston & C.J. Pattie, *Great Britain: Twentieth Century Parties Operating Under Nineteenth Century Regulation*, in *CAMPAIGN AND PARTY FINANCE IN NORTH AMERICA AND WESTERN EUROPE* 123, 129-30 (Arthur B. Gunlicks ed., 1993).

or the amount of their funding. That being said, in the 1950's legislation was put in place which severely restricted the use of the broadcast media for political purposes, which did have the effect of containing the spending of political parties and other electoral participants.<sup>23</sup>

Fundamental distinction was also drawn between third party expenditures on local constituency campaigns and those made on nationwide campaigns.<sup>24</sup> Unless the express permission of a candidate's agent was first obtained, third parties were barred from incurring any "expenses" greater than £5 if these were made "with a view to promoting or procuring the election" of a particular candidate.<sup>25</sup> The limit applied to all expenditures made at any time, as long as they were intended to have the effect of promoting the election of a particular candidate.<sup>26</sup> Anyone who made such an unauthorised expenditure (or aided, abetted or counseled the making of such) commit-

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23. There is a complete ban in the U.K. on the use of television or radio for the making of political advertisements, with the only exception being a limited grant of free broadcasting time provided to qualifying political parties at election time. See Broadcasting Act, 1990, c. 42, § 8(2)(a) (Eng.). The definition of a "political advertisement" is also very wide, covering "any advertisement which is directed towards any political end." See also *R. v. Radio Authority, ex parte Bull and Another*, 2 All E.R. 561 (C.A. 1996) (upholding a decision by the Radio Authority preventing Amnesty International from running an advertisement relating to the genocide in Rwanda as it was considered to be "directed towards [a] political end.").

24. See MARTIN LINTON, *MONEY AND VOTES* 7 (1994). See also KEITH EWING, *THE FUNDING OF POLITICAL PARTIES IN BRITAIN* 80-81 (1987); Lisa E. Klein, *On The Brink of Reform: Political Party Funding In Britain*, 31 CASE W. RES. J. INT'L L. 1, 18 (1999).

25. Representation of the People Act, 1983, c. 2, § 75 (Eng.) [herein-after RPA 1983]. The Act placed a ban on the incurring of unauthorised expenses over £5 by third parties:

[W]ith a view to promoting or procuring the election of a candidate . . . on account (a) of holding public meetings or organising any public display; or (b) of issuing advertisements, circulars or publications; or (c) of otherwise presenting to the electors the candidate or his views or the extent or nature of his backing or disparaging another candidate.

*Id.*

26. The House of Lords held that all that is required to establish the requisite intention is that "[the spender's] desire to promote or procure the election of a candidate was one of the reasons which played a part in inducing him to incur the expense." *Director of Public Prosecutions v. Luft*, 1977 A.C. 962, 983 (H.L.).

ted a "corrupt practice" punishable by up to one year in jail.<sup>27</sup> Where the spending was authorised by some candidate's agent, it had to be counted towards the total election expenses made by that candidate. Given that constituency candidates were themselves subject to a relatively low spending cap (around an average of £8,300 at the 1997 general election), candidates' agents were not well disposed to cut into this amount by authorising the expenditures of third parties.<sup>28</sup> Therefore, the £5 limit became, for all intents and purposes, the maximum spending allowed to a third party for the purposes of "promoting or procuring the election of a candidate."<sup>29</sup>

In sharp contrast to the extremely restrictive approach taken to local constituency spending by third parties, the law placed almost no limits on the spending of money by a third party at the national level.<sup>30</sup> In *R. v. Tronoh Mines*, the High Court of Justice found that a nationally published newspaper advertisement condemning the then Labour Government's policies, and urging the election of "a new and strong government," did not breach the statutory limit on unauthorised campaign expenses.<sup>31</sup> These spending limits were simply held inapplicable to any third party expenditures made on "general political propaganda, even though that general political propaganda does incidentally assist a particular candidate among others."<sup>32</sup> Following the decision in *Tronoh Mines*, all restrictions on the amount that third parties could spend on attacking or praising any particular political party at a national level were swept away, leaving the

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27. RPA 1983 §§ 75(5), 168(1)(b).

28. See RAWLINGS, *supra* note 22, at 188-89 (outlining the difficulties faced by an independent group, Tactical Voting 87, in making its message known to the voters in the 1987 election).

29. *Luft*, 1977 A.C. 962. What is more, in *Luft*, the House of Lords unanimously held that the distribution of pamphlets calling on people *not* to vote for National Front candidates in certain named constituencies breached the limit on unauthorised third-party expenditures, as the pamphlets were held to have the effect of promoting the election of other candidates standing in those electorates. *Id.*

30. But see *supra* note 23, describing the ban on using the broadcast media for political advertising.

31. *R. v. Tronoh Mines*, All E.R. 697 (Central Crim. Ct. 1952).

32. *Id.* at 699-700. See also *Grieve v. Douglas-Home*, 1965 Sess. Cas. 315 (Scot. Elec. Petitions).

door open for the "extensive intervention [in the election campaign] by outside elements with vested interests to protect, whose only constraint is the size of their financial resources, and who can engage in advertising both before and during the campaign."<sup>33</sup>

The regulatory framework for third party electoral participants, as interpreted by the courts in the *Luft* and *Tronoh Mines* cases, reflected the basic duality that until recently characterised the whole of the United Kingdom's approach to regulating political spending. Third party expenditures on supporting or opposing a particular issue or political party at a national level were left almost completely unregulated. However, if an electoral message specifically related to a particular, individual candidate or electorate, then spending on it became so severely restricted as to be, for all intents and purposes, completely banned.<sup>34</sup> In the context of the British parliamentary system of government and first-past-the-post electoral system, in which the party affiliation of a particular candidate is of central importance to his or her chances of election, it seems hard to see the sense, let alone the justice, in the distinction that was drawn by the law.<sup>35</sup> Given this lacuna in the regulatory framework, it is not surprising that a variety of problems began to emerge.

In particular, the lack of regulation of political party financing at the national level, including the absence of any public disclosure of who was funding the election campaigns of the parties, led to the claim that the political process as a whole had become "tainted by a non-criminal corruption."<sup>36</sup> During the 1990's, this "taint" was reinforced by a series of scandals involving allegations that tarnished money had been donated to the then-governing Conservative Party, as well as to some individual Members of Parliament representing that party.<sup>37</sup> In

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33. RAWLINGS, *supra* note 22, at 135.

34. See *supra* notes 28-29 and accompanying text.

35. See RAWLINGS, *supra* note 22, at 188. See also G.W. Hogan, *Federal Republic of Germany, Ireland, and the United Kingdom: Three European Approaches to Political Campaign Regulation*, 21 CAP. U. L. REV. 501, 526 (1992).

36. PETER MADGWICK & DIANA WOODHOUSE, *THE LAW AND POLITICS OF THE CONSTITUTION OF THE UNITED KINGDOM* 211 (1995).

37. See generally SLEAZE: POLITICIANS, PRIVATE INTERESTS AND PUBLIC REACTION (F.F. Ridley & Alan Doig eds., 1995).

an effort to quell the public's outrage, the then Conservative Government appointed the Neill Committee to oversee the ethical conduct of the public's representatives.<sup>38</sup> This Committee was designed to remove the issue from the realm of partisan political debate through placing it under the purview of a specialised watchdog body, whose membership was acceptable to all the political parties.<sup>39</sup> However, this measure proved to be a case of "too little, too late", and in 1997 the Labour Party came to power on the back of a landslide general election win, attributable at least in part to the public's continuing disquiet over the various "sleaze" allegations leveled against the Conservatives.<sup>40</sup>

To capitalise on the embarrassment that the issue was causing to their political opponents, Labour had made an explicit campaign pledge to introduce a greater degree of transparency and accountability to the way in which the political parties' election campaigns were funded.<sup>41</sup> In line with this promise, shortly after its election win, it expanded the terms of reference of the Neill Committee to include the "review [of] issues in relation to the funding of political parties, and to make recommendations as to any changes in present arrangements."<sup>42</sup> The Labour Government also sought the Neill Committee's advice on a specific set of questions relating to the desirability of measures such as banning political party funding from foreign sources, requiring the mandatory public disclosure of political party funding and imposing spend-

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38. See Klein, *supra* note 24, at 39-40.

39. See *A Very British Sleazebuster*, ECONOMIST, June 5, 1999, at 57 ("What makes this body palatable is that it is so very British. It stands outside Parliament, but contains a member of each main party. It is independent, but has no teeth of its own.").

40. Peter Kelher, *Why the Tories were Trounced*, in *BRITAIN VOTES 1997* 108, 113-14 (Pippa Norris and Neil T. Gavin eds., 1997). See also David M. Farrell et al., *Sex, Money and Politics: Sleaze and the Conservative Party in the 1997 Election*, in 8 *BRITISH ELECTIONS AND PARTIES REVIEW* 80 (D. Denver et al. eds, 1998).

41. See LABOUR PARTY, *NEW LABOUR: BECAUSE BRITAIN DESERVES BETTER* (1997), available at <http://www.psr.keele.ac.uk/area/uk/man/lab97.htm> (last visited Nov. 18, 2001).

42. COMMITTEE ON STANDARDS IN PUBLIC LIFE, *FIFTH REPORT, THE FUNDING OF POLITICAL PARTIES IN THE UNITED KINGDOM*, 1998, Cm. 4057-I, at 16 [hereinafter NEILL REPORT].

ing limits on election campaigns.<sup>43</sup> The Government was encouraged to give the Neill Committee such a wide-ranging brief due to the public disclosure of the fact that, shortly before the 1997 election, the head of the British Motor Racing Association had donated over £1 million to the Labour Party's election campaign, and was subsequently granted a concession allowing the continued tobacco sponsorship of Formula One races.<sup>44</sup> Expanding the terms of reference of the Neill Committee's enquiry to cover all aspects of the funding of political parties proved to be an effective means of quieting the political fallout from this revelation. Irrespective of whether such cynicism as to the Government's motives is warranted, the Neill Committee took the opportunity offered to it with both hands, producing a two-volume report containing 100 recommendations for legislative reform.<sup>45</sup> In turn, these recommendations largely form the basis for the changes to the law governing spending on election campaigns brought in by PERA.<sup>46</sup>

### III. THE EUROPEAN COURT INTERVENES: THE *BOWMAN* DECISION

While the Neill Committee was embarking upon its deliberations on the issue of party funding, the European Court of Human Rights ("ECHR") complicated matters by issuing its decision in the case of *Bowman v. United Kingdom*.<sup>47</sup> The ECHR, which sits in Strasbourg, France, adjudicates complaints brought under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention") by claimants who allege that their national government has acted in a way which breaches one of the rights and freedoms guaranteed under

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43. *Id.* at 15-17.

44. See Sarah Lyall, *Political Donations Taint Blair and His Image of New Labor*, N.Y. TIMES, Nov. 14, 1997, at A7; *Britain to Review Campaign Donations; Prime Minister's Labor Party to Return a \$1.7m Contribution*, BOSTON GLOBE, Nov. 13, 1997, at A33.

45. See NEILL REPORT, *supra* note 42.

46. The Neill Committee's report and the legislative response to it are considered in greater depth, *infra* notes 89-117 and accompanying text.

47. 63 Eur. Ct. H.R. 175 (1998). See also Howard Davis, *Bowman v. United Kingdom – A Case for the Human Rights Act?*, [1998] PUB. L. 592.

that treaty.<sup>48</sup> While the United Kingdom ratified the Convention in 1951, at the time the ECHR delivered its judgment in *Bowman*, the rights and freedoms contained therein still had not been incorporated as a formal part of U.K. domestic law.<sup>49</sup> Therefore, the rights and freedoms guaranteed by the Convention did not have a defined status in the United Kingdom's legal framework,<sup>50</sup> and the ECHR had no authoritative role in the British hierarchy of courts. This failure of the U.K. to incorporate the Convention into its domestic law meant that the decisions reached by the ECHR were not "binding" upon the Government, except in so far as it felt political pressure from other European states, as well as its own citizens, to honour its pledge that it would be so bound.<sup>51</sup> As a matter of practice, however, the U.K. has always accepted the ECHR's decisions, and has consistently amended its domestic law if the ECHR found it to be in conflict with the provisions of the Convention.<sup>52</sup>

In light of this fact of the U.K.'s habitual compliance with the ECHR's findings, *Bowman* was tantamount to a process of judicial review as to whether Parliament's decision to limit third party spending on constituency races was an abridgement of any of the individual rights or freedoms guaranteed under the Convention. The case arose after Mrs. Phyllis Bowman, the executive director of the Society for the Protection of the Unborn Child ("SPUC"), was prosecuted for aiding in the distribution of leaflets in various constituencies before the 1992 general

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48. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 222 [hereinafter Convention]. See also MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 65-70 (1995); FRANCIS G. JACOBS & ROBIN C.A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 10-11 (2d ed. 1996).

49. However, the Convention has since been incorporated into U.K. domestic law through the passage of the Human Rights Act 1998. See *infra* notes 119-123 and accompanying text.

50. *In re M. and H. (Minors)*, 3 W.L.R. 485, 498 (H.L. 1998).

51. See Convention, *supra* note 48, arts. 53, 213 ("The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.").

52. See Conor Gearty, *The United Kingdom, in* EUROPEAN CIVIL LIBERTIES AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMPARATIVE STUDY 53 (C.A. Gearty ed., 1997).

election.<sup>53</sup> The leaflets compared the record on abortion of each candidate in the constituency, were not authorised by any candidate's agent and clearly exceeded the £5 spending limit allowed for in the legislation.<sup>54</sup> Following her prosecution in British domestic courts, Mrs. Bowman complained to the ECHR that the expenditure limit constituted a governmental action which was in breach of her right to free expression under Article 10 of the Convention.<sup>55</sup> The ECHR therefore had to answer the following questions: Was the United Kingdom's £5 spending limit on independent third party expenditures a restriction on Mrs. Bowman's freedom of expression; if so, was there a legitimate governmental aim that could serve to justify such a restriction under the Convention; and if so, was

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53. *Bowman v. United Kingdom*, 63 Eur. Ct. H.R. 175, 180 (1998).

54. In total, 1.5 million leaflets were circulated, including 25,000 in the constituency of Halifax (for which distribution Mrs. Bowman was prosecuted). The leaflet in part read "[w]e are not telling you how to vote, but it is essential for you to check on candidates' voting intentions on abortion and on the use of the human embryo as a guinea pig." *Id.* at 181. It was argued that this exhortation, combined with evaluations of each candidate's stance on the abortion issue, was designed to promote those candidates with an anti-abortion position. Whether the English courts would have found that this did constitute an expense made "with a view to promoting or procuring the election of a candidate at an election" is a moot point, as the charges were dismissed on the grounds they had not been brought within the one year time frame stipulated in the legislation. RPA 1983 § 75(1). However, Mrs. Bowman had previously been convicted in 1979 and 1982 for distributing similar leaflets at election time. *Bowman*, 63 Eur. Ct. H.R. at 180-82.

55. Article 10 of the Convention states:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority . . . .

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary.

Convention, *supra* note 48, art. 10.



the particular restriction at issue "necessary in a democratic society" under Article 10(2) of the Convention?<sup>56</sup>

The ECHR very quickly found that, *prima facie*, "the prohibition [on unauthorised spending] . . . amounted to a restriction on freedom of expression."<sup>57</sup> However, it then went on to state that placing a limit on the expenditures of third parties in the election process so as to foster political equality amongst the electoral participants promoted a legitimate governmental purpose under Article 10(2), namely the "legitimate aim of protecting the rights of others."<sup>58</sup> In making this finding, the majority referred to the free election principle enshrined in Article 3 of the First Protocol to the Convention,<sup>59</sup> noting that: "[I]n certain circumstances the two rights may come into conflict and it may be considered necessary, in the period preceding or during an election, to place restrictions, of a type which would not usually be acceptable, on freedom of expression."<sup>60</sup>

The ECHR regarded fostering equality between the electoral contestants and encouraging broad participation by citizens in the campaign process as being legitimate and worthy collective concerns that a government may choose to address through restricting the ability of some participants to engage in the electoral process. As such, the issue for the ECHR finally came down to whether the extent of the restriction on the freedom of expression of

56. *Bowman*, 63 Eur. Ct. H.R. at 186. See also P. Mahoney, *Principles of Judicial Review as Developed by the European Court of Human Rights: Their Relevance in a National Context*, in *THE HUMAN RIGHTS ACT 1998: WHAT IT MEANS* 134 (L. Betten ed., 1999); M. Fordham & T. de la Mare, *Proportionality and the Margin of Appreciation*, in *UNDERSTANDING HUMAN RIGHTS PRINCIPLES* 76 (J. Jowell & J. Cooper eds., 2000).

57. *Bowman*, 63 Eur. Ct. H.R. at 186.

58. *Id.* at 187 (majority judgment); see also *id.* at 193 (joint concurring o. of JJ. Pettiti, Lopes Rocha, and Casadevall); *id.* at 194 (partly dissenting o. of J. Valticos); *id.* at 195 (joint partly dissenting o. of JJ. Loizou, Baka, and Jambrek); *id.* at 199 (partly dissenting o. of J. Sir John Freeland joined by J. Levits).

59. *Id.* at 188. Article 3 of the First Protocol reads: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." Convention, *supra* note 48, art. 3.

60. *Bowman*, 63 Eur. Ct. H.R. at 188.

third parties adopted by the U.K. in pursuit of the legitimate aim of protecting the equality of the election participants was "necessary in a democratic society."<sup>61</sup>

By a fourteen to six majority, the ECHR found that the legislative restriction on third party spending was unnecessarily strict. The £5 limit went beyond what was required to foster conditions of equal participation, and in practice acted as "a total barrier to . . . publishing information with a view to influencing the voters."<sup>62</sup> Even though the spending cap served the legitimate end of promoting political equality, it did so in a way that disproportionately interfered with the liberty of third parties to participate in the discourse surrounding the electoral moment.<sup>63</sup> In making this finding of disproportionality, the majority pointed to a legislative exemption that left the British press free to support or oppose any particular candidate, and the fact that national political parties and their supporters were also free to spend as much as they liked at a national or regional level.<sup>64</sup> But because of the virtual ban on unauthorised third party spending, groups such as the SPUC had no practical means of publicly communicating their opinion about individual candidates at a time when the voters' minds are most focused on choosing their next set of representatives.<sup>65</sup> As a result, the majority of the ECHR found that the extent of the limit on third party spending constituted a disproportionate means of achieving a legitimate governmental aim, and for this reason was an unjustifiable breach of the

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61. *Id.* at 187.

62. *Id.* at 189-90. In addition, Judges Pettit, Lopes Rocha, and Casadevall concurred in the majority decision whilst holding that the SPUC leaflet was not intended to promote the election of any candidate but merely to inform voters of the probable voting intentions of the candidates as regards the abortion issue. *See id.* at 193.

63. *See id.* at 189-90.

64. *Id.* On its face this argument would seem to justify the virtual ban on third party expenditures so long as all other actors in the electoral process were subject to equally strict regulation. Perhaps what the Judges meant was that as the British system of regulation leaves it open for these actors to participate without any restrictions, it is unfair to single out third party expenditures for a complete ban. This may be because there is no practical reason for such a ban (i.e., it performs no "loophole closing" function), or because it inequitably and illegitimately discriminates between different voices in the electoral process.

65. *Id.* at 189.

guarantee of a right to freedom of expression contained in Article 10.<sup>66</sup>

The *Bowman* decision has received some criticism, both for the way in which the ECHR reasoned its way through the issues involved,<sup>67</sup> as well as for the particular conclusion it reached. In particular, Professor Conor Gearty has described the *Bowman* decision as being both "depressing" and "ill-advised."<sup>68</sup> Gearty's major critique is that the majority decision in *Bowman* illegitimately substituted the opinion of the judges in Strasbourg as to what constitutes an appropriate balance between the values of liberty and equality in the British election process for an "expression of will by the primary democratic body in the [United Kingdom]."<sup>69</sup> In so doing, the majority failed to give a convincing answer to a crucial question: "[I]s it any job of the European Court of Human Rights to tell its Member States what 'democracy' means or to override local judgments as to what in specific situations is in the best interests of democracy?"<sup>70</sup>

After all, given the existence of reasonable disagreement over what constitutes an appropriate balance between the values of liberty and equality in the election processes of a liberal-representative democracy such as the U.K., a directly elected Parliament sitting in London would appear to be in a better position to set the ground rules for national elections than is an unelected body of judges, most of whom hail from a different national and cultural background.<sup>71</sup> What is more, the ECHR itself has accepted that there are limits to the legitimacy of its judgments in this area, through its recognition that each Member State has a "margin of appreciation" in setting

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66. *Id.* at 190.

67. See Magali Veneau, *Restoring the Campaigner's Voice: Free Elections and Freedom of Speech*, 23(6) EURO. L. REV. 598 (1998).

68. Conor Gearty, *Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal*, 51 N. IR. LEGAL Q. 381, 394-95 (2000).

69. *Id.* at 395.

70. *Id.* at 390.

71. For arguments to this effect, see JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Jeremy Waldron, *Legislation by Assembly, in JUDICIAL POWER, DEMOCRACY AND LEGAL POSITIVISM* 251, 264-68 (2000); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154-76 (1999).

the rules governing the conduct of its own elections.<sup>72</sup> Why, it may then be asked, did the decision taken by Parliament not fall within this "margin?" Given the ECHR's failure to provide any sort of convincing response to these challenges, Gearty concludes that it was wrong to tell Parliament that its election laws placed a disproportionate restriction on third party expenditures.<sup>73</sup>

The ECHR may certainly be critiqued for its failure to give a response to the sort of objections that Gearty so ably raises. But it may still be possible to go about constructing some sort of defence for the ECHR ruling in the following way. We can begin by acknowledging that, after all, the U.K. *did* take the positive step of ratifying the Convention, thereby agreeing that the ECHR was to have the power to review its governmental actions. In so doing, it conferred upon that body some measure of authority to define and protect the individual democratic rights of British citizens.<sup>74</sup> So, we may ask, what is the ECHR meant to do when a citizen of the U.K. comes before it with a complaint that the laws regulating that nation's domestic elections breach his or her right to take part in the democratic process? After all, the Convention's guarantee of a right to speak and participate must have some normative content separate from, and independent of, whatever a particular Member State happens to say that it does at a particular time.<sup>75</sup> This may be a more convoluted way of saying that while the ECHR may recognise that each Member State has a "margin of appreciation" in creating its own election rules, this cannot be the same as

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72. *Bowman v. United Kingdom*, 63 Eur. Ct. H.R. 175, 188-89 (1998) (citing *Mathieu-Mohin and Clerfayt v. Belgium*, 113 Eur. Ct. H.R. (ser. A) at 23-24 (1987)). See generally P. VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 82-95 (3d ed. 1998).

73. See Gearty, *supra* note 68. In his dissent from *Bowman*, Judge Valticos argued: "There is something slightly ridiculous in seeking to give the British Government lessons in how to hold elections and run a democracy." *Bowman*, 63 Eur. Ct. H.R. at 194.

74. A recognition strengthened by the Government's recent moves to "bring home the Constitution." See *infra* notes 119-123 and accompanying text; Ian Leigh & Laurence Lustgarten, *Making Rights Real: The Courts, Remedies, and the Human Rights Act*, 58 CAMBRIDGE L.J. 509, 510-17 (1999).

75. See Alistair Mowbray, *The Role of the European Court of Human Rights in the Promotion of Democracy*, [1999] PUB. L. 703.

a complete license to do as it likes.<sup>76</sup> To take a real-world example, if the "margin of appreciation" enjoyed by each Member State left each State free to define the democratic rights and liberties of its citizens in any way that it chooses, then Turkey's decision to ban particular political parties because their names and political platforms were viewed as a threat to public security would not be a breach of the Convention's guarantees.<sup>77</sup> Nor, assumedly, would a hypothetical decision by Turkey to outlaw advocating the repeal of its laws barring such political parties be a breach of the Convention's guarantee of free expression – and so on right down the line.

Of course, it does not take us very far to simply point out that for the rights and freedoms in the Convention to have any meaning at all, the ECHR must have some power to decide if and when these guarantees have been breached.<sup>78</sup> In particular, such an insight is still compatible with the argument that the ECHR should refrain from imposing its particular vision of democracy on a Member State where that State has itself acted to regulate its election system following a vigorous, open, and public debate on the form that its democratic processes should take.<sup>79</sup> It remains true that the people of a particular country are, by and large, in a much better position to work out what democracy means for them than are a disparate panel of judges sitting in Strasbourg. But even if we accept this claim, it still need not necessarily follow that the ECHR overreached in its judgment in *Bowman*.

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76. See *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 1, 23 (1976) ("Nevertheless, Article 10 § 2 does not give the Contracting States an unlimited power of appreciation.").

77. See *United Communist Party of Turkey v. Turkey*, 62 Eur. Ct. H.R. 1 (1998); *The Socialist Party v. Turkey*, 75 Eur. Ct. H.R. 1223 (1998).

78. For similar arguments that the courts as institutions ought to have the power to declare that a breach of basic individual rights has occurred, see *Marbury v. Madison*, 1 Cranch 137 (1803); *Australian Capital Television v. Commonwealth* (1992) 177 CLR 106 (High Court of Australia finding that restrictions on the use of television to broadcast political advertisements were a breach of the right of free speech inherent in the Australia Constitution); C.A. 6821/93, *Bank Hamizrachi v. Migdal*, 49(4) P.D. 221 (Supreme Court of Israel holding that the rule of law required that it exercise judicial review over legislative measures).

79. The author takes this to be the particular point made by Prof. Gearty, *supra* note 68, at 394-95.

We rather first need to explore whether the particular provision overturned (the £5 limit on independent third party expenses relating to some particular candidate) really *did* result from such a vigorous, open and public debate.<sup>80</sup> And if not, were there any other factors that perhaps could justify the ECHR intervening with regards to this particular regulation of the British electoral process?

As can be seen by the above canvassed history of the limits on third party spending in relation to constituency candidates,<sup>81</sup> the £5 spending cap hardly formed a part of a clearly devised regulatory structure adopted after careful and deliberative public consideration. The legal controls on third party spending in U.K. elections developed (or, more precisely, failed to develop) in an ad hoc manner, with the main legislative framework rendered increasingly irrelevant as campaign practices changed.<sup>82</sup> In addition, prior to *Bowman*, the rules on third party expenditures had already been substantially altered through judicial interpretation – witness the consequences of the *Luft* and *Tronogh Mines* cases discussed previously.<sup>83</sup> So, the actual regulatory framework was not only the product of Parliament's decision making processes. Unelected judges in the U.K. also had a major hand in its construction. It is of course arguable that Parliament could have rewritten the legislative rules if it did not approve of the way that the courts had interpreted them, but instead it had positively acted to reauthorise the £5 limit as recently as 1985.<sup>84</sup> However, the legislation in which it did so would simply seem to have been little

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80. In other words, there will always be a regression problem involved in this type of situation. The claim that the ECHR should not intervene to overturn a Member State's considered judgment as to how its electoral system should be regulated, where that judgment is the product of some democratic process, still requires the ECHR to decide if the decision making process of the Member State is appropriately "democratic" in the first place. See Frank I. Michelman, *How Can the People Ever Make the Laws? A Critique of Deliberative Democracy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 145, 162-65 (James Bohman & William Rehg eds., 1997).

81. See *supra* notes 24-33 and accompanying text.

82. Butler, *supra* note 21, at 175.

83. See *supra* notes 25-32 and accompanying text.

84. See Representation of the People Act, 1985, c. 15, § 14(3) (Eng.).

more than a pro forma rubber stamp of a rule dating back to 1949.<sup>85</sup> Certainly there is nothing in Hansard to indicate that the measure was the focus of any real Parliamentary debate or attention at that time. Given all of this, it may be questioned whether the rules governing third party involvement in the U.K.'s election process really were the product of the kind of vigorous, open and public debate that should have caused the ECHR to refrain from reaching its own judgment on the issue.

What is more, it may be asked what realistic domestic political options were open to someone like Mrs. Bowman if she were to try and have the limit amended. It is true that she could utilize the U.K.'s domestic democratic processes to lobby Parliament, or to otherwise seek to generate enough public support to effect a change in the spending limits. But there are good reasons to doubt that in this case the domestic political system would be at all responsive to her concerns. Changing the limit would require Members of Parliament to agree to expose themselves to more criticism of their candidacies and their persons at election time – a prospect that is unlikely to fill them with delight. Evidence of the reluctance of Members of Parliament to open themselves to such outside criticism may be found in the fact that in the period since 1949, they had voted to increase the base amount that they themselves could spend on campaigning for election by £4,515, whilst raising the spending limit for third parties by just £4.50.<sup>86</sup>

In light of this factual matrix, the ECHR might well have been justified in viewing the £5 limit as being less the result of an openly reached, deliberative decision on how the participation of third parties in the British electoral process should be regulated, and more of a self-interested legislative measure retained to protect individual candidates, including incumbent Members of Parliament, from external criticism come election time. This would make the limit on third party spending precisely the sort of participatory restraint designed to protect po-

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85. See Representation of the People Act, 1949, 12, 13 & 14 Geo. 6, c. 68, §§ 63, 64 (Eng.) [hereinafter RPA 1949].

86. Compare the spending limits on third parties and individual candidates contained in the RPA 1949 with those contained in the RPA 1983.

litical "insiders" at the expense of "outsiders" that the ECHR should seek to eliminate if it is to properly carry out its role of "policing the process of representation."<sup>87</sup> In such a circumstance, the ECHR may have been perfectly correct to rule that:

[W]hilst you [United Kingdom] may put some limit on how much the various participants may spend on your election process, your politicians may not insulate themselves from personal criticism by making that spending limit so low that it completely excludes some interested participants from being able to have any say at all.<sup>88</sup>

#### IV. THE NEILL COMMITTEE'S REPORT AND THE LEGISLATIVE RESPONSE

Whatever the merits of the ECHR's decision in *Bowman*, the practical effect of the judgment was to render the limits on third party constituency spending redundant at the very moment when the Neill Committee was conducting its enquiry into the funding of political parties. The Neill Committee therefore had to turn its attention to the impact of the *Bowman* judgment on Parliament's ability to limit political expenditures on the electoral processes, especially with regard to third party spending.<sup>89</sup> A major problem for the Committee was that the majority judgment of the ECHR remained silent as to exactly what spending limit would suffice to overcome the

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87. The locus classici for the argument that constitutional courts should adopt this role in carrying out the review of legislative actions is to be found in JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). See also Issacharoff & Pildes, *supra* note 19. For a review of the literature representing restrictions on campaign spending as a form of "incumbency protection," see Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1279 (1994).

88. The Supreme Court of Canada has taken a similar approach in *Libman v. Quebec* [1997] 151 D.L.R. 385. See also ECHR's ruling in *Incal v. Turkey*, 78 Eur. Ct. H.R. 1504, 1567-68 (1988) ("In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion.").

89. For a general account of the Neill Committee's deliberations, see Klein, *supra* note 24.



"disproportionality" problem that made the previous limit a breach of the Convention.<sup>90</sup> Whilst £5 had been held to be too low a spending cap, even given the ECHR's recognition of the legitimacy of protecting equality in the electoral process, there was no indication in the ECHR's decision as to what amount would constitute a permissible expenditure limit. In addition, the question of whether restrictions should be introduced on third party expenditures at a national level had to be considered, along with the potential implications of the *Bowman* decision for this issue, as "it would clearly be an exercise in futility for [the Committee] to recommend a legislative innovation which we anticipated would be set aside on the first legal challenge."<sup>91</sup>

Therefore, the first issue for the Committee to consider was whether a new limit ought to be placed on third party spending at a constituency level, and if so, what level should that limit be set at. Although it recognised that the previous limit of £5 was no longer tenable post-*Bowman*, the Committee concluded that the decision still allowed for some spending restrictions to protect voters "from being subjected to overwhelming election propaganda by a party which has greatly superior financial resources."<sup>92</sup> To prevent this outcome, the Committee recommended that the amount that third parties should be allowed to spend on "activities which are intended to promote or prejudice the electoral prospects of 'particular candidates in a particular constituency,'" be raised to a figure of £500.<sup>93</sup> This amount, the Committee opined, would prove enough to pay for the "production and distribution of a leaflet throughout a constituency or the publication of an advertisement in a local newspaper."<sup>94</sup>

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90. Mowbray, *supra* note 75, at 720.

91. NEILL REPORT, *supra* note 42, at 130.

92. *Id.* (citing *Bowman v. United Kingdom*, 63 Eur. Ct. H.R. 175, 187-89 (1998)).

93. *Id.* This limit would exclude "[l]eaflets designed merely to bring factual information to the attention of voters or to assist a national campaign without referring to particular candidates." *Id.* The figure of £500 is contained in the Neill Report. *Id.*

94. *Id.* at 129. Whether the Committee is correct in this assertion is questionable as they gave no evidence that the amount they recommend would be in fact sufficient for these purposes. However, the Committee had

Interestingly, at no point in its considerations did the Neill Committee overtly question whether or not limiting the ability of third parties to make expenditures on local constituency races was a desirable policy.<sup>95</sup> The Committee seems to have simply assumed that this was so, given its previously stated commitment to ensuring a degree of "fairness" in the electoral process.<sup>96</sup> Additionally, as the Committee had also recommended that the existing spending limits for constituency candidates be retained,<sup>97</sup> it felt that restrictions on third party spending needed to be reintroduced so as to protect a candidate from having to "devote part of his or her limited resources to rebutting the attacks made by third parties."<sup>98</sup> In a similar manner, once the Committee had concluded that a nationwide limit on political party spending should be introduced (as *Bowman* permitted),<sup>99</sup> it bluntly asserted that some national limits on third party expenditures "are obviously needed and obviously need to be enforced."<sup>100</sup> Without such restrictions, the Committee claimed, the cap on na-

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already pointed out that a limit of £1,000 ran the risk of swamping the £8,300 spending cap on individual candidates. NEILL REPORT, *supra* note 42, at 129. It had also considered and rejected as being "a very small sum of money" a figure of £100 (the limit that the Government had imposed on third party expenditures relating to elections to the Northern Ireland Assembly). *Id.* Given this, the £500 suggestion may have been a Solomonic compromise rather than a limit based on a concrete assessment of the actual practical needs of third parties.

95. In fact there was no real discussion at all about the limits on local campaign spending, as "they were supported by all the main political parties and by all the individuals and organisations whose evidence bore on the topic." *Id.* at 111.

96. "[W]hile holding to the view that the creation of a level playing field is an unattainable aspiration, we do consider that fairness has a real place to play in the overhaul of the country's electoral and constitutional arrangements." *Id.* at 27.

97. *Id.* at 111. *But see id.* at 112, arguing for an increase in the spending limit for by-elections.

98. NEILL REPORT, *supra* note 42, at 129. However, the Committee never expressly explains why protecting the spending limits on candidates outweighs the speech rights of third parties. Such an explanation can only be found by reference to the Neill Committee's overall desire to establish a measure of equality between electoral participants.

99. *Id.* at 116-26, especially R47 (endorsing a national limit), R49 (suggesting a figure of £20 million) and R51 (arguing that the limits should "be set in terms of the purposes for which the expenditure is incurred rather than in terms of any specified time period").

100. *Id.* at 131.

tionwide spending by political parties could be evaded either by the parties themselves setting up "front organisations" to spend on their behalf, or by genuinely independent third parties engaging in "large-scale propaganda" aimed at securing the election or defeat of a party.<sup>101</sup> To prevent these loopholes from eviscerating the rest of the spending restrictions it had recommended, the Committee reached the "straightforward" conclusion that "[a]ny individual or organisation that incurs election expenses should be subject to an expenditure limit."<sup>102</sup>

Following the release of the Neill Committee's report, the Labour Government advanced a set of legislative proposals designed to overhaul the rules governing spending on elections in line with the report's recommendations. Parliament in turn passed these proposals into law via PERA.<sup>103</sup> The fact that the new legislation incorporated almost all of the Neill Committee's recommendations is a testament to the general respect with which the Committee is viewed. Given its non-partisan composition, the recommendations it made were somewhat immunised from accusations of bias. And as the roots of the Neill Committee's task lay in a general public desire for change, its findings were endowed with a mantle of moral legitimacy and urgency. In a similar fashion, the appointment of Royal Commissions in both Canada and New Zealand to consider whether reforms were required to the electoral laws in those countries proved to be an effective way of overcoming the inevitable partisan conflicts raised by the issue, and helped to secure a broad basis of support for subsequent legislative moves amongst those countries' political actors.<sup>104</sup>

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101. *Id.* In raising these concerns the Committee pointed to the "American experience" with campaign finance regulation, as well as to previous examples of third party interventions in British elections and to the concerns of the political parties. *Id.* at 131-32.

102. *Id.* at 132.

103. For an excellent overview of the content of the new legislation, see Keith Ewing, *Transparency, Accountability and Equality: The Political Parties, Elections and Referendums Act 2000*, [2001] PUB. L. 542.

104. See CANADIAN ROYAL COMMISSION ON ELECTORAL REFORM AND PARTY FINANCING, *REFORMING ELECTORAL DEMOCRACY* (1991); NEW ZEALAND ROYAL COMMISSION ON THE ELECTORAL SYSTEM, *TOWARDS A BETTER DEMOCRACY* (1986).

Under the new regulatory schema instituted by PERA, the national political parties as well as individual candidates will henceforth be subject to restrictions on both fundraising for, and spending on, their election campaigns.<sup>105</sup> In line with the Neill Committee's recommendations, limits have also been placed on third party expenditures at both a national and a constituency level. No third party will be permitted to make "controlled expenditures"<sup>106</sup> in excess of £10,000 in England (or £5,000 in Scotland, Wales, or Northern Ireland) unless it has first filed a "notification" with the Election Commission, and thus become "recognised" under PERA.<sup>107</sup> While a recognised third party will not have to establish a separate election fund from which to make such expenditures, it will be prohibited from accepting money to fund spending on an election from any donor who is not an identified, "permissible source."<sup>108</sup> Following the election, each recognised third party will also have to make a public return of all the spending it has made, and of the source of all the donations over £5,000 which it has received.<sup>109</sup>

When it comes to involving themselves in an election campaign, all third parties (whether recognised or not) will be subject to a £500 limit on spending designed to "promote or procure the election" of some particular individual constituency candidate.<sup>110</sup> Additionally, recognised third parties will be required to abide by an overall national spending limit set at five percent of the maximum limit allowed for any political party, divided amongst the four parts of the U.K.<sup>111</sup> This limit covers all

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105. Political parties will henceforth only be able to accept donations from "permissible donors." See PERA §§ 54, 56. The identity of any donor who gives a political party more than £5,000 must be publicly disclosed. *Id.* § 62(4)(a), sched. 6. A national limit on election expenditures that can be incurred by political parties has also been introduced. *Id.* § 79, sched. 9 ¶ 3(2)-(3). The existing limits on spending by constituency candidates have been retained. *Id.* § 132.

106. *Id.* § 85(2). See also *infra* notes 112-115 and accompanying text.

107. PERA §§ 88, 94(5).

108. PERA § 54(2), sched. 11 ¶ 6(1). For what counts as a "permissible source," see *id.* § 54(2) (essentially outlawing funding by non-residents).

109. *Id.* § 96, sched. 11 ¶¶ 9-11.

110. *Id.* § 131(3).

111. *Id.* § 94, sched. 10 ¶ 3(2) (at the 2000 election this amounted to some £793,500 in England, £108,000 in Scotland, £60,000 in Wales and £27,000 in Northern Ireland).

"controlled expenditures," defined widely to cover any spending made on any "election material which is made available to the public at large."<sup>112</sup> In turn, "election material" is given a broad definition that includes material "which can reasonably be regarded as intended to" improve the prospects of electoral success of a particular political party, or any set of political parties or candidates who support or oppose particular policies.<sup>113</sup> Following the lead taken in the *Luft* decision,<sup>114</sup> spending money on "prejudicing the electoral prospects" of any party is deemed to be intended to improve the electoral prospects of that party's opponents.<sup>115</sup> The imposition of a one year time limit on these expenditure controls is the most significant legislative departure from the recommendations made by the Neill Committee.<sup>116</sup> Consequently, third parties will be restricted in their spending only in the twelve months preceding the election, with any expenditures made outside of this period falling beyond the reach of the proposed new regulatory structure.<sup>117</sup>

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112. PERA § 85(2).

113. *Id.* § 85(3) (The definition is still met "even though [the election material] can reasonably be regarded as intended to achieve any other purpose as well."). The explanatory notes accompanying the new legislation expand on the purpose of this definition:

In essence, the test is whether the material can reasonably be regarded as intended to benefit a particular party's electoral prospects. The cost of a poster campaign advocating a particular policy without explicitly supporting or attacking a named political party might nevertheless fall to be regarded as 'controlled expenditure,' if the policy in question was closely identified with a particular political party or group of candidates.

*Explanatory Notes to the Political Parties, Elections And Referendums Act 2000* ¶185, at <http://www.hmso.gov.uk/acts/en/2000en41.htm#end,cm4413> (last visited Nov. 18, 2001) [hereinafter *Explanatory Notes*]. These limits are discussed more fully at *infra* notes 134-143 and accompanying text.

114. *See supra* case discussion note 29.

115. PERA § 85(4)(b).

116. *See THE FUNDING OF POLITICAL PARTIES IN THE UNITED KINGDOM, THE GOVERNMENT'S PROPOSALS FOR LEGISLATION IN RESPONSE TO THE FIFTH REPORT OF THE COMMITTEE ON STANDARDS IN PUBLIC LIFE, 1999*, Cm. 4413, at ¶¶ 7.9, 7.12, 7.26 [hereinafter *THE GOVERNMENT'S PROPOSALS*].

117. PERA sched. 10 ¶ 3(3). Although the definition of "election expenditure" is made:

## V. PROBLEMS WITH THE LEGISLATION: WHAT ROLE FOR THE COURTS?

Before these legislative measures have been subject to advice notices from the newly-established Election Commission,<sup>118</sup> as well as scrutiny by both the domestic British courts and the ECHR, any discussion of how they might operate to control third party spending will obviously be speculative. But even so, it is already possible to identify some potential future issues arising from the regulatory framework as ones that are likely to trouble the courts. The point that the author wishes to emphasise in moving to discuss these potential issues is that when and if the courts should happen to adjudicate them, they will also be taking on the role of determining what rules governing third party spending are appropriate in the context of the United Kingdom's democratic processes.

### A. *The Effect of the Human Rights Act 1998*

With the passage of the HRA, the rights and freedoms contained in the Convention have been incorporated into British domestic law. This incorporation has not occurred wholesale, rather under the HRA "certain defined provisions of the Convention [have come to] enjoy a defined legal status."<sup>119</sup> In particular, these guaranteed rights and freedoms do not enjoy quite the same "trumps" status as is the case in the United States and (to a lesser

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By reference to the date on which the benefits of the expenditure were received and not to the date the expenses were incurred. As a result, the cost, for example, of billboard advertisements displayed during an election period would count towards the expenditure limit irrespective of whether the advertisements were paid for before or after the start of that period.

THE GOVERNMENT'S PROPOSALS, *supra* note 116, at ¶ 7.11. See also PERA § 94(8).

118. See PERA §§ 1, 10. For an outline of the Election Commission's role and functions, see the Electoral Commission Homepage at <http://www.electoralcommission.gov.uk> (last visited Nov. 18, 2001).

119. K. D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MOD. L. REV. 84 (1999).

extent) Canada.<sup>120</sup> The HRA explicitly states that Parliament retains final decision making authority over issues of public policy, even to the extent of being able to pass legislation that is in breach of the Convention.<sup>121</sup> That being said, however, the new law does somewhat expand the role of the domestic courts in safeguarding the rights and freedoms contained in the Convention against such legislative encroachment. Therefore, the amalgam created by the HRA means that whilst Parliament retains its sovereignty in the technical, Diceyan sense,<sup>122</sup> its decision-making authority will in the future be somewhat subverted by the inevitable transfer of power to the judiciary that accompanies any sort of constitutionalization of rights.<sup>123</sup>

In concrete terms, there are two ways in which the provisions in the HRA enable the courts to use the rights and freedoms contained in the Convention as a check upon the actions of Parliament.<sup>124</sup> First of all, the HRA requires that "so far as it is possible to do so, primary legislation . . . must be read and given effect in a way which is compatible with the Convention rights."<sup>125</sup> Thus, if there is any uncertainty as to the meaning of a particular legislative provision, the interpretation to be given must be the one that is, in the court's eyes, the most favorable to the protection of the rights and freedoms contained in the Convention. If, however, the courts are unable to give some legislative provision a reading that is compatible with the Convention, then the courts' role is limited to "mak[ing] a declaration of that incompatibility."<sup>126</sup> The

120. For a defence of the idea of "rights as trumps," see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977); Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153, 164-65 (Jeremy Waldron ed., 1984).

121. See HRA § 6(3). But if the government introduces legislation into Parliament which it knows to be in breach of the Convention, the government must "make a statement to [that] effect." *Id.* § 19(1)(b).

122. A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 39-40 (10th ed. 1959).

123. Conor Gearty, *Reflections on Human Rights and Civil Liberties in Light of the United Kingdom's Human Rights Act 1998*, 35 U. RICH. L. REV. 1, 11 (2001).

124. See Ewing, *supra* note 119, at 86-88.

125. HRA § 3(1).

126. *Id.* § 4(2).

issuing of such a declaration does not affect the validity, continuing operation or enforcement of the offending legislation.<sup>127</sup> Nor does it place any formal requirement on Parliament to act to remedy the offending legislative provision, although there is a "fast track" remedial procedure available should the government wish to do so.<sup>128</sup> In practice, however, any government would come under a great deal of political pressure to amend any legislation that has been subject to such a declaration.<sup>129</sup> Therefore it may be, from a *realpolitik* point of view, that any declaration of incompatibility by the courts will, as a matter of course, lead to the repeal or amendment of the offending legislative provision.<sup>130</sup> In this sense the courts can be predicted to take on something of a *de facto*, if not *de jure*, role as the final arbiters of what the rights and freedoms contained in the Convention require in the U.K.'s domestic context.

The HRA also gives the rights jurisprudence developed by the ECHR a defined status in the British domestic legal system. The Act does not go so far as to require British courts to follow the ECHR's decisions when determining what content ought to be given to the rights and freedoms contained in the Convention. But it does state that the domestic courts *must* take any decision of the ECHR into account when making this kind of determination.<sup>131</sup> Given the substantial body of case law that has now been developed by the ECHR, and the fact that decisions of the British domestic courts can themselves be reviewed by the ECHR, it seems likely that the domestic courts will therefore accord that body's decisions a large

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127. See Bamforth, *supra* note 15, at 573.

128. HRA § 10(2).

129. See K. D. Ewing, *A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary*, 38 ALBERTA L. REV. 708, 714 (2000).

130. See Ewing, *supra* note 119, at 99. See also Comments of the United Kingdom's Lord Chancellor, Lord Irvine of Lairg in his Keynote Address to The University of Cambridge Centre for Public Law, in CONSTITUTIONAL REFORM IN THE UNITED KINGDOM: PRACTICE AND PRINCIPLES 4 (1998) ("If a declaration of incompatibility is made . . . Parliament *may* – not *must*, but, in practice, we believe, usually *will* – legislate." (emphasis in original)).

131. HRA § 2.



measure of respect when it comes to deciding how to apply the Convention in the national context of the U.K.

For the purposes of this Article, the importance of the HRA is that it expressly gives courts the power to consider the relationship between the limits on third party spending contained in PERA and the rights and freedoms guaranteed by the Convention. The introduction of this new power in turn gives the courts an expanded role in making the final decision as to what manner and degree of regulation of political spending is appropriate in the electoral context. This is not to say, however, that the courts' involvement in determining these issues will be an *entirely* novel phenomena. As has been seen above, the courts' previous interpretations of the legislative framework of regulation, as seen through the effects of the *Luft* and *Tronogh Mines* cases, has meant that they have in the past played a part in deciding how third party spending on electoral contests ought to be controlled.<sup>132</sup> So rather than bringing the courts into a new area for the first time, the introduction of the HRA will instead act to extend the courts' influence by empowering them to openly and explicitly consider whether the legislative limits on third party spending represent an appropriate balance between the twin goals of equality and liberty in the British electoral process. Given this, it can be anticipated that the domestic courts will become a forum, as was the ECHR in the *Bowman* case, for aggrieved third parties who feel that the new legislative spending limits unduly hamper their ability to influence the electoral process, and are therefore in breach of the rights and freedoms guaranteed by the Convention. In particular, two aspects of the current legislation may be argued to be open to such a challenge before the courts.

### *B. The Spending Limits and "Issue Advocacy"*

The test laid down in the new legislation for determining if some spending on a public message by a third party constitutes a "controlled expenditure," — and is thus subject to the statutory spending limits — looks to

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132. See *supra* notes 26-31 and accompanying text.

the consequences or effect of that message.<sup>133</sup> Where the message does not specifically identify some particular party or candidate,<sup>134</sup> but instead relates to an issue of current political concern (what is known in the United States as “issue advocacy”),<sup>135</sup> the decision as to whether spending on that message constitutes a “controlled expenditure” depends on whether the effect of that message “can reasonably be regarded as intended to” promote some political party which has taken a policy stand in respect of the issue to which that message relates.<sup>136</sup> It should be noted that this test looks not at the consequences that the third party spending the money *actually* intends to bring about through the message that they are funding, but rather at what consequences a *reasonable person* viewing the message would regard it as intended to bring about. What is more, the effect of the message need not appear to be exclusively intended to affect the outcome of an election in order for it to qualify as a “controlled expenditure.”<sup>137</sup> The definition extends to messages on issues even if they “can reasonably be regarded as intended to achieve any other purpose as well” as affecting an election.<sup>138</sup> Therefore, all that seems to be required for some third party spending on a message relating to an issue of public policy to fall under the spending controls in PERA is that the message have one of two very general consequences. First of all, if the message appears to a reasonable viewer to be intended to “procure [the] electoral success of one or more registered parties who advocate . . . [that] particular polic[y],” then it will be a “controlled expenditure.”<sup>139</sup> Alternatively, if the message appears to a reasonable viewer to be intended to “otherwise enhance the standing of any such party [which advocates the particular policy] . . . with the electorate in connection with any future relevant

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133. See *supra* notes 113-115 and accompanying text.

134. See PERA § 85(4) (“[F]or the purposes of determining whether any material is election material, it is immaterial that it does not expressly mention the name of any party or candidate.”).

135. For a discussion of the problems with regulating this type of spending in the United States, see Geddis, *supra* note 13, at 39-47.

136. PERA § 85(3).

137. *Id.*

138. *Id.*

139. *Id.* § 85(3)(a)(ii).

elections (whether imminent or otherwise)," then it will likewise qualify as a "controlled expenditure."<sup>140</sup>

The point of widening the limits on third party spending to cover this type of "issue advocacy" is to try and prevent third parties from evading the statutory expenditure limits through running advertisements that, whilst nominally addressing issues of public policy, are in reality aimed at affecting the election's outcome.<sup>141</sup> However, the problem with applying such a consequences or effects test to these types of messages is that to extend the legislation's reach too far into the discussion of public issues may stifle genuine, robust debate about matters of public importance.<sup>142</sup> After all, political parties and public issues are so inextricably intertwined that virtually every issue which is of public importance, and which third parties might therefore wish to address, will also attract some policy stance from some political party. This problem is further aggravated by the fact that the twelve month period during which the expenditure limits apply is *retrospectively* determined from the date on which the election is held.<sup>143</sup> Given that elections in the U.K. do not necessarily occur at fixed intervals, and that a "snap election" may be called by the government at any point in a five year electoral cycle, a third party will in many cases have no way of knowing in advance whether or not its spending on a particular issue will fall within the relevant twelve month time period.

An example may serve to clarify these various difficulties in the legislation. Let us imagine that the issue of foetal research becomes highly topical in the U.K., and a public debate arises over the extent to which this practice

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140. *Id.* § 85(3)(b).

141. *See, e.g.*, *Federal Election Comm'n v. Furgatch*, 807 F.2d 857, 862 (9th Cir. 1987) (attempting to broaden the range of third party speech regulated by the Federal Election Campaign Act so as to "prevent speech that is clearly intended to affect the outcome of a federal election from escaping, either fortuitously or by design, the coverage of the Act."). *See also* Briffault, *supra* note 14.

142. *See* Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 317-20 (1998); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997).

143. *See* PERA § 94(8), sched. 10 ¶ 3. *See also* THE GOVERNMENT'S PROPOSALS, *supra* note 116.

should be allowed. Desiring to take advantage of the interest in the issue, and flush with funds from a recent bequest, SPUC decides to spend £1.5 million on a six month long publicity campaign seeking to mobilise public support for banning all abortion procedures. As a part of its campaign, imagine SPUC includes the following line on all its messages to the public: The unborn have no voice – use yours to save them. Call the Prime Minister and tell him to stop killing babies.<sup>144</sup>

Four months into this advertising blitz, the Prime Minister dissolves Parliament and announces that a general election will be held in six weeks time. One of the political parties contesting the election decides to make its policy of opposition to abortion a central plank of its campaign. In the light of the looming election, what is the status of SPUC's spending under PERA?<sup>145</sup> Clearly, one consequence of emphasising the issue of abortion, not to mention inferring that the present Prime Minister is a "baby killer," will be to call attention to the policy positions taken by the different political parties, and to encourage voters to support those parties who oppose the practice.<sup>146</sup> If this consequence is enough to mean that the spending can *reasonably be regarded* as intended to affect the outcome of the election, then SPUC's spending on its anti-abortion message will constitute a "controlled expenditure." SPUC would therefore have to halt its publicity campaign in the run-up to the election so as to avoid breaching the spending limits contained in PERA.<sup>147</sup> Yet it is precisely at this electoral moment that SPUC would most want its voice heard by the general public, as it is at this point that its message will have the most chance of being effective in terms of influencing public policy.<sup>148</sup>

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144. Compare this hypothetical with the example of a past third party "issue" advertisement cited by the Neill Committee as being, in their opinion, clearly intended to influence an election. The ad stated "It's not your vote we ask for, it's your voice. Speak up against state-owned steel." NEILL REPORT, *supra* note 42, at 132.

145. The explanatory notes to PERA do not help to clarify this question. See *Explanatory Notes*, *supra* note 113.

146. Note that "prejudicing the electoral prospects at the election of other parties" is deemed to be included in the definition of "promot[ing] or procur[ing] the electoral success" of any party. PERA § 85(4)(b).

147. See PERA § 94, sched. 10 ¶ 3(2).

148. See Kirk L. Jowers, *Issue Advocacy: If It Cannot Be Regulated*

So let us further imagine that a court is called upon to apply PERA to the SPUC example,<sup>149</sup> either because SPUC continues to spend on its advertising and is subsequently charged with an offence under PERA,<sup>150</sup> or because SPUC seeks a declaration that the spending limits are an infringement of its right to free expression under the Convention. The first question the court would have to consider is whether SPUC's spending on this issue of public importance can *reasonably be regarded* as intended to have the effect of promoting or procuring the election of some political party, especially given that the spending on the message began some months before the election was announced. When carrying out this interpretative task, the HRA requires that the court read the legislation in a way that is consistent with the rights contained in the Convention, and also mandates that the findings of the ECHR be considered when doing so.<sup>151</sup> As such, the guarantee of freedom of expression contained in Article 10 of the Convention<sup>152</sup> will be especially relevant, and the ECHR's response to the legislative limits in *Bowman* is instructive of how the British domestic courts might approach the interpretative task at hand.<sup>153</sup> In *Bowman*, three of the ECHR judges expressed their opinion that the leaflet at the centre of the case merely acted to provide information to the voters in the local electorate, and as

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*When It Is Least Valuable, It Cannot Be Regulated When It Is Most Valuable*, 50 CATH. U.L. REV. 65 (2000). See also Ridley & Doig, *supra* note 37 and accompanying text.

149. An outcome that, during the House of Lords' debate on the legislation, Viscount Astor predicted would occur:

The definition, 'reasonably be regarded as intended to achieve,' is one that I feel is bound to end up in the courts. I do not understand how anyone can reasonably be expected to define that under the Government's thinking. I believe that as soon as the Bill becomes an Act, as night follows day we shall end up in the courts for definition.

*Lords Hansard*, Oct. 18, 2000, Column 1127, available at <http://www.parliament.thestationaryoffice.co.uk/pa/id199900/idhansrd/vo001018/text/0101>.

150. PERA § 94(2)(a).

151. See *supra* notes 125-131 and accompanying text.

152. See Convention, *supra* note 48.

153. See *Bowman v. United Kingdom*, 63 Eur. Ct. H.R. 175 (1998).

such any expenditures made on it were not incurred with "a view to promoting or procuring the election of any candidate".<sup>154</sup> This conclusion seems a bit forced given the actual facts of the case, as it might be questioned what other possible purpose Mrs. Bowman had for advertising the local candidates' stances on abortion (in quite graphic and emotive terms), if she did not then intend that information to have some influence on how the voters would cast their votes. The key to the ECHR's finding would therefore seem to lie in the lengths that it was prepared to go to in rewriting the legislative framework so as to preserve an arena for public discussion about issues such as abortion.

In a similar way, the domestic courts in the U.K. may endeavour to give a narrowed interpretation to the limits on third party spending contained in PERA. So, for instance, they may try to read the expenditure limits as applying only to electoral messages that address policy issues which are "clearly identified with" some particular party, or that are published at a time when an election is "clearly foreseeable." But whether such an interpretative avenue is legitimately available to British judges is a moot point. After all, the legislative provisions only require that a policy issue be "advocated" by a political party for the spending limits to apply to third party messages that also address that issue.<sup>155</sup> As such, there does not seem to be any statutory language on which to hang a narrower interpretation of the kinds of advertising messages that Parliament intended to be covered. What is more, given its express decision to create a one-year period during which such spending is to be limited, and given the fluid nature of the electoral timetable in the U.K., Parliament must have meant the limits to apply to spending that occurs before any election campaign could be contemplated. Indeed, the legislation plainly states that spending that enhances the electoral standing of some party is subject to the statutory limits, "whether [some future election] is imminent or otherwise."<sup>156</sup>

As such, if the British courts were to use the Convention's guarantee of free expression (as incorporated

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154. *Id.* at 193.

155. PERA § 85(3)(a)(ii).

156. *Id.* § 85(4)(b).

through the HRA) to limit the type of third party messages that the statutory limits apply to, they would be making a naked policy choice about the appropriate shape of the electoral discourse. Restricting the ambit of the spending limits as they apply to advertising messages on issues of public interest would reflect a conclusion that it is more desirable to allow third parties a broad freedom to address issues of policy than it is to constrain their involvement in the electoral process so as to ensure a measure of equality amongst electoral participants. In this sense the line between rule interpretation and rule making by the courts under the HRA is a very fine one indeed. What is more, the lingering uncertainty over how such a consequences or effects test should be applied to third party spending made on issues of current political significance may lead a court to conclude that there is *no* possible interpretation of the legislative provision available to them that does not breach the Convention's guarantee of freedom of expression. If this proved to be the case, then the court would have to issue a "declaration of incompatibility" to that effect, thereby placing significant pressure on the government to take legislative steps to remedy the incompatibility.

There are two aspects of the legislative limits on third party spending relating to issues of public policy that may lead a court to conclude that they are incompatible with the right to freedom of expression contained in the Convention. First of all, Article 10(2) of the Convention states that the guarantee of freedom of expression can only be made "subject to such formalities, conditions, restrictions or penalties as are *prescribed by law*."<sup>157</sup> In

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157. Convention, *supra* note 48, art. 10(2) (emphasis added). In *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. 1, 31 (1979), the ECHR laid down the following test for whether an interference with the right to free expression is "prescribed by law":

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient provision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to

relation to PERA, the difficulty in knowing in advance whether or not some spending on an issue will qualify as a "controlled expenditure" may mean that the legislative spending limits have not been so prescribed. Because the test is so vaguely expressed, a third party can never be sure at the time of making an expenditure on a particular message whether or not it will fall within the spending restrictions. Again, this "vagueness" problem is exacerbated by the fact that the limit on "controlled expenditures" retrospectively covers spending on all qualifying messages up to a year before an election is actually held, while under the British electoral system the government is able to go to the polls at any time it wishes.<sup>158</sup> Thus, at the time a third party undertakes such spending in relation to some particular issue, it will never be sure if, at some future point, the spending will be deemed a "controlled expenditure" because an election is then called in the following year. In an instructive parallel, problems with the vagueness inherent in creating rules to differentiate between election speech, and general, issue oriented speech, have lead courts in the United States<sup>159</sup> and in Canada<sup>160</sup> to strike down spending limits on third party

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foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

See also *Huvig v. France*, 176 Eur. Ct. H.R. (ser. A.) at 52-57 (1990).

158. A point emphasised by Lord Willoughby de Broke during the House of Lords' debate on the legislation:

The effect is to impose the most sweeping controls on third parties, including restrictions on spending and requirements relating to the disclosure and permissible source of donations, at all times. Such an arbitrary restraint risks being struck down by the courts, I should have thought, as a breach of the guarantee of free speech under Article 10 of the European Convention on Human Rights. At the very least it will result in protracted legal disputes over whether or not specific materials were intended to influence the election.

*Lords Hansard*, Nov. 21, 2000, Column 782, available at <http://www.parliament.thestationeryoffice.co.uk/pa/id199900/idhansrd/vo001121/text/01121>.

159. See *Buckley v. Valeo*, 424 U.S. 1, 42-43 (1976).

160. See *Harper v. Canada* (A.G.), 2001 CarswellAtla 1063, ¶¶ 194, 208 (Decision of the Court of Queens Bench of Alberta holding that a provision in the Canada Elections Act, S.C., c. 9, §§ 319, 350 (2000) (Can.) (limiting third party spending on messages "that take[ ] a position on an issue with which a registered party or candidate is associated") was too vague to be



issue advocacy, as the uncertainty over what speech was covered by these restrictions acted as an impermissible "chill" on the expressive rights of those third parties.

The second way that the restrictions on third party speech contained in PERA might breach the guarantee of freedom of expression contained in the Convention is if it could be successfully argued that the United Kingdom government has failed to demonstrate that the spending limits are "necessary in a democratic society."<sup>161</sup> The ECHR has developed a three-step evaluative process when applying this "democratic necessity" test,<sup>162</sup> which the HRA requires domestic courts to take into account when considering the issue.<sup>163</sup> First of all, the court must inquire whether the interest claimed by the government as justifying the restriction is of a sort that may legitimately be used to limit freedom of expression. In the immediate case, the spending restrictions in PERA are intended to ensure a measure of equality between participants in the electoral process, which the ECHR found in *Bowman* to be a legitimate issue of governmental concern.<sup>164</sup> Secondly, the court must ask if the consequences of the measures taken are proportionate to the legitimate interest that the government is seeking to protect. In applying this proportionality test, the courts will have to specifically consider the balance between liberty and equality in the electoral process. There is no doubt that the spending limits have the potential to stop some third parties from speaking out on political matters as much as they might otherwise choose to. In addition, the variety of expression that is potentially covered by the limits may mean that some expression on matters of public concern

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"prescribed by law," and was thus in breach of the Canadian Charter of Rights And Freedoms).

161. See Convention, *supra* note 48, art. 10. See also *supra* notes 55-56 and accompanying text.

162. See *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) at 11, (1986); *Silver v. United Kingdom*, 61 Eur. Ct. H.R. (ser. A) at 37, (1983); *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 21 (1976).

163. HRA § 2.

164. Compare *supra* notes 58-60 and accompanying text with *Buckley*, 424 U.S. at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.").

will fall within the spending limits, even though those advertising messages are not intended by the speaker to be related to any election.<sup>165</sup> Both of these facts may mean that the spending limits may result in a smaller volume of discussion of public affairs than would otherwise be the case. In recent years, British courts have come to show a greater sensitivity toward the effects of such restrictions on freedom of expression,<sup>166</sup> and the ECHR has also held that the maintenance of a free and robust environment for political speech is a particularly important goal.<sup>167</sup>

That being said, the spending limits do not have the effect of *completely* silencing third parties, as they are still able to spend close to £1 million around the U.K. on making their views known. Thus, the limits on expenditure do not have quite the same effect on third party speech as did, for example, the spending limits that were held disproportionate in *Bowman*. What is more, the leg-

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165. U.S. courts refer to the problem as the "overbreadth doctrine." See *Regan v. Time, Inc.*, 468 U.S. 641, 651-52 (1984). See also *New York v. Ferber*, 458 U.S. 747, 770-71 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Buckley*, 424 U.S. at 44.

166. See *R. v. Home Secretary, ex parte Simms*, 3 W.L.R. 328, 337 B.C (1999). In the opinion of Lord Steyn:

The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.

*Id.* See also *Reynolds v. Times Newspapers*, 4 All E.R. 609, 621 (1999). Per Lord Nicholls:

At a pragmatic level, freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this country. This freedom enables those who elect representatives to Parliament to make an informed choice, regarding individuals as well as policies, and those elected to make informed decisions.

*Id.*

167. See *Ceylan v. Turkey*, 1999- IV Eur. Ct. H.R. 27; *Castells v. Spain*, 236 Eur. Ct. H.R. (ser. A) at 7 (1992); *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) at 11 (1986); *Thorgeirson v. Iceland*, 239 Eur. Ct. H.R. (ser. A) 6, 27 (1992) ("There is no warrant in [the ECHR's] case law for distinguishing . . . between political discussion and discussion of other matters of public concern.").

islative limits form a part of a comprehensive set of election regulations that were introduced in accordance with the Neill Committee's recommendations, which in turn followed this Committee's extensive examination of the issue.<sup>168</sup> This fact may be relevant to the third step in the "democratic necessity" test espoused by the ECHR, namely the granting of a "margin of appreciation" to Member States when deciding on what limits it is appropriate to place on freedom of expression.<sup>169</sup> The idea behind the granting of a margin of appreciation is that national decision-makers are usually better placed to resolve policy issues for a particular country than is a court sitting in Strasbourg. In a similar way, British courts may conclude that Parliament, acting in accordance with the considered, non-partisan advice of the Neill Committee, is in a better position to decide how an appropriate balance should be struck between a third party's freedom to spend on expressing its views on matters of public importance, and an election process in which each participant is guaranteed a measure of equality.

As such, domestic courts ought to be cautious about declaring that the imposition of spending limits on third party issue advocacy cannot be shown to be "necessary in a democratic society." The criticisms levelled by Gearty against the ECHR's decision in *Bowman* would seem to be particularly apposite here.<sup>170</sup> Because Parliament has carefully considered the issues involved, and has chosen to legislate in accordance with the advice of a non-partisan and deliberative body of expert opinion, the courts ought not to second guess the legislature's determination as to the appropriateness of imposing spending limits on third party issue advocacy. However, the lack of clarity as to which types of expenditures these limits apply to may be more problematic. The vagueness involved in the test for deciding whether some category of speech is subject to the expenditure limits may lead the courts to declare that the limits on third party expressive rights have not been "prescribed by law" in accordance with Ar-

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168. See *supra* notes 89-117 and accompanying text. See also Ewing, *supra* note 103.

169. See NEILL REPORT, *supra* note 42, at 130.

170. See Garrity, *supra* note 68, at 390-95 and accompanying text.

title 10(2) of the Convention.<sup>171</sup> If so, the courts would in essence be saying to Parliament: “[W]hile you may choose to limit third party spending on election issues if you want to, you have to more carefully and precisely define the sort of speech that is covered by these limits so that the participants in the electoral process can know in advance whether their expression will be subject to the spending limits in the legislation.”<sup>172</sup>

### *C. Limits on the “Coordination” of Third Party Spending*

There is a second feature of the new regulatory structure that looks likely to exercise the courts, due to its potential impact on individual expressive rights. Under PERA, any expenditure incurred by a third party “in pursuance of a plan or other arrangement [with another third party] . . . which can reasonably be regarded as intended to achieve a common purpose” of promoting some political party’s election prospects is deemed to be an expenditure incurred by all of those involved in the plan.<sup>173</sup> For the purposes of this rule the statutory definition of a “third party” includes a political party.<sup>174</sup> Therefore, if a third party and a political party are found to have entered into a “plan or other arrangement,” under which the third party will spend money on supporting the election prospects of that political party, then the political party must also count that third party’s spending towards the total amount of expenditures it may make on the election. The reason for having such a rule on collusive relationships is to prevent third parties (and political parties) from coordinating their expenditures with other entities, thereby preventing them from attempting to avoid the statutory

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171. See *supra* notes 158-161 and accompanying text.

172. Compare Gearty, *supra* note 68, at 390-95, with *Harper v. Canada* (A.G.), 2001 CarswellAlta 1063, at ¶ 208, and *Federal Election Comm’n v. Christian Action Network, Inc.*, 110 F.3d 1049, 1064 (4th Cir. 1997) (“[T]he [U.S.] Supreme Court has unambiguously held that the First Amendment forbids the regulation of our political speech under such indeterminate standards. . . . To allow the government’s power to be brought to bear on less, would effectively be to dispossess . . . citizens of their fundamental right to engage in the very kind of political issue advocacy the First Amendment was intended to protect- as this case well confirms.”).

173. PERA § 94(6)(b).

174. *Id.* § 85(8).

spending limits by spreading their total expenditures amongst a number of different entities.<sup>175</sup>

However, a side-effect of restraining such relationships between third parties and political parties is that any such restriction may have the incidental effect of "heavily burden[ing] the common, probably necessary, communications between candidates and constituencies during an election campaign."<sup>176</sup> In a liberal-representative democracy, free contact between the political parties and the various groups who represent the diverse concerns of voters is essential if political parties are to be able to properly perform their role as coordinators and advocates of public policy proposals.<sup>177</sup> What is more, it is very hard to draw a bright line between an issue of "policy" and a "campaign" issue, as has been seen in the preceding discussion. A political party's decision on when to take a stand, where to stand, and how to communicate their stand on an issue of public policy will often form integral parts of its overall strategy to win public support. Before making these important strategic decisions, a political party may well want to listen to the concerns of sympathetic constituencies, and find out in turn what actions these groups are proposing to take in relation to the issues. But if by engaging in such communications a political party runs the risk of being deemed to have entered into a "plan or other arrangement" as per PERA, and thus has to adopt the expenditures made by some third party as a part of the limited funds it may spend on campaigning, then political parties may become cautious of having any contact with third parties. The chill this would place on the communications between political parties and third parties is highly undesirable from the point of view of the democratic process.

A refinement of the SPUC example considered ear-

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175. Again, this is an issue the U.S. has struggled with in seeking to distinguish between truly "independent" expenditures and those which are "coordinated" with a candidate. *See* Geddis, *supra* note 13, at 43-52.

176. *Federal Election Comm'n v. Christian Coalition*, 52 F. Supp. 2d 45, 90 (D.D.C. 1999).

177. For the claim that the integrative role of political parties makes them "primus inter pares" amongst the institutions of civil society, *see* Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 823-27 (2000).

lier may serve to illuminate the problem. Let us say that prior to embarking upon its spending campaign, SPUC approaches each of the political parties, informs all of them of its spending plans, and urges them to also adopt and promote a policy of outlawing abortion. One of the political parties states that it agrees with this policy, expresses its support for SPUC's proposed advertising, and makes it clear that it would seek to use the issue to solicit votes in a future election campaign; provided there is enough public interest to make it worthwhile politically. SPUC then begins its advertising campaign, which succeeds in drawing the public's attention to the issue. As a result, when the snap election is called, the political party decides to capitalise on this public interest by making its policy on abortion a more prominent part of its campaign.

The question that arises under PERA is whether this sharing of information with regards to SPUC's spending plans constitutes the entering into a "plan or other arrangement" to make expenditures on messages that appear to a reasonable observer to be intended to promote the political party's election chances.<sup>178</sup> And there are arguments for taking the view that it does meet this test. The net effect of the communication between SPUC and the political party is that both become aware of the proposed strategy of the other, and both have established that any spending on the abortion issue could be to their mutual gain. SPUC discovered that there was an organised electoral vehicle that was prepared to compete for public power on an anti-abortion platform, should SPUC be able to create enough public interest to make it worth the party's while to do so. In turn, the political party found out that SPUC was intending to try and arouse public interest in the abortion issue, that this spending would represent a likely £1 million boost to its election campaign.<sup>179</sup> Given that the communications between them revealed this mutual benefit, perhaps the political party at issue ought to be required to adopt SPUC's spending as a part of its own (limited) election expenditures. After all, to allow SPUC's spending to stand independent of the political party's would be to, in effect, add

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178. PERA § 94(6)(b).

179. This is the statutory limit on how much a third party may make on "controlled expenditures." See *supra* note 111.

£1 million to the total amount that can be spent on trying to get the party elected to power. Political parties and third parties could then make use of this loophole in the regulatory system to evade the spending limits altogether, through reaching tacit understandings regarding the spending that the third party will undertake, and how this will buttress the political party's election campaign.

That being said, it may be argued in response that SPUC should be free to communicate with the political parties on all matters of public policy with which it is concerned. In a democracy, the very purpose (and value) of an organisation like SPUC lies in its role in lobbying for policy change.<sup>180</sup> And the political parties represent an important avenue for achieving such change, in that they are organisations through which the diverse voices and interests of social actors can be transmitted into the decision-making processes of the state.<sup>181</sup> At the risk of lapsing into jargon, the political parties provide a means by which the mechanisms of public opinion formation can act to discipline and restrain the organs of public will formation.<sup>182</sup> However, should the political parties come to fear that a consequence of engaging in communications with a third party is that at election time they might have to adopt that third party's spending as their own, then they will be hesitant about entering into such dialogue. If the law were to put such a potential blockage in the way of the free flow of information between groups like SPUC and political parties, then it risks isolating the political parties as institutions from the full glare of public opinion, and hampering their ability to formulate policy that properly represents the preferences of voters.

Unfortunately, PERA provides no further guidance

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180. See Dietrich Rueschemeyer, *The Self-Organisation of Society and Democratic Rule: Specifying the Relationship*, in PARTICIPATION AND DEMOCRACY EAST AND WEST: COMPARISONS AND INTERPRETATIONS 9 (Dietrich Rueschemeyer et al. eds., 1998).

181. See Samuel Issacharoff and Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999); Nancy L. Rosenblum, *Primus Inter Pares: Political Parties and Civil Society*, 75 CHI.-KENT L. REV. 493 (2000).

182. See JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

to help us resolve the issue. Therefore, in the final analysis it will be up to the courts to define the degree of collusion that is required to be shown between a political party and a third party before their dealings will qualify as "a plan or other arrangement."<sup>183</sup> In making this determination, British domestic courts will again have to read the legislative provision through the lens of the HRA, and thereby endeavour to give the test an interpretation that is consistent with the rights and freedoms contained in the Convention. The courts will thus be required to take particular notice of the right to freedom of expression contained in Article 10,<sup>184</sup> as well as the right to freedom of association contained in Article 11,<sup>185</sup> and the effect that any interpretation of the "plan or other arrangement" test will have on these rights. As such, the decision as to how this test should be applied will pose much the same challenges to the courts as has been described previously in Part V.B.<sup>186</sup> Given the potential imposition that the legislation places on the expressive and associative rights of both political parties and third parties, can the court find an interpretation for the legislative test that will enable it to be precise enough to be "prescribed by law," and proportionate enough in its application so as to be "necessary in a democratic society?"<sup>187</sup>

Rather than engage in any further speculation on how the courts may choose to approach this problem, the author wishes simply to note that whatever approach the courts take will also involve them in a decision as to what represents an appropriate relationship between the par-

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183. PERA § 94(6)(b).

184. See Convention, *supra* note 48, art. 10.

185. See *id.* art. 11. Article 11 of the Convention reads:

(1) Everyone has the right of peaceful assembly and to freedom of association with others. . . .

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society, in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the rights and freedoms of others.

*Id.*

186. See *supra* notes 149-173 and accompanying text.

187. See *supra* notes 158, 162.



ticipants in the U.K. electoral processes. If the courts should interpret the "plan or other arrangement" test broadly, so as to cover the kinds of information sharing in the SPUC example, then the courts would in essence be deciding that it is desirable for the activities of third parties and political parties to be kept separate so as to prevent them from gaining an unfair advantage by acting in unison. Such an interpretation would represent a conclusion on the courts' part that preventing political actors from forming "cartels," which could threaten the equality amongst political participants that the spending limits are designed to create, is more important than allowing those political actors to freely exchange information about their policy positions and proposed future courses of action.

However, should the courts give the test a narrower interpretation, for example, if they should read it as requiring some explicit collusion between a political party and a third party which is designed solely to evade the legislative spending limits, then the courts would be deciding that it is more desirable for third parties and political parties to engage in a free and open dialogue about their policy proposals and future actions than it is to close off a potential loophole in the spending limits. This approach would reflect a view of the electoral system in which the free flow of information between electoral participants is considered more important than the possibility that some set of participants will gain an advantage over others by acting in unison to promote their interests in the electoral process. Under such a view, the political parties and those third parties that agree with their positions should be left free to discuss, refine and promote those commonly shared policy issues. The point to be noted here is simply that whichever interpretation the courts take, it will represent a choice by the judiciary as an institutional body as to the rules that are the most appropriate to shape and govern the United Kingdom's electoral processes.

## VI. CONCLUSION

In light of these ambiguities in the new regulatory framework, as set up by PERA, the debate over the form that the legal rules limiting third party expenditures on the British election process ought to take will likely continue for some time yet. While the new legislation is sourced in a general commitment on the part of Parliament to an egalitarian, "fairness" based vision of the election process (in keeping with the recommendations of the Neill Report), it is still possible to identify some challenges arising from the claim that participants in the electoral process should be free to use their monetary resources as they choose. On the one hand, the egalitarian approach underpinning the legislation calls for the voting process to be protected from the influence of unequal holdings of wealth, so as to maintain the conditions for equal civic participation and self-rule. But any normative definition of democracy also contains a demand that there be genuine and free debate about public issues in order to allow individual voters to reach informed opinions about the policy courses that the current government is pursuing, as well as assessing any alternative policy proposals. It seems a dangerously Orwellian idea that the government ought to be permitted to regulate every aspect of this process of public opinion formation solely because it may have some consequent impact on the election process. Here, the claims of political liberty, with their appeal to the unconstrained "marketplace of ideas,"<sup>188</sup> come into their own.

Trying to reach an appropriate balance between these two concerns will involve a series of contestable choices as to how important each of the particular values is considered to be in the U.K.'s electoral process, as well as the concrete regulatory means by which the two values are to be traded off. Because these choices are so contestable, it may be predicted that the compromise reached with the passage of PERA will in turn be the subject of further public debate and challenge. In particular, the new role that has been given to the courts by the HRA,

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188. RODNEY A. SMOLLA, *FREEDOM OF SPEECH IN AN OPEN SOCIETY* 221 (1992).

that of guarding the rights and freedoms of Britons,<sup>189</sup> means that the domestic courts will take a greater part in deciding these sorts of issues. They may do so covertly, by giving the legislative provisions an interpretation that the courts feel is required to make them consistent with the rights and freedoms contained in the Convention. Or they may do so overtly, by declaring that the provisions simply cannot be reconciled with these rights and freedoms and thereby placing political pressure upon the government to alter the legislative framework. In either case, such decisions will reflect the courts' opinion over the correct way that the electoral system should be viewed, and the appropriate rules that ought to be applied to it in order to balance the competing values of equality and liberty.

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189. See *supra* Part V.A.