

Electoral Finance Reform in New Zealand: A Need for a Conceptual Framework

Introduction

Democracies include arrangements which facilitate collective or social decision making in the formal public arena (Cohen, 2001, p.49; Geddis, 2003, p.53).¹

These arrangements, established and supported by legal systems, comprise various ‘institutions, practices, and procedures’ (Geddis, 2003, p.53). They include voting rights, rules for the organisation of elections (voter eligibility, electoral or representation systems, electoral finance) and the framework for decision making by the legislature and executive (Cohen, 2001, p.49).

The electoral system plays an important role in a well-functioning and legitimate democracy. Elections provide a pivotal opportunity for the members of a democracy to exercise collective decision making. Ideally, the outcomes of elections, and the social decisions that subsequently flow from them, should be accepted by the citizens as binding. That is, these outcomes and decisions, which affect all citizens, should be authoritative and enforceable. For reasonable citizens to consider themselves necessarily bound

requires that they be convinced that the democratic process that produces such decisions is legitimate (Geddis, 2001, pp.11-12).

An important feature of the democratic process is the indispensable and permeating role of money (Ewing and Issacharoff, 2006, p.1). As the 1986 royal commission on New Zealand’s electoral system commented, ‘[i]t is perfectly legitimate and, indeed, highly desirable that those interested in the political process raise and spend money to further their political objectives’ (Royal Commission on the Electoral System, 1986, p.183). Money is, however, an important determinant of political power (Alexander, 1989, p.10). Its prevalence and importance in the democratic process raises public

concerns about whether those funding the process are able to exert inappropriate or disproportionate political influence, thereby undermining the democratic ethos (Geddis, 2001, p.6). The familiar aphorism ‘he who pays the piper calls the tune’ alerts us to this potentiality. In short, money has the ability to make a lie of the democratic slogan ‘rule of the people, by the people, and for the people’ (ibid.).

To mitigate the ‘toxic consequences’ (Geddis, 2001, p.6) of money in the political process, many democracies have introduced some form of regulation for political finance (see, for instance, Alexander, 1989; Alexander and Shiratori, 1994; Ewing and Issacharoff, 2006; Williams, 2000). A well-designed and reliable regulatory regime importantly

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contributes to the legitimacy of the democratic process and, hence, to the binding nature of high-level social decisions that emanate from it.

The National-led government is currently reviewing the regulation of electoral finance.² Consistent with the discussion above, the governmental review has stated: 'It is generally agreed that New Zealand needs to regulate electoral campaigning and political party funding so that we can have confidence in the outcome of parliamentary elections and the integrity of our democratic system' (Ministry of Justice 2009b, p.6).³

But this statement prompts the fundamental question of what particular principles and values characterise and inform the democratic system whose integrity is to be protected. These principles and values in turn should help to determine the structural composition of the relevant democracy in terms of the form of the particular set of political structures, institutions, practices and procedures adopted. Geddis explains this as follows:

Adopting a stance on the meaning of democracy and the nature of the voting system required to produce legitimate and binding social decisions has practical implications for the way in which actual, real world election practices should reflect these ideals. It involves making a commitment to an interlocking set of argument clusters. These interdependent claims about the world that both support and rely on each other for their validity relate to the function of electoral speech in a democracy, the appropriate part the government should play in setting up the rules of electoral debate, and the role of voters and candidates in the democratic process. These commitments support the legal rules that are applied to regulating the activity of different actors in the

election contest. Therefore, we find that any debate over how the electoral process should be constructed inevitably involves having to engage in deeper disputes over the fundamental nature and purposes of democracy. (Geddis, 2001, p.10)

This article has two principal objectives. First, I claim that the current governmental review of electoral finance is seriously deficient in that it has failed to probe adequately and define the philosophical and ethical foundations for regulatory reform. The review has proposed seven 'guiding principles'. However, these have been weakly developed and presented without an in-depth analysis of the kind indicated by Geddis. Further, the review to date has not shown how the guiding principles have been used to evaluate and justify the various proposed options for the regulatory system. There is thus a risk that New Zealand may end up with a regulatory system that is inconsistent across all aspects of electoral finance and that fails to measure up to the democratic ideals that are most important to its citizens.

Second, as a way of addressing such deficiencies, I discuss two alternative conceptual frameworks for viewing the electoral process: the aggregative vision and the conditional vision. In discussing the conditional vision, I introduce and defend Joshua Cohen's principle of political equality (Cohen, 2001) as representing democratic ideals that are compatible with the conditional vision.

New Zealand's review of electoral finance *Background*

The present governmental review of electoral finance follows the repeal in March 2009 of the controversial Electoral Finance Act 2007 enacted by the previous, Labour-led government.⁴ That act was responsible for a number of sweeping regulatory changes. The most

controversial change was the introduction of significantly tighter regulation of third parties – that is, non-candidate and non-party political actors – wanting to influence election outcomes by running parallel campaigns.⁵ This included:

- requiring a person to apply to be 'listed' as a third party with the Electoral Commission if they anticipated spending more than \$1,000 on advertisements relating to a constituency candidate or more than \$12,000 on election advertisements in total;
- requiring a listed third party to appoint a financial agent;
- limiting a listed third party's election expenses during a regulated election period to a maximum amount of \$4,000 for election advertisements relating to a constituency candidate, and to a maximum amount of \$120,000 for any other purpose; and
- requiring a listed third party and the Electoral Commission to disclose information about certain donations received and election expenses incurred by the third party.

Furthermore, the true regulatory burden on listed third parties was accentuated due to the Electoral Finance Act potentially, and in all likelihood, extending the regulated election period substantially beyond the previously regulated period of three months immediately prior to polling day (which has since been reinstated in the amended Electoral Act 1993).⁶ As a result, for the 2008 general election the regulated period was more than 10 months.

The regulation of third parties under the Electoral Finance Act was widely criticised as representing a serious affront to citizens' democratic right to free speech.⁷ Much of the political scrummaging concerning the act was therefore centred on its implications for the right of third parties to engage financially in the electoral process, and this was the major cause of its ultimate rejection. Given this experience, the regulation of third parties is likely to be the most politically sensitive issue in the current governmental review.

The proposed guiding principles

The National-led government's

discussion paper identifies seven guiding principles: equity; freedom of expression; participation; transparency; accountability; legitimacy; and clarity (Ministry of Justice, 2009c, p.11). The stated aim is for these principles to 'both guide the development of electoral finance law and be incorporated in the purpose section of the new legislation' (ibid.). The discussion paper does not, however, elaborate on the principles. Instead, readers are directed to the government's issues paper (Ministry of Justice 2009b, pp.10-11) for further information on the first six principles (the seventh principle, relating to clarity, was added at the discussion paper stage).

The guiding principles, as formulated, do not offer a robust, coherent framework for evaluating different options for electoral reform. In particular, there appears to have been no attempt made to date either to explore or to understand the intrinsic meaning and role of democracy in New Zealand. The development of an electoral process, including its foundational principles, ideally should take place in the context of discussion about the relevant democratic ideals and their implications for arrangements needed to support social decisions which will be accepted by the citizenry as legitimate and binding.

Without a firm philosophical or ethical foundation, it is very difficult to have an educated sense of the precise meanings of relevant democratic principles, how they should be weighted and how any conflicts between them should be resolved. The inevitable tension that arises in the democratic process between freedom of expression and equal opportunities for effective political influence is a prime example here.⁸ As a result, the immediate concern is that electoral finance reform will fail to reflect New Zealand's commitment to important democratic values.

Application of the guiding principles

The discussion paper explains that: 'The use of guiding principles is helpful when reviewing complex and detailed matters such as electoral finance rules. Such principles can provide direction and ensure comprehensive improvements to the law' (Ministry of Justice, 2009c, p.11). However, leaving aside the problems with the guiding principles discussed above,

there is no evidence in the discussion paper to indicate how these principles, or any other criteria, have been applied in developing and evaluating alternative options for electoral finance reform.

For instance, consider the two options proposed for the regulation of spending by third parties on elections (Ministry of Justice, 2009c, pp.32-5). One option is to retain the status quo. This option therefore enshrines the present, largely laissez-faire approach to the regulation of third parties. It implicitly assigns an overwhelming importance to third parties' right to freedom of expression, while the principle of equity seems to have very little weighting. As the discussion paper does not evaluate the option against the guiding principles, it is not clear on what basis it has been proposed or how any trade-offs between the principles have been resolved. Moreover, the option would yield an internally inconsistent and inequitable approach within the regulatory system. Compared to third parties, the spending of political parties and constituency candidates would be tightly restricted during an election period. There is no obvious principles-based explanation provided for why third parties should be largely exempt from limits on their election activities while direct electoral participants are, by comparison, tightly controlled.⁹

Under the other option – referred to as the 'proportionate regulatory scheme' – third parties intending to spend on election activities above some set threshold would first need to register with the Electoral Commission. Each registered third party would then be limited in the overall amount they could spend on election activities during a regulated election period. This option is differentiated from the regulatory scheme for third parties under the Electoral Finance Act 2007 (see above) because its

design would 'be weighted in favour of freedom of expression, and be simple and easy to comply with' (Ministry of Justice, 2009c, pp.33, 34). Although the detailed design of the option is not provided, the discussion paper suggests some possible key features. These include third parties, while being required to identify themselves in any election advertisements, not having to account for and disclose the sources of any political donations they receive (ibid., pp.33, 35).

The proportionate regulatory scheme appears to be considerably more sympathetic to the principle of equity. It implicitly recognises that money is an essential resource for political activity in democratic states, and that the ability to control resources contributes to political influence. As such, the option implies the need for a regulatory system to impose some limits on the use of resources by wealthier citizens and, hence, curtail political speech. However, given that we are not yet informed about the finer details of the scheme, it is not possible to provide a more specific assessment of the extent to which a principle of equity may be satisfied. Moreover, the caveat that the scheme should 'be weighted in favour of freedom of expression' stands out ominously. Once again, the discussion paper does not substantiate – by reference to the guiding principles, or any other criteria – why freedom of expression should be given higher consideration. Not presenting any reasoning diminishes the option's credibility. Additionally, the possible watering down of the scheme by not requiring third parties to account for and disclose political donations is similarly concerning. This would render the scheme largely ineffective. It is easy to imagine third-party front groups or organisations being formed to serve simply as repositories for political contributions by those seeking to influence the outcome

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of an election whilst protecting their anonymity.

Conceptual frameworks for electoral finance reform

In this section I address the issue of a conceptual framework appropriate to electoral finance reform. I begin by discussing two different visions of the electoral process: the *aggregative vision* and the *conditional vision* (Geddis, 2001). These two visions or models broadly cover the debate on electoral finance in liberal democracies. Each takes a different stance on the meaning of democracy and the preconditions for democratic processes. The aggregative vision supports freedom of expression as the paramount democratic principle, which is to be vigorously defended. By contrast, the conditional vision places less emphasis on freedom of expression, supporting a more egalitarian view of elections. As part of discussing the conditional vision, I introduce Cohen's principle of political equality (Cohen, 2001). Finally, I defend this principle and conclude that it provides a robust conceptual framework for considering New Zealand's electoral finance reform.

Aggregative vision

The fundamental assertion of the aggregative vision is that the *raison d'être* of the electoral process is to sum up (or aggregate) the votes representing the preferences of self-interested citizens residing in a pluralistic society, and nothing more. Put simply, political power is then given to those who have the support of the majority of voters (Geddis, 2001, pp.7, 13). Accordingly, the aggregative vision might be viewed by some as supporting a fairly crude or unsophisticated mechanism for collective or social decision making at the highest level of society.

Freedom of expression in the electoral process is upheld as being sacrosanct

and generally not to be compromised by other democratic ideals or, indeed, any other considerations. The United States regulation of electoral finance epitomises this approach. In fact, restricting political speech in the United States for the purpose of curtailing freedom of expression is deemed by the courts to be unconstitutional. Significantly, then, the aggregative vision is opposed to the notion of fairness as an overriding value in the electoral process. Instead, citizens appear as free combatants or competitors in the democratic process, where they tussle against each other, with few constraints, to form or support a majority that will best serve their self-interests. While participation in the process is guaranteed to individuals through formal or negative rights that proscribe their exclusion from the process, citizens are not guaranteed substantive or positive rights entitling them to meaningfully or efficaciously engage. Therefore, under the aggregative model, one person one vote, a competitive politics in a 'marketplace of ideas' that is 'unruly, contentious, and bare-knuckled', and the absence of any significant limits on freedom of expression represent the hallmark of a legitimate electoral process (Geddis, 2001, pp.12-15).

The 'marketplace of ideas' belief assumes that curbing speech harms democracy in two ways. First, it reduces the quantity of information available to voters for selecting the optimal outcome to maximise their utility. Second, it results in unjustifiably favouring certain social interests among the myriad of social interests when, as assumed under the aggregative vision, there is no such entity as the 'common good'. These arguments provide the justification for the state not intervening in the electoral process except to ensure that the aggregate preferences of voters are accurately determined (Geddis, 2001, p.16).

Conditional vision

In contrast to the aggregative vision, the conditional vision demands from the electoral process much more than simply counting voters' preferences. It also expects certain standards and values that attribute to the electoral process a sense of legitimacy – based on some notion of equal opportunity for participation – felt by *all* members of the electorate (Geddis, 2001, p.7). It therefore presents 'a "voting-plus" account of why an election is considered to form a legitimate means of allocating public power. Such an account requires that we broaden our concept of an election to encompass more than an opportunity to cast a ballot for or against some particular individual or issue' (Geddis, 2003, p.60). Hence, bare-knuckled competition – of the free-market kind – in the electorate, together with a voting system to determine majority rule, is not the *sine qua non* under the conditional vision.

As a consequence, the structure of the electoral process and whether it is regarded by voters as legitimate is imperative. If the electoral process is so regarded, social decisions produced by it, though ultimately determined by majority vote, are recognised and accepted by the collective as binding, whatever the actual outcomes of voting (Geddis, 2001, p.20). The spotlight, then, is acutely targeted on 'a wider process of public decision-making, comprised of its own particular set of rules, institutions, and practices. These rules, institutions, and practices are in turn embedded in, and informed by, a broader "vision" of democracy' (Geddis, 2003, p.60).

There are, however, implications for the design of the regulatory framework around the electoral process. The framework must ensure that all reasonable participants can be satisfied that the electoral process is fair and just because it gives all actors the opportunity for effective political participation (Geddis, 2001, p.17; Rawls, 1999, pp.197-8). Moreover, to ensure its own legitimacy, the state must level the playing field so that no political actor is in a position to unfairly influence the outcome (Geddis, 2003, p.70). The electoral processes and regulation of electoral finance in Canada and Britain exemplify the conditional vision.

A principle of political equality

Cohen's principle of political equality, which fits within the conditional vision, prescribes norms or standards applicable to arrangements in a democratic society for making high-level binding social decisions.¹⁰ According to Cohen, the principle 'applies to the framework for making authoritative and enforceable collective decisions and specifies, inter alia, the system of rights and opportunities for free and equal members to exercise political influence over decisions with which they are expected to comply and that are made in their name'. (Cohen, 2001, p.49)

The principle of political equality is stated in three parts:

- 1 Equal rights of participation, including rights of voting, association, and office-holding, as well as rights of political expression, with a strong presumption against restrictions on the content or viewpoint of expression, and against restrictions that are unduly burdensome to some individuals or groups;
- 2 A strong presumption in favor of *equally weighted votes*; and
- 3 Equal opportunities for effective political influence. This last requirement...condemns inequalities in opportunities for holding office and influencing political decisions (by influencing the outcomes of elections, the positions of candidates, and the conduct of inter-election legislative and administrative decision making).¹¹ (ibid.)

While there is an assumption that the principle of political equality should apply in its entirety to arrangements relevant to democratic decision making, in any given situation there may be conflict between and amongst the norms underlying the principle (ibid.). Where such tension arises, the implementation of the principle will require a weighting of the three norms:

the force of saying that arrangements for making binding collective decisions are to accommodate all three components is that, when conflicts emerge, we can't say a priori which

value is to give way. *In particular, if we accept this three-part principle then we allow that we may need to regulate speech to avoid certain kinds of inequalities in opportunities for political influence.* (ibid., pp.49-50, emphasis added)

The third norm of the principle of political equality – equal opportunities for effective political influence – mirrors the well-known standard of equality of opportunity (ibid., p.50).¹² This standard requires that 'one person ought not to have greater chances than another to attain a desirable position because of some quality that is irrelevant to performance in the position' (ibid.). Cohen refers to this as a statement of the '*concept of equal opportunity*', noting that 'different conceptions of equal opportunity are distinguished by the interpretations they give to "irrelevant to performance"' (ibid.). Using Rawls' conception of equal opportunity, 'irrelevant to performance in the position' means that the only factors that ought to be considered relevant to attaining positions of interest are a person's motivation to succeed and their ability to perform in the position (ibid.; Rawls, 1999, p.197).

In the domain of politics, 'the relevant position is *active citizen* in the formal arrangements of binding collective decision making' (Cohen, 2001, p.50). Those who are equally motivated and able to participate as active citizens in the formal arrangements of binding collective decision making should have identical chances to wield influence (ibid.). In particular, this conception of equal opportunity requires that economic status be excluded as a relevant factor in the electoral process and that political finance be regulated if the legitimacy of the democratic process is to obtain (Geddis, 2001, p.20; Rawls, 1999, pp.197-8).

In defence of the principle of political equality

A significant argument for the view that the government should have limited involvement in the electoral process and there should be a right to unrestricted political speech (the aggregative vision) emerges from the belief that curtailing freedom of expression strikes at the heart of democracy because it disengages citizens from the democratic process (Cohen, 2001, pp.69-70). Crucial to this viewpoint is the notion of the inherent role of *individual responsibility* in a democracy. Individual responsibility involves each person having the right to decide for him or herself how much information they need in the democratic process and whether the information is reliable (ibid., p.70). This contingency of individual political responsibility implies that restricting the quantity of speech in the process of collective decision making is antithetical to a proper and fundamental conception of democracy.

Although persuasive, this argument may be challenged by applying moral reasoning which pits it squarely against the norm of equal opportunities for political influence. Central to this counter-argument is the question of how citizens ought to be properly regarded within the democratic process (Cohen, 2001, p.72). The critical analysis begins by observing that the argument against restriction of free speech adopts a narrow view of the citizen's role in a democracy (and, hence, a narrow conception of democracy itself). Consistent with the elite theories of democracy, citizens' interests are prioritised on the basis that they can be met entirely through their role as members of an audience. Citizens are an audience absorbing the messages of elite political competitors, rather than political actors constructively participating in the political process by contributing to the content (ibid.).¹³

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An alternative view – supported by Cohen as a more accurate account of political sociology – casts citizens as having a substantially more expansive role in the democratic process. This view leads naturally to a broader conception of democracy. Citizens are not only an audience for elite political actors, but also bona fide participants in the democratic process, expressing themselves through speech and action. They are seen more sanguinely as capable, if they wish, of effectively influencing political discourse (Cohen, 2001, p.72; Geddis, 2001, p.20).

This account of political sociology was supported by Hannah Arendt. Arendt asserted that human plurality is the basic condition of both action and speech (Arendt, 1998, pp.7, 175). And it is through speech and action that human beings have the means to expose their distinctness (ibid., p.176). Moreover, the initiative of speech and action is inseparable from what it means to be human (ibid.). But this view of human beings as both speakers and actors in a pluralistic society requires citizens to be granted equal opportunities for effective political influence.

Arendt reminds us of another important consideration in thinking about the normative ideal of democracy. Participatory democracy is vital in her interpretation of the concept of power and ongoing survival of the public realm. For Arendt the public realm is held together by the dynamic of action and speech – the prerequisite for all forms of political organisation. And action and speech are made possible only by the proximity of human beings in the *space of appearance* (ibid., pp.200-1). The danger for democracy is disappearance of human power – presenting as collective action and speech – leading to the destruction of political communities, and democracy itself. Hence, Thomas Jefferson ‘had at least a foreboding of how dangerous it might be to allow the people a share in public power without providing them at the same time with more public space than the ballot box and with more opportunity to make their voices heard in public than election day’ (Arendt, 2006, p.245).

As well as being compatible with a wider conception of democracy, a goal of equalising opportunities for political

influence is supported by principles of justice. John Rawls and Michael Walzer are particularly influential here. Rawls (1999, p.197) believed that measures are needed to safeguard ‘a fair opportunity to take part in and to influence the political process’. Importantly for electoral finance regulation, Rawls considered that the familiar democratic principle ‘one person one vote’ may not provide enough protection against the unfair exclusion of some members of society from the political forum because of the political system’s reliance on private sector funding.¹⁴ For Rawls, a just constitutional system – that is, one based on the fulfilment of the principle of participation – is prevented when the demands of the prevailing interests overpower the political forum (ibid., p.199).

Walzer’s proposed regime of complex equality limits the mobility of each social good to its own distributive sphere. This implies that the acquisition of a social good should not lead to a situation of dominance: that is, the possession of one social good belonging to its own distributive sphere cannot be converted into dominance over other social goods attached to their respective distributive spheres. In the case of electoral finance, this means that citizen A’s wealth – acquired, say, in the sphere of the market economy – should not be allowed to become a dominant good such that it provides him or her with an advantage over citizen B in the sphere of politics (Walzer, 1983, p.298). According to Walzer’s thesis, this stipulates democracy as the system of social organisation where politics is the domain of action and speech. The political sphere is therefore immune to social goods that rightly belong to, and whose influences are restricted within, other distributive spheres: ‘Citizens come into the forum with nothing but their arguments. All non-political goods have to be deposited outside: weapons and wallets, titles and degrees’. This represents ‘complex equality in the political sphere’: the opportunity for all citizens to participate in the political forum which affects their lives is equalised (ibid., pp.304, 310).

The ideal of a broad-based democracy is jeopardised by the potential for wealth to influence politics. Walzer (1983, p.310)

observed that the deprivation of power in the United States is largely caused by the controlling influence of money in the sphere of politics. Similarly, Geddis (2001, pp.6, 20) noted that a significant, and most unjustifiable, reason for inequalities in the power of social actors is the relatively higher wealth possessed by some participants, and suggested that this is a major concern for democracy. And Alexander and Shiratori (1994, p.1) have written about the conversion of economic power into political power by those who are more economically privileged. The repercussions for healthy democracy (and, hence, for citizenship), both immediate and generational, are damaging, as Walzer warns:

The endless spectacle of property/power, the political success story of the rich, enacted and re-enacted on every social stage, has over time a deep and pervasive effect. Citizens without money come to share a profound conviction that politics offers them no hope at all. This is a kind of practical knowledge that they learn from experience and pass on to their children. With it comes passivity, deference, and resentment. (Walzer, 1983, pp.310-11)

Conclusion

The current governmental review of electoral finance regulation in New Zealand is taking place in a philosophical and ethical vacuum. This calls for taking a position on the meaning of democracy and the nature of the corresponding electoral process needed to ensure that social decisions made at the highest level of society are perceived by the citizenry as being legitimate and binding. In the absence of such a framework, there is a risk that the resulting regulation will not be consistent with the democratic ideals which most New Zealanders uphold. Further, there is the likelihood that the reform will not be internally consistent and equitable across all aspects of electoral finance, or across all participants in the democratic process.

The aggregative and conditional visions of the electoral process provide two opposed conceptual frameworks for electoral finance reform. As discussed,

Cohen's principle of political equality, which fits within the conditional vision, is compatible with realising the fullest potential of democracy, including the potentiality of all citizens to meaningfully engage as actors in the electoral process. Moreover, it is cognisant of principles of justice. Further, the principle of political equality is consistent with the New Zealand Bill of Rights Act 1990, which provides that '[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form' but that this right may be limited where doing so 'can be demonstrably justified in a free and democratic society'.¹⁵

Implementing the principle of political equality, in particular the norm of equal opportunities for political influence, implies that the role of money in the electoral process should be tightly regulated, despite the effect of reducing the quantity of political speech. In particular, it requires proper and thoroughgoing regulation of the expenditures of third parties, as is the case in Canada and Britain.

1 I would like to thank Jonathan Boston, Andrew Geddis and Paul Harris for their helpful comments on earlier versions of this article.

- 2 The governmental review was launched on 1 April 2009 with the release of a scope paper (Ministry of Justice, 2009a). This was followed by an issues paper released for consultation on 22 May 2009 (Ministry of Justice, 2009b). A discussion paper containing the government's proposals was then released for consultation on 28 September (Ministry of Justice, 2009c). The final part of the review – the legislative stage – is now under way. New electoral finance law is expected to be passed by the end of 2010 to take effect in time for the 2011 general election.
- 3 This is essentially reiterated in the foreword to the issues paper (Ministry of Justice, 2009b, p.2), where the minister of justice, Simon Power, wrote: 'Electoral finance law is central to the integrity of New Zealand's democratic system.' The minister's statement is repeated in his foreword in the discussion paper (Ministry of Justice, 2009c, p.3).
- 4 The current (interim) regulatory regime for electoral finance is, once again, largely contained in the Electoral Act 1993 (as amended on 1 March 2009).
- 5 Despite the Electoral Finance Act having been repealed, many of the regulatory changes it made have been retained in the interim regime. That said, the treatment of third parties has reverted to the largely laissez-faire approach that existed before the act. This approach means that third parties are only indirectly constrained in how much they may spend on advertising that specifically supports, or appears to support, the election of a candidate or a political party. Positive advertising of this kind must first in effect be authorised by the candidate or party being promoted by the advertising and, as a result, be accounted for within the candidate's or party's election spending limit. Third parties are unrestricted in how much they may spend on other forms of parallel campaigning, such as negative ('attack') advertising or issue advocacy.
- 6 The Electoral Finance Act required that where a general election is held in the year in which Parliament is due to expire, the regulated period is the longer of the period beginning on 1 January of that year and ending with the close of polling day, or the period beginning three months before polling day and ending with the close of polling day.
- 7 It appears that anger generated by the Electoral Finance Act is slow to dissipate in some quarters, particularly in regard to the effects on the rights of third parties. For example, an editorial in a leading newspaper commented: 'Labour's Electoral Finance Act was an anti-democratic disgrace. One of its worst features was curtailing the rights of those who wanted to spend their own money throughout an entire election year in trying to gain a particular outcome' ('Caped crusader's plan flawed', *Dominion Post*, 2 October 2009, p.B4).
- 8 Ewing and Issacharoff (2006, p.7) have posed this dilemma in the form of the following question: 'Where is the ideological centre of gravity in the event of conflict?'
- 9 The lack of consistency in this regard was not lost on the 1986 Royal Commission on the Electoral System: 'In the same way that limiting spending by candidates is illogical if parties are not similarly restricted, it is illogical to limit spending by parties if other interests are not also controlled. Supporters or opponents of a party or candidate should not be able to promote their views without restriction merely by forming campaign organisations "unaffiliated" to any party or candidate contesting the election. Nor should powerful or wealthy interest groups be able to spend without restriction during an election campaign while those most directly involved are restricted' (Royal Commission on the Electoral System, 1986, p.193).
- 10 This principle is consistent with John Rawls' 'liberties of equal citizenship' (Rawls, 1999, p.173). To be sure, a principle of political equality is not the only prerequisite for ensuring that a system of collective decision making is binding. Further relevant requirements are that decisions be fundamentally just in accordance with some suitable notion of justice, and that they promote the general welfare. Nonetheless, the standards established by a principle of political equality will typically subordinate other factors, with the exception of the most basic precepts of justice (Cohen, 2001, p.49).
- 11 It may be arguable, at least prima facie, that the second part of the principle (equally weighted votes) forms a subset of the third part (equal opportunities for effective political influence). Although Cohen does not clarify this, my interpretation is that the two parts should be viewed as mutually exclusive, for the following reason. The second part is in my view equivalent to the familiar democratic notion of 'one person one vote'. However, satisfying this notion should not imply that the third part necessarily holds. For instance, unequal opportunities for effective political influence on the part of the constituents of a society due to, say, differences in the holdings of wealth, are a valid concern despite an electoral system that mandates equally weighted votes.
- 12 It also corresponds with Rawls' principle of (equal) participation (Rawls, 1999, pp.194-5).
- 13 For an early discussion of an élite theory of democracy, see Schumpeter (1987, chapter 22).
- 14 The Royal Commission on the Electoral System came to the same conclusion, noting that this requires that electoral finance should not be 'completely uncontrolled' (Royal Commission on the Electoral System, 1986, pp.7, 183).
- 15 New Zealand Bill of Rights Act 1990, sections 14 and 5.

References

- Alexander, H.E. (ed.) (1989) *Comparative Political Finance in the 1980s*, Cambridge: Cambridge University Press
- Alexander, H.E. and R. Shiratori (eds) (1994) *Comparative Political Finance Among the Democracies*, Boulder, Colorado: Westview Press
- Arendt, H. (1998) *The Human Condition*, second edition, Chicago: University of Chicago Press
- Arendt, H. (2006) *On Revolution*, New York: Penguin Books
- Cohen, J. (2001) 'Money, politics, political equality', in A. Byrne, R. Stalnaker and R. Wedgwood (eds), *Fact and Value: essays on ethics and metaphysics for Judith Jarvis Thomson*, Cambridge, Massachusetts; London: The MIT Press
- Ewing, K.D. and S. Issacharoff (eds) (2006) *Party Funding and Campaign Financing in International Perspective*, Oxford; Portland, Oregon: Hart Publishing
- Geddis, A. (2001) 'Democratic visions and third-party independent expenditures: a comparative view', *Tulane Journal of International and Comparative Law*, 9, pp.5-107
- Geddis, A. (2003) 'Three conceptions of the electoral moment', *Australian Journal of Legal Philosophy*, 28, pp.53-78
- Ministry of Justice (2009a) *Review of Electoral Campaigning and Political Party Funding: topics to be considered*, scope paper released 1 April, Wellington: Ministry of Justice
- Ministry of Justice (2009b) *Electoral Finance Reform: issues paper*, released May, Wellington: Ministry of Justice
- Ministry of Justice (2009c) *Electoral Finance Reform: proposal*, discussion paper released 28 September, Wellington: Ministry of Justice
- Rawls, J. (1999) *A Theory of Justice*, revised edition, Cambridge, Massachusetts: Harvard University Press
- Royal Commission on the Electoral System (1986) *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*, Wellington
- Schumpeter, J.A. (1987) *Capitalism, Socialism and Democracy*, sixth edition, London: Unwin Paperbacks
- Walzer, M. (1983) *Spheres of Justice: a defense of pluralism and equality*, New York: Basic Books
- Williams, R. (ed.) (2000) *Party Finance and Political Corruption*, Basingstoke: Macmillan Press