Electoral Law Reform: The Time Has Finally Come to Address Systemic Corruption

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ELECTORAL LAW REFORM: THE TIME HAS FINALLY COME TO ADDRESS SYSTEMIC CORRUPTION

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Unprecedented SFO investigations and Crown prosecutions raise the possibility that the existing framework of electoral law leaves the country vulnerable

to plutocracy —government by and for the wealthy.

The sole party in government, Labour, is presently having its political donations practices dragged through the mud in the High Court. The main opposition

party, National, finds itself in the same situation in a second case concerning even larger donations allegedly employed in a businessman’s quid pro quo

scheme to secure a royal honour. And then there’s a third case involving donations to the governing party’s last coalition partner—the one credited with

defeating policies such as a capital gains tax that would have benefitted the middle and lower classes.

The prosecution’s evidence and the

High Court’s findings

recently revealed how hundreds of thousands of dollars in donations to NZ First were hidden from the view of the party secretary, the Electoral Commission,

and, of course, the public by trustees of the NZ First Foundation. Among other things, those undisclosed donations were used to pay for the party’s fundraising

software, the party’s website, some of the party’s 2017 election expenses including rental of its campaign headquarters, and even the printing of the party’s

revised constitution.

POLITICAL FINANCING INCONGRUOUS WITH NEW ZEALAND’S REPUTATION

Credible evidence of widespread political financing irregularities certainly seems incongruous with New Zealand’s global reputation. When it comes to levels

of perceived public sector corruption, the country has been ranked best in the world sixteen times since 1995 and in the global top four every year. And

when it comes to issues of government quality, New Zealand consistently places within the World Bank’s global top ten and earns a nearly perfect rating

in The Economist’s Democracy Index.

Still, these indices and rankings are based primarily on the views of technical experts and business people—not ordinary citizens, much less the poor.

Unlike the average person on the street, these indices are not highly sensitive to legal forms of corruption referred to by such terms as “

influence markets

” and “

elite democracy

”.

SELLING ACCESS

In the decade leading up to the SFO’s investigations, for example,

Labour, National,

and

NZ First

routinely sold access to party leaders, including prime ministers and cabinet members, to

donors willing to pay sums ranging from $350 - $10,000.

Even during the SFO’s investigations,

these practices have continued

with Labour charging $1,750 to attend a conference with Jacinda Ardern and National charging $1,000 to dine with Christopher Luxon.

A second key example is the

revolving door between lobbying firms and political party staff,

another sector of the marketplace for political access and influence. As a third example of marketplace dynamics, I would cite political donations to NZ

First given at just below the disclosure threshold ($15,000) (or in larger sums to the NZ First Foundation) by ultra-wealthy interests seeking to

prevent a capital gains tax

from going into effect or to obtain favourable terms for the

horse racing

and

fishing industries.

THE PUBLIC NOTICES

Anti-corruption rankings and democracy indices don’t pick up on lawful patterns of undue influence, but the general public does. People without tens of

thousands of dollars in disposable income to spend on political access and influence are naturally quite sensitive to unequal material outcomes invading

the democratic sphere. They become distrustful when the marketplace ethic of profit-maximisation permeates politics.

Take, for instance, the five Institute for

Governance and Policy Studies (IGPS) surveys conducted between 2016 and 2021.

A minimum of 71% of respondents reported “not much trust” or “little to no trust” in “the way in which political parties are funded”. Perhaps relatedly,

an average of just 7% of respondents had a high level of trust in political parties in 2020 and 2021. (That figure grew to a measly 10% when it came to

Members of Parliament.)

Furthermore, a large majority of New Zealanders would prefer a disclosure threshold of $1,000 or less for political donations and a donations limit of

$10,000 or less. (This is from a new

IGPS report on party funding and public confidence.)

We can therefore expect public confidence to be quite negatively affected by the not-guilty verdict in the

NZ First Foundation case.

According to Justice Jagose’s interpretation of the law, funds received by trustees of a political party foundation (who are not technically involved in

the administration of the party’s affairs according to the party’s constitution and the party’s Board) cannot be defined as “political party donations”.

The Justice construed party donations in this extremely narrow light, even though much of the $700,000 + in question was donated with the intent to benefit

the party, solicited to benefit the party by people involved with the party and its leadership, and actually employed to benefit the party. And even if

the funds in question were considered party donations, Justice Jagose pointed out that the failure to transmit party donations to the party secretary or

to deposit them into a bank account nominated by the party secretary, in violation of the Electoral Act, “is not an offence against the Act”.

In other words, the Electoral Act doesn’t allow prosecutors to enforce the key provision, section 207B, that enables party secretaries to comply with their

record-keeping and disclosure obligations.

GAPING HOLES NOT LOOPHOLES

The narrow scope of party donations and lack of an offence provision should not be described as mere loopholes, as seen all over the media and political

debate, but rather as gaping holes—the kinds of holes you could drive a truck through. Not only can these holes be used to transport unlimited funds around

the Electoral Act’s disclosure requirements, they could also potentially be used to circumvent the Electoral Act’s $50 limit on donations or contributions

by overseas persons.

The Labour government is undertaking a two-pronged approach to reforming electoral law. A set of targeted changes, now before the House of Representatives,

would

list of 3 items

• lower the threshold for disclosure of party donations to $5,000

• require disclosure of candidate loans and

• require political parties to disclose their financial statements to the Electoral Commission.

list end

Ironically,

the amendment itself now needs to be amended

to account for Justice Jagose’s decision. These revisions would go into effect before the 2023 election. After the election, a broader, more systematic

set of proposed changes to electoral law is likely to emerge from the

independent review of electoral law,

which is also ongoing.

One hopes that the independent review process will respond to the broader significance of these scandals, which is well conveyed by a coincidence involving

Transparency International. The SFO announced the first of its various investigations into political donations irregularities on the 29th of January 2020.

That same afternoon, the results of the

2019 Transparency International Corruption Perceptions Index

were announced. New Zealand came in first, tied with Denmark. While the CPI does not measure political corruption, in the accompanying executive report,

TI Chairperson Delia Ferreira Rubio implored governments to “urgently address the corrupting role of big money in political party financing and the undue

influence it exerts on our political systems”.

The 2019 report urges all nations to control political financing, manage conflicts of interest, regulate lobbying activities, and tackle preferential treatment.

New Zealand comes up short on each of these fronts, as I’ve argued

 in greater depth

in  a 2021 article in Policy Quarterly.

So long as the Electoral Act fails to place any limit on political donations, even donations from corporations and lobbyists, undue influence will remain

a reality in this country.

The same goes for the unregulated sphere of political lobbying, and the highly discretionary regime of conflicts of interest, where MPs must declare their

assets but need not recuse themselves from voting on matters that directly implicate their own investments or the businesses of large donors to their campaigns,

their parties, or their parties’ political foundations.

The overall significance of such a free-market model of democracy is clear. Economic inequalities are allowed to translate directly into political inequalities.

Consequently, political processes from elections to law-making can readily become a reflection of citizens’ and corporations’ ability and willingness to

pay.

Those who are unable or unwilling to pay -the poor and middle class by definition, but others as well- suffer from political exclusion, meanwhile those

who are able and willing to pay obtain disproportionate political influence or even control.

It should go without saying that this kind of political marketplace is inconsistent with basic democratic values—including popular participation, representation,

and accountability, as well as independent political leadership aimed at achieving the common good and safeguarding the public interest.

And yet, New Zealand’s laissez-faire regime of electoral law plainly allows a political marketplace to operate beneath our superficially clean and democratic

appearance.

TAKE ADVANTAGE OF A RARE CONSTITUTIONAL MOMENT

The SFO’s investigations, Crown prosecutions, and public opinion now provide the government and political parties outside of government with a rare constitutional

moment, a chance to restore the rightful system of government and illegalise the wrongful one. The time has come for New Zealand to close its currently

lawful pathways for cronyism, clientelism, and influence trading. The time has come to rule out plutocracy and to entrench real democracy.

What remains to be seen is, Will the public demand such systemic changes? And will political leaders have the vision and the courage to accomplish them?

ABOUT THE AUTHOR

Timothy K Kuhner is an associate professor in the Faculty of Law at Auckland University. His teaching and research focus on anti-corruption law, democratic

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