

**A HUMAN RIGHTS DISCOURSE ON CAMPAIGN FINANCE IN
THE PHILIPPINES:
AN ANALYSIS OF THE 1987 PHILIPPINE CONSTITUTION
AND INTERNATIONAL HUMAN RIGHTS LAW***

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“It is averred that many of the frauds and crimes committed in elections have been caused directly or indirectly by money, and that the only way to purify the ballot is to limit the expenses of candidates. . . . But it must be admitted that while persons living in a democracy should enjoy freedom in the disposition of their property, this is so only insofar as the interest of others are not infringed and the superior rights of the community are not imperiled: Salus populi suprema lex est. Sic utere tuo ut alienum non laedas.”

- Jose P. Laurel (1931)¹

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¹ JOSE LAUREL, THE ELECTION LAW: AN EXPOSITION OF ITS UNDERLYING PRINCIPLES, HISTORY, AND DEVELOPMENT IN THE PHILIPPINES, TOGETHER WITH

ABSTRACT

Studies have estimated that elections in the Philippines are one of the costliest in the world. Reports indicate that when the per capita incomes of countries are considered, the cost of a national electoral campaign in the Philippines is higher than comparative costs in developed democratic countries such as the United States.

This paper discusses the Philippine legal framework on campaign finance, the rights involved in this area of election law under the Constitution and International Human Rights Law, and their implications on regulation.

Traditional legal thinking – prevailing since the passage of the first election laws in the Philippines – holds that campaign finance is primarily an issue of property rights. Recent threads of jurisprudence and international human rights law considerations have moved from dealing with campaign finance as a property rights issue to an issue of free speech, association, information, and political participation.

I. INTRODUCTION

The reality of campaign finance in society is clear; launching an effective electoral strategy requires heavy investments of time, money and personnel.² However, the stringent requirements of forging a national campaign, particularly monetary requirements, may prove to be undemocratic and ultimately anathema to the role of elections, which is to ensure the people's participation in policy formation and in the selection of leaders.³

COMMENTARIES ON STATUTORY PROVISIONS IN THE LIGHT OF ADJUDICATED CASES, OPINIONS AND ADMINISTRATIVE RULINGS 178-179 (1931).

² FREDERIC CHARLES SCHAFFER, ELECTIONS FOR SALE: THE CAUSES AND CONSEQUENCES OF VOTE BUYING 81 (2007 ed.).

³ *Id.* at 90.

The term “campaign finance” or “political finance” in Philippine law is two-pronged in that it relates to both campaign contributions and expenditures. A study conducted by Global Integrity gives the Philippines a score of “0,” based on a scale of “1” to “100,” on the effectiveness of state regulation of political financing for both parties and individual candidates, based on cross-country surveys.⁴ According to the organization, the Philippines is a democratic nation with a multi-party system that is open to abusive elections partly due to faulty campaign finance regulation.⁵

In the 1980s, the indispensability of funds in an electoral system was exemplified by the political experience of the late Corazon Aquino when she ran for president against Ferdinand Marcos with what must have been a measly campaign fund. It may well be said that perhaps the true beginnings of the people power movement that deposed Marcos was when people started to contribute in cash or in kind to the campaign of Aquino.⁶

In a study by the Institute for Political and Electoral Reform, it was found that a candidate for president needs at least Php 2.5 billion to run a campaign, while a candidate for mayor may need up to Php 100 million.⁷ The International Foundation for Electoral Systems has said that, as far back as the 1960 elections, the amount spent on each vote in the Philippines was 14 times greater than the comparable amount in the United States.⁸ Pera at Pulitika, a civil society consortium which monitors campaign finance, has concluded that

⁴ Global Integrity, *Philippine Integrity Indicators Scorecard on Campaign Finance*, available at <http://report.globalintegrity.org/Philippines/2008/scorecard> (last accessed on Jan. 18, 2010). Global Integrity has since released the 2010 results of the same study. The Philippines was given the same score of “0” on the effectiveness of regulations governing the political financing of political parties and individual candidates. The 2010 scorecard results are available at <http://www.globalintegrity.org/report/Philippines/2010/scorecard> (last accessed on May 26, 2013).

⁵ *Id.*

⁶ PHIL. DAILY INQUIRER, *Know-nothing*, available at <http://opinion.inquirer.net/inquireropinion/editorial/view/20090119-184335/Know-nothing> (last accessed on Jan. 18, 2010).

⁷ Ramon Casiple, Report during the Money and Politics Working Group Conference, Manila, Institute for Political and Electoral Reform, Jan. 22, 2007.

⁸ International Foundation for Electoral Systems, *Seeking transparency in election campaign spending*, available at <http://i-site.ph/blog/?p=25> (last accessed on Jan 18, 2010).

in the 2007 senatorial elections, several winning candidates had exceeded campaign finance limits under the law.⁹

Furthermore, Ramon Casiple reports:

Campaign funds come mainly from major candidates, self-raised funds and financiers. Party-raised funds are scarce due to a very weak political party system. Illegal sources such as illegal gambling lords, drug lords, bank robbery and kidnapping, and smugglers have entered the picture. . . . Use of government resources by incumbents is widespread.¹⁰

He refers to a *sympiotic relationship* between money and politics in Philippine elections that would lead to a situation of decadence if unchecked.¹¹

There are at least three explanations for this phenomenon in Philippine society. One view holds that the problem lies in the enforcement of Philippine campaign finance laws, which are among the most stringent in the world.¹² Another believes that the laws are both unreasonable and unrealistic. The limitations do not match the current costs of forging a national or local campaign. Thus, implementation becomes farcical.¹³ A third combines both views: the current law is inefficient, and there are also inadequate mechanisms to cover aspects of implementation of the positive aspects of the law.¹⁴

⁹ Phil. Center for Investigative Journalism, *Pichay, Villar top political ad spenders*, available at <http://www.pcij.org/blog/?p=1656> (last accessed on Jan. 18, 2010).

¹⁰ Casiple, *supra* note 7.

¹¹ *Id.*

¹² Interview with Louie Tito Guia, Consultant for the International Foundation for Electoral Systems, member of the League for Civil Liberties and Executive Committee member of the Legal Network for Truthful Elections, in Quezon City (May 7, 2009). Guia is currently a Commissioner with the COMELEC.

¹³ Telephone Interview with Edna Estefania Co, Dean of the University of the Philippines National College of Public Administration and Governance and Philippine Representative to the Global Advocacy of Campaign Finance Experts, in Manila (May 11, 2009).

¹⁴ Interview with Ramon Casiple, member of the Political Science Department of the University of the Philippines Diliman and Executive Director of the Institute for Political and Electoral Reforms, in Quezon City (May 4, 2009).

II. CAMPAIGN FINANCE LAW IN CONSTITUTIONAL HISTORY: SURVEY OF THE LEGAL FRAMEWORK

A. A Brief History of Campaign Finance Law in the Philippines

The first election law, Act No. 1582, was enacted by the Philippine Commission on January 9, 1907.¹⁵ Since then, election laws have undergone a series of amendments and repeals.¹⁶ Notably, campaign finance was not a topic in the deliberations of any of the fundamental laws of the Philippines prior to the 1987 Philippine Constitution. Despite this, a tracing of legal history shows the active exercise of police power by the State in regulating campaign finance as early as the first election law.

Jose P. Laurel contends that the early rationale behind the regulation of campaign finance in the country was the prevention of frauds and crimes committed in elections, and that “the only way to purify the ballot is to limit the expenses of candidates.”¹⁷ It was seen by Laurel as a necessary restriction on the freedom to enjoy one’s property – *i.e.*, money on hand and contributions to politicians – for the interest of others and the superior rights of the community in the exercise of the State’s police power.

The origin of Philippine election laws can be traced to Australian and American legislations, which are common law in perspective. In *US v. Cueto*,¹⁸ the Supreme Court of the Philippines said that the early election law was enacted to accomplish the objective of ensuring the “purity of elections.” The Court added that, in its essential details, the law was a counterpart of the ballot

¹⁵ III AMADO CALDERON, THE OMNIBUS ELECTION CODE OF THE PHILIPPINES ANNOTATED 2 (1ST ED. 1993).

¹⁶ EMMANUEL SAMONTE TIPON, WINNING BY KNOWING YOUR ELECTION LAWS RELOADED 5-6 (2004 ED.).

¹⁷ LAUREL, *supra* note 1.

¹⁸ *United States v. Cueto*, G.R. No. 13626, Oct. 29, 1918. The Supreme Court stated that “[t]he Philippine Bill and subsequent Acts of Congress conceded to qualified persons the high prerogative of suffrage. To carry out this purpose, the Election Law was carefully drafted and enacted, and then revised by the Philippine legislature.”

law which was almost universally adopted in the United States and had been generically called by text-writers as the Australian ballot law.¹⁹

The Australian Ballot System was conceived by Sir Francis Dutton, a member of the legislature of South Australia from 1851 to 1865. It is a revival of the secret ballot in the time of Cicero under the Gabinian Law. The Election Act of 1857-1858 of South Australia embodied Dutton's idea of the secret ballot and is the basis of the system generally in force in the United States and Europe.²⁰

The implication of these origins relates to the interpretation and application of the law. Being common law in perspective, the ratio and purpose of election laws – in this paper, campaign finance laws – should be highly considered. Regulations flowing from such laws ought to be necessarily designed to have Dutton's concept of purity of elections as a purpose.

As confirmed by the Supreme Court in *Frivaldo v. Commission on Elections*,²¹

At balance, the question really boils down to a choice of philosophy and perception of how to interpret and apply laws relating to elections: literal or liberal; the letter or the spirit; the naked provision or its ultimate purpose; legal syllogism or substantial justice; in isolation or in the context of social conditions; harshly against or gently in favor of the voters' obvious choice. In applying election laws, it would be better to err in favor of popular sovereignty than to be right in complex but little understood legalisms.²²

Another factor which affects the interpretation of campaign finance law is the fact that it is largely penal in nature. As such, due process is observed and the presumption of innocence (that is, non-violation of campaign finance rules) until proven otherwise beyond reasonable doubt is upheld.²³

¹⁹ *Id.*

²⁰ LAUREL, *supra* note 1, at 137-138.

²¹ *Frivaldo v. COMELEC*, G.R. No. 120295, June 28, 1996.

²² *Id.*

²³ Note, however, that some penal provisions of the law were repealed in 1992. *See* Rep. Act No. 7166, §§ 13 & 39 (1991) (hereinafter "RA 7166").

B. The Legal Framework

There are three main laws that regulate campaign finance in the Philippines. The Omnibus Election Code of 1985²⁴ (“Code”), as amended, sets spending caps on election expenditures; spells out prohibited contributions, especially from foreigners, foreign governments, and those with connections to government; outlines the legal categories of spending and donations; lays down rules and procedures for accepting donations and recording political campaign contributions and expenditures; and, prescribes penalties for violation of the law.²⁵ The other laws include the Synchronized Elections Act of 1991²⁶ and the Fair Election Act.²⁷ In addition, the Commission on Elections (“COMELEC”) has promulgated resolutions pursuant to its quasi-judicial powers under the Constitution.

Jurisprudence has validated that a person who is not a candidate cannot be subject to the rules and regulations of campaign finance. Under the Code, a candidate is any person aspiring for an elective public office, who has filed a certificate of candidacy.²⁸ An election campaign or partisan political activity is defined as an act designed to promote the election or defeat of a particular candidate or candidates to public office.²⁹

Several scholars have lamented this confinement of the applicability of campaign finance rules only to those who have filed certificates of candidacy and are properly considered candidates within the definition of the Code. The danger is that the purpose of the law (*i.e.*, the purity of elections) could be undermined by aspirants for public office who campaign and use funds before

²⁴ Batas Blg. 881 (1985) (hereinafter “BP 881”).

²⁵ Casiple, *supra* note 7.

²⁶ RA 7166.

²⁷ Rep. Act No. 9006 (2001) (hereinafter “RA 9006”).

²⁸ BP 881, § 79 (a).

²⁹ § 79 (b).

the filing of the requisite certificate. Such persons may be convicted for premature campaigning, but the aspect of use of money is not considered.³⁰

In relation to political parties, a global analysis points to four options for the regulation of campaign finance.³¹ The *autonomy option* treats political parties as voluntary associations entitled to unregulated privacy of their internal organizations and financial transactions.³² The *transparency option* emphasizes the right of the people to know, as well as their ability and determination to judge, all aspects of party and candidate behavior, including fundraising and spending.³³ The *advocacy option* dictates the creation of a public agency which is expected to monitor and check the flow of political funds on behalf of the general public.³⁴ The *diversified regulation option* takes into account the different interrelated issues which need to be tackled by a carefully designed policy mix of benign neglect, precise regulation, public incentives, and occasional sanctions – walking the tightrope between *laissez-faire* and perfect rules.³⁵

The Philippines is in a peculiar situation compared with other nations. It is a developing country, but adopts much of the legal system of the United States. The approach of the United States to campaign finance regulation, according to Karl-Heinz Nassmacher, is the advocacy option.³⁶ The Philippines, similar to countries like Thailand and Canada, can be said to have taken the diversified regulation option.³⁷

C. Election Contributions

An election contribution,³⁸ commonly known as a political campaign contribution, is a gift, donation, subscription, loan, advance, or deposit of money or anything of value. It may also be a contract; promise or agreement to

³⁰ Interview with Vincent Pepito Yambao, Director for Civil Liberties of Libertas and Member of the University of the Philippines Institute of Human Rights, in Quezon City (May 7, 2009).

³¹ KARL-HEINZ NASSMACHER, *FUNDING OF PARTIES AND ELECTION CAMPAIGNS* (REGINALD AUSTIN, ET AL. EDS. 2003).

³² *Id.* at 10.

³³ *Id.* at 11.

³⁴ *Id.* at 12.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ BP 881, § 94 (a).

contribute, whether or not legally enforceable; or the use of facilities donated by other persons, the money value of which can be assessed based on the rates prevailing in the area. Such contributions must be for the purpose of influencing the results of elections.

Authors have classified campaign contributions into either one of two forms: *hard money* or *soft money*. Eric Freedman notes that *hard money* is directly contributed to, and spent on behalf of, a particular candidate. It may be employed by the candidate as he or she deems fit. Often, they are deployed by candidates to inform the public about the candidate's ideologies through political advertisements.³⁹ Meanwhile, *soft money* is contributed indirectly to candidates. Soft money contributions are received by a political organization.⁴⁰ This distinction is extremely important in the United States, according to Freedman, because soft money contributions had not previously been regulated by the Federal Election Campaign Act of 1971 ("FECA"),⁴¹ which was only passed into law after the Watergate Scandal. Prior to the recent amendment of the FECA, there was also no limit to the amount of soft money an individual, corporation, or political action committee could give to a party.⁴² It should be noted that this is precisely the situation in the Philippines.

The United States has already passed the Bipartisan Campaign Reform Act of 2002⁴³ ("BCRA"), representing a series of amendments to the FECA. The law focuses on reducing the amount of soft money or unregulated money donated to political parties and candidates. The US Supreme Court in *McConnell v. FEC*⁴⁴ upheld virtually all of the provisions of the BCRA, including its indirect regulation of soft money. Unlike the United States, the Philippines does not limit allowable contributions of a person, group, or corporation to a political party or candidate.

Campaign funds in the Philippines legally constitute funds from the candidate, contributions from persons or corporations not prohibited by the

³⁹ Eric Freedman, *Campaign Finance and the First Amendment: A Rawlsian Analysis*, 85 Iowa L. Rev. 1067 (2000).

⁴⁰ *Id.*

⁴¹ Federal Election Campaign Act of 1971, codified in scattered sections of 2 U.S.C. § 431 and 36 U.S.C. § 510 (1971).

⁴² *See id.*

⁴³ Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §§ 431-55 (2000 & Supp. II) (2002).

⁴⁴ *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

Code from making the same,⁴⁵ or funds accumulated through fundraising activities.⁴⁶ Election donations reported to the COMELEC are exempt from donor's tax.⁴⁷

D. Election Expenditures

An election expenditure⁴⁸ is a payment or delivery of money or anything of value. It may be a contract; a promise or agreement to make an expenditure; or the use of facilities personally owned by the candidate, the money value of which can be assessed based on the rates prevailing in the area. Such expenditures must be for the purpose of influencing the results of the election.

The Supreme Court has had occasion to rule on what constitutes campaign expenditure in this jurisdiction. In *Collado v. Alonzo*,⁴⁹ the victory of a mayoral candidate was questioned on the ground that he had made allegedly excessive or unlawful campaign expenditures. The respondent therein had promised to donate his salary as mayor of the town for the education of indigent but deserving students. The Court held that the respondent could not be held to have "spent in his election campaign, more than the total emoluments attached to the office for one year."⁵⁰ It made the following distinction:

[T]he circumstances before us may be differentiated, because this respondent did not promise to waive collection of his salary. He intended to collect it; but he undertook to spend it in such a way as to help bright and deserving students – not necessarily votes – whose identity could not be known at the time of the election. So, it may not be said that this or that voter had been influenced by the scholarship offer.⁵¹

Clearly, from the above, the actual use and defraying of money and expenses constitute expenditures within the contemplation of the law.

⁴⁵ BP 881, §§ 95-96.

⁴⁶ § 97.

⁴⁷ RA 7166, § 13.

⁴⁸ BP 881, § 94 (b).

⁴⁹ *Collado v. Alonzo*, G.R. No. 23637, Dec. 24, 1965.

⁵⁰ *Id.*

⁵¹ *Id.*

Expenditures are limited by the law through an enumeration of allowable expenses.⁵² It is noteworthy to mention that expenses for legal services, printing sample ballots, and election protests/contests are not included in the statutory caps of spending which are present in the law.⁵³ Such statutory measures may not completely be in line with the apparent intent of the Constitution to limit election spending – it must be remembered that one of the functions of the COMELEC is to recommend to Congress measures to “minimize election spending.”⁵⁴

There had been three traditional methods in determining maximum expenditure limits when the Australian ballot law was being enacted in the Philippines. *First*, the New York method specified the amount for the different grades of office. *Second*, the California and Oregon method, which related the maximum to the salary attached to the office. And, *third*, the Maryland method adopted the English practice and based the maximum upon the number of voters who are entitled to cast their ballots for the office.⁵⁵ The early election law adopted the California and Oregon method, while the present one combines both the New York and Maryland methods.⁵⁶

E. Recording and Reporting Requirements

To help in monitoring the compliance of a candidate or political party with campaign finance rules, the candidate or treasurer of the party is required to keep detailed, full, and accurate records of all contributions received and expenditures incurred by them.⁵⁷ The Code also requires that every person giving contributions to any candidate or party must report such fact to the COMELEC in the manner prescribed by law.⁵⁸ The true name of such contributor is required to be disclosed.⁵⁹ Only certain persons are authorized to incur election expenditures, and the fact or grant of such authority should also

⁵² BP 881, § 102.

⁵³ § 102 (i)-(k).

⁵⁴ CONST., art. IX-C, § 2 (7).

⁵⁵ LAUREL, *supra* note 1, at 179-180.

⁵⁶ *Id.* at 178.

⁵⁷ BP 881, § 106 (b)-(c).

⁵⁸ § 99. *See also* Cayetano, *infra* note 65.

⁵⁹ § 98.

be in writing and reported to the COMELEC.⁶⁰ A receipt must be issued to the contributor and for the expenditure.⁶¹

F. Enforcement and Monitoring Mechanisms

The COMELEC has been tasked by the Code with the duty of examining all statements of contributions and expenditures to determine compliance with the law.⁶² The enforcement mechanism in the original Code – penal sanctions for the violation of campaign finance law – was repealed by the Synchronized Elections Act of 1991. Thus, as the law stands as of this writing, violations of campaign finance laws are no longer election offenses. The repeal also carried a retroactive effect.⁶³ Moreover, the requirement of submitting a statement of contributions and expenditures before the day of election as embodied in the Code was also removed.⁶⁴

Alan Peter Cayetano, in a study, observes that there is “practically no real way” of monitoring compliance with campaign finance regulations despite the imposition of limitations on allowable expenditures and contributions.⁶⁵ Further, the weakness of relying on a reportorial system is that it is dependent on the honesty of the candidate and the party.⁶⁶ One may be charged with perjury,⁶⁷ but this threat of criminal prosecution is only valid when there is an

⁶⁰ § 103.

⁶¹ § 106 (a).

⁶² § 110.

⁶³ RA 7166, § 39.

⁶⁴ RA 7166, § 39.

⁶⁵ Alan Peter S. Cayetano, Campaign Finance Reform: Constitutionality of Public Financing of Political Parties Participating in Elections 41 (1997) (unpublished J.D. thesis, Ateneo de Manila University, on file with the Professional Schools Library, Ateneo de Manila University).

⁶⁶ *Id.*, at 41.

⁶⁷ See REV. PEN. CODE, art. 183. The Revised Penal Code is Act No. 3815 (1932). Art. 183 provides:

ART. 183. *False testimony in other cases and perjury in solemn affirmation.*
 – The penalty of *arresto mayor* in its maximum period to *prisión correccional* in its minimum period shall be imposed upon any person who, knowingly make untruthful statements and not being included in the

effective monitoring system and there is a serious intention to enforce the law and prosecute.⁶⁸

At present, the COMELEC implements campaign finance laws through COMELEC Resolution No. 9476.⁶⁹ The resolution applies to all election contributions and expenditures in connection with the conduct of all elections. Aside from defining terms related to campaign finance as found in different laws,⁷⁰ the resolution creates a Campaign Finance Unit which has the power to, *inter alia*, monitor fund-raising and spending activities; receive, keep, compile, and analyse reports and statements; develop a reportorial and monitoring system; and, audit all reports, statements, and contracts and determine compliance with campaign finance laws.⁷¹ The resolution clarifies that no person elected to any public office shall enter upon the duties of his or her office until he or she has filed a statement of contributions and expenditures.⁷² Failure to file statements or reports constitutes an administrative offense. The amount of the administrative fine to be imposed on the erring candidate depends on the elective position vied for, and whether the failure to do so is the candidate's first or second offense.⁷³

III. THE INTERFACE OF RIGHTS IN CAMPAIGN FINANCE LAW AND ITS IMPACT ON REGULATION

As will be shown below, in addition to various rights to property and the right to free and fair elections, the law on campaign finance also involves a consideration of other rights, which include the following:

provisions of the next preceding articles, shall testify under oath, or make an affidavit, upon any material matter before a competent person authorized to administer an oath in cases in which the law so requires.

Any person who, in case of a solemn affirmation made in lieu of an oath, shall commit any of the falsehoods mentioned made in this and the three preceding articles of this section, shall suffer the respective penalties provided therein.

⁶⁸ Cayetano, *supra* note 65, at 42.

⁶⁹ COMELEC Resol. No. 9476 (2012). This is known as the COMELEC Rules and Regulations Governing Campaign Finance and Disclosure.

⁷⁰ *Id.*, Rule 1, § 4.

⁷¹ *Id.*, Rule 2, § 1.

⁷² *Id.*, Rule 8, § 4.

⁷³ *Id.*, Rule 8, § 5.

A. Right to Freedom of Expression

The First Amendment to the US Constitution, also known as the Freedom of Expression Clause, is found in the Philippine Constitution. The Constitution enshrines freedom of expression as one of the well-entrenched rights in the Philippines. Section 4 of Article III guarantees freedom of speech and freedom of the press (considered forms of freedom of expression) and the right to freely assemble and petition the government for redress of grievances.⁷⁴

In the 1960s, the landmark US case of *Buckley v. Valeo*⁷⁵ used free speech standards to measure the validity of the FECA. This was decided in the context of the aftermath of the Watergate Scandal, which involved the improper use and receipt of campaign funds. It set the doctrine that the “less rigorous” scrutiny standard is to be applied in the regulation of campaign finance – political campaign contributions could be limited if the government shows that the limits are closely drawn to match a sufficiently important government interest.⁷⁶

The doctrine in *Buckley* still echoes prominently in a survey of some recent American jurisprudence. Campaign finance is speech. Contributions, which are an expression of support for a candidate, organization, or cause, can be reasonably restricted. Limits on expenditures, which are in essence an expression of appeal for votes, can also be declared unconstitutional.⁷⁷ The test for the validity of a police power measure relating to campaign finance has been and will still most likely be the Freedom of Expression Clause.

For instance, in *Austin v. Michigan Chamber of Commerce*,⁷⁸ the US Supreme Court held that the Michigan Campaign Finance Act did not violate the First Amendment. The law in question limited a corporation’s political contribution to the use of a special independent fund raised entirely for political purposes instead of using general treasury funds that may have “little or no correlation to the public’s support for a corporation’s political ideas.”⁷⁹

⁷⁴ CONST., art. III, § 4.

⁷⁵ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

⁷⁹ *Id.*

According to Justice Marshall, while the law was indeed a burden to freedom of expression, the burden was justified by a compelling state interest, *i.e.*, the interest to regulate “political expenditures to avoid corruption or the appearance of corruption.”⁸⁰ According to the US Court, it reduced the threat that huge corporate treasuries amassed with the aid of favorable state laws would be used to unfairly influence the outcome of elections.⁸¹ The corrosive effects of political “war chests” were thus recognized.

In contrast to *Austin, First National Bank of Boston v. Bellotti*⁸² established that a political campaign constitutes hardcore political speech and campaign spending is “the type of speech indispensable to decision making in a democracy.”⁸³ As such, campaign expenditures were deemed protected under the Freedom of Expression Clause of the US Constitution. This case effectively legalized independent expenditures in the US, and stated that corporations (as juridical persons) have a right to contribute to political campaigns for the purpose of influencing political processes. Every person has that right. Any law that goes against these precepts should thus be invalidated by the Court.

In another case, *Federal Election Commission v. National Conservative Political Action Committee*,⁸⁴ Justice Rehnquist held that campaign expenditures were protected by the First Amendment in striking down a limit on such expenditures for being “substantially overbroad and inappropriately applying to small informal groups as well as highly organized national organizations.”⁸⁵ The general fear of corruption was not considered as sufficient to justify government restrictions. Instead, political action committees were deemed valuable tools for the common citizen to promote political views in the present era of mass media communication. The US Court also held that prevailing laws already had sufficient safeguards against corruption that would not violate First Amendment rights – particularly, the required disclosure of information respecting large campaign contributions.⁸⁶

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *First Nat’l. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁸³ *Id.*

⁸⁴ *Fed. Election Comm’n. v. Nat’l. Conservative Pol. Action Committee*, 470 U.S. 480 (1985).

⁸⁵ *Id.*

⁸⁶ *Id.*

Since *Buckley*, it can be seen that the concept of campaign finance as speech has evolved and been refined. Several scholars have discussed this evolution in US law.⁸⁷

In the Philippines, the Supreme Court indirectly touched upon the characterization of campaign finance as speech in *Osmeña v. Commission on Elections*.⁸⁸

But do we really believe in that? That statement was made to justify striking down a limit on campaign expenditure on the theory that money is speech. Do those who endorse the view that government may not restrict the speech of some in order to enhance the relative voice of others also think that the campaign expenditure limitation found in our election laws is unconstitutional? How about the principle of one person, one vote, is this not based on the political equality of voters? Voting after all is speech. We speak of it as the voice of the people – even of God. The notion that the government may restrict the speech of some in order to enhance the relative voice of others may be foreign to the American Constitution. It is not to the Philippine Constitution, being in fact an animating principle of that document.⁸⁹

The main implication of the characterization of campaign finance as an issue of free speech is that, when challenged, any measure to regulate the same comes with a heavy burden to prove its constitutionality and its validity as an exercise of police power. To date, the Supreme Court has not had an opportunity to directly and definitively resolve such an issue, but it is only a matter of time when it may have to. Moreover, an internal review of campaign finance regulation and some of its aspects (*e.g.*, expenditure limits) should take into account free speech concerns. Note, however, that according to *Kennedy v. Gardner*,⁹⁰ not all issues relating to money in elections have to be approached from a First Amendment angle.

⁸⁷ See, *e.g.*, Stephanie Sprague, *The Restriction of Political Associational Rights under Current Campaign Finance Reform First Amendment Jurisprudence*, 40 NEW ENG. L. REV. 947 (2006); Paula Baker, *Campaigns and Potato Chips; or Some Causes and Consequences of Political Spending*, 14 J. POL'Y. HIST. 4 (2002).

⁸⁸ *Osmeña v. COMELEC*, G.R. No. 132231, March 31, 1998.

⁸⁹ *Id.*

⁹⁰ *Kennedy v. Gardner*, No. CV 98-608-M, 1999 WL 814273, *2-4 (D.N.H. Sept. 30, 1999).

B. Right to Freedom of Association

The relationship of campaign finance and the right to freedom of association relates to the nature of political parties as organizations. It is submitted that the legitimate giving of election contributions should be considered an exercise of one's constitutional right to freedom of association.

Under the Constitution, insofar as associations may have for their object the advancement of beliefs and ideas, Joaquin Bernas writes that freedom of association is an aspect of freedom of expression and of belief.⁹¹

In the United States, some scholars have argued that the right to freedom of association has been the greatest threat to the validity of the doctrine set forth in *Buckley*, in which it was held that the limits to campaign expenditures subject of the case were unconstitutional. Many have called for the treatment of the issue from a mainly associational perspective. For instance, Stephanie Sprague argues that if the US Supreme Court continues to hold that campaign spending is a form of political speech, it should also balance speech concerns with the political associational rights of poor citizens.⁹² The US Supreme Court must take a new approach to limitations on campaign spending by concentrating on the political associational rights of poor citizens that are affected when candidates are allowed to spend unlimited amounts of money on campaigns.⁹³

Moreover, according to Sprague, being able to contribute to a political candidate of one's choice is a form of political association, enabling "like-minded" people to pool resources in the furtherance of common political goals. Since economic class is arguably also a form of speech, to be able to further political goals in concert with fellow poor persons who share with a collective view is a political associational right.⁹⁴ She claims that:

Thus, in a system where certain candidates have a clear advantage in campaigns, either because they can spend their own money or because they have wealthy supporters and can spend as much as

⁹¹ JOAQUIN BERNAS, S.J., *THE 1987 PHILIPPINE CONSTITUTION: A REVIEWER* 97 (2006 ed.).

⁹² Sprague, *supra* note 87, at 947 & 986.

⁹³ *Id.*

⁹⁴ *Id.* at 972-73.

they can raise within the contribution limits, poor citizens are effectively denied the right to come together to further their political goals by electing candidates that represent their interests.⁹⁵

The situation in the Philippine jurisdiction is different. The framework of campaign finance regulation in the Philippines does not entail the same challenges in the United States that beleaguer the *Buckley* ruling – that expenditure limits are unconstitutional. A fundamental difference between the US Constitution and the Philippine Constitution lies in their respective treatments of campaign expenditures. While the US Constitution has no provision that squarely deals with campaign finance, the Philippine one tells us that the COMELEC “may recommend measures to Congress for limiting campaign spending.”⁹⁶ This implies that, as previously shown, the Constitution allows for the establishment of limits to campaign expenditures.

The Constitution also prescribes that the State should guarantee equal access to opportunities for public service.⁹⁷ In the author’s interview with Christian Monsod, a member of the Constitutional Commission who initiated the inclusion of such a policy in the Constitution and a former Chairperson of the COMELEC, it was explained that this policy had been intended to serve as a guideline for the State to ensure equal opportunity and access to elective public office.⁹⁸ Money is, in reality, a major consideration in determining whether or not a candidate, especially one for a national post, would be able to run a campaign. However, social justice presupposes that no person shall, by reason of poverty, be denied the chance to be elected to public office.⁹⁹

Clearly, the Constitution seeks to limit campaign spending and mandates that all persons who desire to run for public office, if duly qualified, should be given the opportunity to run for election. It goes without saying, however, that such a measure must still pass muster in the face of constitutional challenges from a free speech perspective.

C. Right to Information

⁹⁵ *Id.*

⁹⁶ CONST. art. IX-C, § 2 (1), (6)-(7).

⁹⁷ Art. II, § 26.

⁹⁸ Telephone Interview with Christian S. Monsod, in Quezon City (May 4, 2009).

⁹⁹ *Maquera v. Borra*, G.R. No. 24671 (1965).

The general right to information in the Constitution covers the right to information on matters of public concern. It is subject to limitations that the law may provide.¹⁰⁰ The law on campaign finance in the Philippines does not prescribe the withholding of information pertaining to campaign contributions and expenditures from the public. In fact, as discussed above, the law sets forth a reportorial requirement.

Money in elections is a matter of public concern. There are major considerations for the need to make information on matters relating to money in elections public, including the prevention of corruption, the inappropriate use of public funds by incumbents who seek re-election, and the improper use of contributions by politicians and political parties, as discussed by the United Nations Office on Drugs and Crime in the accompanying papers to the United Nations Convention Against Corruption (“UNCAC”).¹⁰¹

The Philippines is a state party to the UNCAC, which in part provides that:

Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.¹⁰²

As a measure of empowerment, information aids voters in making intelligent choices. Information on donors will enhance knowledge of the interests and patrons of politicians. On a more practical note, it will also assist in the monitoring and enforcement of regulations.

In Germany, where political parties are considered strong and stable institutions, campaign finance regulation subscribes to a transparency model.

¹⁰⁰ JOAQUIN BERNAS, S.J., *THE PHILIPPINE CONSTITUTION FOR LADIES, GENTLEMEN AND OTHERS* 48 (2007 ed.).

¹⁰¹ U.N. Office on Drugs and Crime, *The Global Programme Against Corruption: UN Anti-Corruption Toolkit* 249-250 (3rd ed. 2004), *available at* http://www.unodc.org/documents/afghanistan/Anti-Corruption/corruption_un_anti_corruption_toolkit_sep04.pdf.

¹⁰² U.N. Convention against Corruption, Oct. 31, 2003, art. 7 (3), 43 I.L.M. 37, *available at* http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf. This entered into force on Dec. 14, 2005.

The Basic Law for the Federal Republic of Germany (the “Grundgesetz”) stipulates that parties must account to the public for the sources of their funds.¹⁰³ Germany is also one of the leading Western nations that have adopted a system of publicly financing political parties,¹⁰⁴ holding parties accountable to the public through an audit system.

The Philippines may well adopt the German model of regulation. Jeffrey Carlson and Marcin Walecki, however, write that no disclosure regime will be enforceable unless the burdens it imposes are bearable. Campaign finance systems must be designed with constraints of country-context in mind because regulation is meaningless without enforcement.¹⁰⁵

D. Right to Political Participation

Two instruments – the International Covenant on Civil and Political Rights (“ICCPR”) and the Universal Declaration of Human Rights (“UDHR”) – provide for the right to political participation and collectively form what is lately known as the global norm of participation.¹⁰⁶ The International Convention on the Elimination of all Forms of Racial Discrimination also provides that the right to political participation is to be regarded as the right of everyone.¹⁰⁷

It is a general norm that the will of the people is the basis of the authority of government. The exercise of public powers is to be legitimized by the people.¹⁰⁸ The right is a minimum guarantee that some form of meaningful political participation is accorded to citizens according to the framework of government of a state. Article 25 of the ICCPR states:

¹⁰³ F.R.G. CONST., art. 21 (1).

¹⁰⁴ Cayetano, *supra* note 65.

¹⁰⁵ JEFFREY CARLSON & MARCIN WALECKI, MONEY AND POLITICS PROGRAM: GUIDE TO APPLYING LESSONS LEARNED 17 (2006).

¹⁰⁶ MARK STEVENS & ANDERS ERIKSSON, BENCHMARKS FOR ELECTORAL STANDARDS: A GUIDE FOR EUROPEAN UNION ELECTION OBSERVATION MISSIONS 3 (Mark Stevens, et al., eds. 2008).

¹⁰⁷ Int’l Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 5 (c), *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>. This entered into force on Jan. 4, 1969.

¹⁰⁸ STEVENS & ERIKSSON, *supra* note 106.

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.¹⁰⁹

In 1991, the United Nations (“UN”) General Assembly declared that the determination of the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and to put forward their political views as provided in national constitutions and laws.¹¹⁰

The right to political participation in the ICCPR and UDHR is similar to the constitutional considerations found in the Philippine Constitution and the First and Fourteenth Amendments of the US Constitution. Bernas verifies this in his comparison of the ICCPR and the Philippine Constitution. He concludes that the two instruments contain basically the same guarantees, and that political participation is “written all over” the said Constitution.¹¹¹

Philip Alston declares that the right to political participation can be understood as sharing the programmatic character of many economic and social rights. It nourishes a vital ideal and serves important purposes.¹¹² This characterization of Alston applies more to the “take part” clause of the international norm rather than to the “elections” clause.¹¹³ Specific to

¹⁰⁹ Int’l. Covenant on Civil and Political Rights, Dec. 19, 1966, art. 25, *available* at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>. This entered into force on Mar. 23, 1976.

¹¹⁰ G.A. Res. 46/137, U.N. Doc. A/Res/46/137 (Dec. 17, 1991). The UN General Assembly Resolution is entitled “Enhancing the effectiveness of the principle of periodic and genuine elections #4”.

¹¹¹ JOAQUIN BERNAS, S.J., AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 300 (1st ed. 2002).

¹¹² PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 899 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000).

¹¹³ *Id.*

campaign finance, this may even mean that citizens are enabled to run for election – despite money considerations and on the basis of equality – when a state is able to progressively realize this right for its citizens.

The Human Rights Committee explained this right in a general comment in 1996. The Committee came out with the general comment, according to Stevens and Eriksson, to prevent legitimate campaign funding from “transgressing the line and become a non-legitimate method of influence.”¹¹⁴ Understandably, they argue that some measure of regulation could, hence, be expected.

With regard to campaign finance, the Committee has noted that reasonable limitations on campaign expenditure may be justified where there is a necessity to ensure that the free choice of voters is not undermined or the democratic process distorted by disproportionate expenditure on behalf of any candidate or party.¹¹⁵ If the right and the opportunity to run for elective office are implemented effectively, the Committee said that persons entitled to vote would have a free choice of candidates.¹¹⁶

It is recognized that political participation as a right requires the fulfillment of the rights to freedom of expression, assembly, and association as an essential pre-conditions for its effective exercise.¹¹⁷ The Committee called the right to freedom of association as an adjunct right to all the rights protected by Article 25 of the ICCPR.¹¹⁸

The implication of this in Philippine society is that when the right is not realized, the State may have to perform acts to enable citizens to realize this right. This is related to Alston’s discourse that the right to political participation is programmatic and shares some of the characteristics of social and economic rights, *e.g.*, progressive realization. Such state actions may call for, *inter alia*, the more effective implementation of campaign finance laws and the

¹¹⁴ STEVENS & ERIKSSON, *supra* note 106, at 8.

¹¹⁵ ICCPR General Comment 25 (Fifty-seventh session, 1996), Article 25: The Right to Participate in Public Affairs, Voting Rights and the Right to Equal access to Public Service, A/51/40 vol. 1 (1996), at ¶ 19, *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?OpenDocument).

¹¹⁶ *Id.*, ¶ 15.

¹¹⁷ *Id.*, ¶ 12.

¹¹⁸ *Id.*, ¶ 26.

adoption of a public finance system. An individual opinion by Martin Scheinin in *Diergaardt v. Namibia* promotes the view that there may be situations where special arrangements for the right to participation of members of minorities, including indigenous peoples, may have to be undertaken.¹¹⁹ Social research may be able to shed light on whether candidates are at present indeed unable to realize this right from a campaign finance lens.

IV. CONCLUSION

It is acknowledged that there is an absolute necessity to regulate campaign finance in the Philippines. The Constitution has abandoned the *laissez-faire* approach and the simple consideration of campaign finance as no more than a property rights issue. Elections are at the heart of a government system, granting to the people the power to actually decide and make political choices on their own, whether on topical issues or in the selection of public officials.

The nature of campaign finance in the Philippines, given the Constitution and the State's adherence to international instruments, is inextricably tied with several rights and freedoms, including the right to property, the right to free and fair elections, the right to freedom of expression, the right to freedom of association, the right to information, and the right to political participation.

Thus, a rights-based approach to campaign finance is both imperative and inevitable. Since the State is the primary duty-bearer, campaign finance law reform could be one of the preliminary measures to ensure compliance with the mandates of the Constitution and the obligations of the Philippines under the ICCPR and other international conventions. Accordingly, to be in line with the global norm of political participation espoused in the UDHR and ICCPR, the Philippines may restrict campaign expenditures, but only on reasonable and objective grounds as determined by the context of prevailing circumstances and the spirit and letter of the Constitution. All measures respecting campaign finance, when challenged, should be able to pass the standards of the free speech and association clauses of the Constitution. Limitations on campaign expenditures that are unreasonable will inflict immeasurable injury upon the

¹¹⁹ *Diergaardt v. Namibia*, No. 760/1997, ICCPR, A/55/40 vol. II (Jul. 25, 2000) 140, Individual Opinion by Martin Scheinin (concurring) 160.

right of a candidate to campaign. It could even mean losing a great leader due to the retraction of his candidacy by reason of money concerns. The costs of political campaigns should be considered on the bases of fairness and flexibility. It is to be recalled that the police power of the State restricts and expands according to the needs of the times.

This paper reiterates one of the most fundamental concepts in International Human Rights Law: the universality, indivisibility, and interdependence of human rights.

The right to freedom of expression and the right to freedom of association are reflected in campaign finance. A contribution is an expression of support; while campaign expenditure represents an appeal for votes, the communication of a platform, or an expression of a desire to serve in or run for public office. These can be shown through words or actions, but all forming part of a citizen's exercise of the right to political participation, which is guaranteed as universal under the ICCPR.

The right to information of the people to matters affecting political life and public interest is recognized under the Constitution. A communication of one's platform and desire to serve anew or keep public office is served well by the freedom of expression clause of the Constitution. The free speech clause is advanced by the need of the public for information relative to public interest.

Additionally, because campaign finance is related and subsumed under the right to freedom of speech, it should be anchored on a democratic and rights-based orientation. The following pronouncement of Justice José P. Bengzon in his Concurring Opinion in *Maquera v. Borra* should be considered:

A democratic form of government requires that political rights be enjoyed by the citizens regardless of social or economic distinctions. Such is our government. As far back as 1899, the Representatives of the Filipino people adopted a Political Constitution at Malolos, Bulacan, providing that: "The political association of *all the Filipinos* constitutes a nation, whose state is called the Philippine Republic"; "The Philippine Republic is free and independent"; and "Sovereignty resides *exclusively in the people*." (Arts. 1, 2 and 3.) A generation later, in 1935, the Filipino people, imploring the aid of Divine Providence, ordained and promulgated the present Constitution of the Philippines, stating the same principle: "The Philippines is a

republican state. Sovereignty resides in the people and all government authority emanates from them.” (Sec. 1, Art. II). Clearly and solemnly, *therefore, our citizenry have thus been given the supreme guaranty of a democratic way of life, with all its freedom and limitations, all its rights and duties.*¹²⁰ (Emphasis supplied)

As the Court said in *Lacson v. Posadas*,¹²¹ suffrage is a right because it is the expression of the sovereign will of the people. Fair and free elections are a political right. And, thus, the exercise of that right should be ensured because it would be rendered nugatory if money politics were to hinder it.

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¹²⁰ *Maquera v. Borra*, G.R. No. 24671, Sept. 7, 1965 (Bengzon, J.P., J., *concurring*).

¹²¹ *Lacson v. Posadas*, A.M. No. 74-MJ, July 30, 1976.