

Case Study 1: Enforcement in France

Edited, translated transcript of presentations by:

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Independence of legal and administrative bodies:

Jacques Bonnet, chairman of the French national committee for political campaign funding, spoke about the independence of legal and administrative bodies in France. There are three separate control bodies: the campaign accounts and political funding committee (CAPFC), the constitutional council (which rules on legislative elections) and the council of state¹ (which rules on presidential elections). All enjoy a high degree of independence vis-à-vis the political powers, and above all independence from public opinion and from the media. This independence has never been put into question, especially in the case of the council of state: even during severe crisis such as the war in Algiers, many of the council of state's rulings went against the authorities. The constitutional council is a relatively new body and its members are appointed by the political authorities. This initially led to questions about its independence, but while it cannot be asserted that political considerations never enter decision-making, this is due to the structure of the council rather than to political pressures from political authorities or public opinion.

This independence is surprising given the fact that the independence of the judiciary is sometimes put into question in France. For example, a court in Nice is currently accused of being under the influence of powerful networks, even though it is a court that is highly protected. The council of state, on the other hand, is less protected but has never been accused of being under the influence of higher powers. Once the constitutional court rules, there is no appeal.

In the CAPFC we are nine people appointed for a five-year mandate, one-third by the council of state, one by the court of cassation and one third by the accounts court. The government does not make appointments though it ratifies our appointments.

Jean Claude Colliard confirmed that the courts do have a high degree of independence, but added that they are perhaps too independent, too separate and kept too far apart. This leads to a fragmentation of responsibilities with each

¹ The Council of State is the highest court of administrative law in France. It rules in final resort on all disputes arising from such law and, as a consultative body, it provides the government with expertise and advice, especially in legal matters. No further action can be taken against rulings handed down by the Council of State: there is no possibility of appeal.

body being responsible for one fragment of the electoral process, and, crucially, with some aspects of the problem falling through the net. Examples of this are the redefining of the constituency boundaries and the general rules for election campaigns. There are also an incredibly high number of players. Financial monitoring may well be tackled more satisfactorily in countries where electoral activity is considered as a whole and is not under the discretion of government authorities. France could consider creating an independent administrative authority that would be in charge of the whole electoral process, including financing. The independence the authorities enjoy in France today is real, but is confined to limited sectors.

Jacques Bonnet spoke of the staff and resources at the CAPFC. The permanent staff is 33, with a budget of 3 million euros. During the election period temporary rapporteurs are hired, taking the staff to between 170 and 180 to monitor accounts, plus 15 extra staff at the headquarters.

What could trigger an investigation? The accounts should relate to the entire year prior to the elections. A "vigilance cell" checks the local media for any news related to campaign activity for the year prior to the election. This sometimes seems wasteful since we track the activities of potential candidates who eventually decide not to run. Candidates would be questioned if there were no debit line corresponding to activities that were reported on by the media. Accounts might also be questioned if, for instance, there is no expenditure line for transport or telephone use. Candidates also monitor each other.

Means available to monitor funds:

There are two separate channels of funding, one for electoral campaigns and one for funding political parties. They are kept completely separate in order to avoid a situation where political parties have a monopoly on representing the French population. Rather, independent personalities must have the opportunity to campaign to get elected and therefore are also entitled to access funds. Whether this in fact makes it easier for independent candidates to campaign is another question, but the possibility for them to do so exists.

When it comes to funding political parties there are several difficulties. There are a large number of political parties; presently 210–215. This stems from article 4 of the Constitution, which states that parties are founded and administered freely. A second difficulty arises from the definition of a political party. There are two legal definitions: (1) a political party is a body that gets government funding to exercise as a political party, (2) a political party is any body that is subject to the legislation on political parties. Because of the constitutional law stating that parties administer themselves freely, political parties refuse to have their finances directly monitored by legal administrative bodies. The legal obligation is that on 30 June each year political parties must submit their certified accounts to the CAPFC. The committee has no means of investigating the accounts.

We have made progress. Up until now chartered accountants only monitored accounts for procedural accuracy and did not check their legality. We had lengthy negotiations with political party treasurers to try to change the rules but it is difficult to change the rules of the commission since that would involve altering the Constitution. But now, following the entry into force of the 1995 law prohibiting donations by public companies, political parties have agreed that we can check that this law is actually complied with.

The CAPFC hopes in years to come to make more progress and to check the work of the councils, i.e. to check the "verifiers". The CAPFC also wants to change the way it publish the accounts. At present they are published as they are delivered by the party treasurers. The CAPFC has agreed with party treasurers that accounts will in future be published with appendices that not only include the amounts, but also explain variations in the amounts. The treasurers are now beginning to feel concerned about local initiatives taken by investigative judges who have started to sue the local sections of political parties and are pushing for information about sources of contributions.

The present state of affairs is that the CAPFC does not think there are many irregularities and hidden party funding, because the fear of investigative judges is a high deterrent, hence the risk is low.

There are some concerns when it comes to European funding since the European legislation prohibits funding by state-owned companies but allows funding by private companies. There are some doubts also about the creation of political party foundations, which could be funded by private sources.

Jean Claude Colliard seconded the point on foundation funding, but raised the point that the problem is not so much about foundation flows to the party, but that spending that should be made by the party, such as for research and documentation, is actually made by foundations which exist in parallel. This is, in effect, indirect funding.

The monitoring power of the judge

Jean Claude Colliard explained that the problem of how to define a political party has a huge bearing on electoral legislation. Since the laws of 1988 and 1990, there has been a spending ceiling on elections, currently about 55,000 euros per candidate. One positive aspect is that the French legislation globalises the spending of the candidate, whether it was done by the candidate or by the political party supporting the candidate. This is contrary to US legislation where a distinction is drawn between hard and soft money. A person cannot donate to a candidate, only to a political party. The present process of electoral litigation consists of a candidate conveying a statement of accounts to the committee, which either ratifies or rejects the statement and then it is up to the judge to proceed.

In the last legislative election, 8,500 statements were submitted to the committee, of which 601 were sent to the judiciary, though a lot of these cases were due to the fact that candidates were unfamiliar with their obligations under the legislation.

The role of the electoral judge (either the council of state for presidential elections or the constitutional council for the legislative elections) is to re-examine the file and decide whether the electoral committee ruled properly. With very few exceptions, the rejection was confirmed by the judges. In the field of electoral litigation, the financial aspect has become a major cause for challenges. Usually the defeated candidate will go to the electoral committee to question the legality of the finances of his opponent's campaign. About half of all requests to cancel elections involved questioning the financing of the opponent's campaign.

The legislation has been successful in curbing excessive spending. In 2004 no accounts were questioned for exceeding the ceiling (nor was the ceiling been approached), though the same cannot be said of other elections, especially the last presidential elections.

The other questions tend to be: was the statement produced on time? Was it stamped by a chartered accountant? Did a candidate pay expenses out of his own pocket?

An additional problem is the tradition of accumulation of mandates. Often a mayor will also be counsellor general or member of the national assembly. This leads to a pitfall: it would be totally illegal for a local government to fund the campaign of a mayor hoping to be a member of parliament, but it would be ridiculous if he cannot run because he used his mayoral phone to make a phone call related to his campaign.

Defining political parties

Jacques Bonnet said that periodically the CAPFC receives proposals for establishing a minimum number of votes in the legislative elections as a requirement for qualifying for public funding. At first 5 per cent was suggested but it was said to hamper the formation of new parties and so was brought down to 1 per cent. But that was said to affect no one, so 3 per cent was suggested. The problem was that the communist party now has about 3 per cent, yet we cannot do away with a traditional party. Eventually 1 per cent was decided upon, which affects almost nobody bar one party which is made up of three people but manages to qualify thanks to a quirk in the legislation that states that to apply for public funding a party needs 50 candidates in metropolitan France or a single candidate in one of the overseas territories.

Should parties be allowed to resist direct monitoring efforts given that they are publicly funded? Are they semi-public orders or are they private bodies that shouldn't be monitored in a semi-public way? This argument is coming up in

South Africa. In France the opinion is that parties are only accountable to the voters and the belief is that they should not be subject to scrutiny by magistrates or civil servants.

Impact

What does such a detailed process of producing campaign accounts achieve? Are politics in France notably cleaner than elsewhere? Does the French electorate have a greater appreciation of political processes than elsewhere? In the short-term, Jacques Bonnet argued, we have not achieved much as cases that are currently before the courts have stemmed from the old legislation. What has improved is the public's image of electoral campaigns, though we have not managed to improve the public's perception of political parties. At least now people no longer believe that money buys campaigns. We try work against the temptation to say that all politicians are rotten.

Sanctions

There are simple rules for breaching financial rules, outlined by Jacques Bonnet. If a party fails to submit accounts that have been certified by a chartered accountant by 30 June, it will lose public subsidies for the next elections. Large political parties do not fail to submit because it is not very complicated; it is small parties who are affected. What they do in practice when they fail on this obligation is change their statutes and name and present candidates once more. This gives an impression that political life lacks seriousness.

Jean-Claude Colliard and Yves-Marie Doublet explained that the main sanctions when there are infringements to the law on political party finance are imposed when the accounts are rejected by the CAPFC and subsequently by the constitutional council (legislative and presidential elections) or the council of state (local and European parliament elections). This could lead to withdrawal of public subsidies. The Council of State may declare that the mistake was made in good faith and therefore the candidate might not be declared ineligible. The constitutional council does not have this option, however, and so the candidate is declared ineligible automatically if the accounts are rejected.

This is a strange legislation because when we rule that the candidate is ineligible, this is for one year from the time of the elections, but if named ineligible as a candidate to parliament, he could run for a different election, e.g. European or municipal. This is not a harsh penalty since it is for one year only and the candidate is not likely to embark on another campaign for one or two years anyway.

As for the candidate who was elected, if the accounts are rejected, he is declared ineligible, he is stripped of his mandate and there is a by-election in which he cannot participate. Had there been any other kind of fraud there would still be a by-election, but he would be able to participate in that election. At the last legislative elections we stripped two elected MPs of their mandate for not

particularly nasty irregularities. We have asked this to be changed in order for the sanction to be proportionate to the misdemeanour. The Constitutional Council should have the possibility to redeem a candidate if a minor technical mistake was made in the accounts in good faith.

Since 1990, around 2,200 candidates have been declared ineligible.

Yves-Marie Doublet reminded us that in presidential elections the constitutional council rules on the conduct of the elections and declares the results, and then publishes the accounts of the candidates in summary form three months after the results have been declared. The declaration of the election results are binding on all authorities and are given the status of a judicial sentence. This means that from a legal point of view when the campaign accounts are published the die is already cast and it is too late to question the declaration of the results on the grounds that the ceiling has been exceeded by the winning candidate, for example.

There is then the political point of view. We cannot call into question the results of an election when the win was by a comfortable lead, which is what happened in the 2002 election when Chirac exceeded the ceiling. He was elected with 82% of the vote and therefore it was impossible to call into question the result.