

# The Limits of Transparency

## Money in French Politics

*By Eric Phélippeau*

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**In France as in the United States, transparency has become a core democratic requirement, and this principle informs most of the laws regulating the funding of political parties. But this art of disclosing information often coexists with the ability to conceal it.**

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Money plays a key role in politics. The International IDEA Political Finance Database confirms that all 180 countries listed have at least one type of regulation governing what this role can be.<sup>1</sup> While we cannot imagine discussing an election in the United States without describing the corresponding race for dollars, the role of money in political expression is considered more taboo in France. Comparisons in this area are never simple. The expenditure on the campaigns of Hillary Clinton (\$770 million, or about \$6 per voter) and Donald Trump (\$410 million)<sup>2</sup> in the last presidential election seems extravagant when compared to the 16 and 11 million euros spent in 2017 by Emmanuel Macron (40 centimes per voter) and Marine Le Pen,

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<sup>1</sup> International Institute for Democracy and Electoral Assistance, *Funding of Political Parties and Election Campaigns: A Handbook on Political Finance*, International IDEA Handbooks series, 2014.

<sup>2</sup> [https://www.francetvinfo.fr/replay-radio/c-est-comment-ailleurs/c-est-comment-ailleurs-le-cout-des-campagnes-electorales-aux-usa-et-en-allemande\\_2044823.html](https://www.francetvinfo.fr/replay-radio/c-est-comment-ailleurs/c-est-comment-ailleurs-le-cout-des-campagnes-electorales-aux-usa-et-en-allemande_2044823.html)

respectively.<sup>3</sup> However, in the United States, the elections sought to mobilize close to 138 million voters, while in France, the number of registered voters was 44 million.<sup>4</sup>

The rules in both these countries also vary considerably. Private advertising campaigns are permitted in the United States; they are not permitted in France. While in the United States companies and large private contributors can donate unlimited funds (via super PACS and 527 groups)<sup>5</sup>—sometimes very discreetly, by sending their contributions to 501(c) groups—this is not the case in France. Since 1995, donations by private corporations have been prohibited, while those made by physical persons have been limited. Campaign expenditure is also capped. And, unlike the prevailing situation in United States, an important share of the costs is borne by the French state.

Transparency is the cornerstone of all the laws that claim to regulate the funding of political life. This is particularly true in the United States, but also holds true in France.<sup>6</sup> As the abovementioned specialist of corruption recalls, “Transparency refers to the principle that information about, and used by, major institutions and actors in both the public and (in somewhat different ways) private sectors should be widely available, in the belief that the public both has a right to know about activities affecting their lives and can use information to hold the powerful accountable.”<sup>7</sup> But if we ask whether these expectations materialize in practice, the answer for the United States holds true for France as well: “When it comes to checking corruption in the financing of political campaigns, transparency is of limited value.”<sup>8</sup>

This statement is in no way surprising if we take the time to resituate the emergence of this principle and the actors who collaborate to shape its contours: transparency is a political issue and weapon, forged for and by political elites. It is an issue internal to the political field, supported and debated by political professionals who are both judge and jury. One aspect of their political skills consists in knowing how to take advantage of declaratory obligations. The institutions created to ensure

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<sup>3</sup> [https://www.lemonde.fr/election-presidentielle-2017/article/2017/08/08/comptes-de-campagne-emmanuel-macron-fut-le-plus-dependier-jean-lassalle-le-plus-econome\\_5170153\\_4854003.html](https://www.lemonde.fr/election-presidentielle-2017/article/2017/08/08/comptes-de-campagne-emmanuel-macron-fut-le-plus-dependier-jean-lassalle-le-plus-econome_5170153_4854003.html)

<sup>4</sup> <https://www.insee.fr/fr/information/3142242>. (Per *Statista*, the number of registered voters in France was ~45.8 million.)

<sup>5</sup> A 527-organization or 527 group is a type of U.S. tax-exempt organized under Section 527 of the U.S. Internal revenue code (26USC §527) created to influence the selection, nomination, election, appointment or defeat of candidates to federal, state or local public office.

<sup>6</sup> Michael Johnston, “Corruption Control in the United States: Law, Values, and the Political Foundations of Reform,” *International Review of Administrative Sciences*, vol. 78, no. 2 (2012).

<sup>7</sup> Michael Johnston, “Limits and Ironies of Transparency: Controlling Corruption in American Elections,” *Election Law Journal*, vol. 18, no. 3 (2019), p. 2.

<sup>8</sup> *Ibid.*

that the principle of transparency is respected find themselves unable to ensure its proper implementation on their own, and they have to count on the assistance of the media and politicians interested in the revelation of violations (and, hence, the creation of scandals) perpetrated by some of their adversaries.

## **Transparency as an Issue and Resource in the Political Game**

Historically, the United States and France have followed different paths in terms of legislation on this subject. While much has been written about the reforms introduced in the United States between 1970 and 2002, the right to fund political life was codified as early as 1907 there. The French public authorities did not ignore the issue (in fact, a bill was presented on December 12, 1892, on this subject), but it was only in 1988 that a number of reforms were introduced, after three decades of lethargy and failed proposals.<sup>9</sup>

Since then, about 20 laws have been passed, to say nothing of the additional decrees, ordinances, orders, and regulations in the field of accounting. Candidate expenditure has been capped to avoid an explosion of communication costs and to encourage equality. Candidates benefit from public funds if they have published their expenditure and income in an account maintained by a fiscal agent. Political parties can also receive public funding, depending on their results in the legislative elections. Donations from other corporate entities are prohibited, and the resources parties and candidates make use of have to strictly respect the transparency guarantees in order to avoid secret funding and financial pressure that may compromise their independence. Donations from physical persons are limited (4,600 euros for candidates, and 7,500 euros for parties). Failure to respect this law can entail sanctions (penal, financial), or even disqualification.

An independent administrative authority, the National Commission for Campaign Accounts and Political Financing (CNCCFP), was established in 1990 to apply these rules. The Commission for Financial Transparency in Political Life had been created two years earlier and was then replaced, in 2013, by the High Authority

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<sup>9</sup> Éric Phélippeau, "The Genesis of a Codification: The Reform of French Political Finance and the Parliamentary Learning Process, 1970–1987," translated from the French by Michelle Pinto, *Revue française de science politique*, vol. 60, no. 3 (2010).

for Transparency in Public Life (HATVP), which aimed to ensure public officials were not tempted to take advantage of their functions to enrich themselves. The same year, a financial prosecution service and a central office against corruption, financial and fiscal violations (the OCLCIFI) were established to implement this global public policy of democratic transparency and the fight against threats of fraud and breaches of probity.

The funding of political life is hence highly conducive to the promotion of an ideal of transparency.<sup>10</sup> But this principle is often embodied in a legal format that represents few risks for political actors. If we review the bills for French laws registered between 1970 and 1987, we note that, at times, the provisions only involve candidates who benefit from public assistance. The way this information is to be publicized also varies. Sometimes it is reserved for members of specialist commissions, unless “interested parties” are permitted to view excerpts of the documentation, but the process that allows them access is not defined. The same is true of the information that has to be made public. At times, excerpts of accounts are mentioned, at others, a detailed expenditure list is provided. When it comes to individual and private company donations, questions regarding the limited or wider publication of this income also arise.

These provisions are the result of transactions and power relations that promote the defense of political professionals’ practical interests. The majority and the opposition nonetheless differ in certain areas. During the 1988 debates, the question of how much transparency should exist around elected representatives’ assets created clear divergences. While the Communist Party and the Socialist Party were in favor of making public this information, the Gaullists and the Centrists were more reluctant, as they were concerned about the way it would be used. The dividing lines are not always so clearly drawn, but they are always modified to fulfill immediate practical needs.

Thus, there is nothing trivial about the suggestion made by elected representatives belonging to the National Front to amend Article 1 of the 1988 Act so that only the candidate elected in the presidential election would have to make a public declaration of his or her assets. At the time, the media held forth on Jean-Marie Le Pen’s fortune and his dubious inheritance from a rich cement industrialist. Communist members of parliament underscored that:

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<sup>10</sup> Éric Phélippeau, *L’argent de la politique* [*Money in Politics*] (Presses de Sciences Po, 2018).

If amendment no. 86, which certain journalists called the “cement” amendment, were to be passed, it would tend to exonerate candidates for the Presidency of the Republic from having to declare their assets. ... In the Communist Party we believe that, as they are presidential candidates, citizens should know who they are dealing with. It is certainly useful to know the difference in assets. And we should know exactly who those who seek to occupy the highest position in the Republic actually are. When Article 1 requires candidates for the Presidency of the Republic to disclose their assets and demands the publication of this list in the *Journal officiel*, we say: “Yes!” But this has to be valid for all candidates and not just for the one who is elected.<sup>11</sup>

As a result, these considerations obviously condition the way candidates spend and receive funds. But this ideal of transparency can actually be extremely naive. Will more publicity ensure greater virtue? Nothing is less certain. And this is all the more true when transparency becomes the overriding issue (as opposed to equity, parity, reliable accounting, et cetera) and the question of its excesses and limitations arises.

## Reporting Obligations and the Art of Dissimulation

Despite the promise of greater transparency, supported by an accumulation of regulations since 1988, the prevailing impression is that of persistent opacity. The litigation provoked by the presidential election accounts is a good illustration of this.

Jacques Robert, former member of the Constitutional Council, recalls that, in October 1995, “we presented valid accounts to the nation, but we all knew they were full of irregularities.” Robert writes: “Edouard Balladur’s campaign accounts [exceeded] the legal ceiling and were doctored to conceal large sums of money of dubious origin. As for the accounts presented for Jacques Chirac’s campaign that led to his election as president of the Republic six months before, they also violated the law.” Roland Dumas, who was then the president of the council, immediately asked that the irregularities be rectified. And “the idea agreed upon was that we could not instigate a regime crisis over a financial issue.”<sup>12</sup>

The 2007 presidential election provoked the same reservations. A director of the CNCCFP noted that it was better to “relativize the exhaustive nature of the

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<sup>11</sup> Guy Ducoloné, AN, 03-02-1988, S3, p. 96.

<sup>12</sup> Jacques Robert, “Campagnes de Chirac et de Balladur en 1995: souvenirs d’une arnaque,” [Campaigns of Chirac and Balladur in 1995: memories of a scam] lesinrocks.com, February 23, 2012.

expenditure that appeared [in the accounts] as it was difficult to evaluate what should be listed and the appropriate sums.”<sup>13</sup> And he went on to add:

“The development of new forms of communication, monetary circulation, and new technologies makes the monitoring and assessment of costs complex; grasping the reality of the means dedicated to the campaign will require increasingly sophisticated expertise.”

But it was in 2012 that, for the first time, a major candidate for the presidency, Nicolas Sarkozy, had his campaign accounts rejected after a difficult decision was taken. As the president of CNCCFP recalled:

We heard President [Sarkozy] and the people who were part of his campaign team, and we warned them. They could have paid more attention. We are not hotheads, nor are we unmindful, and we take our decisions collegially after due consideration of the consequences. As concerning Nicolas Sarkozy’s accounts, they exceeded the ceiling by nearly 1.7 million euros, 8 percent above the declared sum. Exceeding the ceiling is only the third violation noted by the Constitutional Council. There are two others: a lack of good faith (due to undeclared expenditure) and irregular funding (on the Elysée budget).<sup>14</sup>

The role the CNCCFP plays in monitoring campaign accounts is evidently real, but it is never simple. The rules its agents have to ensure are respected are far from clear. Some decisions can lead to serious consequences, and the media are watching.

The observations formulated here could be applied to other elections. The belief that spending more provides a better chance of being elected, combined with the low expenditure ceilings, encourages the concealment of expenditure above the limits set by the law. To do this, candidates can use cash, which is difficult to trace.<sup>15</sup> The political profession, like any other profession, is a combination of respectable jobs and less respectable jobs—“dirty jobs” that “go against the most heroic moral values.”<sup>16</sup> In a

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<sup>13</sup> Régis Lambert, “Le financement de la campagne des candidats à l’élection présidentielle au travers des comptes de campagne,” [The financing of the campaign of the candidates for the presidential election through the campaign accounts] *Les Nouveaux Cahiers du Conseil constitutionnel*, no. 34 (2012), p. 57.

<sup>14</sup> “François Logerot, président de la CNCCFP, analyse la décision du Conseil constitutionnel sur le rejet des comptes du candidat Sarkozy,” [François Logerot, President of the CNCCFP, analyzes the decision of the Constitutional Council on the rejection of candidate Sarkozy’s accounts] *Libération*, July 5, 2013.

<sup>15</sup> Gérard Dalongeville, *Rose Mafia* (Jacob-Duvernet, 2012).

<sup>16</sup> Everett Hughes, “Les institutions bâtarde,” [Bastard institutions] in *Le regard sociologique* (1951; Éditions de l’EHESS, 1996).

way, this transgressive behavior constitutes “normal deviance.”<sup>17</sup> It allows candidates to seemingly respect the expenditure ceilings. But you have to be extremely inept to provide the CNCCFP with accounts that exceed the permitted limit and risk facing sanctions.

It should also be noted that during the legislative elections in recent years, the few candidates whose accounts were rejected can be described as inexperienced novices, who in any event won only a limited number of votes (below 5 percent): 89 out of 107 in 2017, 60 out of 95 in 2012, and 139 out of 191 in 2007. Opacity is the norm not only for candidates’ accounts. It also exists in party accounts, but the CNCCFP has fewer means to investigate them. We should, moreover, be wary of the professional and proprietary interests declared by public officials; the high commissioner for pensions demonstrated in 2019 how often declarations of interests are subject to omissions.

## **Disclosure as a By-product of the Political Game**

If we study the CNCCFP statistics, we may be tempted to think that the law is fairly well known and respected, that the candidates and their financial agents respect it, and the situation is clear and transparent. During the 2017 legislative elections, the number of accounts rejected (107) was low when compared to the number of candidates (5,612). But the CNCCFP data can be read in a more nuanced manner if we only consider the problematic accounts, which represent 53 percent of the total (2,996), although they did not give rise to severe sanctions.

The CNCCFP is ill equipped to carry out its missions. Candidates and party leaders are capable of avoiding the obligation to provide accounts that are too transparent, as illustrated by the Bygmalion affair.<sup>18</sup> When, referring to this affair, a

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<sup>17</sup> This concept was developed by Jean-Louis Briquet, « Le système des pots-de-vin. Normes et pratiques des échanges corrompus dans l’Italie de Tangentopoli », in *Patronage et corruptions politiques dans l’Europe contemporaine*, Armand Colin, 2014, pp.229-243.

<sup>18</sup> From 2014 onwards, the communication agency Bygmalion was much talked about in the media due to a political and financial scandal involving Nicolas Sarkozy, who was president of the French Republic from 2007 to 2012. Bygmalion was founded in 2008 by people close to Jean-François Copé, one of the leaders of the Union pour un mouvement populaire (UMP), the president of the UMP from 2010 to 2014, and a staunch supporter of Nicolas Sarkozy. On February 27, 2014, the weekly magazine *Le Point* questioned Nicolas Sarkozy’s favoritism for Bygmalion; the company was accused of having overcharged for services to his political party during the 2012 presidential campaign. False invoices

journalist remarked that the CNCCFP had validated the parties' accounts, the president of the organization replied: "We don't validate them, we publish them." As for knowing whether the commission was equipped to detect false invoices, the latter retorted: "When it's just a false invoice, we can't detect it. The other problem is overcharging: we would have to establish the number of chairs or cameras used at a meeting and we don't have an army of inspectors."<sup>19</sup> This perfectly underlines the fact that the CNCCFP agents' best efforts would not suffice to make up for its lack of means to really carry out its missions.<sup>20</sup>

Over time, and after innumerable demands for legislative change, the "toothless tigers" sometimes become more dangerous. The transformation of the Commission for the Financial Transparency of Political Life into the HATVP is an illustration of this, if we compare the results produced by the young institution to those achieved by its forerunner over 25 years.<sup>21</sup> But, overall, the institutions created to ensure the transparency of the funding of political life find it difficult to carry out their mission.

The recent prosecution of François Fillon and his wife, or the litigation involving the assistants of members of the European Parliament belonging to the National Front, Modem, and La France Insoumise, were publicized by investigative journalists in collusion with actors who benefitted by making these revelations public. As Pierre Péan stated, investigative journalism has changed. It consists of selecting "documents from a judicial investigation that would interest readers, rewriting and then completing them." This basically turns the investigator into a "leak manager."<sup>22</sup> As at least these recent affairs suggest, disclosure remains a derivative of ordinary political struggles in the field of ethical policies. And scandals are part of the process of scandalization, backed by an exchange of fire seeking to test the ethical credibility of

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issued served to conceal the excess electoral expenditure, which was estimated by the online journal *Médiapart* at about 17 million euros. The entire affair was reconstructed and exhumed, not by the CNCCFP, but by Violette Lazard, a journalist with the daily newspaper *Libération*. Her book *Bigmagouilles* (Stock, 2014) includes about 20 annexes that expose the extravagant means poured into the UMP candidate's 2012 presidential campaign. The campaign cost 40 million euros instead of the permitted 22 million.

<sup>19</sup> Renaud Lecadre, "La fausse facture, on ne la détecte pas. Entretien de François Logerot, président de la CNCCFP," [The fake invoice, we do not detect it. Interview with François Logerot, President of the CNCCFP] *Libération*, May 28, 2014.

<sup>20</sup> Notice n° 162 au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale sur le projet de loi de finances pour 2014, t. XXI, registered on November 21, 2013.

<sup>21</sup> See Eric Phélippeau, *L'argent de la politique*, op.cit., chapter 3, pp. 97-130.

<sup>22</sup> Pierre Péan, "À qui profite la lutte anticorruption? Dans les cuisines de l'investigation," [Who benefits from the fight against corruption? In the kitchens of investigation] *Le Monde diplomatique*, September 2019.



political rivals with the revelation of vicarious information that involves their lack of probity.

Following a different time scale, transparency as a weapon has proven to be as limited in France as it is in the United States. On our side of the Atlantic, the race for transparency has led to the greater exposure of problematic behavior. But it has not reinforced citizens' confidence in their institutions, although it has fostered populist, sometimes fundamentalist, demands to fight for greater public integrity—which is, in fact, impossible to achieve. Even in countries where reforms governing the funding of political parties and elections are adopted, the public is more or less ignorant of the main provisions of these regulations.<sup>23</sup>

This observation reinforces the more general question of ordinary citizens' political competence and knowledge, and the limits of the latter—issues that have been raised by American and European political science since the end of the Second World War.<sup>24</sup> Public opinion on the funding of political life is fundamentally marked by a view that politics is corrupt; it permits rich donors to exert undue influence, and the costs keep rising.

Under these circumstances, reforms to increase transparency are unlikely to lead to an increase in public confidence. Clearly, the United States and France both agree on the diagnosis Johnston arrived at, which is that rebuilding confidence in political institutions will not be the result of greater efforts to fill the gaps in terms of transparency. Rather, it can develop if the increasingly unbearable persistence of “huge inequalities in terms of wealth, power, access to politics, efficient political organisation and participation” are seriously addressed. These inequalities “encourage a feeling of exclusion from important roles in democratic life”<sup>25</sup> among a large number of our fellow citizens.

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<sup>23</sup> Jennifer van Heerde-Hudson and Justin Fisher, “Parties Heed (with Caution): Public Knowledge of and Attitudes towards Party Finance in Britain,” *Party Politics*, vol. 19, no. 1 (2013).

<sup>24</sup> Loïc Blondiaux, “Faut-il se débarrasser de la notion de compétence politique? Retour critique sur un concept classique de la science politique,” [Should we get rid of the notion of political competence? Critical return on a classical concept of political science] *Revue française de science politique*, vol. 57, no. 6 (2007).

<sup>25</sup> Michael Johnston, “Limits and Ironies of Transparency: Controlling Corruption in American Elections,” *Election Law Journal*, vol. 18, no. 3, 2019, p.11.

Published in *booksandideas.net*, 13 October 2020, in partnership with  
*www.publicbooks.org*.

Translated from the French by Renuka George.