Is My Foreign Yours? The Concept of Foreignness in the Comparative Regulation of Political Finance

This paper reflects on an ongoing policy debate over the regulation of 'foreign' political influence, including via donations to parties or lobby groups. The debate assumes a paradigm of foreignness, pivoting around money from offshore interests with no direct interest in the state in question. That paradigm masks deeper questions for regulation about the 'why' of regulation, questions that can only be answered by also considering the 'whom': who is foreign? Is foreignness a factor of where the money was housed; or the status of the entity? What of permanent residents, who may or may not have voting rights but are clearly part of the political community? Conversely, what of citizens abroad?

This paper puts the debate in context in two stages. First it analyses the idea of 'foreignness' as a general concept linked to notions of otherness and xenophobia. The notion is then explored within its political and legal context. In doing so three underlying conceptions of foreignness are identified: jurisdiction, political community (thin or thick), and material interconnectedness (which assumes a more internationalist stance). These theoretical conceptions are contrasted with Tham's bottom up typology, which identified three regulatory 'rationales' or categories of foreignness within political finance law: overseas resources, foreign governments and foreigner status (whether individual or organisational).

Then the paper compares the approach of five anglophone liberal democracies to the regulation of 'foreign' political finance. Ultimately, it is shown that existing regulation embraces a variety of conceptions of foreignness – only the old laissez-faire approach, in which there would be few barriers to foreign political money, has been eschewed. Revealingly, although the notion of 'foreign' should be nested and symmetric, it rarely is applied to influence between regions in federal systems, nor to the activities of local corporations abroad.

There is an ongoing policy debate, happening simultaneously in many countries, over the regulation of 'foreign' political influence, including via donations to parties or lobby groups. Much of the debate has centred on practicalities (eg of enforcement) or breadth (eg whether the law should catch only political parties, or election campaign accounts, or lobby groups all-year-round). But there is a deeper question: what is 'foreign'?

Whilst the question of foreign influence on domestic policy and politics is of re-emerging significance, cross-border political activity is nothing new. Interest in the increasingly complexity of its regulation was evidenced in the appearance of a hefty international handbook as early as 2005.[1] For an example of the question in action, one only has to look at the scandal and judicial investigation that has enveloped former French President Nicholas Sarkozy. Sarkozy is alleged to have taken Libyan funds to help finance his campaigning in the late 2000s.[2]

Some of this interest reflects a recrudescence of often conflicting nationalisms, in the past several years. High profile accusations and inquiries into offshore activity aimed at domestic politics

[1] Thomas D Grant (ed), *Lobbying, Government Relations and Campaign Finance Worldwide* (Oceana Publications 2005). An updated, if skeletal, account of relevant laws can also be found through International IDEA, especially its online 'Political Finance Database'

[2] Anne-ael Durand et al, 'Comprendre l'affaire Sarkozy et la Libye en 2007', *Le Monde* online, 18/11/2016. Sarkozy claims the investigation is politicised: Anon, 'Financement libyen: Nicolas Sarkozy dénounce une "manipulation d'une ampleur inédite"', *Le Monde* online, 25/3/2018

include US and western European inquiries into alleged Russian cyber-involvement and offshore technological and social-media assistance in both national election campaigns and high-profile referendums such as on Brexit. Closer to this author's home, and to the immediate topic, Australia has been engaged in a political and legal debate about Chinese influence, including the question of political donations from Chinese business people and entities. China, for its part, has publicly lamenting 'irresponsible' Australian government comments which 'pander[ed]' to 'fabricated' media reports that evinced a 'Cold War mentality'. It asserted that it 'has no intention to interfere in Australia's internal affairs or exert influence on its political process through political donations'.[3]

International political activity can take a plethora of forms: from espionage-style influence, through lobbying and funding of parties, and on to online issue and electoral advocacy. It can involve offshore corporate, private and governmental actors – categories that may overlap, especially in countries where oligarchies flourish or where governments are heavily involved in business activities.

Electoral activity is obviously particularly sensitive to questions of 'foreign' involvement, given it represents the confluence of citizen choice and the legitimation of governing elites within a nation-state. Our focus here will be on one key aspect of that activity: political finance and in particular the source of contributions to political parties and candidates.

Some 116 out of 171 countries surveyed by International IDEA have some prohibition on donations from foreign interests to local political parties.[4] Not all involve blanket prohibitions: some focus only on foreign governments or unions. Nor is the trajectory of regulation all one way: India for instance recently relaxed its 1976 ban on donations from foreign corporations.[5]

The money-in-politics question is not, however, restricted to the paradigm of party or candidate funding. There is also the older question of ingratiation and bribery of politicians or officials. A paradigm example is the famous, old, but little litigated 'emoluments' clause in the US Constitution, designed to restrict that country's president from being the subject of gifts from foreign governments.

'Foreignness' in Political and Legal Context

In public consciousness, the idea of foreignness represents a simple legal duality. If X is foreign to Y, then Y is foreign to X. The underlying concept however is not so simple to pin down. The concept is intertwined, at least in sociological discourse, with the phenomena described as 'xenophobia'. As Wicker points out in the *International Encyclopedia of the Social and Behavioral Sciences*, that term is 'well established' even though it has 'weak theoretical foundation'. Xenophobia may connote a natural wariness of strangers prior to getting to know or understand

[3] Embassy of the People's Republic of China in Australia, 'Remarks of Spokesperson of Chinese Embassy in Australia', 6/12/2017, <http://au.china-embassy.org/eng/sgjs/sghd/t1516965.htm> and 'Foreign Ministry Spokesperson Geng Shuang's Comments on Australian Leader's Remarks', 8/12/2017, <http://au.china-embassy.org/eng/sgjs/sghd/t1518005.htm> (both accessed 3/4/2018).

[4] Sourced from International IDEA, above n 1, accessed 5/4/2018. Such regulation is almost universal in Asia (92% of 34 countries surveyed).

[5] Asha Gupta, 'Party Funding in India', ch 22 in Jonathan Mendilow and Eric Phélippeau, *Handbook of Political Party Funding* (Edward Elgar, 2018) 411 at 414.

them, or it can connote an instinctive aversion or dislike. Fear (of the unknown) or loathing (of difference).[6] Beneath either connotation is a more basic distinction, between the self and the other.

Both connotations have played a role in public and political debates about restraining foreign political activity. The wariness aspect has been evident in Australia in recent years. In 2004, a British Lord and Conservative political figure gave $1m in a single donation to the governing Australian Liberal Party.[7] This remarkable, if lawful, donation did not generate scandal. At most, objections cited egalitarian concerns (the unfairness of large or class-motivated donations), not the donor's nationality. On the contrary, defenders of the largesse saw the donation as a form of sympatico assistance between ideologically and culturally aligned parties in the Westminster tradition, rather than an attempt to buy favour or influence from a member of the establishment of a foreign country.

Yet, as we noted in the introduction, recent attention on clusters of donations from business people or entities from Chinese backgrounds has been framed in terms of unruly offshore commercial interests and, worse, insidious connections to the regime in Beijing. British interest in Australian politics apparently arouse less fear than Chinese. Partly because British influence has been part of the historical memory and partly because China is a relatively new player and its politics seems opaque to Australians. Whilst the debate has been driven by the rise of China, geo-political shifts are not uncommon and not all lead to such domestic unease.

Partly also, then, the debate has revealed a cruder xenophobia, an instinctive aversion that has long roots. These roots date to the flux of Chinese immigrants in the second half of the 19th century, which culminated in restrictive measures such as the *Chinese Acts* of 1861-1890 (Victoria) and ultimately a 'White Australia' immigration policy that survived until the late 1960s.

The confluence of these factors however is complex. It is no coincidence that the debate manifested at a time of renewed nationalism in the West. Although not as obvious in Australian politics as in say the UK 'Brexit' referendum or in the US Trump election, this nationalism was emblemised in the revival of the One Nation Party in 2016, a party whose roots lay in explicit anti-Asian sentiment in the late 1990s. China in one sense then is just the latest manifestation of a 'near northern' threat to the island-mindset of Australia (a la Japan in the 1930s-40s, or Indonesia in the 1970s-90s).

But we should not over-simplify. 19th century resentment was born out of superiority: out of crude racialism and a belief that impoverished immigrants would undercut white labour rates. Concerns over a tide of people have been substituted in contemporary times by concerns driven over a sense of inferiority: financial inferiority in the face of a tide of money with the capacity to erode national sovereignty. Commercialism of course has a contractual element, and inward investment is welcome. But money is more fluid than people, and so harder to police.

In political philosophy, too, a concept like 'foreignness' is not easy to pin down. Even in biology or psychology, the seemingly simple division between organism and environment or self and other (or to put it another way, between internal and external or welcome and unwelcome) is blurry. Just consider the interdependence of cellular and bacterial life or the personal and the social. If as

[6] 'Xenophobia', in Neil Smelser and Paul Baltes (general eds), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, 2001) 16649.
[7] Lord Michael Ashcroft: 'British Lord Made $1m Donation to Libs', *smh.com.au*, 1/2/2006.

the poet Donne put it, 'no man is an island', then how much moreso is it hard to define the essence let alone periphery of a political entity?

However much the political will to regulate 'foreign' political finance has been marked by wariness or even resentment of those labelled 'outsiders', the legal question of what is foreign cannot be reduced to or framed in such terms. This is for two reasons: one to do with liberal legalism, the other to do with the context of what is being regulated. First and most obviously, liberal legalism eschews the language of xenophobia. This is not just a mask;[8] it has aspirational value in any system built formally on non-discriminatory concepts of citizenship or the colour-blind market ethos of trade. For instance, it may be easier for tariffs to gain traction in a time of heightened xenophobia - witness President Trump's 2018 steel and aluminium tariffs. But even Trump had to announce multilateral tariffs then seek to justify exceptions for allies on rational economic or national security grounds.

Second, and more importantly, any framing of the concept of 'foreign' in law has to adapt to the *context* of *what* is being regulated. Laws about foreign involvement in governmental and political activities are different from, say, laws about immigration or trade. An example from the Australian Constitution may suffice. In a rule laid down in 1901, dual citizens of 'foreign powers' remain excluded from being elected to or serving in the Australian Parliament. In the original intention of its framers, the UK and Australia's fellow 'dominions' such as Canada and New Zealand were not caught by that rule. But by the late 1990s the Australian High Court ruled that the UK had become 'foreign'.[9]

The ruling did not draw on evidence of any cooling in fondness between the countries, or any sense of cultural alienation. Rather it was justified by cool facts of governmentality. Australia had become separated from the UK in a political sense, through a series of tectonic drifts. Most obvious were mid-twentieth century conventions about the autonomy of its foreign policy and a severing, by the 1980s, of any lingering avenues through which UK judges or MPs might theoretically make law affecting Australia. A few eyebrows were raised at the ruling, given the two countries retained a shared head of state. But the test of 'foreignness' is not purely symbolic. Sharing a practically powerless constitutional monarchy was an ultimate sign of once close relationship, but too formal to be a barrier to a finding that the UK had evolved from being Australia's 'mother country' to being a 'foreign power'.

Us and Them: 'Foreignness' Defined by Jurisdiction, Political Community or Material Inter-connectedness

Still, the existence of porous boundaries does not negate the search for dividing lines that might capture various conceptions of 'foreignness'. Here I suggest there are three differing conceptions. The state in a jurisdictional sense presents the simplest conception. A second, much subtler idea is that of distinct political community. A third conception, which cuts across the other two is an idea of material inter-connectedness.

The idea of local versus foreign jurisdiction is most obviously a territorial idea: geographical jurisdiction. That which is offshore and beyond the borders of the state is foreign. But it can also encompass a more formal notion of legal jurisdiction, especially in relation to entities as opposed

[8] As it was say at the founding of the Australian Commonwealth. Then, an immigration policy explicitly described as 'White Australia' was achieved through administrative discretion rather than written explicitly into the *Immigration Restriction Act* of 1901, largely to appease British concerns about Japanese sensibilities:
[9] *Sue v Hill* (1999) 199 CLR 462.

to people or tangible objects. In particular, the place of registration of artificial entities such as incorporated bodies.[10]

As Elizabeth Frazer argued, the idea of 'community' can seem too amorphous to be analytically useful.[11] Still, Frazer teases out a thick and thin conception of political community. The thicker one stresses genuine groupness in the form of shared or inherited values and identity. The thinner conception is based on the fact of a 'common subjection to some set of governing institutions and structures'.[12] On its face it is more formal than the thick conception, but it is not insubstantive. Neither conception, as we shall see, is coextensive with the legal notion of citizenship as a prerequisite to political rights. Thus an expatriate citizens may retain a sense of shared values and identity despite years abroad and thus be part of the thicker conception. For their part, regardless of their formal status, permanent residents are subject, everyday, to the 'governing institutions and structures' that bind the thinner conception of political community.

It is worth observing that, in either thick or thin form, the concept of political community need not centre on national identity. This is most obvious in federations, especially those with great regional diversity.[13] Yes, as we will note at the end of this paper, when it comes to regulating political finance the former idea dominates. That is, 'foreign' money or influence is defined as that coming from outside a nationalist conception of political community, leaving state or regional political communities to interfere with and influence each other.

Besides the relatively simple jurisdictional definition, and besides more substantive notions of political community, there is a rival if looser concept societies as materially interconnected. This is often caricatured as a liberal capitalist view of the world: 'community' through the interrelatedness of trade in goods and services and movement of people and capital. But it may also capture left-wing internationalism. That kind of internationalism once followed a socialist conception, of humanity responding to but rooted in a substructure of economic forces. Today it is more likely to assume an environmentalism which stresses a different kind of materialist substructure, namely nature as a borderless pre-requisite for all life.

Normatively, the capitalist and socialist approaches are worlds apart. One legitimates the idea of capital and for-profit corporations possessing interests to be represented in political voice. The other prioritises sectoral interests, class solidarity and unions in the life of any polity. So each approach points to radically different approaches to regulating the role of money in politics generally. But neither would draw the same boundaries around the concept of 'foreign' as the jurisdictional, or the political community approaches. Thus the capitalist might defend the ability of an overseas industry to donate or campaign into an important potential market, if there was a debate about tariffs relevant to that industry in that market. Conversely, a traditional socialist would defend the ability of sympathetic and connected left-wing movements and even governments to support each other across borders. In either conception, there is no per se 'foreignness'. Rather there are degrees of material connectedness.

---

[10] The 'tangible' versus legal entity distinction is not mutually exclusive though. Ships and aircraft for instance, may be caught by a jurisdiction either because of geographical location, or because of their registration with a port of (notional) origin.

[11] Elizabeth Frazer, 'The Concept "Community"' and 'The Idea of a Political Community', chs 2 and 7 of *The Problem of Communitarian Politics: Unity and Conflict* (OUP, 1999). Not just amorphous, but the concept also risks underplaying the conflict, divergence and even contested boundaries that demark any modern polity: Frazer at 244-5.

[12] Ibid, 241.

[13] Compare discussion of political community within federations in Colette Mintz, 'From *NFIB* to *Williams*: A Principled Prohibition on Coercion for Australian Federalism' (2018) 29 Public Law Review 47 at 56 and 59-61.

Rationales for Restricting Foreign Political Finance

According to International IDEA, the rationale for bans on political contributions from foreign interests is to address concerns about 'external/foreign influence' to advance the 'principle of self-determination'.[14] As early as 1974, US Senator Lloyd Bentsen summarised the rationale for prohibiting foreign donations in these terms:

> I do not think foreign nationals have any business in our political campaigns. They cannot vote in our elections so why should we allow them to finance our elections? Their loyalties lie elsewhere; they lie with their own countries and their own governments.[15]

(Bentsen only mentioned 'foreign nationals' because he was speaking in the context of laws that already prohibited direct contributions from corporations or unions, wherever based, to US parties and candidates). Unpacking this argument against foreign political donations reveals two elements to the rationale. One is a positive claim, about who is included in the polity, namely US electors. The other is a negative claim, about the risk of inviting nefarious or at least competing overseas interests to influence US electoral politics. Both claims are in a way chauvinist, but they reflect something deeply rooted in the concept of a self-governing, political community.

These justifications for prohibiting 'foreign' political donations do not go unopposed. An alternative position emerges from a cluster of arguments based in notions of freedom, tinged with internationalist liberalism. On the freedom side is the libertarian principle that no particular viewpoint should be restrained, and that interests expressed through foreign funding of campaigns should not be suppressed. Massaro has argued that this is the end point of the logic of the corporate-friendly US Supreme Court decision in the corporate-friendly campaign finance case, *Citizens United.*[16]

Some, reasoning from a liberal economic perspective, go so far as to argue that foreign political donations are beneficial. Thus Endoh claimed that they may encourage 'Pareto efficient' tariff policy.[17] Powell reasoned that in a globally interdependent economy, arguments from national sovereignty not only hold less sway but that 'foreign corporations have a significant interest in the domestic policies of other countries and thus may have a legitimate right to express those interests', so that 'instead of indiscriminately outlawing all donations from abroad' regulation should focus only on explicit bribes.[18]

Others, it must be noted, have shrugged their shoulders and wondered if regulation of such donations is more expressive than essential. According to a Canadian study, foreign corporations are less likely to donate than locally-owned ones.[19] If there are natural forces restraining the 'supply' side of foreign donations, there may also be cultural factors restraining 'demand' for them.

---

[14] Elin Falguera et al (eds), *Funding of Political Parties and Election Campaigns: A Handbook on Political Finance* (International IDEA, 2014) 21

[15] Contribution in 1974 Congressional debate, cited in Lori Fisler Damrosch, 'Politics across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs' (1989) 83 *American Journal of International Law* 1, 23.

[16] Toni M Massaro, 'Foreign Nationals, Corporate Spending and the First Amendment' (2011) 34 *Harvard Journal of Law and Public Policy* 663.

[17] Masahiro Endoh, 'Cross-Border Political Donations and Pareto Efficient Tariffs' (2012) 21 *The Journal of International Trade and Economic Development* 493. (Pareto-optimality is a kind of normative stability, representing a position where any change from that state would make some worse off without making others better off).

[18] Jeffrey K Powell, 'Prohibitions on Campaign Contributions from Foreign Sources: Questioning their Justification in a Global Interdependent Economy' (1996) 17 *University of Pennsylvania International Economic Law Journal* 957, 959–60.

[19] Joseph Wearing and Peter Wearing, 'Mother's Milk Revisited: The Effect of Foreign Ownership on Political Contributions' (1990) 23 *Canadian Journal of Political Science* 115.

By the time the UK moved to prohibit foreign donations in 2000, Ewing notes, 'the problem of foreign donors [had] largely disappeared'.[20] By the late 1990s both UK major parties had adopted policies of not accepting foreign donations (although such voluntarism did not prevent the British Conservative Party being embroiled in a controversy over foreign sourced loans in 2006.[21])

Recently, Tham has typified 'three different rationales' for restricting foreign political money, by reference to three categories or definitions of 'foreignness':[22]

1. foreign source (in the sense of drawing on resources based overseas),
2. foreign government, and
3. a broad status of foreign person or entity.

The benefit of this approach is that it tethers the normative and theoretical question to concrete categories. It does invite the chicken-and-egg question. These categories are not rationales. Rather they are definitions which may imply clues as to sincere rationales for regulation, or which might be adopted for unprincipled (eg partisan, or rabble-rousing) motives. Still, since the underlying concepts (foreignness, political community) are malleable, an inductive method that reasons outward from existing regulatory categories may be just as useful as any attempt to work deductively from broad, a priori principles.

Foreign source prohibitions, Tham suggests, are principally anti-laundering devices, so that limits focused on local donors are not easily subverted by hard to trace roundabouts of money, from onshore to offshore and back onshore again.[23] That may be a subsidiary purpose, but they also seek to serve as a form of restriction of substantively 'foreign' money.[24] In doing so, a nuance is drawn that deflects accusations of xenophobia. Foreignness becomes not a status of any person or entity, but more an attribute that weaves together the two alternatives to 'political community' discussed in the previous section. One is the territorial conception of jurisdiction – wealth kept outside the jurisdiction should not bleed directly into it for political purposes.[25] The other is the economic connectedness conception – resources that were not invested in or at least available to contribute to the local economy should not circulate in its political life.

The second category is also relatively easy to frame, if imperfectly. As we saw earlier, we have a substantive legal sense of what connotes a 'foreign' country. Indeed the list of such entities is relatively fixed, even if it can be blurry in the case of evolving colonial or for that matter confederal relationships.[26] In a liberal democracy, the state is meant to take no formal role in electioneering,

---

[20] Keith D Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Hart Publishing, 2007) 91.

[21] Ibid. As a rule, loans on commercial terms are not regulated as 'donations'. However foreign loans, especially if from a government bank, may raise concerns similar to donations. *Canada Elections Act 2000* (Canada) s 373 permits parties/candidates to take loans only from Canadian registered banks or individuals, and only Canadian citizens or permanent residents can guarantee such loans.

[22] Joo-Cheong Tham, 'Of Aliens, Money and Politics: Should Foreign Political Donations be Banned?' (2017) 28 *King's Law Journal* 262 at 265 and 268.

[23] Ibid, 265.

[24] In government, the Australian Labor Party sought to base a prohibition on such a definition, but its legislative proposal was blocked (for unrelated reasons) in the Senate.

[25] At this point the reader might see a paradox in the territorial jurisdiction approach: what country can enforce its laws offshore? That is a problem for enforcement but the legal response is to focus on incentives that attach to onshore entities and actors. For example, fines and forfeitures for a party accepting offshore donations or rules restraining flows through local financial institutions.

[26] So 'Europarties' (operating at the EU level) are forbidden from taking donations from outside the EU – or from EU governments. But they can take donations from persons or corporations across the EU. See Wouter Wolfs and

and to take a neutral role in any funding of political parties or candidates. Whether out of fear of the clout of foreign states, or a simple application of the principle of state-neutrality to foreign governments, then, it is unsurprising that prohibitions on foreign governmental activity in domestic elections are commonplace.

The third and broader category of 'foreigner' is perhaps the most interesting as it forms a status attaching to people or entities. Tham associates it with 'understandings of political community'. Of course limits on 'foreign' sourced resources or 'foreign' governments are also rooted in an inclusionary/exclusionary notion, as is 'political community'. Nonetheless, the risk that crude xenophobia might drive regulation suggests we pay particular attention to prohibitions based on the status of people or entities.

Further, whichever conception of political community drives the idea of 'foreigner', attempts to define that idea in legal terms strike a practical problem. (A problem on an order of complexity higher than the relatively simple categories of foreign governments and states, and resources held offshore). People may have multiple identities and residences. As a result, the law often alights on immigration status as a proxy – most commonly citizenship, or permanent residency. But even those simplifications cannot be applied to organisations. Ships have national flags and corporations have a place of incorporation. But a place of incorporation is a highly formal 'birthplace', not a measure of substance; and in any event it is easy to multiply corporations and entities like associations and trusts may have no place of incorporation as such. As a result, other looser but more substantive tests like 'primary place of business' must be invoked.

Tham's typology helpfully identifies the status of foreigner as in turn having three typical legal expressions. These are 'migrant status; the legal right to vote; and business connection'.[27] The concept of 'foreigner', as we just noted, cannot be crudely essentialist. A person's immigration status (not to mention their domicile) may evolve, just as the location of an organisation's core activities may change. Ultimately Tham's mission is to argue, from a social democratic perspective, against a narrow definition of 'foreigner' that would exclude non-citizen permanent residents simply because they are typically denied the franchise.

There is a cart and horse at work here: at the level of the individual the right to vote is surely more fundamental than the ability to pour money into the political system. The job of expanding the franchise beyond mere citizens seems more pressing than preserving the ability to influence politics in one's country of residency through money. A person who resides lawfully in a political community or polity is a political animal, possessing an interest in political expression and equality of concern, however poorly or well-resourced they are. After all, as we have seen, even in its thin conception the political community encompasses those who are subjected to the same system of government.

A corporation however, at heart, is a collection of resources. So it makes sense to restrict corporations from using overseas based assets to influence local politics, and to demand some minimum level of onshore business commitment or operations (and hence interests to defend) before wielding such influence on the same basis as indigenous organisations.[28]

Jef Smulders, 'Party Finance at the Level of the European Union' in Jonathan Mendilow and Eric Phélippeau, *Handbook of Political Party Funding* (Edward Elgar, 2018) 183 at 192-3.

[27] Tham, above n 21, 266.

[28] Say be having a local incorporated entity and business activity to draw on.

Comparative Political Finance Law

The table in the appendix summarises the regulation of foreign political donations, at national level, in five common law democracies. In alphabetical order these are Australia, Canada, New Zealand, the United Kingdom (UK) and the United States (US). This is not to ignore the importance of other systems, but to permit comparison from a shared basis of common law, liberal democracies and economies, with relatively stable party and largely majoritarian party and electoral systems.[29] The regulatory measures adopt elements of *all* the conceptions we identified earlier: jurisdiction, political community especially (whether thick or thin), and material interconnectedness (especially economic interrelationships). Absent is any purely laissez-faire regime, although that was the prevailing approach in all systems until recent decades.

US law was the first to act in the field of restricting 'foreign' political finance.[30] Since 1966 it has 'attempt[ed] to minimize foreign intervention in US elections [through a] series of limitations on foreign nationals [including] general prohibition on political contributions by foreign nationals'.[31] The US Code thus prohibits foreign nationals making 'contributions and donations' or electioneering expenditure. [32] The term 'foreign national' in turn leverages a compendious definition of 'foreign principal'.[33] These restrictions were held to be constitutional in *Bluman v FEC* (2011), despite the otherwise laissez-faire nature of the first amendment and the relaxation of the ability of corporations to directly electioneer in *Citizens United* (2010).

Canada, like the US, bans organisational (especially corporate or union) donations to parties or candidates in general. So it shares with the US a rule that only citizens or permanent residents should donate to parties or candidates. But, unlike the US – and more akin to the UK and New Zealand – it also restrains election expenditures. Any sizeable third party campaign must be mounted by a citizen or resident group, or corporation 'carrying on business' in Canada.[34] Such third party campaigns are themselves faced with a list of prohibited donors (notably overseas governments, or unions or corporations that do not carry on business in Canada).

The UK defines 'permissible source' donors - and campaigners - by reference to a variety of statuses.[35] In particular, corporate donors have to be registered in the UK and carrying on business there. New Zealand caps donations, and electioneering, by 'overseas persons', including bodies incorporated abroad. The donation cap in New Zealand however suffers from a loophole: as a foreign person or entity could give NZ$1500 to every candidate of a favoured party, and indeed donations under the limit are not disclosable.

The regimes proposed in Australia go further than elsewhere in several key respects. Recall there have been two proposals. The former Labor government wanted to ban foreign sourced money. This as we noted earlier embodies the territorial jurisdiction conception of foreignness. The

---

[29] In voting systems, New Zealand is the odd-one out with its move in 1992 to a proportional representation in its house of government. Whilst leading to coalition governments, that move has not upended the two-party dynamic as governments still alternate between cabinets dominated by one or other of the two traditional parties.

[30] Just as it was the first to act in restricting donations generally, with the *Tillman Act* (1907) ban on direct corporate contributions to candidates. On the other hand, the UK was the first to tackle election expenditure, beginning with candidates in the 1880s. Modern attempts to regulate political finance holistically however are a product of relatively recent decades.

[31] Federal Election Commission (US), 'Foreign Nationals' (23/6/2017) <https://www.fec.gov/updates/foreign-nationals/> (accessed 17/6/2018).

[32] 52 USC §30121.

[33] 22 USC §611(b).

[34] 'Third party' is jargon for political actors besides parties and candidates, such as lobby groups.

[35] *Political Parties, Elections and Referendums Act 2000* (UK) s 54.

current Australian conservative government's proposal, summarised in the table below, is more involved.

Under it, one notable feature is the precariousness of any right for permanent residents to contribute financially. A mere Regulation could exclude their ability to donate.[36] This would reflect a rather thin conception of 'political community': citizens first, others are 'foreign'. It would also be odd for such a basic political interest to be subject to ministerial whim rather than statutory definition. A thicker conception of national versus foreign political community is found elsewhere. Thus, US green-card holders are explicitly entitled to donate on a par with citizens.[37] Canada similarly treats permanent residents on a par with citizens, in terms of a right to participate through both donations and direct campaigning.[38] Whilst New Zealand and UK law ostensibly requires individual donors to be electors, permanent residents are able to vote in New Zealand,[39] as can Commonwealth and Irish citizens resident in the UK.[40]

The current Australian proposal is also unusual in extending beyond electioneering, to political campaigning more generally. That is, it seeks to limit the ability of locally-based third parties, like lobby groups and charities, from sourcing funds overseas if those funds might find their way into an advocacy campaign within Australia. This equates political campaigning within civil society with political party activity, and seek to purge any foreign money from either domain. Comparable democracies do not go that far. They see the point of regulation more narrowly, to prevent foreign money tainting parties and candidates directly or indirectly by touching on formal election campaigns. The breadth of the Australian proposal is also remarkable since that nation's political finance system is otherwise light touch. At national level, Australia has no limits on donations to parties/candidates nor electoral expenditure.[41]

Noticeably, all the jurisdictions would preserve an equal right for expatriates – citizens abroad – to donate. This is regardless of how long they had been expatriated. For systems where expatriates retain the right to vote in perpetuity (US) or for a long period (UK, 15 years) this seems logical, if not essential. It makes less sense in nations where expatriates lose their voting rights after a modest period, such as Canada (currently 5 years)[42] or Australia (6 years unless there is an actual intention to return). In either case, we see an extended idea of 'political community' embedded in the notion of citizenship. However in the latter countries the suturing of voting rights reflects a belief that at some point an expatriate citizen drifts away from their homeland to the point of not deserving a formal electoral voice. It might then be asked: on what basis should their ability to *financially* influence their original homeland's politics be preserved?

---

[36] Electoral Legislation Amendment (Electoral Funding and Disclosure) Bill 2017-18, cl 9(2) (proposed new *Commonwealth Electoral Act 1918* (Australia) s 287AA(2)). Subject to constitutional arguments. In 2015 the Australian High Court disapproved of a limitation of (capped) donations in state politics to electors, reasoning that politics was not just about the individual interests of citizens, but included persons and entities affected by government – such as organisations and permanent residents: *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551.

[37] 52 USC §30121(b)(2).

[38] *Canada Elections Act 2000* (Canada) ss 331(b) and 363(b).

[39] *Electoral Act 1993* (NZ) s 74(1)(a). The right is temporarily lost if the permanent resident spends a year abroad: s 80(1)(b).

[40] *Representation of the People Act 1983* (UK) s 1(1). Citizens of EU nations can also vote in UK local and European Parliament elections: *Representation of the People Act 1983* s 2(1) and *European Parliamentary Elections Act 2002* s 8(5) but not UK parliamentary elections.

[41] See further Graeme Orr, 'Party Finance Law in Australia: Innovation and Enervation' (2016) 15 *Election Law Journal* 58.

[42] Subject to a pending Supreme Court appeal, from a decision upholding the 5 year rule, *Frank v A-G (Canada)* [2015] ONCA 536.

When it comes to organisations, all the countries surveyed seek to prohibit foreign governments – and political parties – from contributing. This suggests a rejection of any older idea of (socialist) solidarity across borders. However when it comes to non-government organisations, especially economic actors such as businesses, the position is nuanced. In the countries surveyed, some mix of jurisdiction, and economic interconnectedness, prevails. The jurisdiction side is reflected in rights for bodies formally incorporated within the country, and barriers to foreign governments and states (ie rival jurisdictions). The economic interconnectedness element is reflected in requirements that a corporation have a place of business in the country.[43]

For instance, a body incorporated in New Zealand is not an 'overseas person' and can donate to parties or promote an election time campaign there. In the UK, an organisation must be registered in the UK or the EU (the UK being extended, economically, into the EU) *and* 'carry on business' in the UK. Incorporation in Australia, *or* having a principal place of business there, will suffice. The US similarly. In Canada economic connectedness is sufficient, as long as the corporation carries on business there.

It is also noticeable that in federal systems, the legal expression of 'foreignness' rarely applies between sub-national states or provinces. This strongly suggests a nationalistic conception of 'political community', and possibly a sense of intense material interconnectedness between such states or provinces. Otherwise, such sub-national entities are themselves political communities, and are essentially autonomous jurisdictions for the purposes of regulating their own elections in particular.[44] The issue is particularly piquant where referendums on devolution or independence are involved. 'Foreign' influence through both direct campaigning and campaign finance, emanating from other parts of the UK, was an issue in the Scottish independence referendum. But it was left to flow.[45] In contrast, the Referendums Act of Québec limits contributions to money from political parties or electors of that province.[46] This has the happy (for separatists) effect of staunching the influence of pro-federation money from within the rest of Canada.

A final, if formal, point is that some jurisdictions define foreignness head-on, in the sense of having a list of prohibited donors. That is the case for the US and New Zealand. The UK and the Australian proposal indirectly defines the concept, through an inclusive list of allowable or permissible donors. The indirect approach may seem cleaner: it gives political parties and candidates a checklist, requiring them to ensure donors fall within that list.[47] But, as an Australian parliamentary committee reasoned, the liberty interest may call for a spelling out of – and hence

---

[43] Perhaps illustrating the decline of socialism, there is no equivalent for internationalist unions to participate in any of the countries.

[44] This has long been the case in Australia, the US and Canada, and has become the case for the devolved parts of the UK (Scotland, Wales and Northern Ireland). True, federal systems often have constitutional rules to protect one region from discriminating against residents of other regions. But such rules do not apply to matters inherent to regional institutional autonomy or political representation such as rights to vote (and by extension related electoral rights). See eg *Street v Queensland Bar Association* (1989) 168 CLR 461 at 512-4, 528 and 548.

[45] *Scottish Independence Referendum Act 2013* (Scotland) s 11 and Sch 4, cl 2 ('permissible donor' included electors and entities across the UK). This was in line with the general referendum finance law in the UK, see the *Political Parties, Referendums and Electoral Act 2000* (UK) s 119 and Sch 15. In contrast, at the Brexit referendum, EU nationals resident in the UK could not contribute as they did not have the requisite voting rights; yet EU companies could contribute if they had a UK registered presence.

[46] *Referendum Act 1978* (Québec) chapter C-64.1, ss 37-38. (In addition, Québec government money subsidises both 'yes' and 'no' cases).

[47] Eg, The Electoral Commission (UK), *Permissibility Checks for Political Parties*. <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0015/102282/sp-permissibility-rp.pdf> (accessed 10/6/2018).

justification of – an explicit list of prohibited donors.[48] (Canada employs both approaches. It has a list of allowable donors to parties, and of who can electioneer; but in terms of who can contribute to third party campaigns, there is a list of prohibited donors). Regardless of approach, none of the five countries purport to permit foreign governments or political parties to contribute.

Reciprocity: A Blindspot

Before concluding, it is worth noting the curious absence of the principle of reciprocity from both existing regulations and the ongoing debate. Earlier we noted the fact that in ordinary understanding, 'foreign' is a reflexive relationship. To identify some set of others as 'foreign' is, logically, to identify oneself as 'foreign' to them.

Yet regulation of the international activities of domestic entities tends to only focus on implementing international conventions against outright bribery and graft. Bribing of public officials has long been criminalised at a domestic level;[49] an international push against its offshore manifestations resulted in the 1998 OECD *Convention on Combating Bribery of Foreign Public Officials*).[50] Countries that ban foreign donations *into* their own political system do not seem concerned to stem any flow of political money *from* their own corporations or citizens into overseas polities. Similarly hypocritical is the instinct to fear inward, foreign governmental influence most of all, whilst maintaining outgoing aid programmes tied to particular political and economic outcomes.[51]

This oversight is not necessarily evidence that the debate is xenophobic; it may simply suggest that domestic debates are driven by perceptions of self-interest. It may also reflect the fact that some cultures care less about foreign political activity or donations. What is telling is that the high principle of prohibiting foreign influence is typically seen as a one-way street.

This blindspot is also curious given the difficulty of enforcement of laws extra-territorially. Penalties preventing say Australian corporations from donating into foreign political systems would be more susceptible of enforcement, at the source of the gift, than laws against foreign donors. This is particularly the case given the answerability of those firms to local corporate regulators. Recognising this difficulty of enforcement at the source of the donor, laws against foreign donations instead target recipients such as local political parties.

Conclusion (tbc)

[48] Joint Standing Committee on Electoral Matters, *Advisory Report on the Electoral Legislation Amendment (Electoral Funding and Disclosure) Bill 2017* (Parliament of Australia, April 2018) 45-6.

[49] See, eg, the *Public Bodies Corrupt Practices Act 1889* (UK) and note the exclusion of overseas public bodies/officials in s 7.

[50] Which spawned the *International Bribery Act 1998* strengthening the *Foreign Corrupt Practices Act 1977* (US): Trevor Potter and Paul S Ryan, 'United States' in Grant (ed), above n 1, 581–2. For the UK see the *Bribery Act 2010* (UK) s 6. For Canada see *Corruption of Foreign Public Officials Act 1998* (Canada). For Australia see *Criminal Code Act 1995* (Australia) Div 70 and Simon Bronitt, 'Policing Corruption and Corporations in Australia: Towards a New National Agenda' (2013) 37 *Criminal Law Journal* 283, 287-9.

[51] At a minimum, as Magnus Ohman notes in 'Africa' in Falguera et al (eds), above n 12, 38 at 41, '[h]ow foreign aid is structured [may] have a significant impact on the dynamics of political finance' since parties and businesses will adjust their behaviours and even structures to access donor assistance.

Table: Summary of Comparative Regulation

National System	General scheme	What is 'foreign'
Australia	Relatively light regulation. Annual disclosure, but no caps on donations or expenditure.	Proposed bill would limit contributions over A$250pa to 'allowable donors': • electors or citizens abroad • entities incorporated in, or with head office or principal place of activity in, Australia. Foreign bodies politic or public enterprises are excluded. Permanent residents *could* be excluded by ministerial fiat. The prohibition would extend beyond parties and candidates, to cover third parties that engage in political advocacy campaigns.
Canada	Comprehensive regulation Caps on donations + election period expenditure (including third party electioneering) Election period limited to formal campaign period. Issue advertising is covered.	Donors to parties/candidates must be citizens or permanent residents. Anyone outside that group also commits an offence if they seek to 'in any way induce electors' to vote or not vote, at all or in a particular way. Third party election spending over $500 limited to: • Citizen or resident (or group run by such) • Corporation carrying on business in Canada Third party election advertising must not be funded from: • Non-citizen or non-permanent resident • Corporation not carrying on business in Canada • Trade union lacking bargaining rights in Canada • Foreign political party • Foreign government or agent.
New Zealand	Caps on election advertising expenditure in regulated period. No general donation caps. Broadcasting limited to parties' government funded air-time, or 3rd parties. Third parties can only *broadcast* pure issue advertising. The regulated period for expenditure caps is 3 months (or less if a snap poll)	'Overseas person' defined as: • Individual who resides outside NZ and is not a NZ citizen or elector, or • Body incorporated outside NZ, or • Unincorporated body with principal place of business outside NZ. Party or candidate limited to NZ$1500 from any 'overseas person' per 3 year cycle. 'Overseas person' cannot register to be 3rd party 'promoter'. Registered 3rd parties also limited to NZ$308 000 election expenditure. Unregistered promoter (including 'overseas person') limited to NZ$12 600 per election.
United Kingdom	Caps on election expenditure. But no general donation caps. Only parties may broadcast political ads, and then via free airtime. For 3rd parties, 'regulated campaign activity' is activity reasonably regarded as intended to influence voters.	Exclusive list of 'permissible sources': • Elector (which includes UK citizens overseas, and many Commonwealth and EU citizens resident in UK) • UK registered company or partnership or unincorporated association, carrying on business there • UK registered trade union, building or friendly society • Certain trusts or public funds • *Not* charities

	The 'controlled period' limiting expenditure is 1 year prior to election.	
United States of America	Caps on donations, but no expenditure caps.	There is a general ban on direct contributions to parties or candidates from corporations or unions. 'Foreign nationals' may not make, directly or indirectly: 1. 'contribution .. in connection with … election …for purpose of influencing … election', nor 2. 'expenditure … for electioneering communication'. 'Foreign national' is: • Foreign government or political party • Entity or group organized under foreign law or with its principal place of business in foreign country • Individuals who are not citizens nor admitted for permanent residence. (Domestic subsidiaries of foreign corporations also face limits if the foreign corporation finances that activity.)