

Pushing the Limits of Democracy: U.K. Campaign Expenditure Restrictions Held to Violate the Right to Free Expression under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in *Bowman v. United Kingdom*

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I. THE FACTS

Immediately before the 1992 Parliamentary elections in the United Kingdom, Phyllis Bowman arranged to have 25,000 leaflets distributed throughout the constituency of Halifax, describing the candidates' voting intentions on abortion and the use of the human embryo as a guinea-pig.¹ The reverse side of the leaflets listed the chronological stages of embryo nervous system development from conception to birth, and stated that it was apparent that "we [the British public] are . . . destroying babies painfully up to six months after conception."² Bowman, the Executive Director of the Society for the Protection of the Unborn Child (SPUC), was charged with violating subsection 75 of the Representation of the People Act.³ Subsection 75 prohibits the expenditure of more than five pounds sterling by an unauthorized person to promote or procure the election of a particular candidate during the pre-election period.⁴

The trial court at Southwark Crown Court acquitted her because the summons charging her with the violation had not been issued within the one-year time-limit stipulation of the 1983 Act.⁵ After her acquittal, Bowman and SPUC brought a joint application to the European Commission of Human Rights, alleging that the prosecution brought against Bowman violated her right to freedom of expression under Article 10 of the Convention for the Protection of Human

1. See *Bowman v. United Kingdom*, 26 Eur. H.R. Rep. 1, 5 (1998). Bowman arranged to have a total of 1.5 million leaflets distributed in other constituencies throughout the UK. *Id.*

2. *Id.* at 5-6.

3. See *id.* at 6.

4. See *id.*; Representation of the People Act, 1983, § 75(5) (Eng.).

5. See *Bowman*, 26 Eur. H.R. Rep. at 6; see also Representation of the People Act § 176.

Rights and Fundamental Freedoms.⁶ The European Commission of Human Rights declared Bowman's part of the application admissible on December 4, 1996, expressing the opinion that there had been a violation of Article 10 of the Convention.⁷ Less than two years later, the European Court of Human Rights *held* that the five-pound expenditure limitation in the 1983 Act amounted to a violation of Bowman's freedom of expression under Article 10 of the Convention, and she was entitled to just compensation under Article 50 of the Convention. *Bowman v. United Kingdom*, 26 Eur. H.R. Rep. 1 (1998).

II. BACKGROUND

The European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) was signed in Rome, Italy on November 4, 1950, and came into force on September 3, 1953.⁸ It was the first document that gave "specific legal content to human rights in an international agreement, and combin[ed] this with the establishment of machinery for supervision and enforcement."⁹ This machinery is the creation of the European Commission of Human Rights (Commission) and the European Court of Human Rights (Court) to "ensure the observance of the engagements undertaken by [the signatory nations]."¹⁰ The Commission and the Court, seated in Strasbourg, do not act as appellate courts from domestic tribunal decisions; instead, they play the role of reviewers to ensure that the States correctly administer the standards of the Convention and its Protocols.¹¹ The Convention provides that the Commission may review disputes between Contracting States or claims brought by groups or individuals against a Contracting State.¹² The Court may only review disputes between Contracting States or those brought before it by the Commission.¹³ Although a group or individual cannot directly petition the Court, the Commission may refer those cases to

6. See *Bowman*, 26 Eur. H.R. Rep. at 8.

7. See *id.*

8. See Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221, 222 [hereinafter Convention].

9. IAN BROWNLIE, BASIC DOCUMENTS IN HUMAN RIGHTS 338 (1971).

10. Convention, *supra* note 8, art. 19, 213 U.N.T.S. at 234.

11. See BROWNLIE, *supra* note 9.

12. See Convention, *supra* note 8, arts. 24-25, 213 U.N.T.S. at 236.

13. See *id.* arts. 44, 48, 213 U.N.T.S. at 246.

the Court if its Report concludes that a violation of the Convention has occurred.¹⁴

Under Article 25, the Commission may receive and review petitions brought by victims alleging a violation of one of the rights set forth in the Convention.¹⁵ The Court has interpreted the term “victim” in Article 25 to include individuals who, although not prosecuted or convicted directly, are at risk of being directly affected by a law.¹⁶

In *Norris v. Ireland*, the Court held that Norris, a homosexual considered to be “predisposed to commit [homosexual sodomy]” in violation of an Irish statute prohibiting such acts, could be considered a victim under Article 25 by reason of his homosexual orientation.¹⁷ Although Norris had never been charged with a violation of the statute, the Court reasoned that when a law “remains on the statute book,” it “may be applied . . . in such cases at any time,” therefore Norris can “be said to ‘run the risk of being directly affected’ by the legislation in question.”¹⁸

As signatories to the Convention, Member States undertake the responsibility to secure for their citizens the “rights and freedoms” defined in Section I of the Convention.¹⁹ One of these freedoms is the freedom of expression, secured by Article 10 of the Convention.²⁰ The key provisions of Article 10 provide:

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such . . . restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others . . .²¹

14. See DR. RALPH BEDDARD, HUMAN RIGHTS IN EUROPE 65 (1993). However, as of November 1, 1998, Protocol 11 eliminated the need for the Commission and now allows individuals to directly petition a new, full-time European Court of Human Rights. See *New European Court Ratified*, FIN. TIMES (London), Oct. 2, 1997, at 2. Protocol 11 additionally requires States to recognize an individual’s right to petition the new Court. See *id.*

15. See Convention, *supra* note 8, art. 25, 213 U.N.T.S. at 236.

16. See *Norris v. Ireland*, 13 Euro. H.R. Rep. 186, 196 (1989).

17. See *id.* at 195.

18. *Id.* at 196.

19. See Convention, *supra* note 8, art. 1, 213 U.N.T.S. at 224.

20. See *id.* art. 10, 213 U.N.T.S. at 230.

21. *Id.*

Pursuant to Article 10(2), a restriction on the freedom of expression will be upheld if it is: (1) prescribed by law, (2) has a legitimate aim, and (3) is necessary in a democratic society.²²

Sunday Times v. United Kingdom involved an injunction restraining publication of an article on the subject of the drug thalidomide, which allegedly had been responsible for causing birth defects when taken by pregnant women.²³ The article was intended to assist parents of deformed children in obtaining larger settlements from the distillers of the drug.²⁴ In *Sunday Times*, the European Court of Human Rights held that a restriction is prescribed by law if it satisfies two requirements.²⁵ The first requirement is that the law must be adequately accessible, meaning that the individual must at least have an indication of what legal rules apply in a given situation.²⁶ The second requirement is that the restriction must be “formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able . . . to foresee . . . the consequences which a given action may entail.”²⁷ The Court held that the English Common Law of contempt, although not statutory, sufficiently satisfied the criteria to be prescribed by law.²⁸ However, the Court went on to hold that the injunction violated Article 10 of the Convention because it failed to be necessary in a democratic society, as other families had a vital interest in knowing all the underlying facts and the various possible solutions to the thalidomide disaster.²⁹

In order for a restriction to have a legitimate aim under Article 10(2) of the Convention, it must pursue at least one of the specific aims mentioned in the article, which include: “national security, territorial integrity or public safety, for the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”³⁰ In *Lingens v. Austria*, the Court held that the conviction of a publisher who printed two articles accusing the Austrian Chancellor of protecting former members of the Nazi SS had a legitimate aim in protecting the reputation or rights of

22. See *Vogt v. Germany*, 21 Euro. H.R. Rep. 205, 223-25 (1996).

23. See *Sunday Times v. United Kingdom*, 2 Eur. H.R. Rep. 245, 245 (1979).

24. See *id.*

25. See *id.* at 271.

26. See *id.*

27. *Id.*

28. See *Sunday Times* at 273.

29. See *id.* at 281.

30. BEDDARD, *supra* note 14, at 182.

others.³¹ However, the Court also held that the conviction did not satisfy the requirement to be necessary in a democratic society and was disproportionate to the aim pursued, so it constituted a violation of Article 10.³² Under the Austrian Criminal Code, journalists must prove that their statements are true in these cases to escape conviction, and the Court noted that when the statements in question involve value judgments, it is impossible to prove their truth. The Austrian law thus infringed upon the “freedom of opinion itself.”³³

The third criterion a restriction on the freedom of expression must satisfy is that it must be “necessary in a democratic society.”³⁴ In *Handyside v. United Kingdom*, the Court established the standards for evaluating a restriction’s necessity.³⁵ *Handyside* involved a controversial English publisher that was prosecuted and convicted for violating the Obscene Publications Acts of 1959 and 1964 for possessing obscene books for publication.³⁶ In evaluating the necessity of the prosecution and subsequent conviction, the Court first established the fact that the “machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights,” which allows the Contracting States to have a “margin of appreciation” in passing and enforcing their own legislation.³⁷ While the Court noted that it is primarily up to the national authorities to make an “initial assessment of the reality of the pressing social need implied by the notion of ‘necessity,’” the term “necessity” can neither be defined as strictly as the term “indispensable,” nor can it be as flexible as the terms “‘admissible,’ ‘ordinary,’ ‘useful,’ ‘reasonable,’ or ‘desirable.’”³⁸ The Court reasserted its authority over alleged violations of the Convention, noting that it has the ultimate power to give the final ruling on whether a restriction on an individual’s freedom of expression violates Article 10 of the Convention.³⁹ In making this final judgment on the restriction at issue, the Court stated that it examines the challenged restriction “in light of the case as a whole . . . and the arguments and evidence adduced by the applicant in the domestic legal system and then at the

31. *Lingens v. Austria*, 8 Eur. H.R. Rep. 407, 407 (1986).

32. *See id.* at 421.

33. *Id.*

34. *Vogt*, 21 Euro. H.R. Rep. at 223.

35. *See Handyside v. United Kingdom*, 1 Eur. H.R. Rep. 737, 753 (1976).

36. *See id.* at 740-42.

37. *Id.* at 753-54.

38. *Id.* at 754.

39. *See id.*

international level.”⁴⁰ Finally, after evaluating the facts and circumstances at issue in *Handyside*, the Court held that there had not been a violation of Article 10 because the government authorities had limited the prosecution to what was “strictly necessary.”⁴¹

The Court has continued to use the three criteria in more recent cases involving alleged violations of Article 10.⁴² In *Vogt v. Germany*, the Court held that the applicant’s dismissal from civil service because of her political involvement in the German Communist Party constituted a violation of her freedom of expression under Article 10 of the Convention.⁴³ In evaluating the applicant’s complaint, the Court began by examining whether there had been an official interference with Vogt’s freedom of expression.⁴⁴ Although the right to be recruited into the civil service was not a right under the Convention, the Court noted that the status as a civil servant does not deprive an individual of the Convention’s protection, and being suspended from that position for exercising one’s right to free expression constitutes an interference with that right under Article 10(1).⁴⁵

The Court evaluated whether the interference was justified by applying the three criteria established in Article 10(2).⁴⁶ The interference was held to be prescribed by law in that it was based on the Lower Saxony Civil Service Act which requires civil servants to uphold a duty of “political loyalty.”⁴⁷ The Court also held that the interference pursued the legitimate aim of protecting the national security based upon that fact that the German democratic government was founded “after the nightmare of nazism” and that Germany has a particular interest in ensuring that its democratic Constitution is upheld and defended for that reason.⁴⁸ Finally, the Court held that, in light of the fact that the German authorities have a “margin of appreciation” in evaluating the necessity of its restrictions on freedom of expression, the absolute nature of the restriction at issue, which did not even distinguish private from public expression, was not

40. *Handyside* at 755.

41. *See id.* at 758.

42. *See, e.g., Vogt*, 21 Eur. H.R. Rep. at 223-25; *Silver v. United Kingdom*, 5 Eur. H.R. Rep. 347, 379-80 (1983).

43. *See Vogt*, 21 Eur. H.R. Rep. at 234.

44. *See id.* at 231-32.

45. *See id.*

46. *See id.*

47. *See id.* at 233.

48. *See id.* at 234.

proportional to the legitimate aim pursued, and was thus not “necessary in a democratic society.”⁴⁹

The Court, upon finding that a Contracting State completely or partially violates a provision of the Convention, may award “just satisfaction” to the injured party under Article 50 of the Convention as long as the internal law of the State only affords a partial remedy.⁵⁰ The Court interpreted the scope and meaning of Article 50 in *Sunday Times v. United Kingdom (No. 2)*.⁵¹ The Court stated that with regard to Article 50, just satisfaction is awarded only “if necessary” and is not awarded to the injured party “as of right.”⁵² The Court distinguished between “damage caused by a violation of the Convention” and “costs incurred,” noting that it would be difficult to maintain that simply finding a violation of the Convention would be considered just satisfaction with regard to the actual costs incurred by the injured party.⁵³ Based upon the facts presented to the Court with regard to the domestic proceedings in *Sunday Times*, the Court found that it had previously been agreed that the parties would bear their own costs in litigating the action in the English courts.⁵⁴ Therefore, the Court held that the English costs could not be included as just satisfaction under Article 50 as they were already settled in the domestic proceedings.⁵⁵

In evaluating the Strasbourg costs, the Court stated that costs and expenses would not be awarded “unless it is established that they were actually incurred, were necessarily incurred, and were also reasonable as to quantum.”⁵⁶ The Court used its own discretion in evaluating whether the costs were “actually” and “necessarily” incurred, and although the costs were found to be actually incurred, only a portion of the costs claimed by the applicant were deemed necessary.⁵⁷ The Court then evaluated whether the costs were

49. *Id.* at 239.

50. *See* Convention, *supra* note 8, art. 50, 213 U.N.T.S. at 248.

51. *See generally* *Sunday Times v. United Kingdom (II)*, 3 Eur. H.R. Rep. 317 (1980) (ruling on Article 50 with regard to the proceedings in *Sunday Times v. United Kingdom*, 2 Eur. H.R. Rep. 245 (1979), where the question of Article 50 was reserved).

52. *Id.* at 322.

53. *Id.*

54. *See id.* at 324.

55. *See id.* at 325.

56. *Sunday Times (II)*, 3 Eur. H. R. Rep. at 325.

57. *See id.* at 326-29. The Court found that: (1) the costs incurred by submitting unsuccessful claims were not recoverable; (2) the fees paid to only one of the three counsel representing the applicants were necessary; (3) a portion of travel and hotel expenses claimed were recoverable; (4) the disbursements claimed (opinions on the contempt law of eight countries and copies of the book *Thalidomide: My Fight*) were not recoverable; and (5) “other expenses,” namely counsel fees, telephone calls, and air freighting were recoverable. *See id.*

“reasonable as to quantum,” and the Court held that there was no reason to refuse a full reimbursement of the costs actually incurred as long as they were proved to the Court to be reasonable.⁵⁸

Eleven Protocols have been added to the Convention, conferring additional rights to the citizens of the Contracting States and reforming various procedures established by the Convention.⁵⁹ In particular, Article 3 of the First Protocol to the Convention requires the signatory nations to hold free elections under “conditions that will ensure the free expression of the opinion of the people in the choice of the legislature.”⁶⁰ Article 5 of the same Protocol requires that the provisions of Article 3 be regarded as an additional article to the Convention.⁶¹ The United Kingdom was the first Contracting State to join the Protocol on November 3, 1952; the Protocol was entered into force on May 18, 1954 after obtaining the tenth Contracting State’s signature.⁶²

The European Court of Human Rights has stated that because the Convention’s Preamble states that “fundamental human rights and freedoms are best maintained by ‘an effective political democracy,’” the right to free elections guaranteed by Article 3 of the First Protocol is of “prime importance in the Convention system.”⁶³ However, in *Mathieu-Mohin and Clerfayt v. Belgium*, the Court noted that Article 3 recognizes those rights without expressly defining them, thus there is “room for implied limitations,” and the rights “are not absolute.”⁶⁴ In that case, the Court addressed whether Article 3 of the First Protocol had been violated when two French-speaking citizens of Belgium, while being recognized with the French-speaking members of the legislature, were precluded from being members of the Flemish Council unless they took the Parliamentary oath in Dutch.⁶⁵ The Court stated that in order to determine whether the requirements of the First Protocol had been complied with, the conditions at issue must not “curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness,” they must

58. *Id.* at 330.

59. *See* BEDDARD, *supra* note 14, at 31.

60. Convention, *supra* note 8, Protocol 1, art. 3, 213 U.N.T.S. at 264.

61. *See* Convention, *supra* note 8, Protocol 1, art. 5, 213 U.N.T.S. at 264.

62. *See id.* at 262, n.1.

63. *Mathieu-Mohin and Clerfayt v. Belgium*, 10 Eur. H.R. Rep. 1, 15 (1987).

64. *Id.* at 16.

65. *See id.* at 2-3. The Flemish Council was the relevant regional body of the applicants’ area. *See id.*

pursue a legitimate aim and must not be disproportionate to achieving that aim.⁶⁶

The Court held that, taken alone, the conditions did not breach the requirements of Article 3.⁶⁷ The electoral system at issue pursued the legitimate intention to “defuse the language disputes in the country by establishing more stable and decentralised organisational structures.”⁶⁸ Furthermore, when the Belgian electoral system is considered in its general context, the situation “does not necessarily threaten the interests of the minorities” as the system makes “concessions to the territoriality principle” and provides “safeguards against inopportune or arbitrary changes by requiring . . . special majorities” like the French-speaking members.⁶⁹ Finally, the Court stated the French-speaking voters in the district were in no way deprived of the right to vote or the right to stand for election simply because “they must vote either for candidates who will take the . . . oath in French and . . . sit on the French Community Council, or else for candidates who will take the oath in Dutch and . . . sit on the Flemish Council.”⁷⁰ Therefore, the condition was not a disproportionate limitation “such as would thwart the free expression of the opinion of the people in the choice of the legislature.”⁷¹

The United Kingdom electoral system divides the Kingdom into several constituencies, each of which is represented by a single Parliamentary representative.⁷² Most of the Parliamentary candidates are chosen by the predominant national political parties.⁷³ The candidates do not receive state funding for their campaigns, and in order to protect those without substantial resources, section 76 of the Representation of the People Act limits the amount a candidate may spend before, during, or after an electoral campaign.⁷⁴ An election agent must submit an account of all expenditures after the election in order to prevent excessive spending.⁷⁵

66. *Id.* at 16.

67. *See id.* at 19.

68. *Mathieu-Mohin and Clerfayt*, 10 Eur. H. R. Rep. at 18.

69. *Id.*

70. *Id.*

71. *Id.*

72. *See Bowman v. United Kingdom*, 26 Eur. H.R. Rep. 1, 6 (1998).

73. *See id.*

74. *See id.* at 7; *see also* Representation of the People Act § 76.

75. *See* Representation of the People Act §§ 73, 76, 81.

Section 75 of the Representation of the People Act prohibits any expenditure made by an unofficial person to promote a candidate's election.⁷⁶ The relevant provisions of the section state:

- (a) No expenses shall, with a view to promoting or procuring the election of a candidate at an election, be incurred by any person other than the candidate, his election agent and persons authorised in writing by the election agent
- (b) of issuing advertisements, circulars or publications; or
- (c) of otherwise presenting to the electors the candidate or his views or the extent or nature of his backing or disparaging another candidate, but paragraph (c) of this subsection shall not restrict the publication of any matter relating to the election in a newspaper or other periodical or in a broadcast made by the British Broadcasting Corporation . . . apply to any expenses not exceeding in aggregate the sum of £5.⁷⁷

Section 75(5) additionally provides that if a person "incurs, or aids, abets, counsels or procures any other person to incur, any expenses in contravention of this section . . . he shall be guilty of a corrupt practice."⁷⁸

There are two British cases that interpret the meaning and scope of section 75.⁷⁹ *Director of Public Prosecutions v. Luft* involved members of certain political committees who printed campaign literature directed against the National Front candidates in various constituencies where one of those candidates was seeking election.⁸⁰ The House of Lords held that the phrase "with a view to promoting or procuring the election of a candidate," may also include the intent to simply prevent a particular candidate's election.⁸¹ In another case involving the interpretation of the Representation of the People Act, the Central Criminal Court held that the same section does not apply to a company who condemned the financial policy of the Labor Party in a nationally circulated newspaper because it was generally supporting the interests of a particular party in all constituencies.⁸²

III. THE *BOWMAN* DECISION

In the noted case, the European Court of Human Rights first addressed the Government's preliminary objection in which it argued

76. *See id.* § 75.

77. *Id.*

78. *Id.*

79. *See Director of Public Prosecutions v. Luft*, 3 W.L.R. 32, 42 (1976); *R. v. Trohoh Mines, Ltd.*, 1 All E.R. 697 (1952).

80. *Luft*, 3 W.L.R. at 39.

81. *Id.* at 42.

82. *See Trohoh Mines*, 1 All E.R. at 699.

that Bowman could not claim to be a “victim” within the meaning of Article 25(1) as she was acquitted of the charge.⁸³ Bowman claimed that she was a victim as a result of the prosecution because she had suffered the “anxiety, stigma and expense involved in her interrogation by the police, the prosecution against her, and the surrounding publicity.”⁸⁴ The Court unanimously rejected the Government’s preliminary objection, stating that although acquitted, the acquittal was for a technical reason, and the prosecution itself was at least a “strong indication to her” that it would continue to be a risk if she failed to “modify her behaviour.”⁸⁵ The Court, citing to its previous holding in *Norris v. Ireland*, held that Bowman was directly affected by the 1983 Act, and could be considered a victim within the meaning of Article 25(1) of the Convention.⁸⁶

The Court then analyzed whether the restriction constituted a violation of Article 10 of the Convention.⁸⁷ The Court stated that in order to find a violation of Article 10, the restriction must be: (1) prescribed by law, and (2) necessary in a democratic society.⁸⁸ As there was no dispute to the contrary, the Court quickly established in a single sentence that the restriction was prescribed by law as it was derived from the statutory 1983 Act.⁸⁹ The Court then turned to the more complicated task of assessing whether the restriction was necessary.⁹⁰

The Court began by analyzing whether the restriction was legitimate.⁹¹ The Government asserted that the spending limit was aimed at protecting the rights of others for three reasons.⁹² First, it “promoted fairness between competing candidates for election by preventing wealthy third parties from campaigning for or against a particular candidate.”⁹³ Second, it aided in ensuring that candidates “remained independent of the influence of powerful interest groups.”⁹⁴ Third, it “prevented the political debate at election times

83. See *Bowman v. United Kingdom*, 26 Eur. H.R. Rep. 1, 14 (1998).

84. *Id.* at 15.

85. *Id.*

86. See *id.*

87. *Id.* at 15-19.

88. See Convention, *supra* note 8, art. 10(2), 213 U.N.T.S. at 230.

89. See *Bowman*, 26 Eur. H.R. Rep. at 16.

90. See *id.* at 17-19.

91. See *id.* at 16-17.

92. See *id.*

93. *Id.* at 16.

94. *Bowman*, 26 Eur. H. R. Rep. at 16-17.

from being distorted by having the discussion shifted away from matters of general concern to centre on single issues.”⁹⁵

Conversely, Bowman argued that section 75 of the Act operated to “curtail democratic freedom of expression” as it was unlikely that “a single-issue group . . . could distract voters from the mainstream political platform to such a degree as to hinder the electoral process.”⁹⁶ Furthermore, the spending restriction could not “ensure equality between candidates” as the major political parties that might support a candidate were free to spend unlimited amounts as long as they did not “attempt to promote or prejudice any particular candidate.”⁹⁷ The Court rejected Bowman’s argument, finding that because the restriction contributed to securing equality between candidates, it had the legitimate aim of protecting the rights of others.⁹⁸

The Court next addressed whether the restriction was “necessary in a democratic society.”⁹⁹ The Government argued that the restriction was only partial with regard to expenditure, and Bowman could have pursued a number of other means of communication.¹⁰⁰ Bowman, in turn, argued that the restriction was disproportionate, in that there was no “pressing social need to suppress the dissemination of factually accurate information about the position of candidates for public office on important moral issues.”¹⁰¹ Furthermore, there was no indication that Bowman’s leaflets “operated to disadvantage any particular candidate, since it was possible that the information . . . attracted as many supporters as opponents of the different policies on abortion.”¹⁰² Finally, Bowman asserted that the restriction was illogical as no similar restriction had been placed upon the mass media to publish material in support of or in opposition to any particular candidate.¹⁰³

In its analysis, the Court first noted that the restriction is only one of the detailed “checks and balances” that make up the United Kingdom’s electoral law, so the right to freedom of expression must

95. *Id.* at 17.

96. *Id.*

97. *Id.*

98. *See id.*

99. *Bowman*, 26 Eur. H. R. Rep. at 17-19

100. *See id.* at 17 (noting she could have started her own newspaper, published letters/articles in the press, given interviews on television or radio, or even run for election herself).

101. *Id.*

102. *Id.* at 18.

103. *See id.*

be balanced in light of the right to free elections which is protected by Article 3 of the First Protocol to the Convention.¹⁰⁴ The Court cited its decisions in *Mathieu-Mohin* and *Lingens*, noting that “free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system.”¹⁰⁵ However, it acknowledged that at times the two rights can come into conflict and it may become necessary “in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression.”¹⁰⁶ The Court additionally noted that in balancing the two rights, Contracting States have at least a “margin of appreciation” in organizing their own electoral systems.¹⁰⁷

The Court held that the restriction operated as a “total barrier” to Bowman’s freedom of expression, and was not proportional to the legitimate aim pursued by the restriction.¹⁰⁸ Thus the restriction constituted a violation of Article 10 of the Convention.¹⁰⁹ The Court found the five pound expenditure limitation especially significant in this regard, because, although Bowman could have campaigned freely at any other time, the expenditure restriction operated during the period immediately preceding the election, which would not have “served her purpose in publishing the leaflets which was . . . to inform the people . . . during the critical period when their minds were focused on their choice of representative.”¹¹⁰ Additionally, the Government did not meet the burden of showing that Bowman actually would have had access to alternate means of expressing her opinions.¹¹¹ The Court was further persuaded by the fact that there were no similar restrictions placed upon the press or upon political parties and their supporters.¹¹² Upon finding that there had been a violation of Article 10, the Court went on to review whether Bowman was entitled to monetary damages based upon the stress, stigma and anxiety she suffered as a result of the prosecution.¹¹³ The Court unanimously held, without discussion, that the finding of the violation was sufficient just satisfaction under the circumstances for any

104. *Bowman*, 26 Eur. H. R. Rep. at 17-19.

105. *Id.*

106. *Id.*

107. *See id.*

108. *See id.* at 19.

109. *See Bowman*, 26 Eur. H. R. Rep. at 19.

110. *Id.*

111. *See id.*

112. *See id.*

113. *Id.* at 20.

nonpecuniary damage suffered by Bowman under Article 50 of the Convention.¹¹⁴

Bowman additionally claimed the legal costs and expenses she incurred in both the domestic and Strasbourg proceedings.¹¹⁵ Citing its decision in *Sunday Times (No. 2)*, the Court held that the domestic costs were “necessarily incurred by [Bowman] . . . and were reasonable as to quantum,” and awarded the full amount of the domestic costs to Bowman including any value added tax that might be payable.¹¹⁶ Bowman additionally claimed £35,490 that she incurred as a result of the Strasbourg proceedings, and the Court awarded £25,000 of that amount “on an equitable basis” together with the applicable value added tax.¹¹⁷ The Court also applied an eight percent annual rate of interest, payable for three months until settlement, as that was the statutory rate of interest in the United Kingdom at the date of adoption.¹¹⁸ Finally, the Court dismissed the remainder of Bowman’s claim for just satisfaction.¹¹⁹

Three Judges concurred with the judgment.¹²⁰ Although agreeing with the Court’s decision, they disagreed with the Court’s finding that Section 75 of the 1983 Act operated as a “total barrier to Mrs. Bowman’s publishing ‘information with a view to influencing the voters of Halifax in favour of an anti-abortion candidate.’”¹²¹ They felt that the majority should have stated no more than the fact that Bowman’s leaflet was “intended to inform the voters of Halifax of the probable intentions of the candidates with regard to the abortion issue.”¹²²

Six Judges issued three partly dissenting opinions.¹²³ Judge Valticos wrote alone, stating that he did not agree that there had been a violation of Article 10 of the Convention.¹²⁴ He did not accept the fact that the Representation of the People Act’s restriction on expenditures by unauthorized persons constituted a breach of the Convention, and that although in the case at bar the five pound expenditure limit “precludes payment of even small amounts,” the

114. See *Bowman*, 26 Eur. H. R. Rep. at 20.

115. See *id.*

116. *Id.*

117. *Id.*

118. See *id.* at 20-21.

119. See *Bowman*, 26 Eur. H. R. Rep. at 21.

120. See *id.* at 21 (Pettiti, J., Lopes-Rocha, J., and Casadevall, J., concurring).

121. *Id.*

122. *Id.*

123. See *id.* at 22-28.

124. See *id.* at 22.

amount at issue was substantial since it enabled Bowman to print one and a half million leaflets.¹²⁵ He added that there was “something slightly ridiculous in seeking to give the British Government lessons in how to hold elections and run a democracy.”¹²⁶

Judges Loizou, Baka, and Jambrek also issued a partially dissenting opinion, disagreeing with the majority’s conclusion that the Representation of the People Act amounted to a breach of Article 10 of the Convention in that it was “disproportionate to the aim pursued.”¹²⁷ They argued that the act did not prohibit anyone—a political party, organization, or individual—from spending money to support or oppose a “movement generally, provided that there is no intent to promote or prejudice the chances of any particular candidate.”¹²⁸ They additionally noted the philosophy behind the expenditure limit was to prevent candidates from being manipulated by political pressure groups, and argued that there were alternative ways to express one’s views on a particular issue, such as distributing leaflets that only inform, rather than influence, the electorate on the issue.¹²⁹ They asserted that the limitation must be considered in light of the electoral system as a whole, and cited *Sunday Times v. United Kingdom (No. 2)* and *Vogt v. Germany* to support their contention that the States must be given a “margin of appreciation in assessing the necessity of an interference and . . . the Court is confined to looking at the interference . . . in the light of the case as a whole.”¹³⁰

The last partially dissenting opinion was written by Judge Freeland, and was joined by Judge Levits.¹³¹ Judge Freeland disagreed with the majority’s decision that the restriction went beyond “what is ‘necessary in a democratic society.’”¹³² He based this assertion primarily upon three observations: (1) although the act imposed no restrictions upon political parties or groups, fairness at a constituency level should be treated with special importance; (2) the expenditure restriction is confined to third parties and is sufficiently narrow in scope, thus falling within the permissible margin of appreciation that is left to the State; and (3) the influence of single-issue groups is significant in modern democracies and should be

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 23.

129. *See Bowman*, 26 Eur. H. R. Rep. at 23.

130. *Id.* at 24-25.

131. *See id.* at 25.

132. *Id.*

regulated.¹³³ With regard to proportionality, Judge Freeland noted that the existence of section 75 still did not prevent Bowman's circulation of 1.5 million leaflets and that the prosecution against her failed, therefore the extent of interference with her freedom of expression was minimal.¹³⁴

IV. ANALYSIS

The noted case appears to be in line with the European Court of Human Rights' Article 10 jurisprudence in that the Court did not deviate from using its previously established criteria to evaluate whether a State had violated an individual's freedom of expression.¹³⁵ In that regard, it does not appear to be particularly controversial, as the Court did not advance any new theories or interpretations of the Convention. It is unclear as to what extent the Commission's findings influence the decisions of the Court, and it will be interesting to see how the recent implementation of the newest Protocol to the Convention, which dissolves the Commission and allows an individual to directly apply to the Court for review, will affect the Court's interpretation of the Convention.¹³⁶ In the meantime, the decision has sparked considerable discourse on both sides of the political front in the United Kingdom with regard to what is or should be permissible under the present electoral system.

The Times, a relatively conservative London publication, boasted that it had "consistently opposed caps on party expenditure" and agreed with the *Bowman* Court in that "limitations laid down by statute are not only . . . capable of infringing freedom, they are also, on the lines Labour recommends, impractical."¹³⁷ The article noted that the Labor Party had long advocated election spending caps, and proposed to restrict political parties' spending to 15 million pounds while allowing third-parties to spend one tenth of that amount.¹³⁸ However, *The Times* argued that political parties could easily skirt that limit by setting up committees or campaigns for single issues much like the American system utilizes with its political action committees.¹³⁹

133. See *id.* at 27-28.

134. See *id.* at 28.

135. See, e.g., *Vogt v. Germany*, 21 Eur. H.R. Rep. 205, 232-39 (1996); *Lingens v. Austria*, 8 Eur. H.R. Rep. 407, 416-21 (1986); *Sunday Times v. United Kingdom*, 2 Eur. H.R. Rep. 245, 270-81 (1979); *Handyside v. United Kingdom*, 1 Eur. H.R. Rep. 737, 752-60 (1976).

136. See *New European Court Ratified*, *supra* note 14.

137. *Democracy's Limits*, *TIMES* (London), Feb. 27, 1998, at 25.

138. See *id.*

139. See *id.*

The more liberal London publication and staunch Labor Party supporter, *The Independent*, admitted in a recent article that it had previously supported limits on campaign spending, but the *Bowman* decision forced the article's author to refocus on the freedoms that could be infringed by this policy, namely the freedom of expression—ironically a traditionally liberal notion.¹⁴⁰ Rather than completely withdrawing the previous contention that campaign spending limits are necessary, the author instead emphasized the need for full transparency in all donations and expenditures incurred by the campaigning individuals and parties.¹⁴¹ In a subsequent article, *The Times* refocused its position to rest primarily upon the importance of transparency as well, stating that the amount of a given donation is irrelevant, and that “[t]he main focus should be on disclosure.”¹⁴²

This demand for more transparency in campaign contributions was apparently taken seriously by the current government led by Labor leader Tony Blair, who campaigned to put an end to “sleazy” politics.¹⁴³ Lord Neill, the leader of the Committee on Standards in Public Life, has asserted that the “threat of wealthy individuals buying influence is to be tackled by greater transparency.”¹⁴⁴ The Committee has recently proposed to ban all foreign donations, require all donations over £5,000 to be clearly declared, and additionally call for a total ban on “anonymous donors,” who incidentally contributed heavily to Tony Blair’s private office up until his election.¹⁴⁵ Although the recommendations are not expected to completely “level the playing field,” Lord Neill also proposed to increase public funding for political parties and a tax benefit for small donors who give up to £500 per year.¹⁴⁶ It remains to be seen whether these limitations will also be deemed to violate Article 10 of the Convention.

This debate is not unfamiliar in the United States, as single-issue groups that can freely spend unlimited amounts often all but dominate elections on the state and national level.¹⁴⁷ It is interesting to view the European Court of Human Rights’ decision in comparison with the

140. See *Opening Up the Party War Chests*, INDEP. (London), Apr. 20, 1998, at 14, available in LEXIS, News library, AllNws file.

141. See *id.*

142. *Political Cheques and Balances*, TIMES (London), Mar. 2, 1998, at 20.

143. See *Neill and the Cash Machine*, ECONOMIST (U.S. ed.), Oct. 17, 1998, at 61.

144. *Id.*

145. See *id.*

146. See *id.*

147. See generally Joseph A. Califano Jr., *Run for the Money*, WASH. POST, May 7, 1998, at A23 (advocating the need for the Supreme Court to overturn *Buckley v. Valejo* and listing examples of private interest legislation passed because of large donations including the tobacco industry).

current state of the American electoral system, which is characterized by the staunch campaigning for spending restrictions in Congress.¹⁴⁸ Independent donations and expenditures promoting a particular candidate have become so common in the American system, that outside interest group advertising has begun to “swamp” campaigns at the local level.¹⁴⁹ One American reporter noted that the debate in America, not entirely unlike that in the United Kingdom, is characterized by the Republicans complaining about the injustices of organized labor spending while the Democrats complain of donations given by the Christian right in support of the Republicans.¹⁵⁰

Notably, the American reporter compares the *Bowman* decision to a similar decision handed down by the United States Supreme Court in *Buckley v. Valeo*.¹⁵¹ In *Buckley*, the United States Supreme Court ruled that the Free Speech Clause of the First Amendment to the United States Constitution had been violated by campaign spending limits in the amended Federal Election Campaign Act of 1971.¹⁵² The Court held that, although the Act’s contribution and disclosure provisions were constitutional, the Act’s independent expenditure limits, which imposed a limitation on a candidate’s expenditures from his own personal funds, unconstitutionally infringed the candidates’ protected right of political expression.¹⁵³ Although the restriction in the 1983 Act at issue in *Bowman* differed in that it involved expenditures made by an independent individual, the two cases are similar in that both courts apparently viewed money spent on a particular campaign or candidate as a medium of political expression.

There is a current movement in the United States to overturn the *Buckley* decision in light of the current need for reform, as *Buckley* has been considered a barrier to the implementation of more stringent limitations on campaign financing.¹⁵⁴ Several public interest groups have been rallying for reform at the state and national levels, pressuring the politicians in Congress to set aside their personal

148. See generally Alison Mitchell, *In Europe, Campaign Spending Is a Human Rights Issue*, N.Y. TIMES, Apr. 12, 1998, § 4, at 4, (describing the current state of the Congressional debate on campaign finance limitations in the context of the *Bowman* decision).

149. See *id.*

150. See *id.*

151. See *id.* (discussing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

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

153. See *id.* at 23-51.

154. See *Former ACLU Leaders Break From ACLU Position on Constitutionality of Campaign Finance Reform*, U.S. NEWSWIRE, June 19, 1998, 9:37 EST (National Desk, Political and Legal Writers), available in LEXIS, News Library, CurNws file.

ambitions in order to change the current system.¹⁵⁵ In support of this public demand, a joint statement was issued by nine former leaders of the American Civil Liberties Union (ACLU), an organization that has consistently opposed campaign expenditure restrictions as a violation of the First Amendment, stating that *Buckley* should be overturned for three reasons.¹⁵⁶ First, the opinion “inappropriately treats the spending of money as though it were pure speech” and ignores the Court’s well-established rule regulating speech-related conduct when it threatens to cause serious harm.¹⁵⁷ Second, the opinion makes an “untenable distinction between campaign contributions, which may be [regulated] . . . and campaign expenditures, which are virtually immune from regulation.”¹⁵⁸ By doing this, the former ACLU leaders noted that it encourages politicians to “break the law . . . in order to satisfy an uncontrollable need for campaign cash.”¹⁵⁹ Third, the Court mistakenly refused to allow reasonable spending limits to be established to avoid “unfair domination of the electoral process by a small group of extremely wealthy persons.”¹⁶⁰ This third argument is notably similar to the U.K. government’s argument for imposing the restriction struck down in *Bowman*. The similarities between *Buckley* and *Bowman* however have gone all but unnoticed in the United States except by the National Right to Life Committee, which hailed the *Bowman* decision as a “validation of its own stance that proposed restrictions on issue-advocacy advertising are unconstitutional.”¹⁶¹

In the end, it appears that Phyllis Bowman has become a very unlikely liberal heroine. What began as her far-right campaign to keep pro-choice Labor candidates out of office has instead become a partial victory for both sides. The Tories are allowed to keep spending all they want on their candidates (and incidentally can keep receiving large donations from their corporate supporters), and the Labor Party can rejoice in the fact that freedom of expression will not be suppressed in voicing one’s opinions during campaign season. As one London newspaper said: “this rather puts the cat among the pigeons of easy liberal assumptions.”¹⁶² However, if a balance can be

155. See generally Edwin Chen, *Campaign Finance Reformers Shift Gears*, L.A. TIMES, Mar. 2, 1997, at A17 (discussing the positions of various interest groups and their tactics in pushing campaign finance reform).

156. See *ACLU Leaders*, *supra* note 154.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Mitchell, *supra* note 148.

162. *Democracy’s Limits*, *supra* note 137.

effectively maintained between the two interests, it can only result in a “better, more accountable democracy.”¹⁶³

Joanna R. Joplin

163. *Id.*