

# *My Vote Counts*, International Standards and Transparency of Political Party Funding: Does the State Have a Duty to Provide for Continuous and Systematic Disclosure?

Joo-Cheong Tham\*

---

The regulation of political finance in South Africa is unusual in three respects.

First, the Constitution of the Republic of South Africa, 1996 makes express provision for the public funding of political parties. In a clause entitled ‘Funding for political parties’, s 236 provides that: ‘To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.’<sup>1</sup>

The second way in which South African political finance regulation is unusual is less commendable than the first: a total lack of regulation of private funding. Referring to this lacuna, Fick has argued that:

In the absence of any legislative framework the electorate cannot know or easily obtain information on where political parties derive their funding from. The electorate is unable to form an opinion on the measure of influence brought to bear upon a political party by a private donor. Such unregulated funding creates incentives for corruption.<sup>2</sup>

Dissatisfaction with the lack of transparency has led to the third way in which South African political finance regulation is unusual. This concerns the constitutional proceedings relating to such regulation. Constitutional proceedings involving political finance regulation are not in themselves unusual. These proceedings, at least in established Anglophone countries, have, however, focused on challenges to the constitutional validity of laws already enacted – not on compelling the enactment of laws.

By contrast, the two main South African constitutional cases have involved the question whether the legislature has a duty to provide for disclosure of

---

\* Professor, Melbourne Law School. After finalising this article, the judgment in *My Vote Counts NDC v Minister of Justice and Correction Services* [2018] ZACC 17 was handed down on 21 June 2018 where the Constitutional Court essentially confirmed the High Court’s earlier order in *My Vote Counts 2* (note 10 below).

<sup>1</sup> Acting pursuant to this section, the South African Parliament enacted the Public Funding of Represented Political Parties Act 103 of 1997.

<sup>2</sup> G Fick ‘Elections’ in M Chasklason, J Kentridge, J Klaaren, G Marucs, D Spitz, A Stein & S Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, OS, August 2005) Chapter 29, 22.

private funding of political parties. The principal issue in the first case, *Institute for Democracy in South Africa & Others v African National Congress*, was whether s 32 of the Constitution (access to information) in conjunction with ss 19(1) (right to make political choices) and 19(2) (right to free, fair and regular elections) imposed such a duty.<sup>3</sup> Griesel J of the Cape High Court rejected this argument on the basis that the applicant had failed to demonstrate how the rights in ss 19(1) and 19(2) were unable to be exercised in the absence of access to the donation records of political parties. In his words:

Section 19(1) prevents any restrictions being imposed on a citizen's right of making political choices ... Similarly the right to 'free, fair and regular elections' enshrined in section 19(2), does not impose a duty on political parties to disclose funding sources, nor does it afford citizens a right to gain access to such records. The emphasis in section 19(2) lies upon the elections and the nature of the electoral process and not so much upon the persons or parties participating in those elections.<sup>4</sup>

The second set of proceedings, *My Vote Counts*, is the focus of this article. Invoking the exclusive jurisdiction of the Constitutional Court under s 167(4)(e) of the Constitution, the applicant, My Vote Counts (MVC), argued that s 32(1) (access to information) together with s 19(3) (right to vote) imposed a constitutional duty on Parliament to enact a scheme regulating private funding of political parties that provided for continuous and systematic disclosure. MVC argued that Parliament had failed to fulfill this duty through its enactment of the Promotion of Access to Information Act (PAIA).<sup>5</sup>

In a decision handed down in September 2015, the Constitutional Court dismissed the application by a 7–3 majority. The majority did so on the ground that the exclusive jurisdiction of the Constitutional Court under s 167(4)(e) of the Constitution was not properly invoked. As the constitutional validity of PAIA was at issue, the principle of subsidiarity meant that the applicant ought to have challenged PAIA frontally pursuant to s 172 of the Constitution.<sup>6</sup> Given its dismissal on the question of jurisdiction, the majority found it 'unnecessary ... to pronounce on whether information on the private funding of political parties is required for the exercise of the right to vote'.<sup>7</sup>

The minority, on the other hand, concluded that the principle of subsidiarity did not apply. According to the minority, the constitutional validity of PAIA was not at issue as MVC's contention was that PAIA fell short of fulfilling the obligation imposed by ss 32(1) and 19(3) of the Constitution.<sup>8</sup> It then went on to analyse MVC's substantive arguments, finding in its favour.

MVC consequently brought an application to the Western Cape High Court, seeking a declaration that PAIA was inconsistent with the Constitution because it

---

<sup>3</sup> 2005 (10) BCLR 995 (C) (*IDASA*).

<sup>4</sup> *Ibid* at para 47.

<sup>5</sup> Act 2 of 2000.

<sup>6</sup> *My Vote Counts NPC v Speaker of the National Assembly & Others* [2015] ZACC 31 (CC), 2016 (1) SA 132 (CC), 2015 (12) BCLR 1407 (CC) (*My Vote Counts 1*) at paras 160–183.

<sup>7</sup> *Ibid* at para 124.

<sup>8</sup> *Ibid* at paras 67–74.

failed to provide for continuous and systematic recordal and disclosure of private funding information of political parties. According to the application:

[T]he need for the continuous and systematic recordal and disclosure of private funding information is rooted directly in the provisions of the Constitution:

- 21.1 It is sourced in section 32(1), read with section 19, as access to accurate information about the private funding of political parties is reasonably required for the effective exercise of the right to vote and to make political choices. These provisions are underpinned by section 1(d), which founds our state on fundamental democratic values that are imperiled by the absence of a disclosure mechanism.
- 21.2 It is further sourced in section 7(2), as transparency of political parties is required for the effective prevention and detection of corruption, which erodes the state's capacity to respect, protect, promote and fulfill the rights in the Bill of Rights. To this end, the obligation is strengthened by South Africa's international obligations, as well as by sections 195, 215 and 217 of the Constitution, which require the promotion of transparency in public administration, public finance and public procurement, respectively.<sup>9</sup>

In a decision handed down in September 2017, Meer J accepted most of the applicant's submissions and made a declaration that PAIA was inconsistent with the Constitution but only 'insofar as it does not allow for the recordal and disclosure of private funding information'.<sup>10</sup> In doing so, the High Court concluded that it was precluded from ordering 'continuous and systematic' recordal and disclosure of such information, as sought by the applicant, because of the statements by the majority of the Constitutional Court in *My Vote Counts* that such an order would be proscribed by the doctrine of separation of powers under the Constitution.<sup>11</sup> At the time of this article being completed, the proceedings are before the Constitutional Court which is to decide whether or not to confirm the declaration of the High Court as to constitutional invalidity pursuant to s 172(2)(a) of the Constitution.

The aim of this article is to assess the arguments made by MVC for 'continuous and systematic recordal and disclosure of private funding information' from a perspective based on international standards on political party funding adopted by the United Nations, and those adopted for Africa and Europe; and to do so in light of the decision of the Constitutional Court of South Africa in *My Vote Counts 1* as well as the subsequent High Court decision.

This perspective, based on international standards, is significant in both a narrow and a broad sense. First, many of the international standards being analysed are treaties and conventions and, having the status of international law, they are of constitutional significance in the South African context. Section 39(1)(b) of the Constitution provides that '(w)hen interpreting the Bill of Rights, a

<sup>9</sup> Applicant's Founding Affidavit *My Vote Counts 2* (28 July 2016) at para 21 (on file with the author).

<sup>10</sup> *My Vote Counts NPC v Speaker of the National Assembly & Others* [2017] ZAWCHC 105, 2017 (6) SA 501 (WCC), [2017] 4 All SA 840 (WCC) ('*My Vote Counts 2*') at para 75.

<sup>11</sup> *Ibid* at para 73.

court, tribunal or forum ... must consider international law'.<sup>12</sup> Of particular significance are the international standards that bind South Africa.<sup>13</sup> Here, the article seeks to make a contribution to the constitutional analysis in the *My Vote Counts* proceedings.

International law figured very marginally in the judgments of the Constitutional Court. Only the UN Convention Against Corruption<sup>14</sup> and the African Union Convention on Preventing and Combating Corruption<sup>15</sup> were referred to by the minority judgment in a descriptive part of its decision.<sup>16</sup> The High Court application by MVC<sup>17</sup> and the High Court decision<sup>18</sup> utilise international conventions to a greater extent, most notably in relation to the argument relying upon the prevention of corruption. Neither the Constitutional Court judgments nor the High Court application and decision, however, make reference to international standards on democratic elections or those specifically devoted to political party funding, both of which, as this article will show, are clearly relevant to issues in *My Vote Counts*.

More broadly, the perspective adopted by this article allows *My Vote Counts* to be situated in an international context, providing further insights into the important questions it raises concerning the relationship between the right to vote and the prevention of corruption, on one hand, and disclosure of private political party funding, on the other. For this reason, this article goes beyond international standards found in international legal instruments such as conventions and treaties to include standards in declarations and guidelines.

The article is structured according to three sets of international standards. The first two map upon the arguments of MVC in its High Court application: international standards on democratic elections and those aimed at addressing

<sup>12</sup> *S v Makwanyane & Another* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 35 (Chaskalson P, in the context of s 35(1) of the interim Constitution said 'public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]?') See also Constitution s 233, which applies international law to statutory interpretation.

<sup>13</sup> See also *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 26 (Yacoob J stated '(t)he relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable'). See generally J Brickhill & R Babiuch 'Political Rights' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, Original Service, 2007) Chapter 45, 8–11; and J Foster 'The Use of Foreign Law in Constitutional Interpretation: Lessons from South Africa' (2010) 45 *University of San Francisco Law Review* 79.

<sup>14</sup> 2349 UNTS 41 (Doc A58/422)(31 October 2003)('UN Corruption Convention').

<sup>15</sup> Ratified by South Africa on 7 December 2005, entered into force on 5 August 2006 ('AU Corruption Convention').

<sup>16</sup> *My Vote Counts 1* (note 6 above) at para 15.

<sup>17</sup> Founding Affidavit (note 9 above) at paras 47–53.

<sup>18</sup> *My Vote Counts 2* (note 10 above) at paras 34–42.

corruption. The third set of international standards is devoted specifically to political party funding. The Appendix to the article lists the standards that I draw from.

Do these standards require states to provide continuous and systematic disclosure of private political party funding? The article argues that international standards go a long way in supporting the arguments of MVC – specifically, they strongly support its contention for transparency in terms of political party funding. Their reach does not, however, extend to mandating the disclosure scheme sought by MVC, in particular its claim for continuous and systematic disclosure.

## I INTERNATIONAL STANDARDS ON DEMOCRATIC ELECTIONS AND TRANSPARENCY OF POLITICAL PARTY FUNDING

The foundational documents laying down international standards on democratic elections are the Universal Declaration on Human Rights (UDHR)<sup>19</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>20</sup> These instruments respectively provide in arts 21 and 25 for the right to political participation, the right to vote and equal access to public service. These articles have been adopted, to a varying extent, at the regional level, including through: art 13 of the African (Banjul) Charter on Human and Peoples' Rights (African Charter),<sup>21</sup> the African Charter on Democracy, Elections and Governance<sup>22</sup> (both of which have been ratified by South Africa), and art 3 of the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>23</sup>

International standards on democratic elections can also be found in various declarations and guidelines. Whilst not binding at international law, these documents lay down norms for democratic elections. Key documents in this context include three adopted by the Inter-Parliamentary Union: Declaration on Free and Fair Elections,<sup>24</sup> the Universal Declaration on Democracy,<sup>25</sup> and the Codes of Conduct for Elections.<sup>26</sup> In the African context, the African Union's Declaration on the Principles Governing Democratic Elections in Africa<sup>27</sup> and the Southern African Development Community Parliamentary Forum's Norms

<sup>19</sup> GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

<sup>20</sup> Opened for signature 16 December 1966; entered into force 23 March 1976.

<sup>21</sup> Adopted 27 June 1981; entered into force 21 October 1986. Unlike the corresponding provisions in UDHR and ICCPR, the African Charter does not mention elections.

<sup>22</sup> African Union, African Charter on Democracy, Elections and Governance (opened for signature 30 January 2007; entered into force 15 February 2012).

<sup>23</sup> Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9.

<sup>24</sup> IPU *Declaration on the Criteria for Free and Fair Elections* (1994), available at <http://archive.ipu.org/cnl-e/154-free.htm> (accessed on 14 June 2018).

<sup>25</sup> IPU *Universal Declaration on Democracy* (1998), available at <http://archive.ipu.org/cnl-e/161-dem.htm> (accessed on 14 June 2018).

<sup>26</sup> G Goodwin-Gill *Codes of Conduct for Elections: A Study Prepared for the Inter-Parliamentary Union* (1998), available at [archive.ipu.org/PDF/publications/CODES\\_E.pdf](http://archive.ipu.org/PDF/publications/CODES_E.pdf) (accessed on 14 June 2018).

<sup>27</sup> AHG/Decl.1 (XXXVIII) (2002), available at <https://www.eisa.org.za/pdf/au2002declaration.pdf> (accessed on 14 June 2018).

and Standards for Elections in the SADC Region<sup>28</sup> are also relevant. Further afield, the Organisation for Security and Cooperation in Europe's 1990 Document of the Copenhagen Meeting of the Conference on Human Dimension,<sup>29</sup> and the Venice Commission's *Code of Good Practice in Electoral Matters* also provide useful guidance.<sup>30</sup>

These international standards offer two possible pathways to a conclusion that transparency of political party funding is required as a matter of democratic elections: the first is to reason from the right to vote, whereas the second is to rely separately on standards in relation to free and fair elections.

### **A Right to Vote and Transparency of Political Party Funding**

This line of argument, which was central to the minority judgment of the Constitutional Court and the High Court decision in *My Vote Counts*, can be broken down into five steps:

1. The right to vote is provided under s 19 of the Constitution.
2. The right to vote is a right to an informed vote.
3. The right to an informed vote extends to being informed in relation to the private funding of political parties, amongst others, because of the centrality of political parties to the democratic process.
4. Step 3 together with s 32(1) of the Constitution requires a scheme that provides for 'continuous and systematic recordal and disclosure of information regarding the private funding of political parties'.<sup>31</sup>
5. PAIA fails to provide step 4.

This article will deal with steps 1 to 4 but not 5, which is examined elsewhere in this volume.<sup>32</sup>

#### *1 Step One: Right to Vote*

Section 19(3)(a) of the South African Constitution provides that: 'Every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution.' The significance of this provision is to be understood

---

<sup>28</sup> Adopted on 25 March 2001, available at [http://www.internationaldemocracywatch.org/attachments/167\\_SADCPF%20Norms%20and%20Standard%20for%20Elections.pdf](http://www.internationaldemocracywatch.org/attachments/167_SADCPF%20Norms%20and%20Standard%20for%20Elections.pdf) (accessed on 14 June 2018).

<sup>29</sup> Organisation for Security and Co-operation in Europe *Document of the Copenhagen Meeting of the Conference on Human Dimension* 29 June 1990 ('OSCE *Copenhagen Document*').

<sup>30</sup> European Commission for Democracy through Law *Code of Practice in Electoral Matters: Guidelines and Explanatory Report* (2002), available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e) (accessed on 14 June 2018) ('Venice Commission *Code of Practice*').

<sup>31</sup> Founding Affidavit (note 9 above) at para 13.

<sup>32</sup> See G Orr 'My Vote Counts: The Basis and Limits of a Constitutional Requirement of Political Disclosure' (2016) 8 *Constitutional Court Review* 52; and T Van Wyk "'Don't Blame the Librarian if No One Has Written the Book': My Vote Counts and the Information Required to Exercise the Franchise' (2016) 8 *Constitutional Court Review* 97.



in the context of the fundamental importance of democracy to the Constitution.<sup>33</sup> The Preamble states that the Constitution is adopted as the supreme law of the Republic so as to:

- Heal the divisions of the past and establish a society based on *democratic values*, social justice and fundamental human rights;
- Lay the foundations for a *democratic* and open society in which government is based on the will of the people and every citizen is equally protected by law;
- Build a united and *democratic* South Africa able to take its rightful place as a sovereign state in the family of nations.<sup>34</sup>

Section 1(d) also provides that: ‘The Republic of South Africa is one, sovereign, *democratic* state founded on the following values: (d) Universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of *democratic* government, to ensure accountability, responsiveness and openness’ (emphasis added).

The right to vote recognised in s 19(3)(a) of the Constitution is clearly supported by the international standards on democratic elections. Article 21(3) of UDHR provides that: ‘The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.’ Article 25(b) of the ICCPR similarly provides that:

- Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: ...
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

Explicit recognition of the right to vote is also provided by art 4(2) of the African Charter on Democracy, Elections and Governance which stipulates that ‘State Parties shall recognize popular participation through universal suffrage as the inalienable right of the people’.<sup>35</sup> Article 13(2) of the African Charter on Human and Peoples’ Rights moreover recognises the right to vote by providing that ‘(e)very citizen shall have the right to participate freely in the government of his country, either directly or *through freely chosen representatives* in accordance with the provisions of the law’.<sup>36</sup>

The right to vote in these articles is closely connected to the right to political participation recognised in art 21(1) of the UDHR and art 25(a) of the ICCPR. Referring to the latter provision, the United Nations Human Rights Committee has observed that ‘(p)articipation through freely chosen representatives is

<sup>33</sup> See generally T Roux ‘Democracy’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2007).

<sup>34</sup> Preamble to the Constitution (emphasis added).

<sup>35</sup> African Charter on Democracy, Elections and Governance (opened for signature 30 January 2007; entered into force 15 February 2012) art 4(2).

<sup>36</sup> African Charter on Human and Peoples’ Rights, 1520 UNTS 217 (opened for signature 27 June 1981; entered into force 21 October 1986)(emphasis added).

exercised through voting processes which must be established by law which are in accordance with paragraph (b) [right to vote].<sup>37</sup>

## 2 *Step Two: Right to Vote is a Right to an Informed Vote*

The MVC application to the High Court argued that ‘the right to vote is the right to cast an *informed* vote’.<sup>38</sup> In support, they rely upon the minority judgment in *My Vote Counts 1*.<sup>39</sup> Referring to MVC’s submission before the Constitutional Court that the right to vote is a right to cast an informed vote, the minority judgment in *My Vote Counts* concluded ‘(t)his must be correct’.<sup>40</sup> It went on to say the following:

[T]he right to vote does not exist in a vacuum. Nor does it consist merely of the entitlement to make a cross upon a ballot paper. It is neither meagre nor formalistic. It is a rich right – one to vote knowingly for a party and its principles and programmes. It is a right to vote for a political party, knowing how it will contribute to our constitutional democracy and the attainment of our constitutional goals.<sup>41</sup>

In the High Court, Meer J agreed with such dicta, observing that they ‘accord with a weight of jurisprudence regarding the right of access to information and the right to vote’.<sup>42</sup>

The reasoning of the minority judgment in *My Vote Counts 1* (and that of Meer J) is supported by the international standards on democratic elections. Like the South African Constitution, these standards do not expressly designate the right to vote as a right to an informed vote. This is nevertheless implied. As art 21(3) of the UDHR and art 25(b) of the ICCPR<sup>43</sup> make clear, the right to vote is to ensure that elections reflect the expression of the will of the people. That the expression of the ‘will of the people’ be an informed one can be inferred, firstly, from the significance of information for the effective exercise of the right to vote. As the UN Human Rights Committee stated in its General Comment on art 25 of the ICCPR: ‘In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.’<sup>44</sup>

It can also be inferred from the close relationship between freedom of expression, assembly and association<sup>45</sup> and the right to vote. As the UN Human Rights Committee has observed, ‘(f)reedom of expression, assembly and

<sup>37</sup> UN Human Rights Committee *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote)*, *The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* CCPR/C/21/Rev.1 (12 July 1996) at para 7.

<sup>38</sup> Founding Affidavit (note 9 above) at para 31 (emphasis in original).

<sup>39</sup> *Ibid* at para 29.

<sup>40</sup> *My Vote Counts 1* (note 6 above) at para 38.

<sup>41</sup> *Ibid* at 41 (citations omitted).

<sup>42</sup> *My Vote Counts 2* (note 10 above) at para 30.

<sup>43</sup> See also OSCE *Copenhagen Document* (note 29 above) at para 6.

<sup>44</sup> UNHRC *General Comment 25* (note 37 above) at para 25.

<sup>45</sup> ICCPR art 19 (expression); art 21 (assembly); and art 22 (association).



association are essential conditions for the effective exercise of the right to vote and must be fully protected'.<sup>46</sup>

3 *Step Three: Right to Vote Extends to Being Informed of Private Funding of Political Parties*

This step in the line of argument depends on a claim concerning the importance of political parties under the South African Constitution. As the minority judgment in *My Vote Counts 1* states, '[t]he founding premise of the applicant's argument is the unique role of political parties in our constitutional democracy'.<sup>47</sup>

The MVC application to the High Court reiterated this claim relying upon the minority judgment and earlier Constitutional Court decisions in *Ramakatsa*<sup>48</sup> and the *First Certification Judgment*.<sup>49</sup> The last judgment based the importance of political parties on a central aspect of South Africa's electoral system: 'Under the list system of proportional representation it is the parties that the electorate votes for and the parties which must be accountable to the electorate'.<sup>50</sup>

The decision of the Constitutional Court in *Ramakatsa* combined this analysis with express constitutional provisions dealing with political parties to conclude that political parties are 'indispensable conduits for the enjoyment of the right given by s 19(3)(a) to vote in elections'<sup>51</sup> and are the 'veritable vehicles the Constitution has chosen for facilitating and entrenching democracy'<sup>52</sup> – 'the Constitution itself obliges every citizen to exercise the franchise through a political party'.<sup>53</sup> These conclusions were based, among others, on s 1(d) which identifies as one of the founding values of the Republic of South Africa 'a multi-party system of democratic government'. Also crucial to these conclusions was s 236 of the South African Constitution, which required the provision of public funding to political parties,<sup>54</sup> the requirement of proportional representation in the various legislative bodies<sup>55</sup> and provisions mandating the loss of membership in the National Assembly and the National Council of Provinces if a person ceases to be a member of the party which nominated her or him for these bodies.<sup>56</sup>

In essence, the minority judgment in *My Vote Counts 1* relies upon the *First Certification Judgment* and, more importantly, *Ramakatsa*, in accepting *My Vote Counts*' argument as to the importance of political parties under the Constitution.<sup>57</sup> In the words of the minority, '[t]he electoral system the Constitution creates pivots on political parties and whom they admit as members'<sup>58</sup> and '(o)ur constitutional

<sup>46</sup> UNHRC *General Comment 25* (note 37 above) at para 12. See also para 25.

<sup>47</sup> *My Vote Counts 1* (note 6 above) at para 32.

<sup>48</sup> *Ramakatsa & Others v Magashule & Others* [2012] ZACC 31, 2013 (2) BCLR 202 (CC) ('*Ramakatsa*').

<sup>49</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1966 (10) BCLR 1253 (CC) ('*First Certification Judgment*').

<sup>50</sup> *Ibid* at para 186, cited in *My Vote Counts 1* (note 6 above) at para 33.

<sup>51</sup> *Ramakatsa* (note 48 above) at para 59, cited in Founding Affidavit (note 9 above) at para 31.

<sup>52</sup> *Ibid* at para 58, cited in Founding Affidavit (note 9 above) at para 31.

<sup>53</sup> *Ibid* at para 68, cited in Founding Affidavit (note 9 above) at para 31.

<sup>54</sup> See above text accompanying note 1.

<sup>55</sup> Constitution ss 46(d), 105(d) and 157(2)–(3).

<sup>56</sup> Constitution ss 47(3)(c) (National Assembly) and 62(4)(d) (National Council of Provinces).

<sup>57</sup> *My Vote Counts 1* (note 6 above) at paras 32 and 34–36.

<sup>58</sup> *Ibid* at para 32 (citations omitted).

order places the key to elective office and executive power in the hands of political parties'.<sup>59</sup> In the High Court decision, Meer J agreed with these statements of the minority, observing that '[t]he unique nature of political parties and their influential role has a significant bearing on whence and from whom their funds derive'.<sup>60</sup>

These conclusions about the significance of political parties to democracy are supported by international standards on democratic elections. Indeed, they support the significance of political parties to the democratic process, *whatever the electoral system and regardless of whether a list system has been adopted*. In its *General Comment 25*, the UN Human Rights Committee said: 'Political parties and membership in parties play a significant role in the conduct of public affairs and the election process.'<sup>61</sup> Similarly, one of the key principles of the African Charter on Democracy, Elections and Governance is: 'Strengthening political pluralism and recognizing the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law.'<sup>62</sup>

The South African Development Community (SADC) Parliamentary Forum has also reasoned that:

The concepts of pluralism, multi-party democracy and politics should be enshrined in the constitution as the preferred form of political development and a basis for good governance. All stakeholders should commit themselves to pluralism, multi-party democracy and politics as a condition for participating in the political process of the country.<sup>63</sup>

In *Communist Party & Others v Turkey*, the European Court of Human Rights held that 'political parties are a form of association essential to the proper functioning of democracy'<sup>64</sup> in the process of concluding that legislation dissolving and banning the Communist Party was in breach of art 11 of the ECHR (freedom of association).

Given the significance of political parties to the democratic process, it is not difficult to conclude that the right to an (informed) vote extends to being informed of their private funding. As the minority judgment in *My Vote Counts 1* put it:

Does [the right to vote] include knowing the private sources of political parties' funding? It surely does. Private contributions to a political party are not made thoughtlessly, or without motive. They are made in the anticipation that the party will advance a particular social interest, policy or viewpoint. And political parties, in turn, depend on contributors for the very resources that allow them to conduct their democratic activities. Those resources keep flowing to the extent that they meet their contributors' and funders' expectations.

---

<sup>59</sup> Ibid at para 33.

<sup>60</sup> *My Vote Counts 2* (note 10 above) at para 28.

<sup>61</sup> UNHRC *General Comment 25* (note 37 above) at para 26. See also OSCE *Copenhagen Document* (note 29 above) at paras 7.5–7.6.

<sup>62</sup> Charter on Democracy, Elections and Governance art 3(11).

<sup>63</sup> South African Development Community Parliamentary Forum *Norms and Standards for Elections in the SADC Region and Standards for Elections in the SADC Region* (25 March 2001) Part 2, Article 1.

<sup>64</sup> *United Communist Party of Turkey & Others v Turkey* [1998] ECHR 1 at para 25.

There can be little doubt, then, that the identity of those contributors, and what they contribute, provides important information about the parties' likely behaviour.<sup>65</sup>

4 *Step Four: Right to Vote Together with s 32(1) of the Constitution Requires a Scheme that Provides for Continuous and Systematic Disclosure*

The final step in this line of argument is that the right to vote (which extends to being informed of the private funding of political parties) together with the right to information in s 32(1) of the Constitution requires a scheme that provides for continuous and systematic disclosure of details concerning the private funding of political parties.<sup>66</sup> The central issue here turns on the extent to which the right to an informed vote requires knowledge of the private funding of political parties.

Amongst others, MVC in its High Court application asked that such a scheme facilitate:

- 'the automatic and regular disclosure of private funding information by political parties';<sup>67</sup>
- 'access to all private funding information, whatever form the funding or the information may take';<sup>68</sup> and
- 'the obligatory creation by political parties of records of private funding information in order to facilitate disclosure and access'.<sup>69</sup>

This ambitious application appears to turn on the constitutional centrality of political parties and a strong affirmative duty on the South African state to provide information reasonably required to make effective the right to vote under s 19(3). The latter duty in turn seems to arise, firstly, from the close connection between s 32(1) and the right to vote. Section 32(1)(b) of the Constitution states that: 'Everyone has the right of access to ... (b) any information that is held by another person and that is required for the exercise or protection of any rights.'

In its High Court application, MVC specifically relied upon the Constitutional Court decision in *President of the Republic of South Africa & Others v M & G Media Ltd* for the close connection between this provision and the right to vote under s 19(3): 'In a democratic society such as our own, the effective exercise of the right to vote also depends on the right to access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.'<sup>70</sup> The MVC High Court application also separately relied upon dicta of the Constitutional Court in

<sup>65</sup> *My Vote Counts 1* (note 6 above) at para 42. The minority judgment goes on to cite in support the United States Supreme Court decision in *Buckley v Valeo* 424 US 1, 66–7 (1976). These statements in *Buckley* were also cited with approval by the High Court in *IDASA* (note 3 above) at para 58.

<sup>66</sup> See Founding Affidavit (note 9 above) at para 13.

<sup>67</sup> *Ibid* at para 20.2.

<sup>68</sup> *Ibid* at para 20.3.

<sup>69</sup> *Ibid* at para 20.4.

<sup>70</sup> [2011] ZACC 32, 2012 (2) SA 50 (CC), 2012 (2) BCLR 181 (CC) at para 10, quoted in Founding Affidavit (note 9 above) at para 30.

*Richter*<sup>71</sup> and *New National Party*<sup>72</sup> for the duty upon the South African state to take positive steps to make effective the right to vote.

Unlike the previous steps in this line of argument, matters are far less clear-cut (and more interesting). It is difficult to find strong support for Step (4) from art 21 of the UDHR and art 25 of ICCPR and their corresponding provisions in African<sup>73</sup> and European treaties. There is no specific mention of disclosure of political party funding. More fundamentally, the argument made by Step (4) seems to run against the grain of the approach taken by these instruments to ensuring that there is a right to an informed vote.

A broad distinction can be made here between an interventionist approach that calls for state action and an abstentionist approach that relies more upon the absence of state action. The South African Constitution would appear to adopt a more interventionist approach through s 32, particularly s 32(2) which states that '[n]ational legislation must be enacted to give effect' to the right to access to information.

Article 25 of the ICCPR, on the other hand, can be said to adopt an abstentionist approach based on guaranteeing political freedoms. So much seems reflected in the UNHCR's *General Comment 25* where it was said that:

In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.<sup>74</sup>

In *IDASA*, Griesel J also seemed to adopt such an abstentionist approach in his interpretation of s 19(1) of the Constitution when he stated that 'section 19(1) prevents any *restrictions* being imposed on a citizen's right of making political choices'.<sup>75</sup>

This abstentionist approach – which places the primary responsibility for informing the electorate on civil society – limits affirmative state action to a narrow range of areas. As reflected in *General Comment 25*:

Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty or impediments to freedom of movements which prevent

---

<sup>71</sup> *Richter v Minister for Home Affairs & Others* 2009 (3) SA 615 (CC) at paras 52–53, quoted in Founding Affidavit (note 9 above) at para 40.

<sup>72</sup> *New National Party v Government of the Republic of South Africa & Others* [1999] ZACC 5, 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 11, quoted in Founding Affidavit (note 9 above) at para 41.

<sup>73</sup> The position in relation to Africa may change soon with the adoption of African Commission on Human and Peoples' Right *Guidelines on Access to Information and Elections for Africa*. The draft guidelines are available at [http://www.achpr.org/files/news/2017/05/d288/draft\\_guidelines\\_on\\_ati\\_\\_elections\\_for\\_africa\\_eng.pdf](http://www.achpr.org/files/news/2017/05/d288/draft_guidelines_on_ati__elections_for_africa_eng.pdf) (accessed 17 October 2017).

<sup>74</sup> UNHRC *General Comment 25* (note 37 above) at para 25.

<sup>75</sup> *IDASA* (note 3 above) at para 47 (emphasis added).

persons entitled to vote from exercising their rights effectively. Information and materials about voting should be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice.<sup>76</sup>

Characterising the approach under the South African Constitution as interventionist does not, however, necessarily suggest support for MVC's argument for continuous and systematic disclosure of private political party funding – there is still the question of what kind of intervention is constitutionally required.

A key difficulty with relying upon dicta affirming the duty of the state to take positive steps to make effective the right to vote under s 19(3) is the paradoxical character of such statements: while signaling an interventionist approach, such dicta has emphasised deference to Parliament in terms of the *type of intervention*. In *New National Party*, the Court stated that: ‘The right to vote contemplated by section 19(3) is therefore a right to vote in free and fair elections in terms of an electoral system prescribed by national legislation which complies with the aforementioned requirements laid down by the Constitution. *The details of the system are left to Parliament.*’<sup>77</sup>

Similarly in *NICRO*, the Constitutional Court, while accepting that positive steps had to be taken to make effective the right to vote, underlined that ‘[t]his is the task of the legislature and the executive which have the responsibility for providing the legal framework, and the infrastructure and resources necessary for the holding of free and fair elections.’<sup>78</sup> And finally in *AParty*, the Court stated that ‘Parliament has the constitutional *authority* and duty to design an electoral scheme to regulate the exercise of the right to vote’<sup>79</sup> and that ‘the key issue (in this case) is the question of the constitutional validity of the electoral system – a matter that lies peculiarly with Parliament’s constitutional remit.’<sup>80</sup>

Such deference to Parliament<sup>81</sup> is in line with the reasons based on separation of powers which prompted the majority of the Constitutional Court to reject MVC’s application. According to the majority: ‘[W]hat the applicant wants is but a thinly veiled attempt at prescribing to Parliament to legislate in a particular manner ... That attempt impermissibly trenches on Parliament’s terrain; and that is proscribed by the doctrine of separation of powers.’<sup>82</sup>

It was these statements, amongst others, that prompted Meer J of the High Court to only grant ‘(m)ere disclosure’ rather than ‘continuous and systematic’ recordal and disclosure.<sup>83</sup> In particular, Meer J declared that PAIA ‘is inconsistent

<sup>76</sup> UNHRC *General Comment 25* (note 37 above) at para 12.

<sup>77</sup> *New National Party* (note 72 above) at para 14 (emphasis added).

<sup>78</sup> *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others* (2004) [2004] ZACC 10, 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) at para 28.

<sup>79</sup> *AParty & Another v The Minister for Home Affairs & Others, Moloko & Others v The Minister for Home Affairs & Another* [2009] ZACC 4, 2009 (3) SA 649 (CC), 2009 (6) BCLR 611 (CC) (‘*AParty*’) at para 6 (emphasis added).

<sup>80</sup> *Ibid* at para 80.

<sup>81</sup> Such deference has been criticised in Roux (note 30 above) at ch10–p28; Brickhill & Babiuch (note 13 above) at ch45–p5.

<sup>82</sup> *My Vote Counts 1* (note 6 above) at para 156.

<sup>83</sup> *My Vote Counts 2* (note 9 above) at para 73.

with the Constitution and invalid insofar as it does not allow for the *recordal and disclosure* of private funding information'.<sup>84</sup>

This declaration is, moreover, consistent with the minority Constitutional Court judgment in *My Vote Counts* which did not conclude that continuous and systematic disclosure of private political party funding was constitutionally required.<sup>85</sup> Its conclusion was far more modest:

Parliament has failed to fulfil its constitutional obligation to enact national legislation to give effect to the right of access to information as required by section 32(2) of the Constitution, to the extent that—

- (a) information about the private funding of political parties registered for elections for any legislative body established under the Constitution is reasonably required for the effective exercise of the right to vote in those elections; and
- (b) no national legislation currently requires that this information be publicly accessible.<sup>86</sup>

## **B Free and Fair Elections and Transparency of Political Party Funding**

Do international standards on democratic elections require transparency of political party funding separately from the right to vote? Whilst not specifically raised in the *My Vote Counts* proceedings, this is clearly an issue posed by s 19(2) of the Constitution which provides that: 'Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.'

Indeed, as noted earlier, Griesel J in *IDASA* rejected the argument that this provision required disclosure of private political party funding.<sup>87</sup> This judgment, however, made no reference to the international standards on democratic elections. Having said that, the conclusion of Griesel J is largely consistent with international standards on democratic elections, which generally do *not* require transparency of political party funding separately from the right to vote.

Some instruments like the Copenhagen Document<sup>88</sup> make no mention of political party funding. Others do deal with this topic but are quite non-descript. For instance, the Inter-Parliamentary Union's 1994 Declaration on Free and Fair Elections provides that states should '*possibly* regulate the funding of political parties and electoral campaigns'.<sup>89</sup> The IPU's 1996 Universal Declaration on Elections is stronger in stating that '[p]arty organisation, activities, finances, funding and ethics must be properly regulated in an impartial manner in order to ensure the integrity of the democratic processes'<sup>90</sup> – but fails to specifically require disclosure of political party funding. The UNHRC *General Comment 25* is couched in similarly vague terms in its statement that 'States should ensure that,

---

<sup>84</sup> Ibid at para 75 (emphasis added).

<sup>85</sup> *My Vote Counts 1* (note 6 above) at para 119 (minority judgment).

<sup>86</sup> Ibid at para 120 (minority judgment).

<sup>87</sup> Ibid at para 47. But see *My Vote Counts 2* (note 9 above) at para 33 (Meer J distinguished *IDASA*).

<sup>88</sup> OSCE *Copenhagen Document* (note 29 above).

<sup>89</sup> IPU *Declaration on Elections* (note 24 above) clause 4(1) (emphasis added).

<sup>90</sup> IPU *Universal Declaration* (note 25 above) at para 12.



in their internal management, political parties respect the applicable provisions of article 25 in order to enable citizens to exercise their rights thereunder.<sup>91</sup>

Some of the documents providing for international standards on democratic elections are more specific in terms of the measures they require. Concerns other than transparency of political party funding are, however, at the fore. The African Union *Declaration on the Principles Governing Democratic Elections*, for example, commits governments to ‘ensure that adequate provision of funding for all registered political parties to enable them to organize their work’.<sup>92</sup> Other documents are animated by concerns relating to fairness of campaign funding. For example, the SADC Parliamentary Forum’s *Norms and Standards* deals with misuse of public resources by incumbent parties during campaigns;<sup>93</sup> and excessive campaign spending in the context of the absence of spending caps or caps being commonly ignored.<sup>94</sup> Similarly, *General Comment 25* states that ‘[r]easonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party’.<sup>95</sup>

Transparency of political party funding is, however, a key principle of two documents: the Inter-Parliamentary Union’s *Code of Conduct for Elections* and the Venice Commission of the Council of Europe (European Commission for Democracy through Law), *Code of Good Practice in Electoral Matters*. Clause 2 of the Model Code provides that:

Recognizing that financial issues can distort the electoral process, leading to a lack of public confidence, political parties should consider themselves bound by the principles of transparency and disclosure. In addition to publicising their constitution and aims, political parties should disclose their income and assets, sources of income, and expenses.<sup>96</sup>

The Venice Commission provides more detail by stating that:

107. Regulating the funding of political parties and electoral campaigns is a further important factor in the regularity of the electoral process.
108. First of all, funding must be *transparent*; such transparency is essential whatever the level of political and economic development of the country concerned.
109. Transparency operates at two levels. The first concerns campaign funds, the details of which must be set out in a special set of carefully maintained accounts. In the event of significant deviations from the norm or if the statutory expenditure ceilings are exceeded, the election must be annulled. The second level involves monitoring the financial status of elected representatives before and after their term in office. A commission in charge of financial transparency takes formal note of the elected representatives’ statements as to their finances. The latter are confidential, but the records can, if necessary, be forwarded to the public prosecutor’s office.<sup>97</sup>

These two documents provide strong support for the applicant’s argument for a

<sup>91</sup> UNHCR *General Comment 25* (note 37 above) at para 26.

<sup>92</sup> AU *Declaration on Democratic Elections* (note 27 above) at clause III(g).

<sup>93</sup> SADC Parliamentary Forum (note 63 above) at clause 3, part 2 and clause 6, part 3.

<sup>94</sup> *Ibid* at clause 6, part 3.

<sup>95</sup> UNHRC *General Comment 25* (note 37 above) at para 19.

<sup>96</sup> Goodwin-Gil (note 26 above) at 65.

<sup>97</sup> Venice Commission *Code of Practice* (note 30 above) at paras 107–9.

scheme providing systematic disclosure of the private funding of political parties. They, however, provide scant support for continuous disclosure with no mention in either document as to the frequency of disclosure.

## II INTERNATIONAL STANDARDS ON CORRUPTION AND TRANSPARENCY OF POLITICAL PARTY FUNDING

The application of MVC before the High Court submitted that: ‘Transparency in the funding of political parties is required for the effective prevention and detection of corruption, which erodes the state’s capacity to respect, protect, promote and fulfill the rights in the Bill of Rights.’<sup>98</sup>

There are two steps to this argument:

- (1) Corruption erodes the state’s capacity to respect, protect, promote and fulfill the rights in the Bill of Rights pursuant to s 7(2) of the Constitution; and
- (2) The prevention and detection of corruption requires transparency in the funding of political parties in the form of continuous and systematic disclosure.

In making these arguments, MVC heavily relied on three treaties ratified by the South African Parliament: the South African Development Community Protocol against Corruption; the United Nations Convention Against Corruption; and the African Union Convention on Preventing and Combatting Corruption.<sup>99</sup>

This reliance is unsurprising given the binding nature of these treaties and also the importance placed on international law by the Constitutional Court in *Glenister v President of the Republic of South Africa & Others*.<sup>100</sup> In that decision, which dealt with the question of whether an independent anti-corruption unit was constitutionally required, the majority said that: ‘What reasonable measures does our Constitution require the state to take in order to protect and fulfill the rights in the Bill of Rights? The question must be answered in part by considering international law.’<sup>101</sup>

### **A Step One: Corruption Erodes the State’s Capacity to Respect, Protect, Promote and Fulfill the Rights in the Bill of Rights Pursuant to s 7(2) of the Constitution**

The international standards on corruption generally provide support for this step.<sup>102</sup> The Preamble to the UN Convention Against Corruption – which is cited in the MVC High Court application<sup>103</sup> – records the concern of the UN General Assembly in relation to ‘the seriousness of problems and threats posed by

---

<sup>98</sup> Founding Affidavit (note 9 above) at para 21.2.

<sup>99</sup> Ibid at paras 47–52.

<sup>100</sup> [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC) (*Glenister*).

<sup>101</sup> Ibid at para 192.

<sup>102</sup> Some of the documents laying down standards on corruption do not deal with transparency of political party funding, namely, the European Union Convention against Corruption Involving Officials (‘EU Convention against Corruption’); and the OECD Anti-Bribery Convention (but note Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Annex II(A)).

<sup>103</sup> Founding Affidavit (note 9 above) at para 49.

corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law’.

The Preamble to the African Union Convention on Preventing and Combating Corruption (AU Corruption Convention) – also cited in the MVC High Court application<sup>104</sup> – similarly records the disquiet of members of the African Union in relation to ‘the negative effects of corruption and impunity on the political, economic, social and cultural stability of African states and its devastating effects on the economic and social development of the African peoples’.

All this is strongly consistent with the jurisprudence of the Constitutional Court. In *South African Association of Personal Injury Lawyers*, the Court held that corruption ‘undermine(s) the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms’.<sup>105</sup> And in *Glenister*, it was said that: ‘It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy ... The State’s obligation to ‘respect, protect, promote and fulfil the rights in the Bill of Rights thus inevitably, in the modern State, creates a duty to create efficient anti-corruption mechanisms.’<sup>106</sup>

Citing this dictum, Meer J in the High Court also accepted the applicant’s argument on this point.

### **B Step Two: The Prevention and Detection of Corruption Requires Transparency in the Funding of Political Parties in the Form of Continuous and Systematic Disclosure**

There is some support for this step from international standards on the prevention of corruption. These instruments also lay down transparency as a key principle in measures against corruption.<sup>107</sup> They also view political parties (and their funding) as possible sites of corruption and, therefore, subject to anti-corruption measures including transparency of political party funding. Article 7(3) of the UN Convention, for instance, provides:

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

Entitled ‘Funding of Political Parties’, art 10 of the AU Corruption Convention provides that:

Each State Party shall adopt legislative and other measures to:

- (a) Proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and

<sup>104</sup> Ibid at para 50.

<sup>105</sup> *South African Association of Personal Injury Lawyers v Heath & Others* [2000] ZACC 22, 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 4.

<sup>106</sup> *Glenister* (note 100 above) at para 177.

<sup>107</sup> UN Corruption Convention art 5(1); AU Corruption Convention art 2(5).

- (b) Incorporate the principle of transparency into funding of political parties.

Section VII(7) of the OECD Guidelines for Multinational Enterprises also provides that enterprises shall not ‘make illegal contributions to candidates for public office or to political parties or to other political organisations. Political contributions should fully comply with public disclosure requirements and should be reported to senior management.’

These instruments provide support for the argument of MVC with respect to the importance of transparency of political party funding in addressing corruption. Or to put it in the words of Meer J, they highlight ‘the nexus between corruption and (secret) political donations’.<sup>108</sup>

They do not, however, provide support for the conclusion that continuous and systematic disclosure of such funding is required. Neither the UN Convention, the AU Convention, nor the OECD Guidelines specifically requires such a scheme. They refer only somewhat vaguely to ‘transparency’. Indeed, art 7(3) of the UN Convention is rather ‘soft’, obliging state parties to only ‘consider’, and the OECD Guidelines merely require compliance with ‘public disclosure requirements’ – if they exist.

There may also be a deeper problem with seeking to extract a requirement for continuous and systematic disclosure of political party funding from international standards dealing with corruption. The subject matter of these standards naturally means that the transparency measures contemplated are those directed at the risk of corruption. Put more specifically, disclosure of political party funding in this context would be limited to disclosure of contributions that pose a risk of corruption.

‘Corruption’ is, however, a concept with various meanings, an ambiguity that the UN Convention perpetuates by failing to define the term.<sup>109</sup> When the term is, however, defined, a narrow meaning of ‘corruption’ based on quid pro quo corruption such as bribery has been adopted.<sup>110</sup> Whilst MVC characterises the definition of ‘corruption’ in the Prevention and Combating of Corrupt Activities Act<sup>111</sup> as being informed by a ‘broad understanding of corruption’, this definition, which depends on an exchange, is still an understanding of corruption based on quid pro quo.<sup>112</sup>

There is little indication of ‘corruption’ under these instruments extending, for instance, to what the Australian High Court dubbed ‘clientelism corruption’, corruption that ‘arises from an office-holder’s dependence on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power be exercised in the public interest’,<sup>113</sup> or to what the Court referred to as ‘war-chest’ corruption

---

<sup>108</sup> *My Vote Counts 2* (note 10 above) at para 37.

<sup>109</sup> UN Corruption Convention art 2.

<sup>110</sup> See African Union Convention on Preventing and Addressing Corruption, 5 August 2006, Article 4(1); *OECD Guidelines for Multinational Enterprises* (2011), section VII(1).

<sup>111</sup> Act 12 of 2004.

<sup>112</sup> Founding Affidavit (note 9 above) at para 53.

<sup>113</sup> *McCloy v New South Wales* [2015] HCA 34, (2015) 89 ALJR 857 at para 36.

which arises when ‘the power of money ... pose(s) a threat to the electoral process itself’.<sup>114</sup>

A narrow approach towards the meaning of ‘corruption’ will correspondingly limit the scope of disclosure requirements in relation to political party funding. It may mean that only large political contributions are to be disclosed as it can be plausibly argued that it is these contributions that pose a meaningful risk of quid pro quo corruption.

### III INTERNATIONAL STANDARDS ON POLITICAL FINANCE REGULATION AND TRANSPARENCY OF POLITICAL PARTY FUNDING

While no standards devoted specifically to political finance regulation have been adopted by the United Nations or for Africa, there have been significant instruments adopted at the European level.<sup>115</sup> These European standards bring together the key concerns separately animating the international standards on democratic elections and those addressing corruption – and in this way are relevant to ss 7(2) (state’s duty to respect, protect, promote and fulfil rights in the Bill of Rights), 19(2) (right to free, fair and regular elections) and 19(3) (right to vote) of the Constitution.

The Venice Commission’s *Guidelines and Report on the Financing of Political Parties* begins by ‘[n]oting with concern problems relating to the illicit financing of political parties recently uncovered in a number of Council of Europe member states; [t]aking into account the essential role of political parties within democracy’.<sup>116</sup>

In its opening paragraph, of its recommendation on financing political parties, the Parliamentary Assembly of the Council of Europe states:

Citizens are showing growing concern with regard to corruption linked to political parties gradual loss of independence and the occurrence of improper influence on political decisions through financial means. The Assembly, stressing that political parties are an essential element of pluralistic democracies, is seriously preoccupied with this situation.<sup>117</sup>

In a similar vein, the Committee of Ministers recommendation on the issue provides as follows:

Considering that political parties are a fundamental element of the democratic system of states and are an essential tool of the political will of citizens;

<sup>114</sup> Ibid at para 38.

<sup>115</sup> These include:

- (1) Parliamentary Assembly of the Council of Europe *Recommendation 1516: Financing of Political Parties* (2001);
- (2) Committee of Ministers of the Council of Europe *Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns* (8 April 2003);
- (3) Venice Commission *Guidelines and Report on the Financing of Political Parties* (2001) (‘Venice Commission Guidelines’);
- (4) Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights & Venice Commission *Guidelines on Political Party Regulation* (2010); and
- (5) Organisation for Economic Co-operation and Development *Financing Democracy: Framework for Supporting Better Public Policies and Averting Policy* (2016) (‘OECD Financing Democracy’).

<sup>116</sup> Venice Commission *Guidelines* (note 115 above) preamble.

<sup>117</sup> Parliamentary Assembly *Recommendation 1516* (note 115 above) at para 1.

Convinced that corruption represents a serious threat to the rule of law, democracy, human rights, equity and social justice, that it hinders economic development, endangers the stability of democratic institutions and undermines the moral foundations of society.<sup>118</sup>

Transparency of political party funding figures significantly in these standards. The recommendation of the Parliamentary Assembly calls for ‘complete transparency of accounts’.<sup>119</sup> The Committee of Ministers requires specific rules to ‘ensure transparency of donations and avoid secret donations’.<sup>120</sup> The OECD *Framework on Financing Democracy* has four key objectives, one of which is to ensure ‘transparency and accountability’.<sup>121</sup>

The reasoning underlying the importance placed on transparency of political party funding is made clear by the OECD:

Transparency has two potential advantages:

1. It is a guard against corruption and improper influence. If a politician is elected to office with major financial support from an individual donor, corporation or industry and subsequently uses his or her power unduly to benefit the benefactor, the *link between donation and reward* will not pass unnoticed.
2. If donations have to be declared before the poll, transparency may permit the elector to know the identity of each candidate’s and each political party’s main backers. This information will permit the elector to be *informed about the interests* behind the rival contestants.<sup>122</sup>

The OECD’s *Framework on Financing Democracy* does not, however, lay down specific requirements for disclosure of political party funding.<sup>123</sup> By comparison, the other instruments do, in broadly similar ways, by requiring that political parties maintain proper accounts and disclose their details, including donations exceeding a certain value (determined by legislation), on at least an annual basis.<sup>124</sup>

These instruments support the argument of MVC for *systematic* disclosure of political party funding, but by requiring only annual disclosure. They do not extend to supporting the argument for *continuous* disclosure.

#### IV CONCLUSION

Do the relevant international standards require states to provide for continuous and systematic disclosure of private political funding, as argued by MVC?

The short answer is ‘no’. International standards on the right to vote strongly support the contention that this right extends to being informed of private political party funding, but they fail to require such information to be provided through continuous and systematic disclosure. Much of the same can be concluded on the

---

<sup>118</sup> Committee of Ministers *Recommendation Rec(2003)4* (note 115 above) preamble.

<sup>119</sup> Parliamentary Assembly *Recommendation 1516* (note 115 above) at para 7.

<sup>120</sup> Committee of Ministers *Recommendation Rec(2003)4* (note 115 above) at art 3(a).

<sup>121</sup> OECD *Financing Democracy* (note 115 above).

<sup>122</sup> *Ibid* at 24 (emphasis in original).

<sup>123</sup> The framework does emphasise that disclosed data be ‘timely, reliable, accessible and intelligible’: *ibid* at 25 (emphasis original).

<sup>124</sup> Venice Commission *Guidelines* (note 115 above) at para 7.



issues surrounding international standards on the prevention of corruption: they require transparency in terms of political party funding but not such stringent disclosure. International standards specifically devoted to political party funding provide the strongest support for MVC's argument, but even then they only extend to requiring annual disclosure. MVC's application is then an overreach from the perspective of international standards.

This does not mean, of course, that continuous and systematic disclosure is bad policy. In *IDASA*, Griesel J drew a distinction between what is constitutionally required and what is desirable public policy. Having rejected the applicant's arguments that disclosure of political party funding was constitutionally required, he said that 'the applicants have nevertheless made out a compelling case – with reference both to principle and to comparative law – that private donations to political parties ought to be regulated by way of specific legislation in the interest of greater openness and transparency'.<sup>125</sup> A distinction can similarly be made here between what is required by international standards – which necessarily grants a degree of autonomy to states – and desirable public policy.

## V POST-SCRIPT: DRAFT POLITICAL PARTY FUNDING BILL 2017

On 19 September 2017, the Draft Political Party Funding Bill 2017 was tabled before the National Assembly for public comment. This Bill proposes various measures dealing with political party funding – including a disclosure regime for political donations directly received by political parties.<sup>126</sup> Amongst others, this regime will require political parties to disclose all donations received above a threshold set in regulations adopted by the Independent Electoral Commission. In election years, the Commission is to publish details of such donations on a quarterly basis as well as a month before an election; publication is to be made on an annual basis in non-election years.<sup>127</sup>

If enacted, would this disclosure regime comply with the international standards discussed in this article? In most cases, the answer will be an unequivocal 'yes'. It is doubtful whether the international standards on democratic elections in relation to the right to vote require a disclosure regime so the question of non-compliance does not really arise. Other standards on free and fair elections require systematic disclosure at most – a requirement easily met by the Bill (if enacted). As to the international standards on political finance regulation, they require annual disclosure at most, again a requirement clearly met by the proposed Bill.

Much the same applies in relation to most of the international standards on corruption which emphasise transparency but typically in a 'soft' manner. The 'hardest' obligation is found in art 10(b) of the AU Corruption Convention which requires signatory states to '(i)ncorporate the principle of transparency into

---

<sup>125</sup> *IDASA* (note 3 above) at para 58.

<sup>126</sup> Draft Funding Bill Chapter 3. Private donors also have the option to contribute indirectly to political parties with representation in national or provincial legislatures by giving to the Multi-Party Democracy Fund. Draft Funding Bill clause 3. Monies in this Fund are to be allocated based on a formula prescribed by regulations. Draft Funding Bill clause 6.

<sup>127</sup> Draft Funding Bill clause 10.

funding of political parties'. Whether this obligation is met by the proposed Bill will depend upon how the disclosure regime is operationalised.

The Bill leaves key details of disclosure obligations to be governed by regulations, including the threshold at which donations are to be disclosed by political parties to the Electoral Commission, the form and manner of disclosure to the Commission as well as the form and manner in which the Electoral Commission makes public these details.<sup>128</sup> Regulations on these matters can be made by the President, acting upon a resolution of the National Assembly, or by the Electoral Commission with regulations by the former taking precedence over those made by the latter.<sup>129</sup> If the enacted regulations result in most of the private funding of political parties remaining secret, it is arguable that the principle of transparency has not been incorporated into such funding – as required by art 10(b) of the AU Corruption Convention.

## Appendix

### International standards on democratic elections

- Universal Declaration on Human Rights (1948)
- International Covenant on Civil and Political Rights (1966)
- UN Commission for Human Rights *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* (1996)
- African (Banjul) Charter on Human and Peoples' Rights (1981)
- African Union *Declaration on the Principles Governing Democratic Elections in Africa* (2002)
- African Charter on Democracy, Elections and Governance (2007)
- Southern African Development Community *Norms and standards in the SADC Region*
- European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
- Organisation for Security and Co-operation in Europe *Document of the Copenhagen Meeting of the Conference on Human Dimension of the CSCE* (1990)
- Venice Commission *Code of Good Practice in Electoral Matters* (2002)
- Inter-Parliamentary Union *Declaration on Criteria for Free and Fair Elections* (1994)
- Inter-Parliamentary Union *Universal Declaration on Democracy* (1996)
- Inter-Parliamentary Union *Codes of Conduct for Elections* (1998)

### International standards on corruption

- United Nations Convention against Corruption (2003)
- African Union Convention on Preventing and Combating Corruption (2003)
- European Union Convention against Corruption Involving Officials (1997)

---

<sup>128</sup> Draft Funding Bill clauses 10(1)–(2) (see clause 1 for definition of 'prescribed').

<sup>129</sup> Draft Funding Bill clause 23(1)–(2).

- OECD *Guidelines for Multinational Enterprises*
- OECD Anti-Bribery Convention

**International standards on political finance regulation**

- Parliamentary Assembly of the Council of Europe *Recommendation 1516 (2001) of the – Financing of Political Parties* (2001)
- Committee of Ministers of the Council of Europe *Recommendation Rec(2003)4 of the Committee of Ministers to Members States on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns* (2003)
- OECD *Framework on Financing Democracy* (2016)