

# Buying Democracy: The Regulation of Private Funding of Political Parties and the Press After *My Vote Counts*

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**ABSTRACT:** Private funding of political parties and candidates has been recognized by many countries as a source of corruption and as distorting the democratic process. Solutions to the problem include restrictions on private funding, and the supply of public funding so that candidates and parties would not have to depend on wealthy individuals, corporations, or even foreign countries to cover the high costs of political campaigning. *The My Vote Counts* (2018) decision of the South African Constitutional Court showed the dangers of unregulated private funding of political parties and candidates to the South African political system and brought about a new legislative regime of transparency and regulation. This article describes the history of the case and tries to assess some of the features of this new regime, comparing it to funding regimes in other countries. It also argues that the *My Vote Counts* decision can be taken to represent something larger than political funding only; it is based, so this article argues, on a general theory against ‘buying’ democracy that can be extended to another democratic institution in danger of being ‘bought’ – the press. The corrupting and distorting effects of private money on the press – a crucial element of the democratic system – are also recognized by many countries, including South Africa; especially so in the internet age which deprived the press of much of its income. The article surveys the different ways in which economic interests affect the impoverished press, from direct bribery of journalists to subtle economic deals of reporting in exchange for favour. The article uses the theory against ‘buying’ democracy and the analogy to political parties to argue for applying transparency, regulation, and public funding to the funding regime of the press as well.

**KEYWORDS:** campaign finance, corruption, freedom of the press, free speech, political funding, political parties, social media, the right to vote

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## I INTRODUCTION

The *My Vote Counts*<sup>1</sup> case of 2018 is a rare example of a successful litigation campaign that went to the heart of politics. Together with the cases preceding it and a civil society campaign, it managed to transform the South African political system from a system that did not impose any regulation on private funding of political parties to a system that, like systems in many other countries, dictates requirements of transparency and limitations on party funding.

In *My Vote Counts* the South African Constitutional Court ruled that the Promotion of Access to Information Act 2 of 2000 ('PAIA') was constitutionally invalid to the extent that it failed to provide for the 'recordal, preservation and reasonable disclosure'<sup>2</sup> of information on the private funding of political parties and independent candidates and mandated Parliament to amend the law accordingly within 18 months.<sup>3</sup> The decision emphasized the importance of disclosing donor identity as part of the information necessary for the voter, so that the right to vote is 'exercised meaningfully or with understanding,'<sup>4</sup> and the importance of transparency in order to prevent corruption and the influence of capital on the political process.

Although the case mandated only one legislative change, it brought about two. In April 2021, three years after the case was decided, two pieces of legislation finally came into operation – the Political Parties Funding Act 6 of 2018 ('PPFA') (which was a Bill when the case was decided); and the Promotion of Access to Information Amendment Act 31 of 2019 (the amendment required by the case). Together these two pieces of legislation provide for a new regulatory regime for political party funding. At the time of writing in November 2021, it was yet to be seen to what extent and in what degree of success these new laws would be implemented, but their final approval provided a good opportunity to look at this case through comparative lenses and place the new funding regime among similar models of political funding regimes in other countries.

In my opinion, the *My Vote Counts* case did not only provide a constitutional framework for regulating party funding, it also provided for a general theory of democratic funding that could be extended to other democratic institutions. At the heart of the case is the recognition that private sources of money provided to democratic institutions by wealthy individuals, corporations, or foreign states corrupt and distort the democratic process. Moreover, when the sources of funding are hidden from the public, voters cannot properly exercise their right to vote if they do not know the sources of influence on the information they receive. As much as this applies to political parties, I will argue that it also applies to another vital democratic institution – the press. The press (which also includes online newspapers and many forms

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<sup>1</sup> My Vote Counts ([www.myvotecounts.org.za](http://www.myvotecounts.org.za)) was registered in 2014 as a civil society organisation to act as a 'watch dog' over political party funding. *My Vote Counts NPC v Minister of Justice and Correctional Services & Another* [2018] ZACC 17, 2018 (5) SA 380 (CC) ('*My Vote Counts*').

<sup>2</sup> *Ibid* at para 9.

<sup>3</sup> The decision was based on the right of access to information, protected by section 32 of the Constitution of South Africa, and the right to vote protected by section 19 of the Constitution. The right to vote is coupled with the duty of the state to 'respect, protect, fulfil and promote' all rights in the Constitution as provided by section 7(2).

<sup>4</sup> *My Vote Counts* (note 1 above) at para 8.

of social media reporting)<sup>5</sup> is probably the primary source of information about government and all matters that affect the vote. When private money affects the way news is framed and communicated and influences the choice of news and contents to be delivered, this distorts the democratic process. When voters are unaware of these distortions, the problem is exacerbated. The threat of corruption is also not to be dismissed when it comes to private sources of money funding the press. Admittedly, the press is in many ways different from political parties, both formally (for example, it is not recognized by legislation and constitutions as a political institution) and practically (it has always operated as a private business, unlike parties which have always been regulated by law and have a semi-public status). However, the press too is often regarded as a semi-public institution, vital to democracy. I will try to argue that the general theory of democratic funding which underlies the *My Vote Counts* case has relevance to the press as well.

I call this general theory of funding the theory against ‘buying’ democracy; it applies to the two institutions discussed in this article – political parties and the press. In part II, I review the background and the litigation leading to the *My Vote Counts* case, as well as the case itself, and outline the theory that can be deduced from it regarding private funding and the democratic process. Part III outlines different models of political funding regimes and compares them to South Africa’s new regime and to the theory against buying democracy. I concentrate on the comparison of two extreme examples of funding regimes: the USA and Israel. Part IV then describes the application of my theory to the press. It reviews the radical changes the press has undergone and the different ways in which it can be, and is, bought. Part III ends with a suggestion about the public funding of the press and the way it can be adapted to South Africa. Here too, most of the examples will be drawn from the USA and Israel.

## II *MY VOTE COUNTS* AND A THEORY OF DEMOCRATIC FUNDING

### A Background to the case

For many years, South Africa was relatively exceptional in the international landscape for not regulating private funding for political parties and candidates in any way.<sup>6</sup> South African law not only did not require transparency of private donors, it also did not limit the amount of the donations amounts, nor the donor identities.<sup>7</sup> Thus, banks, international companies, foreign governments, and wealthy businesspersons all donated large sums of money to parties and candidates without political parties being required to disclose any of these donations nor reveal them to the public. On many occasions, incidents of corruption by donations, in money or in

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<sup>5</sup> ‘The press’ refers to journalism generally. It includes all online press, whether the newspaper has a printed version or not. It also comprises of journalism which appears in social media or other internet forms. Later on I will address the issue of such avenues of journalism. As I explain later, the emphasis in this article is more on printed and digital journalism (which is more directly associated with the term ‘the press’ than on broadcast journalism (radio and television), as the latter are less susceptible to the damaging economic processes affecting the former. In general, though, I do not engage here with ‘non-news’ media (for example, entertainment and culture) which are outside the scope of the argument here.

<sup>6</sup> For example, L Karvonen ‘Legislation on Political Parties: a Global Comparison’ (2007) 13 *Party Politics* 437.

<sup>7</sup> This statement was still true at the time of writing this article in November 2021, despite two new pieces of legislation, since both had not yet taken effect.

kind, to candidates and top party officials in return for governmental favours were reported by the press; and some led to indictments.<sup>8</sup>

The South African Constitution contains provisions that have the effect of regulating private funding. First, the Constitution in section 236 mandates the enactment of legislation regarding the provision of *public* funding for political parties, and indeed such legislation was enacted and provides for relatively generous public funding for political parties in South Africa. In its Public Funding of Represented Political Parties Act 103 of 1997, South Africa provided for public funding of political parties in amounts relative to their size in Parliament, with the African National Congress (the ANC), for example, receiving around ZAR 60 million (USD 4.3 million), and the Democratic Alliance (DA) around R16 million (USD 1.2 million) in 2015.<sup>9</sup>

Secondly, in section 32(2) the Constitution also provides that legislation be enacted to give effect to the right of access to information, protected by section 32(1), which could be interpreted to include information regarding political parties and their sources of funding.<sup>10</sup> However, the ensuing legislation left out political parties from its ambit. In its Promotion of Access to Information Act 2 of 2000 (PAIA), South Africa provided for access to information from a variety of governmental and non-governmental bodies. However, PAIA did not cover political parties.<sup>11</sup> The outcome was, therefore, that despite providing for public funding, South African law did not expressly impose any restrictions on private money for parties and, in addition, allowed parties to conceal the sources and amounts of private money they receive, and the way they use it.

It is not quite certain why South Africa chose not to include limitations on political party funding in its Constitution, which in many other respects was very carefully crafted. One suggestion is that at the time the Constitution was drafted the ANC relied heavily on foreign funding and did not want to jeopardise this source of support.<sup>12</sup> In any case, the outcome was, not surprisingly, an influx of murky donations and cases of corruption, and the situation has become the source of much concern in South Africa. Furthermore, it is conceived as a central element in one of its prime social problems – state corruption.<sup>13</sup>

The lack of transparency of donations allowed for corruption in the guise of money transfers, or gifts in kind, from corporations, billionaires, and even entities associated with crime, to party officials and members of parliament. For example, during the proceedings of the Zondo Commission of Inquiry into State Capture, in 2019, Angelo Agrizzi, former chief operating officer at African Global Operations (AGO), revealed that AGO spent between

<sup>8</sup> *My Vote Counts Report – The Private Funding of Political Parties: What Do We Know?* (2019), available at <http://www.myvotecounts.org.za/wp-content/uploads/2019/04/Historical-Political-Party-Funding-1.pdf> ('My Vote Counts Report'). See also K Cowan 'Mantashe, Mokonyane scored big in Bosasa bonanza' *News24* (9 Sept 2018), available at <https://www.news24.com/SouthAfrica/News/bosasa-ministers-bonanza-20180909-2>.

<sup>9</sup> M Swart 'Why South Africa's New Political Party Funding Bill is Good News for Democracy' *The Conversation* (June 2018), available at <https://theconversation.com/why-south-africas-new-political-party-funding-bill-is-good-news-for-democracy-99034>.

<sup>10</sup> Constitution, sections 32(1), 32(2), 236.

<sup>11</sup> *My Vote Counts* (note 1 above) at para 8 (Referring to the High Court's decision according to which 'PAIA neither applies to political parties nor to independent candidates nor to all records on private funding').

<sup>12</sup> See *My Vote Counts Report* (note 8 above)(Documenting the donations that ANC received from foreign countries under President Mandela).

<sup>13</sup> *Transparency International Corruption Perceptions Index* (2018), available at <https://www.transparency.org/country/ZAF> (assigned South Africa an index of 43 out of 100, ranking South Africa 73 out of 180 countries. Countries with scores below 50 are believed to have serious corruption problems).

ZAR 4 million and ZAR 6 million monthly on cash bribes to senior government officials on the company's payroll. This included Nomvula Mokonyane, a former minister and Premier of Gauteng province who allegedly received monthly payments of R50 000 from 2002 to 2016, security upgrades, 12 cases of frozen chicken, 200kg of beef braai packs, eight lambs, and specialty alcohol including cases of premium brandy. In return, between 2003 and 2019, AGO received around ZAR 12 billion in government contracts.<sup>14</sup>

Even without evidence of direct corruption, the list of contributors to political parties raises much concern of undesirable influence on political activity in South Africa through donations of money to parties. The 2019 report by My Vote Counts, a non-profit organization advocating for more transparency and accountability in South Africa's political and electoral system (the same organization that initiated the petitions to be discussed shortly), stated that among the contributors to political parties are leading banks, consulting companies, and billionaires. Many of these entities donate to more than one party.<sup>15</sup> In addition, it is reported that, over the years, foreign governments and foreign political entities donated large sums of money to the ANC including China, Saudi Arabia, the United Arab Emirates, the Indian National Congress, and Libya.<sup>16</sup> International corporations are also on the list of donors.

## B The *My Vote Counts* litigation and decision

The litigation in the *My Vote Counts* case was the last in a series initiated by the My Vote Counts organisation. In the first round of litigation, My Vote Counts launched an application to the Constitutional Court<sup>17</sup> requiring Parliament to initiate legislation that would compel political parties to disclose the sources of their donations, but the application was denied in 2015, mainly because of a technical matter – subsidiarity.<sup>18</sup> The Court (in a 7:4 decision) asked that an application be made first to the High Court, frontally attacking the constitutionality of PAIA, which the application did not do. Some commentators viewed this as a missed opportunity,<sup>19</sup> and others criticised it as an evasion on part of the Court.<sup>20</sup> It was delivered

<sup>14</sup> My Vote Counts Report (note 8 above).

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> *My Vote Counts v Speaker of the National Assembly* [2015] ZACC 31 (CC), 2016 (1) SA 132 (CC) (*'My Vote Counts 2015'*).

<sup>18</sup> Subsidiarity is the principle according to which matters must be referred first to a lower court before filing an application to the Constitutional Court as long as the Constitutional Court does not have exclusive jurisdiction on the matter.

<sup>19</sup> J Klaaren, 'My Vote Counts and the Transparency of Political Party Funding in South Africa' (2018) 22 *Law, Democracy, & Development* 1.

<sup>20</sup> R Cachalia 'Botched Procedure, Avoiding Substance: A Critique of the Majority Judgment in My Vote Counts' (2017) 33 *South African Journal on Human Rights* 138; J Fowkes 'Dominant Assumptions: Reading Between the Lines of a New South African Party Funding Decision' Blog of the *International Journal of Constitutional Law* (26 July 2018), available at <http://www.iconnectblog.com/2018/07/dominant-assumptions-reading-between-the-lines-of-a-new-south-african-party-funding-decision-i-connect-column/> (refers to the fact that the Court in the later, 2018, case implied that legislation does not have to be in the form of amending PAIA as evidence that its earlier ruling was an evasion). See *My Vote Counts* (note 1 above) at para 17 ('Parliament enjoys functional independence in the discharge of its law-making obligations even in relation to the regulation of private funding. Whether it does so through one, two or more pieces of legislation falls squarely within its discretionary powers. It may for example meet that obligation through an appropriately recalibrated PAIA alone, PAIA and another legislation or a different mechanism altogether.').

during a time (towards the end of the Zuma presidency) when the Court was under increased criticism from the government and applied more restraint, and the issue of funding did not have political support.<sup>21</sup> Nevertheless, the minority opinion did provide important rhetoric that would serve as background for the second and decisive *My Vote Counts* case:

In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of 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>22</sup>

Prior to the second round of litigation, viz, (*My Vote Counts NPC* in the High Court) that gave rise the current case in the Constitutional Court, My Vote Counts (the organisation) requested information from political parties about their private sources of funding and some of the parties rejected these requests, referring to the fact that PAIA did not cover political parties.<sup>23</sup> Subsequently, My Vote Counts brought an application in the Western Cape Division of the High Court, Cape Town, frontally challenging the constitutionality of PAIA. In 2017 the High Court issued an order of invalidity with respect to PAIA to the extent that it did not cover political parties<sup>24</sup> and in 2018 the Constitutional Court confirmed this decision unanimously.<sup>25</sup>

When the Constitutional Court handed down its 2018 decision, Mogoeng CJ delivered an extensive and strongly worded judgment for the unanimous Court. The judgment opened with a general statement on the importance of transparency in the political process, citing the well-known US Supreme Court case on campaign finance, *Buckley v Valeo*.<sup>26</sup> The judgment continued with a call against public sector corruption in South Africa:

The need for efficiency and effectiveness in the prevention, containment and elimination of corruption linked to the private funding of political parties and independent candidates seems to cry out for urgent intervention. For, corruption that flows from secret private funding could otherwise stealthily creep into our political and governance space, toxify it and fossilise itself to our detriment, if it has not already done so.<sup>27</sup>

As to its legal basis, the decision is based on two rights protected by the Constitution read together: the right to access to information protected by section 32 of the Constitution, and the right to vote, protected by section 19 of the Constitution.

Section 32 of the Constitution provides that: ‘(1) Everyone has the right of access to – (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights.’ The Court maintained that the words ‘another person’ in section 31(1)b apply to political parties as well, and then went on to maintain that the right for which such information is required is the right to vote in section 19. ‘By its very nature’ argued Mogoeng CJ ‘the proper exercise of the right to vote is largely

<sup>21</sup> Fowkes *ibid*. At the time, the opposition parties also objected to transparency regarding the source of their donations received, probably for fear that revealing their donors would subject those donors to harm or harassment from the ruling ANC party.

<sup>22</sup> *My Vote Counts (2015)* (note 17 above) at para 35 where the minority quoted from an earlier decision in *President of the Republic of South Africa v M&G Media Limited* [2011] ZACC 32, 2012 (2) SA 50 (CC) at para 10.

<sup>23</sup> *My Vote Counts* (note 1 above) at para 18.

<sup>24</sup> *My Vote Counts NPC v President of the Republic of South Africa* [2017] ZAWCHC 105, 2017 (6) SA 501 (WCC) (High Court judgment).

<sup>25</sup> *My Vote Counts* (note 1 above).

<sup>26</sup> *Buckley v Valeo* 424 US 1 (1976).

<sup>27</sup> *My Vote Counts* (note 1 above) at para 4.

dependent on information.<sup>28</sup> As the right to vote includes the right to vote meaningfully according to reliable information, the inability to access information about donations to parties makes a vote based on reliable information impossible. Mogoeng CJ wrote:

This case is after all about establishing a principle-based system that will objectively facilitate the meaningful exercise of the right to vote... For this reason, any information that completes the picture of a political party or an independent candidate in relation to who they really are or could be influenced by, in what way and to what extent, is essential for the proper exercise of the voter's "will" on which our government is constitutionally required to be based... what is implicitly envisioned by section 19 is an informed exercise of the right to vote.<sup>29</sup>

The operative conclusion of the judgment was that 'Parliament must amend PAIA and take any other measure it deems appropriate to provide for the recordal, preservation and facilitation of reasonable access to information on the private funding of political parties and independent candidates within a period of 18 months.' While the Court's ruling pertains only to the issue of transparency, some of the strong language of the decision seems to apply with equal force to the need for restrictions on the donations themselves. The Court was forthright as to the potential danger of 'buying' the democratic process:

The reality is that private funders do not just thoughtlessly throw their resources around. They do so for a reason and quite strategically. Some pour in their resources because the policies of a particular party or independent candidate resonate with their world-outlook or ideology. Others do so hoping to influence the policy-direction of those they support to advance personal or sectional interests. Money is the tool they use to secure special favours or selfishly manipulate those who are required to serve and treat all citizens equally.

Although the Court is bound by the limits of the application and its aims, which revolves around PAIA and the access to information, the words of Mogoeng CJ lead to the conclusion that unrestricted donations pose a serious problem to democracy, whether disclosed or not:

Unchecked or secret private funding from all, including other nations, could undermine the fulfilment of constitutional obligations by political parties or independent candidates so funded, and by extension our nation's strategic objectives, sovereignty and ability to secure a 'rightful place' in the family of nations. Our freely elected representatives must thus be so free that they would be able to focus on their core constitutional mandate. They cannot help build a free society if they are not themselves free of hidden potential bondage or captivation.<sup>30</sup>

### C General theory against 'buying' democracy

Historically, the primary concern of violation of human rights and democracy arose from fear of the tyranny of the ruler and the oppressive powers of the state over the individual – be it the monarch, the tyrant, or even the elected parliament and government. Public force was the opponent of individual liberty and the rights of the people. However, as early as the beginning of the twentieth century, the distinction between the private and the public spheres was questioned, and a new kind of danger to democracy and human rights began to

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<sup>28</sup> *My Vote Counts* (note 1 above) at para 37.

<sup>29</sup> *Ibid* at para 33.

<sup>30</sup> *Ibid* at para 41.

be acknowledged – the tyranny of private power and especially private wealth of individuals and corporations.<sup>31</sup>

The *My Vote Counts* decision is based, to my mind, on one manifestation of this concern against the tyranny of the private sector – the threat of ‘buying’ democracy. It relates in particular to the threat posed by wealthy individuals and corporations who wish to ‘buy’ institutions that are vital to the democratic process and yet are not fully public because they are historically dependent on private money. The decision can be read therefore as relying on a *general* theory against buying democracy. As I mentioned in the introduction, while the *My Vote Counts* decision applies this theory only to one democratic institution of such nature – political parties and candidates – I believe its ramifications are larger and should be applied at least to one more democratic institution – the press. I will also briefly discuss the possibility of extending it to other democratic institutions which are not at the centre of this article.

Two major principles related to the theory against buying democracy can be found in the *My Vote Counts* decision: transparency and non-bondage. Together with accountability, transparency is obviously a basic element in the general framework and ethos of the South African Constitution, as South Africa’s past was pervaded by non-transparency and secrecy in the service of the apartheid regime.<sup>32</sup> In *My Vote Counts*, transparency is connected to the democratic process through the right to vote, and through the importance of understanding the factors that can skew and manipulate the information citizens receive from political parties (and by analogy also from the press). If we know that private interests are involved in the way we get our information, we can offset some of that bias in our minds and be more cautious before accepting that information at face value. We are reminded of Mogoeng CJ’s strong words: ‘any information that completes the picture of a political party or an independent candidate in relation to who they really are or could be influenced by, in what way and to what extent, is essential for the proper exercise of the voter’s “will”’.<sup>33</sup> One can find similar strong rhetoric in the minority opinion of *My Vote Counts (2015)*: ‘[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.’<sup>34</sup>

Non-bondage, the second major principle in *My Vote Counts*, affirms that democratic institutions, such as political parties (and by analogy, the press), must be free from the bondage of private sponsors and donors so that they are able to administer their democratic functions unfettered and un beholden to anyone for the sake of public good. Again, the words of Mogoeng CJ echo strongly this principle: ‘Our freely elected representatives must thus be so free that they would be able to focus on their core constitutional mandate. They cannot help build a free society if they are not themselves free of hidden potential bondage or captivity.’<sup>35</sup> Non-bondage can be achieved by either immunising the democratic institutions from the

<sup>31</sup> Generally see WN Hohfeld ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale Law Journal* 16; WW Cook ‘Privileges of Labor Unions in the Struggle for Life’ (1918) 27 *Yale Law Journal* 779 (1918); D Kennedy ‘The Stages of Decline of the Public-Private Distinction’ (1982) 130 *University of Pennsylvania Law Review* 1349.

<sup>32</sup> T van Wick “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 Law Review* 97.

<sup>33</sup> *My Vote Counts* (note 1 above) at para 33.

<sup>34</sup> *My Vote Counts (2015)* (note 17 above) at para 41.

<sup>35</sup> *Ibid* at para 41.

influence of private funding or through the provision of public funding that makes private funding unnecessary, or both. A host of mechanisms can be used for the first purpose, such as: complete denial of access to private money, or putting caps on it; the creation of effective ethical standards that water down the funding's effects; or making available general funding from the public by subscriptions or payment for the service. I explore these options in the next two parts, both with regard to political parties and candidates, and to the press. The facts presented in these two parts show that in many countries, not only in South Africa, some traditional, non-regulatory immunization mechanisms have also been critically eroded, both with regard to political parties and to the press. Therefore, with both the press and political parties, a need for state regulation and funding to ward off dependency and bondage and provide for transparency has arisen.<sup>36</sup>

The following are a few characteristics of the theory against buying democracy as derived from the context of the *My Vote Counts* decision. Note that these are mainly initial explorations outlining what such a theory could look like. It is not my intention here to provide anything more than a conceptual understanding of the theory.

First, the theory is not only about corruption. Corruption has always haunted politics and good governance. The concern over buying democracy however is larger and may exist when no direct corruption is present. For one thing, buying a democratic institution can be motivated ideologically rather than merely by pure greed or the quest for power. In addition, buying democratic institutions can happen in various indirect or even unintended ways, many of which appear quite innocent, such as donations or help without an immediate or even a concrete request for return. Therefore, our concern with such funding stems sometimes from the potential of influence, even if no direct influence can be proved.<sup>37</sup>

Secondly, buying democratic institutions may be regarded as part of the liberty of a person to do with her money as she pleases; it can be regarded as part of political freedom, as when a person promotes his ideological and political goals through funding; or it can be regarded as part of freedom of expression, as when a person uses her money to promote her ideas. The principle against buying democracy should therefore overcome some perceived infractions against liberty that would view regulations against providing funds for political parties as restrictive and even oppressive.<sup>38</sup>

Finally, the kind of democratic institutions covered by this theory are, on the one hand, private, or at least non-governmental, and thus often dependent on private donations and funding, but, on the other hand, they are public in the sense that they operate in the public sphere and provide a vital democratic function as a check on government. Political parties and the press are of such a nature. The primary threat to these institutions has always been, and still is, that the government would interfere with their independence and take them over. However, they are also under the threat of harm to their independence and of takeover by powerful

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<sup>36</sup> See generally parts III & IV below.

<sup>37</sup> One of the ways in which donations effect the democratic process without involving corruption is by making some issues get to the front of the line in terms of politicians' preferences. See L Lessig *Republic Lost* (2011) chapter 1.

<sup>38</sup> See the discussion on the American conception of free speech (Part IIIA2 below).

money interests, wealthy individuals and corporations, and even wealthy foreign states. This double threat is one of the characteristics of the theory against buying democracy.<sup>39</sup>

Following this last characteristic of the theory against buying democracy one may think of other institutions that may fit this double nature as both public and private described above, and where protection against private money may be required. Such institutions may include civil society institutions, such as non-profit and non-governmental organizations; universities, research institutions, and purveyors of knowledge; and maybe even cultural institutions such as theatre, cinema, museums, and so on. Commentators have recently attempted to group similar institutions under the heading of ‘guarantor institutions’, or ‘fourth branch institutions’, and have mentioned similar concerns regarding private money control over them.<sup>40</sup> It is even possible to view the internet and social media as part of this group. This list of institutions is not set in stone, and one can think of many reasons why some should not belong to the list, and state many differences among them, or between them and political parties. As mentioned, this is an initial exploration. I spell out below the differences between the press and political parties, which are germane to this article.

### III PRIVATE FUNDING FOR POLITICAL PARTIES

#### A Political funding in comparative perspective

Whereas corruption has always been part of politics, fending off private funding and providing public funds to political parties is relatively new and dates back to the beginning of the twentieth century and, in most countries, only to the past few decades.<sup>41</sup> There are two main reasons for this new concern. The first is the decline in revenue from party memberships. For a variety of reasons, membership declined dramatically over the years and membership fees ceased to be a substantial source of funding for parties. If we take for example the UK, in the mid-1950s there were approximately three million members of the Conservative Party and one million members of the Labour party, whereas in 2015 these numbers fell dramatically to 150 000 and 270 000 respectively. Today only 1.3 per cent of the population in Britain has party membership.<sup>42</sup> The second reason is the dramatic increase in the expenses of parties in the modern age. The cheaper ways of campaigning for elections such as rallies, gatherings and

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<sup>39</sup> See the following assertion regarding ‘guarantor institutions’: ‘Therefore, in most democratic contexts, guarantor institutions will typically need independence from the ruling party/coalition; in other words, in order to be sufficiently independent to provide credible and enduring guarantees, guarantor institutions typically need to be *constitutionally entrenched* (whether legally or politically). Depending on the norm in question, independence from other actors – such as large corporations – may also be required.’ T Khaitan ‘Guarantor Institutions’ (forthcoming 2022) *Asian Journal of Comparative Law* 1, 5, available at <https://ssrn.com/abstract=3766137>.

<sup>40</sup> M Tushnet *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (2021); Khaitan *ibid* (‘Actors most likely to have a vested interest in the sound functioning of guarantor institutions include the political opposition, civil society organisations, sub-state or supra-state political organisations, independent media and others.’). Both Tushnet and Khaitan take as their primary examples institutions that are strictly public, such as ombudspersons, and corruption watchdogs. However, both refer to the independent media, and civil society institutions, as democracy protecting institutions as well.

<sup>41</sup> N Karl-Heinz ‘Introduction: Political Parties, Funding and Democracy’ in R Austin & M Tjernström (eds) *Funding of Political Parties and Election Campaigns* (2013) International IDEA Handbook Series.

<sup>42</sup> A Defty ‘Fewer and Older: Consequences of the Decline in Party Membership in the UK’ *Democratic Audit UK* (13 November 2015), available at <https://www.democraticaudit.com/2015/11/13/fewer-and-older-consequences-of-the-decline-in-party-membership-in-the-uk/>.

speeches have become less effective, and new methods are much more expensive – in particular TV and newspaper advertisements, and more recently, the use of polling and outreaching through social media and the internet.

As a result, many countries felt the need to supplement the income of parties by providing them with public funds and, on the other hand, to fend off the increasing dependency of parties on private donors by restricting private donations.

The next part of this article will concentrate on the regulation of private funding of political parties in two countries, representing different models of regulation, and then compare South Africa's new regime with the two. But first, it is important to briefly sketch some comparative methods for regulating the control of private funding and the provision of public funding.

Extensive international research to survey restrictions on private funding of political parties and candidates of the members of the Organisation for Economic Cooperation and Development (OECD) was conducted by the Institute for Democracy and Electoral Assistance (IDEA) in 2012. The findings for the OECD countries were as follows:

- no anonymous donations (84%);
- no foreign donations (73 %);
- no donations from government contractors or government-owned or partially-owned corporations (70%);
- a cap on party spending – either in an election year or generally (52%);
- a cap per donor in an election year (47%);
- no donations from unions (39%);
- a general cap per donor (39%);
- no donations from corporations (38%).<sup>43</sup>

The same research also examined the prevalence of the different models of public funding for parties and candidates and came out with the following results:

- direct public funding during elections (85%);
- free or subsidized airtime (76%);
- tax exemptions (64%);
- direct public funding between elections (53%);
- indirect funding from other sources (24%);
- storage space for election campaigns materials (18%);
- free venues for election meetings (18%);
- free or subsidized mail (15%);
- free or subsidized public transportation (6%).<sup>44</sup>

Both surveys attest, first, to the great variety of mechanisms both for curbing private donations and for the provision of public funding. Secondly, they attest to the large variety and methods for providing donations. For example, a large majority of OECD countries adopted direct public funding during elections, and a similar percentage adopted a prohibition on anonymous donations (transparency). Other restrictions such as on foreign donations and government

<sup>43</sup> The data collected here is compiled by A Ben-Bassat & M Dahan in *Reforms Politics, and Corruption* (Israel Democracy Institute 2014) at 160 (in Hebrew; my translation. Henceforth, unless noted otherwise, all translations from Hebrew are mine), from Institute for Democracy and Electoral Assistance *Political Finance Regulations Around the World: An Overview of the International IDEA Database* (2012), available at <https://www.idea.int/publications/catalogue/political-finance-regulations-around-world-database-overview>.

<sup>44</sup> *Ibid* at 154.

corporations are also very frequent. Caps on spending and caps on individual donors are not uncommon but less so than are those on foreign and government corporations.

These data should be born in mind when we take an in depth look at the funding regimes in the two model countries we have chosen to compare with the new regime in South Africa.

## 1 *Israel*

Israel has one of the highest levels of spending on public funding for political parties, per voter, in the world. For many years, it used to top most world surveys on election spending per voter, and currently it is considered the highest spender on elections among all OECD countries.<sup>45</sup> In parallel, Israel has one of the most restrictive legal regimes regarding private funding of political parties and candidates.<sup>46</sup> Israel restricts both direct and indirect donations to political parties and permits them only to persons who are eligible to vote in Israel.<sup>47</sup> This means that no corporations (either local or foreign), no foreign citizens, or foreign countries and entities may donate to political parties in Israel, either directly or indirectly. The amount allowed for a donation is also very low – approximately 1000 Israeli new shekel (ILS) (~USD 290) during a regular year per household, and ILS 2300 (~USD 650) in an election year. Both the donor giving the donation and the party receiving it must report the donation. Anonymous donations are not allowed, and failure to report is a criminal offence, with a penalty of up to three years imprisonment, so is receiving donations of more than the maximum amount. The state comptroller oversees the implementation of the regulations and can issue fines as well. In addition, donations are viewed as if they were donated to a party if they were donated to any institution that is related to the party. These institutions are also under similar restrictions regarding the amount of money they may receive from donations, and what the source of the money is. Recently this has been extended to persons and institutions that are not related to party if their actions can reasonably be conceived as campaigning for a party. To conclude, since membership fees in parties have dropped dramatically in recent decades and, as mentioned above, authorized private funding is very low (while public funding is very high) the result is that for 99 per cent of political parties in Israel, spending comes from the government.<sup>48</sup>

<sup>45</sup> Political Parties Financing Law 5733-1973 (Israel). The funding of each party depends on the number of members of Knesset the specific party has in the outgoing Knesset and the incoming Knesset. Each parliamentary group is entitled, pursuant to the provisions of this law, to financing for election expenses, financing for ongoing expenses each month, as well as for financing the salaries for parliamentary staff. English version available at the Israel Ministry of Foreign Affairs website: <https://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Party%20Financing%20Law.aspx>.

<sup>46</sup> The rules for funding candidates in Israel are more complex than those of funding parties, and may, in some instances, allow for donations of relatively large amounts of money. However, these rules are of lesser importance as Israel's general elections involve only parties, and not individual candidates. Private funding for candidates happens only during primaries that exist only for some of the political parties.

<sup>47</sup> Article 8(d1) Parties Financing Law 1973 ('A parliamentary party group or a party shall receive a donation directly or indirectly only from a registered voter').

<sup>48</sup> A Shapira 'Campaign Financing in Israel' (20 January 2016) The Israel Democracy Institute, available at <https://en.idi.org.il/articles/3255> ('99% of the money the parties spent in the 2013 election campaign came from state funding [about NIS 195 million of some NIS 197 million]'). See also IDEA *Political Finance Database* (Israel) (2018), available at <https://www.idea.int/data-tools/country-view/144/55>.

## 2 *The USA*

The USA is at the opposite extreme in terms of private versus public funding of political parties and candidates. While in Israel 99 per cent of funding for political parties and candidates comes from public money, in the USA federal elections the figure is much below one per cent.<sup>49</sup> On the other hand, private funding is almost the only mode of financing parties and politicians, and reaches staggering levels. One person alone, Sheldon Edelson, contributed more than 120 million dollars to the Republican Party campaign in the 2016 elections; another person, Michael Bloomberg, contributed more than 95 million dollars to the Democratic Party campaign in the same elections.<sup>50</sup> All in all, the amount of private money poured into the US 2016 federal elections was 6.5 trillion dollars, which is more than double the amount spent in the 2000 elections.<sup>51</sup>

Several factors in the current US regime allow for, and foster, such a high level of private expense on political parties and candidates. First, election campaigns in the US are very long – including primaries, they total almost a year and a half – and there are no restrictions on their duration. In comparison, many countries limit their electoral campaigns to a few months or less (three months in Israel, 50 days on average in Canada, and just two weeks in Japan). They restrict political advertisement in the media to that period only, or even to a limited time within that period, and to limited slots of airtime (e.g. in the UK, Brazil, and Japan).<sup>52</sup> Secondly, US law does not restrict party and candidate spending on elections, while many countries do.<sup>53</sup> This allows for a spiral race of spending between parties and candidates. Thirdly, though US law does restrict private contributions to relatively small amounts – roughly USD 2000 per person per election year – these restrictions have many loopholes making them virtually ineffective. Thus, indirect spending is largely unrestricted, allowing for unlimited private funding of ‘independent expenditures’ – for example, spending on television ads and other activities supporting a candidate that are not coordinated or controlled by the candidate or party. Moreover, donations by corporations and trade unions to such independent expenditures are allowed and individual contributors can coalesce into Political Actions Committees that can amass together unlimited sums of money raised by individual donors, corporations and trade unions. Fourthly, while public funding for parties and candidates does exist, it comes together with restrictions on the use of private money. At first, public funding was extensively used by parties and candidates, however, once private money amounts reached very high levels, it became more profitable not to use public money in order not to be restricted in the use of private money. Thus, in the last elections the two big parties and the two leading candidates did not use any federal funds and a mere 1.5 million dollars was used (compared to 6.5 trillion

<sup>49</sup> In 2016 only 1.5 million dollars of federal funding were used by candidates (none by parties), compared to 6.5 trillion dollars spent by private entities. Open Secrets Center for Responsive Politics *Top Individual Contributors: All Federal Contributions, 2019–2020*, available at <https://www.opensecrets.org/overview/topindivs.php>.

<sup>50</sup> *Ibid.*

<sup>51</sup> Open Secrets Center for Responsive Politics *Cost of Elections*, available at <https://www.opensecrets.org/overview/cost.php>.

<sup>52</sup> D Kurtzleben ‘Why Are US Elections So Much Longer Than Other Countries?’ *NPR* (21 Oct 2015), available at <https://www.npr.org/sections/itsallpolitics/2015/10/21/450238156/canadas-11-week-campaign-reminds-us-that-american-elections-are-much-longer>.

<sup>53</sup> IDEA (note 48 above).

dollars in private contributions) – all of it by independent candidates for the presidential campaign.<sup>54</sup>

This has not always been the case in the US. In the wake of the Watergate affair there arose a bipartisan political will to correct the corruption that had polluted American politics through a scheme of regulations on private funding and provision of public funding for parties and candidates. Despite that, this bipartisan agreement was basically circumvented by the Supreme Court. In 1976 the US Supreme Court ruled that certain limitations on campaign financing – those on independent expenditures – are unconstitutional, because they contradict the First Amendment's protection of free speech.<sup>55</sup> According to the Court's doctrine, limiting a person's spending on political advertisements, constitutes a limitation on his right to free speech as it limits his abilities to further his speech and his ideas. This partial strike down in effect created enough loopholes to make the entire arrangement ineffective. Subsequent case law widened these loopholes even more, especially when the Court ruled in 2010 that corporations also enjoy the right to free speech and may donate to political parties in the same way as individuals do, resulting in the situation described above.<sup>56</sup>

The idea that limiting spending on political advertisements amounts to an unconstitutional infringement of speech is unique to the US. Australia,<sup>57</sup> Canada,<sup>58</sup> England<sup>59</sup> and Israel, among others, have ruled the opposite. In these countries, the limitations on private funding for parties are themselves viewed as a protection against the distortion of free speech by money, and thus as enhancing rather than limiting free speech. The American conception, however, is based on an absolutist version of the *marketplace of ideas* principle,<sup>60</sup> according to which the state should step out of the market of ideas and not attempt to regulate it in any way, lest it subvert the vital free exchange and flow of ideas in a democracy. However, this free market conception of speech received a particular and new interpretation once it was applied not to the regulation of the contents of speech, but to the funding of speech, and the amounts of money spent on it. Several commentators equate the American Supreme Court's doctrine on campaign financing to the infamous *Lochner* decision of the early twentieth century.<sup>61</sup> In that decision, the court's conception of liberty from state intervention and of the individual's freedom to engage in economic activity, disregarded the harmful effects of power inequality in the private sector, and the state's legitimate role in correcting them.<sup>62</sup>

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<sup>54</sup> Federal Elections Committee (FEC) USA *Public Funding of Presidential Elections* (n.d.), available at <https://www.fec.gov/introduction-campaign-finance/understanding-ways-support-federal-candidates/presidential-elections/public-funding-presidential-elections/>.

<sup>55</sup> *Buckley v Valeo* 424 US 1 (1976).

<sup>56</sup> *Citizens United v FEC* 558 US 310 (2010) (allowing donations from corporations).

<sup>57</sup> For example, *McCloy v NSW* (2015) 257 CLR 178 (upholding provisions that imposed caps on some political contributions, prohibited indirect campaign contributions, and banned political contributions from property developers. The Court upheld these provisions maintaining that they are necessary to fight corruption.).

<sup>58</sup> *Harper v Canada* (AG) (2004), 1 SCR 827 (upholding the 1974 *Election Expenses Act's* restrictions on third party spending on political advertisements).

<sup>59</sup> *Animal Defenders International v United Kingdom* [2013] ECHR 362.

<sup>60</sup> The term is associated with Justice Oliver Wendell Holmes' dissent in *Abrams v United States* 250 US 616, 630 (1919).

<sup>61</sup> *Lochner v New York*, 198 US 45 (1905).

<sup>62</sup> For example, R Post & A Shanor 'Adam Smith's First Amendment' (2015) 128 *Harvard Law Review* 165, 182 (arguing that the Supreme Court's expansive free speech jurisprudence 'threatens to revive the long-lost world of *Lochner*').

Lehman et al. summarise these harmful effects:

When we think about the operation of elections in America, we focus on the essential equality among voters, each of whom has one vote. We rarely incorporate the fundamental insight ... that year after year, decade after decade, and from one generation to the next, the affluent and well educated have participatory megaphones that amplify their voices in American politics. These class-based participatory inequalities shape what politicians hear about political needs, concerns, and preferences.<sup>63</sup>

Indeed, the system creates a vicious circle in which the more politics depends on the money of the wealthy and of corporations, the more politicians will further the interests of the wealthy, creating more wealth in the hands of the few, and allowing for another step up on the amounts of money they donate. The concern with the situation is well represented in the title of Larry Lessig's influential 2011 book *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It*.<sup>64</sup>

## B Political funding in South Africa

South Africa used to resemble the US model rather than the Israeli one in that there was no regulation of private donations. Indeed, it went even further than the US model as it did not even require transparency of private donations, as opposed to strict transparency requirements in the US. However, this has changed following *My Vote Counts*.

Shortly after the *My Vote Counts* decision, the President of South Africa signed into law the Political Parties Funding Act 6 of 2018 (PPFA), which was a Bill during the time when the *My Vote Counts* decision was being written and was mentioned in the decision.<sup>65</sup> In addition, as of 3 June 2020, PAIA itself had been amended to comply with the Court's ruling.<sup>66</sup> The amendment corrects PAIA and includes within its scope political parties. Thus, for example, the amendment inserts 'political parties' under the PAIA's definition of a 'private body' that is subject to PPFA's requirements of transparency and adds a new section (s 52A) that mandates a head of a party to 'create and keep records of any donation exceeding the prescribed threshold. [referring to the threshold set in PPFA]'

For a few years, neither PPFA nor the PAIA amendment took effect as they were both awaiting the Presidential commencement declaration for which no date had been set.<sup>67</sup> Finally the commencement was declared in April 2021 and both laws took effect.

PPFA addresses some of the concerns raised by the *My Vote Counts* judgment and follows some of the two main principles of what I described as the theory against buying

<sup>63</sup> K Lehman Schlozman, S Verba, & HE Brady *The Uneven Chorus: Unequal Political Voice and the Broken Promise of American Democracy* (2012) 232. See also M Gilens *Affluence and Influence: Economic Inequality and Political Power in America* (2012) (finds a strong correlation between the preferences of the affluent and actual policy decisions, and a weak correlation between the preferences of the middle class and the poor and policy).

<sup>64</sup> Lessig (note 37 above).

<sup>65</sup> Political Party Funding Act 6 of 2018 ('PPFA').

<sup>66</sup> Promotion of Access to Information Amendment Act 31 of 2019 ('PAIA Amendment 2019'). See also 'President Signs the Promotion of Access to Information Amendment Act' Altadvisory Public Interest Advisory Services and Activism for the Information Age (5 June 2020), available at <https://altadvisory.africa/2020/06/05/president-signs-the-promotion-of-access-to-information-amendment-act/>.

<sup>67</sup> PPFA s 26 and PAIA Amendment 2019 s 4. See also P de Vos 'Party Funding Act Useless Unless Enacted' *Corruption Watch* (14 February 2019), available at <https://www.corruptionwatch.org.za/party-funding-act-useless-if-not-enacted/>.

democracy – transparency and non-bondage, but some important aspects remain unattended or problematic, especially if compared to the variety of means described earlier in the comparative section. The following are the main features of PPFA.

In terms of limiting the actual donation amount, PPFA addresses only *direct* private donations, and imposes the following limitations: first, no donation can be given by foreign governments and foreign persons (except for the purpose of training, skills or policy development, nor from state-owned enterprises, organs of state and proceeds of crime. Secondly, the maximum amount any person or entity can donate in a financial year is ZAR 15 million.<sup>68</sup> Thirdly, no donations can be made directly to a party member unless received on behalf of the party and for political purposes.<sup>69</sup>

In terms of transparency, PPFA together with PAIA require the disclosure of all donations above ZAR 100 000, and their publication on a quarterly basis.<sup>70</sup> PPFA imposes accounting and reporting obligations on political parties and gives the Independent Electoral Commission (IEC) monitoring and inspection powers and authority to suspend payments of money and recover money received or spent irregularly. The Electoral Court is given the power to review decisions of the IEC and to impose administrative fines.<sup>71</sup>

The following are the important advantages of the PPFA and, in contrast, its important omissions in comparative perspective. In terms of its advantages, PPFA prohibits donations not only from foreign governments, but also from organs of the state, and state-owned entities. This provision, which does not exist in many other countries,<sup>72</sup> addresses ruling-party corruption, where the ruling party transfers public money of the state to its organisations and people. The limitation on receiving the proceeds of crime will also make it difficult to receive money from entities that donated to political parties in the past and were associated with bribery and other allegations. Another important feature of the PPFA is the prohibition of donations paid directly to a party member for non-political purposes, such as the donations of security systems, frozen chickens and cash payments to party members documented above. In terms of transparency and accountability, the law requires quarterly reports on donations as well as accounting reports and allows for meaningful enforcement by empowering the IEC to recover money and suspend the transfer of money. It also authorizes the Electoral Court to impose administrative fees.

There are however also important omissions. First, only direct contributions are regulated, and a vast range of donations remain unregulated, such as buying political advertisements in favour of the party, which in the US currently accounts for the bulk of private money spent on elections.<sup>73</sup> This could potentially become a serious loophole. Secondly, corporations, including international corporations, are permitted to donate.<sup>74</sup> This too could become a serious loophole, given the pessimistic US experience. The review by IDEA mentioned above showed that 38 per cent of OECD countries prohibited donations from corporations, and the review of Israel showed that it was among those who did so.<sup>75</sup> In the past, foreign corporations in particular have proven to be great donors of money to South African parties, and PPFA

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<sup>68</sup> PPFA s 8 and Schedule 2 s 7.

<sup>69</sup> PPFA s 10.

<sup>70</sup> PPFA s 9 and Schedule 2 ss 9.

<sup>71</sup> *Ibid.*

<sup>72</sup> See comparative discussion part IIIA2 above.

<sup>73</sup> See discussion on campaign finance laws *ibid.*

<sup>74</sup> Compare the US debate on contributions from corporation and the situation in Israel which does not allow it.

<sup>75</sup> Defty (note 42 above).

would not bar them from doing so in the future (subject to the cap on the sum). Thirdly, the maximum donation sum of ZAR 15 million by person or corporation is still very high and will give the donor substantial influence over the donee. Fourthly, party spending is not regulated at all, so that the measure of inspection and restriction does not apply. The IDEA review showed that 52 per cent of OECD countries did regulate party spending, either during the election year, or also between elections.<sup>76</sup> Finally, PPFA only covers donations extended directly to parties and allows them to bypass the restrictions by receiving donations through entities associated with them, or controlled by them, and through third party entities that support a party or candidate but are not associated with them. As mentioned previously, in Israel these donations are forbidden, and experience has shown that this too could be a serious loophole in terms of the regulation of private money. Finally, the transparency requirements apply only to sums of money that exceed ZAR 100 000 which still allows for the transfer of non-negligible sums of money without record.

#### IV PRIVATE FUNDING FOR THE PRESS

The second argument in this article is that “the theory against buying democracy” that is underlying the *My Vote Counts* decision can be extended to another vital democratic institution – the press. The press has undergone processes similar to those of political parties: it has witnessed increased dependency on private money and has consequently suffered from corrupting and distorting effects on reporting. These, in turn, affects and distorts the democratic process.

I will begin with a description of the changes that have taken place in the press and then go on to describe their effects in terms of the dependency of journalists and newspapers on private sources of money through direct bribery, or, much more often, exchanges of money for reporting. The US and Israel provide examples of these processes. I will then discuss the similarity between funding the press and funding political parties and the implication of applying the theory against buying democracy to the press and, in the end, with some insights about the South African press.

##### A The changes in the press

The history of the press goes hand-in-hand with the history of democracy in the modern age. The development of democracy can hardly be detached from the concurrent development of the press, and the causal connection between them can run both ways in that the development of the press advanced the development of democracy just as much as democracy empowered the press.<sup>77</sup> In England, for example, one of the first manifestations of free speech was the abolition of government licences required for printing newspapers and books, which had been

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<sup>76</sup> Ibid.

<sup>77</sup> For example, TP O’Mahony ‘The Press and Democracy’ (1974) 63 *Studies: An Irish Quarterly Review* 47 (‘The correlation between the growth of a free press and of democracy is now at a stage where the latter has become unthinkable and practically unworkable without the former’).

advocated by John Milton as early as 1664.<sup>78</sup> In the USA, the struggle for independence and the democratic process of the ratification of the Constitution were both facilitated by the press.<sup>79</sup>

An unknown fact is that public funding has been part of the press in the USA since the colonial age.<sup>80</sup> In England and in the USA, the main advancement of the press was undertaken by private entrepreneurs, and from the start newspapers were developed as businesses based on the sale of a product – newspapers. Newspapers, like books, were viewed as commodities that were financed by their sale. This created biases in reporting in favour of news items that ‘sell’ – a fact which has always been part of the debate over the value and integrity of the press.<sup>81</sup> In the twentieth century, advertisements became another important source of income and introduced further economic bias. Pressures from governments are a third source of concern for the independence of journalism.

In order to defend itself against economic and political pressure, journalism developed a set of formal and informal self-regulating mechanisms. In terms of informal self-regulation, the press established itself as a prestigious profession, with an ethical and professional ethos of serving the public interest, uncovering corruption, and criticizing governments and big businesses.<sup>82</sup> Schools of journalism have been established in prestigious universities which provide the integrity and moral weight to serve as role models for journalists. The cultivation of these role models is rewarded through national recognition such as the Pulitzer Prize. Formal mechanisms were developed for self-regulation included ethical codes,<sup>83</sup> press organizations, and press ethical tribunals, that monitored deviations from ethical and professional standards and protected the prestige of the profession.<sup>84</sup>

<sup>78</sup> J Milton *Areopagitica: A Speech of Mr John Milton for the Liberty of Unlicensed Printing, to the Parliament of England* (1644). Licensing was abolished 50 years later in 1694.

<sup>79</sup> For example, the famous trial of John Peter Zenger, for publishing satirical attacks against the British governor of New York, in 1734, which became a central event in American struggle for independence.

<sup>80</sup> RW McChesney & J Nichols *The Death and Life of American Journalism* (2010) (documenting public funding for the press during the colonial age through the mid-19th century).

<sup>81</sup> For example, G Schneebaum & SJ Lavi ‘The Riddle of Sub-judice and the Modern Law of Contempt’ (2015) 2 *Critical Analysis of Law* 173, 186. (‘The eighteenth-century press created a new public sphere but, as we have seen, one which is governed not by freedom of expression, but rather by opinion produced for mass consumption. The press strives to draw public attention and thrives on public scandal.’).

<sup>82</sup> For example, SJA Ward *The Invention of Journalism Ethics: The Path to Objectivity and Beyond* (2005).

<sup>83</sup> For example, International Federation of Journalists (IFJ) *Global Charter of Ethics for Journalists*, available at <https://www.ifj.org/who/rules-and-policy/global-charter-of-ethics-for-journalists.html>; American Society of News Editors (ASNE) *Statement of Principles*, available at <https://members.newsleaders.org/content.asp?pl=24&sl=171&contentid=171>; *The Press Complaints Commission’s Code of Practice* (UK)(currently outdated), available at <https://accountablejournalism.org/ethics-codes/UK-Press-Complaints>; See generally, Accountable Journalism website <https://accountablejournalism.org/about> (journalism ethic codes from around the world).

<sup>84</sup> For example, the Independent Press Standards Organisation (<https://www.ipsa.co.uk/>) which is a voluntary self-regulating body existing of representative of major newspapers. This body took the place of the previous Press Complaints Commission (PCC). The PCC closed after receiving extensive criticism for its lack of action in the ‘News of the World’ phone hacking affair. In that affair journalists were accused of engaging in phone hacking, police bribery, and exercising improper influence in the pursuit of stories. See O Wright, I Burrell, M Hickman, C Milmo & A Grice. ‘Hacking Scandal: Is this Britain’s Watergate?’ *The Independent* (9 July 2011), available at <https://www.independent.co.uk/news/uk/crime/hacking-scandal-is-this-britain-s-watergate-2309487.html>.

The business model based on subscriptions and advertisement has lasted a long time. However, the model now faces serious challenges that bring its future viability into question.<sup>85</sup> The reasons are primarily technological, though not solely so. Radio and television were the early technological changes that affected the press by providing additional avenues for the dissemination of news and information, and for advertisements. However, the crucial change came with the advent of the internet which introduced three changes in the provision of information: free, non-centralized, and immediate information. The internet facilitates the ability to receive news, for free, and immediately as it occurs, and especially with the advent of smart phones, it has considerably reduced the importance of the printed press as the supplier of news. According to recent surveys, most people in the USA receive their news from the internet, either through news websites or through social media. Television and radio are graded as the second and third sources and printed media the fourth, with only 16 per cent of the population being users of print media.<sup>86</sup> Traditional newspapers still have an important function as a platform for analysing, filtering, and making news accessible, but this too can now be provided by non-traditional platforms, such as blogs, social media and free online newspapers.

Over past decades, revenues from subscriptions and from advertisement have declined dramatically.<sup>87</sup> Many newspapers have closed; the number of journalists has dropped considerably, as many were retrenched, and salaries were reduced. According to the American Bureau of Labor, from 1990 to 2016, the number of newspaper employees in the United States dropped from 456 300 to about 183 000 – a decline of almost 60 per cent.<sup>88</sup> According to a Pew research report, in the decade between 2008 and 2018, there was a drop of 45 per cent in the number of newsroom employees in US newspaper firms.<sup>89</sup> In the same period, newsroom employment figures in broadcast television remained relatively stable, whereas the number of digital-native newsroom employees increased by 82 per cent.<sup>90</sup> According to another Pew study,

<sup>85</sup> The titles of the following books and articles attest to this phenomenon (as well as the discussion below): J Lepore 'Does Journalism Have a Future?' *The New Yorker* (21 January 2019); M Grabar & T Trent *The News About the News: American Journalism in Peril* (2003); L Downie Jr & RG Kaiser *The Crisis in American Journalism and the Conservative Response* (2013); S Waldman & C Sennott 'The Crisis in Local Journalism has Become a Crisis of Democracy' *The Washington Post* (11 April 2018).

<sup>86</sup> E Shearer 'Social Media Outpaces Print Newspapers in the US as a News Source' (10 December 2018) Pew Research Center, available at <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/> (In the UK, a similar phenomenon with a drop in three years – from 2013 to 2016 – from 60 per cent to less than 40 per cent of people reporting that printed media is their main source of news). RK Nielsen 'Where Do People Get Their News?' *Medium* (30 May 30 2017) available at <https://medium.com/oxford-university/where-do-people-get-their-news-8e850a0dea03>.

<sup>87</sup> For example, 'Who Killed the Newspaper?' *The Economist* (24 April 2006). (In Denmark, Switzerland and the Netherlands newspapers have lost half of their classified advertising to the internet).

<sup>88</sup> US Bureau of Labor Statistics 'Employment Trends in Newspaper Publishing and Other Media, 1990–2016' *TED: The Economics Daily* (2 June 2016), available at <https://www.bls.gov/opub/ted/2016/employment-trends-in-newspaper-publishing-and-other-media-1990-2016.htm>.

<sup>89</sup> E Grieco 'US Newsroom Employment has Dropped by a Quarter Since 2008, with Greatest Decline at Newspapers' Pew Research Center (9 July 2019), available at <https://www.pewresearch.org/fact-tank/2019/07/09/u-s-newsroom-employment-has-dropped-by-a-quarter-since-2008/>.

<sup>90</sup> *Ibid.*

36 per cent of the largest newspapers across the USA experienced layoffs between January 2017 and April 2018.<sup>91</sup>

The printed media tried – and is still trying – to adapt to this change,<sup>92</sup> for example, through advertisements in online editions of the newspaper and online subscription fees. However novel technologies are not the only threat to newspapers. Vulture capitalists pose another large threat: for decades such investors have bought papers and gradually stripped them of both expensive personnel – writers and editors – and other standard operating costs (for example, space and tools).<sup>93</sup> At the same time, these new owners maintained the subscription costs at the standard rates for as long as possible and increased the profitability of what has always been a rather marginally profitable enterprise. However, these papers ultimately fail while their owners could accept their death after turning a nice return on investment. Whatever the cause – technological or strictly economic – the inevitable result is the death or the significantly diminished quality of a product as well as the lowering of ethical and professional standards.<sup>94</sup>

## B Additional sources of income and susceptibility to economic pressure

This section will document some of the avenues through which newspapers and journalists are susceptible to corruption. It will dwell on the influence of money in their reporting, the business models and ‘deals’ struck between them and interest-holders willing to pay for favourable reporting. These avenues are not new, and many have been part of the business for many years. The extent of these ‘deals’ varies from country to country: in some they are outright bribery deals of money transferred in envelopes to reporters – ‘envelope journalism’.<sup>95</sup> Studies have shown correlations between the bribery of journalists and factors such as the level of democracy, economic development, and the existence of codes of ethics for journalists in a country.<sup>96</sup>

However, even in countries where direct bribery is uncommon, and an ethical and professional ethos of journalism is well entrenched, there has been a change in the ethics of

<sup>91</sup> E Grieco, N Sumida & S Fedeli ‘About a third of large US newspapers have suffered layoffs since 2017’ Pew Research Center (23 July 2018), available at <https://www.pewresearch.org/fact-tank/2018/07/23/about-a-third-of-large-u-s-newspapers-have-suffered-layoffs-since-2017/>.

<sup>92</sup> For example, RH Giles ‘New Economic Models for US Journalism’ (2010) 139(2) *Daedalus* 26 (presenting ideas for new business models for the press based on online entrepreneurship, but also shows skepticism whether any of them would be able to replicate the previous business model of the newspaper).

<sup>93</sup> McKay Coppins ‘A Secretive Hedge Fund is Gutting Newsrooms: Inside Alden Global Capital’ *The Atlantic* (14 October 2021), available at <https://www.theatlantic.com/magazine/archive/2021/11/alden-global-capital-killing-americas-newspapers/620171/>. I thank the editors for this point.

<sup>94</sup> For example, the scandal that broke in the UK over the *News of the World* phone hacking affair. The conclusions of the Levinson Inquiry that followed that affair were that ethical standards in journalism had deteriorated and that newspaper self-regulation became ineffective, requiring a new, independent and legally authorized regulatory body for journalism ethics. See *Leveson Inquiry – Report into the Culture, Practice and Ethics of the Press* (29 November 2012), available at <https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press>.

<sup>95</sup> D Kruckeberg & K Tsetsura *International Index of Bribery for News Coverage* (2003) Institute for Public Relations. A Romano ‘Bribes, Gifts, and Graft in Indonesian Journalism’ (2000) 94(1) *Media International Australia*, 94, 157–171, available at <https://doi.org/10.1177/1329878X0009400115>; K Tsetsura ‘Bribery for news coverage: Research in Poland’ (2005) *Institute for Public Relations Online: International Research*.

<sup>96</sup> A Yang ‘Assessing Global Inequality of Bribery for News Coverage: A Cross-National Study’ (2012) 15 *Mass Communication and Society* 201.

journalists and a rise in the threat to objective journalism. This change is attributed, among others, to the economic crises of the press and the rise in its reliance on alternative means of finance.<sup>97</sup> The change seems to be in the degree of reliance that reporters have on economic deals with interest-holders, the weakening of internal defence mechanisms against them, and this becoming common in journalism.

Economic deals may be cut with individual journalists, or with a newspaper as a whole, namely with its owners and editors. Some are evident and easy to detect, but some are more indirect and sophisticated and therefore more difficult to uncover.

### 1 *Economic deals and incentives involving individual journalists*

#### aa Good reviews in exchange for gifts and perks

The most obvious and simple trade-off between reporting and economic interest are personal gifts, perks and honoraria given to journalists as part of their reporting jobs, with the tacit understanding that they will report favourably on, or at least refrain from criticizing, their contributor. Common examples are journalist reporting on consumer products such as cosmetics, clothing, the food industry, or on tourism, and technology. Such reporters who are usually viewed by readers as giving an unbiased opinion or evaluation of these products, receive packs of cosmetics, clothes, free travel abroad, free lodging in hotels, free electronic merchandise, and more from commercial companies. They may also be rewarded with invitations to events or conferences organized by commercial companies, sometimes in lucrative locations and in high-end hotels.<sup>98</sup>

Though ethical codes against corrupting transactions do exist,<sup>99</sup> they have waned substantially as a matter of practice. Furthermore, they do not apply to freelancers, bloggers and other online writers who now comprise a large share of reporting. Moreover, due to the economic difficulties of newspapers, only some of the larger media outlets can afford paying travel expenses for journalists, and less so for freelancers. Asked about the ethics of such practices in a conference of science journalists a common answer was that ‘fees for freelancers have remained stagnant for decades and when media companies don’t pay expenses, reporters miss out on stories’.<sup>100</sup>

#### bb PR articles concealed as objective reporting

Deals and exchanges somewhat less obvious, but rising in importance, are public relations articles concealed as objective reporting. In this type of exchange, favourable reporting is not given in return for a perk or a gift but for the work done by the PR agency in writing the article. Since the reporter (especially the online reporter) is underpaid and overworked, she does not have time and is not rewarded for her own investigative reporting, and is expected

<sup>97</sup> For example, K Tsetsura & K Aziz ‘Toward Professional Standards for Media Transparency in the United States: Comparison of Perceptions of Non-Transparency in National vs Regional Media’ (2018) 44 *Public Relations Review* 180. (‘Results showed direct media bribery is not a pressing issue in the USA; however... Indirect media bribery is common at the local and regional media levels in the USA.’).

<sup>98</sup> See generally, K Tsetsura & D Kruckeberg *Transparency, Public Relations and the Mass Media: Combating the Hidden Influences in News Coverage Worldwide* (2017).

<sup>99</sup> See notes 81 to 83 above.

<sup>100</sup> PD Thacker ‘Where Do Science Journalists Draw the Line?’ (23 Nov 2015) *Columbia Journalism Review*, available at [https://www.cjr.org/criticism/science\\_journalism\\_conflicts\\_of\\_interest.php](https://www.cjr.org/criticism/science_journalism_conflicts_of_interest.php).

to provide news that will sell, or increase ‘clicks’ in the online media, with minimum costs. A blogger reviewing computers and designs describes the temptations of his trade: ‘I can... rehash the material presented to each of us, painstakingly and carefully prepared for me by a diligent PR team who has worked hard to provide press releases, product information, even graphics and captions, bios of the execs and case histories. Some of this material is ready-to-use. I could do a cut-and-paste article, with little thought of my own.’<sup>101</sup> Therefore when a public relations person of a commercial company feeds the journalist with a news item, adapted to look like a genuine piece of reporting, and including interesting pieces of information, this is a profitable exchange to both sides.<sup>102</sup> The phenomenon of PR material concealed as regular reporting is increasing dramatically, as are the creative ways in which it operates in the digital age. Such reporting has recently acquired the name of ‘Native Advertisement’ or ‘Embedded Advertisement’.<sup>103</sup>

News provided through PR persons can come not only from commercial companies, but also from professionals, such as lawyers and law firms, doctors, actors and so on, who have their own PR persons promoting their interests.<sup>104</sup> It can also come from politicians.<sup>105</sup> The PR persons of the lawyer or politician would provide the reporter with news items already edited, packaged and ready to print, with little work required on the part of the reporter, and the expectation of return would be in the form of publishing the news item unreflectively.

Along the spectrum of favourable reviews in return for perks, and the publication of PR articles in return for the provision of free and ready to print news items, one can find the provision of free and exclusive news by leaks. Such reporting is not based on independent investigation but on news provided by elected officials and government functionaries, either directly or through leaks. The sources of information can be ministers, MPs, police officers, the attorney general’s office, army generals and many more.

In a recent Pew Research Center analysis, it was reported that:

As the press scales back on original reporting and dissemination, reproducing other people’s work becomes a bigger part of the news media system. Government, at least in this study, initiates most of the news. In the detailed examination of six major storylines, 63 per cent of the stories were initiated by government officials, led first of all by the police. Another 14 per cent came from the press. Interest group figures made up most of the rest.<sup>106</sup>

<sup>101</sup> R Tara ‘What Do Journalists Pay for Free Trips?’ *The CAD Insider* (30 June 2014), available at [https://cadinsider.typepad.com/my\\_weblog/2014/06/what-journalists-pay-for-a-free-trips.html](https://cadinsider.typepad.com/my_weblog/2014/06/what-journalists-pay-for-a-free-trips.html).

<sup>102</sup> Compare TR Piety ‘Free Advertising: The Case for Public Relations as Commercial Speech’ (2006) 10 *Lewis & Clark Law Review* 367.

<sup>103</sup> See Tsetsura & Kruckeberg (note 97 above); Z Said ‘Embedded Advertising and The Venture Consumer’ (2010), 89 *North Carolina Law Review* 99.

<sup>104</sup> The realization that public relation professionals are integrated into the work of lawyers is already commonplace, see M DeStefano Beardslee ‘Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys’, (2009) 22 *Georgetown Journal of Legal Ethics* 1259, 1283 (‘Lawyers must ensure that the right information is disclosed in the proper manner and PR executives help the lawyer determine what a consumer or stockholder might consider “material” and therefore necessary to disclose.’). The extent of PR integration into lawyers’ work is manifest in the legal question whether PR professionals are entitled to lawyer client privilege.

<sup>105</sup> See below the discussion on leaks from government.

<sup>106</sup> *Report – How News Happens: A Study of the News Ecosystem of One American City* (2010) Pew Research Center, available at <https://www.journalism.org/2010/01/11/how-news-happens/>.

The exchange can be of a general nature: providing easy access to news in return for publishing it. It can also be of a more personal nature. Over time, the reporter may develop personal and professional ties with particular sources of news, such as police officers, district attorneys, or MPs, so that they will give him exclusivity in new information and leaks, in return for publishing the articles in a way that serves the interests of the person or organisation that provided the news.<sup>107</sup> These news items often have valid reporting value, but obviously, they receive priority over other stories, and the way they are packaged serves the interests of the source.<sup>108</sup> The free speech protection of *journalist privilege and source protection* is an invaluable component in such deals, as it protects the sources of leaks from being revealed. In addition, since both the police and the public attorney's office often use leaks, sometimes to promote genuine investigatory concerns and sometimes to promote personal prestige or gain advantages over defendants, it is unlikely that these leaks, that often constitute an offence, will ever be investigated or charged.<sup>109</sup> See the following frank assessment of prosecutor culture in the USA:

Every day, federal prosecutors... leak negative information about ongoing investigations. They do so for a variety of reasons: self-aggrandizement; to put pressure on potential witnesses and defendants; to curry favor with the media; to attempt to influence the jury pool; to generate favorable public opinion for their office.<sup>110</sup>

#### cc Second careers

Other indirect ways of compensating reporters for favourable reporting are through second career opportunities. One of the most telling statistics in this regard is a graph showing the changing proportion of the number of journalists in relation to the number of PR people over the years. According to the Bureau of Labor Statistics Occupational Employment Survey, there are today six PR people for every journalist in the USA.<sup>111</sup> In 2000 there were only twice as many PR professionals as journalists; forty years ago the proportion was in reverse. It is noticeable that in the USA, PR people get paid today on average 16 000 dollars more than journalists, while in 2000 they earned only 6 000 dollars more than PR professionals.

<sup>107</sup> For a survey of governmental leaking in the US see RB Kielbowicz 'The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795-2005' (2006) 43 *San Diego Law Review* 425.

<sup>108</sup> See E Schor 'Why Does the Media so detests the Chief of Police, Roni Alsheich?' *Nrg* (13 Jan 2016) ('journalists are in panic. The new Chief of Police closed their sources... What do you do? Move to an attack regardless of the merits of his decisions') (Hebrew), available at <https://www.makorishon.co.il/nrg/online/1/ART2/748/212.html>; Compare with SY Oei & D Ring 'Leak-Driven Law' (2018) 65 *UCLA Law Review* 532 (discussing tax laws that are triggered by leaks and warning that 'Leak-driven lawmaking has clear benefits, but it also carries distinctive risks, ...including agenda setting by third parties with specific interests in the leaks').

<sup>109</sup> D Posen 'The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information' (2013) 127 *Harvard Law Review* 512.

<sup>110</sup> AM Dershowitz *Sexual McCarthyism* (1998) at 172. See RG Morvillo & RJ Anello 'Proposals for Grand Jury Reform' (1 August 2000) *New York Law Journal* 3. ('Grand jury leaks are a pervasive problem that can cause damage to the reputation of an individual who even the prosecutor later determines is not properly the subject of criminal charges. In other cases, such leaks by law enforcement can cause prosecutors whose investigations have become public to pursue criminal charges in a controversial matter when they might otherwise use their discretion to decline charges').

<sup>111</sup> M Rosenberg 'America now has nearly 5 PR people for every reporter, double the rate from a decade ago' *Muck Rack* (14 April 2016), available at <https://muckrack.com/blog/2016/04/14/america-now-has-nearly-5-pr-people-for-every-reporter-double-the-rate-from-a-decade-ago>.

A journalist's career path often moves from journalism to PR and sometimes back. This means that journalists have a strong incentive to maintain good relations with commercial companies that will someday hire them as PR persons, and little interest in engaging in damaging investigations of powerful companies. Financial and legal reporters, and other professionals, may attain second careers in big commercial firms as economists, lawyers etc. They too may have an incentive to develop good ties in their field, and be careful in their reports, with an eye to a second career.<sup>112</sup>

## 2 *Economic deals and incentives involving the newspaper as a whole*

Deals and exchanges with individual reporters may also help the business model of the newspaper as a whole, since they allow paying journalists lower salaries and encourage them to rely on such deals for their supplement income. However, in this section I will focus on exchanges that provide sources of income and benefits to the newspaper, and usually involve deals with the editors or the owners of the newspaper, or both.

### aa Using the paper as a platform to promote owner's business interests

The first most obvious exchange is the watering down of what used to be a holy cow of journalism – editorial discretion and editorial independence from the publisher and owner. Owners are today involved in editorial decisions, or there is a tacit understanding between the editor and the owner about the kinds of reporting that are favoured and those that are not. An owner can be a large corporation or business group, or a media mogul, who has a large array of businesses, and therefore have many business interests to promote other than the newspaper's. The editors, and through them the individual journalists, are expected not to publish news that harms the owner's business interests and to publish news that advances these interests.<sup>113</sup>

One extreme economic transaction of this nature involves the owner 'buying' the reporting platform of the paper. This becomes apparent when an investor buys a newspaper, which is clearly not profitable; a newspaper that is losing money and has almost no chance of surviving. What may make such a transaction sound, even if the newspaper does eventually fail, is the use of the newspaper as a platform to promote other business interests of the owner, or other non-economic interests of his, such as protecting the owner from possible criminal charges.<sup>114</sup>

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<sup>112</sup> Compare D Starkman *The Watchdog that Didn't Bark: The Financial Crisis and the Disappearance of Investigative Journalism* (2014), back cover (The author 'exposes the critical shortcomings that softened coverage in the business press during the mortgage era and the years leading up to the financial collapse of 2008. He locates the roots of the problem in the origin of business news as a market messaging service for investors in the early twentieth century').

<sup>113</sup> For example, in Israel. S Ran & O Barzohar, "Keshet" in Response to the Item in "Yediot Aharonot": They are Using News Items in the Newspaper for a Commercial Battle Against Us' *The Marker* (24 Nov 2010) (Hebrew) available at <https://www.themarker.com/advertising/1.583902>. ('In Keshet there are claims that "Yediot Aharonot" published an article on Channel 24 with the intent to hurt its commercial adversary, and that it did not notify the readers about its business interests in the matter as it should have').

<sup>114</sup> In Israel, the example for such deal was the buying of the failing newspaper Maariv, by the business mogul Nohi Dankner. There was no reasonable economic plan to save the newspaper and it closed within two years, but in the meanwhile, the newspaper was used to promote the business interests of the owner.

## bb Using the paper as a platform to promote owner's ideological interests

Another related phenomenon is newspapers that are funded with personal resources from the owner, or from donations, to promote political or ideological purposes. Such is the case of the Israeli newspaper *Israel Today*, currently the largest newspaper in Israel in terms of readership of the print editions, which is owned and funded by the American Jewish billionaire Sheldon Adelson and distributed free of charge. Adelson was a close friend and admirer of the former Israeli Prime Minister, Benjamin Netanyahu. Though he was not directly involved in the editorial decisions of the newspaper, Adelson's purpose from the start has been to provide a platform for views associated with the political right in Israel, led by Prime Minister Netanyahu, and to counter the perceived, or real, left-oriented mainstream media in Israel. Ideological orientation of newspapers is not a new or unique phenomenon. Big papers in the US, such as the *New York Times*, publish their support for certain political candidates and are clearly associated with a political view. However, to the extent that such newspapers are still funded by the public, their subscribers in effect also support their political causes by choosing to buy them, and thus their political influence is backed by public support for their ideological line. When a wealthy person, that may not even be living in the relevant country, donates the money for political purposes, his influence is not distributed in a way that reflects the democratic forces in the country, but rather by his economic resources. Large donations to newspapers, direct or indirect, are therefore possible sources of influence of private money on a newspaper's political contents.

## cc Making exchanges of reporting for favour at the level of the newspaper as a whole

The owner of a newspaper may also use it indirectly to promote his business or personal interests, by 'selling' the platform to people of influence, who, in return, would promote the owner's interests. The Israeli newspaper *Yediot Aharonot* had much to benefit from a Bill to make the distribution of free newspapers such as *Israel Today*, its main competitor, illegal. The publisher of *Yediot Aharonot*, Noni Moses, reportedly ordered the editors of *Yediot Aharonot* to favour those MPs who supported the Bill, and disfavour those who opposed it, as a way of pressuring more MPs to support the Bill. Since Prime Minister Netanyahu was very much opposed to the Bill and exerted his influence to prevent it, *Yediot Aharonot* has reportedly used its platform to create bad press about Netanyahu, especially during election time, in order to help remove him from office.<sup>115</sup>

There are several other versions of such exchanges at the level of the newspaper as a whole. One example is contracts for publishing government announcements in a newspaper. Such publications have become increasingly common and take the form of ministerial announcements regarding campaigns on health, environment, safety issues, et al, to make the public aware of recent reforms or programmes. The more there is a drop in revenues from private advertisement, the more newspapers become dependent on these governmental sources of income, a situation that can lead to dependency relations. The newspaper that can offer the

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<sup>115</sup> N Toker 'The Moses Method: The Secret is Revealed: The Black Lists of "Yediot Aharonot"' *The Marker* (7 Sept 2016) (in Hebrew) ('The battle between prime minister Netanyahu and the publisher of "Yediot Aharonot" Noni Moses is not a battle between Right and Left, but about power, influence and money. Top people at Ynet tell for the first time on the orders to censor items, silence the "social protest", and on the aggressive attack against Netanyahu.').

politician or officeholder the best overall ‘deal’, including promoting her interests on the pages of the paper through favourable reporting, would keep receiving these lucrative contacts.<sup>116</sup>

### C The theory against ‘buying’ democracy and the press

The analogy between the influence of private money funding of political parties, and of the press should be clear by now. Both have a dramatic impact on the political process. Both channel the flow of political information to the public, and both can affect the promotion or the hindering of policies and initiatives. Both can also be ‘bought’ by private money – either through corrupt personal deals, or through more systemic and large-scale deals. The outcome in both cases is a substantial distortion of the political process. It decreases the influence and participation of the large body of voters in favour of a select group of people or corporations of wealth who derive ‘extra votes’ in the political process.<sup>117</sup> Mogoeng CJ’s words, ‘[t]hey cannot help build a free society if they are not themselves free of hidden potential bondage or captivity,’<sup>118</sup> therefore, seem to apply with equal force to the press as they do to political parties.

There are of course also important differences between the press and political parties. The most obvious difference is that political parties are official elements of the political system and are governed by the legislation and the constitutions of most countries. The press on the other hand does not receive the same kind of formal recognition and is not a formal institution of the democratic process. Secondly, the independence of the press from government and the separation of the press from government are of paramount importance for its function and success as a democratic institution. Regulating the press therefore is inherently suspect of encroaching on political freedoms to a greater extent than regulating political parties, which, as mentioned, are traditionally institutions of the political system and subject to regulation. For the purposes of the theory against buying democracy however, I hope the review above provides sufficient evidence for the analogy.

Accepting the analogy, how would the theory against buying democracy and the two principles that were derived from it – transparency and non-bondage – be applied to the press? The following are some initial suggestions for possible implications. The principle of transparency may require the press to report on any of the exchanges discussed above, including reporting sources of influence on particular news items. Journalists are already asked to report on any interest they may have in the contents of a news item or any personal relationship with the people or contents of the news item. In addition, they are required to report on news items that are directly sponsored. However, such requirements are not always

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<sup>116</sup> S Keler ‘The Silenced Watchdogs: When the Government Buys Ads’ *Mida* (13 March 2014), available at <https://mida.org.il/2014/03/13/> (Hebrew)(describing tens of millions of advertisement contracts of three ministries headed by ministers of the same party, all with the same newspaper. The head of the party used to work for that newspaper as a journalist, and received favourable reporting in that newspaper.).

<sup>117</sup> M Rosenfeld ‘Free Speech, Equality and Minority Access to the Media in the United States’ in A Sajo & M Price (eds) *Rights of Access to the Media* (1996) 60–64; See also K Lehman Schlozman, S Verba & HE Brady *The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy* (2012) 232; M Gilens *Affluence and Influence: Economic Inequality and Political Power in America* (2012).

<sup>118</sup> *My Vote Counts* (note 1 above) at para 41.

enforced, and, in addition, more indirect transactions such as PR items that are copied as a whole from PR agencies are not even required to be reported.<sup>119</sup>

The implication of the non-bondage principle in the press may mean, on the one hand, imposing immunities from private sources of money and influence and, on the other hand, the provision of public funding to the press. Several types of immunities from the influence of private money already apply to many newspapers, either embedded in ethical codes or in legislation. These include restrictions on ownership of newspapers stemming from anti-monopoly laws; ethical codes imposing editorial independence from the owner; and ethical codes prohibiting journalists from receiving money or perks from commercial entities about which they report. However, as mentioned above, many of those have been radically eroded due to economic pressures. Thus, the principle of non-bondage may require more formal and extensive immunities and restrictions.

Finally, state funding of the press can be a solution to its dependency on private money in the same way it has been a solution to the dependency of political parties on private money. This idea might seem radical, especially to the English-speaking world, but in fact it is already incorporated in many countries and, as mentioned above, was not alien to the US press as well. Thus, a very common measure for state sponsorship of the press is tax exemptions, such as a full or partial exemption from value-added tax. Some countries, however, fund newspapers directly according to established criteria. For example, Sweden, whose press has a very long and established history, sponsors its newspapers according to a ratio which depends on the number of subscribers of each paper. Other European countries also sponsor the press to various degrees.<sup>120</sup> It seems to me that the successful experience with funding political parties shows that it is possible to avoid the danger of state control despite state funding, provided there are clear and manageable criteria for the funding and an independent mechanism to impose these criteria. As the Swedish example shows, this goal is not unattainable.

Does the application of the principles of the theory against buying democracy apply to South Africa? The *My Vote Count* decision portrays a grim reality of political corruption in South Africa. The press in South Africa, on the one hand, has had a crucial role in exposing corruption.<sup>121</sup> Exposing the Gupta affair is one example of successful and courageous investigatory reporting. Its importance to South African democracy cannot be overemphasised.

On the other hand, the press is not immune from corruption either; and recent revelations show the extent to which it is possible to ‘buy’ the press in South Africa. The Guptas were after all media moguls and used their media business as a platform for state capture. Indeed, the phenomenon of PR articles concealed as reporting or public discourse came to an ugly head in South Africa with the Bell Pottinger scandal. The public relations firm worked for

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<sup>119</sup> M Heins ‘Reclaiming The First Amendment: Constitutional Theories Of Media Reform: “Jacob’s Voice, Esau’s Hands”: Transparency as a First Amendment Right in an Age of Deceit and Impersonation’ 35 *Hofstra Law Review* 1489; Z K Said ‘Symposium: The Disclosure Crisis: Essay: Mandated Disclosure in Literary Hybrid Speech’ (2013) 88(2) *Washington Law Review* 419.

<sup>120</sup> S Allern & E Pollack, ‘Journalism as a Public Good: A Scandinavian Perspective’ (2017) 20 *Journalism: Theory, Practice & Criticism* 1.

<sup>121</sup> J Campbell ‘South African Media Recognized for Exposing Zuma Corruption’ *Africa in Transition* (12 April 2018), available at <https://www.cfr.org/blog/south-african-media-recognized-exposing-zuma-corruption> (“The 2017 Taco Kuiper Award for Investigative Journalism went to a group of three media outlets that investigated and reported on the Gupta brothers, cronies of Jacob Zuma and widely accused of exercising improper influence or “state capture”).

the Gupta family who were situated at the heart of state capture corruption in South Africa. The firm effectively provided ‘reputation laundering’ through both mainstream press outlets, including those owned by the Guptas (such as African News Network 7 television channel and the *New Age* daily newspaper) and, perhaps more significantly, through a coordinated social media campaign that saw the creation of over a hundred fake Twitter accounts with the express aim of rehabilitating the Guptas’ name, and redirecting public conversation.<sup>122</sup> More broadly, the Zondo Commission has unravelled a scheme for buying favourable reporting using state money and the secret service.<sup>123</sup> Another revelation, regarding the *Sunday Times*, shows how the press can easily be manipulated by feeding it with distorted information once its economic impoverishment lowers the bar for independent investigation and verification.<sup>124</sup> These instances exemplify some of the sharpest dangers of buying democracy, and a need for extending regulation of private funding to the press. The *My Vote Counts* decision can therefore be used as an alarm call against corruption in the press and as an indication that South Africa too may benefit from the immunities and restrictions on journalism suggested above and from the provision of state funding to the press.

State funding of the press may prove more difficult to provide in countries, such as South Africa, that are economically struggling and have more urgent needs that require state resources. Suggestions for state funding of the press may therefore seem unfeasible for South Africa. This can be a general concern for the Global South countries. One possible solution could be international funding for the local press in such countries. Again, the fear of influence and control – this time of international institutions and wealthy countries – is obvious. However, monetary institutions such as the World Bank that provide loans and relief for Global South countries in order to strengthen democracy and the rule of law, should also consider the sponsoring of an independent local press as another measure to support democracy.

One cannot conclude a discussion on regulating and funding the press without mentioning social media (and in South Africa, this is acutely so in the wake of the Bell Pottinger/Gupta scandal).<sup>125</sup> Social media has become a central source of news consumption, at times even surpassing online newspapers, and especially printed newspapers. In addition, bloggers and other independent reporters take their place among journalists and provide news and coverage that is not part of the established press. It may seem that some of the discussion above is no longer relevant as it deals with the print media rather than contemporary social media. This is not necessarily so. Most commentators agree that whatever the new configuration of the news media may be, there is no alternative to organised and institutionalized reporting and journalism that still constitutes the cornerstone of news production today. Social media

<sup>122</sup> For an overview of this scandal, see D Segal ‘How Bell Pottinger, PR Firm for Despots and Rogues, Met Its End in South Africa’ *New York Times* (4 February 2018), available at <https://www.nytimes.com/2018/02/04/business/bell-pottinger-guptas-zuma-south-africa.html>. I thank the editors for these points.

<sup>123</sup> ‘Project Wave: How the Zuma SSA [State Security Agency] Penetrated the Media: Key Extracts from Evidence of Sydney Mufamadi and “Ms K” to the Zondo Commission’ *Politicsweb* (1 February 2021), available at <https://www.politicsweb.co.za/documents/project-wave-how-the-zuma-ssa-penetrated-the-media>.

<sup>124</sup> A Harber *So, for the Record: Behind the Headlines in an Era of State Capture* (2020); A Harber ‘When Journalism Goes Bad: A Case Study from South Africa’ (9 November 2020) *Global Investigative Journalism Network*, available at <https://gijn.org/2020/11/09/when-journalism-goes-bad-a-case-study-from-south-africa/>.

<sup>125</sup> David Segal ‘How Bell Pottinger, P.R. Firm for Despots and Rogues, Met Its End in South Africa’ *New York Times* (4 February 2018), available at <https://www.nytimes.com/2018/02/04/business/bell-pottinger-guptas-zuma-south-africa.html>

often rehashes and distributes news produced by organized news agencies and newspapers. Admittedly some of the principles suggested and discussed here may need adjustment. The task of fleshing out these judgments is beyond the scope of the article. However, the basic principles, so it seems, would remain the same. As long as citizens depend on a mechanism that would filter, organize, and analyse the information they receive, there will be a press.

## V CONCLUSION

The *My Vote Counts* decision has had a profound effect on the South African political system. It exposed the dangers of unregulated private funding of political parties and candidates; and brought about a new legislative regime of transparency and regulation of political funding. This article described and tried to assess the effectiveness of some of the features of this new regime, comparing it to funding regimes in other countries. It also argued that the *My Vote Counts* decision is based on a general theory against buying democracy and extended the implications of this theory to another democratic institution that is in danger of being bought – the press. Buying democracy will remain an urgent problem in need of correction for the foreseeable future, whether in South Africa or elsewhere. It is my hope that this article helped shed some light on this problem using the important insights from *My Vote Counts*.

