

HOW TO TURN A TRANSPARENCY POLICY INTO A WORKABLE AND EFFECTIVE LEGAL REGIME

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ABSTRACT

‘Democracy means being in touch and in tune with life as it’s lived in our communities, and that is what we should expect from our leaders...’ – Barak Obama

Political parties are indispensable conduits for the enjoyment of political rights as they are responsible for aggregating and articulating interests, developing competing policy proposals, organising legislatures and co-ordinating the formation and activities of government, none of which is possible without adequate financial resources. The money political parties derive from the public revenue is not enough to allow them to run successful election campaigns, and as a result, they are left largely reliant on private sources of funding. However, the way in which this private funding infiltrates the political system has proven to be one of the biggest threats to democracy. An insidious link, fuelled by a lack of transparency and openness, is seen between those who donate money and those who receive it. Often, this culminates in a *quid pro quo* relationship between the donor and the donee which we see manifest as rampant corruption within the (dys)functioning of our state arms. In an effort to attenuate the ruinous effects of the unregulated passage of money through political systems, most democracies around the world have moved towards enacting regulatory disclosure laws, which are premised on the understanding that information on the private funding of political parties, and how this money is used, is essential for the effective exercise of the right to make political choices and to participate meaningfully in elections.

No universally accepted model has been developed to regulate political finance; however, it is accepted that the core feature of any transparency policy is to be firmly rooted in the principles of access to information which in turn promotes accountability, responsiveness and openness. This paper examines whether South Africa’s legal framework on political finance adequately addresses the problems that exist in relation to the funding of political parties and particularly, the threat of corruption.

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ABBREVIATIONS AND ACRONYMS

ANC	-	African National Congress
AU	-	African Union
CP	-	Constitutional Principles
DA	-	Democratic Alliance
IDASA	-	Institute for Democratic Alternatives in South Africa
IDEA	-	Institute for Democracy and Electoral Assistance
NT	-	National Text
SADC	-	Southern African Development Community
UN	-	United Nations

CHAPTER 1:

INTRODUCTION

1.1. Introduction

The academic study of corruption in South Africa indicates that it exists in large, unsettling and unrelenting ways¹ and that it is directly linked to moral and economic decay.² South Africa's history of corruption dates back to the apartheid era when the government was obsessed with official secrecy,³ thus allowing them to practise esoteric governance. The lack of administrative transparency and accountability promoted criminality⁴ and was structurally conducive to corruption.⁵ Corruption has been described as 'the abuse of public office for private gain'.⁶ We see the magnitude of this abuse displayed in the current revelations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector which have illustrated just how money buys influence, undermines basic democratic principles and cripples society. Corruption has settled mainly in government structures (public office) because it is on this level that the *quid pro quo* relationship is most beneficial to corrupt benefactors. Government structures are occupied through the contestation for public office by political parties, and campaigns for public office are usually waged at a great cost.⁷ However, as Butler observes, the role of money in politics remains a vexed issue in many political systems⁸ because it is impossible in modern-day politics to divorce money from power.⁹ Government officials wield enormous power and, as Sir John Dalberg-Acton so aptly put it, 'all power tends to corrupt and absolute power corrupts absolutely'.¹⁰ Absolute corruption proliferates in the secrecy that underpins government action and decision-making

¹ It is estimated hundreds of millions of rands are lost yearly due to corruption. www.businessstech.co.za/news/trending/99074/10-corruption-scandals-that-rocked-south-africa/ (accessed 25 May 2020).

² <https://www.intechopen.com/books/trade-and-global-market/corruption-causes-and-consequences> (accessed 19 June 2020).

³ I Currie I & J Klaaren J *The Promotion of Access to Information Commentary* (2002) Siber Ink at 2.

⁴ Currie & Klaaren op cit (n 3) at 21.

⁵ Currie & Klaaren op cit (n 3) at 21.

⁶ 'Impact of corruption on governance and socio-economic rights page 1' available at <http://www.casac.org.za/wp-content/uploads/2011/09/IMPACT-OF-CORRUPTION1.pdf> (accessed 26 August 2018).

⁷ It is estimated that about R2 billion was spent on campaigning for the 2019 elections

www.thesouthafrican.com/news/what-political-parties-spend-election-campaign-2019/

⁸ A Butler (ed) *Paying for Politics: Party Funding and Political Change in South Africa and the Global South* (2011), Jacana Media at 1.

⁹ Butler op cit (n 8) at 1.

¹⁰ JN Figgis & RV Lawrence *Historical Essays and Studies* (1907) MacMillan.

despite the right of access to information¹¹ guaranteed by the Constitution.¹² This paper seeks to assess how the entitlement to access information can be carved into an effective and workable legal regime capable of addressing the problems that plague political finance, particularly corruption.

Currie and De Waal opine that ‘accountability is unattainable if the government has a monopoly on the information that informs its actions and decisions’.¹³ This, according to the authors, is the basis of claims to a right of access to information.¹⁴ Access to information gives rise to entitlements and obligations, linking itself to the relevant human rights protections afforded to other rights¹⁵ and asserting itself as an essential component of the democratic process. As Transparency International puts it, ‘countries successful at curbing corruption have a long tradition of government openness, freedom of the press, transparency and access to information’.¹⁶ The right of access to information guaranteed by the Constitution entitles everyone to have access to any information held by the state¹⁷ or any information held by any other person, which is relevant for the protection of any rights.¹⁸ Democracy is governed by explanation¹⁹ and the Promotion of Access to Information Act (the PAIA)²⁰ provides the contextual reference to the rights and entitlements attendant on this explanation. This is because the fundamental aim of any access to information legislation is to promote good government and in turn good governance.²¹ On this point, the Constitutional Court has specifically held that

‘Details governing freedom of information are not ordinarily found in a constitution, and it is unlikely that the drafters of the CPs contemplated that such provisions would be contained in the NT itself. It is also significant that freedom of information is ... directed at promoting good government’.²²

¹¹ S 32.

¹² Constitution of the Republic of South Africa, 1996 (1996 Constitution).

¹³ I Currie & J De Waal *The Bill of Rights Handbook* 5 ed (2005) 684.

¹⁴ Currie & De Waal op cit (n 13) at 684.

¹⁵ This can in turn be linked to s 8 of the Constitution which provides that ‘[t]he Bill of Rights applies to all law, and binds the legislature, the executive and the judiciary and all organs of state’.

¹⁶ <https://www.transparency.org/en/news/how-to-stop-corruption-5-key-ingredients#> (accessed 24 May 2020).

¹⁷ S 32(1)(a).

¹⁸ S 32(1)(b).

¹⁹ Currie & De Waal op cit (n 13) at 684.

²⁰ Act 2 of 2000.

²¹ <https://socialprotection-humanrights.org/framework/principles/ensure-transparency-and-access-to-information/> (accessed 20 July 2018).

²² *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (‘*First Certification Judgment*’) para 85.

Good governance requires an administration that is sensitive and responsive to the needs of the people and at the same time effective in coping with emerging challenges in society,²³ by framing and implementing appropriate laws and measures. Wixley and Everingham explain that governance is concerned with the structures and processes associated with management, decision-making and control in organisations.²⁴ Bolton surmises that government (decisions) are mainly attached to the policies they aim to achieve which, she explains, from a public interest point of view require an understanding of the policy and philosophy behind government decisions.²⁵ Good governance therefore demands strict rules of transparency and accountability.²⁶

An understanding of what informs government actions and decisions requires a clear understanding of the mainspring behind political policy reform. Policy, according to the Centre for Civic Education, is

‘made in response to [an] issue or problem that requires attention. Policy is orientated toward a goal or desired state, such as the solution of a problem. Policy is ultimately made by governments, even if the ideas come from outside government or through the interaction of government and the public’.²⁷

Government policies are usually framed by political parties and in this regard, they wield immense power within the democratic process and have been said to be indispensable conduits for the enjoyment of political rights.²⁸ As such, they are afforded resources because they are recognised as the ‘veritable vehicles chosen for facilitating and entrenching democracy’.²⁹ Elections are not won cheaply as political parties engage in a wide range of functions in their contest for public office. These functions, together with the prevailing socio-economic realities, place great reliance on parties’ receipt of private sources of funding. This funding is regrettably clouded in secrecy owing to the insufficiency of regulatory reforms, and as the universal consensus rightly echoes, ‘unregulated and poorly managed political finance is often ... one of the biggest threats to democracy’.³⁰

²³ A A Senghore ‘*Democracy, Human Rights and Governance in the Gambia: Essays on Social Adjustment*’ (2008) Cenmedra at 82.

²⁴ T Wixley T and G Everingham ‘*Corporate Governance*’ 3ed (2010) Siber Ink at 1.

²⁵ Bolton P ‘*The law of government procurement in South Africa*’ (2007) LexisNexis Butterworths at 5

²⁶ Senghore op cit (n 23) at 82.

²⁷ <https://www.civiced.org/pc-program/instructional-component/public-policy> (accessed 23 May 2020).

²⁸ *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31 para 43 (‘*My Vote Counts I*’).

²⁹ *Ramakatsa v Magashule & Others* [2012] ZACC 31 para 67 (‘*Ramakatsa*’).

³⁰ <https://www.u4.no/publications/the-role-of-political-party-finance-reform-in-the-transition-from-dominant-to-competitive-party-systems> (accessed 22 January 2020).

Historically, regulation of political party funding was limited to their receipt of public funds and this was legislated through the Public Funding of Political Parties Act,³¹ which Act was borne of section 236³² of the Constitution and a drafting process which commenced in 1997 when the Promotion of Multi-Party Democracy Bill³³ was introduced.³⁴ Today, on the understanding that transparency and access to information are inextricably linked as ‘essential components of a rights-based social protection system’,³⁵ the Political Party Funding Act³⁶ has been signed into law. Hyslop asserts that ‘the issue of corruption is also a question of representation and of moral economy’.³⁷ Given that the South African democracy is fashioned primarily as a representative democracy,³⁸ this paper assesses the Political Party Funding Act’s sufficiency as an anti-corruption framework.

1.2. Problem statement and research question

South Africa operates within a multi-party political system which enables multiple parties to contest elections and have capacity to gain control of government office.³⁹ Apart from contesting elections, some of the functions of political parties have been described as including ‘aggregating and articulating interests, developing competing policy proposals that provide voice and choice, ... organising legislatures, co-ordinating the formation and activities of government ...’.⁴⁰ none of which is possible without adequate financial resources. As Butler explains, political funds are mainly derived from public and private sources⁴¹ and within each category a distinction is made between ‘legitimate and illegitimate funds, covert and overt funds, concentrated sources that create dependency versus dispersed ones that build relations between society and party’.⁴² Within these dichotomies it is noted that the main source of funding remains private funding.⁴³ Private donors play a dominant role in party financing,

³¹ 103 of 1997.

³² To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.

³³ B 69-97.

³⁴ This Bill was adopted by Parliament in October 1997 and came into force in April 1998 as the Public Funding of Political Parties Act 103 of 1997.

³⁵ <https://socialprotection-humanrights.org/framework/principles/ensure-transparency-and-access-to-information/> (accessed 20 July 2018).

³⁶ 6 of 2018.

³⁷ J Hyslop ‘Political Corruption: Before and After Apartheid’ (2005) 31(4) *Journal of Southern African Studies* at 774.

³⁸ Currie & De Waal op cit (n 13) at 447.

³⁹ Bolton op cit (n 25) at 5.

⁴⁰ <https://www.u4.no/publications/the-role-of-political-party-finance-reform-in-the-transition-from-dominant-to-competitive-party-systems> (accessed 18 December 2019).

⁴¹ Butler op cit (n 8) at 5.

⁴² Butler op cit (n 8) at 5.

⁴³ Butler A op cit (n 8) at 2.

fashioning patterns of dependency, collusion and corruption between donors, recipients and those who get to spend the funds.⁴⁴ Money is often given in return for favours which in turn usually has the effect of corrupting⁴⁵ the political system in addition to undermining its legitimacy.⁴⁶ Those who are unable to contribute to party reserves are often excluded from the political equality promised to them.⁴⁷ As was mentioned in *My Vote Counts v President of the Republic of South Africa*⁴⁸

‘The prospect of political parties being beholden to donors, especially substantial donors, creates considerable scope for corruption. Secret funding creates the risk that public officials may extend undue and undetected favouritism towards those who funded their political progress. In this way, secret funding of political parties threatens to encourage or at least conceal corruption ...’⁴⁹

The insidious⁵⁰ link between money and corruption is clearly highlighted by the phenomenon of ‘money politics’ which is characterised by an ‘arms race’ between political parties and their funders.⁵¹ It appears that the more the money is required to compete the more willing campaigners are to compromise principles and legality in order to secure funding.⁵² These compromises have seen an array of interventions being implemented internationally in an attempt to regulate the financing of politics. Regulation operates on the premise that transparency and access to information are inextricably linked. They are said to be ‘essential components of a rights-based social protection system’.⁵³ While there is no universally accepted model for the regulation of political party finance, regulatory measures, which include bans on vote buying, disclosure rules, caps on campaign expenditure and contribution limits, have been widely accepted as being the most apposite means to assist in the fight against the corrupting effect of money in politics. Hyslop correctly asserts that ‘[t]he question of

⁴⁴ Butler op cit (n 8) at 1.

⁴⁵ According to the OECD Public Governance Reviews (2016) (Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture, OECD, Publishing, Paris).

⁴⁶ <http://dx.doi.org/10.1787/9789264249455-en> at 23 ‘when government policy-making is captured by individual donors with a significant amount of power and money, in whose favour the rules are bent, this leads to the erosion of democratic governance, the pulling apart of social cohesion, and undermining of crucial concepts that underlie democracy such as equal opportunities for all’.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ 2017 (6) SA 501 (*‘My Vote Counts WCC’*).

⁵⁰ At 38.

⁵¹ <https://www.businessinsider.com/how-likely-people-are-to-be-corrupted-by-money-2013-6?IR=T> (accessed 18 December 2019).

⁵² Butler op cit (n 8) at 5.

⁵³ Butler op cit (n 8) at 5.

⁵⁴ <https://socialprotection-humanrights.org/framework/principles/ensure-transparency-and-access-to-information/> (accessed 20 July 2018).

corruption is ... central to battles over control of information'⁵⁴ and it is against this backdrop that this paper seeks to review South Africa's party funding regulation in light of international and domestic legal and political contexts and consider the question of whether it satisfactorily addresses the problems that exist in relation to the funding of political parties and particularly, the threat of corruption.

1.3. Significance of the problem

The act of suffrage is important because it encourages civic consciousness and political participation.⁵⁵ Participation in turn creates a platform for scrutiny which helps people make informed choices.⁵⁶ This view was confirmed when the Constitutional Court held in *New National Party*⁵⁷ that 'the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy. It is both empty and useless'.⁵⁸ Taking it a step further in the *My Vote Counts I* minority judgment, Cameron J held that:

'Section 19(1) of the Constitution envisages that every citizen is "free to make political choices" [...] But that choice, like all others, is only valuable if one knows what one is choosing. It loses its value if it is based on insufficient information or misinformation.'⁵⁹

In the widely quoted United States case of *Buckley v Valeo*⁶⁰ the Supreme Court held that:

'First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office". It allows the voters to place each candidate in the political spectrum more precisely than is often possible solely than on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is more likely to be responsive and thus facilitate predictions of future performance in office.

Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for

⁵⁴ Hyslop op cit (n 37) at 775.

⁵⁵ <https://www.fordfoundation.org/ideas/equals-change-blog/posts/how-to-encourage-better-and-more-meaningful-political-participation-in-the-us/> (accessed 19 May 2019).

⁵⁶ *My Vote Counts I* para 41.

⁵⁷ [1999] ZACC 5.

⁵⁸ At para 11. See also *My Vote Counts I* minority judgment para 42-43; *President of the Republic of South Africa and others v M & G Media Ltd* [2011] ZACC 32) para 10 ('M & G Media'); *Democratic Alliance v African National Congress* [2015] ZACC 1 para 124; *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* [2012] ZACC 21 para 64.

⁵⁹ *My Vote Counts I* minority judgment para 39.

⁶⁰ *Buckley v Valeo* 424 US1 (1976) at para 62.

improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return'.

The right to vote is a hybrid right. It does not 'consist merely of the entitlement to make a cross upon a ballot paper It is a right to vote for a political party, knowing how it will contribute to our constitutional democracy and the attainment of our constitutional goals'.⁶¹ Put differently, the importance of suffrage is more than just an act of selecting a vote; it is an investment for the future⁶² which aims for an ideal of development and equality. However, as pointed out in *United Democratic Movement v President of the Republic of South Africa*⁶³ 'voters have no control over the conduct of their representatives. They cannot dictate to them how they must vote in Parliament, nor do they have any legal right to insist that they conduct themselves and refrain from conducting themselves in a particular manner'.⁶⁴ Given this reality, voters can only exercise control over their votes. However, the proper exercise of this control is negated by the lack of understanding about party policy formation in general and party funding information in particular. This current political narrative, which will be expounded upon in the next chapter, allows corruption to find a fertile breeding ground post-elections because South African politicians benefit from the partisan voting patterns fuelled by the deficiency of information. This is the practice which anti-corruption policies seek to attenuate because

'Corruption is antithetical to democracy and the rule of law as it diverts resources that are needed to improve the lives of citizens to enrich a few at great cost to many.⁶⁵ Corruption prevents the state from fulfilling its constitutional obligations, erodes the legitimacy of the democratic government and subverts the rule of law. It gnaws away at the ethical fabric of our society and stifles economic growth.'⁶⁶

⁶¹ *My Vote Counts 1* para 41.

⁶² www.quora.com/why-is-right-to-vote-important (accessed on 7 March 2019).

⁶³ 2003 (1) SA 495 (CC) ('UDM').

⁶⁴ At 49.

⁶⁵ Casac 'Corruption: Towards a Comprehensive Societal Response' available at <http://www.casac.org.za/wp-content/uploads/2011/03/corruptionfullreport.pdf> (accessed 6 September 2018).

⁶⁶ *Ibid.*

1.4. Literature Review

Currie and De Waal state that ‘public access to information is fundamental to encouraging transparency and accountability in the way government and public authorities operate. It is an important weapon in the fight against corruption’.⁶⁷ The source of corruption in South Africa is rooted in the country’s bureaucratic traditions, political development and social history.⁶⁸ Corruption has thrived on institutional weaknesses⁶⁹ as it is rooted in secrecy. As the Prevention and Combating of Corrupt Activities Act⁷⁰ notes:

‘Corruption and related corrupt activities undermine the [rights enshrined in the Bill of Rights], endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality and jeopardise sustainable development, the rule of law and the credibility of governments ...’.⁷¹

And as Reddy correctly points out:

‘After we recognise the existence of procedural democracy in South Africa, notice that it mostly functions according to formal rules established in the Constitution and appreciate the mammoth struggle and sacrifices involved to bring it about; it is difficult to ignore the signs of state and institutional decay, intra-elite conflict, growing popular discontent, and political fragility in the face of society’s demands and development challenges’.⁷²

In their aptly titled article ‘Lacking Information or Condoning Corruption: When do voters support corrupt politicians’⁷³ Winters and Weitz-Shapiro correctly point out that ‘in a democracy, corruption undermines the quality of representation when elected politicians make decisions motivated by the desire for personal enrichment rather than the preference of voters. This decreased accountability poses a real threat to stability in young democracies’.⁷⁴ Our own courts have surmised that the seriousness of the offence of corruption cannot be overemphasised. It offends the rule of law and the principles of good governance.⁷⁵ As pointed out above, good governance is concerned with strict rules of accountability, rooted in

⁶⁷ Currie & De Waal op cit (n 13) at 684.

⁶⁸ G T Mirugi-Mukundi (2006) ‘Impact of corruption on governance and socio-economic rights’ 1 available at <http://www.casac.org.za/wp-content/uploads/2011/09/IMPACT-OF-CORRUPTION1.pdf> (accessed 26 August 2018).

⁶⁹ Ibid.

⁷⁰ 12 of 2004.

⁷¹ Preamble.

⁷² T Reddy ‘ANC Decline, Social Mobilization and Political Society: Understanding South Africa’s Evolving Political Culture’ (2010) 37(2-3) *Politikon* at 185.

⁷³ *Comparative Politics* 45(4) (July 2013).

⁷⁴ M S Winters & R Weitz-Shapiro ‘Lacking Information or Condoning Corruption: When do voters support corrupt politicians’ (2013) 45(4) *Comparative Politics* at 418.

⁷⁵ *S v Shaik & Others* 2007 (1) SA 240 (SCA) at 223.

transparency and openness. Ensuring transparency, as Mureinik⁷⁶ explains, is a means towards two ends. First, it aims to promote the accountability of government, and secondly it aims to promote greater public participation in government. He states further that transparency, and by extension access to information, are important weapons in the fight against corruption.⁷⁷

Jagwanth⁷⁸ explains further:

‘The right of access to information ... is not only important for its facilitation of an accountable and democratic government in which power is exercised rationally and open to public scrutiny. It is also important in that it is closely linked to other rights. It allows an individual to access information that may have an impact on her or him so that she or he can meaningfully exercise the other rights in the Bill of Rights’.

Access to information laws provide a basis for the informed discussion of government policies and actions. They are premised on the understanding that in modern democracies citizens are entitled to participate in decision-making processes and that their role is not simply confined to the election of representatives.⁷⁹ Section 9(e)(iii) of the PAIA reiterates this by providing that the objects of the Act were generally, to promote transparency, accountability and effective governance of all public and private bodies by empowering and educating everyone to effectively scrutinise, and participate in decision-making by public bodies that affects their rights.⁸⁰ An assertion that rights have been affected applies mainly to private information; however Currie and De Waal explain that ‘[t]he good-government rationale for disclosure is often applied to private-sector information if it has public implications’.⁸¹ Party funding information, notwithstanding the [private] legal nature of political parties, necessarily has public implications because of their proximity to government office. Access to their financial information is ‘therefore part of the broad constitutional project of establishing a democratic system of government’.⁸² As Magnus Oham⁸³ states: ‘[o]ne of the main factors preventing the political process in many countries from attaining democratic ideals is the influence of money’.

⁷⁶ Mureinik E ‘Reconsidering Review: Participation and Accountability’ (1993) *Acta Juridica* 35.

⁷⁷ Mureinik op cit (n 76) at 35.

⁷⁸ Jagwanth S ‘The right to information as a Leverage Right’ in Calland R & Tilley A (eds) (2002) *The Right to Know the Right to Live: Access to Information and Socio-economic Justice* 3.

⁷⁹ Currie and De Waal op cit (n13) at 692.

⁸⁰ See Currie and De Waal op cit (n13) at 684 (footnote 1) where an example of providing access to information is found in the revolutions of Eastern and Central Europe during 1989 where the public in the German Democratic Republic was given access to television from the Federal Republic (West Germany) which allowed the public to make their own comparisons and form their own opinions about their Communist leaders rather than accept the opinions as dictated to them by the party.

⁸¹ Currie and De Waal op cit (n 13) at 694.

⁸² Currie and De Waal op cit (n 13) at 691.

⁸³ <https://www.idea.int/sites/default/files/publications/funding-of-political-parties-and-election-campaigns.pdf> (accessed 10 July 2018).

Klaaren supports this assertion by stating that ‘an open society, presumes, at a minimum, a condition of no political capture as a precondition for democracy’.⁸⁴ A Brazilian experiment by Winters and Weitz-Shapiro which hypothesised whether or not voters vote for corrupt politicians because they lack the information⁸⁵ necessary to help them make informed decisions in the voting booth or because they hope that they will benefit⁸⁶ in the long run from a corrupt officials term in office, found that ‘when given sufficiently specific, credible, and accessible information about corruption ... voters ... express a willingness to reject politicians described as corrupt’.⁸⁷ This conclusion feeds neatly into the standards set by international law which require, at a minimum, the implementation of access to information laws as means of curbing corruption.⁸⁸

1.5. Research Methodology

The research methodology in this paper will utilise a qualitative desktop study relying on primary sources (e.g. legislation, national and international instruments and case law), as well as secondary sources (e.g. academic books, journal articles and essays). It will examine, evaluate and analyse these sources in order to gain an understanding of the reasons, opinions and motivations used in support of, and in opposition to, the research question. An analysis of this research will provide a basis upon which to identify loopholes and shortcomings in the current regulatory instruments and offer propositions to ensure the realisation of an effective and workable transparency policy consonant with international best practice and the values underpinned by the Constitution.

1.6. Provisional chapter structure

This study will be divided into six chapters.

Chapter 1

This chapter outlines the background to the study, the problem statement; the significance of the research; the relevant literature which has been reviewed as well as the methodology to be used in the study.

⁸⁴ Klaaren J ‘My Vote Counts and the transparency of political party funding in South Africa’ Law, (2008) *Democracy and Development* (2008) at 2.

⁸⁵ Information Hypothesis.

⁸⁶ Trade-off Hypothesis.

⁸⁷ Winters and Weitz-Shapiro op cit (n 74) at 419.

⁸⁸ See international law instruments discussed in chapter 4.

Chapter 2

This chapter will provide an assessment of the centrality of political parties and their importance within the greater democratic scheme in order to opine on the uniqueness of the political culture within South Africa and its impact on democracy.

Chapter 3

This chapter will provide an assessment of why the PAIA, as the principal transparency statute, fails to address the party funding problem by examining its jurisprudential journey through *IDASA, My Vote Counts (1)* and *My Vote Counts (2)*.

Chapter 4

This chapter will provide a review of international legal and political contexts and their importance in helping South Africa to understand its own regulatory trajectory.

Chapter 5

This chapter will provide a critical evaluation of South Africa's own efforts to regulate political finance, juxtaposed with international best practice.

Conclusion

The conclusion will draw upon the realities presented by corruption, the mechanisms in place to curb the scourge and the lessons from international best practice in order to opine whether or not South Africa's regulatory framework adequately addresses the problems that plague the funding of political parties, particularly the threat of corruption.

1.7. Conclusion to chapter 1

According to Transparency International, understanding corruption is key to fighting it.⁸⁹ Corruption is deeply rooted into the fabric of the world, and countries around the world are moving to implement anti-corruption frameworks as they recognise that the hallmark of any open and democratic society is a government that accounts for its use of power;⁹⁰ and a government which is unable to do so, lends itself to the infiltration of corrupt activities. These anti-corruption frameworks begin on the premise that access to information is an essential component in the fight against corruption. As stated above, this is recognised in the obligations imposed by international law in promoting legislation for the fight against corruption. Since most governments are formed through political processes, it is important that access to

⁸⁹ <https://www.transparency.org/topic/detail/education> (accessed 24 May 2020).

⁹⁰ Currie & Klaaren op cit (n 3) at 17.

information is recognised as an ‘inalienable entitlement’ of human beings⁹¹ that attaches intimately to an individual’s ability to make an informed choice, which choice is premised on an investment in the welfare, not only of the voter, but of the nation at large.⁹² In South Africa, despite the recognition and promotion of access to information as a fundamental human right, corruption has found a way to become institutionalised in the public sphere,⁹³ where credibility in a public service concerned with citizen governance must be beyond reproach . This paper interrogates the entitlement of access to information in South Africa and assesses its sufficiency as an anti-corruption reform mechanism.

⁹¹ Currie & Klaaren op cit (n 3) at 7.

⁹² <https://medium.com/buhaykolehiyo/the-importance-of-suffrage-national-elections-a-personal-perspective-ca18ac5000a3> (accessed 7 April 2019).

⁹³ See www.businessstech.co.za/news/trending/99074/10-corruption-scandals-that-rocked-south-africa/ (accessed 25 May 2020).

CHAPTER 2:

POLITICAL CULTURE AND ITS IMPACT ON DEMOCRACY

2.1. Introduction:

Lodge surmises that ‘secrecy concerning the sources of political party electioneering funding can be a major cause of corruption ...’.⁹⁴ It is against this backdrop that the first chapter stressed the importance of fostering transparency and accountability through access to information about political finance. Corruption, mainly public sector corruption, and the continued vagueness attaching to political finance, serve to exacerbate the problem in South Africa. Transparency, particularly political finance transparency, is directly linked to the effectiveness of the functioning of government, its overall governance and its ability to curb the scourge of corruption.

This chapter, in seeking to emphasise the significance of political parties and the need for more transparent politics, will assess the political culture of South Africa’s electoral system and how this culture continues to influence voting patterns – having a direct impact on the proliferation of corruption. The importance of this chapter lies in the reality that suffrage, being a necessary condition for democracy, fails to meet the needs⁹⁵ of the political system, which is largely influenced by the political history of the electoral system in place.⁹⁶

The end of apartheid in South Africa was followed by a new Constitution, the preamble of which declares the intention to ‘heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights’.⁹⁷ These democratic values⁹⁸ include human dignity, equality, supremacy of the constitution and the rule of law, universal adult suffrage, a national common voters’ roll, regular elections and a multi-party system of

⁹⁴ T Lodge ‘Countering public corruption in South Africa: Transformation 48’ (2001) *Michigan State University Library* 63-64.

⁹⁵ www.hsf.org.za/publications/hsf-briefs/a-long-walk-to-universal-franchise-in-south-africa-1 (accessed 9 February 2020).

⁹⁶ R Friedman ‘Political Party Finance – The Global Picture’ Available at <https://hsf.org.za/publications/hsf-briefs/political-party-funding-iv-the-global-picture> (accessed 23 October 2018).

⁹⁷ Preamble to the Constitution.

⁹⁸ S 1 of the Constitution provides that

The Republic of South Africa is one sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality, and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the Constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

democratic government. The need for free and fair elections was influenced by the text of the Universal Declaration of Human Rights, which states in Article 21(3) that:

‘The will of the people shall be the basis of authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures’.

South Africa’s apartheid history was pivotal in shaping the multiparty democracy⁹⁹ in which the current political system operates. Political freedoms, and more specifically the right to vote, were hard-won entitlements resulting in a political system fashioned upon a political culture which, as a result of the historical denial of these civil liberties, is largely influenced by the electoral system in place and the dominance of one political party.¹⁰⁰ The political landscape is still largely ‘characterised by the hegemonic stature of the African National Congress (ANC) which, inherited an abundance of popular legitimacy and enviable state capacity’.¹⁰¹ The ANC has been ‘able to draw upon the inherited racial cleavages¹⁰² in the country¹⁰³ because it derives its dominant position from its social support and this has been retained despite the employment of the proportional representation election method’.¹⁰⁴ Under a ‘list system’ of proportional representation, the electorate chooses which party to vote for, and the party is in turn accountable to the electorate.¹⁰⁵ However, as illustrated in the previous chapter, this choice is only valuable when one knows what one is choosing.¹⁰⁶

Since 1994, South Africa has enjoyed six relatively uncontroversial elections and is said to be on the road to ‘democratic consolidation’,¹⁰⁷ despite there being a perpetual debate around the quality of that democracy.¹⁰⁸ The Democracy Index¹⁰⁹ has classified South Africa’s democracy

⁹⁹ S 1(d) of the Constitution.

¹⁰⁰ Reddy op cit (n 72) 186.

¹⁰¹ Ibid.

¹⁰² R Southall ‘The state of democracy in South Africa’ (2000) 38(3) *Journal of Commonwealth and Comparative Politics* 153.

¹⁰³ JE Lane & S Arson S ‘South Africa: Explaining Democratic Stability’ (2007) *Commonwealth & Comparative Politics* at 224.

¹⁰⁴ Lane & Ersson op cit (n 103) at 224.

¹⁰⁵ *First Certification Judgment* para 186.

¹⁰⁶ *My Vote Counts 1* para 39.

¹⁰⁷ See also *My Vote Counts 1* para 9 where the Speaker of Parliament is quoted as saying that ‘the passing of the Promotion of Multi-Party Democracy Bill represents a very significant step in the ongoing process of consolidating and entrenching a multi-party democracy in South Africa and that the key to the success of our new emerging democracy is the role of strong, resilient, democratically elected political parties’.

¹⁰⁸ Southall op cit (n 102) at 147 (footnotes omitted); See also Lane & Ersson op cit (n 103) at 222.

¹⁰⁹ Index compiled by UK based company, Economist Intelligence Unit, that measures the state of democracy in 167 countries using 60 indicators which are grouped into five different categories measuring pluralism, civil liberties and political culture. At the time 166 of these countries were sovereign states and 165 UN member states.

as a ‘flawed democracy’,¹¹⁰ suggesting that elections are free and fair and basic civil liberties are largely honoured. However, there are significant faults within our democracy, which are noted as ‘an under-developed political culture, low levels of participation in politics, problems with functioning governance and high levels of corruption’.¹¹¹ There is also rising concern globally about diminishing electoral participation, declining trust in public institutions, public discontent and hostility.¹¹² Most of these problems are attributable to the lack of transparency between citizens and the government. Since the primary aim of the Constitution is to establish and safeguard a representative democracy, this chapter seeks to juxtapose South Africa’s unique political climate with the need for more inclusive and transparent politics.

2.2. Suffrage in South Africa

Historically, black people were denied the right to vote due to their ‘inferior educational status’.¹¹³ The Union of South Africa imposed strict or prohibitive voting conditions on people of colour¹¹⁴ and only white men were allowed to vote and be elected to Parliament.¹¹⁵ It was only when the homelands/Bantustans were granted ‘independence’ between 1970 and 1980 that black people were allowed to vote in their mainly tribally demarcated areas.¹¹⁶ The formation of the tri-cameral parliament in 1983 allowed black South Africans to vote in black local government structures¹¹⁷ and it was within these strictures that the franchise was extended to people of colour. Under this exclusionary system, large proportions of government expenditure were allocated to secret votes and this allowed certain areas of bureaucratic activity to be protected from public scrutiny by reporting restrictions.¹¹⁸ What was known about corruption indicates that the poor and disenfranchised were its main victims¹¹⁹ ‘while those with the benefit of the franchise were much less likely to encounter corrupt officials as their

¹¹⁰ In comparison there are also full democracies, hybrid regimes and authoritarian regimes.

¹¹¹ Available at https://en.wikipedia.org/wiki/Democracy_Index (accessed on 24 June 2018).

¹¹² J Struwig, B Roberts & E Vivier ‘A vote of confidence: Election Management and Public Perceptions of Electoral Processes in South Africa’ (2011) 46(3.1) *Journal of Public Administration* – special issue *Human Sciences Research Council* 1137.

¹¹³ Available at www.sahistory.org.za/article/history-elections-south-africa (accessed 10 July 2018).

¹¹⁴ Ibid. In the Orange Free State and the Transvaal all black people were denied the right to vote and a similar ban was in place in Natal with nearly all blacks being denied the right to vote. However, in the Cape a number of black and coloured men were allowed to vote under a ‘colour-blind’ permission based on property requirements. White women were extended the franchise in 1930.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ <https://artscomments.wordpress.com/2016/08/03/a-very-brief-history-of-voting-in-south-africa/> (accessed 8 September 2018).

¹¹⁸ Lodge op cit (n 94) at 56.

¹¹⁹ Ibid.

lives were much less affected by bureaucratic controls and restrictions'.¹²⁰ Today, despite the benefit of the franchise, all people continue to experience, in varying degrees, the crippling effects of corruption. This is so because 'despite the scope of bureaucratic public accountability having widened, ... bodies which spend public money, escape public scrutiny'.¹²¹

The democratic order that followed the transitional political negotiations sought to 'lay [a] secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflict and a legacy of hatred, fear, guilt and revenge'.¹²² As Von Holdt summarises:

'The negotiations, the draft constitution, the first democratic elections in 1994, ... and the drafting of the Final Constitution represented a profound political rupture and the formation of a new symbolic order in which for the first time the black majority were recognised as full citizens'.¹²³

Since 1994, suffrage is guaranteed as a fundamental human right through sections 1(d) and 19 of the Constitution. Section 1(d) provides that South Africa is one, sovereign, democratic state founded on the values of universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness¹²⁴ while section 19 provides that:

- (1) Every citizen is free to make political choices, which includes the right –
 - a. to form a political party;
 - b. to participate in the activities of, or recruit members for, a political party; and
 - c. to campaign for political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right –
 - a. to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - b. to stand for public office and, if elected, to hold office.

¹²⁰ Ibid.

¹²¹ Lodge op cit (n 94) at 56.

¹²² D Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* (1998) Juta & Co 2.

¹²³ K Von Holdt 'Review of African political economy South Africa: the transition to violent democracy' (2013) 40(138) *Review of African Political Economy* 592.

¹²⁴ Together with all its entitlements (i.e. transparency, public engagement and participation).

While the empowering provision contained in section 1(d) does not in itself create an enforceable right,¹²⁵ it is given effect to by section 19 which must then be construed consistently with section 1(d).¹²⁶ The purpose of section 19 is twofold. On the one hand, it aims to prevent the wholesale denial of political rights from ever happening again,¹²⁷ while on the other hand it aims to ‘ensure that citizens are able to align themselves freely with the political cause of the party of their choice ...’.¹²⁸ The scope and content of this right must therefore be ascertained by means of an interpretation process informed by a context that is both historical and constitutional.¹²⁹ Section 19 must also be read and understood within the broader interpretative context of the Bill of Rights, which gives effect to the ‘broad constitutional commitment to democracy’¹³⁰ by encouraging a reading which is generous and purposive, thus giving the rights-holder the full protection guaranteed by the right.¹³¹ This is significant because suffrage is seen as essential to democratic self-government.¹³² The importance of suffrage was emphasised as follows by the Constitutional Court:

‘Universal adult suffrage on a common voters’ roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important for both the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.’¹³³

¹²⁵ It is important to note that the court in *National Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC), 2005 (3) SA 280 (CC) para 21 held that universal adult suffrage is one of the values on which the state is founded and does not create an enforceable right. It could be limited, but only if clear and convincing reasons were advanced.

¹²⁶ *Ibid.*

¹²⁷ *Ramakatsa* para 64.

¹²⁸ Currie and De Waal op cit (n 13) at 448.

¹²⁹ Currie and De Waal op cit (n 13) at 446-6. See also *Ramakatsa* para 64. See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO* 2001 (1) SA 545 (CC).

¹³⁰ Currie and De Waal op cit (n 13) at 447.

¹³¹ *Ramakatsa* para 70.

¹³² *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC) para 1.

¹³³ *August and Another v Electoral Commission* 1999 (3) SA 1 (CC).

To be sufficiently effective, the franchise must be exercised through free and fair elections which are not characterised by fear, intimidation or inhibiting factors,¹³⁴ and which include the rights of freedom of association, freedom of speech, access to information and open access to adequate campaign funding.¹³⁵ South Africa's electoral model, commissioned to facilitate the entitlements in section 19 and section 1(d) of the Constitution, was borne of the desire to select 'an appropriate electoral system for the highly divided and unequal society in the process of a delicate transition'.¹³⁶ It was decided that the basic electoral system should be that of proportional representation,¹³⁷ selected for its inclusiveness, simplicity and tendency to encourage coalition government.¹³⁸ Within this model, South Africa uses a closed-list proportional representation system which means the electorate votes for parties which must in return be accountable to the electorate.¹³⁹ To achieve this, the parties submit lists to the Independent Electoral Commission (IEC), and whilst these lists are publicised widely for voters to consider, they are closed and cannot be altered by voters.¹⁴⁰ The closed-list nature of the model deprives the electorate of meaningful party participation, and as a result, other facets of participation and representation become important entitlements in the democratic process.

The electoral system in South Africa promotes the formation of socially inclusive political parties and civil electioneering. The electorate's ability to meaningfully participate in the electoral process pivots on what they know about these political parties and their members. As pointed out in *Ramakatsa*, the success of political parties lies in the policies they adopt and solutions they put forward in addressing the challenges faced by communities.¹⁴¹ The types of party systems which develop are largely influenced by the type of electoral system at play. Electoral systems can also impact on the way parties campaign and behave, thus helping to determine the broader political climate.¹⁴² The electoral system the Constitution creates

¹³⁴ Currie and De Waal op cit (n 13) at 448.

¹³⁵ www.hsf.org.za/publications/hsf-briefs/a-long-walk-to-universal-franchise-in-south-africa-1 (accessed 9 February 2020).

¹³⁶ <https://hsf.org.za/publications/hsf-briefs/the-south-african-electoral-system> (accessed 2 September 2018) (footnotes omitted).

¹³⁷ www.sahistory.org.za/article/convention-democratic-south-africa-codesa (accessed 2 September 2018).

¹³⁸ Ibid.

¹³⁹ *First Certification judgment* at 186.

¹⁴⁰ W Louw 'The South African Electoral System' (2014) *Helen Suzman Foundation* Available at <https://hsf.org.za/publications/hsf-briefs/the-south-african-electoral-system> (accessed 3 September 2018).

¹⁴¹ *Ramakatsa* at 65.

¹⁴² D Nupen 'Elections, Constitutionalism and Political Stability in South Africa' (2004) 4(2) *African Journal on Conflict Resolution* at 131. See also K O'Regan 'Political Parties in South Africa: The interface between Law and Politics' Keynote address Cape Town 27 August 2010 at 9.

therefore pivots on political parties and whom they admit as members¹⁴³ while the democratic order the Constitution envisages depends on the electorate and what they know about these parties and their members.

2.3. Political culture¹⁴⁴ in South Africa

South Africa's current political culture is largely influenced by the effects of the apartheid regime, under which the nation was 'characterised by state-reinforced divisions expressed through unrelenting political oppression on the one hand and resistance on the other; social and racial discrimination which permeated general society; severe economic exploitation; inequalities and disparities'.¹⁴⁵ The democratic settlement, which has been described as 'ambitious',¹⁴⁶ constituted a dramatic political shift¹⁴⁷ which is strongly attached to ideology.¹⁴⁸ As one National Union of Metal Workers of South Africa (NUMSA) shop steward explained: '[r]emember we still have people who are still indebted, in a sense, that they still feel they owe their loyalty to the ruling party.'¹⁴⁹ This indebtedness is confirmed by the reality that 'the source of public confidence (in election results) is not the existence of efficient, independently managed elections, but rather, due to forgiveness of electoral process deficiencies by a country all too pleased to be governed by liberation leaders'.¹⁵⁰ As Jensen so aptly puts it '[m]any today know the complex political reality of post-apartheid South Africa and in their minds the debt still remains unpaid'.¹⁵¹ These sentiments still largely influence¹⁵² the political choices made by the electorate. Unfortunately, the forgiveness of these electoral deficiencies permeates an ignorant acceptance of unscrupulous government action.

¹⁴³ *My Vote Counts 1* para 32.

¹⁴⁴ GA Almond and S Verba 'Attitudes towards the political system and its various parts, and attitudes towards the role of the self in the system' (1963) *The Civic Culture* (Princeton: Princeton University Press) 13.

¹⁴⁵ www.thepresidency.gov.za/content/historical-and-political-context (accessed 12 July 2018).

¹⁴⁶ Von Holdt op cit (n 123) at 593.

¹⁴⁷ Von Holdt op cit (n 123) at 593.

¹⁴⁸ See M Paret 'Working-class fragmentation, party politics, and the complexities of solidarity in South Africa's United Front' (2017) 65(2) *The Sociological Review* 278-280.

¹⁴⁹ Paret op cit (n 148) at 280. See also K J Maphunye, M L Ledwaba & M K Kobjana 'Democracy without accountability, or accountability without democracy? Born-free perspectives of public representatives in South Africa' (2014) 49(1) *Journal of Public Administration* 176; and J Kotze S & G Prevost 'An assessment of political identity formation and party support of South Africa's first post-apartheid generation' 2015 44(4) *Africa Insight, African Journals Online* 151.

¹⁵⁰ Padmanabhan V 'Democracy's Baby Blocks: South Africa's Electoral Commission' (2002) 77(4) *New York University Law Review* 1160-1161.

¹⁵¹ S Jensen 'Shosholozu: Political Culture in South Africa between the Secular and the Occult' (2012) 38(1) *Journal of Southern African Studies* 104.

¹⁵² A Habib & S Naidu 'Race, Class and Voting Patterns in. South Africa's Electoral System: Ten Years of Democracy' 86 and 91.

Since the organising principle of society in South Africa has historically been colour, it is hardly surprising that interests are still perceived in racial terms.¹⁵³ This being a reality, South Africa has tried to entrench equality through a number of institutions¹⁵⁴ that are conducive to democratic stability. There is therefore a ‘Constitutional Court with the power of legal review, an Ombudsman, proportional representation and political decentralisation. At the same time, there is a presidential system of government based upon the dominant position of one of the political parties. One of the major findings in the literature on democracy is that a predominant position for one political party, which becomes almost identical with the state, makes democracy unstable’.¹⁵⁵ Furthermore, the dominance of one political party is seen as more of a threat to democracy because of ‘the risk of a marriage between domination and concentration of power’.¹⁵⁶ This creates long-term challenges to the integrity and effectiveness of the political system¹⁵⁷ resulting in a democratic deficit.¹⁵⁸ However as Habib points out ‘even though the electorate identifies less with the ANC, it sees no serious alternative to it. However, voting patterns indicate that the electorate is gravitating towards making rational choices during elections, which choices are based on the information available to them’.¹⁵⁹ Critical political information is sparse and it is evident that this lacuna deprives the electorate the ability to make ‘rational choices’ and offends against the ideal of the representative democracy envisaged by the Constitution. Winters and Weitz-Shapiro opine that ‘[a]ssuming that citizens disapprove of corruption, and given that by definition, democracies provide citizens with the right to choose their leaders, those regimes where citizens have the most power to select their leaders should be expected to suffer the least from corruption’.¹⁶⁰ However, this is hardly the case and it follows that a change to the narrative underlying this political culture can only be achieved through meaningful public participation and more inclusive politics. Political discourse needs to be redesigned to promote transparency which in turn creates a platform for informed voting and is capable of triggering accountability because as Currie and Klaaren observe, ‘the hallmark of an open and democratic society is an account for the use of authority’.¹⁶¹

¹⁵³ Welsh D ‘Democratic challenges and opportunities for South Africa’ (2004) 23(3) *Politeia* 9.

¹⁵⁴ Chapter 9 Institutions.

¹⁵⁵ Lane & Ersson op cit (n 103) at 219.

¹⁵⁶ Lane & Ersson op cit (n 103) at 224.

¹⁵⁷ Lane & Ersson op cit (n 103) at 219-220.

¹⁵⁸ Lane & Ersson op cit (n 103) at 227.

¹⁵⁹ Habib op cit (n 152) at 86 and 91.

¹⁶⁰ Winters and Weitz-Shapiro op cit (n 74) at 418.

¹⁶¹ Currie and Klaaren op cit (n 3) at 17.

2.4. Political Corruption in South Africa

The political culture shown above interestingly ties in very aptly with the current political corruption we see exposed. Corruption is not a new phenomenon in South Africa. It is an inherited problem. According to Hyslop and Lodge, South Africa's history of corruption can be traced back to 1870¹⁶² with every administration from then on tainted with some type of graft-related activity. Political corruption in South Africa is the birth-child of historical government corruption as a whole. Under apartheid, corruption festered through 'preferential funding of Afrikaner cultural and educational institutions, the favouring of Afrikaner enterprises in the awarding of contracts and the vast extension of Afrikaner-dominated parastatal organisations all of which constituted policies which favoured rent-seeking government supporters'.¹⁶³ This practice has found its way into the new democratic order in very much the same fashion as it existed in the Broederbond era.¹⁶⁴ Much of it is attributable to Hyslop's observation that

'... questions of corruption interact with the questions of risk and trust ... in a specific way When the ANC entered government ... the people who knew how to make the administrative system work and who advised on technical questions, were not trusted by the incoming regime The ANC therefore had a classic dilemma of any insurgent regime; they had to manage the immense risks of transition, while relying on a bureaucracy in which they had no trust. This circumstance has tended to favour a situation in which government prioritises considerations of political reliability of officials and of political stability over considerations of the effectiveness or probity of public services'.¹⁶⁵

This practice was conducive to the promotion of 'political loyalties'¹⁶⁶ and patronages which we still see today.

Secretary-General of the United Nations, Kofi Annan, observed that corruption 'is found in all countries big and small, rich and poor but it is in the developing world that its effects are most destructive Corruption hurts the under-privileged disproportionately by diverting funds intended for socio-economic development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid'.¹⁶⁷ The effect of corruption is that the capital allocated to address socio-economic

¹⁶² Hyslop op cit (n 37) at 780.

¹⁶³ Hyslop op cit (n 37) at 782.

¹⁶⁴ Hyslop op cit (n37) at 782.

¹⁶⁵ Hyslop op cit (n 37) at 777.

¹⁶⁶ Hyslop op cit (n 37) at 778.

¹⁶⁷ https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (accessed 26 August 2018).

challenges is selfishly exploited and there is a monopolising of senior positions and dysfunctional government institutions and state owned enterprises.¹⁶⁸ Interestingly, while the scandalous nature¹⁶⁹ of corruption festers through secrecy and gnaws away at the ethical and democratic fabric which the Constitution seeks to create, the health of the South African democracy is evidenced through the freedoms afforded to the press.¹⁷⁰ Many corrupt issues surface as a consequence of high-quality journalistic investigations,¹⁷¹ exposing much of which government denounces (in principle); but mainly as a ritualistic activity with no real relation to practical politics,¹⁷² the result of which is the existence of ‘persistent pervasive political corruption in a democracy’ and unfortunately voters, knowingly and unknowingly, continue to cast their ballots for corrupt politicians.¹⁷³

2.5. Conclusion

Voting is regarded as a ‘formal expression of preference’¹⁷⁴ and political parties are the vehicles through which this preference is exercised¹⁷⁵ and the axis upon which our electoral system pivots. It is therefore crucial that the right to vote is given its fullest entitlement. As Fraser points out, to be effective, the formal right to vote requires a range of other liberties,¹⁷⁶ the most important of which is recognised to be access to information. As pointed out earlier, the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless¹⁷⁷ and equivalent to a denial of this fundamental entitlement. Transparency, fostered by access to information, is one of the fundamental pillars of the effective exercise of the right to vote, as an electorate armed with knowledge about who is funding the political system is more likely to cast votes which resonate with their preferences. Absent this transparency, our democracy lends itself to the ruinous effects of a system allowed to fester under a protected veil of secrecy. As Pienaar states the ‘lack of regulation of the funding of political parties still represents a major fault in many

¹⁶⁸ www.theconversation.com/how-corruption-is-fraying-south-africas-social-and-economic-fabric-80690 (accessed on 26 August 2018). See also Winters and Weitz-Shapiro op cit (n 74) at 418.

¹⁶⁹ Hyslop op cit (n 37) at 775.

¹⁷⁰ S 16 of the Constitution.

¹⁷¹ Hyslop op cit (n 37) at 775.

¹⁷² Hyslop op cit (n 37) at 778 and Lodge op cit (n 94) at 53.

¹⁷³ Winters and Weitz-Shapiro op cit (n 74) at 418.

¹⁷⁴ See Welsh op cit (n 153) at 9 where he opines that ‘voting in a society like South Africa, with its long legacy of conflict, is more than an expression of interest; it is also an expression and an affirmation of identity’. See also Habib op cit (n 153) at 86.

¹⁷⁵ *Ramakatsa* para 65.

¹⁷⁶ www.hsf.org.za/publications/hsf-briefs/a-long-walk-to-universal-franchise-in-south-africa-1 (accessed 9 February 2020).

¹⁷⁷ *New National Party* para 11.

countries' anti-corruption frameworks',¹⁷⁸ a problem South Africa should not be sitting with 26 years after democracy.

The vision of society proclaimed by the Constitution is an open democracy which lends itself to many progressive elements but ironically, secrecy is also one of them.¹⁷⁹ As Currie and De Waal argue, 'in an open and democratic society, ... government should be accountable for its actions and decisions ...'.¹⁸⁰ This means that people are entitled to have access to records, meetings, occasions where policy is formulated, and decisions taken about the use of public power.¹⁸¹ Historical disenfranchisement not only led to the recognition of and guarantee to the universal right to suffrage but also brought about a political culture that is deeply affected by the scars of the past. The tragic events of the apartheid regime have created patterns of blind loyalty resulting in partisan politics and the concentration of power and resources. This blind loyalty threatens to render our democracy unstable. It is unfortunate that South Africa has, through its enactment of information-centric legislation, fulfilled accepted criteria on political rights and civil liberties,¹⁸² but has simultaneously allowed a subversion of its democratic processes¹⁸³ due to a lack of effective transparency policies.

¹⁷⁸ G Pienaar 'Upholding Democratic Ideals and the challenge of regulating political party funding and election campaign finance: case study Southern Africa' *Human Sciences Research Council – EISA 20th Anniversary Symposium* October 2016 17.

¹⁷⁹ Klaaren op cit (n 84) at 1.

¹⁸⁰ Currie and De Waal op cit (n 13) at 684.

¹⁸¹ Ibid.

¹⁸² Lane & Ersson op cit (n 103) at 222.

¹⁸³ *My Vote Counts NPC v Minister of Justice and Correctional Services and another* 2018 (5) SA 380 (CC) at para 47 (*'My Vote Counts 2'*).

CHAPTER 3

PROMOTION OF ACCESS TO INFORMATION ACT

3.1. Introduction:

In the context of the political culture of South Africa presented in the previous chapter and the challenge presented to hard-won political freedoms by secrecy in relation to party funding, the question needs to be asked: what is the prescription? Offering citizens access to information has been held to be one of the most effective ways of upholding the constitutional values of transparency, openness, participation and accountability.¹⁸⁴ Flowing from this, it has been specifically held that information about the private funding of political parties is essential for the informed exercise of the right to vote that section 19(3) of the Bill of Rights confers.¹⁸⁵ Access to information is not only seen as being fundamental to a properly functioning participatory democracy, but it is also recognised as an entitlement which is able to increase public confidence in the government and enhance its legitimacy.¹⁸⁶ In providing for access to information, section 32(2) of the Constitution directs that national legislation be enacted to give effect to the broad objective of the entitlement. However, as Calland observes, despite its constitutional obligations, South Africa has not yet cast off its historical tendency towards secrecy.¹⁸⁷ This is so despite section 32, the PAIA and a plethora of other information-centric legislation. It is for this reason that the PAIA, as the principal statute intended to facilitate access to information, has been held to be invalid and unconstitutional¹⁸⁸ to the extent that it fails to facilitate access to information on the private funding of political parties. In making this declaration, the Constitutional Court held that

‘Information on the private funding of political parties and independent candidates is essential for the effective exercise of the right to make political choices and to participate in the elections ... therefore PAIA is rendered inconsistent with the Constitution to the extent that it fails to provide for the recordal, preservation and reasonable disclosure of information on the private funding of political parties and independent candidates’.¹⁸⁹

¹⁸⁴ C Hoexter ‘*Administrative Law in South Africa*’ (2012) 2ed Juta 94.

¹⁸⁵ *My Vote Counts 1* at 2.

¹⁸⁶ Hoexter (n 184) at 94.

¹⁸⁷ Calland R ‘Illuminating the Politics and the Practice of Access to Information in South Africa, available at <http://www.foip.saha.org.za/static/paper-wars-access-to-information-in-south-africa> (accessed 10 September 2018) 1. See also *My Vote Counts 1* para 37.

¹⁸⁸ An amendment to the PAIA was published in GN R. 630 of 3 June 2020 published in *Government Gazette* 43388 of 3 June 2020 (The Promotion of Access to Information Amendment Act 31 of 2019).

¹⁸⁹ *My Vote Counts 2* order.

This chapter examines how the PAIA has fallen short of its constitutional mandate.¹⁹⁰

3.2. The Constitutional right of access to information and political party funding

The inclusion of the right of access to information in the Interim Constitution was seen as an innovation of great significance¹⁹¹ given the apartheid government's obsession with official secrecy.¹⁹² In one of the earliest cases to deal with this right, Jones J held:

'The purpose of section 23 is to exclude the perpetuation of the old system of administration, a system in which it was possible for government to escape accountability by refusing to disclose information even if it had a bearing upon the exercise or protection of rights of the individual. This is the mischief it is designed to prevent. [...] Demonstrable fairness and openness promotes public confidence in the administration of public affairs generally. This confidence is one of the characteristics of the democratically governed society for which the Constitution strives'.¹⁹³

There was therefore a need to foster a culture of transparency and accountability in public and private bodies and to promote a society in which people were able to exercise and protect all their rights.¹⁹⁴ To achieve this, the right of access to information is divided into two distinct parts¹⁹⁵ namely:

- (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.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

The PAIA is the principal legislation created¹⁹⁶ by section 32(2) and mirrors the entitlements provided for in sections 32(1)(a) and (b). However, despite the enactment of the PAIA there has been little information in the public domain about the passage of money within the political

¹⁹⁰ See *My Vote Counts 1* at 94 where the court found that the PAIA's mechanisms and processes were inherently limited and not capable of affording citizens their right to be properly informed about political parties' funding.

¹⁹¹ World Heritage Encyclopedia (Article ID – WHEBN0040704214).

¹⁹² Currie & Klaaren op cit (n 3) at 2.

¹⁹³ *Phato v Attorney-General, Eastern Cape* 1995 (1) SA 799 (E) at 815 D-F.

¹⁹⁴ Preamble to the PAIA.

The Constitutional Court also held that what is envisaged by [the constitutional principles] is not access to information merely for the exercise or protection of a right, but for a wider purpose, namely, to ensure that there is open and accountable administration at all levels of government. See *First Certification Judgment* at 83 (footnotes omitted).

¹⁹⁵ S 1(a) and section 1(b).

¹⁹⁶ See *My Vote Counts 1* at 136-149.

system. What we do know is that South African political parties enjoy no less than three sources of funding: the first stems from public funds, the second from a standing rule of Parliament¹⁹⁷ and the third from private sources.¹⁹⁸ While the allocation of public funds is publicised, how and on what political parties spend this money remains largely unknown. Furthermore, there is no information on the private funds that political parties receive and there has, until recently been no mechanisms to facilitate this fundamental disclosure requirement. Recognising this insufficiency, the Constitutional Court held that:

‘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’.¹⁹⁹

A year later, the court in *Ramakatsa* went further to tie political party affairs to their public nature by surmising that ‘public resources are directed at political parties for the very reason that they are the veritable vehicles the Constitution has chosen for facilitating and entrenching democracy’.²⁰⁰ This reasoning was developed three years later in the same court when Cameron J held in his minority judgment that:

‘*Ramakatsa*’s reasoning on the public funding of political parties applies pointedly to the question whether information about parties’ private funding is required for the right to vote. Political parties receive public resources because they are the vehicles the Constitution has chosen for facilitating and entrenching democracy. This entails a corollary: that the private funds that they receive necessarily also have a distinctly public purpose, the enhancement and entrenchment of democracy as well as a public effect on whether democracy is indeed enhanced and entrenched. The flow of funds to political parties, public or private, is inextricably tied to their pivotal role in our country’s democratic functioning. There is a further corollary: given the parties’ emphatically public role, any notion of privacy attaching to their private funding must be significantly attenuated’.²⁰¹

Cameron J further acknowledges that ‘the right to vote is a right to cast an informed vote’.²⁰² It does not exist in a vacuum; it consists of more than making a cross on a ballot paper. It is a right which requires ‘one to vote knowingly for a party and its principles and programmes. It

¹⁹⁷ S 57(2)(c) and section 116(2)(c) of the Constitution.

¹⁹⁸ Sarakinsky I ‘Political Party Finance in South Africa: Disclosure Versus Secrecy’ (2007) 4(1) *Democratisation* 112-113.

¹⁹⁹ *M & G Media Ltd* para 10.

²⁰⁰ *Ramakatsa* at para 67.

²⁰¹ *My Vote Counts I* para 37.

²⁰² *Ibid* para 38.

is a right to vote for a political party knowing how it will contribute to constitutional democracy and the attainment of constitutional goals'.²⁰³

The right of access to information is therefore seen as a conduit for civic engagement and state accountability. The PAIA, which is geared to facilitate this right, was held to have two material faults. The first was that it provided for 'request based access'; therefore, absent a request, there is no obligation on the holder of information to make this information available. Secondly, the PAIA possessed a two-pronged approach that made no room for information requests from hybrid institutions, like political parties, as they are neither created by legislation nor required by any legislation to be juristic persons.²⁰⁴ Therefore, to the extent that they do not provide for their legal personality in their constitutions, the PAIA was not applicable to them.²⁰⁵ As a result of this, the PAIA was held to be inconsistent with the Constitution. This declaration of invalidity followed on a more than decade long litigious journey which commenced with a desire to build a mandate, out of section 32, for the disclosure of political party's private funding.²⁰⁶

3.2.1. *Institute for Democracy in South Africa & Others v African National Congress and others 2005 (5) SA 39 (C)*

This case 'positioned civil society squarely against political parties in testing the ambit of the PAIA'²⁰⁷ as it was the first litigious effort by interested parties to try to gain access to the records of donations made to political parties.²⁰⁸ The applicants launched this application after previous attempts to obtain information from the political party respondents²⁰⁹ on their private donation records had failed.²¹⁰ The applicants sought a declaration that the respondents were obliged in terms of section 32(1) of the Constitution, read with sections 11 and 50 of the PAIA, to give access, on due and proper request, to their financial records.²¹¹ The application was based on section 32(1) and was limited to seeking disclosure in respect of donations that were

²⁰³ Ibid para 41.

²⁰⁴ *My Vote Counts 2* at para 65.

²⁰⁵ Ibid.

²⁰⁶ Orr G 'My Vote Counts: The basis and Limits of a Constitutional Requirement of Political Disclosure' (2016) 8 *Constitutional Court Review* at 57.

²⁰⁷ S Bosch 'IDASA v ANC – An opportunity lost for truly promoting access to information' (2006) 123 *SALJ* at 615.

²⁰⁸ This request was made for donations over R50 000.00 for the period 1 January 2013 to 1 May 2014.

²⁰⁹ African National Congress, Democratic Alliance, Inkatha Freedom Party and New National Party

²¹⁰ *IDASA* reason for application.

²¹¹ *IDASA* at 5.

sufficiently substantial, current and capable of influencing and having an effect on a political party, its office-bearers and its members.²¹²

The court found that the issue was whether the applicants were entitled, in terms of the statutory provisions relied on, to the specific records claimed.²¹³ The court first determined whether or not the applicants were entitled to invoke the constitutional provisions of section 32 directly, or whether their remedy was confined to the provisions of the PAIA.²¹⁴ Observing the principle of subsidiarity, (an approach adopted and described in a subsequent judgment),²¹⁵ the court held that ‘section 32, while providing the underlying basis for and informing the rights contained in PAIA, was subsumed by PAIA’²¹⁶ and therefore the applicants had to seek their remedy within the four corners of the PAIA, unless its constitutionality was itself in issue.²¹⁷ To hold otherwise, the court continued, would encourage the development of ‘two parallel systems’²¹⁸ which would go against the Constitutional Assembly’s ideal of having one intervening framework to give effect to the right of access to information. Operating from the premise that the remedy sought had to be found within the PAIA itself, the court then delved into the legal nature of political parties in order to determine the correct request procedure under the PAIA’s two-pronged request procedure. Mirroring the wording of section 32, the PAIA contains two request procedures, namely section 18 which deals with the procedure for requesting information from public bodies and section 53 which deals with the information request procedure for information in private institutions. The court found this distinction to be of significance as, if the respondents were found to be private bodies, the applicants would then have to overcome the additional hurdle of establishing that the donation records were required for the exercise or protection of rights.²¹⁹

Unconvinced by the applicants’ submissions regarding the legal personality of political parties in which the applicants tried to define them as public entities, the court held that in receiving donations political parties were private entities which exercised common law powers which,

²¹² *IDASA* at 6. See also *Bosch op cit* (n 210) who states at 615 that the proceedings were launched amidst a spate of allegations implicating high-ranking politicians in political corruption.

²¹³ *IDASA* at 8.

²¹⁴ *IDASA* at 10.

²¹⁵ *My Vote Counts I* minority judgment.

²¹⁶ *IDASA* at 17.

²¹⁷ *IDASA* para 19. See also the courts reliance on *Currie and Klaaren op cit* (n 3) at 25-6 who explain that a constitutional right of access to information can only be directly relied on in exceptional cases where a provision of the AIA, other legislation or conduct beyond the reach of the IA is challenged as an infringement of section 32.

²¹⁸ *IDASA* at 19.

²¹⁹ *IDASA* at 20.

subject to the relevant fundraising legislation, were open to any person in South Africa.²²⁰ This conclusion necessitated a further inquiry which was to examine whether the applicants, in terms of sections 19(1) and (2) of the Constitution, reasonably required the respondents' donation records in order to exercise or protect their right to make political choices.²²¹ In deciding this point, the court found that the applicants did not reasonably require any of the records in question for the proper exercise or protection of any of the rights claimed.²²² The court held that the phrase 'reasonably required' should be understood to connote a substantial advantage or an element of need and not absolute necessity. The test for need was objective²²³ and according to the court, the applicants had failed to show how the respondent's donation records would assist them in exercising and protecting any of the section 19 rights or why, absent these donation records, they were unable to exercise those rights.²²⁴ The court incorrectly, in my opinion, concluded that disclosure of donor funding was not a prerequisite to free and fair elections,²²⁵ but recognised the public interest in greater transparency concerning political parties' funding sources.²²⁶ This, the court amplified by stating that '[t]he abovementioned conclusion does not mean that political parties should not, as a matter of principle, be compelled to disclose details of private donations made to their coffers. It merely means that, on my interpretation of existing legislation, the respondents are not obliged to disclose such records'.²²⁷

This case highlighted the strictures that the PAIA lent itself to, especially considering the entitlements it is intended to facilitate. It exposed the PAIA's limited reach and impracticality in facilitating general and systematic access to information. Most notably though, the case 'laid the basis for the court to promote a nuanced and purposive interpretation of the PAIA'²²⁸ which we see play out below.

²²⁰ IDASA at 32.

²²¹ IDASA at 42.

²²² IDASA at 36.

²²³The court relied on *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 (3) SA 1013 (SCA) (2001 (10) BCLR 1026) where it was held that information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of section 32, an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information will assist him in exercising or protecting that right (footnotes omitted). Confirmed in *My Vote Counts I* para 31 with reference to *Clutchco (Pty) Ltd v Davis*; 2005 (3) SA 486 (SCA) para 13 and *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) para 30.

²²⁴ IDASA para 47.

²²⁵ IDASA para 52.

²²⁶ IDASA para 87.

²²⁷ IDASA at 57 – 58.

²²⁸ Bosch op cit (n 207) at 624.

**3.2.2. *My Vote Counts NPC v Speaker of the National Assembly and Others (CCT121/14)*
[2015] ZACC 31**

The applicant in this case adopted an approach similar to the one in *IDASA*, relying on section 32 of the Constitution to give proper effect to the right contained in section 19(3).²²⁹ The applicant invoked the exclusive jurisdiction of the Constitutional Court²³⁰ and asserted that information about political party private funding was essential to an informed exercise of the enshrined political right.²³¹ The applicant further contended that the problem was precisely that the PAIA did not require disclosure of party political funding²³² and that for this reason Parliament should be compelled to pass legislation that obliged political parties to disclose the sources of their private funding. This application sought to compel the enactment of legislation regulating the disclosure of private funding records as a matter of continuous course, rather than as a once-off upon request,²³³ as is the case currently under the PAIA. The relief the applicant sought was not contemplated in the PAIA itself, but in section 32 and the applicant required that the court interpret the ambit of the section 32(1) right and the extent to which Parliament had fulfilled its obligations under section 32(2).

Cameron J, for the minority, held that the specific question was whether information on the private funding of political parties was information that was required to exercise the right to vote. If it was, then the further question was whether Parliament had passed legislation that gave effect to this right.²³⁴ Relying on existing precedents²³⁵ he found that the information on political parties' private funding was required for the proper exercise of the right contained in section 19 and further that Parliament had failed to pass legislation that gave effect to this right. He held, therefore, that the issue was not the validity of the PAIA, but whether Parliament had adequately fulfilled its obligations in terms of section 32.²³⁶ This, the minority concluded, required an assessment of the reach, and not necessarily the validity, of existing access to information legislation.²³⁷ The minority further concluded that this assessment could be achieved by 'invoking the Constitution to gauge the extent to which legislation meets the

²²⁹ *My Vote Counts 1* para 2.

²³⁰ Section 167.

²³¹ *My Vote Counts 1* para 2.

²³² *My Vote Counts 1* para 19.

²³³ *My Vote Counts 1* para 19.

²³⁴ *My Vote Counts 1* para 2.

²³⁵ Which confirm that access to information is a necessary precondition for the enjoyment of the entitlements in section 19.

²³⁶ *My Vote Counts 1* para 67.

²³⁷ *Ibid.*

constitutional obligation'.²³⁸ The PAIA had failed because it did not define 'information',²³⁹ and only defined 'record', thereby limiting the operation of the Act to that which was defined and excluding anything which wasn't.²⁴⁰ Coupled with this, the PAIA created no obligation for the preservation of recorded information and, as such, rendered the application of the Act reactive.²⁴¹ Most pertinently, the court concluded that the PAIA failed because records could only be requested from private or public bodies,²⁴² thus excluding all entities whose legal personality did not fall within these constrictions. The PAIA was therefore unable to facilitate the disclosure of information regarding the funding of political parties and this, the minority found, was a context with unique demands to which the PAIA failed to address itself²⁴³ and this mischief ought to be corrected without putting form over substance.

The majority of the court disagreed with the minority finding that 'Parliament had failed to fulfil its constitutional obligation to enact the legislation envisaged in section 32(2)'.²⁴⁴ The majority considered the issues of

1. Exclusive jurisdiction;
2. Whether the PAIA was the legislation envisaged in section 32(2) of the Constitution;
3. Separation of powers;
4. Circumstances in which the principle of subsidiarity applies and the need for it; and
5. Whether the applicant had challenged the constitutional validity of the PAIA.

Exclusive jurisdiction having been decided²⁴⁵ in the affirmative, the court then turned its attention to the wording of section 32 of the Constitution, the long title, the preamble and section 9 of the PAIA together with the dicta in *inter alia Independent*

²³⁸ *My Vote Counts I* para 69. The court goes on to hold that if this was the attack then the principle of subsidiarity did not apply as in order for the principle to apply the statute's validity had to be at stake

²³⁹ *My Vote Counts I* para 97.

²⁴⁰ *Ibid.*

²⁴¹ *My Vote Counts I* para 99.

²⁴² *My Vote Counts I* para 102.

²⁴³ *My Vote Counts I* para 96.

²⁴⁴ *My Vote Counts I* para 122.

²⁴⁵ The court held at para 135 that 'We conclude thus: the applicant alleges that Parliament has failed to fulfil the obligation imposed by section 32(2) of the Constitution to enact legislation that gives effect to the right contained in section 32(1) of the Constitution. In terms of section 167(4)(e) of the Constitution, only this Court has jurisdiction to answer that question.'

Newspapers,²⁴⁶ *Brummer*²⁴⁷ and *PFE International*²⁴⁸ to find that there was no doubt that the PAIA was the legislation envisaged by section 32(2) and the fact that ‘it might have shortcomings in its protection of the right and possibly even be constitutionally invalid does not alter this legal reality’.²⁴⁹ The PAIA was the legislation envisaged by the Constitution and the applicant could not dictate to Parliament how the PAIA should read²⁵⁰ as this would offend against the principle of separation of powers. Any shortcomings complained of within the PAIA were best to be dealt with by a frontal challenge to the PAIA. To the extent that this had not happened, the principle of subsidiarity was breached.²⁵¹ Simply put, the court held that subsidiarity was a well-established doctrine in South African law which states that ‘where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution’.²⁵² Mirroring the reasoning in *IDASA*, the court held that ‘allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of “two parallel systems of law”’.²⁵³ The court held that the applicant’s failure to challenge the PAIA rendered the application, at least on the merits, moot and the application was dismissed.

3.2.3. *My Vote Counts NPC v Minister of Justice and Correctional Services and another* 2018 (5) SA 380 (CC)

The trilogy of cases in the access to political information melee ends with a recognition of the insufficiency of the PAIA in facilitating, in particular, the entitlements of section 19. In this case, as proposed by the majority judgment in the preceding case, a frontal challenge to the constitutional validity of the PAIA was launched in the Western Cape High Court.²⁵⁴ The applicant contended that, properly understood, section 32 read with sections 19 and 7(2) of the Constitution required Parliament to pass legislation that provided for the recordal and disclosure of information about the private funding of political parties and independent

²⁴⁶ *Independent Newspapers (Pty) Ltd v Minister of Intelligence Services: In re: Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) at para 23 and 156.

²⁴⁷ *Brummer v Minister for Social Development and Others* [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (1) BCLR 1075 (CC) at para 75.

²⁴⁸ *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC).

²⁴⁹ *My Vote Counts I* para 147.

²⁵⁰ *My Vote Counts I* para 156.

²⁵¹ *My Vote Counts I* para 159.

²⁵² *My Vote Counts I* para 161 (footnotes omitted).

²⁵³ *My Vote Counts I* para 160 (footnotes omitted).

²⁵⁴ *My Vote Counts v President of the Republic of South Africa and Others* 2017 (6) SA 501 (WCC).

candidates; and the PAIA, being the legislation passed to fulfil this obligation, had failed to do so.²⁵⁵ The High Court, relying heavily on the minority judgment in *My Vote Counts I*, held that in terms of sections 19(1), 19(3), 32 and 7(2) of the Constitution information about the private funding of political parties and independent ward candidates was reasonably required for the effective exercise of the right to vote and, to the extent that the PAIA did not allow for the recordal and disclosure of this information, it was inconsistent with the Constitution and invalid. In reaching this conclusion, the court considered three pertinent issues. The first was whether the Constitution required disclosure of private funding; if it did whether the PAIA allowed for the disclosure of the private funding of political parties, as is required under s 32(1) of the Constitution, and whether or not the PAIA was unconstitutional.

These issues were decided systematically by the court probing, in each instance, the substance of the issues. In deciding the first issue, the court considered the wording of section 32 and held that there was no restriction on who could access information and similarly, the concept of information that was held was suggestive of information that was known or current.²⁵⁶ Therefore, the interdependency created by section 32(2) meant that section 32 had to be read together with section 19 in order to determine what the Constitution required.²⁵⁷ The court having established that the right in section 19(3), was among the rights contemplated in section 32(1)(b) and that the term ‘required’ meant ‘reasonably required’,²⁵⁸ found that ‘the unique nature of political parties and their influential role has a significant bearing on whence and from whom their funds derive’²⁵⁹ and as such, information about their private funding was required for the exercise and protection of the right to vote. Following this conclusion, the court had to consider whether the PAIA allowed for the disclosure of party funding information. After considering the circumstances under which information can be requested under the PAIA, the court found that the PAIA’s mechanisms and processes were inherently limited and not in sync with section 32 and, as a result, limited this section.²⁶⁰ This conclusion necessitated an enquiry whether this limitation was reasonable and justifiable as contemplated in section 36. In answer, the court found that the right to privacy could be justifiably attenuated as privacy

²⁵⁵ *My Vote Counts 2* para 59. The Court reached this conclusion by noting that the PAIA operates pairwise by requiring one requester of information from another entity whereas information about political party funding was not pairwise as it is a relationship between dozens of political parties and millions of voters. See *My Vote Counts I* minority judgment at para 95-96.

²⁵⁶ WCC Judgment at 14.

²⁵⁷ WCC Judgment at 22.

²⁵⁸ WCC Judgment at 24.

²⁵⁹ WCC Judgment at 28.

²⁶⁰ WCC Judgment at 64.

operated truly in a personal realm, and as one moved into business and social interactions, the scope of personal space shrank.²⁶¹ Therefore, ‘given the public nature of political parties and the fact that the private funds they receive [serve] a distinctly public purpose’, the limitation imposed by the PAIA on section 32 was not reasonable and justifiable. Tying all these issues together, the court held that the PAIA was unconstitutional and invalid insofar as it did not allow for the disclosure of private funding of political parties as required by section 32(1) for the effective exercise of the right to vote and make political choices.

Following the declaration of invalidity by the High Court, the matter was referred to the Constitutional Court for confirmation.²⁶² The court observed that making information reasonably accessible to voters in terms of the PAIA was a laborious procedure.²⁶³ The court found, as proposed by Currie and Klaaren,²⁶⁴ that the PAIA was firstly under-inclusive²⁶⁵ in that it did not go far enough in its coverage; and secondly the Act was limited as its provisions and procedures permitting and restricting access to information were too onerous and restrictive.²⁶⁶ The court further noted that it did not help much that this crucial information could only be freely accessible at the discretion of the respondent Minister. Reasonable access, the court held, should be institutionalised²⁶⁷ and the ease with which information was made accessible ought to depend on the nature of the right whose exercise or protection was sought to be facilitated. The right to vote was one such example. It was intrinsic to its proper enjoyment and its essentiality that all information be recorded and be easily or reasonably accessible.²⁶⁸ For these reasons the PAIA was held to fall short of its constitutional mandate.

3.3. Conclusion:

Access to information is not only fundamental to a properly functioning participatory democracy, but also serves to increase public confidence in government and enhances its legitimacy.²⁶⁹ As found by the Constitutional Court, ‘the architectural design of the nation’s constitutional democracy requires that leaders must first be elected by the populace before any of them, including the head of state, may be elected by fellow members in legislative bodies to

²⁶¹ WCC Judgment at 67.

²⁶² S 172(2).

²⁶³ *My Vote Counts 2* para 70.

²⁶⁴ Currie & Klaaren op cit (n 3) at 27.

²⁶⁵ *My Vote Counts 2* para 70.

²⁶⁶ See *My Vote Counts 1* paras 96, 104, 108 and 116.

²⁶⁷ *My Vote Counts 2* para 70.

²⁶⁸ *My Vote Counts 2* para 71.

²⁶⁹ Ibid.

become leading constitutional office-bearers'.²⁷⁰ The PAIA fails to honour this 'architectural design' because it affords only the right to gain access, upon specific request, to specific records held by specific bodies at specific times.²⁷¹ The upshot was, as the minority held in *My Vote Counts 1*, that 'the private contributions, and their amount and provenance, could be left unrecorded – and therefore incapable of being requested in terms of PAIA'.²⁷² This, together with the narrow pairwise relationship the PAIA envisaged between individual requesters and individual entities holding the records, whose disclosure is compelled only upon application, means that it cannot fulfil the demand of section 19(3), or the promise of section 32.²⁷³ The PAIA, despite being the law upholding transparency, offends, in its current form, the Constitution's entitlements and the need for effective, practical and systematic access to information.

²⁷⁰ *My Vote Counts 2* para 2.

²⁷¹ *My Vote Counts 1* para 95.

²⁷² *My Vote Counts 1* para 100.

²⁷³ *My Vote Counts 1* para 101.

CHAPTER 4

REVIEW OF INTERNATIONAL POLITICAL AND LEGAL CONTEXTS

4.1. Introduction

The preceding chapters illustrated the importance of promoting access to information through the development of adequate regulatory regimes in the fight against corruption. This regulation pivots on regulating the passage of private funds to and through political coffers. The previous chapter demonstrated how easily transparency frameworks create unintended strictures, contradicting their intent. Being a global phenomenon, the fight against corruption has necessitated a collective approach, which according to international law, comprises ‘a body of rules established by custom or treaty and recognized by nations as binding in their relations with one another’.²⁷⁴ International law instruments place a positive duty on state parties to adopt measures which incorporate principles of transparency and access to information in an effort to root out illegal, corrupt and illicit practices. This chapter reviews the international legal and political contexts applicable in the fight against corruption.

In *Glenister*²⁷⁵ the court held that ‘our Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the state’s conduct in fulfilling its obligations in relation to the Bill of Rights’.²⁷⁶ Governments’ ratification of anti-corruption international law instruments which require the adoption of laws, policies and practices to detect and deter actual or perceived corruption reflects acquiescence with the need to fight this most debilitating scourge. This was aptly stated in *My Vote Counts (WCC)* where it was surmised that ‘the nexus between corruption and political donations has already been accepted by Parliament by its ratification of these conventions, and South Africa has an obligation to honour them’.²⁷⁷ *Glenister* further confirms that:

‘The obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere and is enforceable not only there. Our Constitution appropriates the obligation itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere.’²⁷⁸

²⁷⁴ https://www.lexico.com/definition/international_law (accessed 19 August 2018).

²⁷⁵ 2011 (3) SA 347 (CC) (“*Glenister*”).

²⁷⁶ At 178.

²⁷⁷ Para 37.

²⁷⁸ At 189.

International law recognises that transparency and openness, especially in the fight against corruption, are crucial to gaining and maintaining citizens' trust in government. Among other things, transparency helps create fairness of opportunity by exposing and punishing undue influence over politicians, protecting against the infiltration of illicit money into politics, and encouraging parties and candidates to adhere to the rules.²⁷⁹ As Chaskalson J held: '[t]he international and foreign authorities are of value because they analyse arguments for and against and show how other jurisdictions have dealt with this issue. For that reason alone, they require our attention.'²⁸⁰

Regular elections involving competing political parties and movements have become the dominant method of selecting a government.²⁸¹ Funding, with no reciprocal obligation, is crucial to the overall vibrancy of an electoral and democratic system.²⁸² Genuinely competitive democratic politics is not possible without well-functioning and socially embedded parties.²⁸³ In order to function, political parties require substantial financial resources. However, because these parties contest for public power, it is a natural expectation that those who donate money to political parties expect and are sometimes promised and even given favourable treatment in political decisions.²⁸⁴ It is therefore essential for every well-functioning democracy to develop a party funding regime that is capable of at least reasonably mitigating the threat of corruption in this crucial area.²⁸⁵ Regulation is seen as the first of many vital steps in mitigating the effects of corruption, and to this end a number of guidelines have been published to guide states in their regulatory endeavours.

4.2. International Law instruments

South Africa is considered bound at international level by agreements ratified by Parliament²⁸⁶ and is therefore obliged to accede to the instructions thereby prescribed. International law is defined as

‘that body of law which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe, and therefore, do commonly observe in their relations with each other and which includes also: (a) the rules of law

²⁷⁹ E Falguera et al *Funding of Political Parties and Election Campaigns: A Handbook on Political Finance* (2014) IDEA at 2.

²⁸⁰ Makwanyane at 34.

²⁸¹ Falguera op cit (n 279) at 1.

²⁸² Ibid.

²⁸³ www.ekint.org-1480597166-finec_ekint_political_party_finance_best_practice.pdf (accessed 24 November 2018).

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Law of South Africa, 2ed, Replacement Volume (2012) 5(3) LexisNexis para 330.

relating to the functioning of international institutions or organisations, their relations with each other, and their relations with States and individuals; and (b) certain rules relating to individuals and non-State entities so far as the rights or duties of such individuals and non-State entities are the concern of the international community'.²⁸⁷

The international law which must be considered includes agreements to which South Africa is not a party, and other norms of international law not binding on South Africa.²⁸⁸ The Constitutional Court in *S v Makwanyane*²⁸⁹ held that:

‘International agreements and customary international law provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies ... may provide guidance as to the correct interpretation of particular provisions’.²⁹⁰

The following instruments, to which South Africa is a signatory, comprise our international law obligations: United Nations Convention against Corruption,²⁹¹ UN Convention Against Transnational Organised Crime,²⁹² African Union Convention on Preventing and Combating Corruption,²⁹³ and Southern African Development Community Protocol against Corruption.²⁹⁴ Other international instruments which may be consulted include the Universal Declaration of Human Rights,²⁹⁵ the International Covenant on Civil and Political Rights,²⁹⁶ the International Covenant on Economic, Social and Cultural Rights²⁹⁷ and the Organisation for Economic Co-operation and Development: Convention on Combating of Foreign Public Officials in International Business Transactions.²⁹⁸

²⁸⁷ Butterworths *Words and Phrases Judicially Defined* 2ed.

²⁸⁸ Bill of Rights Compendium Issue 29 General 1A-12.

²⁸⁹ [1995] ZACC 3 (*Makwanyane*).

²⁹⁰ Para 35.

²⁹¹ 22 November 2004.

²⁹² 2000.

²⁹³ 11 November 2005.

²⁹⁴ 15 May 2003.

²⁹⁵ 1948.

²⁹⁶ 1966.

²⁹⁷ 1966.

²⁹⁸ 1999. This Report ‘is not in itself binding in international law but can be used to interpret and give content to the obligations in the Conventions’ to which South Africa is a signatory see *Glenister* at 187.

4.2.1. *Southern African Development Community Protocol against Corruption (15 May 2003)*

The Southern African Development Community Protocol (SADC Corruption Protocol) provides codes of procedure and practice on various issues, as agreed by member states.²⁹⁹ The protocol refers to ‘the adverse and destabilizing effects of corruption throughout the world on the culture, economic, social and political foundations of society’ and recognises that ‘corruption undermines good governance, which includes the principles of accountability and transparency’.³⁰⁰ The protocol prescribes in article 2 that ‘each state party shall adopt such legislative and other measures under its domestic law to prevent and combat acts of corruption committed in and by private sector entities’.³⁰¹ The significance of this provision to South Africa’s unique political system lies in the fact that whilst South African political parties are neither considered to be private nor public entities, the Constitutional Court has held that ‘any notion of privacy attaching to their private funding must be significantly attenuated’³⁰² because ‘[t]he flow of funds to political parties, public or private, is inextricably tied to their pivotal [public] role in our country’s democratic functioning’.³⁰³

Article 4 of the protocol details preventative measures that should be adopted in order to deter corruption by, *inter alia*, adopting mechanisms to promote access to information in order to facilitate the eradication and elimination of opportunities for corruption.³⁰⁴

4.2.2. *United Nations Convention against Corruption (22 November 2004)*

The United Nations Convention (UN Convention) against corruption is a far-reaching measure, and the mandatory character of many of its provisions make it a unique tool for developing a comprehensive response to this global problem.³⁰⁵ Under international law, freedom of information is a fundamental human right and the touchstone of all the freedoms to which the United Nations is dedicated.³⁰⁶

Article 5(1) of the UN Convention provides that:

‘Each State Party shall in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption

²⁹⁹ <https://www.sadc.int/about-sadc/overview/sa-protocols/> accessed 20 September 2018.

³⁰⁰ *Glenister* at 169.

³⁰¹ Article 2 of the SADC Protocol.

³⁰² *My Vote Counts 1* para 37.

³⁰³ *Ibid.*

³⁰⁴ Art 4(1)(d) of SADC Protocol.

³⁰⁵ Available at <https://www.unodc.org/unodc/en/treaties/CAC/> (accessed 1 October 2018).

³⁰⁶ Jagwanth *op cit* (n 78) at 5.

policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability’.

Article 7(3) provides that:

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

Article 7(4) directs that ‘each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest’. The UN Convention places transparency at the centre of the fight against corruption and recognises the importance of promoting citizen participation in issues that affect public affairs.

4.2.3. African Union Convention on Preventing and Combating Corruption (11 November 2005)³⁰⁷

The African Union Convention on Preventing and Combating Corruption (AU Convention on Corruption) represents a consensus on what African countries should do in the areas of prevention and criminalisation of corruption.³⁰⁸ The preamble to the AU Convention on Corruption acknowledges that ‘corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent’.³⁰⁹

Article 10 of the AU Convention provides that ‘each State Party shall adopt legislative and other measures to:

- (a) Proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and
- (b) Incorporate the principle of transparency into funding of political parties.

Article 9 provides that each state party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences.

³⁰⁷ African Union Convention on Preventing and Combating Corruption of 11 July 2003 (AU Convention) ratified without material reservation on 11 November 2005.

³⁰⁸ Available at <https://www.business-anti-corruption.com/anti-corruption-legislation/african-union-convention-on-preventing-and-combating-corruption/> (accessed 24 June 2018).

³⁰⁹ *Glenister* at 169.

These instruments, which are binding on South Africa, illustrate the belief that suffrage and political participation are fundamental human rights which can only be protected through appropriate measures that promote transparency and accountability. There is therefore a clear obligation, at international level, on states to adopt legislative measures that promote and enhance transparency and public participation through access to information, in the funding of politics.

4.3 The International political economy and the party funding narrative

One of the main factors impeding the political process in many countries from attaining democratic ideals is the influence of money.³¹⁰ Thus awareness has gradually been building that organising well-administered elections does nothing for democracy if the outcome is bankrolled.³¹¹ Political finance poses global challenges and, in an attempt to address these challenges, most countries now have at least some form of regulation over the passage of money within the political system.³¹² No set of rules will be effective in any two countries,³¹³ and there is therefore no universally accepted regulatory regime mainly because political party funding systems are largely influenced by political history and the electoral system in place.³¹⁴

The Council of Europe has set standards to guide its members towards finding their own answers to the party funding dilemma. Without prescribing an ideal model, countries are urged to adopt rules which ensure an equal and fair opportunity for all parties competing in the political arena and guaranteeing their independence.³¹⁵ Political finance reforms are largely ineffective if they are not ‘conscientiously enforced as part of the broader governance and ethics framework’.³¹⁶ The legal framework of party financing includes, where applicable, constitutional provisions, locally enacted laws on political parties and laws on the financing of political parties and election campaigns; and all other laws that impact on the financing of political parties.³¹⁷

³¹⁰ Ibid.

³¹¹ Ibid at 2.

³¹² Ibid at 2.

³¹³ Falgeura op cit (n 279) at 3.

³¹⁴ Fn 96.

³¹⁵ I Van Biezen ‘Financing Political Parties and Election Campaigns’ available at https://www.researchgate.net/publication/268442128_Financing_Political_Parties_And_Election_Campaigns (accessed 25 November 2018).

³¹⁶ G Pienaar ‘Upholding Democratic Ideals and the challenge of regulating political party funding and election campaign finance: case study Southern Africa’ HSRC at 20.

³¹⁷ Available at https://www.researchgate.net/publication/268442128_Financing_Political-Parties_and-Election_Campaigns at 14 (accessed 24 November 2018).

Countries would benefit from written laws as opposed to customary law or administrative policies in governing the financing of political parties and the conduct of candidates and election campaigns, as written law is more readily subject to judicial interpretation and review and is more useful to interested parties, especially voters.³¹⁸ The legal framework adopted should be objective, clear, transparent and publicly accessible.³¹⁹ In regulating political finance, legislation should also cover the fundamental matters of traditional sources of finance, private donations, public subsidies to political parties, the financing of election campaigns and provisions for disclosure, reporting, monitoring and enforcement.³²⁰ It is important that legislation is adopted which counteracts (i) the imbalance in opportunities for political participation, (ii) competition generated by unequal access to private donations, and (iii) the potentially corrupting effects of private funding.³²¹

According to the Framework for Supporting Better Public Policies and Averting Policy Capture (Framework),³²² money is a necessary component of the democratic process, and if the financing of political parties and electoral campaigns is not adequately regulated and the rules enforced, money becomes a means for undue influence and policy capture by narrow interests.³²³ According to the Framework, the overall objective is to promote a ‘level playing field’ and ensure transparency and accountability, and this can be achieved by:³²⁴

- 1) Balancing funding through direct and indirect public contributions. In this regard, it is imperative to have clear and equitable criteria relating to access and proportionality.
- 2) Framing private funding by *inter alia*, banning and/or limiting certain types of private contributions.
- 3) Limiting privileged access to state resources by controlling the use of state resources;
- 4) Requiring disclosures in the form of timely and comprehensive reporting which will enable scrutiny from both civil society, observers and the media;
- 5) Creating a platform for the independence of monitoring bodies and processes;
- 6) Providing for dissuasive and enforceable sanctions; and
- 7) Reviewing periodically, the functioning of the system.

³¹⁸ Ibid.

³¹⁹ Ibid at 15.

³²⁰ Ibid at 15.

³²¹ Ibid at 21.

³²² OECD ‘Financing Democracy: Framework for supporting better public policies and averting policy capture’ GOV/PGC/ETH (2014) 3/REV1.

³²³ Ibid at 3.

³²⁴ Ibid at 6-7.

A study of the relevant literature, which is by no means exhaustive, prescriptive or binding, and an examination of how foreign jurisdictions, against the backdrop of their international obligations, have fashioned regulatory regimes, indicates that the generally accepted criteria for selecting the best practice can be summarised as follows:

4.3.1. *Balancing competing considerations:*

In regulating the permissible sources of party funding, lawmakers (MPs) weigh and balance a number of different and sometimes competing considerations.³²⁵ For example, in considering the different submissions in *IDASA*, the court had to consider the right of privacy enjoyed by donors juxtaposed with the right of access to information, as guaranteed by the Constitution. Many jurisdictions have, in an effort to limit reciprocity, attenuated the various sources of funding. This is done, in some cases, by prohibiting foreign and anonymous donations. The problems of vote buying appear to be particularly profound in many transitional and consolidating democracies where the political process more broadly tends to be dominated by ‘particularistic exchanges’.³²⁶ In those democracies, caps on individual and corporate donations seem to be a viable prescription.³²⁷ Restrictions commonly apply to corporate donations due to the porous nature of their funds and, although private business remains an important source of finance, some countries³²⁸ have moved towards more stringent legislative frameworks on corporate donations in an attempt to limit the influence of ‘plutocratic financing’ of democratic politics.³²⁹ This limitation often tends to apply to donations from foreign governments as well, as these have been found to lead to policy capture.

4.3.2 *Limitations on spending*

Unlimited spending creates an unfair disadvantage for some parties, in that parties with wealthier voters may simply drown out the voice of political actors representing less wealthy social groups.³³⁰ Capping campaign-related expenditure may have the benefit of reducing the demand for political donations, and thus also the possibility of *quid pro quo* and reliance on potentially risky sources of funding.³³¹ Therefore, an ideal campaign finance regime will cap spending at some level that is high enough to allow for vigorous competition, but that is at the

³²⁵ Currie and Klaaren op cit (n 3) at 27.

³²⁶ Van Biezen op cit (n 315) at 5.

³²⁷ See FN 283 *supra*. See also Van Biezen op cit (n 315) at 5 where it is explained that contributions are in the US are deemed justified in the interests of preventing corruption or the appearance thereof.

³²⁸ Belgium, France, Israel, Mexico and Poland.

³²⁹ Fn OECD 327 *supra* at 6.

³³⁰ Fn OECD 327 *supra* at 3.

³³¹ *Ibid*. See also Van Biezen op cit (n 315) at 5.

same time low enough to protect equality of opportunity and to reduce the risk of corruption.³³² In some countries, spending limits are controversial because they are seen as imposing restrictions on the freedom of speech.³³³ However, most democracies have leaned towards more restrictive regulations³³⁴ as these tend to have a more positive effect on governance.

Restrictions on campaign expenditure are accepted on the grounds that unrestricted spending gives an unfair advantage to interests with privileged access to financial resources, and might make elected officials dependent on their economic contributors at the expense of the general interests of the population at large.³³⁵ The Canadian Supreme Court ruled in *Harper v Canada*³³⁶ that ‘spending limits are justified with a view to preventing the most affluent citizens from monopolizing the electoral discourse’.³³⁷ Limits on party and campaign expenditure are a device to avoid excessive increases in the cost of party politics. They also help to control inequalities between political parties and restrict the scope of improper influence and corruption.³³⁸

If a limit in force only applies to the amount of money an individual donor may contribute, rather than to the total sum of the permissible private donations, then wealthy contributors might divide up a large donation into various smaller ones,³³⁹ thereby circumventing the very purpose of the limit. Therefore, in order to ensure equality of opportunity for the different political forces, electoral campaign expenses should have a fixed ceiling.³⁴⁰ As with donation limits, the effectiveness of spending limits depends both on whether the limit is set at the right level to curb the advantage for those with access to a lot of money without hindering inclusive and engaging campaigning.³⁴¹ In the same way that private funding drowns out the voice of

³³² Ibid.

³³³ Van Biezen op cit (n 315) at 5 where she explains that the United States is known for having privileged the freedom of speech and represents a particularly permissive tradition with regard to campaign expenditure, as spending by candidates is not limited, with the exception of presidential candidates who voluntarily accept spending limits in exchange for public subsidies. She goes on to explain that the US Supreme Court ruled in *Buckley v Valeo* that expenditure ceilings impose direct and substantial restraints on ... political speech, thus deeming expenditure limits unconstitutional and in violation of the First Amendment.

³³⁴ Van Biezen op cit (n 315) at 5 explains that the European approach has been to justify restrictions on campaign expenditures as a means to control the potential disruptive role of money in politics.

³³⁵ Ibid.

³³⁶ *Harper v Canada (AG)* [2004] 1 S.C.R 827, 2004 SCC 33.

³³⁷ Van Biezen op cit (n 315) at 5. See also *Harper v Canada* as this judgment has been seen as representing a more egalitarian approach to political finance.

³³⁸ Van Biezen op cit (n 315) at 29.

³³⁹ Ibid at 22.

³⁴⁰ Ibid at 30.

³⁴¹ Falguera op cit (n 279) at 27.

those with limited coffers, uncapped spending drowns out the campaign efforts of smaller political parties.

4.3.3. *Transparency, Access to Information and Oversight:*

The basis of any policy regulating political finance would be for the beneficiaries in the political process to submit information about how they raise and spend money.³⁴² Transparency requirements seek to enhance political accountability by providing insight into the actual levels of income and expenditure.³⁴³ Much depends on the ability, competence and willingness of particular regulators and agency officials to adequately perform their duties.³⁴⁴ The agencies responsible for oversight and enforcement should have some degree of independence from the executive and legislative branches of government, so as to diminish influence from the very elected officials whose parties they are obliged to oversee.³⁴⁵ There are also some advantages inherent in having multiple agencies exercising oversight and enforcement, each acting on its own and independent of one another.³⁴⁶ However the best practice appears to lie in having multiple oversight mechanisms for different branches of government,³⁴⁷ precisely because the different levels of government are self-governing.

4.3.4 *Enforcement and sanctions*

Party finance regimes operate as integrated systems, and for this reason the question of sources of funding and of various limits applicable to spending by parties require adequate enforcement.³⁴⁸ Formal rules alone do not have a significant impact. Dedicated work by numerous stakeholders is required to manage the role of money in politics. Reformers must emphasise how political finance regulations can be effectively implemented.³⁴⁹ Effective enforcement requires a public institution with a clear mandate and sufficient independence, resources and a willingness to engage with political finance issues.³⁵⁰ However, given that rules are inevitably broken, it is equally important that transgressions are met with adequate sanctions, because sanctions serve to deter evasion or violation of the rules. An effective system of enforcement demands that these requirements are embedded in a context of legal sanctions

³⁴² Ibid at 28.

³⁴³ Van Biezen op cit (n 315) at 7.

³⁴⁴ Fn 283 *supra* at 3.

³⁴⁵ Ibid at 4.

³⁴⁶ Ibid at 4.

³⁴⁷ Falguera op cit (n 279) at 4.

³⁴⁸ Ibid at 21.

³⁴⁹ Falguera op cit (n 279) at 4.

³⁵⁰ Ibid at 31.

which impose penalties for violations of the law.³⁵¹ Sanctions should be heavy enough to deter violations,³⁵² but excessively heavy-handed sanctions are rarely enforced and therefore do not represent credible threats to violators.³⁵³ The best approach may be to rank violations from serious to minor,³⁵⁴ with enforceable, proportionate, effective and dissuasive sanctions,³⁵⁵ the lack of which can discredit the rule of law and the regulatory regime.³⁵⁶

4.4 Conclusion

While money is necessary for democratic politics, it can also be a tool to buy votes or influence policy decisions.³⁵⁷ The need to regulate uncontrolled, undisclosed and opaque political finance was identified by the Global Commission on Elections, Democracy and Security as important in upholding the integrity of elections in both emerging and mature democracies.³⁵⁸ However, too often political finance regulations are reactive measures for crisis situations, focusing on a particular regulation rather than a more holistic consideration of broader issues, such as the role of political parties and election candidates.³⁵⁹ Nevertheless, the need for transparency in the role of money in politics cannot be overstated, and it is for this reason that international law focuses primarily on law enforcement strategies in the fight against corruption.³⁶⁰ While there is no universally acceptable model upon which to premise regulation, international law obligations prescribe, at a minimum, the advancement of transparency and openness together with formalised regulatory institutions with sufficient resources, expertise and independence.

The next chapter examines the adequacy and effectiveness of South Africa's regulatory framework.

³⁵¹ Van Biezen op cit (n 315) at 7.

³⁵² Fn 283 *supra* at 4.

³⁵³ *Ibid* at 5. See also Van Biezen op cit (n 315) at 27.

³⁵⁴ Fn 283 *supra* op cit at 5.

³⁵⁵ Fn 96 *supra*; see also OSCE-ODIHR – Discussion paper on political party finance in Spain at 19.

³⁵⁶ Van Biezen op cit (n 315) at 6.

³⁵⁷ Falguera op cit (n 279) at 1.

³⁵⁸ *Ibid* at Foreword (section 1:III).

³⁵⁹ Falguera op cit (n 279) at 14.

³⁶⁰ T Budhram & N Geldenhuys 'Corruption in South Africa: The demise of a nation? New and improved strategies to combat corruption' (2018) 1 *SACJ* 37.

CHAPTER 5

POLITICAL PARTY FUNDING ACT 6 of 2018

5.1. Introduction

The previous chapter outlined the obligations imposed by international law for the regulation of political party funding while highlighting some facets of the party funding narrative. Countries, including South Africa, increasingly appreciate the need for legal frameworks to regulate political finance, and in response to its constitutional and international obligations, Parliament has passed, and the President has assented³⁶¹ to, the Political Party Funding Act, 6 of 2018. This chapter assesses whether the Act's provisions adequately address the problems associated with party funding, particularly the threat of corruption.

The legislature recognises that public confidence in Parliament requires disclosure by Members of Parliament of their financial interests,³⁶² and has adopted a Code which deals with the issue of conflicts of interest between their work as representatives of the South African electorate and their personal financial interests. In addition to a duty to disclose, the Code requires parliamentarians to resolve conflicts of interest in favour of the public interest.³⁶³ This is known as the public interest override, and Currie and Klaaren suggest that 'where it does apply, the public interest override equals disclosure ...'.³⁶⁴ This assertion relates mainly to refusals to disclose under the PAIA; however the recalcitrance that defines non-disclosure of political finance is analogous to a refusal under the PAIA and should have, without more, been able to trigger the public interest override. Instead however, the PAIA was declared unconstitutional and an intervening framework has been adopted.

Sections 1, 7, 19, 32, 33 and 195 of the Constitution require appropriate legislation to ensure transparency and accountability in the funding of political parties. Each provision imposes a specific obligation on Parliament to enact legislation to give effect to the duties, rights and principles³⁶⁵ enshrined therein. Vibrant, genuinely competitive democratic politics is not possible without well-functioning and socially embedded parties,³⁶⁶ which require substantial financial resources. Those who donate money to political parties tend to expect and are

³⁶¹ 21 January 2019.

³⁶² K O'Regan *Political Parties in South Africa: The interface between Law and Politics* Keynote address Cape Town 27 August 2010 at 18 (op cit n 143).

³⁶³ Ibid. This is also closely related to the public interest override principle.

³⁶⁴ *De Lange v Eskom Holdings Ltd* [2012] 1 All SA 543 (GSJ) at 137.

³⁶⁵ My Vote Counts submission to Parliament, referred to in the *My Vote Counts I* at 16

³⁶⁶ Fn 283 *supra*.

sometimes promised and even given favourable treatment in political decisions.³⁶⁷ South Africa's unique political culture, as outlined in chapter 2, illustrates that dominant-party politics is still greatly entrenched within the political fabric as a result of the racial cleavages of the past;³⁶⁸ and the ideal of a multi-party democracy exists mainly as an ideology, while access to political resources remains within the reach of a select few parties and individuals. This reality negates the founding provisions of the Constitution and section 236 which, read together, provide that '[t]o enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis'. The Political Party Funding Act (the Act) not only responds to the directive in sections 1(d) and 236 by facilitating a multi-party democracy, but it also assumes the responsibility of democratising the electoral system, balancing access to political resources, rooting out opportunities for corruption and giving effect to section 32.

The Act represents a positive step towards acknowledging and promoting the values of transparency, openness, responsiveness and accountability, intending, as its long title suggests, to provide for and regulate the public and private funding of political parties, and in particular:

- to establish and manage official Funds to sufficiently support political parties;
- to prohibit certain donations made directly to political parties;
- to regulate disclosure of donations accepted;
- to determine the duties of political parties in respect of funding; to provide for powers and duties of the Electoral Commission; to provide for administrative fines;
- to create offences and penalties; to repeal the Public Funding of Represented Political Parties Act, 1997; and
- to provide for transitional and related matters.

The preamble recognises the Republic's public international law obligations, which require transparency in the funding of political parties; and in the process, Parliament has given effect to section 44³⁶⁹ of the Constitution by enacting legislation which regulates, in particular, private political party funding.

³⁶⁷ Ibid.

³⁶⁸ Lane and Ersson op cit (n 103) at 224.

³⁶⁹ Which details the National Legislative Authority.

5.2 An evaluation of the Political Party Funding Act

The Political Party Funding Act was assented to on 21 January 2019, its date of commencement is yet to be proclaimed. Similarly, its regulations are still in draft form. Nevertheless, this thesis examines the Act's sufficiency as:

- a) an anti-corruption framework which promotes access to information, transparency and accountability; and
- b) a legal framework which gives effect to the constitutional objectives contained in section 1(d), section 236 and section 19 of the Constitution.

Holtes³⁷⁰ observes that:

‘One of the key elements of disagreement is whether the ... PAIA covers the entire field of section 32. This stems from the ambiguous nature of the phrase “national legislation must be enacted” which does not clearly indicate whether a single piece of legislation is envisaged or whether there might be a plurality of legislation which gives full effect to the right. Perhaps the constitutional drafters intentionally left the phrase ambiguous in order to allow Parliament to decide which approach would be more effective ... Parliament has evidently decided that one Act will fulfil the obligation ... But on the other hand, the fact that PAIA is the legislation principally intended to honour the section 32(2) obligation does not necessarily mean it is the *only* legislation intended to give effect to the right (original author’s emphasis). Quite plainly, PAIA is the core legislation intended to facilitate the right. Meanwhile on the penumbra, gaps in providing access to information concerning specific rights might be filled by separate legislation where section 32 is not the central concern of that legislation’.³⁷¹

The Act represents an innovative intervening framework primarily intended to address political finance in response to the directive in section 236 read with sections 1(d), 32 and 19 of the Constitution. The Act commences with an acknowledgement that the Republic’s public international law obligations require it to incorporate the principle of transparency in the funding of political parties.³⁷² Section 9 introduces this requirement by prescribing that ‘[a] political party must disclose to the Commission all donations received-

- (a) above the prescribed threshold;
- (b) in the prescribed form and manner.

³⁷⁰ Ryan Holtes, ‘Political Party Funding III’ *Helen Suzman Foundation*

³⁷¹ https://hsf.org.za/publications/hsf-briefs/political-party-funding-iii-the-implications-which-follow-from-our-legal-framework#_edn (accessed 17 June 2018) footnotes omitted.

³⁷² Preamble.

Furthermore, juristic persons making donations above the prescribed threshold must disclose them to the [Independent Electoral] Commission.³⁷³ This dual reporting requirement acts as a further measure of ensuring the veracity of the information received by the Commission and also allows audits of to the books of the Commission to detect any reporting discrepancies. The Commission is further required to publish information of the donations disclosed to it, on a quarterly basis.³⁷⁴ While the Act does not exclude the application of the PAIA, it ensures that the PAIA's request strictures are circumvented by requiring the Commission to make information readily available. As Bentley and Calland observe, the PAIA plays a valuable role because of its capacity to prompt the inversion of power relationships.³⁷⁵

Apart from requiring disclosure of donations, the Act regulates the types of donations political parties may receive. The historical secrecy that attaches to political finance has made it possible for them to accept monetary assistance from any source. Under the Act, political parties may not accept donations from foreign governments or foreign government agencies,³⁷⁶ foreign persons or entities,³⁷⁷ organs of state³⁷⁸ or state-owned enterprises.³⁷⁹ The prohibition of receipt of monies from foreign sources is intended to safeguard the country's domestic autonomy and sovereignty.³⁸⁰ However, it has also been argued that (foreign) party aid is of critical importance for transitional societies because it supports the existence of a viable opposition in a context of patronage-dominated politics.³⁸¹ Given South Africa's budgetary constraints, it is important to leave the way open for as many legitimate alternative sources of funding as possible. The Act could accommodate the receipt of foreign aid through one of the Funds established to avert policy capture – aimed mainly at promoting the ideal of a multi-party democracy. The Funds, generally, are responsible to hold money obtained in contravention of the provisions of the Act³⁸² and interest earned on that money.³⁸³ The first Fund is the Represented Political Party Fund³⁸⁴ which is responsible for administering funds appropriated

³⁷³ S 9(2).

³⁷⁴ S 9(3)(a).

³⁷⁵ Bentley K & Calland R 'Access to Information and Socio-Economic Rights: A Theory of Change in Practice' in Langford M, Cousins B, Dugard J & Madlingozi T' (Eds), *Socio-Economic Rights in South Africa* (2013) Cambridge University Press at 358.

³⁷⁶ Section 8(1)(a).

³⁷⁷ Section 8(1)(b) unless the donation is related to training or skills development of a member of a political party, policy development by a political party [subsection 8(4) and (5)].

³⁷⁸ Section 8(1)(c).

³⁷⁹ Section 8(1)(d).

³⁸⁰ Van Biezen op cit (n 315) at 6.

³⁸¹ Ibid.

³⁸² S 2(2)(b) and 3(3)(b).

³⁸³ S (2)(2)(c) and 3(3)(c).

³⁸⁴ S 2.

by an Act of Parliament;³⁸⁵ and the second Fund is the Multi-Party Democracy Fund³⁸⁶ which is responsible for administering funds appropriated from private sources.³⁸⁷

The Multi-Party Democracy Fund is similar to the US PAC model³⁸⁸ through which funds from organs of state, state-owned enterprises and foreign governments and/or government agencies may not be received.³⁸⁹ While the Funds may not receive funds from the sources prohibited under section 8, they are tailored to accept anonymous donations,³⁹⁰ and the money held under this Fund may only be allocated to represented political parties³⁹¹ in accordance with the prescribed formula, which makes provision for equitable and proportional representation. Democracies benefit from a public funding regime which encompasses an equitable formula of funding that does not disproportionately favour large parties.³⁹² Ideally, the formula for allocation of funds should strive to achieve a 50/50 split between proportionality and equity.³⁹³

Sections 7 and 7(2) provide for what the money allocated by the Fund may and may not be used for respectively. The latter includes paying any remuneration, fee, reward or benefit to any person representing a party at local, provincial or national level, or any person employed in the state,³⁹⁴ to finance or contribute to any matter, cause or event or occasion in contravention of any code of ethics binding on members of Parliament (MPs) or members of the provincial legislatures (MPLs),³⁹⁵ or to defray legal costs relating to internal political party disputes.³⁹⁶ These limitations are novel in that placing restrictions on the use of money diminishes the need for excessive fundraising. This prohibition should ideally extend to political parties generally and not be limited to money received from the Funds.

The prohibition of certain types of donations, ties in with the donation thresholds which, according to the draft regulations, are determined by regulation 9 of the presidential regulations. Donations may not be in excess of the prescribed amount in a particular financial

³⁸⁵ S 2(2)(a).

³⁸⁶ S 3.

³⁸⁷ S 3(3)(a).

³⁸⁸ United States of America Political Action Committee which is a model which pools campaign contributions from members and donates those funds to campaigns for or against candidates, ballot initiatives and legislation. Available at https://en.wikipedia.org/wiki/Political_action_committee (accessed 10 September 2018).

³⁸⁹ S 3(4).

³⁹⁰ S 3(5).

³⁹¹ S 6(1).

³⁹² Fn 283 *supra*.

³⁹³ See also submissions to the NCOP made by MVC.

³⁹⁴ S 7(2)(a).

³⁹⁵ S 7(2)(b).

³⁹⁶ S 7(2)(d).

year³⁹⁷ and political parties are required to disclose to the Commission all donations received in excess of the prescribed amount in any given financial year.³⁹⁸ The obligation to disclose donations above a certain threshold rests both with the political party and the juristic entity donor.³⁹⁹ While donation and disclosure thresholds are favoured, the disclosure threshold limit should not be so high so as to exclude the corrupt activity at local government level or so low and strict as to impose an undue administrative burden that could erode the freedom of political organisations to operate freely.⁴⁰⁰ International trends suggest that an ideal campaign finance regime caps spending at a level that is high enough to allow for vigorous competition, but low enough to protect equality of opportunity and to reduce the risk of corruption.⁴⁰¹

Chapter 4 of the Act includes provision for the duties of political parties to furnish information to the Commission⁴⁰² and to account for income.⁴⁰³ The information must be furnished at the prescribed time in the prescribed manner in order to enable to the Commission to monitor compliance with the Act.⁴⁰⁴ All funds received by political parties must be deposited into a bank account registered in the political party's name⁴⁰⁵ and proper books of account and financial statements must be maintained by an accounting officer⁴⁰⁶ and audited by a qualified auditor,⁴⁰⁷ who will then provide an opinion on the party's compliance with the prescripts of the Act.⁴⁰⁸ The Auditor-General is also empowered to audit any registered political party's books and records of account and financial statements relating to money allocated by the Represented Political Party Fund.⁴⁰⁹ The office of the Auditor-General of South Africa (AGSA) has raised concerns⁴¹⁰ about its involvement as required by section 12(5).⁴¹¹ Apart from raising capacity issues, it is of the view that it is not clear whether the monies received by political parties from the Represented Political Parties Fund are intended for a public purpose as envisaged by section 188(2) of the Constitution because political parties are not accountable to

³⁹⁷ S 8(2).

³⁹⁸ S 9(1).

³⁹⁹ S 9(2).

⁴⁰⁰ OSCE-ODIHR – Discussion paper on political party finance in Spain at 16.

⁴⁰¹ Fn 283 *supra* at 3

⁴⁰² S 11.

⁴⁰³ S 12.

⁴⁰⁴ S 11.

⁴⁰⁵ S 12(1)(a) and (b).

⁴⁰⁶ S 12(1)(c).

⁴⁰⁷ S 12(1)(d).

⁴⁰⁸ S 12(3).

⁴⁰⁹ S 12(5).

⁴¹⁰ Submission to NCOP ad hoc committee by AGSA dated 8 June 2018.

⁴¹¹ The Auditor-General may at any reasonable time audit any represented political party's books, records of account and financial statements relating to money allocated to the party from the Represented Political Party Fund.

Parliament for the running of their operations or the use of their funds. The AGSA's comments, however, seem to overlook the persuasive minority judgment of Cameron J in *My Vote Counts I*, in which he stated that the funds political parties receive are inextricably tied to their pivotal role in our country's democratic functioning and therefore serve a 'distinctly public purpose';⁴¹² therefore by extension, political parties can and should be made to account to Parliament under the aegis of the AGSA.

Chapter 5 of the Act provides mechanisms to enforce the regulations, in terms of which the Commission is entrusted with wide powers of monitoring and inspection. The Commission may request any person to disclose and/or produce any relevant information in whatever form and be required to answer questions in relation to that information.⁴¹³ Provision is also made for the Commission to approach the Electoral Court for an order compelling⁴¹⁴ compliance with a request as set out in section 14(2). The Commission is also empowered to issue directions in terms of section 15(1) in lieu of imposing a sanction, but in the event that the Commission has no option but to impose a sanction, the following sanctions are available to the Commission:

- Suspension of payment of allocated money under section 16;
- Recovery of money irregularly accepted or spent under section 17;
- Imposition of an administrative fine in terms of section 18.

The Act also provides for penalties in the form of imprisonment, for violations related to some of its provisions.⁴¹⁵ However, as Lodge states, '[i]n theory, national politicians acknowledge the importance of reducing corruption, even if they are not always willing to undertake the political risks attendant upon punishing prominent offenders'.⁴¹⁶

The intention to align this Act with globally adopted regulatory norms is evident. The Act is the result of a robust consultative process and represents a significant step in promoting the values of openness, accountability and responsiveness as required in the Bill of Rights, and it is widely lauded as a significantly progressive step towards cumulatively meeting the obligations imposed by sections 1(d), 7(2), 19, 32 and 236 of the Constitution.

⁴¹² *My Vote Counts I* para 37.

⁴¹³ S 14(2).

⁴¹⁴ S 14(3).

⁴¹⁵ S 19.

⁴¹⁶ Lodge op cit (n 95) at 53

5.3 Conclusion

South Africa has the obligation imposed by section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. This injunction is fortified by section 217 of the Constitution which requires that ‘all spheres of government maintain high ethical standards, provide impartial services, and that they be responsive, accountable and transparent’. Transparency is a means towards two ends: the first aims to promote the accountability of government and the second to promote greater public participation in government. Access to information legislation is therefore pivotal for the informed discussion of government policies and actions. Whilst political finance disclosure does not guarantee free and fair elections, disclosure of political finances serves as an important anti-corruption measure and these broader good governance aims are part of the ideal of the franchise, creating an accountable and representative government⁴¹⁷ because - ‘in an open and democratic society, government should be accountable for its actions and decisions.’⁴¹⁸ Acquiesce to this commitment is evident from the provisions of the Act.

Disclosure permits additional funds to be made available over and above those in the cash-strapped public purse, but importantly assists the detection of undue influence in donations by enabling the monitoring of how the actions of political parties might benefit donors.⁴¹⁹ The South African legal framework on political finance is comprehensive in that it provides for permissible sources of funding, allowed expenses, disclosure, reporting, enforcement and sanctions. These provisions are stated in clear and unambiguous language and a cursory reading of the regulations indicates that the Act is objectively rational and based on public-political consensus.⁴²⁰

Regulatory reforms aren’t simply idealistic. They are created in real-world situations which pose formidable challenges.⁴²¹ Under the PAIA these challenges were found to render it under-inclusive and over-restrictive and this is the mischief that this Act aims to cure. The Act’s essentiality lies in the fact that it is crucial to electoral integrity and credibility, which

⁴¹⁷ Orr op cit (n 206) at 57.

⁴¹⁸ Currie and De Waal op cit (n 13) at 637.

⁴¹⁹ Available at <http://www.hsrc.ac.za/en/review/hsrc-review-jan-march-2016/reforming-party-finance-in-sa> (accessed 4 September 2018).

⁴²⁰ Walecki et al ‘Political Finance’ available at https://www.legislationline.org/download/action/download/id/2845/file/Walecki,+et+al_Political_finance.pdf at 24 (accessed 25 November 2018).

⁴²¹ Falguera op cit (n 279) at 14.

contributes to the achievement of democratic elections and in turn representative and accountable institutions.⁴²²

⁴²² Struwig, Roberts & Vivier op cit (n 112) at 1122 and at 1137.

CONCLUSION

The vision of society proclaimed by the Constitution is an open democracy. There are a number of dimensions to that openness and paradoxically, secrecy is one of them.⁴²³ Secrecy has historic roots, dating back to the days of apartheid rule when the administration was preoccupied with official secrecy, enabling advancement of esoteric ideals and creating a platform for the proliferation of corruption. Due to the lack of any mechanisms, legal and otherwise, to scrutinise government activity, corruption thrived – and the speed with which the scourge has spread post-democracy has not been contained, despite the best efforts of the constitutional drafters to prevent official secrecy by introducing transparency, openness and accountability to the constitutional order.

Access to information is entrenched as a fundamental human right which aims to exclude the perpetuation of the old regime⁴²⁴ and serves as a conduit for the attainment, enjoyment and protection of other guaranteed rights. As Jagwanth states, the main aim of allowing access to information is to ‘allow an individual to access information that may have an impact on her or him so that she or he can meaningfully exercise the other rights in the Bill of Rights’.⁴²⁵ The reach of access to information is delineated by the PAIA which provides for

- i) categories of information;
- ii) categories of dispatchers of information; and
- iii) the procedure to be followed to access required information.

However, this delineation, while necessary for the provision of legal certainty, lends the PAIA to some unintended strictures which in turn limit its application and invariably impede its aim. Whilst the PAIA is the primary law intended to fulfil the right guaranteed by section 32 of the Constitution, it is not the only piece of legislation that can facilitate this right; ‘gaps in providing access to information concerning specific rights might be filled by separate legislation where section 32 is not the central concern of that legislation’.⁴²⁶

The Political Party Funding Act is one such piece of legislation. Its preamble makes plain that it is intended to incorporate the principle of transparency in the funding of political parties in order to address the proliferation of corruption which has festered within political finance. But what exactly is required of an Act which is meant to facilitate transparency, encourage

⁴²³ Klaaren op cit (n 84) at 1.

⁴²⁴ See fn 193 supra.

⁴²⁵ Jagwanth op cit (n 78) at 4.

⁴²⁶ https://hsf.org.za/publications/hsf-briefs/political-party-funding-iii-the-implications-which-follow-from-our-legal-framework#_edn (accessed 17 June 2018) footnotes omitted.

accountability and promote the core objectives of a participatory democracy? First, this legislation falls to be construed in line with the broad objectives of the PAIA and secondly, it has to be interpreted against the backdrop of the mischief it intends to cure.

The future of the nation largely stands or falls on how elections are conducted, who gets elected into public office, how and why they get voted in.⁴²⁷ Voting is regarded as a ‘formal expression of preference’⁴²⁸ and ‘voting patterns indicate that the electorate is gravitating towards making rational choices during elections, which choices are based on the information available to them’.⁴²⁹ These conclusions fortify the inextricable link between access to information and the proper exercise of the right to vote, which is critical to the coming into being of the different arms of state and the effective and efficient functioning of the entire state machinery.⁴³⁰ Against this backdrop the need for transparency, openness and accountability from those seeking public office is undeniable.⁴³¹ Accountability, as this paper has demonstrated, is unattainable if the government has a monopoly on the information which informs its policies, decisions and actions.⁴³² During the campaign period, political parties vie for votes by putting forward promises of how government administration will function, should they be elected to office. As such, the information that political parties disseminate becomes fundamental to the proper exercise of the right to vote. Not only does this information aid in the facilitation and enjoyment of political rights, but it also speaks to the overall intention of the democratic core of our constitutional order, which rests on the pillar of participatory democracy.⁴³³ Participation in turn creates a platform for scrutiny,⁴³⁴ the significance of which goes beyond affording the electorate the ability to make informed choices but also shines the light on the largely uncharted area of government administration.

The grand scale of malfeasance and corruption within government administration indicates just how little we know about to whom office-bearers are indebted. What we do know is that political parties are mainly financed by private sources, and what we can accept is that political parties cannot function efficiently and effectively without adequate financial resources.⁴³⁵

⁴²⁷ *My Vote Counts 2* at 32.

⁴²⁸ Fn 174 *supra*.

⁴²⁹ Habib *op cit* (n 152) at 86 and 91.

⁴³⁰ *My Vote Counts 2* at 32.

⁴³¹ *Ibid*.

⁴³² Currie and de Waal *op cit* (n 13) at 467.

⁴³³ *Ibid*. See also Hoexter *op cit* (n 184) at 94.

⁴³⁴ Fn 60 *supra* at 62.

⁴³⁵ Butler *op cit* (n 8) at 1.

However, it is the way that this money infiltrates the political system⁴³⁶ and the extent to which parties are beholden to donors, that continues to cripple the democratic order. States are increasingly becoming aware that corruption presents a serious threat to their core principles and values and hinders social and economic development. As a result, there has been a growing acceptance of the need to address the problem in a coordinated, comprehensive and sustainable manner.⁴³⁷ The problem has mainly been rooted in a ‘lack of consensus around definitions, classifications and typologies’⁴³⁸ all of which stood in the way of adequate regulatory reforms. Therefore, the international guidelines for drafting regulatory frameworks include⁴³⁹ limiting campaign spending, setting donation limits, prohibiting certain types of donations, providing public funding, balancing public and private sources, increasing transparency through disclosure requirements and providing for compliance and enforcement.

South Africa’s regulatory efforts align broadly with these guidelines, despite the Act containing lacunae which can allow unscrupulous donors to circumvent its intended purpose. Corruption thrives due to formalised weaknesses within systems and therefore freedom of information legislation usually involves detailed and complex provisions, defining the nature and limits of the right and the requisite conditions for its enforcement⁴⁴⁰ in order to limit the scope for corruption. However, the Political Party Funding Act, while being of great moment, remains too open-ended and generous in its intention. First, the Act’s disclosure ceiling, with no concomitant donor ban at the same ceiling, paves the way for multiple donations to be made under the ceiling by the same donor. Since ‘donor’ is not defined, nothing bars the circumvention of the donation ceiling from the same family of donors. This paper has argued that the best way to circumvent the donation ceiling lacuna is to first define the term ‘donor’ so as to exclude single donations from the same family of donors and at the same time reducing the donation ceiling to an amount that would create an undue administrative burden on donors who intend to circumvent the ceiling. Given South Africa’s stark wealth divides, the current ceiling invariably excludes a majority of the voting population, thereby doing nothing to alleviate the capture between private interests and political candidates. Furthermore, the issues of donations by foreign entities need to be more strictly regulated. Policy considerations vary from party to party and any party can accept a donation from a foreign entity and claim that the

⁴³⁶ Butler op cit (n 8) at 2.

⁴³⁷ *Glenister* at 168.

⁴³⁸ Butler op cit (n 8) at 4.

⁴³⁹ 179817 IEC Regulation – Political party funding: Options for enhanced regulation. Presentation to the Ad Hoc Committee on Party Funding Electoral Commission 17 August 2017.

⁴⁴⁰ *IDASA* at para 12 (footnotes omitted).

donation is for “skills and/or policy development”. Policies are never cast in stone and as such, parties can oscillate between policy considerations in order to fall within the allowable category of receiving funding from foreign entities. These lacunae are too easily navigable, rendering the Act’s intended purpose redundant. The Act also fails to facilitate the functioning of South Africa’s multi-party democratic system which seeks to have political parties operate from a level playing field. This is so because the allocation of money received via the Multi-Party Democracy Fund is limited only to parties that are represented in the National Assembly. Secondly, the proportionality and equity splits would see many parties unable to maximise their campaign efforts and therefore offend against the entitlements of section 19(1)(c). The current public funding model already isolates most parties, and so the proportionality and equity split should do more to bridge the financial gap and create a platform for other political parties to benefit from the funds collected and be less reliant on private donors.

While there is no panacea for institutionalised ills like corruption, measures can be put in place to limit its scope, particularly within government administration. South Africa’s regulatory attempts *prima facie* mirror internationally acceptable criteria for regulating political finance and abating the corruption that accompanies it, but fails to take South Africa’s unique political climate into consideration, thus creating an opportunity for donors to be more creative in their capture efforts and thereby failing to meet its stated mandate.

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