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Opening Pandora's Box? On Revealing the Private Funding of Political Parties

The legislative regulation of the private funding of political parties in South Africa is long overdue. It is a matter that has been discussed by Parliament since 1997 but on which, until very recently, there has been a perplexing lack of transparency. The recent High Court judgment in the My Vote Counts case has finally focused attention and called for action on amending the law and developing a clearer policy on the private funding of political parties. It is surprising that this topic has not been scrutinised more closely during the first two decades of democracy. In light of the importance of the question of funding, it is also surprising that there has not yet been greater public insistence that parties should reveal their funders especially since the media have been consistently critical of instances of corruption resulting from the lack of regulation of private funding.

The question of the lack of private funding regulation was initially raised in 2003 by the Institute for Democratic Alternatives in South Africa and, subsequently, by various non-governmental organisations and political parties.¹ The media has been consistently critical of instances of corruption resulting from the lack of regulation of private funding.² South Africa is one of very few democracies worldwide that does not regulate private funding of political parties.

Although legislation on public funding of political parties was enacted in 1997 in the form of the Public Funding of Represented Political Parties Act, there is still no regulation of private funding of political parties in South Africa. There is also no legislation or other forms of regulation for the public or private funding for the local sphere of government. But all this is set to change. This is however set to change. The Political Party Funding Bill was published in the Government Gazette in September 2017 and the public has been given an opportunity to make written submissions.

Intriguingly, it is not just the ruling party that has resisted such disclosure. Opposition parties such as the Democratic Alliance have been particularly unsupportive of such disclosure efforts. Reluctance to disclose naturally raises the question: What is the agenda here? It will be argued here that disclosure of donations is vital for the promotion of transparent government and multi-party democracy. Such disclosure is also of crucial importance in the fight against corruption.

The most important objective of legislation on private funding would be to combat corruption, particularly *quid pro quo corruption*.³ The direct exchange of an official act for money, described as *quid pro quo corruption*, should be clearly legislated against.

Political party funding pertains to the set of methods that a political party applies to raise money for campaigns and routine party activities. It is suggested that the matters of public funding and private funding should be combined in one Act. This is the position in Germany where the Political Parties Act of 2009⁴ regulates both public and private funding.

Although the public funding of political parties is equally of interest and will briefly be commented on, this piece will focus on the regulation of private funding.

The Constitution:

The starting point for devising a principled framework for the regulation of political party funding is the 1996 Constitution:⁵ Section 236 of the Constitution states:

The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Funding for Political Parties:

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.⁶

The regulation of political party funding impact on rights in the Bill of Rights, most significantly the right to freedom of expression, the right to political participation and the right to access to information.

Regarding the right to freedom of expression, the Constitutional Court has held that this right

is what “makes [the right to vote] meaningful.” This is only if information is freely imparted, and citizens are kept informed. As Mogoeng CJ has noted on behalf of the Court, “the public can only properly hold their elected representatives accountable if they are sufficiently informed of the relative merits of the issues at stake”. As the United States Supreme Court explained in *Buckley v Valeo*, disclosure of political funding “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 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 most 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 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 favours that may be given in return.

This right to vote for a political party includes knowing the private sources of political parties' funding. This is because private contributions to a political party are not made thoughtlessly or without motive. They are made in the anticipation that the party will advance a particular social interest, policy or viewpoint. Political parties, in turn, depend on contributors for the very resources that allow them to conduct their democratic activities. Those resources keep flowing to the extent that they

meet their contributors' and funders' expectations. There can be little doubt, then, that the identity of those contributors, and what they contribute, provides important information about the parties' likely behaviour. Judge Cameron powerfully captured the importance of informed decisionmaking in the initial *My Vote Counts* case:

So the right to vote does not exist in a vacuum. Nor does it consist merely of the entitlement to make a cross upon a ballot paper. It is neither meagre nor formalistic. It is a rich right – one to vote knowingly for a party and its principles and programmes. It is a right to vote for a political party, knowing how it will contribute to our constitutional democracy and the attainment of our constitutional goals.⁷

The principle of multi-party democracy is a foundational value of the 1996 Constitution.⁸ The principle therefore requires further elaboration.

The My Vote Counts Case

In 2015 the organisation My Vote Counts (MVC) approached the Constitutional Court to order Parliament to enact legislation obliging political parties to disclose their sources of private political funding.

On 27 September this year, Judge Yasmin Meer found that the right to vote includes the right to cast an informed vote, stating that the right to choose a political leader “is valuable only if one knows what one is choosing”.

The Court failed to deal with the substance of the issue and focused on the rather technical question of subsidiarity. The majority of the Constitutional Court held that MVC should have mounted a “frontal challenge” to the constitutionality of the Promotion of Access to Information Act (PAIA) for failing to allow access to information on the private funding of political parties, in a High Court.

MVC proceeded to bring the case to the Western Cape High Court this year.

Due to the importance of this information in the right to vote, MVC contended that the constitutional right of access to information required the systematic disclosure of private funding to parties. MVC further argued that information about political parties' private funding is essential for citizens to exercise their constitutional right to vote and is an essential to SA's multiparty democracy.

On 27 September this year, Judge Yasmin Meer found that the right to vote includes the right to cast an informed vote, stating that the right to choose a political leader “is valuable only if one knows what one is choosing”. Meer found that the Promotion of Access to Information Act did not adequately provide for disclosure of private funding for political parties and that the mechanisms to access information through PAIA were limited. She therefore held that the act limited the right to information and the right to vote. In her view, PAIA did not allow for the ‘continuous and systematic’ recording and disclosure of private funding.

If a member of the public currently wants to obtain information on party funding, he or she has to apply through the rather arduous procedure provided for in PAIA. This should not have to be the case. The information should be much more readily available.

The High Court found in favour of the MVC constitutional challenge to PAIA. In essence the court held:

That information about the private funding of political parties is reasonably required for the effective exercise of the right to vote and to make political

choices and that PAIA is unconstitutional and invalid to the extent that the Act does not allow for disclosure of private political funding information. And finally that Parliament has 18 months to fix PAIA and to allow for disclosure of private political funding info

MVA and the court focused on PAIA as the route to greater transparency. There is however a case to be made for the enactment of specific legislation on party funding. This is the route that has been elected by various modern democracies.

Multi-Party Democracy

It is often stated that political parties are vital public institutions to enhance citizens' participation in their own governance and in democracy as well as civic education. Multi-party democracy necessitates the development of the political will of the people, shaping public opinion, political education, promoting active participation of citizens in political life and establishing links between the people and the organs of state and the Legislature.

In the South African context the value of this statement needs to be tested against the reality to ensure that reference to purposes such as the 'development of the political will of the people' does not remain merely rhetorical. It is proposed that measures be taken to strongly encourage parties to invest in the political education of the citizenry.

The ultimate aim of the new legislation on political party funding should be to help improve the capacity and financial sustainability of political parties in the legislature, both big and small.

It can be argued that the current South African system of public and private funding of parties is not sufficiently conducive to strengthening multi-party democracy. In some instances political funding is distorting the principle of multi-party democracy. An unregulated or under-regulated system of funding does not contribute to achieving a level playing field for all parties. There should be greater sensitivity to the fact that the larger political parties almost always have an undue funding advantage over smaller parties. It should further not be unduly onerous for new political parties to enter the political arena and contest elections.

The ultimate aim of the new legislation on political party funding should be to help improve the capacity and financial sustainability of political parties in the legislature, both big and small. It is suggested that a mandatory rule should be introduced that would oblige political parties to spend a percentage of their funding on civic education.

Public Funding

Public funding sustains the institutionalisation of political parties in democracies since such funding provides the necessary financial support for political parties to conduct their daily activities. It also reduces their dependence on private funding. Such support strengthens the capacity of political parties and can help to level the electoral playing field.⁹

National Legislation provides for funding of political parties in the Public Funding of Represented Political Parties Act;¹⁰ which is the enabling legislation that is administered by the Independent Electoral Commission. The Act created the Represented Political Parties Fund which is administered by the Independent

Electoral Commission. 90% of this fund gets allocated to parties in accordance with their representation in the National Assembly; 10% of the fund gets distributed between the provinces proportionally.

The Act provides for the performing of audits on political parties. Ninety percent of the funds are allocated to parties in terms of their representation in the National Assembly and Provincial Legislature; and the remaining ten percent is divided proportionally amongst provinces, and equally amongst the parties represented in each provincial legislature. The amount allocated to parties has barely kept pace with inflation.¹¹ No funding is currently made available at local government level.

It is for example possible to devise a model whereby a certain percentage of public funding gets distributed proportionally and a certain percentage gets distributed equally among all political parties.

Other sources of public funding include: MPs funded through their party caucuses by national and provincial legislature; funds transferred directly from Provincial Legislatures; and currently funding from any other private source is allowed which can include its members, businesses (local and foreign) and civil society groupings.¹²

Section 5(1)(b) of the Act¹³ says that the allocation may be used “for any purposes compatible with [the party’s] functioning as a political party in the modern

democracy,” the scope of ‘functioning is not defined in the Act nor is a political party defined in any legislation. However section 5(3) sets out specific prohibitions on the uses of public funds. These funds constitute a small portion of the financing of political party activity, and the majority of the funding is not accounted for and reliable figures are not available.

Concerns have been expressed that the amount that gets distributed from the Public Funding is inadequate to meet the purposes the Fund was designed to meet. It is suggested that the fund be enlarged. The extent to which it should be enlarged should, however, be carefully considered. It is especially important to consider whether enlarging the fund will mean that money will be diverted from other priorities.

The question of the proportionality of the allocation and distribution of moneys from the fund is fairly controversial. The term ‘proportionality’ is interpreted as meaning that each party should receive funding according to its performance in the last election. For this reason, the ANC received close to R60 million and the DA R16 million in 2015. One significant problem attached to this method of distribution is that it can perpetuate the dominance of the ruling party and does not sufficiently support multi-party democracy. It might be prudent to conceive of other methods of distribution that will meet the fairly vague ‘proportionality’ requirement. It is for example possible to devise a model whereby a certain percentage of public funding gets distributed proportionally and a certain percentage gets distributed equally among all political parties.

Finally...

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One of the trickiest questions involves the extent of disclosure that should be expected from donors. Political parties have access to indirect funding, which takes a number of forms including tax exemptions and subsidised access to media. Whereas it can be argued that enjoying these benefits is just part of the political game, any material benefits enjoyed by parties should pass constitutional muster. Improper influence can be traded in many currencies. Proper scrutiny would include access to information on indirect as well as direct funding.

In light of the scourge of corruption and state capture that is corroding our public life, revealing the identity of private funders should become an urgent priority. The foundational values of accountability and transparency mean that for parties to reveal their sources of funding follows irresistibly from the spirit and text of the Constitution. At the very least, a decision that parties and funders should have the privilege of protection and discretion should be justified in an open and transparent manner.

NOTES

- 1 The ANC pledged to develop legislation following the dismissal in April 2005 of a high court application brought by civil society group Idasa aimed at forcing the DA, the ANC, the IFP and the former New National Party to reveal major private financial donors. According to Judith February of IDASA, one of the reasons IDASA decided not to appeal the judgment was that it took the ANC's pledge in good faith. See Vicki Robinson 'ANC reluctant to legislate on political party funding' *Mail & Guardian* 2 March 2007.
- 2 Tabela Timse '1 Billion in Illegal Party Payouts' *Mail & Guardian* 8 March 2013.
- 3 Justice Roberts referred to quid pro quo corruption in *McCutcheon v. Federal Election Commission*. He cited *McCormick v. United States*, 500 U.S. 257, 266 (1991): 'The hallmark of corruption is the financial quid pro quo: dollars for political favors.'
- 4 *Parteiengesetz* 2009
- 5 Constitution of the Republic of South Africa, Act 108 of 1996.
- 6 Constitution of the Republic of South Africa Act 108 of 1996 section 236.
- 7 *My Vote Counts* para 41
- 8 Section 1 (d) of the Constitution refers to: Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.
- 9 <http://www.oecd.org/gov/ethics/financing-democracy-framework-document.pdf> p 9
- 10 Public funding of Represented Political Parties Act 103 of 1997
- 11 Brief document: Public Funding and Regulation of Political Party Finances to enhance and deepen democracy- Draft discussion document- May 2013
- 12 Electoral Commission: Party Funding <http://www.elections.org.za/content/parties/Party-Funding/>
- 13 *Supra* 2