My Vote Counts: The Basis and Limits of a Constitutional Requirement of Political Disclosure

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Should disclosure of information about the finances of political parties and candidates be constitutionally mandated? If so, on what basis? And how might such a constitutional mandate to political information be delimited, so it does not expand into sensitive areas such as the internal workings of parties or private affairs of candidates? Each of these questions is raised by litigation initiated in South Africa by a not-for-profit group, My Vote Counts NPC.

The path to this goal involves arguing that South Africa's constitutional 'right' to freedom of information (FOI) penetrates into the financial affairs of political parties. The litigation seeks to cure a significant lacuna in the law of electoral politics in South Africa, namely the absence of financial disclosure obligations on national political parties. Such laws are commonplace across liberal democracies, in the form of rules requiring parties to declare the receipt of any significant donations and gifts.[1]

But rather than continuing to press the legislature – in effect the caucuses of the parliamentary parties and especially the dominant ANC party – to self-impose such obligations, the group has upped the ante. It has taken the judicial review path under the Constitution of the Republic of South Africa, 1996 (the Constitution) to have the Court dictate to the legislature that political finance disclosure laws must be enacted. In *My Vote Counts 1*,[2] the opening stanza of the litigation, the Constitutional Court rejected the initial plaint and split on issues of substance and procedure.

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[1] Donors in many regimes also have reciprocal legal obligations. There is as yet no suggestion that the South African FOI mandate must apply to individuals and businesses directly, as opposed to parties. In practice donors are less likely to know of their disclosure obligations than are parties. But such obligations act as a check on the parties, especially if they capture cases where a donor has donated multiple amounts, or through slightly different names, and the parties' accounting systems have missed aggregating those donations.

[2] *My Vote Counts NPC v Speaker of the National Assembly* [2016] ZACC 31, 2016 (1) SA 132 (CC), 2015 (12) BCLR 1407 (CC).

Follow up litigation – which I would love to call *My Vote Counts Twice*, but which is formally dubbed *My Vote Counts 2*[3] – is working its way towards the Constitutional Court. In September 2017 a High Court judge declared South Africa's FOI law to be 'invalid' to the extent that it does not provide for any disclosure of private funding of political parties.[4] Constitutional Court review of this decision is expected in the first half of 2018.

The procedural aspects of this litigation are either a wonderland or a minefield. Which descriptor you prefer will depend on your view of the role of apex courts in developing positive constitutional mandates (as opposed to just vetoing laws which they believe overreach limitations on power). Assuming the Constitution implicitly requires disclosure of donations to parties, one procedural conundrum involves whether this renders the present FOI statute unconstitutional because it fails to provide that disclosure. Or would it mean that Parliament can be judicially directed to enact fresh legislation, say a new part to the electoral code, to regulate party finances?

This article will skirt procedural and jurisdictional niceties and focus on the substance of the litigation. These substantive issues should be of interest to those around the globe who are concerned with either the ideal reach of FOI, or the legal conception of parties and regulation of electoral politics. Regardless of whether one approaches these fields – FOI law and the law of electoral democracy – from a philosophical, statutory or constitutional framework, the normative issues raised by the litigation are thought-provoking.

The litigation particularly invites us to reconsider the standard accounts of the purpose and scope of FOI, in the context of regulating money in politics. Both FOI and campaign finance have been issues for public law since even before the emergence of 'modern' electoral democracy through universal suffrage in the late 19th and early 20th centuries. FOI dates, as we shall see, to the Swedish Freedom of the Press Act of 1776. From the mid-Victorian era, candidate expenses have, in many democracies, been subject to regulation. In Westminster parliamentary elections this first arose through disclosure via publication of expenses, then via caps to limit the size of campaigns, as now apply in both the United Kingdom and some of its 'dominions'.[5] As early as 1907 the United States, for its part, sought to prohibit corporate donations to federal parties or candidates.[6] Yet, curiously, there is precious little literature or debate uniting FOI and political finance.

The scheme of this article is to explore these linkages and to welcome the litigation, whilst issuing a cautionary warning. Ultimately, the paper argues for four propositions:

[3] *My Vote Counts NPC v President of the Republic of South Africa* [2017] ZAWCHC 105, 2017 (6) SA 501 (WCC), [2017] 4 All SA 840 (WCC).

[4] Ibid at para 75.

[5] Corrupt Practices Prevention Act 1854 (UK) and Corruption and Illegal Practices Prevention Act 1883 (UK).

[6] Tillman Act 1907 (US) PL 39–56. Though riddled with loopholes in the US, particularly since the neo-liberal ruling in *Citizens United v FEC* 558 US 310 (2010), the idea of capping or prohibiting donations to parties and candidates is now commonplace. See, for example France (bans on direct contributions by entities), Israel (caps on donations) and Canada (limited donations, from individual electors and permanent residents only).

1. Beyond access to personal or private information, FOI is not normally conceived as an individual 'right'. In contrast, the franchise is a cornerstone entitlement of individual adults in any democracy. Unusually, the South African Constitution explicitly recognises FOI *both* as an entitlement of persons and as an important adjunct to the exercise of other constitutional guarantees, including the right to vote. By splicing together these two constitutional yarns, My Vote Counts seeks to weave its case that voters deserve and even need financial disclosure by political parties.
2. FOI classically applies to state agencies. Outside communist or totalitarian systems, political parties are not arms of the state. But alongside its constitutional mandate of FOI, the South African Constitution is also unusual in *insisting* that political parties enjoy some 'clean' public funding.[7] When parties – or for that matter other civil society bodies – receive significant taxpayer financial support, there is a strong argument that their internal finances be open to public scrutiny. This argument is oddly lacking in both *My Vote Counts 1* and *My Vote Counts 2*.
3. Making this link between FOI, elections and public funding of parties not only bolsters the rationale for an implied constitutional requirement of disclosure of party finances. It can also rein in the FOI–political disclosure nexus. There is otherwise a risk that sensitive information will be demanded of electoral actors in future, based on the contestable idea that parties are quasi-public agencies, or on vague notions about what is 'required' for an 'informed' franchise. That risk has already come to pass in Indian Supreme Court cases requiring candidates to declare information about their past, cases surprisingly not discussed in *My Vote Counts 1* or *My Vote Counts 2*. Freedom of political association and the need to avoid discrimination against candidates are values worth balancing in developing jurisprudence in this area.
4. The claim that political finance disclosure is an important element of electoral deliberation by voters has a weak empirical basis. However, the goal of shining light on political donations is such a fundamental one that it is reasonable to ground it within the constitutionalised franchise. Understood as a tool for good governance, FOI can be rationally linked to political finance disclosure. This is because disclosure of private funding of politics enables media scrutiny of – and hence public and even electoral debate about – behind-the-scenes links between politicians and business and lobby groups. Whilst political finance disclosure alone is no panacea for free and fair elections, disclosure of political finances serves anti-corruption and integrity purposes. These broader, good governance aims are part of the ideal of the franchise to create accountable, representative government.

[7] The term 'clean money' has US origins, eg the Maine Clean Election Act, a product of a 1996 citizen-initiative.

I Background – South Africa's Political Finance Regime

According to a Money, Politics and Transparency project, South Africa rates a mere 36 per cent for its overall political finance laws.[8] To put this in context, Africa as a whole has the least developed political finance regulations of any region in the world. Of the countries on the continent that were surveyed and rated, South Africa was behind Kenya yet ahead of Rwanda, Nigeria and Ghana, and well ahead of Botswana and Malawi. Such headline ratings, however, obscure as much as they reveal.

As Ohman, in his recent report for International IDEA explains, South Africa's modest rating was inflated because of its provision of public funding to parties, and the respect and resourcing accorded to its constitutionally enshrined Independent Electoral Commission.[9] Some form of 'equitable and proportional' public funding is required, under s 236 of the Constitution, to 'enhance multi-party democracy'. This is currently provided for in the Public Funding of Represented Political Parties Act.[10] Outside the constitutional mandate of 'clean' public funding and the esteem of its Electoral Commission, South Africa fares poorly by international standards of electoral fairness and integrity. In particular, it has had a laissez-faire approach to not just private donations to parties and candidates, but to campaign expenditure and to the role of third party political actors such as corporate lobby groups and unions.

Unsurprisingly then, the Money, Politics and Transparency project scored South Africa at a miserable 17 per cent for its 'reporting and public disclosure' laws. This low rating was largely due to the absence of any requirements for parties to disclose private donations or to account for their expenditures.[11] To provide a non-African comparison, Australia's national system ranked better, if still unsatisfactorily, at 41 per cent for its overall political finance laws; its disclosure system rated 64 per cent.[12] Australia's national system is similar to South Africa's in providing 'clean' public funding and for having a professional and independent Electoral Commission. However, Australia, unlike South Africa, has a 33-year history of requiring annual disclosure of all sizeable donations to national parties and candidates, and more recent laws requiring similar post-election disclosure by 'third party' campaigners.

What of South Africa in a broader international context? Around 88 per cent of 180 countries surveyed by International IDEA in 2012 had laws requiring some

[8] Money, Politics and Transparency *Campaign Finance Indicators*, available at https://data.moneypoliticstransparency.org/ (accessed 8 June 2018). In contrast, other African countries tend to score less well in practice than on paper, reflecting cultural and resourcing problems in enforcing formal legal provisions.

[9] Constitution ss 190–191.

[10] Act 103 of 1997 (Party Funding Act).

[11] Money, Politics and Transparency *Campaign Finance Indicators*, available at https://data.moneypoliticstransparency.org/countries/ZA/ (accessed 9 April 2017).

[12] Australia is a federal nation; a majority of its states now have both tighter disclosure law and a more comprehensive funding regime than at the national level.

level of financial disclosure by candidates or parties or both.[13] Drilling into that figure, 75 per cent of those surveyed required disclosure from parties, and 65 per cent from candidates (leaving loopholes in countries which did not cover both). Altogether, 75 per cent required some disclosure of private donations, whether the onus was on parties, candidates or both. But only 65 per cent made financial disclosure fully public.[14] These worldwide figures include many illiberal electoral systems. In Europe, about 95 per cent of countries required public disclosure of political donations.[15] South Africa's laggard status is also illustrated by reference to the Convention against Corruption, a United Nations initiative which came into force in late 2005. That treaty calls on nation states to 'consider taking appropriate legislative and administrative measures … to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties'.[16]

Thus, until now South Africa has had a very laissez-faire political finance system. I say 'until now' because, in September 2017, an exposure draft of a Political Party Funding Bill was gazetted.[17] The bill would, for the first time, provide for *some* disclosure of donations to parties. Private gifts, in cash or kind, above a threshold, would be disclosable on both an annual basis and also within one month of an election. Donations from foreign governments, persons or entities, or organs or agencies of the state, would also be prohibited. Anonymous donations above the threshold would still be permitted, but not to a party directly. Instead they could be given to 'a multi-party democracy fund', to be distributed along similar lines as public funding: that is, as a reward for success in elections to the National Assembly and the provincial legislatures. This relatively thin bill appears some 23 years after the first democratic election in the country. It has, almost certainly, been prompted by the *My Vote Counts* litigation. Whilst a start, it is not the constitutionally mandated, nor relatively continuous, disclosure that the backers of the litigation are pressing for.

II The *My Vote Counts* Litigation

The *My Vote Counts* litigation was foreshadowed by a 2005 suit involving the *Institute for Democracy in South Africa v ANC*.[18] There, another not-for-profit group sought to leverage the constitutional guarantees of FOI and the right to vote into a 'principle that political parties, or at least those who hold seats in the …

[13] M Ohman *Political Finance Regulations around the World: An Overview of the International IDEA Database* (2012) at 38, available at https://www.idea.int/sites/default/files/publications/political-finance-regulations-around-the-world.pdf (accessed on 8 June 2018).

[14] Ibid at 38–43.

[15] Ibid.

[16] Convention against Corruption art 7(3). It is notable that unlike measures to establish anti-corruption, anti-bribery and proper government procurement mechanisms, in the Convention political finance disclosure is seen as a desirable but not yet mandatory. For more on the international standards that might apply to South Africa in this area, see J Tham 'My Vote Counts, International Standards and Transparency of Political Party Funding' (2016) 8 *Constitutional Court Review* 74.

[17] *Government Gazette* GN 41125 (19 September 2017).

[18] *Institute for Democracy in South Africa v ANC* [2005] ZAWCHC 30, 2005 (5) SA 39 (C), [2005] 3 All SA 45 (C).

legislatures, are obliged … to disclose particulars of all the substantial donations they receive'. The Western Cape High Court held[19] that party fundraising was a private, not public matter within the Promotion of Access to Information Act (PAIA).[20] The presiding judge also held that, to raise a constitutional matter, the plaintiffs needed to directly attack that statute. On top of that, he held that there was 'no rational connection' between party donation records and other political guarantees in the Constitution to freedom of expression or freedom of association.[21]

Undeterred by those apparent judicial nails in the coffin, and given the continuing inaction of the National Assembly on transparency in political finance,[22] My Vote Counts launched suit in the Constitutional Court in 2014. It named as respondents the Speaker of the Assembly, the President of the Republic, the Ministers for Justice and Home Affairs, and a host of political parties. The applicant's focus was, like the Institute for Democracy before it, on building a mandate for disclosure of private funding of political parties out of the FOI guarantee found in Chapter 2 of the Constitution, the 'Bill of Rights':

> **32 Access to Information**
> (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.

My Vote Counts, following the hint in the earlier case, argued that disclosure was 'required for the exercise' of the right to vote provided in s 19 of the Constitution, rather than more broadly to support freedom of expression. It sought an order that the existing PAIA legislation was inadequate, but avoided a direct attack on its constitutionality. Presumably it feared the baby of FOI might be thrown out with the bathwater. Nor did it do more than 'faintly' seek to argue that parties were to be conceived as organs of the state.[23] Instead it sought an order that, in effect, would require Parliament to broaden PAIA, or amend the relevant electoral legislation, to embrace disclosure of donations to parties.

A majority of seven judges, led by Khampepe, Madlanga, Nkabinde JJ and Theron AJ, held against the applicant. They concluded that Parliament had not failed in its constitutional obligations regarding FOI. The thrust of the majority opinion was not concerned with the substance of the case in the sense of the relationship of FOI to party finance. Rather, it sought to rebuff what it felt was a 'thinly veiled attempt at [judicially] prescribing to Parliament to legislate in a

[19] Ibid at paras 30–32.

[20] Act 2 of 2000.

[21] Ibid at para 41. Freedom of expression and association are found in the Constitution ss 16 and 18 respectively.

[22] In enacting public funding in 1997, a National Assembly committee report said it was the 'first stage of a process', with the 'need for public disclosure of private funding received by political parties' to be a key stage 'to be addressed in the near future'. *My Vote Counts 1* (note 2 above) at para 11.

[23] *My Vote Counts 1* (note 2 above) at para 113.

particular manner'.[24] In passing over the substance, the majority casts aspersions on the necessary relationship of information about political finance to the right to vote, whilst explicitly leaving the question open.[25] In doing so, it effectively invited round two of the litigation, but on a condition that the applicant mounts a 'frontal challenge' explicitly questioning the constitutional validity of the existing statute: PAIA.[26] As we noted in the introduction, My Vote Counts regrouped, and mounted that frontal challenge successfully before a single judge in the Western Cape High Court in 2017.

In dissent four judges, led by Cameron J, held for My Vote Counts. They found that disclosure of private funding of political parties was required for the exercise and protection of the franchise.[27] Citing the Court's earlier decision in *Ramakatsa*, the minority stressed the constitutional 'centrality of political parties [as] "veritable vehicles … for facilitating and entrenching democracy"'.[28] They linked information about party finances to the s 19 right to vote, arguing that the franchise was more than a formal right to 'make a cross upon a ballot paper' in a system aggregating existing electoral preferences.[29] Rather, the right to vote necessarily, or at least ideally, implied an informed choice.[30] Information about private financial contributions to parties, it was reasoned, may assist electors to know who or what 'particular social interest, policy or viewpoint' is sought to be advanced by or through that party.[31]

In doing so the minority judges invoked the notorious post-Watergate US case of *Buckley v Valeo*.[32] In *Buckley*, the US Supreme Court claimed that knowledge of donors allows electors to 'place each candidate in the political spectrum more precisely … than is often possible solely on the basis of party labels or campaign speeches'.[33] This reasoning of the Constitutional Court's minority opinion has since been endorsed by Meer J in the High Court in *My Vote Counts 2*. She asserted that the 'unique' and 'influential' role of political parties means that voters 'reasonably required' information about 'whence and from whom their funds derive'.[34]

As in the earlier *Institute for Democracy* decision, the dissenting judges found that PAIA did not provide for disclosure of donations received by parties, even under a constitutionally informed interpretation. Besides the obvious lack of parliamentary intent to cover that terrain, PAIA is of a vintage predicated on a 'pull-model'. Its scheme is to invite South Africans to identify and make requests for the release of specific information. Nor does PAIA impose any obligation on

[24] Ibid at para 156.
[25] Ibid at para 158.
[26] Ibid at paras 174 and 192.
[27] *My Vote Counts 1* (note 2 above) at paras 31–43.
[28] Ibid at para 34. Citing *Ramakatsa v Magashule* [2012] ZACC 31, 2013 (2) BCLR 202 (CC) at para 67.
[29] Ibid at para 41.
[30] Ibid at paras 39 and 41.
[31] Ibid at para 42.
[32] 424 US 1 (1976).
[33] Ibid at 66.
[34] *My Vote Counts 2* (note 3 above) at paras 23–31, especially para 28.

bodies like parties to keep records of donations.[35] But more deeply, the PAIA regime, like most FOI laws around the world, has its central focus on 'public bodies' (state organs) not 'private bodies'. Admittedly, the South African FOI regime – given its constitutional linking of FOI to other core constitutional 'rights' – is more generous than others in the way it imposes some obligations on non-state bodies to produce information to enable the exercise of those rights. But PAIA only extends that obligation to natural and juristic persons, not unincorporated associations such as political parties.[36]

The dissenting opinion implicitly criticised the majority for allowing 'form [to] prevail over substance', and cast the Constitutional Court as the ultimate arbiter and enforcer of the requirement that Parliament fulfil all constitutional obligations.[37] The majority judgment, in turn, effectively sided with the parliamentary respondents in viewing the question in the case not as one for justiciable rights, but as one involving broad constitutional goals entrusted to the political branches under s 32(2). Indeed, the majority decried the minority's approach as it 'violates the separation of powers'.[38] The Court's role was subsidiary to that of Parliament and limited to vetoing unconstitutional legislation rather than acting as a curator of legislation.

III FOI: Instrument for Better Governance, Individual Right or Adjunct to Other Rights?

In late 2015, a suit was filed in India seeking to bring political parties under the Indian FOI statute, known as the Right to Information Act, 2005. For reasons developed below, that litigation was well-meaning yet conceptually misguided. But before doing that, it is necessary to consider the origin and purpose or rationale for FOI.

FOI is often imagined to be a relatively modern phenomenon, linked to the information age. Certainly, FOI laws have proliferated in recent decades.[39] This spread has been attributed to international donor and advisory pressure, the liberalising and anti-corruption efforts of organisations like Article 19 and Transparency International, democratisation after the cold war, and a general zeitgeist given impetus by the influential US Freedom of Information Act of 1966.[40]

In truth, FOI is an old idea. Its legal origins – like the origins of its accountability cousin, the ombudsman's office – lie in the Swedish enlightenment, and that country's Freedom of the Press Act of 1766.[41] As the name makes clear, the

[35] *My Vote Counts 1* (note 2 above) at paras 95, 101 and 107.
[36] Ibid at paras 106–107 and 109–111.
[37] Ibid at paras 5–6.
[38] Ibid at para 122.
[39] Article 19 has estimated that more than 80 per cent of the world's population lives under some form of FOI law.
[40] See the discussion in H Mai *Securing Freedom of Information in Vietnamese Government and Law* (PhD thesis, University of Queensland, 2016) at Chapter 2.2.
[41] KM Shrivastava *The Right to Information: A Global Perspective* (2013) 1–4 (also notes the credit the Swedish progenitor, Chydenius, gave to the Confucian idea of an informed 'censorate' that would critique government).

purpose of that pioneering law was to enhance the role of the press. This was to be done not simply by mitigating censorship but through a positive fiat. That fiat required the publication of official documents, to aid the ability of the press to question the use of governmental power and to foster democratic debate.[42] Whilst the 1766 law is hardly progressive by modern standards, the inheritance of the principle within the 1919 independence constitution of Finland led, in time, to that Nordic nation adopting the first comprehensive statute on access to governmental information in the west in 1952.[43]

In its roots, then, FOI embraces an instrumental goal. Whilst the pull-model (via which people can request information) makes FOI seem like a statutory right attaching to individuals, outside of private information held by public agencies, it is not best conceived of as an individual right. It is certainly not, as Darch and Underwood explain, a human right in the sense of an inalienable moral entitlement.[44] Nor is it, in practice, something that belongs to or is even predominantly used by 'citizens' as such: it is more a tool for the media and intermediate, civil society groups.[45] Ultimately, FOI is a mechanism to facilitate political and governmental processes.

In this instrumental role, FOI involves a constitutive process: transparency is not so much an end in itself but a process that enhances public governance. The headline means to do this is captured in the metaphor of casting 'sunshine' into the workings of governmental power. This notion of public exposure as a disinfectant against conflicts of interest and corruption of the public interest can seem hackneyed. Yet in a more everyday sense FOI is a tool of governance when it encourages a greater and more accurate flow of information between government and the governed, particularly by informing intermediate interest groups and the media. It also seeks to create an accountability fillip, and an incentive to better or at least more publicly-spirited decision-making, since decision-makers are aware that the bases and reasons for their decisions may become publicly knowable and hence criticisable.[46] All this is acknowledged in South African Supreme Court opinions on the importance of s 32's right to information. In *Brümmer v Minister for Social Development* the Court observed the good governance values of

[42] Replicated in the structure of the contemporary Swedish Freedom of the Press Act. Chapter 1 is titled 'On the Freedom of the Press' and Chapter 2 'On the Public Nature of Official Documents'. The Act is available at http://www.servat.unibe.ch/icl/sw03000_.html (accessed 8 June 2018).

[43] See further O Mäenpää 'Openness and Access to Information in Finland' in J Mustonen (ed) *The World's First Freedom of Information Act: Anders Chydenius' Legacy Today* (2006) 58. Colombia's Code of Political and Municipal Organisation 1888 may have been the first administrative act to offer a process for individuals and entities to formally request information, however ineffective: Mai (note 40 above) at 32–33.

[44] C Darch & P Underwood 'Freedom of Information Legislation, State Compliance and the Discourse of Knowledge: The South African Experience' (2005) 37 *International Information and Library Review* 77, 84–85.

[45] By 'predominantly' I mean in cases of significant requests.

[46] None of this is to guarantee the perfect working of FOI as a tool: decision-makers can be chilled if they feel they are working in a fish-bowl, well-heeled interest groups and a cynical media may abuse the process, and so on.

'accountability, responsiveness and openness' and, relatedly, that FOI was a fillip for 'freedom of expression which includes the freedom of the press'.[47]

The twist in the South African constitutional model, however, has been to conceive of FOI both as an individual 'right' ('everyone has the right of access to') and as an instrumental value. Under South Africa's Constitution FOI is also an instrumental value in a second sense, different from the good governance rationale just described. This second sense is the sense in which related principles such as a right to education, and press freedom itself, may also be seen as instrumental. These constitutional principles are important facilitators of other social and democratic rights, like the right to work or liberty of expression.[48] FOI of course differs from, say, education, which is a human right bordering on a need. Education is essential to individual flourishing as well as a key adjunct to democratic functioning. Nevertheless, whilst not as primal as most of the 'rights' which precede it in Chapter 2 of the Constitution, s 32 constructs FOI in South Africa as both a direct entitlement of persons to state-held information, *and* as an entitlement where 'required for the exercise … of any [other] rights'.

The text of the South African Constitution therefore goes beyond the traditional liberal-institutionalist framework in which FOI is understood as an obligation on those in power. It does this by also embracing the liberal-individualist language of FOI as a 'right' of 'everyone'. Little wonder then that a survey for Privacy International adjudged South Africa's s 32 to be 'the most open and expansive' of the various constitutional provisions on FOI worldwide.[49]

And yet … as much as Wikileaks and similar movements may wish to dramatically extend the principle of transparency and apply it to corporate, civil society and government entities alike, FOI is not an absolute principle. South African constitutionalism may construct FOI as a 'right', in the sense of an entitlement held by citizens. However, in the end, FOI is less a 'right' in the traditional sense and more a guiding light. It is an aspirational impost on agencies of the state and – in South Africa – on other entities, to release material that can inform social discourse and media investigations, whilst encouraging those agencies and entities to be more reflective about, and accountable for, how they exercise their powers. This is particularly so in a society like South Africa with a free media, but a sclerotic political system still searching for a way to a fully-fledged multi-party democracy.

As it happens, FOI regimes in many countries are experiencing a practical boost as the cost of electronically storing, locating and publishing information declines. This has led to an FOI 2.0 movement, where the legal pragmatics of FOI are shifting from a purely pull-model to also encompass a push-model.[50]

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[47] *Brümmer v Minister for Social Development* [2009] ZACC 21, 2009 (6) SA 323 (CC), 2009 (11) BCLR 1075 (CC) at paras 62–63, reiterated in *President of the Republic of South Africa v M & G Media* [2011] ZACC 32, 2012 (2) SA 50 (CC), 2012 (2) BCLR 181 (CC) at para 8.

[48] R Peled & Y Rabin 'The Constitutional Right to Information' (2011) 42 *Columbia Human Rights Law Review* 357, 363.

[49] D Banisar *Freedom of Information around the World 2006: A Global Survey of Access to Government Information Laws* (2006) 17.

[50] For discussion, see FOI Independent Review Panel *The Right to Information: Reviewing Queensland's Freedom of Information Act* (2008) Chapter 3.

The older pull-model is based on a statutory power for individuals and groups to *request* specific information. In the push-model, government agencies are required to screen documents and data, with a presumption that it will be made available online for all to access and use. That is, there is a shift from the language of a 'right to request/access' to an obligation on holders of public information to give broader, proactive disclosure. This shift in technology and emphasis will pose challenges to the liberal-individualist model of FOI as a right of 'everyone' against the state. However, in the *My Vote Counts* litigation, it is not FOI as a direct entitlement against the South African state which is in question, but an argument about whether financial information held by political parties is 'required' as an adjunct to the franchise.

IV The Franchise and Political Information and Expression – Comparative Jurisprudence

In the Supreme Court of India, the constitutionally protected 'freedom of speech and expression'[51] has given birth to a 'right to know about' candidates. Curiously, the South African courts, in the *My Vote Counts* litigation, are yet to engage with this jurisprudence. But it is worth assaying these Indian cases. They provide salutary warnings about the need for caution in constitutional reasoning extending or conflating one value into new territory: both as a matter of principle and, at least as importantly, to avoid undesirable consequences.

The Indian jurisprudence flowered from the seed of a general right to know about public affairs, in the 2002 case of *Union of India v Association for Democratic Reforms*.[52] There, as in the *My Vote Counts* litigation, a non-partisan group initiated the suit. But in the *Association for Democratic Reforms* case, the mechanism involved the Indian High Court, in effect, issuing a mandatory injunction to the Election Commission to positively gather and release details about candidates' affairs (as opposed to an order requiring the parliament to erect such a law, let alone an order directed to political parties). Subject to modifications imposed by the Indian Supreme Court, the following information was to be collected by the Election Commission when candidates were nominated:

(i) past criminal record (convictions or acquittals) plus any pending charges;
(ii) personal assets (including those of any spouse and dependants);
(iii) liabilities, including any payments due to financial institutions or government; and
(iv) educational qualifications.

The Indian National Congress responded by seeking to restrain the decision, so that a candidate's criminal history need only include charges for offences carrying a maximum of two years' gaol. It also tried to neuter the strength of the decision by providing that no one could be compelled to disclose the kind of non-criminal history that the Supreme Court had required.[53]

[51] Constitution of the Republic of India, art 19(1)(a).
[52] *Union of India v Association for Democratic Reforms* (2002) 5 SCR 294, [2002] AIR 2112.
[53] Representation of the People Act 1951 (India) ss 33A–B.

The Supreme Court quickly overruled these neutering provisions in *People's Union of Civil Liberties v Union of India* (2003). Surveying the *Association for Democratic Reforms* case, PV Reddi J lauded it as a 'creative approach … a fresh path'.[54] Reddi J stressed, however, that an informational right about candidates is

> qualitatively different from the right to get information about public affairs or the right to receive information through the Press and electronic media, though to a certain extent they may be overlapping. … [It] is sought to be enforced against an individual who intends to become a public figure and the information relates to his personal matters.[55]

That is, whilst FOI and the freedom and role of the media are in the same ballpark, the essential source of a right to political knowledge lay elsewhere. To Reddi J, it rests in the idea that 'the sustenance of the democratic polity' depends on 'intelligent and rational' voter choice, for which voters require 'basic' or 'essential' information about 'candidates' antecedents'.[56] To Shah J, it was analogous to courtship and marriage: 'Now, young persons are selecting mates of their choice after verifying full details thereof. Should we not have such a situation in selecting candidates contesting elections?'[57]

This requirement is said to flow from precedents which envisage 'voting [as a] formal expression of will or opinion',[58] in which the voter 'speaks out or expresses by casting' a ballot.[59] In truth, this is but one side of a coin, whose reverse is the idea that adult suffrage (guaranteed by article 326 of the Indian Constitution) requires political discourse. That discourse has both an individual element ('[i]t will help the voter … to form an opinion') and a social element ('it will facilitate the Press and voluntary organizations in imparting information … of vital public concern').[60] The analogy with My Vote Counts' argument that disclosure of political party information is required to flesh out the right to vote in South Africa, is obvious.

The attentive reader will, however, have twigged that the scope of such informational rights is vague and contestable. To the Indian Supreme Court, it clearly requires a candidate's criminal history be disclosed. The obvious retort is, how far back? The purpose of rehabilitation of offender legislation is to wipe the slate clean and permit offenders to move on after a time. Is offering oneself for election so sensitive that it can be equated, say, to screening people who work with children for a prior history of offences against minors? The problem here is that becoming a member of parliament carries no job description beyond representing people or public interests. And history shows that information, especially about

[54] *People's Union of Civil Liberties v Union of India* (2003) 2 SCR 1136, [2003] AIR 2363, 2398.
[55] Ibid.
[56] Ibid at 2399.
[57] Ibid at 2371.
[58] Ibid at 2399, citing *Thomas v Speaker, Lok Sabha* (1993) 4 SCC 234.
[59] Ibid at 2400, citing *Union of India v Association for Democratic Reforms* (note 52 above).
[60] Ibid at 2399.

juvenile criminal records, can be used to reinforce discrimination against the young and marginalised groups.[61]

Besides the temporal boundaries of how far back such disclosure should reach, there is the question of the scope of a candidate's 'criminal' history? What of regulatory or simple offences like drink-driving, or pre-emptory 'apprehended violence orders' in domestic disputes? After all, many electors in an age of what Manin calls 'audience democracy'[62] are genuinely interested in the 'character' of their politicians as much as their policy or ideology. And what of the consequences for the electoral prospects of over-policed minorities and on rehabilitation of offenders legislation?

In the result, the Indian Court in *People's Union of Civil Liberties* took a step back from the orders in the *Association of Democratic Reforms* case and accepted Congress's watering down of the criminal history requirements. To an optimist this demonstrates the ebb and flow in the implicit discourse between judicial review and parliamentary deliberation. To the pessimist, though, the cases raise clear amber lights about the wisdom of courts seeking to dictate the rules of practical politics. How would South African jurisprudence contain the requirements of an implied 'right to know' about the affairs of political actors, in particular parties and candidates? Will party committees be forced to release minutes of meetings just because parties and their MPs may engage in political and governmental power? Will candidates have to disclose their educational history and records? Why just focus on parties – what about other activist groups and businesses that electioneer?

Consider a second aspect of the Indian rulings, namely the personal finances of those seeking elective office. Must the law mandate the disclosure of income tax returns – as was thought to be the custom for US presidential candidates until 2016 – and if so, how far back? After all, most legislatures require MPs, after their swearing in, to make disclosures on a pecuniary interest register, to help expose any conflicts of interest. The Indian Congress wanted to leave financial disclosure as a post-election matter. Yet *People's Union of Civil Liberties* ruled that electors were entitled to hear, in advance, about the family finances of all candidates. Progressives will applaud, and media outlets delight, at the chance to unveil the finances of the well-to-do. But what of the interests of children or spouses, especially in families not modeled on the paterfamilias turned politician? What of pragmatic considerations that a parliament, for all its self-interest, is the best forum to decide whether such mandatory disclosure might deter worthwhile candidates or create barriers to smaller parties and independents who lack legal and professional advice?

Recently, the Association for Democratic Rights returned to the Indian Supreme Court to argue that political parties should be brought under the Indian

[61] Compare the pressure recently put on an Aboriginal Australian MP. G Orr 'Billy Gordon's Past Shouldn't End the Queensland Government' *The Conversation* (30 March 2015), available at https://theconversation.com/billy-gordons-past-shouldnt-end-the-queensland-government-39487 (accessed 1 May 2017).

[62] B Manin *The Principles of Representative Government* (1997) Chapter 5.

Right to Information Act.[63] The national government – and indeed the political parties en masse – oppose the suit. Unlike South Africa, Indian parties already face some legal requirements to make annual financial disclosure, but only of contributions received above RS20 000. In any event, the Election Commission does not publish that material and offences for false disclosure are almost non-existent.[64] Taken collectively, these Indian cases are forerunners to, and an analogue for, the *My Vote Counts* litigation.

Elsewhere, similar questions, about the relationship of freedom of expression and the franchise to political information, have led to judicial creativity, albeit on a less activist scale. A good example has been spun from Australia's otherwise thin constitutional fabric. From 1992, the requirement that Australia's national parliament be 'chosen by the people' has been held to imply a 'freedom of political communication'.[65] (Curiously, this discovery of a liberty of communication predated the recognition, in 2006, that 'chosen by the people' also implied a universal franchise).

The rationale for this freedom of political communication is that a level of liberty protecting the spread of information and opinion about government and political matters necessarily underpins electoral choice in a system of responsible, representative government.[66] But, unlike in India or South Africa, in Australia this implied principle operates only as a 'negative liberty'; a support for the constitutionally guaranteed system of representative government. That is, it is not a 'right', let alone of individuals. Rather it acts only as a restraint on undue legal restriction of political communication.[67] Without a radical change in interpretative and remedial approaches, it could not be read as a positive constitutional requirement for FOI, let alone for political finance disclosure. (Both of these, as it happens, have been legislated for in Australia since the 1980s.)[68]

The Australian approach – negative constitutional protections – takes some of the sting from the question of the 'scope' of informational rights, since it demands little in the way of positive guarantees from governments or parliaments, let alone from private entities such as political parties or the media. Nonetheless, the Australian courts have had to grapple with the 'how long is a piece of string' question of the scope of the constitutional idea of 'political' communication, where 'political' is rooted in an idea of electoral democracy. Even given those constitutional roots, the term 'political' is as slippery as a

[63] J Kothari & A Ravi 'Bring Parties under RTI Ambit for Effective Government' *The Sunday Standard* (30 August 2015).

[64] Representation of the People Act (India) s 29C.

[65] See especially *ACTV v Commonwealth* (1992) 176 CLR 1.

[66] See *McCloy v NSW* [2015] HCA 34 at paras 100–124 (Restated the rationale, but the liberalist bias in the 'freedom of political communication' was tempered in that case with the apparent implication of an 'equality of opportunity to participate' in the political process.)

[67] Ibid at para 2.

[68] Freedom of Information Act 1982 (Australia) and Commonwealth Electoral Amendment Legislation 1983 (Australia) s 113. The latter has morphed into Commonwealth Electoral Act 1918 (Australia) Pt XX. At national level, disclosure requirements are annual and only cover donations over about A$13 000 per annum. G Orr 'Political Disclosure Regulation in Australia: Lackadaisical Law' (2007) 6 *Election Law Journal* 72. But states like Queensland have constructed requirements for continuous, online disclosure at much lower levels.

constitutional concept comes. Thus, discussion about judges and court decisions have been held to be not political; yet defaming the neighbouring New Zealand prime minister was deemed to be sufficiently political, since international affairs related to representative government. Advice to students about how to shoplift, wrapped in pseudo-marxist discussion about poverty and the state, is not 'political'; but protesting duck-hunting or the logging of old growth forests is, since environmental protection is a governmental concern. Somewhere in the middle, religious preaching in a mall may be 'political', provided the moral harangue intersects with social values.[69]

The point of all this is three-fold:

1. It is plausible, if one follows the approach in India and Australia, to imply certain informational guarantees or liberties, from constitutional requirements of freedom of expression and electoral choice.
2. Whether such an implication comes in the form of a negative immunity (limited to courts vetoing or reshaping legal burdens) or a positive or individualised 'right' is another matter. The South African Constitution clearly supports a positive informational right that can extend to non-state actors.
3. The difficult task, then, lies in determining the *scope* of any constitutional entitlement to 'political' information known to political parties or candidates, and whether it extends to lobby groups or third party campaigners.

Put simply, in the *My Vote Counts* litigation the central question of substance is which affairs, if any, of which political actors fall squarely within the scope of the informational mandate. The devil lies in the detail of determining which financial information held by parties and candidates in particular is constitutionally necessary, and whether a line can be drawn around 'financial' as opposed to other information.

V Political Finance: 'Clean' Public Funding and Coming Clean about Donations

To even use the term 'political finance' is to invite the question of scope: what is 'political' activity? If party finances and donors are to be exposed to the glare of sunshine, why not every campaigner and activist group, My Vote Counts included? And if every campaigner, then why not every industry lobby, trade union and, ultimately, the media too? Why even just stop at financial affairs and links – what of networks of influence, so that diaries and lobbying contacts are fully disclosed? Fortunately, at least at the initial stage of developing this constitutional mandate, we do not need to dissect the onion completely to know what is in its core. If 'political' is to mean anything in modern electoral democracies, then political parties and candidates are at that core. The quest for perfectly coherent law should not be the enemy of the good.

[69] Case law on this is explained in D Meagher 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28 *Melbourne University Law Review* 438.

On one view, modern political parties are primarily electoral machines. That is, they are competitive vehicles for different ideologies and for cabals of potential MPs and ministers. If so, it is not clear that voters need – let alone want – to know about parties' 'internal' affairs. If so, the primary concern of the law of electoral politics ought to be with fair competition between parties and candidates. For those who wish to know more about how the 'sausage' of party politics is made, they can join any one of the parties and exercise their associational rights.[70] On this view, South Africa is less in need of an FOI-derived law for disclosure of political donations, than of a law limiting political donations and expenditures altogether. After all, information about donations can only go so far. It may even have the unintended consequence of breeding cynicism, or stoking an arms race as companies start to see how much other companies are giving to obtain access to ministers or influential party figures. Caps on campaign expenditure and donations, however, could advance electoral competition.

In another view, parties should be both competitive electoral units *and* movements that can aggregate citizen interests and participation. One can only join one party at a time if one wants to squirrel information from within a party. And, whoever each of us happens to vote for, one party or coalition will gain the lion's share of power. On this view, it important that the internal affairs of all parties, and especially parties with MPs, are as irreproachable as possible.

There is merit in each of the approaches just described. The first has descriptive power and points us to the need (if the fairness of elections is the key goal) to not vest too much faith in disclosure of political finances. It also reminds us of the importance of framing regulation in ways that are sensitive to the freedom of political association. Political association is a collective right often neglected in discussions focused on individual 'rights' or idealism about internal party democracy. For its part, the second view reminds us that the perfect should not be the enemy of the good. Free and fair elections will always be a work in progress: building a better system of regulating politics requires staged development, not some Mosaic moment.

Ultimately, there is a clear justification for opening party finances to public scrutiny. Reform in South Africa should go beyond donation disclosure to the publishing of audited party accounts (as occurs in the UK). This is a reasonable requirement given the special role parties play in representative democracy. That special role is reflected in legal mechanisms which support and intertwine with the parties. The most commonplace of these mechanisms is schemes for party registration and the printing of party names and logos on ballot papers. In South Africa, the support for parties culminates in a 'party list' system of proportional electoral representation which limits the ability of electors to discriminate between party and candidate. Most of all, in South Africa, parties receive public subsidies

[70] On the divergent conceptions of parties, see G Orr 'Private Association and Public Brand: The Dualistic Conception of Political Parties in the Common Law World' (2014) 17 *Critical Review of Social and Political Philosophy* 332.

and funding.[71] Where public money is fed to parties, comprehensive disclosure of party finances is a must, on accountability grounds alone.

As we have seen, South Africa is unusual amongst democracies in the Anglophone world in having a constitutional *guarantee* of public funding. Legislation implementing that guarantee has, since 1997, offered direct, annual cash subsidies to every party with some legislative representation.[72] This legislation in turn recognises that some obligations accompany such funding, notably limits on its use.[73] Indeed over time the auditing and accountability requirements on the use of public funding have been strengthened.[74] The minority judgment in *My Vote Counts 1* comes close to recognising a link between public funding and private funding. But it falls short, falling back on the mantra that parties have an 'emphatically public role'.[75]

My argument here is that the receipt and admixture of significant public funds, in and of itself, creates an obligation for an organisation to be open about its finances: to disclose both its audited balance sheets and its revenue streams.[76] This principle makes sense for all not-for-profit organisations in civil society, but especially for political parties.[77] This approach is consonant with the idea that public funding is a means of injecting 'clean' money into the system. The term 'clean' does not appear in the South African Constitution. But the concept helps frame the issue by juxtaposing one key purpose of the public subsidy to parties, as against potentially tainted business donations. A constitutional framework that guarantees public funding of parties, by constitutional implication, should at least link public funding to a requirement that parties come 'clean' about their other sources of finance.

VI The Link between Political Finance Law and the 'Right to (an Informed) Vote'

As just argued, the constitutional mandate of 'clean' public funding is an important element of the more nebulous and broader argument linking the franchise to access to information held by parties and candidates. Recognising this element does not simply add weight to the constitutional link which My Vote Counts seeks to have recognised; it also insulates that link from being stretched in the future.

[71] Around the world, such subsidies may come in various guises: from tax credits to encourage donations, through to direct public funding by way of annual grants or reimbursement of campaign costs.

[72] Funding for the 2016–17 financial year totaled R133.7m (US$9.4m in current undervalued rates; Intl$17.6m allowing for purchasing power parity).

[73] Party Funding Act s 5(2). This may be replaced by the Political Party Funding Bill (note 17 above).

[74] Party Funding Act s 6; notably strengthened in 2008.

[75] *My Vote Counts 1* (note 2 above) at para 37 (Public funding 'entails a corollary: that the private funds they receive necessarily also have a distinctly public purpose').

[76] G Orr 'Justifications for Regulating Party Affairs: Competition not Public Funding' in KD Ewing, J Rowbottom & J Tham (eds) *The Funding of Political Parties: Where Now?* (2012) 245 at 256–258.

[77] I say 'not for profits' as there may be commercial-in-confidence issues relating to trading organisations, whose financial disclosure is best left to corporate and business law.

The link from FOI to the 'right to vote' on which My Vote Counts has so far rested its case is powerful, but potentially problematic. There are several reasons for this, some of which are apparent in a naïvete in the Indian jurisprudence discussed earlier.

First, the franchise is primarily seen as an individual political right. It is something that attaches to each of us as rational and dignified citizens, or *zoon politikon* (political animals). Information and discourse, however, are essentially collective goods. My Vote Counts' (and the Indian) litigation weave a connection between the individual right to vote and the collective good of FOI, through a claim that voters *need* certain information to make meaningful electoral choices. In truth, this claim is better understood by conceiving of politics as a collective enterprise, in which media scrutiny and debates about accountability for electoral donations are *underpinned* by the franchise. The franchise is an instantiation of the idea that all citizens are equal and all people deserving of representation. Without the franchise, accountability of political office-holders and institutions is a pious hope rather than an essential obligation. Disclosure of political donations is not essential to the right to vote per se, but to the essential democratic values, including accountability of governments, which that right emblemises.

Second, and relatedly, the concept of an 'informed' right to vote, invoked in the Indian and South African litigation, may be an unruly horse to mount. The US Supreme Court line in *Buckley v Valeo* that electors can learn more from knowing who is giving to a candidate than from knowing the candidate's public positions is a very American one. Perhaps it makes some sense in a candidate-centred polity where money can easily buy leverage over individual legislators. But it makes less sense in a party-based system. There is, in any event, precious little evidence (outside extreme scandals) that electors care much or change their party loyalties or policy preferences based on information about political finance. Instead, it is information that goes to general governance issues of probity or to the fairness of inter-party electoral competition.

Third, where will this horse take us? That is, where will informational disclosure end? This is an important factor to consider when engaging in judicial activism. When a new constitutional implication is drawn, it juridifies an area of human activity (in this case politics). Whilst having the law of politics guarded and overseen by independent judges is generally a good thing, having them develop and frame that law is not always so. Judges, as a group, may be liberal in instinct, but they are not necessarily attuned to the complexities of practical politics or the totality of values that might be called 'democratic'. Why are party finances so special to informed voting? Logically, the *Buckley v Valeo* approach should require much wider disclosure. In particular, each parties' membership list – at least when prominent and influential people are members – and records of diary meetings between the executive or leadership of such parties and lobbyists, should be disclosed. Also, perhaps, committee minutes, policy development documents and candidate selection processes. After all, FOI expects that breadth of disclosure from public agencies generally.

Rules made on the basis of a constitutional rationale of an 'informed franchise' will need to apply to all political parties that stand candidates, whether the parties

are old or new, in government or parliament or neither. Yet it is hard to draw the line between parties and candidates, and lobby groups that campaign at election time, if an 'informed franchise' is the rationale for disclosure. The 'informed vote' rationale in India, as we have seen, spills problematically into aspects of a candidate's past that may be quite sensitive. Requiring such disclosure on pain of law may deter many decent candidates.

In short, there are dangers in crafting an overly broad constitutional principle, and expecting courts to do a better job of appreciating the different values to be balanced than parliament can, with its greater ability to consult and act in pragmatic and fine-grained ways. My argument is that by attending to the broader structure of the South African Constitution, in which public funding of parties is guaranteed, the laudable goal of mandating a base-level disclosure of donations to parties and candidates can be achieved without opening up a Pandora's Box of questions about the affairs of lobby groups, or the affairs of parties and candidates beyond their financial accounts.

VII Disclosure – Necessary but no Panacea

Earlier I noted that disclosure of political donations is important. But it only goes so far, and can have some unintended consequences. As Tham (and others) have argued, political finance disclosure may 'normalise' large scale private donations.[78] Whether it does this or not of course depends on cultural and situational factors. In addition, parties may not mind such normalisation. In Australia it is said that the otherwise trade union oriented Labor Party monitors business contributions to their main rival, the conservative Liberal Party, so it can contact those businesses and ask for equal treatment. This dynamic may not arise in South Africa given the hegemony of the ANC: power does not see-saw in South Africa between two major parties as it tends to do elsewhere. Instead, power tends to rest in one dominant entity whose internal fissures are where the action is. Around the ANC buzz a swarm of smaller rival parties.

To give another Australian example, until recently the 'big four' banks who benefit from protective national regulation typically made significant annual donations to both major parties. When confronted about such contributions, which were important to party budgets but mere pin money to the banks, the banks would claim they were not hedging their bets about enhancing their access to the major parties. Instead they would say that their donations were an example of corporate citizenship. Recently, however, one of the banks has disavowed the practice, following the lead of some publicly listed companies who have moved to adopt no party-donation policies. This shift has been motivated by the global financial crisis, shareholder activism and a general stench around money politics in recent years. So 'normalisation' can work both ways.

Any such 'de-normalisation' of large political donations through disclosure itself carries a cost. As Rowbottom (and others) have argued, transparency in

[78] J Tham 'Campaign Finance Reform in Australia: Some Reasons for Reform' in G Orr et al (eds) *Realising Democracy: Electoral Law in Australia* (2003) 114 at 123–124.

the hands of a cynical media has the downside of breeding mistrust of politics.[79] Deservedly or not, such mistrust can smear all politicians and accentuate a cycle of declining interest in politics, the very opposite of the desired effect of transparency enhancing citizen participation.

Put simply, political finance disclosure on its own is no prophylactic against the buying of political favours and concerns about undue influence, let alone the problem of unequal access to power sometimes dubbed 'pay-per-play'.[80] Political finance disclosure is at most an 'indispensable (though by no means sufficient) tool in the fight against corruption'.[81] Most liberal democracies augment it with other measures to limit the corrupting influence of money in electoral politics. These include basic measures to root-out quid pro quo like anti-corruption commissions. And there is a broader 'menu' of political finance regulation, beyond disclosure. This menu includes caps on donations and limits on political expenditure, and 'clean' public funding.[82] South Africa has both a constitutionally entrenched Public Protector (with a purview over impropriety in governance) as well as public funding of parties. This public funding may be 'clean money'. But the electoral dominance of the ANC since apartheid means that paying public funding proportional to seat share,[83] combined with an absence of controls on private donations – which follow power, the world over – risks reinforcing the ANC's incumbency.[84] If the ultimate goal of reformers in civil society, like My Vote Counts and the Institute for Democracy, is for fairer elections and more accountable party government, remedying the absence of donation disclosure will cure just one lacuna in the South African system.

VIII Conclusion: Getting There from Here

In an old joke, attributed to the Irish, a woman asks for directions from a local yokel. Scratching his head, the local replies, 'Well, if I wanted to get there, I wouldn't start from here.' In this article, I have argued that there are pitfalls in constitutionalising financial disclosure in South African politics, especially through linking the FOI mandate to the franchise. Politics is a collective exercise not well captured in an individualised account of the 'right to vote'. Related to this is the practical importance of corralling any 'right to an informed vote', so that it does not expand into a constitutional mandate that candidates disclose

[79] J Rowbottom 'Corruption, Transparency, and Reputation: the Role of Publicity in Regulating Donations' (2016) 75 *Cambridge Law Journal* 398 at 423–425.

[80] J Tham *Money and Politics: The Democracy We Can't Afford* (2010) 57–58.

[81] KD Ewing *The Cost of Democracy: Party Funding in Modern British Politics* (2007) 44.

[82] KD Ewing 'Political Party Finance: Themes in International Perspective' in J Tham, B Costar & G Orr (eds) *Electoral Democracy: Australian Prospects* (2011) 143 at 150–4. See also Ewing (note 81 above) at Chapter 3 on 'Regulatory Methods'.

[83] See the guidelines in Party Funding Act s 5. In an attempt to mitigate this imbalance (which is a consequence of the ANC's organic dominance) s 5 allows an element of minimum or weighted funding.

[84] MP Lowry 'Legitimizing Elections through the Regulation of Campaign Financing: A Comparative Constitutional Analysis and Hope for South Africa' (2008) 31 *Boston College International and Comparative Law Review* 185 at 209–211.

salacious aspects of their past or that parties' internal operations be played out in a fishbowl.

Constitutional implications have a tendency to expand beyond their original justification. They also can be a blunt instrument. FOI is not an absolute right, but one balanced by exemptions; yet a constitutional mandate to political information may be mistaken as a strict obligation. In practice, even if My Vote Counts is ultimately victorious, the legislature will still have to make numerous judgment calls about the shape of the legislative requirement for financial disclosure. Examples of these legislative judgments are: at what threshold will disclosure be triggered, so that small donors (including those who work in the public service) will not be chilled? Or, what frequency of disclosure will balance the administrative impact, especially on smaller parties, with the timeliness that accountability requires and the risk of 'snowing' the media with a dump of too much information at once? There is also the question of which branch of law political finance disclosure formally belongs in. As van Wyk argues, specific record-keeping obligations usually appear in sector-specific regulation.[85] The South African Election Commission is the relevant agency to superintend (and add-value to) any disclosure obligations of parties and candidates. Not an information commissioner. Ultimately, FOI is an adjunct to a debate about constitutionalising electoral law, not the other way around.

For all this cavilling, the *My Vote Counts* litigation has a laudable aim. Disclosure of political finances is important to the goal of collective accountability in any system of representative government underpinned by the franchise. Whatever generic concerns are in play about judicial imposition of legislation, there comes a point where litigation has a role in filling the void of serious political inaction. As Issacharoff explained in this journal in 2013, the dominance of a single party in the South African political landscape magnifies the risks of self-dealing which every electoral democracy experiences.[86]

The *My Vote Counts* litigation thus raises a broader question about the constitutionalisation of politics through litigation. It is nothing new to note that, in jurisdictions with rich constitutional tapestries and highest courts with reputations for creativity, political struggles are often waged through judicial review. Even ardent defenders of parliamentary sovereignty, who hold dear to the idea that the political branches should be left alone to deal with contentious social issues, might appreciate the force of John Hart Ely's argument that the courts should play a 'representation-reinforcement' role.[87] That is, unelected though they are, courts can play a role in the law of politics by breaking legislative impasses and scrutinising incumbency benefits.

My Vote Counts is an attempt to overcome such legislative inertia, and read a mandate for political finance disclosure into the South African Constitution. The aim is as progressive as the destination is desirable. The pitfalls I have noted arise

[85] T van Wyk '"Don't Blame the Librarian if No One Has Written the Book": *My Vote Counts* and the Information Required to Exercise the Franchise' (2016) 8 *Constitutional Court Review* 97.

[86] S Issacharoff 'The Democratic Risk to Democratic Transitions' (2013) 5 *Constitutional Court Review* 1 at 31.

[87] JH Ely *Democracy and Distrust: A Theory of Judicial Review* (1980).

from the need to set sail with a fabric woven from constitutional guarantees of FOI and the right to vote, which were not drafted with specific questions like electoral and party disclosures in mind. To take this route, the Court has to be careful to not do damage to those guarantees or invite overreach in later cases. As I have argued, drawing additionally on the constitutional mandate for public funding of parties provides a constitutional suture to avoid this new constitutional principle becoming a slippery slope to a doctrine whereby all manner of party and candidate affairs would be constitutionally disclosable.

Issacharoff responded to this generic risk in judicial activism with a call for the South African Supreme Court 'to articulate a theory of proper democratic politics in order to discharge a principled role in engaging political process failures' and avoid courts overstepping their constitutional mandates.[88] That call sounds like a Herculean (in the Dworkinian sense) expectation. Roux's reply to Issacharoff was to wonder if the South African system had the 'legal-cultural maturity' for such judicial masterwork, or whether there was a fragile balance between the Court and the political branches which requires nurturing.[89] In the question at hand of political disclosures at least, we can square the circle. The Court can hew to the constitutional text and do justice to the practice of politics, whilst avoiding the Indian mistake of embracing a nebulous 'right to an informed vote'. It can do so by recognising an obligation to disclose political finances, rooted in the accountability principle inherent in the representative franchise and the constitutional guarantee that public funds are admixed with private donations in South African electoral politics.

The link between money and electoral politics will always be with us. This is especially so in a jurisdiction like South Africa that for decades has lacked any limits on donations and expenditure. Disclosure of political finance may be no panacea. But if government is to have the appearance of integrity, and hopefully the reality of 'representativeness' captured in the ideal of one person, one vote, then such disclosure is a necessary constituent of the law of politics.

[88] Issacharoff (note 86 above) at 27.

[89] T Roux 'The South African Constitutional Court's Democratic Rights Jurisprudence' (2013) 5 *Constitutional Court Review* 33 at 73.