

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NO:7630/23

In the matter between:

MY VOTE COUNTS NPC

Applicant

and

**PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA**

First Respondent

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Second Respondent

MINISTER OF HOME AFFAIRS

Third Respondent

INDEPENDENT ELECTORAL COMMISSION

Fourth Respondent

AFRICAN NATIONAL CONGRESS

Fifth Respondent

DEMOCRATIC ALLIANCE

Sixth Respondent

ECONOMIC FREEDOM FIGHTERS

Seventh Respondent

INKATHA FREEDOM PARTY

Eighth Respondent

NATIONAL FREEDOM PARTY

Ninth Respondent

UNITED DEMOCRATIC MOVEMENT

Tenth Respondent

FREEDOM FRONT PLUS

Eleventh Respondent

CONGRESS OF THE PEOPLE

Twelfth Respondent

AFRICAN CHRISTIAN DEMOCRATIC PARTY

Thirteenth Respondent

AFRICAN INDEPENDENT CONGRESS	Fourteenth Respondent
PAN AFRICANIST CONGRESS	Fifteenth Respondent
AFRICAN TRANSFORMATION MOVEMENT	Sixteenth Respondent
GOOD PARTY	Seventeenth Respondent
AL JAMA-AH	Eighteenth Respondent
ACTION SA	Nineteenth Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Twentieth Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Twenty-First Respondent

APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

1. This case involves a challenge to the constitutionality of provisions of the Political Party Funding Act, 2018 ("**the PPFA**") which deal with disclosure of the receipt and use of the private funding of political parties,¹ as well as the upper thresholds for such funding.
2. The matter is opposed by the Minister of Justice, the Minister of Home Affairs ("**the Ministers**"), the Democratic Alliance ("**the DA**"), Action SA and Parliament. Economic Freedom Fighters initially opposed the relief, but now abide the decision of the Court. The President likewise abides, but has filed an explanatory affidavit.
3. We set forth below why the opposition is ill-founded and why My Vote Counts must succeed.

RELEVANT PROCEDURAL HISTORY AND LEGISLATIVE FRAMEWORK

4. In 2015, the applicant made an application to the Constitutional Court seeking an order compelling Parliament to enact legislation in terms of a constitutional obligation to give effect to the right of access to information and to regulate the disclosure of private funding information.²
5. The majority of the Constitutional Court in the resultant judgment, *My Vote Counts v Speaker of the National Assembly* [2015] ZACC 31 at 147-148 ("**My Vote Counts I**"), held that the Promotion of Access to Information Act ("**PAIA**")

¹ In these submissions, any reference to "*political party*" or "*political parties*" is also a reference to independent candidate/representative or independent candidates/representatives, as the case may be, unless the context indicates otherwise.

² Pleadings Bundle ("**PB**"), applicant's founding affidavit ("**FA**"), page 16, para 19.

is the relevant legislation envisaged in terms of section 32(2) of the Constitution and was intended to give full effect to the right of access to information, in all respects.³

6. Accordingly, the Constitutional Court held that the principle of subsidiarity dictated that the applicant's arguments should have taken the form of a "*frontal challenge*" to the constitutional validity of PAIA in an application before the High Court of South Africa under section 172(1) of the Constitution.⁴
7. In 2017, the applicant, in accordance with *My Vote Counts I*, made an application to the High Court for relief in the following terms: (i) a declaration that information about the private funding of political parties is reasonably required for the effective exercise of the right to vote in Section 19(3)(a) of the Constitution; and (ii) a declaration that PAIA is unconstitutional insofar as it does not mandate the recordal, preservation, and disclosure of private funding information of political parties. ("**the PAIA proceedings**").⁵
8. The High Court, in *My Vote Counts NPC v President of the Republic of South Africa and Others* 2018 (2) SACR 644 (WCC) ("**the High Court decision**"), granted the relief sought by the applicant, and referred its decision to the Constitutional Court for confirmation, in accordance with section 172(2) of the Constitution.⁶

³ PB, FA, page 16, para 20.

⁴ Ibid.

⁵ PB, FA, page 21, para 21.

⁶ Ibid.

9. On 21 June 2018, the Constitutional Court unanimously confirmed the High Court decision in *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC) ("**My Vote Counts II**").⁷
10. The relevant part of the Order handed down by the Court in *My Vote Counts II* provided as follows:⁸

"The order of the constitutional invalidity made by the Western Cape Division of the High Court, Cape Town is confirmed, in these terms:

1.1 It is declared 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.

1.2 It is declared that information on private funding of political parties and independent candidates must be recorded, preserved and made reasonably accessible.

1.3 It is also declared that the Promotion of Access to Information Act 2 of 2000 (PAIA) is invalid to the extent of its inconsistency with the Constitution by failing to provide for the recordal, preservation and reasonable disclosure of information on the private funding of political parties and independent candidates.

1.4 Parliament must amend PAIA and take any other measure it deems appropriate to provide for the recordal, preservation and facilitation of

⁷ PB, FA, page 17, para 22.

⁸ Ibid.

reasonable access to information on the private funding of political parties and independent candidates within a period of 18 months."

11. Pursuant to *My Vote Counts II*, and to provide for the regulation of access to information concerning the private funding of private parties, the PPFA came into effect on 1 April 2021, as the primary mechanism by which political parties and donors to political parties would be required to record and disclose private donations and funding information.⁹

12. The relevant provisions of the PPFA were as follows:

12.1 Section 8(2) provided that *"a political party may not accept a donation from a person or entity in excess of the prescribed amount within a financial year"*. The *"prescribed amount"* was stipulated in regulation 7 of the Regulations as follows:

"7. Upper limit of donations

The amount contemplated in section 8(2) of the Act is fifteen million rand within a financial year."

12.2 Section 9(1) (a) provided that a political party must disclose every donation received *"above the prescribed threshold"*. Regulation 2 of the Regulations define the *"prescribed threshold"* as:

"9. Disclosure limit

⁹ PB, FA, page 18, para 23.

The threshold referred to in section 9(1)(a) of the Act is R100,000 within a financial year."

- 12.3 Section 9(2) excluded natural persons from the obligation to disclose donations made above the prescribed threshold in subsection(1)(a). To this end, section 9(2) reads as follows:

"A juristic person or entity that makes a donation above the threshold prescribed in terms of subsection (1)(a) must disclose that donation to the Commission in the prescribed form and manner."

- 12.4 Section 12(2)(d)(i) provided for political parties to produce financial statements, books and records to account both for the income and expenditure of party funding received from public sources, but the comparable section 12(2)(d)(ii) relating to private funding only required an accounting for income, not expenditure. Section 22, concomitantly, did not require the Independent Electoral Commission ("IEC") to report on such expenditure to Parliament and the public.

- 12.5 Section 24(1) left the decision as to the prescribed upper limit and the disclosure threshold to political actors and provides that *"the President, acting on a resolution of the National Assembly, may by proclamation in the Gazette make regulations in respect of matters contemplated in sections 6(2), 7(2)(e), 8(2), 8(5) and 9(1)(a)"*.

13. On 15 May 2023, the applicant launched these proceedings for an order in terms of section 172(1) of the Constitution, *inter alia* declaring sections 8(2), 9(1)(a), 12(2)(d)(ii), 12(3)(c), 22 and 24(1) of and regulations 7 and 9 in Schedule 2 to,

the PPFA invalid and unconstitutional insofar as and to the extent that it, *inter alia*, (i) fails to require a political party to disclose all private donations received by and made to it; and (ii) fails to impose adequate controls on the private funding of political parties.

14. On 7 December 2023, the Electoral Matters Amendment Bill (B42-2023) ("**the EMAB**") was first introduced into Parliament.¹⁰ In terms of the preamble, the EMAB aimed to amend the PPFA *inter alia* to "*amend the powers of the President to make regulations on certain matters, and to amend Schedule 2 in respect of the formula for the allocation of money in the Funds on a proportional and equitable basis, in respect of the upper limit of donations and disclosure limit for donations*".
15. Following its introduction and before it was enacted, the applicant made several written and oral submissions to the Portfolio Committee on Home Affairs and the Select Committee on Security and Justice, and the President, raising constitutional concerns created by the proposed amendments in relation to: (i) the fact that the EMAB would create a lacuna in the law; and (ii) the President's sole discretion to determine the upper limit of donations and the disclosure threshold (this will be explained in more detail below).¹¹
16. Prior to the EMAA being enacted, members of Parliament representing the DA, and the President, acknowledged the existence of the lacuna.¹²

¹⁰ PB, applicant's supplementary affidavit ("**SA**"), page 40, para 41.

¹¹ PB, SA, pages 413- 419, paras 14-37.

¹² Ibid.

17. Despite the applicant's submissions, however, on 8 May 2024, Electoral Matters Amendment Act, 2024 ("**the EMAA**") came into operation by Order of the President.¹³ The constitutional concerns raised by the applicant were not addressed and remained in the EMAA, including the lacuna.
18. The relevant provisions of the PPFA, as amended by the EMAA (which are the subject of this application) are as follows:
- 18.1 section 8(2) and 9(1) of the PPFA have been preserved in the EMAA, merely adding that both political parties and now independent candidates disclose any donation received above a prescribed threshold and prohibit the acceptance of donations exceeding the limit.
- 18.2 however, the EMAA introduces a significant change: (i) it removes the limits and caps set by Parliament; and (ii) grants the President the sole discretion to set these upper limits and disclosure thresholds. To this end:
- 18.2.1 in terms of section 29(g) of the EMAA, regulation 7 of the PPFA (in dealing with the upper limits of donations) was replaced by the following:
- "7(1) Upper limit of donations*
- The President may, from time to time after a National Assembly resolution and by notice in the Gazette, determine the amount contemplated in section 8(2) of the Act"*

¹³ PB, SA, page 419, para 36.

(2) In determining the amount referred to in subregulation (1), the President may consider the following:

(a) the actual fiscal contribution to public funding for political purposes;

(b) inflation; and

(c) the actual costs of running a party and running elections, as submitted by parties.";

18.2.2 in terms of section 29(h) of the EMAA, regulation 9 of the PPFA (in dealing with the disclosure limit) is substituted with the following:

"9. Disclosure Limit:

The President may, from time to time after a National Assembly resolution and by notice in the Gazette, determine the amount contemplated in section 8(2) of the Act"

18.2.3 section 24(1) and (5) of the PPFA (as amended by the EMAA), reads as follows:

"(1)(a) The President, acting on a resolution of the National Assembly, may by proclamation in the Gazette, make regulations in respect of matters contemplated in sections 6(2), 7(2)(e), 7(3)(d), 8(2), 8(5), and 9(1)(a);

(b) When making regulations for section 8(2) and (5), the President must take the following factors into account:

(i) The amount of money previously appropriated by Acts of Parliament for the Political Representatives Fund within the previous five financial years;

(ii) The effects of inflation on the value of money over time; and

(iii) the costs associated with participating as a political party, independent representative or independent candidate in elections and the democratic process in South Africa"

(5) Each regulation in Schedule 2 is a transitional regulation and shall become inoperative on the date that a regulation replacing the said regulation made by the President in terms of subsection (1) becomes effective.";

18.2.4 As with their pre-amendment form (ie, unchanged by the EMAA): section 9(2) excludes natural persons from the obligation to disclose donations made above the prescribed threshold in subsection(1)(a); section 12(2)(d)(ii) did not require accounting for income; and section 22, concomitantly, did not require the IEC to report on such expenditure to Parliament and the public.¹⁴

19. As the applicant warned in its submissions, the amendments to regulations 7 and 9, which came into effect on 8 May 2024, resulted in the removal of both the upper limit in regulation 7(1) and the disclosure threshold for donations in

¹⁴ PB, FA, page 25, para 31.3.

regulation 9. The previous limits of R15 million and threshold of R100,000, had been deleted, and the President did not issue simultaneous proclamations to set new upper limits and disclosure thresholds.

20. As such, on 10 May 2024, the applicant launched an urgent application in the Western Cape High Court under case number 10607/24 ("**the EMAA application**") to fill the lacuna in the EMAA.¹⁵
21. In the EMAA application, the applicant sought a *rule nisi* that: (i) the upper limit be deemed to be determined at R15 million per annum; and (ii) the disclosure threshold be deemed to be determined at R100,000 per annum, which relief was to operate as interim relief, until the earlier of determination of the upper limit and the disclosure threshold or the finalisation of these proceedings.¹⁶
22. On 27 May 2024, following an initial hearing on 17 May 2024, this Court held that the EMAA is *prima facie* unconstitutional on account of the lacuna it created. The Court, however, only ordered the *rule nisi*, without making an interim order, and held that the Court hearing the matter on the return date, scheduled for 12 August 2024, should make a determination on whether the interim relief should be granted ("**the rule nisi judgment**").¹⁷
23. On 26 June 2024, the applicant filed an amended notice of motion and a supplementary affidavit in the May 2023 application, seeking, *inter alia*, an order declaring sections 8(2), 9(1)(a), 9(2), 12(2)(d)(ii), 12(3)(c), 22 and 24(1) of the

¹⁵ PB, SA, page 36, para 40.

¹⁶ Ibid.

¹⁷ PB, SA, page 421, para 45.

PPFA (as amended by the EMAA) to be inconsistent with the Constitution and invalid.¹⁸

24. On 16 August 2024, following the hearing on the return date, this Court delivered a judgment in which it confirmed the *rule nisi* and granted the interim relief ("**the EMAA judgment**").¹⁹
25. As a result of the EMAA judgment, until the earlier of either the finalisation of these proceedings or the determination of the upper limit and disclosure threshold by the President, the *status quo* was restored and the financial thresholds under the PPFA prior to its amendment by the EMAA, are reinstated (ie an upper limit of R15 million and disclosure threshold of R100,000 for private donations to political parties per annum by private donors).

OVERVIEW

26. Against that background, this is an application for an order in terms of section 172(1) of the Constitution declaring the PPFA (as amended by the EMAA), including the Regulations thereto, invalid and constitutional insofar as and to the extent that it:(i) fails to require the disclosure of all private donations received by and made to it; and (ii) fails to impose adequate controls on the private funding of political parties.
27. At its core, this application is concerned with strengthening democracy by giving meaningful effect to the constitutional imperatives of transparency, openness and accountability. To this end, this application seeks affirmation and meaningful

¹⁸ PB, FA, page 852, para 89.

¹⁹ See, annex "**RA7**".

realisation of fundamental constitutional imperatives: (i) that citizens be able to access information required for the effective and informed exercise of their right to vote as enshrined in sections 19(1) and (3) of the Constitution; (ii) that elections are free and fair in accordance with section 19(2) of the Constitution; and (iii) that the state carries out its duties to promote, respect and fulfil the Bill of Rights, including the right to vote and other constitutional rights, an integral part of which is the provision of information and the enactment of measures to mitigate against corruption and the undue influence exercised by private interests over elected representatives and political parties.

28. The applicant submits that although the PPFA (as amended by the EMAA) ostensibly attempts to give expression to the aforesaid constitutional imperatives, it falls short of the constitutional standard, and is both irrational and unlawful, on account of the fact that it: (i) limits the disclosure of any single donation (or, potentially, a combination of donations by the same donor) to amounts over a particular threshold, and set that threshold at R100,000.00 (a figure set without any supporting studies, research or evidence); (ii) does not, in any event, regulate cumulative donations by donors which are related to one another (in respect of both the upper limit and disclosure threshold); (iii) entitles political parties to accept private direct donations up to an excessive limit of R15 million (a figure set out without any supporting studies, research or evidence); (iv) only requires juristic persons, to the exclusion of natural persons, to disclose donations made in excess of the "prescribed threshold"; and (v) does not require political parties to account for the expenditure of the income received from private donations, and the IEC to report on such expenditure.

29. Moreover, the specific amendments introduced by the EMAA create a lacuna in the law and grant the President the sole discretion to determine the upper limit and disclosure threshold.
30. The applicant submits that various constitutional imperatives render the relevant provisions of the PPFA (as amended by the EMAA) and associated regulations unconstitutional.
31. It will be demonstrated that the PPFA (as amended by the EMAA) is woefully inadequate in respect of providing access to and the full disclosure of all private funding information, and further fails to safeguard against the scourge of corruption (and in fact leaves the door wide open for such corruption), undue influence exercised by private interests over elected representatives, and the insidious effects of patronage in our democracy.
32. These submissions are structured as follows:
 - 32.1 First, we address the disclosure threshold, including the constitutional imperatives that require the disclosure of all donations, and the unconstitutionality of the current R100,000 limit. We also discuss the PPFA's failure to require political parties to account for the expenditure of private donations.
 - 32.2 Second, we address the constitutional imperatives relating to the upper limit on donations, demonstrating why the PPFA fails to meet those imperatives and showing that the R15 million limit is unconstitutional and irrational.

32.3 Third, we examine the amendments introduced by the EMAA, including the lacuna, and the fact that it grants the President the sole discretion to determine the relevant financial thresholds.

32.4 Fourth, we deal with the issue of costs.

DISCLOSURE OF INFORMATION

All donations must be disclosed

33. At the outset, it is important to set out the fundamental constitutional imperatives, as enshrined in the Constitution, which necessitate full disclosure of private funding of political parties:

33.1 access to accurate information about the private funding of political parties is reasonably required for the effective exercise of the right to vote and make political choices as envisaged under sections 19 and 32(1) of the Constitution.

33.2 these provisions are underpinned by section 1(d) of the Constitution, which founds our state on fundamental democratic values that are imperilled by the absence of a proper disclosure and regulation mechanism; and

33.3 it is further sourced in section 7(2) of the Constitution, as transparency in the funding of political parties is required for the effective prevention and detection of corruption, which erodes the state's capacity to respect, protect, promote and fulfil all the rights in the Bill of Rights. To this end, the obligation is strengthened by South Africa's international obligations, as well as by sections 195, 215 and 217 of the Constitution, which require the

promotion of transparency in public administration, public finance and public procurement, respectively.

34. The Constitutional Court in *My Vote Counts II* sets out the constitutional considerations underlying and giving rise to the intrinsic relationship between access to information and the effective and informed exercise of the right to vote:

34.1 the Court found that any information that "*completes the picture of a political party*"²⁰ in relation to: (i) who a political party could be influenced by; (ii) in what way could such influence be exerted; and (iii) to what extent is it essential for voters to exercise their will in an informed and effective manner. In other words, for section 19 to be given meaningful expression and realisation, access to information concerning the source of private funding and the resultant influence exerted upon political parties is central;

34.2 the interrelatedness of sections 32(1), read with section 19, and section 7(2), as foundational sources necessitating the disclosure of private funding information was also confirmed in *My Vote Counts II* as follows:

"[73] More importantly, it remains the primary duty of the State to ensure that it facilitates access to information that would enhance the enjoyment of fundamental rights. For this reason, the nature of the information on private funding is such that Parliament might, if so advised, impose on the State or any of its organs the duty to hold, preserve and disclose that information, so that voters may have ready or reasonable access, as envisaged by section 32(1)(a) of the

²⁰ *My Vote Counts II*, para 33.

Constitution. Be that as it may, whatever Parliament might decide to do, the State is obligated by a proper reading of section 32 with sections 19 and 7(2) to make this information reasonably accessible to the public. (emphasis added)

[74] The consequence of all this is that political parties and independent candidates are constitutionally obliged to record, preserve and disclose information on private funding. But, because section 7(2) imposes the obligation on the State to facilitate the enjoyment of rights in the Bill of Rights, and section 32(2) requires the enactment of national legislation to essentially provide for the recordal or "holding" and disclosure of required or needed information, it thus falls on the shoulders of the State to honour its section 7(2) obligations."

34.3 Importantly, the Court's rationale for requiring the disclosure of and access to funding information as a means to facilitate the proper exercise of the constitutional rights in terms of section 19 and 32, read with 7(2), of the Constitution was informed by deep concerns over the threat posed by secrecy and the potential for corruption and undue influence to steer the conduct of elected representatives. According to the Court: "*lack of transparency on private funding provides fertile and well-watered ground for corruption and deception of voters*".²¹ Furthermore:

²¹ *My Vote Counts II*, para 47.

"[51] Transparency in the area of the private funding of political parties and independent candidates helps in the detection or discouragement of improper influence and the fight against corruption. Both the African Union and the United Nations have come to this realisation and have taken appropriate steps to help inject transparency and root out corruption in relation to private funding. Politicians who use public office in the furtherance of the agendas of benefactors, at the expense of the best interests of all, are very likely to be found out where there is transparency. The recordal, preservation and disclosure of information on the private funding of political players will thus keep voters better-equipped to make out the real interests these politicians are likely to serve."

35. Similarly, the constitutional imperatives correspond precisely with the twin priorities served by transparency in respect of private funding of political parties, as they were eloquently explained by the United States Supreme Court in *Buckley v Valeo*:²²

"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

²² *Buckley v Valeo* 424 US 1 (1976) at 62.

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 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."

36. The minority judgment in *My Vote Counts I*, which was foundational to the substantive findings in the High Court judgment and *My Vote Counts II*, cited the above dicta in *Buckley v Valeo* with approval, adding that:

*"For the reasons Ramakatsa sets out, the first two considerations noted in Buckley v Valeo have particular edge in our democracy. This is because political parties hold the key to elective and executive office. They are the indispensable conduits through which the Constitution's vision of our democratic function is to be attained."*²³

37. *Buckley v Valeo* was also cited with approval in *IDASA*,²⁴ where the Constitutional Court stated that the applicants in the matter "*made out a compelling case – with reference to principle and to comparative law – that*

²³ *My Vote Counts I*, para 43.

²⁴ *Institute for Democracy in South Africa and Others v African National Congress and Others* 2005 (5) SA (39) (C) ("*IDASA*").

private donations to political parties ought to be regulated by way of specific legislation in the interest of greater openness and transparency."²⁵

38. In addition to the constitutional basis for disclosure generally, the applicant submits that there is no constitutional justification for any limit on full disclosure, and no case has been made out by the respondents in this regard. This is reinforced by *My Vote Counts II*:

38.1 The Constitutional Court held that "*no information on the private funding... may be "unheld" or "unrecorded" or destroyed at the discretion of the holder and therefore undisclosable*".²⁶ Thus, all information concerning private funding must be recorded, held and reasonably disclosed.

38.2 According to the Constitutional Court:

"[39] This then means that political parties and independent candidates should not be left to pick and choose what information would be "held", preserved and disclosed to those who depend on information to determine to whom to entrust their future, that of the nation and posterity. All information necessary to enlighten the electorate about the capabilities and dependability or otherwise of those seeking public office must not only be compulsorily captured and preserved but also made reasonably accessible.

...

²⁵ *IDASA*, para 87.

²⁶ *My Vote Counts II*, para 75.

[54] Access to public office is a highly contested terrain. Contestants ought therefore to have virtually unrestrained access to information on the private funding of one another. This way they would be able to use it to expose and eliminate corruption or the appearance of corruption tied up to funding."

(emphases added)

39. In view of the above, the applicant submits that the PPFA (as amended by the EMAA) fails to give effect to the constitutional imperatives and rights that underlie it on the basis that it places a threshold on disclosure of private donations accepted by political parties in circumstances where the constitutional imperatives dictate that all donations must be disclosed. Such a threshold is not constitutionally permissible and defeats the purpose of the disclosure.
40. The DA, the Ministers and Action SA assert that the Constitutional Court's judgment in *My Vote Counts II* did not require all private donations to be disclosed.²⁷
41. Those respondents contend that Parliament, as opposed to the Court, is best positioned (and effectively, has the sole discretion) to determine whether "small" donations need to be recorded and disclosed, and that it has a "*margin of appreciation*" and "*broad mandate*" in making such a determination. Therefore,

²⁷ PB, DA's AA, page 235, para 44-46; PB, Action SA's AA, page 324-326, para 20-22; PB, Ministers' AA, page 725, para 33-37.

the respondents suggest that the applicant's relief encroaches on the separation of powers, insofar as the relief is impermissibly prescriptive.²⁸

42. In support thereof, the respondents rely on paragraph 75 of the judgment in *My Vote Counts II*, where the Constitutional Court observed that whether political parties "*should be required to record and disclose any and every help, is a matter best left to Parliament to reflect and decide on*".

43. The respondents' position is, however, premised on a misappreciation of the import of *My Vote Counts II* and the relief sought by the applicant:

43.1 the above statement is carefully circumscribed simply to make the point that just because there is a requirement of full disclosure (which is otherwise confirmed by the Constitutional Court) does not mean that every tiny (even *de minimis*) bit of help (which is possibly even non-financial) of any sort must be recorded and disclosed. This statement certainly does not give Parliament open-ended discretion to exclude wide swathes of information from seeing the light of day;

43.2 it is the Constitution which commands that all donations should be disclosed. The balance of *My Vote Counts II* confirms the constitutional imperatives of full disclosure. The legislature's efforts must now be assessed against the constitutional standard to test for compliance. A similar approach was adopted by the Constitutional Court in *Glenister II*,²⁹

²⁸ PB, DA's AA, page 235, para 44-46; PB, Action SA's AA, page 324-326, para 20-22; PB, Ministers' AA, page 725, para 33-37.

²⁹ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) ("*Glenister II*").

with the measures adopted by Parliament to fulfil its obligation found to be wanting in *Helen Suzman Foundation*;³⁰

43.3 sections 32 and 7(2) do not contain any internal limitation to full disclosure and the respondents cannot shift the burden by introducing such a limitation through the back door of a creative reimagining of what the Constitutional Court has held. If the respondents want to limit the right to full disclosure, then the onus is firmly on them to discharge that onus, which they have failed to do;

43.4 while Parliament has a specific role in determining the mechanisms for implementing the requirement of full disclosure, its discretion is not without constitutional constraints. The Constitutional Court in *My Vote Counts II* recognised that Parliament is best positioned to enact legislation that gives practical effect to the constitutional imperative of transparency in political funding. This mandate, however, must be exercised within the constitutional strictures and the Constitutional Court's clear direction that all private donations must be disclosed;

43.5 the discretion afforded to Parliament pertains to technical and practical modalities of implementing full disclosure and how such disclosure is effected, and does not extend to abrogating the principle of disclosure, and certainly not in a manner which stifles proper disclosure. In other words, while Parliament is best placed to decide how to implement full disclosure (such as the methods of reporting, timelines and administrative process), it

³⁰ *Glenister II* was affirmed unanimously by the Constitutional Court in *Helen Suzman Foundation v President of the Republic of South Africa and Others* ("**Helen Suzman Foundation**").

cannot enact measures that undermine the constitutional requirement of full disclosure of private donations; and

- 43.6 this Court may grant whatever relief it deems just and equitable in the circumstances, to correct the unconstitutionality which besets the PPFA (as amended by the EMAA).

The current limit is unconstitutional

44. As set out above, the applicant submits that there is no constitutional justification for a disclosure threshold, and all donations must be disclosed.
45. However, even if a minimum limit may be constitutional, which is denied, the State has failed to discharge its burden of establishing the constitutionality of any such limit or the current limit of R100,000.
46. First, and in any event, there is simply no factual or policy basis set forth for any limitation on the right of access to information. We respectfully submit that this is the end of the enquiry in terms of well-worn constitutional limitation doctrines.
47. Second, the PPFA (as amended by the EMAA) fails to address how related persons or entities can all donate below the annual threshold, and thus not be subject to transparency and scrutiny, even if that kind of funding cumulatively is above the annual threshold or even constitutes the preponderance or the entirety of a party's revenue. In addition, section 9(1)(a) of the PPFA (as amended by the EMAA) establishes a disclosure limit per donation, rather than per donor. Thus, multiple donations in a year may be made below the R100,000 without detection or disclosure.

48. As matters stand, nothing stops a series of connected entities, with identical shareholding and directorships, from donating multiple times under R100,000 adding up to a vast total while remaining undisclosed.
49. The multiple connected corporate (or other) donors who donate below the R 100,000 disclosure threshold will never be known under the PPFA (as amended by the EMAA). Similarly, donors who donate to multiple political parties below the threshold will never be known, with the result that their outside influence across the spectrum of political parties goes undetected by the electorate.
50. This can undoubtedly distort the political landscape and erode public trust in the democratic process. The applicant's concerns in this regard are not merely theoretical, but rather represent a plausible and dangerous loophole in the disclosure regime, undermining the spirit of transparency and accountability that the constitutional imperatives demand.
51. The DA, Ministers and Action SA argue that section 9(1)(a), properly interpreted, refers to a threshold applicable to the sum of donations by a single donor in a financial year. As such, once donations from a donor cumulatively exceeds R100,000, a disclosure must be made.³¹
52. The interpretation proffered by the respondents is strained to say the least. As an important starting point, section 9(1)(a) of the PPFA states: "*a political party must disclose to the Commission all donations received above a disclosure threshold*". This wording, on its face, refers to individual donations that exceed

³¹ PB, DA's AA, page 256, para 85; PB, Action SA's AA, page 334, para 47; PB, Ministers' AA, page 727, para 43.1 and 43.1.

the threshold. The provision is not worded such that multiple donations from the same donor over a financial year should be aggregated for disclosure purposes. This is to be juxtaposed with the wording in sections 8(2) and 8(5) of the PPFA, which refers to cumulative total of donations hitting the upper limit over the course of a year.

53. The wording of section 9(1)(a) is different and appears to import a different, individual-donation emphasis. Terms like "*aggregate*", "*cumulative*", "*combined*", or "*total over financial year*" do not appear in section 9(1)(a).
54. In any event, even if the meaning of section 9(1)(a) is that the disclosure threshold is cumulative, the PPFA (as amended by the EMAA) does not cater for related entities or parties. There is no substantive answer to this very serious issue in the respondents' papers.
55. Third, the legislation contains no requirement for disclosure of donations by individuals. This further undermines the justifiability of any threshold.
56. Fourth, the disclosure threshold is plainly too high and donations below this limit may have a material impact on political decisions on the basis that political parties receive a large portion of their private funding from donations below the threshold, and thus, donations below the threshold are plainly material to parties and potentially their policies.
57. In this regard, the DA and the Ministers argue that donations of less than R100,000 are insignificant, as such amounts constitute a small fraction of political

parties' total revenue and income, and costs and expenses, including the costs of running a political party.³²

58. This argument oversimplifies the nature of political influence.
59. From the financial year 2022/2023, a large share of the smaller political parties disclosed either amounts received below the threshold or reported no donations at all. These parties did not report any donations above the threshold and, as such, would only have received donations below the threshold.³³
60. In view thereof:
- 60.1 smaller political parties' financial support base is, in most cases, composed entirely of donations below the threshold. Even a single contribution of a few hundred rand can represent a substantial portion or percentage of their entire private funding base. What might seem like an insignificant donation in absolute terms becomes highly influential in relative terms;
- 60.2 when a single donation below the threshold makes up a large fraction of the party's total funding, that donor's priorities, interests, or affiliations could have a disproportionately outsized impact on the party's decision-making, policy positions, or campaign strategies;
- 60.3 moreover, if most of the donations of a political party are comprised of small donations from the general public, this can have a material impact on

³² PB, DA's AA, page 242, paras 54-55; PB, Minister's AA, page 720, para 14.

³³ PB, RA, page 827, para 51.3.

political parties' policies and voters' choices and the voters have a right to know this;

60.4 in the absence of full disclosure, a voter cannot: (i) identify who is behind the relevant streams of funding; (ii) cannot gauge the true scale and diversity of a party's private funding; and (iii) and cannot measure how donors' interests may shape party agendas; and

60.5 for a voter considering supporting a smaller political party or independent candidate at national, provincial or local level, understanding the sources of even the smallest donations (in absolute terms) is critical to casting an informed vote.

61. Established parties also rely significantly on donations below the threshold. In the financial year 2022/2023:

61.1 the DA received R54,472,855 in private donations above the threshold, and R14,447,718 below the threshold. Thus, over a fifth of all private donations received (approximately 20.96%) were below the threshold.³⁴

61.2 uMkhonto we Sizwe ("**MK party**") (who has 58 of the 400 allocated seats in Parliament), has since its registration, declared just one "in kind" donation to the party valued at R380,555. The MK has indicated in media reports that its funds come from individual members of the party, and from small businesses in particular (ie, small donations below the threshold).³⁵

³⁴ PB, IEC Report, page 894.

³⁵ Davis R et Njilo N: 'The MK party's year of living dangerously – from a dramatic political debut to internal turmoil' in *Daily Maverick*, available at: <https://www.dailymaverick.co.za/article/2024-12-07-the-mk-partys-year-of-living-dangerously-from-a-dramatic-political-debut-to-internal-turmoil/>.

62. It is clear from the above statistics that smaller donations below the threshold, when aggregated, constitute a meaningful share of the total financing from private entities and persons. For voters, reducing or eliminating the disclosure threshold would ensure that contributions are brought to light, as it can reveal patterns of influence, show which constituencies a party might be catering to, the true scale and nature of a party's financial support, and the stakeholders whose interest may steer political party's policies.
63. This is especially important in light of the lack of provisions dealing with related parties and disclosure of donations by individuals.
64. In fact, even donations that appear modest in proportion to a political party's overall budget and total financing can exert influence in significant ways. For instance, a strategically timed contribution, even if relatively small in relation to the overall budget of the political party in question, may gain the donor special access to decision makers, help finance a critical aspect of the party's operations (especially during the election period), or support targeted campaign efforts that sway public perception.
65. The fact that the respondents assert that private funding is usually critical to maintaining parties' operations simply reinforces the fact that there should be full disclosure as this funding can materially influence the political party in question, its leadership, its policy choices and its conduct in the political sphere.
66. Fifth, there is no suggestion that the R100,000 limit was determined with regard to any evidence, studies, data, or analysis as to the appropriateness of that limit. It is clear that no research was done in this regard. The threshold applies to every party (big or small, local, provincial, or national), every election cycle, every

independent candidate, and every kind of donor. The limit is plainly unlawful, arbitrary and irrational.

The respondents' contrived section 36 limitation analysis

67. The respondents contend that, despite the overwhelming import of sections 32, 19 and 7(2) of the Constitution and comprehensive jurisprudence to the contrary, the PPFA's failure to provide the full disclosure of private funding information is not unconstitutional. Essentially, this contention is based on a limitation analysis in terms of section 36 of the Constitution.³⁶

68. In support of this argument, the DA, Action SA, and the Ministers submit that:

68.1 the applicant has failed to show that all funding information is required for the effective exercise of the right to vote;

68.2 the limitation protects the (weighty and countervailing) rights of donors and political parties in, *inter alia*, the following ways:

68.2.1 the disclosure of all private funding information would violate a political party's right to privacy;

68.2.2 the political convictions and voting patterns of donors would be exposed by the disclosure of private funding information violating the donor's right to privacy and the right to vote; and

³⁶ PB, DA's AA, page 237-238, para 48; PB, Ministers' AA, pages 721-722, paras 23-24, 30-32; PB, Action SA's AA, pages 323-324, para 19.

68.2.3 donations to political parties should be capable of being made freely, without broadcasting this to members of the public and, as such, disclosure would violate the right to freedom of association.

68.3 full disclosure of private funding information would have a severe effect as it will result in:

68.3.1 private funders withdrawing financial support for parties for fear of recrimination from other established parties; and

68.3.2 funders increasing their financial donations to other established parties in a show of support and withdrawing funding from other, smaller opposition parties.

69. At the outset, it is important to note that these submissions are not novel at all and have, in fact, been raised and well traversed on previous occasions within the jurisprudential history and matrix of this matter in both the PAIA proceedings and *My Vote Counts II*.³⁷

70. In the High Court decision in the PAIA proceedings, the Court ruled on this issue and held "*the right to privacy cannot avail the DA*", and "*the possibility of a ruling party taking action to punish donors for supporting opposition parties is not in my view the type of reasonable and justifiable limitation contemplated in s 36 of the Constitution for the limitation of the right of access to information and the right to vote*".³⁸

³⁷ PB, RA, pages 808-811, paras 25-27.

³⁸ *My Vote Counts NPC v President of the Republic of South Africa and others* 2017 (6) SA 501 (WCC), paras 65-69.

71. The Constitutional Court, in *My Vote Counts II*, held that PAIA is invalid because it fails to provide for the recordal, preservation and reasonable disclosure of information on the private funding of political parties and independent candidates. One of the reasons that PAIA was deemed to be deficient was that it allowed information to be withheld on the basis of: (i) protecting the commercial or financial interest of the private or public body (ie the entity that made the private donation); (ii) a breach of duty of confidence owed to a funder; and (iii) the mandatory protection of the privacy of third parties. In this regard, the Constitutional Court found as follows:

"[66] The real question is whether PAIA provides for the recordal, preservation and disclosure of information on the private funding of political parties and independent candidates. Sections 18 and 53 of PAIA do not pass muster. They prescribe a form to be completed with laborious particularity. And information on private funding would have to be requested from a particular political party for a specific purpose or as and when it is needed. To have it, a fee must be paid and the record asked for must obviously be in existence. It is a cumbersome process that many would not be able to follow. PAIA does not impose any obligation to record information on the private funding of political parties and independent candidates, but even if it did, provision was not made for reasonable access.

[67] Information might be withheld on the basis that it is likely to harm the commercial or financial interests of say the private or public body or would amount to a breach of a duty of confidence owed to a "funder" in terms of

an agreement. Possible legal action for breach of a duty of confidence owed to a third party in terms of an agreement could justify denial of access to information. In some respects, PAIA offers mandatory protection of the privacy of third parties.

[68] All of the above highlight PAIA's inconsistency with the constitutional obligation to avail information on private funding to all who need it in a reasonable manner. In sum, PAIA is deficient because it does not provide that: (i) information on the private funding of political parties and independent candidates be recorded and preserved; (ii) it be made reasonably accessible to the public; and (iii) independent candidates and all political parties are subject to its provisions. Additionally, it suffices to say that no compelling reasons exist to justify these limitations."

(emphasis added)

72. The balancing exercise has already been performed. The Constitutional Court found that the right of access to information must prevail over the right of privacy and associated rights invoked on behalf of donors.
73. Moreover, it is useful to take into account the fact that political parties occupy a unique and critical role in our constitutional democracy. Like the national and provincial legislatures, the executive and the judiciary, they are institutionalised within the legal system.³⁹ The centrality of political parties has been recognised by the Constitutional Court and cannot be gainsaid.⁴⁰

³⁹ IDASA, para 42.

⁴⁰ For a general discussion see Lisa Thomtan "The Constitutional Right to Just Administrative Action – Are Political Parties Bound?" (1999) 15 SAJHR 351, p358.

74. The entire electoral system is dependent on political parties contesting elections, and therefore, determining which persons are allocated to legislative bodies and the executive.⁴¹ Members of political parties (in their capacity as members of the national and provincial legislature and executive) determine the laws and policies of the country. Under the Constitution, membership of the legislature and the executive is inextricably linked to party membership.⁴² Broadly, in terms of sections 57(c) and (d) and section 116(2), the Constitution envisages the provision of public funding of political parties, and political parties, through their congresses and think tanks, shape and often define policies and legislation.
75. As such, it is clear that political parties are not only the bearers of political rights but are also duty-bound to respect and advance the political rights of the electorate. Although political parties are not organs of states in the strict sense, they are a special species of actors, rightly bearing constitutional responsibilities towards the voting public. Political parties are constitutionally unique – central vehicles of democracy which must be considered, approached and regulated in a manner alive to their place within the constitutional firmament.
76. In the *First Certification* judgment, the Constitutional Court sketched the constitutional place of political parties briefly as follows:⁴³

⁴¹ Part 3 of the Electoral Act, 1998; schedule 3 item 1(1).

⁴² Section 47(3)(c) of the Constitution specifies that a person loses membership of the National Assembly if that person "ceases to be a member of the party that nominated that person as a member of the Assembly, unless that member has become a member of another party in accordance with Schedule 6A". Section 62(4)(d) of the Constitution provides that a person ceases to be a permanent delegate to the National Council of Provinces if that person ceases to belong to a particular party.

⁴³ *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), para 186.

"Under a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate."

77. More recently, in *Ramakatsa*, the Court robustly affirmed the special role of political parties in our constitutional project. Writing for the majority, Moseneke DCJ held as follows:⁴⁴

"In our system of democracy political parties occupy the centre stage and play a vital part in facilitating the exercise of political rights. This fact is affirmed by section 1 of the Constitution which proclaims that "[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness" are some of the values on which our state is founded. ...

In order to enhance multi-party democracy, the Constitution has enjoined Parliament to enact national legislation that provides for funding of political parties represented in national and provincial legislatures. 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.

Our democracy is founded on a multi-party system of government. Unlike the past electoral system that was based on geographic voting constituencies, the present electoral system for electing members of the

⁴⁴ *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC) ("**Ramakatsa**"), paras 65-68.

national assembly and of the provincial legislatures must "result, in general, in proportional representation". This means a person who intends to vote in national or provincial elections must vote for a political party registered for the purpose of contesting the elections and not for a candidate. It is the registered party that nominates candidates for the election on regional and national party lists. The Constitution itself obliges every citizen to exercise the franchise through a political party. Therefore political parties are indispensable conduits for the enjoyment of the right given by section 19(3)(a) to vote in elections."

(emphases added)

78. A decade earlier, the Constitutional Court made it patently clear in *Masondo* that political parties are not only conduits of constitutional power, but are essential to the achievement of our Constitution's most sacred goals:⁴⁵

"The open and deliberative nature of the process [of our democracy] goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not towards exercising (or blocking

⁴⁵ *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) SA 413 (CC), paras 42-43.

the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, 'South Africa belongs to all who live in it.'

(emphasis added)

79. In the minority judgment in *My Vote Counts I*, the Court observed that political parties are central to our democracy, facilitating and entrenching it.⁴⁶ The Court also stated that *Ramakatsa* authoritatively establishes the link between the role of political parties and their private funding, as political parties' activities are critical to social progress.⁴⁷ Moreover, the minority judgment stressed that public resources are directed to political parties precisely because of their central role in our political system and, as a necessary corollary, any *private* funds they receive have a distinctly *public* purpose.⁴⁸
80. In view of all of the above, the applicant submits that the unique nature of political parties and their integral role in the success of the democratic project bear undeniable significance for the determination of whether anything may be withheld and whether all funding information is required for the effective exercise of the right to vote and the effective protection of all constitutional rights from, *inter alia*, corruption.
81. The applicant submits that all funding information must be disclosed. On the other hand, the respondents contend that such information is not reasonably required for the right to vote and that such disclosure would, in fact violate the

⁴⁶ *My Vote Counts I*, para 34.

⁴⁷ *My Vote Counts I*, para 36.

⁴⁸ *My Vote Counts I*, para 37.

rights of donors and political parties. We turn now to explain why the respondents are wrong.

82. First, for the reasons already advanced, the allegation in paragraph 68.1 is incorrect. The applicant has clearly laid a firm foundation for the disclosure of private funding information in respect of constitutional prescripts and comparative law. This would promote and give effect to section 32 read with section 19 and 7(2) of the Constitution.
83. Second, the arguments raised in respect of the right to privacy cannot avail political parties (and/or donors) from full disclosure.
84. In *Bernstein*, the Constitutional Court explained that an integrated approach to interpreting the right to privacy eschews "*an abstract individualistic approach*".⁴⁹ Because no right is absolute, "*each right is already limited by every other right accruing to another citizen*".⁵⁰ Therefore:

*"[p]rivacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly"*⁵¹

85. Furthermore, in *Mistry*, the Constitutional Court affirmed that the right to privacy exists on a continuum and that:

⁴⁹ *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC) ("*Bernstein*"), para 67.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

*"[T]he more public the undertaking and the more closely regulated, the more attenuated would the right to privacy be and the less intense any possible invasion"*⁵²

86. The right to privacy is necessarily and significantly attenuated in respect of the funding of political parties. This view is supported by the reasoning employed in *Ramakatsa*, which recognised the public nature of political parties as well as the fact that private funds they receive have a distinctly public purpose and public effect on whether democracy is enhanced and entrenched.
87. The same principles must, as a necessary corollary, apply to the donors. As *Bernstein* makes plain, the matter of disclosure is not an individualistic inquiry, but one which focuses on the nature of the funding itself and, naturally, must factor in its distinctly public purpose and effect. The donors choose to donate to political parties and through this step into the public domain; they expressly or implicitly do so for public or political purposes and cannot rely on some residual "right to privacy" in doing so. In any event, it is telling that in these proceedings, no donor or prospective donor has challenged full disclosure on the basis of an infringement to the right of privacy. The recourse to privacy is made by political parties who are not the bearers of those rights.
88. Third, the arguments raised in respect of the right to freedom of association and the right to vote are also of little moment:

⁵² *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC), para 27.

- 88.1 no person will be precluded from making financial contributions to a political party as a result of full disclosure – they will simply have the details of such funding made publicly available;
- 88.2 full disclosure, to the extent that it may dissuade some persons from making financial contributions to political parties, will simply have an effect on the choices made by them – choices which they will still be able to make freely, notwithstanding the consequences of public reporting;
- 88.3 the same considerations apply in a number of instances where people choose to exercise their rights, in conjunction with other rights and in a constitutionally acceptable manner – the right to freedom of expression and the constraints placed on this right under our Constitution is a prime example of this interplay;⁵³
- 88.4 in any event, a person is not forced to make financial contributions to a political party and any such contribution, and its disclosure would constitute an informed election by the donor, which can hardly be a breach of their constitutional rights;

⁵³ See, for example, the judgment in *Davis v Tip* NO 1996 (1) SA 1152 (W) where Nugent J held at p 1158-9 that: *"The applicant's submission suggests that, if the alternatives which are to be chosen from are equally unattractive, then choice is tantamount to compulsion, and that the right to silence entitles an accused person not to be faced with that choice. I do not agree. What distinguishes compulsion from choice is whether the alternative which presents itself constitutes a penalty, which serves to punish a person for choosing a particular route as an inducement to him not to do so ... Hard as the choice may be, it is a legitimate one which the applicant can be called upon to make and does not amount to compulsion. In my view his right to silence does not shield him from making that choice"*.

- 88.5 a person's decision to make a financial contribution to a political party does not necessarily betray a person's political beliefs or voting patterns. Donors fund numerous political parties, for a variety of reasons;⁵⁴
- 88.6 moreover, what the Constitution guarantees to take place in secret is the citizen's vote. It does not guarantee the secrecy of financial contributions made to political parties – whether by a South African or foreign national or by companies. Indeed, section 32, the right to vote and *My Vote Counts II* say the opposite; and
- 88.7 the Constitution also does not guarantee that a person's "association" (of any sort) will be kept secret, let alone where they are financing the exercise of political or public power.
89. The rights of donors and political parties are thus not limited by full disclosure, and certainly not in a manner which should prevent or inhibit the removal of the disclosure threshold, given the clear constitutional imperatives in favour of full disclosure. Therefore, if the respondents' case fails in respect of the allegations made in 68.1, as the applicant submits it must, there is no need to proceed to section 36 of the Constitution.⁵⁵
90. Fourth, the section 36 analysis conducted by Action SA is also fundamentally flawed in that the respondents seek to establish the unjustifiable nature of the applicant's case by asserting that other parties may take some unlawful and pervasive action in order to punish donors for supporting it, and that donors'

⁵⁴ For example: billionaire donors, such as Patrice Motsepe, Martin Moshal, and the Oppenheimer Family, have all donated to multiple parties, including the ANC, DA, Action SA, the EFF, IFP, and Freedom Front Plus (without betraying their secret vote).

⁵⁵ *S v Steyn* 2001 (1) SA 1146 (CC), paras 32-36.

actions will be dictated by such concerns.⁵⁶ With respect, aside from the bald speculation inherent in the assessment, the purported possibility (which essentially amounts to an unlawful form of coercion or blackmail) cannot be used to justify the limits of removing the disclosure threshold and undermine the self-standing constitutional prescripts which are founded on the right of access to information and the right to vote. There are other remedies in the Constitution and legislation to counteract unlawful conduct and threats.

91. It is noteworthy that the IEC, in the oral presentation made at the public hearing in December 2024, reiterated that there was no evidence of any retribution against donors or that any donor is not prepared to donate because their name may become known.⁵⁷
92. In any event, a limitation which is premised on anticipated breaches of the Constitution or criminal conduct or that does not contribute to an open and democratic society based on human dignity, equality and freedom can never be used to justify a limitation of rights.⁵⁸
93. In any event, the purported or potential intrusion on the rights of donors and political parties is, overall, outweighed and justified by the fact that full disclosure is constitutionally mandated, and gives meaning and effect to the right to vote and access to information. Moreover, the opposition parties' application of

⁵⁶ PB, Action SA's AA, page 323-324, para 19.

⁵⁷ PB, RA, page 816, para 35. The Portfolio Committee has not issued an official transcript in this, however, this has been transcribed from the audio recording available on its website at: <https://static.pmg.org.za/241203pchome.mp3> (starting at 14:53).

⁵⁸ *S v Makwanyane* 1995 (3) SA 391 (CC), CC, paras 117 and 185; *National Coalition for Gay and Lesbian Equality v Minister of Justice v Minister of Justice* 1999 (1) SA 6 (CC), para 37; *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC), paras 184-185.

section 36 is fundamentally flawed in that it fails to set forth an equally important (or more important) right or interest which is unjustifiably restricted by the respondents' approach.

94. Therefore, and as the applicant's case makes plain, any balancing exercise must be determined in favour of the applicant's case and the limitation enquiry under section 36 does not avail the respondents.

Alleged administrative and financial burden of full disclosure

95. In a further effort to support an argument for limited disclosure of funding:

95.1 the DA and the Ministers argue that the Constitutional Court itself recognised the "*tedious exercise*" for political parties to have to record and disclose every "*quantifiable assistance*" received and accepted;⁵⁹

95.2 Action SA submits that requiring smaller political parties to collect and process a large volume of smaller donations would be a "*financial and administrative impossibility*" as it would necessitate significant resources, including hiring additional staff;⁶⁰ and

95.3 according to Action SA, the variety of donations methods (ie, online platforms, SMS, and social media) complicates data collection and increases the risk of non-compliance due to practical difficulties.⁶¹

⁵⁹ My Vote Counts II, para 75; PB, DA's AA, page 235, para 45; PB, Ministers' AA, page 732-733, para 59.

⁶⁰ PB, Action SA's AA, para 23, page 326-327.

⁶¹ Ibid.

96. The first question is whether full disclosure (in light of the constitutional imperatives set forth above) ought to be subjected to limitation due to the fear of administrative hassle on the part of political parties.
97. The applicant submits that it should not be subject to limitation.
98. First, the alleged administrative burdens are simply not a basis for limiting rights to disclosure in this case. The rights are too important in their own right and for our constitutional democracy and the limitation is extensive, arbitrary and unjustified. Acceptance of private donations carries with it responsibilities to ensure that the donations are fully recorded and disclosed. A party can choose not to accept private donations and would then not have any administrative burdens.
99. Second, there is no evidence of any impossibility or supervening difficulty in complying with the requirements of full disclosure. The allegations in this regard are vaguely stated and it is not explained let alone proven why it may be impossible, especially given the ubiquitous modern technology for storing information and accepting payments, which could easily record and disclose the information in question. The tools are accessible, cost-effective, and scalable, eliminating the need for labour-intensive manual processes. Donation platforms, such as those referenced by Action SA (e.g., online platforms, SMS, and social media), automatically capture essential donor details, including name, contact information, and amount donated. This ensures that data are readily available for disclosure, rendering the argument that small donation disclosure imposes an undue burden untenable. It must plainly be possible to undertake the exercise in the same way it is done for all donations above the threshold.

100. Third, the defence of impossibility or impracticality is also unavailing to the State because no research or analysis in this regard has been done to indicate, at the time of the PPFA (or indeed thereafter), that there will be insuperable obstacles if donations above the threshold of R 100,000 have to be recorded and disclosed. The restrictions it enacted in terms of the disclosure threshold are thus plainly irrational.

101. Fourth, and in any event, the respondents' justification is decimated on the facts. Under the PPFA, in its current formulation and purported application, all donations are presently required to be recorded. The upper limit for donations is an annual sum (of R 15 million). Given that it is an annual amount (and the political parties cannot know whether by the end of the year that limit will be reached in respect of any specific donor), parties will have to record all donations received at all times. Given that those are recorded, they can obviously be disclosed. It is noteworthy that the respondents assert that the R 100,000 threshold is likewise cumulative for the financial year. If this is so, all donations have to be recorded for this further reason. Moreover, and in any event, all political parties are required to report to the IEC all the donations they receive in a year. In all the above circumstances, recordal of all donations is required to occur already, and no material additional burden will be entailed if the applicant succeeds. Moreover, the current architecture of the PPFA (as amended by the EMAA) already contemplates and accepts the imposition of precisely such administrative burden on all political parties:

101.1 section 12 of the PPFA (as amended by the EMAA) imposes strict administrative obligations on political parties in relation to accounting and

record keeping on income and expenditure of public funding, including "*listing the donations under the threshold prescribed in Section 9(1)*" (which includes a monetary and "*in kind*" donation, as defined in section 1). Should the disclosure be set aside and full disclosure be mandated, political parties would need to disclose all donations which they are already required to record subject to an audit;

101.2 political parties are required to disclose the total amount of donations received below the threshold, which the IEC then publishes in its annual reports (a point conceded by the DA).⁶² To calculate this cumulative total, political parties must already collect and process information on each small donation received; and

101.3 for the purposes of the upper limit and disclosure threshold requirements, all political parties are already required to record all of the details concerning the donor, including identity and amount, in respect of every donation, however small.

102. In all those circumstances, the alleged administrative burdens are imaginary, not real.

103. The so-called burden on the IEC is also overstated. The IEC would receive this information from political parties as part of their reporting obligations, and the only additional step would be for the IEC to publish this information and make it reasonably accessible to the public. At the Portfolio Committee meeting on 3 December 2024, the CEO of the IEC did not indicate any such difficulty on the

⁶² PB, DA's AA, page 237 and 255, paras 47.4.2 and 79.1.

part of the IEC. Moreover, the IEC was cited as a party in this matter and could have filed papers to explain any difficulties concerning the relief sought by the applicant. Tellingly, it did not do so, but chose to abide the decision of this Court.

104. To the extent that there is an administrative burden on political parties to collect information on the sources of their donations (which is denied as aforesaid), then it is entirely appropriate for them to bear this responsibility.

105. As set forth above, political parties operate within the public domain and are entrusted with public confidence and enormous public power, and thus, they have a heightened constitutional obligation to ensure transparency and accountability in respect of their funding sources. The need for full disclosure is not an undue imposition but a necessary function to uphold the integrity of the electoral process and ensure compliance with constitutional imperatives.

106. Moreover, the purported procedural burdens associated with full disclosure do not, with respect, withstand scrutiny.

107. In any event, inconvenience is not a defence to fulfilment of constitutional injunctions.

No requirement for natural persons to disclose above the prescribed threshold

108. Another reason that the PPFA (as amended by the EMAA) fails to give effect to the constitutional imperatives and rights that underlie it, is that it excludes natural persons from reporting obligations in respect of donations made in excess of the prescribed threshold, without any basis.

109. In this regard, section 9(2) of the PPFA (as amended by the EMAA) excludes natural persons from the obligation to disclose donations made above the prescribed threshold in subsection 1(a). Section 9(2) of the PPFA (as amended by the EMAA) reads as follows:

"A juristic person or entity that makes a donation above the threshold prescribed in terms of subsection (1)(a) must disclose that donation to the Commission in the prescribed form and manner"

110. The exclusion of natural persons from the reporting obligations under the PPFA (as amended by the EMAA) fundamentally undermines the constitutional imperatives of transparency, accountability, and the right to an informed vote. This exclusion, entrenched in section 9(2), directly contradicts the principles outlined in *My Vote Counts II*, which emphasised the necessity of comprehensive access to funding information to enable voters to make informed political choices.

111. By limiting the obligation to disclose donations above the prescribed threshold solely to juristic persons, the PPFA creates a significant loophole. Natural persons, who are equally capable of making substantial donations and influencing political outcomes, are effectively exempted from this vital transparency mechanism. This allows individuals covertly to channel significant sums to political parties or candidates, without any obligation to disclose these contributions, leaving the electorate unaware of potential sources of undue influence.

112. The constitutional imperatives underpinning the right to vote and access to information demand that all sources of private funding, regardless of whether they originate from juristic or natural persons, are subject to scrutiny. This is

because the influence of large donations is not confined to legal entities; natural persons can exert significant influence over political agendas and elected representatives, shaping policy in ways that serve private interests rather than the public good.

113. The absence of any legitimate basis for this exclusion exacerbates the issue.

There is no evidence to suggest that natural persons should be treated differently from juristic persons regarding disclosure obligations. On the contrary, the exclusion undermines the very purpose of the PPFA: to promote transparency and prevent corruption. By allowing donations from natural persons to go unreported, the PPFA fails to address a key source of potential undue influence in the political process.

114. This exclusion also creates an unequal and irrational regulatory framework.

While juristic persons are subject to disclosure requirements, natural persons, who may have similar or even greater capacity to influence political outcomes, are given a free pass. This inconsistency is irrational.

115. The Ministers advance an astonishing argument that "*the requirement on juristic persons is an added extra by Parliament – the Constitution does not require it to be extended also to natural persons*". They further claim that juristic persons are more capable of making disclosures, whereas natural persons are not.⁶³

116. This argument is fundamentally flawed for several obvious reasons.

117. First, it misconstrues the constitutional imperative of transparency, accountability and the right to an informed vote, as recognised in *My Vote Counts II*. The Court

⁶³ PB, Minister's AA, page 737, paras 76-77.

made it clear that the purpose of disclosure is to ensure that voters have access to comprehensive information about private funding to make informed political choices. This imperative applies equally to donations from natural persons as it does to those from juristic persons, as both have the potential to exert undue influence over elected representatives and distort the democratic process. In fact, *My Vote Counts II* makes no distinction between natural and juristic persons in identifying the risks posed by undisclosed funding.

118. Second, the Ministers' claim that natural persons are somehow less capable of making disclosures is both unsubstantiated and illogical. The information required for disclosure is minimal and straightforward—typically limited to the donor's name, the amount donated, and the recipient political party or candidate. These details are not overly invasive and are standard for many financial transactions, including for charitable donations or crowdfunding contributions. There is no evidence to suggest that requiring natural persons to disclose their donations would impose an insurmountable burden, and in any event, any minimal inconvenience is far outweighed by the constitutional need to ensure transparency and accountability in political funding.
119. Third, the Ministers' argument fails to recognise the broader implications of exempting natural persons from disclosure obligations. Allowing natural persons to donate significant amounts without scrutiny creates a glaring loophole in the regulatory framework, enabling individuals to influence political outcomes covertly. This not only undermines public trust in the democratic process but also creates fertile ground for corruption and undue influence, as voters are

deprived of critical information about who may be bankrolling political parties and candidates.

The accounting for and disclosure of expenditure of private funding

120. Section 12(2)(d)(ii) of the PPFA (as amended by the EMAA) does not require accounting for expenditure of private funding by political parties; and section 22, concomitantly, does not require the IEC to report on such expenditure to Parliament and the public.

121. The applicant submits that this is unconstitutional and must be remedied by Parliament because:

121.1 First, the constitutional imperatives demand meaningful disclosure that enables voters to make an informed choice. Such disclosure includes how private funds are deployed. This may reveal for what purposes a political party solicits private donations and some of the reasons why private donors may be willing to contribute to a political party. It is part of the explanation about whether, how and why the private funding in question influences the political party to which the funding is made available. The manner in which the funds are expended is an inseparable part of the private donation fund flow and information in this regard is critical. A voter's right to an informed vote, protected under section 19 of the Constitution, encompasses not only knowing where parties secure their resources from, but also how those resources are directed and for what ends. Disclosure limited only to the origins of funds is incomplete because it obscures the real effect that funding might have on a party's priorities, its internal decision-making processes, and its responsiveness to the electorate's interests.

121.2 Second, the Constitutional Court in *My Vote Counts II* made it clear that "information on the private funding of political parties and independent candidates" must be "recorded, preserved and reasonably disclosed" through appropriate legislation. This imperative to ensure transparency and accountability in political funding is not limited merely to identifying the sources of private funding. Rather, it requires that voters be placed in a position to understand the broader context and implications of these financial flows.

122. The Minister argues that nothing in the Constitution, or the PPFA, requires Parliament to restrict the expenditure of private donations (and no case is made out by the applicant in this regard).⁶⁴ Action SA submits that the Constitutional Court confined its findings to "funding and not expenditure" and information on expenditure does not inform a voter in relation to its priorities and whether some form of clandestine influence is being exerted.⁶⁵

123. In summary, the DA contends as follows:⁶⁶

123.1 The Constitutional Court in *My Vote Counts II* provided that the source of private funding contains useful information (not the expenditure of private funding);

123.2 Voters do not need to know how a political party expends its funds to exercise their rights to an informed vote;

⁶⁴ PB, Ministers' AA, page 737, paras 79-80.

⁶⁵ PB, Action SA's AA, page 335, para 52.

⁶⁶ PB, DA's AA, para 98-110, pages 264-268.

123.3 There is a distinction between accounting for expenditure related to private funds and that related to public funds. Public funds must be disclosed in terms of Section 7 of the PPFA (as amended by the EMAA), because they are provided on a conditional basis and must be used for specific purposes. Private funds, by contrast, are not conditional. Donors who provide private funds entrust the party to spend them appropriately without the same conditions attached to public funding; and

123.4 Even if voters require information about how political parties spend private money, limiting disclosure in this respect is reasonable and justifiable. Requiring full disclosure would: (i) invade the privacy of donors and infringe on the party's rights to freedom of association and political participation; (ii) undermine fair competition between political parties; and (iii) place a massive administrative burden on political parties.

124. For the reasons already advanced, the allegation in paragraphs 122 and 123 above is incorrect. The applicant has clearly laid a firm foundation for the need to account for expenditure in relation to private funding in terms of the constitutional prescripts. This would promote and give effect to section 32 read with sections 19 and 7(2) of the Constitution.

125. In respect of the remaining allegations, the applicant submits as follows:

125.1 It cannot be assumed that donors, having parted with their money, impose no conditions or expectations. Even if no explicit conditions are attached, disclosing expenditure patterns illuminates how influences (through funding) might manifest in practice and whether a party's policies are driven by public interest or by the interests of affluent backers. In any event,

political parties are not ordinary private entities (regardless of whether they use public or private funds); they are central institutions in a constitutional democracy. The public nature of political parties as well as the fact that the use of private funds they receive have a distinctly public purpose and public effect on whether democracy is enhanced or entrenched must mean that other rights (and pertinently here, the right to cast an informed vote) have the effect of justifiably limiting privacy, in accordance with the principles espoused in *My Vote Counts II*. Disclosure of expenditure in no way restricts the political parties' rights to political participation or freedom of association. In any event, the claim based on donors' privacy is inconsistent with and destructive of the argument that donors give funds dispassionately and entrust the parties to do with them what they will. If these concepts are correct, then donors have no interest (let alone privacy interest) in the expenditure of funds donated by them.

125.2 The contentions in relation to the purported burden and the supposed effects on competition are likewise untenable.

125.2.1 Political parties are required to maintain proper financial records, including full statements of income and expenditure, and the books of account must show how funds are used. Requiring disclosure of how funds are used does not introduce fundamentally new or onerous demands, but simply requires that already-maintained financial information is made reasonably accessible. There are obviously no insuperable obstacles in disclosing operating costs and expenses related to public funds (which can be used for essentially any

legitimate political party process). It is therefore difficult to understand why requiring similar disclosures for private funding expenditure would pose any greater challenge. But even if there are additional costs associated with this, it is a cost which pales into insignificance compared to the constitutional imperatives it is intended to promote. It is simply one of the costs of being part of and participating in the electoral and political system as a political party, which is the political parties' *raison d'être*.

125.2.2 In addition, political parties are not normal economic entities with commercial secrecy objectives and strategies protectable by law: they are not corporate entities engaged in a race to optimise production costs or marketing techniques to outbid each other on a uniform product. Rather, their principal "competitive advantage" (if this term can even be applied to political parties) rests in their ideological positions, policy proposals, leadership, and, perhaps most importantly, the credibility and sway they hold with the electorate. They compete in a decidedly public space, for electoral influence. In this context, they are not governed by the ordinary rules of commerce. Transparency and access to information about political actors is critical and is a constitutional imperative.

125.2.3 But in any event, from a practical perspective, the influence on competition in an economic sense is entirely overstated. The ANC, for instance, will not suddenly adopt the DA's programme simply by learning how the DA allocates its private donations. Different parties

operate on fundamentally divergent value systems and political and distributive principles. In any event, if other parties genuinely wished to gain a competitive edge through expenditure disclosures, they could already do so using information on how the DA spends its public funding. It is therefore difficult to believe that disclosing the manner in which private funding is spent would suddenly yield a qualitatively different or greater competitive advantage.

126. In any event, any purported or potential intrusion on the rights of donors and political parties is small in extent and the nature of the rights is attenuated at best. Any intrusion is thus outweighed and justified by the imperative of disclosure, supporting the right to vote and access to information, as well as section 7(2) of the Constitution.

THE UPPER LIMIT

Constitutional imperatives in respect of the upper limit of donations

127. To begin with, there are constitutional imperatives which necessitate a limit on private funding to prevent corruption and to give meaning to the right vote, rooted directly in sections 7(2), 19, 195, 215, and 217 of the Constitution.

128. Section 7(2) of the Constitution contains a pivotal demand: "*The state must respect, protect, promote and fulfil the rights in the Bill of Rights*". This general injunction is fortified in sections 195, 215 and 217 of the Constitution, which require, *inter alia*, that all spheres of government maintain high ethical standards; are responsive, accountable, fair and transparent; and promote the efficient, economic and effective use of resources.

129. The ability of a state to discharge these duties is, however, corroded by the insidious effects of corruption. The Constitution thus requires that effective preventative measures be put in place to safeguard against it. As this Court held in *Glenister II*:⁶⁷

"The Constitution enshrines the rights of all people in South Africa. These rights are specifically enumerated in the Bill of Rights, subject to limitation. Section 7(2) casts an especial duty upon the state. It requires the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights.' It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an integrated and comprehensive response. The state's obligation to 'respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create efficient anti-corruption mechanisms."

130. The essential import of *Glenister II* is that the Bill of Rights entitles everyone to protection from corruption and that the state has a duty to ensure that this protection is manifest. This flows from the fact that "*corruption in the polity corrodes the rights to equality, human dignity, freedom, security of the person and various socio-economic rights*".⁶⁸

131. This conclusion is bolstered by international law, which plays an important role in interpreting section 7(2), 19 and 32, and understanding the extent of the state's obligations. As the Constitutional Court explained in *Glenister II*, "*our*

⁶⁷ *Glenister II*, para 177.

⁶⁸ *Glenister II*, para 200.

*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 measure the state's conduct in fulfilling its obligations in relation to the Bill of Rights".*⁶⁹

132. In this regard, Parliament has unreservedly ratified three international agreements that directly addresses corruption:

132.1 the South African Development Community Protocol against corruption ("**the SADC Protocol**") on 15 May 2003;

132.2 the United Nations Convention against Corruption ("**the UN Convention**") on 22 November 2004; and

132.3 the African Union Convention on Preventing and Combating Corruption ("**the AU Convention**") on 11 November 2005.

133. The SADC protocol obliges South Africa to "*adopt measures, which will create, maintain and strengthen*" mechanisms needed to prevent, detect, punish and eradicate corruption in the public and private sector.⁷⁰ These must include "*mechanisms to promote access to information and to facilitate eradication and elimination of opportunities for corruption*",⁷¹ as well as "*mechanisms for promoting public education and awareness in the fight against corruption*".⁷²

⁶⁹ *Glenister II*, para 178.

⁷⁰ SADC Protocol, article 4.

⁷¹ SADC Protocol, article 4(d).

⁷² SADC Protocol, article 4(j).

134. The UN Convention likewise obliges South Africa to "develop and implement or maintain effective, coordinated anti-corruption 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".⁷³

135. The AU convention is even more robust, requiring explicitly as follows:⁷⁴

"Funding of Political Parties

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."

(emphasis added)

136. There are also additional calls for the regulation of private funding information from various international bodies in Europe. For example, the Venice Commission's Guidelines and Report on the Financing of Political Parties, 2001 ("**the Venice Report**") records concerns in its preamble "*relating to the illicit financing of political parties recently uncovered*" and takes into account "*the essential role of political parties within democracy*". The Venice Commission is a body of constitutional law experts set up to advise the Council of Europe. Its publications are a source of international law. The Venice Report recommends

⁷³ UN Convention, article 5(1).

⁷⁴ AU Convention, article 10.

that parties impose "*a maximum level for each contribution*"⁷⁵ and emphasises that "*in the case of funds from private sources there is doubtless also a need for stricter regulation in terms of fixing the limits*".⁷⁶ The Venice Report is annexed marked "**A**".

137. Moreover, the Parliamentary Assembly of the Council of Europe notes with concern the "*corruption linked to political parties; gradual loss of independence and the occurrence of improper influence on political decisions through financial means*".⁷⁷ Thus, rules must be established in relation to private donations, including "*a legal limit on the maximum sum of donations*".⁷⁸ The relevant recommendations are annexed marked "**B**".

138. As confirmed in a number of these international instruments, "corruption" may take a number of multi-faceted and complex forms. This broad understanding of corruption is also echoed in the Prevention and Combatting of Corrupt Activities Act, 2004, which brings within its ambit the giving or offer of gratification in exchange for: the abuse of a position of authority; the breach of a relationship of trust; and/or actions which are designed to achieve an unjustified result. As such, while the necessity for a donation cap is given colour and content by the international agreements South Africa has ratified, that obligation remains rooted firmly in the Constitution itself.

139. The applicant thus submits that placing a lower maximum limit on the funding of political parties is imperative for the effective protection of all persons from

⁷⁵ Venice Report, para 6, page 2.

⁷⁶ Venice Report, p 12.

⁷⁷ Para 1, page 1.

⁷⁸ Para 7(v)(d), page 2.

malfeasance in governance. The prospect of a political party being beholden or grateful to its donors – especially substantial donors – creates considerable scope for corruption if indeed that party is elected into a position of public power. For this reason, private funding of political parties creates the clear and compelling risk that public officials may extend undue – and undetected – favouritism towards those who funded their political progress. In this insidious way, unregulated private funding threatens to encourage corruption, and thus to retard the realisation of the pivotal command in section 7(2) of the Constitution. In fact, it is almost certain that this is so.

140. This view is also expounded in *My Vote Counts II*, in which the Constitutional Court held:

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

141. Importantly, *My Vote Counts II* recognised the constitutional requirement that elected representatives must prioritise their constitutional mandate over all else and must be unencumbered so as effectively to discharge their democratic mandate. To this end, the Court made the following pertinent remarks:

"[41] Our freely elected representatives must thus be so free that they would be able to focus on their core constitutional mandate. They cannot help build a free society if they are not themselves free of hidden potential bondage or captivity."

142. And *My Vote Counts II* specifically held that "Unchecked or secret private funding from all, including other nations, could undermine the fulfilment of constitutional obligations by political parties or independent candidates so funded, and by extension our nation's strategic objectives, sovereignty and ability to secure a "rightful place" in the family of nations"⁷⁹ (emphases added). Thus, not only the secrecy, but also the unchecked (ie, unrestrained, uncapped and uncontrolled) nature of it gives rise to constitutional and democratic concerns. These comments were made in the context of the following findings of the Court: *"Others [donate] hoping to influence the policy-direction of those they support to advance personal or sectional interests. Money is the tool they use to secure special favours or selfishly manipulate those who are required to serve and treat all citizens equally."*⁸⁰

143. Thus, the facilitation of private funding of political parties must also guard against the inherent risk of *"buying out"* politicians and ultimately democracy. *My Vote Counts II* succinctly links the risks of funding with corruption and the need to mitigate such occurrence as follows:

"[48] The foundational values of our constitutional democracy like openness, responsiveness, accountability and the realisation of the

⁷⁹ Para [41].

⁸⁰ Para [40].

constitutional vision of building a united nation and improving the quality of life of all, could thus be at the mercy of unknown and even unscrupulous funders. For, there is indeed no free lunch. This is not to say that all funders are, without more, intent on furthering selfish or sectional interests at the expense of national interests. But some big political campaign funders even in old democracies have been exposed as being inclined "to use money for improper purposes". They reportedly tend to determine or influence in a meaningful way, the policy-direction to be pursued by those in whose political life or fortunes they "invested" their resources. And when elected public office-bearers are illegitimately dictated to, that is likely to poison the broader political landscape and governance, thus weakening or throttling our shared values and constitutional vision."

144. In addition to the above and given the interconnected nature of the rights in the Bill of Rights, section 7(2) should be read together with section 19. To this end, the applicant submits that the State is also under an obligation to respect, fulfil, and promote the right to vote by ensuring that it is exercised meaningfully and with understanding.

145. The judgment in *My Vote Counts I* confirmed that the right to vote is an informed one. This judgment, in reaching that conclusion, illustrates the rich and fundamental nature of the right to vote as follows:⁸¹

"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

⁸¹ *My Vote Counts I*, para 41.

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."

(emphasis added)

146. This was confirmed in *My Vote Counts II* in which the Constitutional Court held:

"The right to vote derives its fundamentality from the central role voting plays in the establishment, functionality and vibrancy of a constitutional democracy. It is a pre-requisite for the very existence of the Legislature and the Executive at all levels of the State. And the proper exercise of that right is so critical to the coming into being of our political arms of the State and the effective and efficient functioning of the entire State machinery that the need for transparency and accountability from those seeking public office is self-evidently more pronounced. 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. Only when transparency and accountability occupy centre stage before, during and after the elections may hope for a better tomorrow be realistically entertained."⁸²

(emphasis added)

147. The above judgments accord with, and is the obvious culmination of, a weight of jurisprudence in respect of the right to vote, as set out below.

⁸² *My Vote Counts II*, para 32.

148. Sachs J, writing for a unanimous Court in *August* held that:⁸³

"The universality of the franchise is important not only for nationhood and democracy. The vote for each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts. In a country of great disparities in 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."

(emphasis added)

149. The equal exercise of the right to vote is, of course, not only a symbol but a constitutional imperative, requiring practical and positive steps to be taken towards its realisation. In *New National Party*, Yacoob J explained that the right to vote *"is fundamental to a democracy for without it there can be no democracy. But 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."*⁸⁴ (emphasis added).

150. The Constitutional Court brought these elements together in *Richter*:⁸⁵

"Each vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will. The moment of voting

⁸³ *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC), para 17.

⁸⁴ *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC), para 11.

⁸⁵ *Richter v Minister of Home Affairs and Others* 2009 (3) SA 615 (CC), paras 52-53.

reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values. We should accordingly approach any case concerning the right to vote mindful of the bright, symbolic value of the right to vote as well as the deep, democratic value that lies in a citizenry conscious of its civic responsibilities and willing to take the trouble that exercising the right to vote entails.

Unlike many other civil and political guarantees, as this Court has remarked on previous occasions, the right to vote imposes an obligation upon the state not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised."

(emphases added).

151. Thus, the right to vote is the right to cast an informed vote, and the right to make political choices is the right to make informed political choices. Corruption facilitated by large private donations, however, threatens to erode the right to an informed vote, and the very foundation of a democratic system for, *inter alia*, the following reasons:

151.1 where large private donations shape political agendas, wealthy donors can exert undue influence on office-bearers, distorting public policymaking to serve private interests rather than the common good. At the core of this distortion is the threat that elected representatives may become more responsive to special-interest funders than to the broader electorate;

151.2 such manipulation fundamentally compromises the electorate's capacity to vote, and the free expression of the electors, on the basis of accurate

information about whom and what they are truly electing. The voter is effectively misled by a façade of policy promises or public statements, while the real *drivers* of political behaviour lurk in undisclosed or insufficiently restrained funding. The result is the corruption of policy positions, legislative priorities, and governance practices—thus defeating the constitutional promise that each vote "*quite literally ... says that everybody counts*"; and

151.3 corruption drains public trust from the democratic system. When citizens perceive that office-bearers are "bought" or unduly swayed by powerful funders, a pervasive cynicism sets in. This can discourage voter turnout, foster political disengagement, and undermine the legitimacy of elected institutions. Corruption gnaws at the belief that one's vote matters or can meaningfully alter the course of governance—directly undercutting the "*deep, democratic value*" of the franchise emphasised in *Richter*.

152. From the foregoing, it is clear that combatting corruption is a pivotal constitutional imperative in South Africa, and the scourge of corruption (facilitated by large private donations) has the real potential to destroy our constitutional project, including the right to an informed vote. An upper limit is critical to ensure that corruption and the practice of providing monetary compensation or political favours or indulgences are prevented.

153. The respondents seek to downplay the constitutional need for a donation limit on private funding on the frivolous basis that it is not constitutionally required, since it was not dealt with in *My Vote Counts II*, and that Parliament implemented it out of its own accord. This argument is without merit:

- 153.1 First, an upper limit was not part of the case which My Vote Counts presented to the Court in *My Vote Counts II*, so it would not have been dealt with in that context. This does not mean that it is not constitutionally required. The *dicta* in *My Vote Counts II* clearly support the argument that there is such a constitutional requirement, however. The applicant is entitled to seek relief in terms of section 172(1) of the Constitution for relief in the context of the PPFA (as amended by the EMAA) on the basis that it fails to impose adequate controls on the private funding of political parties.
- 153.2 Second, the PPFA expressly was passed on the basis and for the purposes of fulfilling and protecting the right to vote, and other constitutional rights. The fact that Parliament passed legislation imposing a donation limit out of its accord simply reinforces the importance of having an upper limit and the need for such a limit to support the right to vote. Parliament would not have passed the legislation, and cannot pass legislation, for no reason. In fact, it is clear that it itself recognises the need for an upper limit as a constitutional safeguard.
- 153.3 Third, and in any event, it is trite that the content of a constitutional right is not determined by reference to legislation (or indeed *My Vote Counts II*). The Bill of Rights, including the right to vote, must be interpreted in its own terms. As set forth above, the applicant has clearly explained the manner in which the Constitution, and compelling case law prescribes, and international treaties demand, a regime to cap donations received from private parties to prevent corruption and give meaning to the right to vote.

154. As will be discussed in more detail below, while the PPFA (as amended by the EMAA) ostensibly seeks to meet this constitutional imperative, it fails to do so. Unfortunately, the limit it did impose is irrational, unlawful and does not give effect to constitutional rights.

155. In what follows, we set out further reasons why the PPFA (as amended by the EMAA) fails to achieve its stated purpose and falls short of the constitutional imperatives set out above.

Related or connected entities

156. The applicants submit that the upper limit on donations is unconstitutional because the cap is imposed on each specific donor on a per annum basis, while there are no corresponding restrictions or upper limits on donations from related persons or entities.

157. This means that political parties can receive multiple donations from entities connected to the same individual or group, provided that no *single* donor contributes more than R15 million within a given year.

158. A glaring example of the lack of related party constraints in relation to the upper limit is provided by Michiel le Roux and his entities. For the year ending March 2022, two entities connected with Mr le Roux, Fynbos Ekwiteit (Pty) Ltd and Fynbos Kapitaal (Pty) Ltd donated a total of R 30 million to the DA (out of R 54 million of donations above R 100,000 for the year).⁸⁶ In the first quarter of

⁸⁶ PB, FA, page 31, para 33.3.3.4.

2024/2025, these same entities connected to Mr le Roux, donated a total of R30 million to the DA.⁸⁷

159. Similar practices are evident in the case of Mr Motsepe, Mr Moshal, Mr le Roux and members of the Oppenheimer family. These persons, individually and through entities connected with them, account for approximately 53.24% of the donations disclosed in the period 1 April 2021 to 30 September 2024. Since the PPFA took effect on 1 April 2021, a total of R808 million has been declared in private disclosable donations.⁸⁸ Of these, the Oppenheimer family alone has contributed over R200 million, representing more than 25% of all disclosed donations, with companies controlled by Mr le Roux donating R110.3 million, and Martin Moshal donating R103 million. Moreover, Batho Batho Trust stands at R60 million, and companies associated with Mr Motsepe contributing R 52.46 million. Private funding remains dominated by a small group of high-profile individuals who can easily divide or channel contributions through multiple entities to sidestep any nominal thresholds. Consequently, these few donors exert disproportionate influence, underscoring the vulnerability of the current system to circumvention and the need to regulate donations from related entities / persons.

160. The DA, the Minister, and Action SA submit that related or connected entities, remain separate juristic persons, with separate interests, and thus, it is inappropriate to treat them as a single entity for the purposes of private

⁸⁷ PB, RA, page 850, para 83.

⁸⁸ PB, RA, page 823, para 47.

donations.⁸⁹ In this regard, for each separate legal person that donates, it is an exercise of their associational rights under section 19(1)(b) and (c) of the Constitution.⁹⁰ The DA further argues that it is difficult, if not impossible, to ascertain whether one person or entity is related to another, which remains a "*contestable issue*".⁹¹

161. In the context of private donations, it cannot be seriously contended that connected entities represent genuinely separate interests. A pertinent example is found in the DA's own funding.

162. As set out above, the DA had received donations from Fynbos Ekwiteit (Pty) Ltd, and (ii) Fynbos Kapitaal (Pty) Ltd. Mr le Roux, a private donor of the DA, is a listed director of both Fynbos companies. It is well known that these companies are connected to Mr le Roux, the dollar billionaire founder of Capitec Bank (who is estimated to be worth R27 billion) and a prominent donor to the DA. It is no surprise that throughout the lifespan of the PPFA, Mr le Roux, through his entities, contributed a staggering amount of R95.37 million to the DA, making up a third of the party's total private funding.

163. It is evident that the Fynbos entities do not represent separate and distinct interests. Rather, they serve as vehicles for Mr le Roux to circumvent the upper limit on donations. These entities are not independent actors; they are clearly controlled or influenced by the same individual with the unified purpose of supporting the DA. Mr le Roux has now, on two separate occasions, been able

⁸⁹ PB, DA's AA, page 257, para 90.1; PB, Ministers' AA, page 731, para 54; PB, Action SA's AA, page 335, para 50.

⁹⁰ PB, DA's AA, page 260, para 90.4.

⁹¹ PB, DA's AA, page 261, para 90.5.

to donate millions to the DA and is thereby able to circumvent the R15 million upper limit because each of these two entities can donate up to the threshold amount.

164. Thus, the upper limit for persons with great wealth and influence, such as Mr le Roux and Mr Motsepe, is only limited to the number of entities or companies they can register, which in essence, for all practical purposes, is limitless.

165. It is further denied that it is impossible to determine which entities are related. The example provided above demonstrates that, in most instances, it is evident that entities, while ostensibly unrelated, are in fact controlled or influenced by the same person or entity. The question of what constitutes control and how to determine the relatedness between entities is not a novel issue, as the DA suggests. The Companies Act, 2008, provides clear guidance in section 2 regarding related and interrelated persons, juristic persons, and the concept of control. It is a well-worn and extensively utilised concept in corporate law. It is used in corporate law precisely for the purpose of determining what transactions are prohibited, what constitutes a conflict of interest and which transactions should be subject to additional oversight, approvals and accountability. Parliament has thus previously specifically addressed itself to these very same issues. These are necessary safeguards and do not present insuperable obstacles for the law-giver.

166. In any event, and to the extent that there is a difficulty in determining whether entities are related or subject to the same level of control is not a proper reason to forego constitutional requirements or forsake constitutional controls. If the

relief sought in the proceedings is granted, Parliament must cure the constitutional defect and address these issues, as necessary.

The limit is unlawful, arbitrary and irrational

167. In *New National Party*, the Constitutional Court held that:

*"The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional."*⁹²

(emphases added)

168. The process for passing legislation must also be rational. It is therefore both the means as well as the ends in achieving those means that has to be rational.⁹³

169. In *Law Society*, the Constitutional Court explained procedural irrationality as being:

*"... about testing whether, or ensuring that there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power".*⁹⁴

⁹² *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC), para 19.

⁹³ *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC), para 34 to 37.

⁹⁴ *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC), para 64.

(emphasis added).

170. In *Minister of Water and Sanitation*, the Constitutional Court held that "*the procedure followed must reasonably be capable of leading to the attainment of the purpose for which the power was conferred*".⁹⁵ The Court further explained: "*if the procedure followed is such that it could not result in achieving the purpose for which the power was conferred, the purported action must be set aside*".⁹⁶

171. A decision-maker must therefore follow a procedure that allows for collecting and evaluating all relevant information if the power cannot be exercised rationally without such information.⁹⁷

172. It cannot be gainsaid that there is a legitimate governmental purpose to pursue in imposing a donation limit, and the basis thereof is set out above.

173. The imposition of the upper limit, however, is not rationally connected to its stated purpose in the PPFA (as amended by the EMAA) and is arbitrary for, *inter alia*, the reasons set forth below:

173.1 the R15 million upper limit is not grounded in any systematic research or analyses. No expert studies or comparative data appear to have informed the threshold as to what was appropriate and sustainable (or how members

⁹⁵ *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd and Another* 2023 (1) SA (1) (CC), para 45.

⁹⁶ *Ibid*, para 47.

⁹⁷ *Zuma v Democratic Alliance and Others* 2018 (1) SA 200 (SCA) para 82 ("*Rationality review also covers the process by which the decision is taken... If a failure to take into account relevant material is inconsistent with the purpose for which the power was conferred there can be no rational relationship between the means employed and the purpose*"). See also *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GNP) para 127, 165 ("*A refusal to include relevant and interested stakeholders in a process, or a decision to receive representations only from some to the exclusion of others, may render a decision irrational*"). See also *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) at para 39 ("*a decision can be irrational if the decision-maker ignored relevant facts*"). *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC), para 38 to 40.

of Parliament satisfied themselves that it was appropriate). Without supporting evidence on its decision to determine the threshold, including in relation to, *inter alia*, amounts already received from the Represented Political Representatives Fund ("**the RPRF**"), previously, the Represented Political Party Fund ("**the RPFF**") (collectively, "**the Fund**"), average donations sizes, campaign costs, the financial structure of political parties and what amounts can reasonably or unduly influence a political party to act in a particular way, the threshold appears to be plucked from thin air. No distinction is drawn between parties who operate in different spheres (local, provincial or national), and the donations are not tied to anticipated activity or the resources of the political party in question.

173.2 There is no evidence placed before this Court whatsoever that a process was followed (let alone a rational one) when implementing the R15 million upper limit. Parliament has not set out the facts and research on which it relied, nor has it explained its reasoning or process in arriving at the R15 million upper limit. In fact, Parliament admits that it has struggled to articulate reasoning for the upper limit. This is not a constitutionally acceptable basis for a legislative determination, particularly given the gravity of the issue.

173.3 in any event, even in the absence of a rational process and supporting evidence, the imposition of a R15 million upper limit on private donations is plainly irrational and arbitrary:

173.3.1 as set out above, political parties can (and indeed *have*) received a multitude of donations from entities linked to the same individual or

group, each donation falling below the upper limit. This loophole effectively allows a single donor—or a tight circle of donors—to circumvent the cap, thereby undermining the very purpose of having a limit in place (and effectively renders it meaningless). By omitting a mechanism to aggregate donations from related persons/entities, Parliament acted irrationally, as it did not tailor the legislation to address a foreseeable, and in practice exploited, method of evading the intended checks on large-scale political influence.

173.3.2 it also applies the same upper limit to all parties (local, provincial or national, or independent candidates), irrespective of size of budget, and it allows for a donor to donate to as many political parties as they please.

173.3.3 the excessive limit of R15 million falls short of the constitutional imperatives concerning the obligation on elected representatives to fulfil their constitutional mandate unencumbered by the dictates of private interests. It does not address the stated aim of reducing corruption, and private parties are able to still wield undue influence (through cumulative donations). Indeed, even a single donation of R15 million is high in its own right on the basis that: (i) for smaller parties, which often operate on limited budgets and rely heavily on smaller donations or grassroots funding, a single donation of R15 million will be huge; and (ii) a strategically timed contribution of R15 million may still gain a donor special access to decision makers, help finance a critical aspect of the party's operations (especially during the

election period) or support a targeted campaign efforts that sway public perception.

174. In these circumstances, the imposition of the upper limit of R15 million must be set aside and Parliament must follow a proper process in coming to a constitutional outcome.

The respondents' contentions in respect of the upper limit are flawed

175. The DA argues that lowering the donation cap would reduce the donation income received by political parties, including the DA and the ANC.⁹⁸

176. According to the DA, reduced private funding would mean that political parties would have less money to fulfil their functions and that the "*quality of our democracy will suffer.*" In addition, political parties would struggle to meet their financial obligations, and if they cannot obtain funding through legitimate donations, they might be "*tempted*" to seek money through unlawful, undisclosed donations.⁹⁹

177. First, this argument is internally inconsistent. On the one hand, the DA insists that private donations form only a fraction of its total income and expenditure. On the other hand, it claims that lowering the donation limit would so severely diminish its funding that both it and other parties would struggle to operate effectively.

⁹⁸ In support of this contention, the DA conducts a hypothetical analysis, positing that if the donation cap were lowered to R10 million, it would have lost over R20 million in donations, while the ANC would have lost over R26 million in donation income, per annum. Although the DA acknowledges that it lacks detailed information about the finances of other political parties, it asserts that lowering the donation limit would similarly reduce funding for other parties. See, PB, DA's AA, pages 229-230, paras 31-36; DA's SA, pages 627 -631, para 33-45.

⁹⁹ PB, DA's AA, page 230-231, para 37.

178. Second, the DA's argument is self-serving, and disregards the broader political landscape:¹⁰⁰

178.1 for the entirety of 2023, only the DA and the ANC were the beneficiaries of individual private donations which had reached the R15 million upper limit;

178.2 for the first quarter of the financial year 2024/2025 (during the 2024 election period) only four out of the twelve parties that disclosed donations above the threshold (12 out of 531 political parties registered with the IEC) – namely, the ANC, the Democratic Alliance, Inkatha Freedom Party, Rise Mzansi - received individual donations that hit the donation limit; and

178.3 for the second quarter of 2024/2025 financial year, only the DA, the ANC, and the Inkatha Freedom Party disclosed receiving private donations. None of these parties reported individual donations that reached the R15 million threshold.

179. Lowering the donation cap does not harm all political parties because most parties do not come close to receiving individual donations hitting the cap and/or do not rely on substantial individual contributions. Reducing the annual limit would have little to no impact on most parties insofar as their operational viability is concerned.

180. Third, to the extent that reducing the upper limit on donations has a material impact on the DA (and/or other political parties that are reliant on large donations), it is not a zero-sum scenario. Such parties are well established and well-resourced and are able to adapt their fundraising strategies to source funds

¹⁰⁰ PB, RA, page 844, para 69.

from a broader pool of private donors (which would reduce the reliance on individual donors and insidious influence). On the other hand, it is critical that parties are not beholden to specific large donors. This would distort the right to vote and has the real potential to enable corruption, including corruption of the broader political process, leading to all rights being adversely affected.

181. Fourth, it is clear that the DA's contention is premised on the notion that the relief sought is to reduce the total funding a political party can receive. This is not true. The applicant seeks to lower the upper limit to curb reliance on excessively large individual donations that enable disproportionate and potentially corrupting influence. Lowering the cap will not reduce overall private funding, but it will promote a more diverse donor base and diffuses concentrated influence.
182. Fifth, and most importantly, registered political parties (such as the DA) already have access to substantial financial resources from the Fund.
183. In this regard, large public funding is allocated to political parties and between 2009 and 2021, parties collectively received approximately R14 billion in public funding from the Fund, Parliament itself, and the provincial legislatures.¹⁰¹ Most of the funding from the Fund, however, was not utilised.
184. For instance, in the financial year 2022/2023, the majority of represented political parties did not spend their allocated funding from the Fund, with a surplus remaining even after accounting for all disclosed operational costs and expenses. Notably, the DA spent only 44.42% of its allocated funding.¹⁰²

¹⁰¹ The report from the Organisation Undoing Tax Abuse (OUTA) illustrates this. See the link to this report at: <https://www.outa.co.za/web/content/202119>.

¹⁰² PB, RA, page 846-847, paras 72-74.

185. The funding available pursuant to the RPRF can be used for all legitimate aspects of running a political party. In terms of section 7 of the PPFA (as amended by the EMAA), the purpose for which money from the RPRF may be used are broad and can be directed towards "*any purpose compatible with its functioning as a political party or independent representative in a modern democracy*". There is simply no need for excessive private funding, and insofar as the RPRF funding is not sufficient (which it is, given the lack of utilisation), Parliament can increase the allocation, which would be distributed proportionately and equitably.
186. Sixth, political parties are not entirely dependent on the public and private funding mechanisms under the PPFA (as amended by the EMAA). They also derive income from investments and other sources that are not subject to disclosure. For example, in the 2022/23 financial year, the DA received R44.1 million in "other income" that fell "outside the ambit of the Act," while the ANC received R28.5 million from similar sources. Furthermore, many parties obtain significant revenue from membership fees and levies: during the same period, the ANC received R39 million, the EFF R51.6 million, and the IFP R23.9 million from these streams.¹⁰³
187. Furthermore, the DA contends that donations in the amount of R15 million do not give individual donors excessive influence over political parties. In support thereof, the DA advances that:¹⁰⁴

¹⁰³ PB, IEC Report, page 20.

¹⁰⁴ PB, DA's AA, pages 243-248, paras 56 to 60.

- 187.1 an individual donation is insignificant when compared to the total income of a political party (this argument is supported by the Ministers);
- 187.2 private funding does not influence the behaviour or policies of political parties;
- 187.3 large donors who contribute to the DA do not do so with the expectation of receiving a specific return. Instead, they donate because they already align with the policies and priorities of the DA;
- 187.4 corruption would be apparent from the current disclosure regime and can be investigated by law enforcement, anti-corruption agencies, and investigative journalism organisations (such as the Hawks and amaBhungane);
- 187.5 the ability of politicians to abuse the contracting powers of the State to favour their donors is subject to legal controls; and
- 187.6 unscrupulous individuals would, in any event, not be thwarted or discouraged by a lower upper limit on donations.

188. Action SA echoes the above submissions asserting that "*the relief sought would never deter corruption and influence peddling*", and that the real problem is the failure to report, and corruption under the veil of secrecy, that leads to influence peddling.¹⁰⁵

189. These submissions are unavailing for, *inter alia*, the reasons set forth below.

¹⁰⁵ PB, Action SA's AA pages 338-339, para 62.

190. At the outset, and in short: what the DA cannot deny – and does not deal with – is that the nexus between corruption and private funding has already been accepted by Parliament through its unreserved ratification of the UN and AU conventions, each of which prescribe preventative measures against corruption and enactment of the PPFA, by the Constitutional Court in *My Vote Counts II* (and indeed *My Vote Counts I*), by foreign legislatures in enacting upper limits and requirements of transparency in private funding of political parties, and by foreign courts, such as the US Supreme Court in *Buckley v Valeo*. In *My Vote Counts II*, the Constitutional Court recognised that "*private funders do not just throw their resources around. They do so for a reason and quite strategically.*"
191. All right-minded South Africans accept that South Africa has been plagued by rampant corruption, and that there is a relationship between private funding / moneyed interests and corruption. In addition, the insidious connection between private party funding and political favouritism is one which is globally acknowledged and has been recognised in a number of countries, regions and civil society institutions. The fact that political processes and parties can be unduly influenced or corrupted by financial contributions is trite.
192. Donors often invest in parties they believe can advance or protect certain economic, social, or regulatory environments favourable to them. Even if the donor generally agrees with a party's philosophy, their investment may be aimed at refining or prioritising specific policies within that ideological framework, ensuring that these policies receive sustained attention and resources, and the absence of a direct "policy purchase" does not mean influence is absent.

193. If a donor's contributions are truly noble and motivated by pure altruism, those donations would logically be directed to the Multi-Party Democracy Fund. Notably, however, in the first quarter of 2024/2025, this fund has received only a single contribution—R25 million—made by the mining company Exxaro Resources Limited in early May 2024.¹⁰⁶

194. It is quite apparent that substantial donors have, want to have, and (perhaps most importantly) have the ability to exercise, an outsized influence on the party in question. Simply by way of example, Mr Michiel le Roux, to whom I have adverted earlier, has been instrumental in influencing the DA's policy and leadership direction. This is illustrated by his role in reporting to the DA on its election performance in 2019 and petitioning for and influencing the change of leadership, including the resignation of Mr Maimane as DA leader, in October 2019.¹⁰⁷

195. Therefore, for the reasons set out above, the assertion that: (i) private funding cannot influence policy because parties are guided by their memberships; and (ii) donors merely "give out of alignment" without expecting any form of return is, respectfully, disingenuous, plainly naïve, and divorced from reality. In any event, the realistic prospect of potential undue influence or corruption is sufficient to require prevention or mitigation.

196. Moreover:

¹⁰⁶ PB, RA, page 840-841, para 65.4.

¹⁰⁷ See media articles in annex "RA3" and "RA4".

- 196.1 to dismiss R15 million worth of funding as insignificant because it may constitute a fraction of a large political party's overall income is an absurdly simplistic view of influence. Even if one donation may not be as significant, it can still wield influence. R 15 million is a fraction, but usually a significantly large fraction. Several donations from related entities may make an even greater impact, resulting in the party being bound to the dictates of one individual or a narrow group of funders. Moreover, the DA dismisses the significance of a R15 million donation based on the income of larger parties and overlooks the impact that such a donation has on smaller political parties. For smaller parties, which often operate on limited budgets and rely heavily on smaller donations or grassroots funding, a single donation or cumulative funding of R15 million will be huge and will create an overreliance on private donations which can profoundly shape their politics and activities;
- 196.2 the DA's argument is also internally inconsistent. If the DA believes that private donations are important for its operations, then such donations must axiomatically be capable of exerting a material influence on it. On the other hand, if the DA submits that these funds are actually immaterial, then it is unclear on what basis it resists the imposition of smaller upper limits;
- 196.3 while parties do have formal processes, it is trite that leadership structures hold sway over policy direction, candidate selection, party lists (which are critical in our system of proportional representation) and legislative agenda-setting. A well-funded donor may gain privileged access to key decision-makers or indirectly shape legislative priorities;

- 196.4 the DA's suggestion that any corrupting influence would become evident through policy changes and disclosures, subjecting malfeasance to later investigation. This argument is reactive rather than preventative, effectively conceding that potential harm must occur and be detected *ex post facto*, which is clearly not what is envisaged by the Constitution and PPFA, even in the current formation. Relying solely on after-the-fact enforcement ignores the constitutional imperative to pre-empt undue influence before it distorts democratic processes, so as to give effect to the State's obligations not only in relation to the right to vote, but also section 7(2) of the Constitution. The respondents have ignored the import of *Glenister II*. The State's duty is not wholly discharged by the establishment of "*criminal justice authorities*" tasked with tackling corruption. In any event, it may well be that there are countless policies and positions which on their face are plausible but which have been adopted by political parties not because these are in the best interests of the electorate and the country, but to further the interest of one or other well-placed, influential donor;
- 196.5 disclosure is vital, but it must work in concert with donation limits. Limits serve as a prophylactic measure, reducing the scale of possible influence before it becomes entrenched. Disclosure and limits work hand in hand: disclosure ensures transparency, while limits prevent donors from buying disproportionate influence through sheer financial muscle. Both are needed fully to realise constitutional rights and standards, as well as the promises of accountability and fairness; and

196.6 the fatalistic claim that determined corrupt actors will circumvent any limit or measure misses the point. Constitutional safeguards are built not on the assumption that rules will deter all wrongdoing, but on the principle that legal structures must be put in place to limit and inhibit such corrupt conduct. The provision must be worded in a manner which is sufficiently clear and tight to prevent circumvention. Just because additional legislative measures may need to be devised and there should be more effective enforcement does not mean that Parliament may, from a constitutional perspective, throw up its hands and do nothing. Action SA's position amounts to abdication and suggests that all legislation in relation to corrupt actors is entirely meaningless.

THE EMAA

The lacuna

197. As set forth above, upon the commencement of the EMAA, there was no upper limit to the donations in regulation 7(1) or disclosure threshold for donations in regulation 9, as the previous limit of R15 million and the threshold were deleted.

198. Moreover, the EMAA did not include any provisions to bridge the gap between the repeal of the previous regulations and the establishment of new ones and left a critical aspect of political funding unregulated. The absence of transitional measures meant that, upon the commencement of the EMAA, there were no enforceable limits on donations or mandatory disclosure requirements.

199. This was an untenable and unconstitutional situation in that it was directly in breach of the requirements of the Constitution, as pronounced by the

Constitutional Court in *My Vote Counts II*, and invidious to the right to make an informed vote, the right to vote more generally, and the very purpose of the PPFA (as amended by the EMAA). In addition, it breached several provisions of the Bill of Rights, including sections 7(2), 19 and 32(1) of the Constitution.

200. To compound matters, it is undoubtedly an irrational and unlawful decision to bring a law into force when doing so creates a lacuna. While the PPFA (as amended by the EMAA) seeks to modify the legal framework (changing the process and powers for setting disclosure thresholds and cap) it has: (i) not provided a transitional measure and (ii) leaves the decision to fill the gap to the bureaucratic machinery of the National Assembly and the National Executive.

201. In these proceedings, the DA searches for safe harbour in section 11 of the Interpretation Act, 1957 ("**the Interpretation Act**") and section 27(5) of the PPFA (as amended by the EMAA) to save the legislation from unconstitutionality. Neither plugs the lacuna in the EMAA, and these arguments have already been rejected by this Court in the EMAA judgment:¹⁰⁸

201.1 Section 11 of the Interpretation Act clearly states that it only applies in a situation where: (i) the President has signed (the substituted) law but: (ii) has yet to bring the (substituted) law into operation. Section 11 applies to this interim period to prevent a hiatus, stating that the repealed law will continue to apply until the President proclaims the commencement of the Act. Section 11 of the Interpretation Act does not find application in this matter on the basis that "the substituted provisions" came into effect and

¹⁰⁸ PB, DA's SA, pages 632-634, paras 48-55.

operation on 8 May 2024, when the President proclaimed in the Government Gazette that, in terms of section 46 of the PPFA (as amended by the EMAA): "*I hereby determine 08 May 2024 as the date on which the (whole of) the said Act shall come into effect.*"

201.2 The new section 27(5) only came into force on 8 May 2024. It can only thus preserve the thresholds which are in force on, or after 8 May 2024. On 8 May 2024, Regulations 7 and 9 did not prescribe the disclosure threshold or the upper limit for donations. Section 27(5) will regulate the situation going forward once there is a determination of the disclosure threshold and the upper limit for donations by the President, not before then.

202. It is important to note that these same submissions were raised in the EMAA proceedings. In the EMAA judgment, however, the Honourable Judge Thulare, in granting the interim relief, found these submissions to be without merit and confirmed his view as set forth in the *rule nisi* judgment. In this regard, and in the *rule nisi* judgment, Judge Thulare stated as follows:

"[13] Reliance on section 27(5) of EMAA is basically on the same footing as reliance on section 11 of the Interpretation Act, 1957 (Act No. 33 of 1957) (the IA)...

...I am persuaded by the applicant's case that the old regulations have been replaced. The legislation, the PPFA, since the amendment through the EMAA, no longer has the upper limit and disclosure threshold. It seems to me that by the time section 27(5) came into operation, the R15 million in regulation 7 and the R100,000 in regulation 9 had already left the stable, and the NA had to pass a resolution, and the first respondent had to

determine the amounts in the respective regulations. Section 27(5) upon which the third respondent relied may save the day each regulation in schedule 2 from 8 May 2024, but not before then in my view."

203. The DA's submissions on EMAA in the current application are also at odds with the views expressed by the National Assembly and the DA's own Member of Parliament before and after the enactment of the EMAA. In the EMAA application, the President also confirmed that he is of the view that there is a lacuna in the law pursuant to the enactment of the EMAA.¹⁰⁹
204. Regarding the applicant's request for retrospective relief—namely, for the Court to direct the repayment of donations exceeding the legal limit and the disclosure of donations above the threshold following the enactment of the EMAA—the DA maintains that there has never been a lacuna necessitating such a remedy. Consequently, political parties and independent candidates were always obligated to comply with these requirements. Moreover, the DA asserts that there is no evidence before this Court showing that any political party or independent candidate failed to comply with the pre-amendment donation limits or disclosure thresholds after the amendments took effect.¹¹⁰
205. The Constitutional Court held in *Ferreira v Levin*, that the enquiry of constitutional invalidity "*is an objective one. A statute is either valid or 'of no force and effect to the extent of the inconsistency'. The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other*

¹⁰⁹ PB, RA, page 856, para 97.

¹¹⁰ PB, DA's SA, page 643, para 91.

*competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach."*¹¹¹ It is thus not the details of any specific individual case which are critical, but whether the statutory provision in question has a tendency, objectively speaking, to infringe on rights protected under the Constitution. This is a matter of inference.

206. As set forth above, the lacuna did indeed exist, and this was confirmed by the EMAA judgment. The very presence of the lacuna alone is a sufficient basis for the requested relief, given that it would have enabled political parties to exploit the state of the EMAA. The DA's attempt to shift focus onto the applicant's lack of evidence is a distraction: it cannot be assumed that no donations were made to any political party which were not disclosed or did not breach the upper limit. Almost by definition, given the lacuna, there was no requirement of any disclosure on the face of the legislation.

The President's discretion to determine the upper limit and disclosure threshold

207. In *Doctors for Life*, the Constitutional Court explained the role of Parliament as a legislative organ of state, and the principle of the separation of powers:

¹¹¹ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC), para 26.

"Parliament has a very special role to play in our constitutional democracy – it is the principal legislative organ of the state. With due regard to that role, it must be free to carry out its functions without interference.

...

The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle "has important consequences for the way in which and the institutions by which power can be exercised".¹¹²

(emphasis added)

208. Moreover, in *Treatment Action Campaign*, the Constitutional Court affirmed the constitutional principle of the separation of powers:

"This Court has made it clear on more than one occasion that, although there are no bright lines that separate the roles of the Legislature, the Executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation."¹¹³

¹¹² *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416, para 36-37.

¹¹³ *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC), para 98.

(emphasis added)

209. In one of its early decisions, *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*, the Constitutional Court considered the extent to which legislative powers may be delegated by the Legislature to the Executive.¹¹⁴ The Court examined whether section 16A of the Transition Act—which authorised the President to amend the Act by proclamation—was inconsistent with the Constitution and therefore invalid.¹¹⁵

210. In his majority judgment, Chaskalson P concluded that the provision was overly broad and effectively unbounded, as it allowed the President to amend both the Act and its Schedules. It granted the President sweeping authority to alter the Act's core provisions in whatever manner he saw fit.¹¹⁶

211. More recently, in *Nu Africa*, the Constitutional Court held that:

*"Parliament's entitlement to delegate does not only depend on the pure form of the amendments to the Schedule but also on the nature and extent of the delegation. The answer thus lies in the substance, nature and extent of the delegation instead of the form".*¹¹⁷

212. To this end, the Constitutional Court set out some of the factors to consider when determining whether a delegation of legislative power is constitutionally permissible:

¹¹⁴ *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC).

¹¹⁵ *Ibid*, para 14.

¹¹⁶ *Ibid*, para 65.

¹¹⁷ *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance and Others* 2024 (1) SA 567 (CC), para 93.

"to determine whether a delegation constitutes an affront to the Constitution, the enquiry should be context specific, and consideration should be given to the scope of the delegation, the subject matter to which it relates, the degree of delegation and the sufficiency of the constraints on the exercise of the discretion powers conferred by the section".¹¹⁸

213. In *Smit*, the Constitutional Court struck down section 63 of the Drugs and Trafficking Act, 1992 on the following basis:

"Section 63 confers on the Minister plenary legislative power to amend the Schedule. As the Schedules are essentially part and parcel of the Act, it in effect delegates original power to amend the Act itself. This is a complete delegation of original legislative power to the Executive and there is no clear and binding framework for the exercise of the powers."

"Section 63 also undermines the doctrine of separation of powers, which the Court has repeatedly affirmed as an important constitutional principle..."¹¹⁹

(emphasis added)

214. In *Justice Alliance*, the Constitutional Court held that the ultimate question in determining whether Parliament is entitled to delegate its powers depends on whether the Constitution permits the delegation.¹²⁰

¹¹⁸ Ibid, para 95. The Constitutional Court adopted the test set out by Mahomed DP in *Executive Council*.

¹¹⁹ *Smit v Minister of Justice and Correctional Services* 2021 (1) SACR 482 (CC), para 37.

¹²⁰ *Justice Alliance of South Africa v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC), para 54.

215. Moreover, in respect on the guidelines governing the exercise of power, the Constitutional Court in *Affordable Medicines*, held that while discretionary powers may be conferred to delegates, "*there must be constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers*".¹²¹

216. The need for guidance to govern the exercise of power in circumstances where a wide discretion is conferred forms an integral part of "*the constitutional obligation on the legislature to promote, protect, and fulfil the rights entrenched in the Bill of Rights*".¹²²

217. It is also trite that the rule of law, a founding value of our Constitution,¹²³ requires that the law be formulated in a clear and accessible manner. A law that is vague will not pass constitutional muster.¹²⁴

218. In view of the above, the applicant submits as follows:

218.1 Entrusting the President with the discretion to establish the financial thresholds places a substantial amount of political influence within the grasp of one individual, who is a political actor and typically the head of a political party who would either be greatly disadvantaged or benefited by the

¹²¹ *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC), para 33.

¹²² *Janse van Rensburg and Another v Minister of Trade and Industry and Another* (CCT13/99) 2001 (1) SA 29 (CC), para 25. The Constitutional Court applied the test which was established in *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC), para 42-48.

¹²³ Section 1 of the Constitution.

¹²⁴ *South African Liquor Traders Association and Others v Chairperson, Gauteng Liquor Board and Others* 2006 (8) BCLR 901 (CC) at paras 27-28; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 108; in *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC), at para 47.

changes. The President, as the leader of a political party, inherently possesses a vested and one-sided interest in the outcomes of such decisions. The ability to influence the financial dynamics of political competition, including the flow of private donations, can significantly impact the political landscape to favour the President's party. This arrangement essentially allows the President to set rules that could disproportionately benefit the President's political interests, creating an unequal playing field for other political parties. Such a concentration of power contravenes the separation of powers and does not provide an adequate safeguard against a breach of the constitutional right to an informed vote and the right of access to information, and the State's duty to protect, promote, and fulfil all the rights in the Bill of Rights. Indeed, the Constitutional Court has cautioned against precisely this form of undue sub-delegation, where the Executive is granted a free hand to shape, and thereby rewrite, the underlying policy determination that should properly be determined in the legislation. Such latitude effectively renders the Executive a co-legislator, cutting across the delineations intended to maintain constitutional checks and balances.

218.2 The delegation is also unmoored from the constitutional rationale of the PPFA, including the right to vote and the right of access to information. The key reasons for requiring full disclosure and the setting of limits on contributions are to ensure that South Africa's political discourse is not unduly influenced by a select few holders of financial and other resources. It is to expose and eradicate the insidious or odious influence of cash or donations in kind in corrupting the policy or objectives of political parties

when they execute their public mandate as representatives in legislative, executive and administrative roles in government.

218.3 Granting the President the sole discretion to determine, revise, or otherwise alter the upper limit and disclosure threshold is tantamount to granting the President the authority to amend a core feature of the PPFA (as amended by the EMAA) and rewrite the provisions of the PPFA (as amended by the EMAA), whenever the President chooses to do so. The quantum of the thresholds is not a mere administrative detail (the President is not merely filling in figures). It is central to the scope and effectiveness of the PPFA (as amended by the EMAA). The manner in which these thresholds are set directly determines the extent to which the PPFA (as amended by the EMAA) can promote transparency and guard against corruption or undue influence in the political sphere. The essential policy choices embodied by the threshold—namely, how permissive or restrictive the legislative scheme will be—are properly matters for Parliament itself, not one political actor like the President. Parliament has handed over plenary authority over to the President, in respect of matters which are "*pre-eminently in its domain*".

218.4 Parliament, by design, deliberates through multiple readings, committee hearings, and public participation, thereby fostering a degree of accountability and democratic input. When the power to set or adjust thresholds is placed exclusively in the hands of the President, however, the guiding process is comparatively opaque. This is especially problematic in the sensitive sphere of political party funding, where even small shifts in disclosure or donation limits can significantly alter the political playing field.

The President could, for instance, raise the threshold to a level that renders donation caps and disclosure obligations virtually meaningless, or reduce the limit in a manner unduly restricting parties' funding streams—both outcomes undermining the PPFA's stated aims.

218.5 In any event, even if Parliament was entitled to delegate its powers to the President, there are no meaningful guidelines governing the exercise of the President's power, and such guidelines as are provided are vague, unreasonable and grossly underinclusive. The listed factors as set forth in paragraphs 18.2.1 and 18.2.3 above are overbroad, lack specificity, and fail to establish concrete or quantifiable standards or guidelines. They simply have no meaningful constraining or guiding effect on the exercise of enormous public power; they are also misleading and incorrect:

218.5.1 while the actual expenses of running a political party may hold some practical relevance, they are not an appropriate basis for setting the parameters for private contributions. As outlined above, and by way of example, the RPRF allocates funds to political parties specifically to cover their operational costs and expenses, thereby reducing or eliminating the need for private funding for such purposes. The relationship between the RPRF and operating costs and expenses is not spelled out. Nor is the legislation clear which operating costs and expenses should be, or not be, relevant. Certain expenses may promote constitutional democracy, while others may not, and if operating expenses are at all relevant, specific guidelines would need to indicate what is to be taken into account and how. In any event, it

is unclear how information about one or other party's expenses can logically have a relevance to determining an upper limit, given that the legislation allows one upper limit to be determined for all political parties, big and small, and without any regard to the specific circumstances of a political party, and without testing the purposes for which the funds are used and the efficiencies of the operations of the party in question.

218.5.2 similarly, other factors, such as inflation, do not address the key principled issues and may, at best, serve as part of the broader context, rather than providing substantive criteria.

218.5.3 on the key principled issues in relation to the constitutional rationale for the PPFA, including the right to vote and the right of access to information, no guidelines are set. There are no guidelines which speak to determining a limit which would not unduly concentrate influence or assist in preventing corruption and what levels of contribution may be made more safely without having an insidious influence on the party's behaviour.

219. The DA submits that the President's power to determine the financial threshold is not unconstitutional because:¹²⁵

219.1 the guidelines provided to the President to determine the donation limit and disclosure threshold in terms of section 24(1)(b) and regulation 7(2) of Schedule 2 are "*constitutionally sufficient*".

¹²⁵ PB, DA's SA, pages 634-636, 640, paras 56-58, 75-77.

219.2 the use of the word "*may*" in regulation 7(2) is not determinative. In this regard, the DA contends that, under general administrative law principles, the President is required to consider all relevant factors, including unlisted factors; and

219.3 the listed factors, in any event, such as the amount allocated by Parliament for political funding, and the actual costs of running a political party is the epitome of "*specific standards*".

220. The Minister also raises the question of whether the President has a vested interest in determining the thresholds, highlighting that the President is the head of a political party that no longer holds a majority representation in Parliament.¹²⁶

221. These arguments are without foundation:

221.1 none of these submissions addresses the applicant's core argument that the setting of any upper limits or disclosure thresholds cannot be subdelegated to the President;

221.2 to the extent still relevant, however, the argument that the President must consider all relevant factors under administrative law (even if true) is not an answer to the constitutional vagueness argument. The law is settled that the guidelines must be contained in the primary legislation itself,¹²⁷ and not be left simply to the open-ended discretion of a delegate or general administrative law principles. In any event, administrative law and the

¹²⁶ PB, Ministers' AA, page 730, para 48.

¹²⁷ *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC), para 54.

principle of legality set a very low bar for public officials exercising public power and do not require them to act pursuant to any specific guidelines;

221.3 moreover, the more onerous and invasive, and more open to abuse, the power is, the more important it is for the guidelines to be given and for them to be detailed. The issue is thus not whether the President's exercise of the power can be tested after the fact but rather whether granting such sole discretion to the President in the first place, is irrational and unconstitutional. As set out above, the Constitution demands protective safeguards to prevent the potential abuse of power, not a reactive approach that relies on after-the-fact judicial review; and

221.4 the fact that the President's party happens now not to hold a majority in Parliament does not mitigate the constitutional concerns raised above. As the head of a political party, the President still has an incentive to act in the interest of his political party (and potentially those political parties affiliated with the ANC in the Government of National Unity), and irrespective of whether the ANC has a parliamentary majority, this does not detract from the simple fact that the discretion to determine financial thresholds should not be vested in a single political actor. The partisan nature of the President's position, as head of the political party, which is a structural and institutional issue, not contextual or situational, conflicts with the need for neutrality in setting financial thresholds. In any event, unconstitutionality is gauged objectively, without regard to the vicissitudes of an election cycle.

222. Another recurring theme in the answering affidavits is the assertion that the President's power to determine the financial thresholds is, in any event,

"*supervised*" by Parliament pursuant to section 24(1) of the PPFA (as amended by the EMAA), which requires the President to pass regulations acting on a resolution of the National Assembly.

223. This is the mainstay of Parliament's submissions. In summary, Parliament contends as follows:¹²⁸

223.1 The correct process is as follows: (i) Parliament must adopt a resolution setting out the disclosure threshold and donation limit; and (ii) the President is then empowered to make regulations adopting them;

223.2 This was confirmed in the EMAA judgment in which Judge Thulare held that "*it is Parliament's responsibility to resolve the upper limits and disclosure thresholds, and the President's responsibility to make the determination*".

223.3 Given that Parliament's resolution is pending, the relief sought in these proceedings is premature, and it is more appropriate for the applicant to await the thresholds (ostensibly set by Parliament), and then challenge them, if so advised.

224. Parliament fundamentally misunderstands and misconstrues the role of Parliament in the context of the provisions in the PPFA (as amended by the EMAA) set forth above. It is clear that the role of Parliament is one of procedure, it must simply pass a resolution which authorises the President to enact regulations setting the financial thresholds; the legislative scheme does not confer the authority on Parliament to prescribe the financial thresholds. In this regard, the decision to determine the thresholds lies solely with the President,

¹²⁸ PB, Parliament's explanatory affidavit, pages 756-790.

and Parliament has delegated its decision-making authority to the President (a fact conceded by the opposition parties and which was accepted before Thulare J by the Ministers and the DA). Otherwise, there would be absolutely no point to the EMAA and the language that the President is to determine the disclosure threshold and the upper limit would be nothing more than surplusage. The submissions are particularly untenable in circumstances where EMAA expressly sought to amend the PPFA (which previously vested the authority to prescribe the limits in the National Assembly).

225. In any event, even if Parliament were to recommend specific financial thresholds, the President is not bound by such recommendations. The President retains the discretion to determine the thresholds.

226. The reliance by Parliament on the EMAA judgment is ill-conceived.

227. In the EMAA proceedings, the applicant's case was premised on the fact that, upon the commencement of the EMAA, there was a lacuna in the law as Parliament failed to pass a resolution authorising the President to determine the upper limit and disclosure threshold, and the President failed to make the determinations.

228. In that context, Judge Thulare found that there was indeed a lacuna in the EMAA, and reinstated the previous financial thresholds on an interim basis. Parliament was urged to pass a resolution authorising the President to enact regulations determining the new financial thresholds. Judge Thulare did not (and could not), however, rule that the process set out in the PPFA (as amended by the EMAA) should be subverted to require that Parliament must now exercise oversight over the President's decision. The PPFA is clear that the determination is made by

the President, not Parliament. Parliament simply passes a resolution to authorise the President to do so. The legislation itself plainly specifies that the President is the decision maker and outlines that factors he is required to take into account.. No amount of revisionism by the National Assembly can change the legislation which Parliament has enacted.

229. In any event, as also set forth above, legislation which allows for any lacuna in the determination of the upper limit or disclosure thresholds, by leaving those to the happenstance of future parliamentary resolution and presidential determination, is not in compliance with *My Vote Counts II*, breaches the Bill of Rights, including sections 7(2), 19 and 32(1) of the Constitution and is plainly unlawful and must be struck down for this further reason. It is noteworthy that the National Assembly has now taken over nine months since the enactment of the EMAA on 8 May 2024 not to pass a resolution as contemplated in the amended regulations 7 and 9, and section 24(1), of the PPFA. This illustrates in vivid, practical terms the constitutionally intolerable and impermissible situation created by the amendments brought into force in terms of the EMAA.

REMEDIES

230. The PPFA (as amended by the EMAA) has failed to satisfy the standards set by the Constitution. It is respectfully submitted that in those circumstances this Court is required to declare the relevant provisions inconsistent with the Constitution and invalid.¹²⁹ In certain cases, a declaration of invalidity (the effect of which is a retrospective setting aside of the provision) will suffice.

¹²⁹ Section 172(1)(a) of the Constitution; *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* 2015 (5) SA 370 (CC). para 13-16.

231. The Court, however, also has the additional power to grant a just and equitable remedy to ensure that the failures are corrected without undue delay.¹³⁰

232. In terms of section 172(1) of the Constitution, this Court may make any order which is just and equitable. This is a wide power "*bounded only by considerations of justice and equity*".¹³¹ A just and equitable order must effectively vindicate the constitutional right infringed,¹³² and requires this Court to "*analyse the nature of the constitutional infringement, and strike effectively at this source*".¹³³

233. Severance is a remedial measure which can be utilised consequent upon declaration of invalidity. If notional or actual severance or reading-in can achieve constitutional compliance of the provision, then this is often a just and equitable remedy which is to be preferred to ensure constitutional alignment.¹³⁴ If a notional or actual severance or reading in will not or cannot effectively remedy the problem, the Court may make other orders, including deeming the provision to read in a different way to its actual text, suspension of the declaration of invalidity, direction to Parliament to remedy the defect, and an interim regime pending the parliamentary processes.

¹³⁰ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC), paras 30 and 56. *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC) ("**Gijima**"), paras 52 and 53.

¹³¹ *Gijima*, para 53.

¹³² *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

¹³³ *Ibid*, para 96.

¹³⁴ *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), para 88.

234. The applicant submits that the below is the relief which should be granted, taking account of the above principles.

235. First, sections 27, 29(g) and 29(h) of the EMAA, as impugned, fall to be set aside with full retrospective relief. The effect of the declaration of invalidity is to set aside the relevant EMAA provisions *ex tunc* (ie from 8 May 2024). The applicant submits that these provisions are so fundamentally inconsistent with constitutional requirements that no judicial reading-in or notional severance is necessary or desirable. Unlike situations where a court can simply add or remove discrete words to align the legislation with the Constitution, these impugned sections create a structural lacuna that cannot be remedied without substantially overhauling the legislative scheme.

236. The following consequential relief, the applicant submits, is just and equitable in all the circumstances:

236.1 All amounts received by political parties and independent candidates from private juristic and natural persons above the annual limit in terms of section 8(2) of the PPFA, read together with regulation 7 of the PPFA (before the amendment), from the date of the enactment of the EMAA to the date of this Honourable Court's order, must be paid back by the recipients to the donors.

236.2 All amounts received by political parties and independent candidates, from private parties (*alternatively*, at least those beyond the disclosure threshold, in terms of section 9(1)(a) of the PPFA, read together with regulation 9 of the PPFA (before the amendment)) should be disclosed to the public in

accordance with the PPFA from the date of the enactment of the EMAA, to the date of the Honourable Court's order.

237. The grounds for retrospective invalidity in this context is that no party should be allowed to benefit from legislation that was constitutionally invalid from its inception. As set out above, the very presence of the lacuna alone is a sufficient basis for the requested relief, given that it would have enabled political parties to exploit the state of the EMAA.
238. Second, sections 8(2), 9(1)(a), 9(2), 12(2)(d)(ii), 12(3)(c), 22 and 24(1) of the PPFA (as amended by the EMAA, *alternatively* in their pre amendment form), together with regulations 7 and 9 must be declared to be inconsistent with the Constitution and invalid.
239. To give the legislature an opportunity to remedy the defects in respect of which there is potentially more than one option, the applicant seeks the suspension of declarations of invalidity for certain of the section (save for the invalidity of sections 9(1)(a), 9(2) and regulation 9, for the reasons the applicant submits below) for a period of 12 months ("**the suspension period**"), within which Parliament must take the necessary steps and measures to remedy the constitutional defects.
240. Third, given, however, that the unconstitutionality of sections 9(1)(a), 9(2) and regulation 9 and remedies in relation thereto are clear-cut, insofar as there is a suspension period, the following regime should apply during any suspensions period:

240.1 the declaration of invalidity of section 9(1)(a) and regulation 9 should not be suspended (ie the PPFA must be read and implemented without section 9(1)(a) and regulation 9);

240.2 section 9(2) must be deemed to be read as follows: "*A person or entity that makes a donation must disclose that donation to the Commission in the prescribed form and manner*".

241. As set out above, the applicant submits that reading-in in this context is necessary because:

241.1 the dictates of the constitutional imperatives demand that (i) there be no prescribed threshold to limit disclosure; and (ii) all persons making donations, whether natural or juristic, must be required to disclose such donations. Given that sections 9(1)(a), 9(2) and regulation 9 fail to give effect to the constitutional imperatives, the Court must exercise its powers in reading-in a provision that effectively inserts the constitutionally necessary language.

241.2 unlike in other instances where Parliament needs to do the research and apply its collective mind to an appropriate upper limit or provisions in respect of related parties, the requirement of full disclosure is not, constitutionally, subject to debate. Given the clarity of this constitutional imperative, it is not for Parliament to determine whether a threshold should apply or whether some donations may remain undisclosed. The respondents have not made out a case for any restriction of this nature. Continuing to limit disclosure perpetuates the very harm—lack of full transparency—the constitutional imperatives seek to prevent, and imperils

the right to vote, the right of access to information and all other rights in Chapter 2 of the Constitution.

242. To the extent that the Parliament, despite the suspension period, fails to remedy the constitutional defects, then the interim provisions as set forth above must continue to apply.

243. To the extent that this Court finds that the imposition of a disclosure threshold passes constitutional muster (ie that some form of disclosure threshold is necessary), the applicant submits that section 9(1)(a), 9(2) and regulation 9 must nonetheless be declared unconstitutional and invalid. For the reasons set forth above, the R100,000 donation limit is irrational and unlawful. In these circumstances, and to provide the legislature with an opportunity to determine an evidence-based and constitutionally permissible threshold, the applicant prays that the declaration of invalidity be suspended for 12 months.

COSTS

244. *Biowatch* applies.¹³⁵ If the applicant is successful, it is entitled to its costs. We submit that Scale C is appropriate in this regard.

245. If the applicant is unsuccessful, it should not bear the costs of opposing parties.

246. This is a challenge to the constitutionality of legislation, pursued in the public interest. The applicant is a non-profit organisation founded to conduct research, analysis and advocacy concerning electoral issues. It has championed electoral rights for over a decade. It has approached this Court in good faith after

¹³⁵ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC), para 43.

exhaustive efforts to engage Parliament on the subject matter of this application. The issues we raise are, we submit, of great constitutional moment and their ventilation is eminently in the public interest.

VM Movshovich

Applicant's legal representative

Johannesburg

24 January 2025



Venice Commission
Commission de Venise



Strasbourg, 23 March 2001

CDL-INF (2001) 8

GUIDELINES AND REPORT
ON
THE FINANCING OF POLITICAL PARTIES

adopted by the Venice Commission

GUIDELINES

adopted by the Commission
at its 46th Plenary Meeting,
(Venice, 9-10 March 2001)

The Venice Commission:

Being engaged in the promotion of fundamental principles of democracy, of the rule of law and the protection of human rights, and in the context of improving democratic security for all;

Noting with concern problems relating to the illicit financing of political parties recently uncovered in a number of Council of Europe member states;

Taking into account the essential role of political parties within democracy and considering that freedom of association, including that of political association, is a fundamental freedom protected by the European Convention on Human Rights and is one of the cornerstones of genuine democracy, such as that envisaged by the Statute of the Council of Europe;

Paying particular attention to state practice in the area of financing of political parties;

Recognising the need to further promote standards in this area on the basis of the values of European legal heritage;

Has adopted the following guidelines:

1 For the purpose of these guidelines, a political party is an association of persons one of the aims of which is to participate in the management of public affairs by the presentation of candidates to free and democratic elections.

2 Such political parties may seek out and receive funds by means of public or private financing.

A Regular Financing

a. Public Financing

3 Public financing must be aimed at each party represented in Parliament.

4 In order, however, to ensure the equality of opportunities for the different political forces, public financing could also be extended to political bodies representing a significant section of the electoral body and presenting candidates for election. The level of financing could be fixed by legislator on a periodic basis, according to objective criteria.

Tax exemptions can be granted for operations strictly connected to the parties' political activity.

5 The financing of political parties through public funds should be on condition that the accounts of political parties shall be subject to control by specific public organs (for example by a Court of Audit). States shall promote a policy of financial transparency of political parties that benefit from public financing.

b. Private Financing

6 Political parties may receive private financial donations. Donations from foreign States or enterprises must however be prohibited. This prohibition should not prevent financial donations from nationals living abroad.

Other limitations may also be envisaged. Such may consist notably of:

- a. a maximum level for each contribution;
- b. a prohibition of contributions from enterprises of an industrial, or commercial nature or from religious organisations;
- c. prior control of contributions by members of parties who wish to stand as candidates in elections by public organs specialised in electoral matters.

7 The transparency of private financing of each party should be guaranteed. In achieving this aim, each party should make public each year the annual accounts of the previous year, which should incorporate a list of all donations other than membership fees. All donations exceeding an amount fixed by the legislator must be recorded and made public.

B Electoral Campaigns

8 In order to ensure equality of opportunities for the different political forces, electoral campaign expenses shall be limited to a ceiling, appropriate to the situation in the country and fixed in proportion to the number of voters concerned.

9 The State should participate in campaign expenses through funding equal to a certain percentage of the above ceiling or proportional to the number of votes obtained. This

contribution may however be refused to parties who do not reach a certain threshold of votes.

- 10 Private contributions can be made for campaign expenses, but the total amount of such contributions should not exceed the stated ceiling. Contributions from foreign States or enterprises must be prohibited. This prohibition should not prevent financial contributions from nationals living abroad.

Other limitations may also be envisaged. Such may consist notably of a prohibition of contributions from enterprises of an industrial or commercial nature or religious organisations.

- 11 Electoral campaign accounts will be submitted to the organ charged with supervising election procedures, for example, an election committee, within a reasonable time limit after the elections.
- 12 The transparency of electoral expenses should be achieved through the publication of campaign accounts.

C. Control and sanctions

- 13 Any irregularity in the financing of a political party shall entail sanctions proportionate to the severity of the offence that may consist of the loss of all or part of public financing for the following year.
- 14 Any irregularity in the financing of an electoral campaign shall entail, for the party or candidate at fault, sanctions proportionate to the severity of the offence that may consist of the loss or the total or partial reimbursement of the public contribution, the payment of a fine or another financial sanction or the annulment of the election.
- 15 The above-mentioned rules including the imposition of sanctions shall be enforced by the election judge (constitutional or other) in accordance with the law.

REPORT

by Mr Jacques ROBERT (Member, France)

**adopted by the Commission
at its 44th Plenary Meeting,
(Venice, 13-14 October 2000)**

This report has been prepared from the replies to a questionnaire sent to all the countries represented within the Venice Commission.

Over thirty countries responded. They are listed here in alphabetical order: Albania, Argentina, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Georgia, Hungary, Ireland, Italy, Japan, Kazakhstan, Latvia, the Netherlands, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Turkey, Ukraine, United Kingdom, Uruguay.

As in all surveys of this kind, the replies received by the secretariat differed considerably both in volume and in their degree of detail. The diversity of political contexts naturally results in very different situations in different countries.

This report clearly cannot set out to describe in full all the solutions found to the complex problems

posed by the highly sensitive issue of party funding, which has numerous political ramifications. It will therefore not be possible to cite all the respondent countries in the report although, in view of the thoroughness of their replies to the questionnaire, many would well deserve to be mentioned. We will cite only a few countries as examples of the points we are seeking to make.

The aim of this synopsis of the national reports is merely to attempt to explain the major general principles - if any - adopted by the different countries, to highlight the implications of applying those principles, and to bring to the fore the similarities, or conversely the main differences, between solutions, with the aim of possibly suggesting improvements that might be made, here or there, to ensure that the functioning of political parties, which are absolutely essential to all democracies, gives rise to fewer difficulties, and possibly even fewer abuses, in future.

We shall first draw a number of general conclusions from the descriptions of the financing arrangements in force in the countries covered by the survey and then go on to examine the salient points of their replies to the main questions posed.

I. General observations

A. - Our first comment concerns the fact that interest in the issue of political party funding is a relatively recent phenomenon. Although this is understandable in the case of countries which began their transition to democracy only a short time ago, it is more surprising in those which have long had democratic systems of government and already have considerable experience of political pluralism, electoral contests and parliamentary - and possibly presidential - election campaigns.

It is astonishing that in many countries the main legislation governing the funding of political parties was passed only a few years ago. As a result, there is fairly little case-law - in particular from constitutional authorities - in this field. This situation does not facilitate an in-depth study of the many problems posed.

To cite three examples, the Austrian legislation on political parties was enacted only 25 years ago (1975) and the Austrian Constitutional Court, although the oldest in Europe, has delivered only a small number of judgments on the funding of political parties. What is more, those judgments deal solely with more or less technical matters.

Armenia, where the Constitution requires political parties to guarantee the transparency of their financial activities, has addressed the issue of party finances only in two very recent instruments (a law of 1991 and the Electoral Code of 17 February 1999).

In 1998 the Registration of Political Parties Act introduced for the first time in the United Kingdom a Register of political parties. A political party is entitled to be entered on the Register if that party intends to have one or more candidates at parliamentary elections. However, there is no specific legislative provision on financing of political parties. In November 1997, the Government extended the terms of reference of the Committee on Standards in Public Life to include political party funding. As a result of its work the Committee elaborated a number of recommendations on the issue. The Political Parties, Elections and Referendums Bill 2000, when enacted, will give effect to these recommendations.

In Luxembourg, the scope of laws relating to the financing of political parties dates only from January 1999 and is limited to the sole financing of legislative and European elections.

This long-lasting indifference on the part of the public authorities in the majority of countries has had very harmful consequences. The complete lack of rules meant that anything was permitted. As political parties clearly could not survive merely with the funds raised through the collection of membership fees and as no form of public funding was provided, each party had to find its own expedients. In several countries, the outcome was widespread reliance on dubious, undercover

financing practices, which – even in many of the major democracies - led to the prosecution, and even the conviction and sentencing, of party leaders, who, in an effort to obtain at all costs the financing vital to their parties' activities, had resorted to unlawful fund-raising practices. Spectacular examples can be found in the scandals which have shaken Italy, Germany, France and the United States, among other countries, not all of which have yet come to a final conclusion in the courts.

B. - It should also be said that the countries which have felt the need to regulate political party funding - even if only recently - have not always followed their ideas through to their logical conclusion.

For instance, in both Bosnia and Herzegovina and Slovakia national law does not go far enough in regulating matters relating to the overall financing of political parties, whereas in Hungary the law entirely disregards the issue of private-sector funding and in Georgia it makes no provision for supervisory mechanisms. In Croatia the law is too vague, and in Latvia it is the entire party system that is in need of in-depth reform.

The major democracies themselves are also fully aware that the financing arrangements which they have introduced, albeit with a scarcely justifiable delay, have many shortcomings, lead to unfairness and leave room for some regrettable abuses. Although the situation is clearer, it is not yet rosy everywhere.

C. - It must be said that the diversity of the rules established in this field facilitates neither their understanding nor their observance.

Where rules exist and where there is also a will to enforce those rules, should they be ranked as constitutional law by including them in the Constitution? This offers the advantage of permitting the review of any subsequent law that might have the effect of undermining rights or possibilities granted, but entails the disadvantage of making it far more difficult to reform the entire body of rules.

Where criminal or civil penalties may have to be imposed on political parties which fail to comply with the funding rules, should the relevant legal provisions also be included in the Constitution?

It can be seen that in many countries a distinction would appear to have been drawn between political parties, which are normally mentioned in the Constitution, and their funding, which - where it is regulated - is governed by ordinary law.

D. - But what is a political party?

It is true that once the decision has been taken to provide political parties with assistance and funding for the pursuit of their activities (which often entail significant amounts of expenditure), it becomes absolutely essential to identify the potential beneficiaries in very precise terms. Whether funding is public or private - or both - who should receive it? In other words, should the Constitution give a precise definition of what constitutes a political party or, at the very least, stipulate the criteria to be met in order to be entitled to aid, and even ban its being granted to certain kinds of organisations whose intentions are unclear - or perhaps only far too clear?

In this sphere the countries have adopted a very broad range of solutions, depending on their own individual - more or less democratic - tradition.

Mention can be made of the following:

In France Article 4 of the 1958 Constitution provides "Political parties and groups shall contribute to the use of suffrage. They shall be freely established and carry on their activities freely. They shall comply with the principles of national sovereignty and democracy." The requirement that political

parties must promote gender equality in access to electoral functions or elective office was recently added to this article. But there are no provisions on party funding.

It follows from the very wording of Article 4, which recognises the freedom of activity enjoyed by French political parties, that their functioning must not be entirely dependent on state aid. However, it was not until a law of 11 March 1988, which first seriously broached the issue of party financing, that the principle of public funding was established. That law's provisions were confirmed and supplemented by successive laws passed in 1990, 1993 and 1995.

Does this mean that parties are entitled to the promised state aid only in so far as they comply with the constitutional requirements (contributing to the use of suffrage, compliance with the principles of national sovereignty and democracy, promotion of gender equality)? It cannot be asserted that this is unequivocally the case, although, during the debate on the constitutional bill on gender equality, some people argued that parties might incur financial penalties if they failed to promote equality of access to electoral functions or elective office. Such financial penalties might in fact take the form of a significant reduction in the state aid granted to an offending party.

Liechtenstein requires political parties to assume the legal form of an association and to declare their commitment to the principles enshrined in the Constitution in order to qualify for public funding, which they are of course free to use as they see fit, on condition that they keep documentary evidence of the use made of funds.

In Portugal the Constitution provides that all parties shall enjoy freedom of association, apart from armed organisations of a racist nature. The implication is that since such organisations cannot, by definition, freely carry on their activities, they do not qualify to receive the slightest state aid.

It should be noted that in Russia the Constitution safeguards political pluralism, except in the case of parties whose aim is to overthrow the regime. However, the Constitution says nothing about party financing. It should be added that state registration of political parties is a mandatory formality.

In Spain the wording of the Constitution bears some similarity to that found in France. Article 6 of the 1978 Constitution similarly provides "political parties shall embody political pluralism ... and shall be the fundamental means of public participation." Parties may be freely established and enjoy freedom of activity providing they abide by the Constitution and the law. Their internal structure and functioning must be democratic.

It was against the background of these requirements that the law of 19 June 1985 laying down the general rules governing elections and the law of 2 July 1987 on political party funding were subsequently passed.

Some countries' law says absolutely nothing about either political parties or their funding. This is the case in Switzerland, where no recognition is granted to political parties in the Federal Constitution, but constitutional case-law in fact acknowledges their "de facto" existence.

There is no federal law on party finances, and this would seem to imply that there are no restrictions on fund-raising, which is left to the parties' sole initiative. Nor are there regulations governing the use of funds raised by political parties.

In a limited number of cantons provision is made for full or partial reimbursement by the cantonal authority of the cost of printing and distributing ballot papers, but this public subsidy is confined to expenditure incurred in connection with an election.

What are the reasons for this virtually complete lack of legislation - whether federal or cantonal - on the specific subject of party financing?

A number of reasons may be advanced. Firstly, in Switzerland it is taken for granted that a party's main source of funds should be members' contributions. Similar traditions are to be found in other countries where the prevailing view is that parties, which function as private associations, must - like all such associations - be capable of financing themselves. However, this requires a civic sense among the general public and a strong public interest in community affairs. Both exist in Switzerland, but are far less in evidence elsewhere.

It can also be argued that in Switzerland political parties generally have a fairly lightweight internal organisation and, as a result, do not incur much expenditure. In larger democratic states political parties are huge machines necessitating a large number of permanent staff, vast premises and a high operating budget that cannot be covered merely from members' contributions, which are often completely insufficient in terms of the number of contributors and the relatively small amounts paid in.

One might add that if Switzerland some day wished to pass legislation on party financing, it would no doubt be obliged to hold a public referendum, with absolutely no guarantee as to the outcome given the hostile tradition mentioned above.

Switzerland has perhaps also been lucky in that, unlike some of its larger neighbours, it has not experienced a public scandal concerning political party financing, which would have tarnished the reputation of its governing class and forced it to regulate parties' sources of funds.

In Luxembourg, where the Constitution mentions neither the existence nor the function of political parties, the latter were defined for the first time within legislation on 7 January 1999, which concerned provisions for the partial reimbursement of electoral campaign expenses.

In Uruguay the Constitution provides for the existence of political parties, but the country has no legislation on their financing.

II. Guiding principles

All states wishing to bring some semblance of order to party funding, with the aim of both allowing the free expression of pluralist political opinion and guaranteeing equal treatment of all political parties according to their respective circumstances, are confronted with a number of major issues.

A. - The first is whether parties should be aided solely during election periods, to enable them to face the high costs inherent in any campaign, or whether, on a broader level, some form of regular, permanent funding of political parties should be introduced. The decision is an important one as it has obvious political and financial implications.

Confining funding to the full or partial coverage of campaign expenses (in particular through the reimbursement of a percentage of expenditure incurred) merely aims to avoid emptying the parties' coffers every time an election takes place and to permit the trouble-free functioning of the democratic process through the holding of regular, free elections. In this case, political parties are regarded as private organisations which have a free hand in raising the funds necessary for their day-to-day functioning but must be aided during the holding of elections, which are organised by the public authorities on their own responsibility.

The second approach, where the state bears all or part of the costs arising from political parties' very operation, follows a somewhat different line of reasoning. In this case political parties are regarded as officially recognised bodies, since they contribute to the state's ongoing democratic functioning, and it is therefore reasonable that the state should help to support their existence.

It therefore comes as no surprise that the countries which have opted for this second approach include those where parties are regarded as "institutions", whose means of subsistence cannot but be

a matter of state concern.

This is the case in most of the major European democracies. Germany is a prime example.

The German Federal Constitutional Court acknowledges the need for public funding not only of campaign expenses, but also of expenses incurred in connection with political parties' routine activities, on condition that state aid is in inverse proportion to each party's self-financing capacity and is calculated solely on the basis of funding requirements absolutely essential to the proper functioning of the public authorities.

B. - The second issue is the nature of the funds that may be granted to parties or that they may themselves raise.

1. Many states have, as a matter of principle, introduced a strict, mandatory ban on the funding of political parties by foreign entities or the acceptance of financial or material aid from foreign sources, whether another state, a foreign political party or foreign individuals or corporate bodies. This applies, inter alia, to Armenia (section 3 paragraph 4 of the law of 1991) and Bulgaria, which prohibits political parties from accepting financial assistance, donations or legacies from foreign countries or organisations and even from anonymous sources.

Russia bans donations to campaign funds by foreign states, companies or organisations, stateless persons, international organisations and Russian legal entities in which more than 30% of the capital is foreign owned.

It is perfectly understandable that a state should be reluctant to allow a foreign country to interfere with its domestic politics by making funds available on a discretionary basis to certain of its political parties.

Although it had been common knowledge for many years that some parties, which had long been in positions of strength in some of the major democracies, regularly received funds from foreign states to finance not only their election campaigns but also their day-to-day existence, once general legislation on party funding was in the pipeline, this could no longer be officially permitted, or even merely tolerated.

In this connection, the spectacular scandal that broke out very recently in Germany shows to what extent public opinion in certain countries - but not all - heeds any hint of corrupt electoral practices which might - even indirectly - jeopardise the functioning of democracy.

2. Public or private funding? Or both?

Here too the choice raises an essential substantive issue. As mentioned above, for decades many countries had no legislation governing the financing of political parties, which implies that the state took no interest in such matters, leaving each party entirely free to raise the funds necessary to its functioning here and there, without being too scrupulous about the methods employed.

This completely anarchical state of affairs led to the excesses of which we are aware. Each party had to raise funds at all costs, and the richest were the strongest. Since there were no rules, and therefore no limits on either income or expenditure, parties competed with one another in a frantic race to find contributors, and the firms contacted took advantage of the position of strength in which they then found themselves in order to provide funds - with strings attached - to those parties that would get their message across and safeguard their interests.

Hence the - when all's said and done quite recent - idea of ending this constant quest for financing by providing a public source of funds, with the aim of placing parties and their candidates on a more equal footing.

The emergence of this new source of funds did not, however, mean an end to all private financing. But since the state was offering financial assistance, it could legitimately exercise some degree of supervision over parties' private sources of funds, so that the diversity of their nature and amount did not in fact undermine the equality between parties which the public financing arrangements were seeking to promote. Some countries' parliaments or constitutional courts would even go so far as to encourage parties to engage in profit-making activities as a means of increasing their autonomy vis-à-vis their backers, whether public or private, by generating their own funds.

For instance, the Czech Constitutional Court did away with legislation prohibiting parties from carrying on commercial activities. Czech political parties can now bring out publications and hold cultural events for fund-raising purposes.

In Japan, in a decision of 24 June 1970 the Supreme Court ruled that, although private firms could also continue to finance parties, under no circumstances must this become a means of exerting pressure on the parties concerned.

Public and private sources of funds therefore co-exist. But is it necessary to limit their respective amounts? And have such limits been imposed in practice?

C. - Limits on financing

1. Where the state finances political parties it is naturally free to decide the nature and extent of the aid granted. A great variety of arrangements exist. Some states offer extensive coverage of the cost of election campaigns, parties' routine functioning and certain specific activities.

For instance, Austria makes an annual grant to political parties holding at least five seats in the National Council or those which, without having won any seats, polled more than 1% of the vote in the most recent elections.

Parties represented in the Council also receive financial assistance for the running of election campaigns (whether national or European).

Under a law of 1985, parliamentary groups consisting of at least five MPs also receive an annual grant to cover the cost of their work in the two chambers of parliament.

Apart from funding parties' political activities in the true sense, under a law of 1984 on the promotion of political training the state makes annual grants to fund political training activities pursued by the parties through the mounting of exhibitions or through foundations. Publication of periodicals for the purpose of dispensing political training may also be subsidised by the state.

In Spain the same principles govern the award of public subsidies. Firstly, there are "electoral" subsidies. The law defines a state contribution to campaign expenses payable not only to political parties but also to federations of parties and groups of electors, in so far as they have won at least one seat. This contribution is proportional to the number of votes polled.

Part of the subsidy may be paid in advance, on the basis of the amount received by each individual party for the previous election.

"Annual" subsidies, intended to cover a party's day-to-day functioning, are payable according to criteria based on the number of seats and votes obtained. One-third of the total amount is distributed in proportion to the number of seats, and the remaining two-thirds in proportion to the number of votes. Political parties which did not win any seat are not entitled to this subsidy.

In France, the law of 1988 (section 9, as amended) provides parties with a source of public financing,

which is stable for the duration of parliament and represents a substantial amount. As in Spain, a law of 15 January 1990 established the principle of proportional distribution of the sum concerned, but on a half-and-half basis. Half of the grant is based on performance in the general elections to the National Assembly. It is payable to parties which field candidates in a minimum number of constituencies and is proportional to the number of votes obtained in the first round of voting by candidates standing for the party concerned. The other half of the grant is calculated according to the number of members of parliament who have stated that they belong to the party and is payable on condition that the party already qualifies to receive the first half of the grant.

2. The problem facing states which, alongside other public or private institutions, decide to finance political parties is striking a fair balance among all parties - in terms of the funds distributed - and avoiding distribution based on arbitrary criteria, which would favour the most powerful parties to the detriment of those which either did not score well in the most recent elections or are newly formed and have not yet stood the test of elections.

It is therefore important that state financing should be calculated on the most objective, fairest basis possible.

Constitutional courts whose jurisdiction extends to electoral disputes and the regulation of election campaigns must seek to ensure that such aid is equally balanced.

In Croatia, for example, the Constitutional Court has upheld the right of a political party representing a national minority to apply for reimbursement of its campaign expenses by the state. In even more precise terms, the Constitutional Court of Slovenia has held, conversely, that grants made to political parties by the state, calculated on the basis of the score obtained in local elections, do not breach the constitutional principles of the right to local self-government and the right to vote.

In Hungary the Constitutional Court has ruled that the legislation providing for state aid to be granted solely to parties which obtained more than 1% of the votes cast in the preceding election is not unconstitutional.

More often than not, national law - of which we have seen a number of examples above - makes public aid for political parties conditional on both the number of seats obtained and the overall percentage score.

3. The issue of private funding is more complex. It is therefore not surprising that different countries have adopted different solutions in this field.

Some countries permit private funding of political parties without imposing any restrictions on its amount or origin. Others prohibit it and regard as lawful sources of funds only grants made by the state and individual membership fees. Some confine themselves to imposing maximum limits on private financing.

Examples of legislation or case-law are cited below.

In Japan, in a decision of 24 June 1970 the Supreme Court held that private firms could contribute funds to political parties, on condition that such financing did not constitute or become a means of exerting pressure on the parties concerned.

In France, a law passed in 1990 made it lawful for firms to make contributions to political parties, where such contributions were deemed to be in keeping with the firm's corporate purpose, and specified that the amounts concerned would be deductible for corporate income tax purposes. Contributions had to be paid to political parties' financing associations or financial agents. However, the law did place a limit on contributions by corporate bodies, which could not exceed a sum specified on an annual basis. Since these financing arrangements gave rise to many

misunderstandings, a very strict law was passed on 19 January 1995, banning corporate contributions to political parties.

Contributions by private individuals may take only one of two forms. They may be "identified", in which case a limit per donor is imposed, or may be contributions from unidentified individuals collected at meetings, rallies or fund-raising events.

D. - Supervision of financing

1. Supervision may, firstly, take the form of a reporting requirement, making it compulsory for each political party to explain the origin of the funds at its disposal.

In Bulgaria, for example, supervision of this kind is exercised by a standing committee of the National Assembly (committee members may include civil society representatives), to which political parties are required to submit an annual report indicating the amount and the origin of their funds and expenditure incurred over the past year.

Parties must file a similar report two weeks after the holding of elections. Similarly, the many members of parliament and newly appointed municipal councillors and mayors are required to report their sources of funds and their campaign expenditure to the respective body to which they belong within one month of the holding of elections.

Canada also requires the submission of an annual report.

2. Supervision may also be performed by Constitutional Courts. However, given that the legislation governing such supervision is recent there is not yet enough constitutional case-law to permit an assessment of the scope and effectiveness of this form of supervision.

3. State financial bodies (in particular an Auditor General's department) may also be vested with some degree of supervisory authority (particularly Courts of Auditors).

4. Lastly, those who break the rules on party financing may be liable to criminal penalties.

5. These various techniques may moreover be applied concurrently. In Russia, for instance, supervision of political party financing is exercised by both the public prosecution service at the level of the Federation, which also monitors social associations' compliance with the law, the Federation Ministry of Justice, as the body which registers social associations and ensures that their activities are in keeping with their statutory purposes, and financial bodies (divisions of the Federation Auditor General's department, the tax inspectorate), which monitor social associations' sources of income, the amounts of the contributions that they receive and the payment of tax.

6. Some states rely on their political parties' good sense and probity, trusting them to carry out their own internal supervision by means of a number of non-contentious techniques such as audits, accounting systems and their own statutory financing bodies.

7. Mention can also be made of other more stringent means of supervision.

Where the law has been broken, some states have no hesitation in even going so far as to permit their constitutional court to disband or ban the offending political party. Others empower, and even make it binding on, their electoral commissions to refer to the courts any breaches of the electoral code that come to their knowledge. A number of states merely confine themselves to imposing financial penalties, for instance a reduction in the amount of state aid granted the subsequent year.

Conclusion

It can be seen from an examination of the various systems established by individual states to organise political party financing in the best possible way that, although the chosen techniques often differ considerably, the underlying concerns are the same everywhere and the objectives fairly similar.

The constant aim is to meet the requirements inherent in the inevitable cost of democracy. If the democratic process is to function well, it is necessary both to limit, as far as possible, and reduce expenditure by political parties and at the same time to safeguard the principle of equality between parties, which often appears to be jeopardised in favour of mainstream parties, which - because they obtain the highest scores and the largest number of seats - are allocated considerable public subsidies.

It is also necessary to ensure greater transparency in the reporting requirements imposed on parties and more thorough supervision of the uses made of the funds that they receive.

In the case of funds from private sources there is doubtless also a need for stricter regulation in terms of the fixing of limits and more severe penalties for those who break the law.



Recommendation 1516 (2001)¹

Financing of political parties

Parliamentary Assembly

1. Citizens are showing growing concern with regard to corruption linked to political parties' gradual loss of independence and the occurrence of improper influence on political decisions through financial means. The Assembly, stressing that political parties are an essential element of pluralistic democracies, is seriously preoccupied by this situation.
2. A number of scandals linked to the financing of political parties in several Council of Europe member states in all parts of Europe over recent years has demonstrated that this issue must be addressed as a matter of urgency in order to prevent the loss of citizens' interest in the political life of their respective countries.
3. In order to maintain and increase the confidence of citizens in their political systems, Council of Europe member states must adopt rules governing the financing of political parties and electoral campaigns.
4. The Assembly is of the opinion that the general principles on which these rules should be based must be formulated at European level.
5. In this connection, the Assembly takes note of the activities of the Council of Europe's bodies in this field, in particular of the guidelines for financing political parties, adopted by the European Commission for Democracy through Law (the Venice Commission) in March 2001, and of the ongoing work of the Council of Europe's Working Group on the Funding of Political Parties (GMCF) aimed at formulating recommendations to member states on "common rules against corruption in the funding of political parties and electoral campaigns".
6. The conditions in which political parties exercise their activities have changed over recent decades and nowadays they need substantial financial resources to gain visibility and to obtain political support for their ideas. Therefore, the Assembly considers that the regulation mechanisms must take these realities into account and empower political parties to obtain sufficient resources to carry out their tasks and functions.
7. The Assembly believes that the rules on financing political parties and on electoral campaigns must be based on the following principles: a reasonable balance between public and private funding, fair criteria for the distribution of state contributions to parties, strict rules concerning private donations, a threshold on parties' expenditures linked to election campaigns, complete transparency of accounts, the establishment of an independent audit authority and meaningful sanctions for those who violate the rules
8. Accordingly, the Assembly considers that:
 - a. As regards sources of finance
 - i. States should encourage citizens' participation in the activities of political parties, including their financial support to parties. It should be accepted that membership fees, traditional and non-controversial sources of finance, are not sufficient to face the ever increasing expense of political competition.

1. Text adopted by the Standing Committee, acting on behalf of the Assembly, on 22 May 2001 (see [Doc. 9077](#), report of the Political Affairs Committee, rapporteur: Mrs Štěpová.).



- ii. Political parties should receive financial contributions from the state budget in order to prevent dependence on private donors and to guarantee equality of chances between political parties. State financial contributions should, on the one hand, be calculated in ratio to the political support which the parties enjoy, evaluated on objective criteria such as the number of votes cast or the number of parliamentary seats won, and on the other hand enable new parties to enter the political arena and to compete under fair conditions with the more well-established parties.
- iii. State support should not exceed the level strictly necessary to achieve the above objectives, since excessive reliance on state funding can lead to the weakening of links between parties and their electorate.
- iv. Besides their financial contributions, states may contribute indirectly to financing political parties based on law, for example by covering the costs of postage and of meeting rooms, by supporting party media, youth organisations and research institutes; and also by granting tax incentives.
- v. Together with state funding, private funding is an essential source of finance for political parties. As private financing, in particular donations, creates opportunities for influence and corruption, the following rules should apply:
 - a. a ban on donations from state enterprises, enterprises under state control, or firms which provide goods or services to the public administration sector;
 - b. a ban on donations from companies domiciliated in offshore centres;
 - c. strict limitations on donations from legal entities;
 - d. a legal limit on the maximum sum of donations;
 - e. a ban on donations by religious institutions.
- b. As regards expenditure during election campaigns
 - States should impose limits on the maximum expenditure permitted during election campaigns, given that in the absence of an upper threshold on expenditure there are no limits to the escalation of costs, which is an incentive for parties to intensify their search for funds.
- c. As regards transparency
 - Financing of political parties must be fully transparent, which requires political parties, in particular:
 - i. to keep strict accounts of all income and expenditure, which must be submitted, at least once a year, to an independent auditing authority and be made public;
 - ii. to declare the identity of donors who give financial support exceeding a certain limit.
- d. As regards control
 - States should establish independent auditing bodies endowed with sufficient powers to supervise the accounts of political parties and the expenses linked to electoral campaigns.
- e. As regards sanctions
 - In the case of a violation of the legislation, political parties should be subject to meaningful sanctions, including the partial or total loss or mandatory reimbursement of state contributions and the imposition of fines. When individual responsibility is established, sanctions should include the annulment of the elected mandate or a period of ineligibility.
- f. As regards “third parties”
 - The legislation on financing political parties and on electoral campaigns should also apply to entities related to political parties, such as political foundations.
9. The Assembly therefore recommends that the Committee of Ministers:
 - i. adopt “common rules against corruption in the funding of political parties and electoral campaigns”, taking into account the work of the Multidisciplinary Group on Corruption (GMC) pursuant to a proposal of its Working Group on the Funding of Political Parties (GMCF) and the above-formulated principles, as well as the guidelines adopted by the European Commission for Democracy through Law in March 2001;

- ii. invite member states to adopt legislation on financing political parties and electoral campaigns based on the above-formulated principles reflected in Council of Europe guidelines.



COUNCIL OF EUROPE COMMITTEE OF MINISTERS

Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns

*(Adopted by the Committee of Ministers on 8 April 2003
at the 835th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

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

Considering that political parties and electoral campaigns funding in all states should be subject to standards in order to prevent and fight against the phenomenon of corruption;

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

Having regard to the recommendations adopted at the 19th and 21st Conferences of European Ministers of Justice (Varese, 1994 and Prague, 1997 respectively);

Having regard to the Programme of Action against Corruption adopted by the Committee of Ministers in 1996;

In accordance with the Final Declaration and the Plan of Action adopted by the Heads of State and Government of the Council of Europe at their Second Summit, held in Strasbourg on 10 and 11 October 1997;

Having regard to Resolution (97) 24 on the twenty guiding principles for the fight against corruption, adopted by the Committee of Ministers on 6 November 1997 and in particular Principle 15, which promotes rules for the financing of political parties and election campaigns which deter corruption;

Having regard to Recommendation 1516 (2001) on the financing of political parties, adopted on 22 May 2001 by the Council of Europe's Parliamentary Assembly;

In the light of the conclusions of the 3rd European Conference of Specialised Services in the Fight against Corruption on the subject of Trading in Influence and Illegal Financing of Political Parties held in Madrid from 28 to 30 October 1998;

Recalling in this respect the importance of the participation of non-member states in the Council of Europe's activities against corruption and welcoming their valuable contribution to the implementation of the Programme of Action against Corruption;

Having regard to Resolution (98) 7 authorising the Partial and Enlarged Agreement establishing the Group of States against Corruption (GRECO) and Resolution (99) 5 establishing the Group of States against Corruption (GRECO), which aims at improving the capacity of its members to fight corruption by following up compliance with their undertakings in this field;

Convinced that raising public awareness on the issues of prevention and fight against corruption in the field of funding of political parties is essential to the good functioning of democratic institutions,

Recommends that the governments of member states adopt, in their national legal systems, rules against corruption in the funding of political parties and electoral campaigns which are inspired by the common rules reproduced in the appendix to this recommendation, – in so far as states do not already have particular laws, procedures or systems that provide effective and well-functioning alternatives, and instructs the "Group of States against Corruption – GRECO" to monitor the implementation of this recommendation.

Appendix

Common rules against corruption in the funding of political parties and electoral campaigns

I. External sources of funding of political parties

Article 1 Public and private support to political parties

The state and its citizens are both entitled to support political parties.

The state should provide support to political parties. State support should be limited to reasonable contributions. State support may be financial.

Objective, fair and reasonable criteria should be applied regarding the distribution of state support.

States should ensure that any support from the state and/or citizens does not interfere with the independence of political parties.

Article 2 Definition of donation to a political party

Donation means any deliberate act to bestow advantage, economic or otherwise, on a political party.

Article 3 General principles on donations

a. Measures taken by states governing donations to political parties should provide specific rules to:

- avoid conflicts of interests;
- ensure transparency of donations and avoid secret donations;
- avoid prejudice to the activities of political parties;
- ensure the independence of political parties.

b. States should:

- i. provide that donations to political parties are made public, in particular, donations exceeding a fixed ceiling;
- ii. consider the possibility of introducing rules limiting the value of donations to political parties;
- iii. adopt measures to prevent established ceilings from being circumvented.

Article 4 Tax deductibility of donations

Fiscal legislation may allow tax deductibility of donations to political parties. Such tax deductibility should be limited.

Article 5 Donations by legal entities

a. In addition to the general principles on donations, states should provide:

- i. that donations from legal entities to political parties are registered in the books and accounts of the legal entities; and
- ii. that shareholders or any other individual member of the legal entity be informed of donations.

b. States should take measures aimed at limiting, prohibiting or otherwise strictly regulating donations from legal entities which provide goods or services for any public administration.

c. States should prohibit legal entities under the control of the state or of other public authorities from making donations to political parties.

Article 6 Donations to entities connected with a political party

Rules concerning donations to political parties, with the exception of those concerning tax deductibility referred to in Article 4, should also apply, as appropriate, to all entities which are related, directly or indirectly, to a political party or are otherwise under the control of a political party.

Article 7 Donations from foreign donors

States should specifically limit, prohibit or otherwise regulate donations from foreign donors.

II. Sources of funding of candidates for elections and elected officials**Article 8 Application of funding rules to candidates for elections and elected representatives**

The rules regarding funding of political parties should apply *mutatis mutandis* to:

- the funding of electoral campaigns of candidates for elections;
- the funding of political activities of elected representatives.

III. Electoral campaign expenditure**Article 9 Limits on expenditure**

States should consider adopting measures to prevent excessive funding needs of political parties, such as, establishing limits on expenditure on electoral campaigns.

Article 10 Records of expenditure

States should require particular records to be kept of all expenditure, direct and indirect, on electoral campaigns in respect of each political party, each list of candidates and each candidate.

IV. Transparency**Article 11 Accounts**

States should require political parties and the entities connected with political parties mentioned in Article 6 to keep proper books and accounts. The accounts of political parties should be consolidated to include, as appropriate, the accounts of the entities mentioned in Article 6.

Article 12 **Records of donations**

a. States should require the accounts of a political party to specify all donations received by the party, including the nature and value of each donation.

b. In case of donations over a certain value, donors should be identified in the records.

Article 13 **Obligation to present and make public accounts**

a. States should require political parties to present the accounts referred to in Article 11 regularly, and at least annually, to the independent authority referred to in Article 14.

b. States should require political parties regularly, and at least annually, to make public the accounts referred to in Article 11 or as a minimum a summary of those accounts, including the information required in Article 10, as appropriate, and in Article 12.

V. **Supervision****Article 14** **Independent monitoring**

a. States should provide for independent monitoring in respect of the funding of political parties and electoral campaigns.

b. The independent monitoring should include supervision over the accounts of political parties and the expenses involved in election campaigns as well as their presentation and publication.

Article 15 **Specialised personnel**

States should promote the specialisation of the judiciary, police or other personnel in the fight against illegal funding of political parties and electoral campaigns.

VI. **Sanctions****Article 16** **Sanctions**

States should require the infringement of rules concerning the funding of political parties and electoral campaigns to be subject to effective, proportionate and dissuasive sanctions.

Ministers' Deputies

CM Documents

CM(2001)195 revised addendum (restricted) 24 April 2002

796 Meeting, 22 May 2002

10 Legal questions

10.3 Multidisciplinary Group on Corruption (GMC)

c. Draft Explanatory Memorandum to the Draft Recommendation Rec(2002).. of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and election campaigns

Document prepared by the Directorate General I (Legal Affairs)

Foundations of the Recommendation

1. Political debate is essential for the existence and development of modern democracies. Political parties, vehicle of political ideas, have a crucial part to play in this process.
2. The functioning of political parties in modern time has become extremely costly. Nowadays, it is hardly possible for a political party to exist and develop its activities only on the contributions of its members. Therefore, if a society wants its citizens to participate in political life, political parties should be allowed to receive funding of various nature and origin.
3. Political parties may be funded by the State and by natural and legal persons. It should however be underlined that, as private funding becomes more significant for political parties, so new possibilities for influence over them are created. Political parties thus become more vulnerable to corruption. In many modern societies funding of political parties gives rise to widespread corruption in several forms.
4. Corruption of political parties goes to the heart of the democratic political system because it distorts the equality of opportunity between parties and the process of policy decision-making. It raises the prospect of political parties supporting particular interests only because of outside financial influence.
5. In many countries the laws governing political party funding are very recent, while in others they are inadequate. At present, there is no international standard or reference, the question of political party financing being closely linked to the constitutional and electoral systems of each State, which are themselves generally the product of each country's historical or cultural background.
6. One of the main issues in regulating political party funding is how the rules can be enforced. Another is how public trust in political parties can be fostered by transparency. Modern democracies cannot accept lack of transparency.
7. Taking into account the wide mandate of the GMC over different aspects of the modern manifestations of the phenomenon of corruption, the problem of fighting corruption in political party funding had also to be addressed.

Background to the Recommendation

8. The Council of Europe became strongly interested in the international fight against corruption because of the obvious threat corruption poses to the basic principles this Organisation stands for: the rule of law, the stability of democratic institutions, human rights and social and economic progress. Furthermore, corruption is a subject well-suited for international co-operation: it is a problem shared by most, if not all, member States and it often contains transnational elements. The specificity of the Council of Europe lies in its multidisciplinary approach, meaning that it deals with corruption from the perspectives of a criminal, civil and administrative law
9. At the 1994 Malta Conference of the European Ministers of Justice, the Council of Europe launched its initiative against corruption. The Ministers considered that corruption was a serious threat to democracy, the rule of law and human rights and that the Council of Europe, being the pre-eminent European institution defending these fundamental values, should respond to that threat.
10. The Resolution adopted at this Conference endorsed the need for a multidisciplinary approach, and recommended the setting up of a Multidisciplinary Group on Corruption with the task of examining what measures could be included in a programme of action at international level, and the possibility of drafting model laws or codes of conduct, including international conventions, on this subject. The importance of elaborating a follow-up mechanism to implement the undertakings contained in such instruments was also underlined.
11. In the light of these recommendations, the Committee of Ministers agreed, in September 1994, to set up the Multidisciplinary Group on Corruption (GMC) under the joint responsibility of the European

Committee on Crime Problems (CDPC) and the European Committee on Legal Co-operation (CDCJ) and invited it to examine what measures would be suitable for a programme of action at international level against corruption, to make proposals on priorities and working structures, taking due account of the work of other international organisations and, to examine the possibility of drafting model laws or codes of conduct in selected areas, including the elaboration of an international convention on this subject and a follow-up mechanism to implement undertakings contained in such instruments. The GMC started its work in March 1995.

12. The Programme of Action against Corruption (PAC), prepared by the GMC in the course of 1995 and adopted by the Committee of Ministers at the end of 1996, is an ambitious document, which attempts to cover all aspects of the international fight against this phenomenon. It defines the areas in which action is necessary and provides for a number of measures to be adopted in order to realise a global, multidisciplinary and comprehensive approach to tackling corruption. The Committee of Ministers instructed the GMC to implement this programme before the end of the year 2000.

13. At their 21st Conference (Prague 1997), the European Ministers of Justice adopted Resolution No 1 on the links between corruption and organised crime. The Ministers emphasised that corruption represents a major threat to the rule of law, democracy and human rights, fairness and social justice, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society. They further underlined that a successful strategy to combat corruption and organised crime requires a firm commitment by States to join their efforts, share their experience and take common actions. The European Ministers of Justice specifically recommended speeding up the implementation of the Programme of Action against corruption which includes examining, with a view to drawing up a recommendation, the financing of political parties and its impact on corruption.

14. On 10 and 11 October 1997, the 2nd Summit of the Heads of State and Government of the member States of the Council of Europe took place in Strasbourg. The Heads of State and Government, in order to seek common responses to the challenges posed by corruption throughout Europe and to promote co-operation among Council of Europe member States in the fight against corruption, instructed, *inter alia*, the Committee of Ministers to secure the rapid completion of international legal instruments pursuant to the Council of Europe's Programme of Action against Corruption.

15. The Committee of Ministers, at its 101st Session on 6 November 1997, adopted Resolution (97) 24 on the 20 Guiding Principles for the fight against Corruption. Principle 15 specifically indicates that States should "promote rules for the financing of political parties and election campaigns which deter corruption."

16. Consequently, following the adoption of the Criminal Law Convention on Corruption (European Treaty Series No 173), of Resolutions (98) 7 authorising the partial and enlarged Agreement establishing the "Group of States against Corruption – GRECO", of Resolutions (99) 5 establishing the Group of States against Corruption, of the Civil Law Convention on Corruption (European Treaty Series No 174), as well as the Recommendation N° R (2000)10 of the Committee of Ministers to Member States on codes of conduct for public officials, the Committee of Ministers [adopted Recommendation Rec(2002)... on common rules against corruption in the funding of political parties and election campaigns.]

Preparatory work and adoption of the Recommendation

17. The Programme of Action against Corruption had drawn attention to the existence of links between the illegal financing of political parties and corruption. The Third Conference of Specialised Services in the Fight against Corruption (Madrid, 28-30 October 1998) had been also devoted to these issues, and the participants had suggested that a relevant international instrument be drafted. In the conclusions of the Madrid Conference, they invited the Council of Europe :

- "to prepare common standards with a view to the setting up of transparent systems for the funding of political parties so as to prevent corruption" ; and to

- "prepare a Protocol to the Criminal Convention on Corruption providing for the co-ordinated criminalisation of the illegal financing of political parties and the personal and unjustified enrichment of elected representatives during their term of office."

18. The GMC examined therefore the possibility of drafting international rules on the fight against corruption in the funding of political parties and election campaigns. In December 1998 the GMC decided to have prepared a questionnaire on national legislation and practice concerning the funding of political parties and candidates for election and to send it to member and observer States. An analysis of the replies was prepared (GMC (99)24).

19. On the basis of these documents the GMC in September 1999 decided to take this work forward. The GMC considered more effective to have guidelines in a non binding form instead of a legally binding instrument. At its meeting in December 1999, the GMC decided to create a special working group on the funding of political parties (GMCF). It was agreed that this group would consider the elaboration of common principles in the States participating in the GMC's work with regard to the funding of political parties, candidates and election campaigns, the aim being to prevent corruption. The GMCF had also the task to express a view on the type of legal instrument which might frame these principles.

20. The GMCF working group met five times (April, June, October, December 2000 and March 2001) to consider and finalise a draft Recommendation of the Committee of Ministers including in appendix a set of common rules against corruption in the funding of political parties and election campaigns. It submitted the draft to the GMC for consideration at its 23rd meeting in March 2001.

21. In its work on the issue of the fight against corruption in funding of political parties and election campaigns, the GMC draw inspiration from Recommendation 1516 (2001) of the Parliamentary Assembly on Funding of Political Parties (adopted on 22 May 2001).

22. The GMC examined the present draft recommendation at its 23rd, 24th and this 25th and last meeting (in the light of the view of the CDCJ). In [] the GMC submitted to the Committee of Ministers a draft Recommendation on common rules against corruption in the funding of political parties and election campaigns.

23. The Committee of Ministers of the Council of Europe adopted the Recommendation Rec(2002)... to member States on common rules against corruption in the funding of political parties and election campaigns at the ... meeting of the Ministers' Deputies (Strasbourg,) and authorised the publication of the explanatory memorandum.

24. By this instrument the Governments of member States are urged to adopt and implement in their national laws provisions against corruption in the funding of political parties and election campaigns, on the basis of the common rules appended to the Recommendation. However, a State may at the date of this Recommendation already have in place a law, procedure or system that provides an effective, equivalent alternative to a particular provision of the Recommendation. Also by this instrument the Committee of Ministers instructs GRECO to monitor the implementation of the Recommendation. This instrument being a Recommendation, does not have the legal binding effect of a Convention. This will no doubt be taken into account in the monitoring process adopted by GRECO in respect of this Recommendation.

Structure and content of the Recommendation

25. The Recommendation concerns itself with those aspects of the funding of political parties and election campaigns that are vulnerable to corruption. It comprises a number of general rules that should underpin the legislation and practices of a State relating to this subject.

26. This body of rules comprises common minimum standards that should be found in the relevant laws and practices of a modern, liberal, democratic State.

27. The provisions of the Recommendation offer these standards at two levels of insistence.

First, some provisions use the word “should”, indicating that they advocate a standard generally recognised as desirable and to be achieved as soon as reasonably possible, subject to the existence of an effective equivalent alternative (see paragraph 24 above).

Secondly, there are provisions that point the way to good practice by using the word “may”, indicating that a State is entitled, if it thinks fit, to adopt the recommendation contained in the provision.

Indicating that a State may adopt a certain law or practice does not imply that it may not adopt a law or practice that is different, provided of course that the law or practice adopted is not inconsistent with the other principles of the Recommendation. Equally, the word “may” allows a State’ laws to remain silent on the matter.

28. The Recommendation is structured in six chapters dealing with:

Sources of external funding of political parties:

the chapter deals with State support, the meaning of “donation”, the general principles that should govern donations, tax deductibility, donations by legal entities and foreign donors, and donations to organisations linked to a political party.

Sources of funding of candidates for elections and representatives elected to public office:

the single article of this chapter simply applies the rules regarding political party funding *mutatis mutandis* to election candidates and elected representatives.

Election campaign expenditure:

the chapter contains the articles limiting election campaign expenditure and requiring proper accounts of such expenditure to be kept.

Transparency:

the chapter contains those articles that are designed to shed light on the finances of political parties. They deal with the keeping of proper accounts, the recording of donations and their donors, and the presentation and publication of accounts. It is generally recognised that the strongest single influence against corruption is the light of accountability and public scrutiny.

Supervision:

this chapter deals with the function of supervision that should be undertaken by an independent authority and the need for the specialisation of personnel to combat illegal funding.

Sanctions:

the recommendation that breach of the rules should be visited with dissuasive sanctions is found in this chapter.

29. Comments on each of the articles follow.

Article 1 - Public and private support to political parties

30. Support to political parties may be public or private. There are arguments for and against both forms of support.

31. The argument against state support is that the taxpayer should not be obliged to support financially organisations of which he or she does not approve politically. Furthermore, the development of political will should proceed from society to the state, not the other way round. Two other reasons are sometimes put forward: first, state support could cause an existing party system to ossify making it difficult for new parties to break in; second, reliance on state support could lead parties to abandon efforts to raise money from electors and thereby damage civic engagement in the political process. Those who are in favour of this kind of funding consider that in this way a greater equality between parties may be achieved and undue influence on political parties may be limited as the need for private funding would be reduced.

32. The great majority of member States provide state support for political parties and election candidates in recognition partly of their significance in the democratic process and partly of the vulnerability of that process to improper influence by means of private donations. The nature and extent of State support varies from country to country and in a few countries is limited to the provision of free broadcasting time. The intention underlying the provision of reasonable contribution is that both the nature and the amount of the contribution should be reasonable.

33. The article urges the State to make contributions to political parties. Such contributions may be financial. State support is to be distributed in accordance with objective, fair and reasonable criteria, matters to which GRECO can be expected to have due regard. Examples of such criteria might be a minimum of registered members, a minimum proportion of votes cast, the number of seats won.

34. In paragraph (d) the support from citizens of a State refers to financial or other support that is so extensive as to interfere with the policy making process of the party.

Article 2 - Definition of donation to a political party

35. The meaning of “donation” covers any form of material advantage bestowed on a political party, excluding subscriptions. The advantage can take the form of a gift, loan, credit, payment or discounted price or release of any liability. It can be in cash or in kind, goods or services. The rules do not apply to subscriptions, which are small regular payments made to a party by its members as a condition of membership, but they do apply to donations otherwise made by its members.

36. It should be noted that no definition of “political party” is suggested. For the purpose of qualifying for support from public funds, the criteria referred to in Article 1 will necessarily include criteria which a group will have to meet in order to be eligible for any public funding. Those criteria will provide a definition of sorts, and perhaps will be a sufficient and suitable definition of a “political party” for the purpose of compliance with the other provisions regulating the funding of political parties. This matter of definition is for each member State to determine. However, in doing so, States could draw inspiration from the definition included in the guidelines on the financing of political parties, adopted by the Venice Commission according to which “ a political party is an association of persons one of the aims of which is to participate in the management of public affairs by the presentation of candidates to free and democratic elections” (see 46th Plenary meeting, 9-10 March 2001).

Article 3 - General principles on donations

37. The first part of this article sets out four principles that States’ legislation should specifically provide for: the avoidance of conflicts of interests; transparency of donations and the avoidance of secrecy; the avoidance of prejudice to the activities of parties arising from donations; the maintenance of the independence of parties.

38. Conflict of interests would arise where a donation was given on condition that it was applied for a particular purpose contrary to the aims of the party, or where the donor’s interests conflicted with the aims of the party, or where the donor’s interests conflict with the public interest. The first example of conflict of

interests might be dealt with by a specific rule prohibiting such conditions from attaching to donations. The second and third examples could be neutralised by requiring not only the identity of the donor to be disclosed but also the nature of the donor's interests, whether financial or otherwise.

39. Transparency is generally thought to be an effective precaution against the dangers of improper influence and favouritism that arise from large undisclosed donations in that it allows the public to form its own views about the integrity of a party. Rules requiring a party to maintain and make available for public scrutiny records that identify donors making donations over a certain value and specifying the size of their donations would embody the principle of transparency. A secret donation is understood to be one that does not appear in the accounts of the party and is to be contrasted to an anonymous donation which does appear in the accounts but the donor is not identified.

40. The avoidance of prejudice to the activity of a party and the maintenance of independence can be regarded as complementary. No donation should compromise a party's freedom of action or its independence.

41. The sheer size of donations to political parties can be the cause of improper influence being brought to bear on the actions of the party. For this reason States are urged to place an upper limit on the value of donations that can lawfully be made to a political party. States should each determine the appropriate limit in the light of their particular political and economic circumstances. States are also urged to set strict rules preventing circumvention of the upper limit. While it is recognised that it is difficult entirely to prevent evasion of donation limits, the combination of strict rules and a range of dissuasive sanctions would be effective in achieving general compliance.

Article 4 - Tax deductibility of donations

42. Recognising the desirability of encouraging political activity and public support of such activity, this article allows a State to permit taxpayers to deduct donations to a political party from their taxable income. Political parties benefit indirectly from tax deductibility as it encourages private donors to contribute financially to the activities of parties.

43. On a related matter, it should be noted that no recommendation is made as to whether a political party should be exempt from paying tax on the donations it receives.

Article 5 - Donations by legal entities

44. The three parts of this Article each address an aspect of donations by legal entities such as companies. If the funding of political parties by companies is not regulated by strict rules, this may adversely affect equality between the parties.

45. The approach to the issue of funding by legal entities varies from one country to another but most countries consider that there should be more restrictions on donations from companies because they exercise economic power and thus may seek more favourable treatment.

46. First, some countries consider that legal entities such as companies can exert so much influence by the size of their donations that they should not be permitted to make any political donations. Others consider company donations should be more strictly controlled than donations by individuals. The article urges States to take one or other of these legislative measures.

47. Second, donations by legal entities that provide goods or services to the public administration are regarded as providing opportunities for improper influence on the award of contracts. States are urged to limit such donations, prohibit them entirely or otherwise regulate them.

48. Third, in some States the opportunity for the party in Government to coerce legal entities owned by the State or by a local authority to contribute to the party is the reason for urging States to prohibit donations from these sources.

Article 6 - Donations to entities connected with a political party.

49. In recent years institutions connected with political parties have been used in different ways for the circumvention of political parties funding rules. In order to avoid evasion of rules concerning donations to political parties, this article provides for their application to any organisation connected to a political party. However, it is not necessary that the provisions in Article 4 allowing for tax deductibility of donations apply to donations made to such organisations, and Article 6 therefore excludes that provision. But, if it thinks fit, a State may allow such tax deductibility.

50. The form and function of these bodies vary greatly. Research institutes, political education foundations, local or regional branches of a national party can all be connected with or come under the influence of a party in such a way as to warrant applying to them the rules that apply to political parties. Some of the criteria indicating that a body is a subsidiary organisation of a political party are that the body forms part of a political party, or is established by or under the constitution of the party, or is effectively controlled by the party or its officers, or has functions conferred on it by or under the constitution of the party.

Article 7 - Donations from foreign donors

51. This Article enables States to control foreign donations more strictly than domestic donations or even to prohibit them entirely. The rationale for the provision is that foreign donations may exert an improper, interfering influence on the political life of a country. Furthermore, the identity of a foreign donor or the origin of the donation may be more difficult to verify.

52. A donation may be defined as “foreign” if it emanates from abroad or if it is made by a non-citizen. It is for each State to determine the “nationality” status of legal entities and subsidiaries of legal entities.

Article 8 - Application of funding rules to election candidates and elected representatives

53. It appears from States’ existing legislation and practice that similar funding rules are applicable to election candidates and elected representatives. It does not appear necessary to envisage different rules.

54. Therefore, this article applies the rules regarding political party funding *mutatis mutandis* to election candidates and elected representatives. This means that the articles contained in Chapters I, IV, V and VI are to apply, with necessary modifications, to these candidates and representatives. (The phrase “*mutatis mutandis*” is understood to mean “changing what has to be changed”). It should be noted that the rules are also to apply to the funding of political activities of elected representatives.

Article 9 - Limits on expenditure

55. Political parties believe it is necessary to spend ever increasing amounts on advocating their views to the public. The rate of this expenditure is increased by competition from political rivals. The consequent pressure to attract financial support makes a party susceptible to improper influence from substantial donors. The source of donations and the reasons for making a donation may become matters of indifference.

56. Limits on expenditure should apply also to expenditure of funds received in the form of State support in order to ensure some equality of arms between parties.

57. For these reasons a number of States limit the amounts that may be spent on election campaigns. This article reflects that desirable practice and urges States that have not done so to put in

place laws that limit such expenditure. The limits should apply to electoral expenditure not only by political parties but also in respect of individual candidates and lists of candidates. It is for each State to determine the appropriate limits.

Article 10 - Records of expenditure

58. As a necessary corollary to limiting campaign expenditure, the keeping of proper records of what is spent on election campaigns is required in respect of political parties, lists of candidates and candidates.

Article 11 - Accounts

59. This article and the following two are intended to enhance the transparency of party political funding. These three articles are extremely important for the establishment of a coherent system for the prevention of and fight against corruption in the funding of political parties.

60. By law political parties should be required to keep proper books and accounts. Entities connected with political parties, as described in Article 6, are also required to keep proper books and accounts. It is important to note that this Article further recommends that the accounts of political parties should be consolidated to include the accounts of the connected entities so that the true extent of a party's support becomes evident.

Article 12 - Records of donations

61. Donations in cash or in kind should be recorded in the accounts of a political party so as to show accurately the amount of funding received by the party. Equally important is the identity of the donor if the donation is above a certain value, for it is such donations that may influence the attitude and actions of the party or buy access to the party's decision-makers. By virtue of Article 6 the obligations under Article 12 apply also to the entities connected to political parties.

62. It is for each State to decide the value of the donation above which the donor must be identified. In determining that value States should balance the importance of preserving the confidentiality of the individual's political preference against the need to bring to light the sources of influence on the party.

Article 13 - Obligation to present and publish accounts

63. This article contains two distinct obligations: first, States should require political parties to present their accounts at set intervals to an independent authority; second, the parties themselves should be required to publish annually or more frequently at least a summary of their accounts, and the election expenses on the occasion of each election. The first obligation enables effective control and sanction; the second is intended to provide the public with the information needed to judge for itself the sources and extent of certain kinds of influence on a party.

Article 14 - Independent supervisory authority

64. States are urged to have an independent authority established by law, whose function is to supervise the funding of political parties and election campaigns. Such an authority is regarded as essential in ensuring compliance with the laws regulating this corruption-prone area of the political life of a country. The authority would foster the effectiveness of control over political parties and the confidence of the public in political party funding. The authority's duties need not be limited to the supervisory functions referred to in the article.

65. The second part of this Article envisages the authority's duties as including the supervision of the accounts of political parties and of election campaign expenditure. Supervision also extends to the presentation and publication of those accounts. This supervision should include the investigation of suspected irregularities and, where necessary, the referral of the investigation to competent authorities.

66. As regards sanctions for breach of the rules, the authority's role may be both to punish and to refer to other authorities, such as the courts, for appropriate action.

67. It is left to the discretion of each State to define the status of this control authority. "Independence" is necessarily relative and can never be absolute. The essential attribute of the supervisory authority is that it should be free from improper external influence in discharging its functions under this article.

Article 15 - Specialised personnel

68. By this article States are urged to develop the specialisation of judiciary, police, and other personnel in the fight against illegal political funding. It is envisaged that specialised education and training would allow prevention and enforcement personnel to deal more effectively with the problem.

69. It is left to the discretion of the State to determine whether there should be a structural specialisation or only functional specialisation of the personnel in the fight against illegal political funding. As regards the independent supervisory authority referred to in Article 14, the personnel should include those with specialist knowledge of the financing of political parties and election campaigns.

Article 16 - Sanctions

70. In requiring States to provide effective, proportionate and dissuasive sanctions for breach of the rules about the funding of political parties and election campaigns, this article leaves it to States themselves to determine what those sanctions should be.

71. Sanctions can be penal or administrative in nature. Administrative sanctions can be aimed at the person or at property. Currently, sanctions vary widely from one country to another, ranging from small fines to imprisonment for up to 10 years and include:

- deprivation of an elected representative's mandate;
- disqualification from standing for election for up to 10 years;
- loss of right to vote for up to 5 years;
- loss of office or employment;
- ineligibility for appointment as magistrate or public official for 2-10 years;
- loss of election expenses refund;
- ineligibility for State funding;
- forfeiture of illegal funds;
- cancellation of election;
- award of seat to election opponent;
- dissolution of party.

72. It is also to be noted that the effective use of sanctions is important in dissuading political parties and election candidates from breaching the rules regarding political funding and in reinforcing public confidence in the political process.