

**Upholding democratic ideals and the challenge of regulating political party funding  
and election campaign finance: Case study of Southern Africa**

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**Abstract**

This paper is based largely on selected key findings of the *Money, Politics and Transparency Project* research survey coordinated jointly by Global Integrity, the Sunlight Foundation and the Electoral Integrity Project during 2014. It summarises selected survey results for four African countries, three of which are in Southern Africa. In doing so, it seeks to highlight similarities and differences in law and practice, as well as relevant global and regional standards. It also refers to relevant media reports of parties' and candidates' conduct during recent election campaigns in these countries. It argues that transparency is the essential element of comprehensive anti-corruption regulation.

**Introduction**

The data used in this paper are drawn from the key findings of the *Money, Politics and Transparency Project* (MPT 2015a, p63), undertaken jointly by Global Integrity, the Sunlight Foundation and the Electoral Integrity Project. MPT's research methodology focuses on law and practice in each of the 54 countries surveyed.<sup>1</sup>

This paper responds to the invitation to assess trends and developments in three Southern African countries, at least one of which has recently experienced a general election. The three countries from this sub-region included in the MPT research are Botswana, Malawi and South Africa. Political

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<sup>1</sup> The research process, including fieldwork and peer reviews, ran from July to December 2014. The period of study for the research was January 2013 to July 2014 – all comments thus refer to sources and evidence that were current during this timeframe. In cases where the most recent national elections occurred prior to 2013, the study period was elongated so as to include those elections. When applicable, information from late 2014 has also been incorporated.

finance is almost completely unregulated in these countries, making useful comparison of limited value. As a result, it may be useful to consider also another African country included in the MPT research, albeit not located in Southern Africa. Kenya was chosen because of the similarities between its colonial past and the three Southern African countries, and because its new constitutional order may provide a useful comparison with South African law and practice in particular.

### *Why political finance regulation?*

Although political parties are generally understood to be private associations having, along with their members and supporters, related rights to privacy and freedom of association, expression and speech, it seems obvious that when they seek and hold public office they are performing a public function. With few exceptions (e.g. independent candidates), they are, as the SA Constitutional Court has recognised, particularly in closed party list electoral systems, the ‘veritable vehicles the Constitution has chosen for facilitating and entrenching democracy’ (*Ramakatsa* 2013, paras 57-58). Especially where, as in South Africa, ‘the Constitution itself obliges every citizen to exercise the franchise through a political party’ (*Ramakatsa* 2013, para 68), it is vital that voters be appropriately informed about the real interests and values that are vested in those political parties.

The democratic voice of the ordinary citizen, especially the poor and most vulnerable, exercised through the vote, is easily drowned out by the influence of wealthy donors to political parties and candidates. As part of many approaches to regulating political finance, various forms of disclosure, especially of large donations, can help moderate the resulting imbalance.

The United States Supreme Court in *Buckley v Valeo*<sup>2</sup> famously observed that -

‘First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in

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<sup>2</sup> 424 US 1 (1976) at 62.

evaluating those who seek federal office. It allows the voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is 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.'

#### **I. Public funding of political parties and electoral campaigns**

Public funding can enhance democracy by sustaining political parties' ability to ascertain voters' interests and needs, and to represent them, especially between elections. It can enhance the quality of democracy by reducing parties' reliance on wealthy donors, thereby reducing the potential for corruption. At the same time, it can help ensure the equal value of each person's vote by reducing the often-secretive power of wealthy special interests. The SA Constitution explains the objective of public funding as 'to encourage multiparty democracy that promotes a system of government which is accountable, representative, responsive and open'. Public funding is consistent with international good practice and can point the way to more transparent and accountable forms of party-funding regulation.

No law exists in Botswana or in Malawi to provide public funding. However, s.40(2) of Malawi's Constitution envisages state funding for political parties that meet prescribed requirements, including having secured more than one tenth of the national vote in parliamentary elections. Public

funding is intended to enable political parties to continue to represent their constituencies between elections, but the Constitution doesn't explicitly bar its use in election campaigns.

In terms of the Electoral Act 1998, in South Africa's pure proportional representation system, individuals are elected only if they are included in political parties' electoral lists. Public funding is not provided for electoral campaigns, but for other authorised activities, from three primary sources.

Section 236 of the Constitution 1996 envisages national legislation to provide for public funding on an 'equitable and proportional' basis to 'enhance multi-party democracy'. The Public Funding of Represented Political Parties Act 1997 (the Public Funding Act), provides for the annual funding of political parties participating in national and provincial legislatures from the Represented Political Parties Fund. Public funding is also provided, controversially, in terms of Parliament's Policy on Political Party Allowances 2005,<sup>3</sup> to political parties represented in the National Assembly to support a range of internal administrative functions, including for the party leader and to operate constituency offices in the broad public interest, i.e. on a non-partisan basis to all members of the public. All nine provincial legislatures have passed similar additional laws.

## **II. Use of state resources in favour of or against political parties and individual candidates.**

No explicit prohibition exists in law in Botswana, but the Public Service Act<sup>4</sup> prohibits public servants from engaging in partisan politics, or conduct that could involve them in political controversy or from taking improper advantage of their position in the public service. Ni similar law applies to political leaders.

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<sup>3</sup> Section 8.7.1.

<sup>4</sup> Section 37(d).

The Constitution of Kenya 2010<sup>5</sup> requires Parliament to enact legislation to provide for restrictions on the use of public resources to promote the interests of political parties. Kenya's Election Campaign Financing (ECF) Act 2013<sup>6</sup> provides that candidates and political parties may not receive any contribution or donation, in cash or in kind from the state, a state institution or agency - or any other source - for the purpose of supporting any electoral campaign.<sup>7</sup>

Section 193(4) of the Malawian Constitution 1994<sup>8</sup> provides clearly that no public financial, material or human resources may be used for 'the purposes of promoting or undermining any political party or member of a political party or interest group', save as permitted by the Constitution or an Act of Parliament. In practice, the party in power has tended to exploit its incumbency advantage. As noted by the European Union Observer Mission to the 2014 general elections in Malawi (EU EOM, 2014), 'the lack of explicit prohibition of the use of state resources for campaigning, as already highlighted by the 2009 EU EOM, opens up the possibility of blurring between the ruling party resources and state resources'. The EOM's report recommends the 'Introduction of a clear and enforceable ban on the use of state resources for campaigning purposes.... together with an independent oversight mechanism...'.

In South Africa, the conduct of public servants is regulated in terms of s.195 of the Constitution and the Code of Conduct for Public Servants,<sup>9</sup> which prohibits partisan conduct and use of public resources. In similarly broad terms, elected public representatives in the executive may not 'act in a way that is inconsistent with their position'; or 'use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person'.<sup>10</sup> The conduct of members of Parliament is not regulated in these terms as MPs don't ordinarily have direct access to or dispositive

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<sup>5</sup> Art. 92(h).

<sup>6</sup> Section 14(1).

<sup>7</sup> Section 14(5) of the ECF Act allows for public funding provided through the Political Parties Fund to be used for election campaigning. See further below.

<sup>8</sup> 1994, as amended in 1999.

<sup>9</sup> Issued in terms of the Public Service Act 1994.

<sup>10</sup> Conduct of national and provincial executives is regulated by the Executive Members' Ethics Act, 1998 (Executive Ethics Act) and the Executive Code of Conduct, 2000 (Executive Code) issued in term of the Act.

authority concerning the allocation or use of meaningful quantities of state assets.<sup>11</sup> Perhaps because of the existence of these provisions, the Electoral Act 1998 does not explicitly prohibit the use of state resources to influence election outcomes. However, the Act does prohibit any person or political party from ‘offering any inducement or reward’ to another person to join or not to join a party, or to influence political party allegiance.

### **III. In practice, to what extent are state resources used in favour of or against political parties and individual candidates' electoral campaigns?**

The research documented a few instances where members of Botswana’s ruling party have been accused of using state resources to their campaigns or candidates. A well-publicised report involved the President flying government helicopters to campaign around the country. As in most countries, the line is blurred in the case of the president and the vice president as the state is obliged to provide them with 24/7 security, air and road transport and accommodation, even while campaigning.

In Kenya, there are ‘elaborate’ provisions and penalties targeted at preventing abuse of public resources, but politicians, especially in the executive, have consistently violated the regulations. Widespread abuse of public resources, mainly of public servants and vehicles, during the last general elections was documented.<sup>12</sup>

In Malawi, the party in power has used state resources, particularly public media, vehicles and helicopters, giving the incumbent an advantage over others. The difficulty noted is that ‘there is no clear distinction between a political party meeting and a government meeting when the president is in attendance’. So-called development meetings are ‘usually’ campaign meetings, and the ‘most

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<sup>11</sup> The conduct of Members of Parliament is regulated by the Code of Conduct for Members of Parliament (1999).

<sup>12</sup> By the Kenya Human Rights Commission (KHRC), a CSO, and an independent constitutional commission, the Commission on the Administration of Justice (CAJ).

abused resource has been traditional Chiefs'. Allegations of the use of state-owned maize stocks surfaced during the recent election campaign.

Two common types of incidents were among those reported during South Africa's 2014 general election campaign (EISA 2014, pp42-43). (1) ANC-controlled municipalities refused opposition parties use of public facilities (town halls) for their campaign meetings. (2) The South African Social Security Agency (Sassa) allegedly distributed blankets and food at a political rally attended by ANC and national president, Jacob Zuma. The main opposition Democratic Alliance (DA) alleged that these were "inducements" or "rewards" to sway voters (Merten, 2014).

The South African media has reported alleged misuse of Parliamentary constituency funds for party purposes - party members allegedly used supposedly non-partisan parliamentary constituency office funds for travel purposes although they were not public representatives designated by their party to that office (*Daily Dispatch*, 2013). There was also a complaint concerning the use of public funds by the Gauteng provincial legislature to advertise on bill boards in colours of the ruling party (*Mail & Guardian*, 2014).

Political analyst and professor at Wits University (Booyesen, 2014) noted that the elections were preceded by a 'rapid succession ... of official openings of dams, schools, houses, bridges and power stations' to aid the ANC's election campaign. Separate research found several forms of intimidation and coercion by the ANC, especially 'economic coercion' – misinformation and threats by ANC party campaigners among poorer voters (who often depend on the state for grants and employment via public works programmes) that a vote for an opposition party would result in the loss of grants and the denial of jobs, contracts, services and development opportunities (CASE, 2014).

**IV. The law provides for free or subsidised access to equitable air time for electoral campaigns.**

While no law exists in Botswana or Malawi to provide free or subsidised airtime for parties or candidates, in Malawi any access is in the discretion of the Electoral Commission, which may, by arrangement with the Malawi Broadcasting Corporation, allocate airtime to electoral candidates. Any access must be 'equal' for every candidate. Equal treatment is reaffirmed by the Presidential and Parliamentary Elections (PPE) Act 1998,<sup>13</sup> which requires every public official and entity to treat all political parties and candidates equally. The Communications Act 1998 applies this principle to all broadcasting licensees, including private media.

Kenya's ECF Act<sup>14</sup> provides that the IEBC must, after consultation with political parties, state-owned media and media regulatory authorities, set out the limits for media coverage of candidates and political parties, including paid advertisements and free broadcast time or print media coverage. The 2011 Election Act<sup>15</sup> also requires that political parties participating in an election must have access to state-owned and private media services during the campaign period, that coverage must be impartial and non-discriminatory, and that all candidates and political parties participating in an election must be allocated reasonable airtime, including free airtime.

The South African Constitution<sup>16</sup> requires the public broadcaster, the South African Broadcasting Corporation (SABC), to 'ensure fairness and a diversity of views that broadly represent South African society'. The regulatory authority, the Independent Communications Authority of South Africa (ICASA), is required to function without any political or commercial interference.<sup>17</sup> It regulates free and equitable access to public and private radio and television broadcasts during the election campaign period.<sup>18</sup> Parties are allocated slots in terms of a formula that attempts to balance existing

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<sup>13</sup> Section 58.

<sup>14</sup> Section 20(1), in accordance with Art. 92(2) of Kenya's 2010 Constitution.

<sup>15</sup> However, at the time of the 2014 elections, the IEBC had yet to develop transparent criteria for determine access to free media by political parties.

<sup>16</sup> Section 192.

<sup>17</sup> The Independent Communications Authority of South Africa (ICASA) Act, 2000, establishes ICASA. It administers the Electronic Communications Act, 2005 (ECA).

<sup>18</sup> In terms of the provisions of the 'Regulations on Party Election Broadcasts, Political Advertisements, the equitable treatment of Political Parties by Broadcasting Licensees and Related Matters' (the Elections



seats held in the national and provincial legislatures with the number of candidates being fielded to contest available seats. However, changes to the allocation formula in the Regulations for the 2014 elections 'skewed allocations slightly against the newcomer parties such as the Economic Freedom Fighters and Agang' (Duncan, 2014).

Subject to quality and content requirements, private radio and television stations are obliged to broadcast a maximum of eight one-minute party political advertisements per party, and an equitable share of party election events, during the election period formally declared by the Electoral Commission. Political parties must pay the costs of producing advertisements, but not all can afford to do so. Election campaign advertising in 2014 was estimated to cost all parties together over R1bn (approx. US\$92m).

#### **V. Cash contributions are banned.**

Botswana and South Africa neither regulate nor ban any donations. Kenya's ECF Act 2013<sup>19</sup> merely requires all contributions to be deposited into dedicated bank accounts. Candidates and political parties must issue receipts for any contribution exceeding twenty thousand shillings. The Political Parties Act 2011 doesn't require the use of dedicated accounts. Malawi's PPE Act 1998<sup>20</sup> allows parties and candidates in any election to solicit contributions from any source and in any form and from a wide range of sources.

#### **VI. Anonymous contributions are banned.**

Neither Botswana, Malawi nor South Africa prohibit any source of private funding. In Kenya, the Political Parties Act 2011<sup>21</sup> requires parties to keep and submit to the Registrar accurate and authentic records, including the latest independently audited accounts, which must show the

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Broadcasting Regulations), promulgated in terms of the ICASA Act read with provisions of the ECA Act. The Regulations have tended to be updated shortly before each general election as experience is gained.

<sup>19</sup> Sections 7, 8, 9 10 & 15.

<sup>20</sup> Section 66.

<sup>21</sup> Section 17(1)(g).

sources of the funds, including the names, addresses and contact details determined by the Registrar. This means that parties are expected to report all contributions. The ECF Act<sup>22</sup> goes further by explicitly prohibiting receipt of anonymous contributions, whether in cash or in kind.

#### **VII. Reporting in-kind donations to political parties and individual candidates.**

In Botswana, the Electoral Act<sup>23</sup> requires that all donations and gifts (including in-kind) to candidates for election expenses must be fully disclosed to the Independent Electoral Commission. However, the IEC acknowledges that this provision has not been enforced for many years. As mentioned above, Kenya's Political Parties Act 2011<sup>24</sup> requires parties, but not candidates, to keep accurate and detailed records of all sources of funding and support, including donations in cash or in kind. Similar provisions exist in the ECF Act.<sup>25</sup> Malawi and South Africa do not regulate private donations in any way.

#### **VIII. Loans to political parties and individual candidates must be reported.**

Not unlike donations, loans create obligation on the part of the recipient, because, not unlike donations, loans can be a means to control the conduct of the recipient. Botswana's Electoral Act<sup>26</sup> requires that all loans must be fully disclosed, although the IEC concedes that it does not enforce this provision. Again, in Malawi and South Africa there is no requirement to disclose or report the source or nature of funding, including loans.

Kenya's ECF Act<sup>27</sup> recognises loans as a form of contribution which must be reported along with other financial contributions to both candidates and parties. Similarly, the Political Parties Act 2011<sup>28</sup>

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<sup>22</sup> Section 13(1)(a).

<sup>23</sup> Section 84(1).

<sup>24</sup> Section 17(1)(g)(iii).

<sup>25</sup> Section 10 and 26. Section 2(1) of the ECF Act defines 'contribution' to mean monetary and non-monetary contributions including loans, donations, grants, gifts, property, services provided to a candidate or political party, and money spent on behalf of a candidate, political party or referendum committee in paying any expenses incurred directly or indirectly, but does not include volunteer services'.

<sup>26</sup> Section 84(1).

<sup>27</sup> Section 12(1)(d).

<sup>28</sup> Section 16(1).

deems 'fully registered' political parties to be corporate entities that can transact business. As such, they are expected to report all sources of financing, including loans.

**IX. There are quantitative limitations on individual contributions.**

There are no legislated upper limits on the size of individual donations in Botswana, Malawi or South Africa. In Kenya, by contrast, the ECF Act<sup>29</sup> prohibits contributions from a single source that exceed twenty per cent of the total contributions received by that candidate or political party. The Political Parties Act<sup>30</sup> takes a slightly different approach, prohibiting any individual or organisation from making any contribution to a candidate or party with a value exceeding five per cent of the total expenditure of the political party in any one year. However, s.28(6) exempts from this limit initial contributions, whether in cash or in kind, from founding members within a party's first year of existence. As the prescribed ceilings are not phrased in absolute monetary terms, but as percentages, they are moving targets that require capacity by recipients and authorities to undertake close monitoring.

**X. The law places limits on corporate contributions.**

Corporate contributions, like other contributions for private sources, are not regulated in Botswana, Malawi or South Africa. Kenya alone applies some regulation, but they are generalised limits not focused on legal or natural persons. The ECF Act<sup>31</sup> provides that the IEB Commission must prescribe limits on contributions from a single source during an election campaign, whether or not the contributor is a corporate entity. As noted earlier, no contribution from a single source may exceed twenty percent of the total contributions received by any candidate or political party during an election campaign. In effect, therefore, candidates and parties are at liberty to raise any amount

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<sup>29</sup> Section 12(2).

<sup>30</sup> Section 28(2).

<sup>31</sup> Section 12(1)(b)

prior to official declaration of an election campaign. There are, however, no limits on how much a candidate or political party may donate to their own campaign finance account.<sup>32</sup>

An example of the potential for abuse arising from unregulated donations by corporations arose in South Africa's 2016 municipal elections. Truman Prince was the ANC's mayor and mayoral candidate in Beaufort West, a small town in the Karoo. He was fined R10 000 by the ANC for bringing it into disrepute after it was revealed that he had written a fundraising letter on his municipal manager's official letterhead (*Independent Online*, 2016). The letter was addressed to a sectoral education and training authority (SETA), challenging a decision they had made that negatively affected ANC-aligned companies. It stated, in relevant part –

'We are an ANC[-]led municipality, we are therefore in need of financial injection for our 2016 Local Government Election Campaign and therefore will also want to see construction companies sympathetic and having a relationship with the ANC to benefit, in order for these companies to inject funds in our election campaign process.'

#### **XI. Contributions from foreign sources.**

Donations from foreign sources are not regulated in either Botswana or South Africa. In Kenya, the Political Parties Act<sup>33</sup> prohibits 'donations, bequests and grants' from 'a non-citizen, foreign government, inter-governmental or non-governmental organisation'.<sup>34</sup> However, a 'foreign agency or a foreign political party' which shares an ideology with a political party registered in Kenya, may provide technical assistance.<sup>35</sup> The law does not explicitly preclude candidates from receiving donations from non-citizens or foreign companies.

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<sup>32</sup> Section 12(2) and 18(2).

<sup>33</sup> Section 27(1)(c).

<sup>34</sup> Section 11(b) of the ECF Act is to similar effect, prohibiting contributions from a foreign government.

<sup>35</sup> Section 27(2). Technical assistance excludes provision of any assets - s.27(3).

In Malawi, some contributions from foreign sources are permitted. The Presidential and Parliamentary Elections Act 1998<sup>36</sup> explicitly allows political parties to receive voluntary contributions from any individual, non-governmental organisation or other private organisation, whether in or outside Malawi.

## **XII. Election campaign expenditure limits.**

Botswana's Electoral Act<sup>37</sup> limits individual candidates' election expenses to P50 000 (US\$6 000), but imposes no spending limit for political parties. The IEC's spokesperson<sup>38</sup> pointed out that this low threshold is unenforceable and the Commission has not enforced it for more than two decades. It is unclear why the limit has not been adjusted upwards through an amendment to the law.

The Kenyan Constitution<sup>39</sup> empowers the IEB Commission to regulate the amount of money that may be spent by or on behalf of a candidate or party in respect of any election.<sup>40</sup> Accordingly, the ECF Act<sup>41</sup> requires the Commission to prescribe spending limits, including the total amount that a candidate or political party may spend during an expenditure period, including the limit for expenditure on media coverage. The ECF Act allows<sup>42</sup> for public funding provided through the Political Parties Fund to be used for election campaigning. However, the IEBC did not operationalise the law by promulgating the necessary regulations to set any limits for the March 2013 general elections, so the provisions were not enforced.

Some of the considerations relating to campaign expenditure limits can be discerned from two examples. During a visit to Kyrgyzstan shortly before its election in 2011, we were told of an inter-party agreement to limit campaign expenditure. Given the high levels of poverty in the country, a pragmatic agreement was reached to reduce the cost of campaigning. The only form of advertising

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<sup>36</sup> Section 66.

<sup>37</sup> Section 81.

<sup>38</sup> Osupile Maroba.

<sup>39</sup> Art. 88(4)(i).

<sup>40</sup> Section (4)(i) of the Independent Electoral and Boundaries Commission Act 2011 contains a similar provision.

<sup>41</sup> Section 18(1).

<sup>42</sup> In s.14(5).

was pamphlets. In addition to being cost-effective, it encouraged at least some degree of personal contact between candidates' campaigners and the electorate.

Contrast that with South Africa's 2016 local government elections. The ANC's head of campaigns, Nomvula Mokonyane, said that the party had spent about R1bn on its campaign (EWN<sub>a</sub>, 2016). This was later denied by ANC Treasurer-General Zweli Mkhize, who said Mokonyane was 'joking', that it was an incorrect 'estimate', and that the party reported financial matters to its 'structures', not to the public. (EWN<sub>b</sub>, 2016). Given South Africa's severe poverty levels, would it not be a responsible decision to agree some limit to campaign expenditure? It would also contribute to reducing highly questionable efforts to solicit corporate funding.

#### **XIV. Public disclosure of financial information from political parties and individual candidates.**

Botswana law contains no such requirement, but Kenya's Political Parties Act<sup>43</sup> requires political parties to publish annually in at least two national newspapers, the following details –

- (a) the sources of its funds, including –
  - i. the amount of money received from the public fund;
  - ii. the amount of money received from its members and supporters;
  - iii. the amount and sources of donations given to the party;
- (b) the income and expenditure of the political party; and
- (c) the assets and liabilities of the political party.

Kenya's ECF Act<sup>44</sup> is far more conservative. Candidates' and parties' disclosure of funds to the Commission is confidential, and details of disclosures may not be divulged except where those details are the subject of a complaint or an investigation, or in proceedings in a court of law. While

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<sup>43</sup> Section 29(1) and (2).

<sup>44</sup> Sections 16(5), and 26(2) and (3).

the Commission must make disclosure records available for 'inspection' on request, the Commission may determine 'confidentiality requirements'.

No law obliges political parties or candidates in Malawi to make publicly available their financial information. In general, Malawi has no access to information legislation, although Art.37 of the Constitution envisages that, subject to national legislation, there is a right of access to all information held by the State insofar as that information is required for the exercise of a right. In February 2014, the Malawian government approved an access to information policy, paving way for the enactment of the access to information Bill that had been stalled in Parliament for 11 years. However, passage has since been delayed, and it is unclear whether the Bill will include political finance issues.

South African law exhibits the same gap, requiring public availability of information only in respect of funds disbursed by and received from Parliament, the IEC and provincial legislatures, i.e. public sources. Section 32 of the Constitution 1996 prescribes a right of access to information held by the state, and any information that is held by 'another' (ie private) person 'and that is required for the exercise or protection of any rights'. National legislation has been enacted in the form of the Promotion of Access to Information Act, 2 of 2000 (PAIA), which doesn't deal with private funding of political parties.

The only court decision that has explicitly considered the right of voters to access to information about sources of funding is *Idasa and Others v ANC and Others* (2005), which held that, ordinarily, political parties are private associations rather than public bodies or bodies that perform public functions. As a result, in terms of the existing law, they were held not to be obliged to disclose their sources of funding. However, the court also recognised the public interest in greater transparency concerning political parties' funding sources and accepted an undertaking by the ruling ANC that it would urgently introduce legislation to regulate transparency and access to information in this

regard. The ruling party has since failed to act on this undertaking and has rebuffed efforts by opposition MPs to do so.

My Vote Counts (MVC) recently initiated litigation against the Speaker of Parliament in order to compel the introduction of this long-promised legislation.<sup>45</sup> The majority decision in the Constitutional Court last year<sup>46</sup> declined to decide the merits of MVC's application and instead held that the application should have challenged the constitutionality of PAIA to the extent that it fails to regulate access to political parties' fundraising information.

**XV. In practice, citizens can easily access the financial information of all political parties and individual candidates.**

An important test of the value of regulation (i.e. legislation) is whether it enables citizens, including voters, to easily access the information reported by political parties. When records are available, a fee is often payable, which places access beyond the reach of many. With the exception of the Kenyan law above, which appears to be impressively open in principle, albeit limited to political parties and inapplicable to individual candidates, citizens and journalists struggle to see the full picture. Officials with authorised access are not permitted to divulge financial information on request. When records are leaked, this mode of disclosure undermines their authenticity and credibility. In Malawi, political parties' financial information has been described as their "best kept secret". In South Africa, details of disbursements from the Public Fund are readily available, whether in reports tabled in Parliament, or on the IEC's website or on request. But details of how parties spend that money are not published. Information on disbursement of parties' allowances allocated in terms of Parliament's Allowances Policy is available from Parliament only by lodging a formal request and paying the relatively modest (but still unaffordable for many) prescribed fee in terms of PAIA. Parliament's annual report is extremely terse on the subject, although large amounts are

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<sup>45</sup> Case number 13372/2016.

<sup>46</sup> *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 (30 September 2015).



involved. A journalist who made an ordinary request for information concerning parliamentary allowances was refused access by both Parliament and by the larger political parties.<sup>47</sup> Political parties routinely refuse all requests for details of their private funding, which is by far the largest source of funding for the larger political parties.

## **Conclusion**

Political parties require funding for legitimate political activities, but given the almost complete lack of transparency surrounding the income and expenditure of political parties, significant uncertainty surrounds how much is actually raised and used, from whom, how much might be reasonably necessary, or how efficiently those funds are spent. The absence of regulation of private funding to political parties represents a major gap in many countries' anti-corruption frameworks, beyond our sub-region. Private individuals and companies, as well as foreign governments, are able to donate as much as they wish in secret, leaving the door wide open for corruption and the buying of influence. In a country like South Africa in particular, but also in other African countries already divided by high levels of inequality, wealthy individuals are able to influence policy in myriad ways, thus 'drowning out' the voices of the already poor and marginalised (Judith February, HSRC 2013). Legislation regulating these relationships cannot alone resolve the 'complex ways in which the influence of money on the body politic manifests itself'. Political parties must be able to raise money for much-needed activities, from building research capacity to electioneering; the essential additional ingredient is transparency (February and Ferris, 2015).

### *International and regional standards*

Legislation is, of course, usually necessary to ensure transparency. The Kenyan legislative experiment may still be too new and incompletely established to provide a sound basis for lessons drawn from experience. However, many of the laws it has enacted reflect regional and global commitments applicable to most of the countries considered in this paper. If for no other reasons than self-respect

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<sup>47</sup> Jeanne van der Merwe, Media24, interviewed 23 September 2014.

for the integrity of their own commitments, as well as the widespread experience they reflect, these standards ought to be domesticated in the countries in this sub-region.<sup>48</sup>

In the Preamble to the **SADC Protocol Against Corruption**, state parties acknowledge that ‘corruption undermines good governance, which includes the principles of transparency and accountability’, and reaffirmed ‘the need to eliminate the scourge of corruption through the adoption of effective preventative and deterrent measures and by strictly enforcing legislation against all types of corruption’.

Accordingly, Art. 4 obliges parties ‘to adopt measures, which will create, maintain and strengthen’ mechanisms needed to prevent, detect, punish and eradicate corruption in the public and private sector. These must include ‘mechanisms to promote access to information and to facilitate eradication and elimination of opportunities for corruption’ (Art. 4(d)), as well as ‘mechanisms for promoting public education and awareness in the fight against corruption’ (Art. 4(j)). (Emphasis added)

The **UN Convention Against Corruption** is more specific. Art.5(1) requires that parties must, in ways best suited to their own legal systems, maintain effective 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. (Emphasis added)

Art.7(3) requires, in relevant part, that each state party must also ‘consider’ taking appropriate legislative and administrative measures to enhance transparency in the funding of political parties and candidates. Art.7(4) requires each state party to ‘... adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest’. (Emphasis added)

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<sup>48</sup> Status of international instruments in the sample of countries considered in this paper. Botswana: AUCAC – acceded/ratified 14 May 2014; SADC Protocol – signed 14 Aug 2001; UNCAC – acceded 27 June 2011. Kenya: AUCAC – signed 17 Dec 2003, acceded/ratified 3 Feb 2007; SADC Protocol – N/A; UNCAC – acceded 27 Sept 2013. Malawi: AUCAC – acceded/ratified 26 Nov 2007; SADC Protocol – signed 14 Aug 2001; UNCAC – signed 21 Sept 2004, ratified 4 Dec 2007. South Africa: AUCAC – signed 16 March 2004, acceded/ratified 11 Nov 2005; SADC Protocol – signed 14 Aug 2001; UNCAC – signed 9 Dec 2003, ratified 22 Nov 2004.

The **AU Convention on Preventing and Combating Corruption** is even more robust, accepting in its Preamble that ‘corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development’, and that there is a ‘need to address the root causes of corruption’, through (among other efforts) legislation and adequate preventive measures’. (Emphasis added) Accordingly, Art. 10 requires as follows -

#### **‘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)

This obligation is positioned between, and buttressed by, the obligation in Art. 9 to give effect to the right of access to any information that is required to assist in the fight against corruption, and the obligation in Art. 11(1) and (3) to adopt legislative and other measures specifically to prevent and combat the payment of bribes by private sector to win tenders.

In a powerful statement, the South African Constitutional Court noted in *Glenister* the binding nature of international law obligations, at least in South African law (Constitutional Court 2011, at para 178) –

‘our Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the state’s conduct in fulfilling its obligations in relation to the Bill of Rights’. (Emphasis added)

The right to access to information, concerning also the sources of political parties’ funding, and the right to vote are inextricably interlinked. The substantial and substantive minority judgment in *My*

*Vote Counts* (Constitutional Court, 2015: paras 39 and 42) concluded that information about political parties' private funding is required for the exercise of the right to vote and to make informed political choices.

Transparency of political finances can, however, have at least short-term negative consequences if the broader context is not also reformed. In September 2015, Brazil's Federal Supreme Court handed down a landmark judgment banning corporate funding in politics when it declared null and void a clause in the country's electoral act that allowed corporate donations to political parties and candidates. The Court found that corporate donations were unconstitutional because they undermined the rights of citizens to elect their government (Saxena *The Wire*, 2015).

However, disclosed donations undermined public trust in government, increasing citizen dissatisfaction. Disclosure laws allowed intense scrutiny of corporate donations, and brazen financial ties between Brazilian politicians and the private sector and a series of scandals including the Petrobras scandal, called into question the political class' commitment to the public interest. As we saw earlier this year, President Dilma Rousseff has been impeached, and her predecessor, ex-President Luiz Inacio Lula da Silva, faces criminal charges.

MPT results confirm that political finance reforms are largely ineffective if they are not conscientiously enforced as part of broader governance and ethics frameworks.

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*Ramakatsa and Others v Magashule and Others* (CCT 109/12) [2012] ZACC 31; 2013 (2) BCLR 202 (CC) (18 December 2012)

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