

PRINCIPLES AND PRACTICALITIES OF DISCLOSURE OF POLITICAL DONATIONS WERE THE SUBJECT OF COURT ACTION IN SOUTH AFRICA, PARTLY FUNDED BY IFES. A MAJOR NGO, IDASA, BROUGHT A SUIT AGAINST SEVERAL MAJOR POLITICAL PARTIES IN ORDER TO OBLIGE THEM TO AGREE TO DISCLOSURE. IN A PERSONAL CAPACITY, IFES BOARD MEMBER MICHAEL PINTO-DUSCHINSKY SUBMITTED TWO EXPERT AFFIDAVITS. THE FOLLOWING ARE EXTRACTS FROM THE FIRST AFFIDAVIT.

AFFIDAVIT OF MICHAEL PINTO-DUSCHINSKY

SUMMARY OF OPINION

1. Money (or, rather, its misuse) lies at the root of several political evils. Three of them are central:
 - 1.1. **Corruption.** Politicians and parties may be tempted to give improper favours in return for political contributions. The search for funds often has led to corruption, as will be shown below.
 - 1.2. **Unfairness.** Money may lead to unfairness and may distort electoral competition. If one party is able to attract disproportionately large funds from some very wealthy supporters, it stands to gain a considerable advantage over another party which has a similar number of poorer supporters. A well-funded campaign will be able to employ a larger staff and to pay for a greater number of posters and advertisements. It is hard to assess scientifically the extent to which superior resources win votes. A huge budget is no guarantee of success. Yet there are circumstances where the candidate with the largest budget has a clear advantage.

1.3. **Financial barriers against standing for political office.**

If electoral success depends on access to money, citizens who are not rich may be deterred from putting themselves forward as candidates for public office. The health of democracy demands that members of every group, rich or poor, should be able to undertake a career in politics.

2. This opinion concentrates on the crucial issue of political corruption. It does not attempt to comment on South African law and practice.

3. The main arguments are as follows:

3.1. International experience shows that the financing of elections and political parties is frequently corrupt and that often it leads to serious corruption.

3.2. Despite necessary qualifications, the disclosure of political finances is generally a vital anti-corruption measure.

3.3. Many democracies have introduced legislation requiring disclosure of political finances. The principle of disclosure is a central feature of international codes and standards.

4. The following are recommended as basic principles:

4.1. In normal circumstances, there is a strong case for disclosure by political parties and by candidates for public office of (a) overall income and expenditure accounts and (b) specific sources of funds.

- 4.2. In the case of small donations, the case for privacy should predominate. The larger the donation, the stronger the case for disclosure.
- 4.3. In countries in which there is serious and generalised political violence and harassment and where people known to have made political donations would have a well founded fear of serious retribution, there should be no disclosure requirement as long as these conditions prevail.
- 4.4. In countries in which political violence and harassment are not general but in which donors to particular parties and candidates would have a well founded fear of serious retribution, (a) there should be a general disclosure requirement and (b) particular political parties and candidates should be able to seek relief in the courts from the requirement. Such relief should not be granted on grounds of mere inconvenience of disclosure for potential donors but only of the well founded fear of serious danger and harassment.
- 4.5. The exception to a legal requirement about disclosure outlined in 18.4(b) should apply only to donations for constitutional political activities of political parties and candidates. It should not be used as cover for secret donations for violent purposes.

INTERNATIONAL EXPERIENCE CONCERNING THE LINK BETWEEN POLITICAL FINANCE AND POLITICAL CORRUPTION.

5. Political finance and political corruption are not identical. Not all political financing is corrupt. Indeed, the task of contributing to parties and to election campaigns is a legitimate and essential part of

democratic politics. Equally, not all corruption involves the funding of politics. For example, administrative corruption and judicial corruption are often unconnected with the funding of politics.

6. In practice, political finance and political corruption are linked all too often. Hardly a month goes by without a serious new scandal about political money in some part of the globe.
7. The meaning of 'corrupt' political financing is often unclear and its scope needs to be explained. (The following paragraphs have been adapted from my study titled "Financing Politics: A Global View." Journal of Democracy, 2002.)
8. Conventional definitions of political corruption (such as 'the use of public office for unauthorised private gain') do not apply to corrupt political financing. First, the definition of political corruption as the 'use of public office' does not apply to all forms of political fundraising. In the case of opposition parties and candidates who are challengers, corrupt funding consists of commitments to misuse public office in the future the event of success at the polls.
9. A second difference between ordinary forms of political corruption and corruption in the field of political financing is that, in the latter case, money is not necessarily used for private gain but rather for the gain of a political party or of a candidate. In one notorious incident in Philadelphia in the early 1970s, several lawyers purchased appointments as judges for some \$15,000 each. However, the money apparently did not go into the pockets of those accepting the bribes; it went into the coffers of the city's Democratic Party.
10. References in common parlance to 'corrupt' political financing usually refer to one of the following:

11. Political contributions that contravene existing laws on political financing. Illegal donations (the first category listed above) are often regarded as scandalous, even if there is no suggestion that the donors obtained any improper benefit in return for their contributions. Prominent examples include the Filesa case (1991 onwards), which contributed to the electoral defeat of the Spanish Prime Minister, Felipe Gonzales, the 'Kohlgate' scandal in Germany in 2000, and the One Israel Affair in Israel in the same year.
12. Use of money for campaign or party objectives that has been received by a political officeholder from a corrupt transaction. In such a case, all that differentiates corrupt political funding from other forms of political corruption is the use to which money received in bribes is devoted. Examples include such centi-million US dollar corruption cases of the 1990s as the Costea Affair in Romania and the Goldenberg Affair in Kenya. In both instances, the profits of large-scale corruption are reported to have ended partly in private pockets and partly in campaign coffers.
13. Unauthorised use of state resources for partisan political purposes. The unauthorised use of state resources for campaigning by the ruling party is a common phenomenon in established and developing democracies alike. Invitations to receptions at the White House and to sleep in one of its bedrooms was one of the more innocent ways in which President William Clinton used a public resource to raise campaign funds. More important is the common practice of paying staff from public funds to carry out partisan activities. President Jacques Chirac is said to have used hundreds of patronage posts available to him as the Mayor of Paris to save his party from the need to raise private funds for its headquarters.
14. In parts of Africa and the former Soviet Union, the resources available to political office-holders, national and local, are used blatantly for

electioneering. According to an academic study of the 1990 elections in Zimbabwe,

'there was also the use (or abuse) of government transport and other facilities to make the star rallies [of the governing party, ZANU-PF] a success. At the Sakubva Stadium rally, addressed by the President, this researcher counted up to 100 government vehicles and vehicles belonging to parastatals ... (W)hile ZANU-PF could commandeer all these transport resources, rival parties could not do so.'

15. Other countries in which governmental resources have been used for campaigning on a significant scale include Bangladesh, Gambia, Kazakhstan, Kenya, Mexico, Russia, Ukraine and Zambia.

16. Acceptance of money in return for an unauthorised favour or the promise of a favour (such as a public contract) in the event of election to an office. Any attempt to give a representative variety of examples of this category would require an encyclopaedia. Significant cases discovered during the researches of the author of this article included 28 countries ranging from Antigua and Barbuda to the United Kingdom and the United States, from Belgium and Brazil to Italy and India, and from Papua New Guinea to Cameroon. It should be stressed that all the examples are of allegations. It is not suggested that any particular persons cited in this opinion as the subjects of such allegations were guilty, for this is a field in which false as well as correct charges abound.

17. Examples include:

17.1. **Belgium:** Willi Claes was obliged in 1995 to resign as secretary-general of the North Atlantic Treaty Organisation amid a lurid affair which had begun in Liege in 1991. In that year, a fellow leader of the Belgian Socialists, Andre Cools, had been gunned down outside his home by two Tunisian hit-men who had been hired by the Italian Mafia. It gradually emerged that the affair was

linked to political contributions paid to the Belgian Socialists by French and Italian arms manufacturers to secure military contracts.

- 17.2. **Brazil:** President Collor de Mello resigned under threat of impeachment in a case involving alleged kickbacks and illegal campaign contributions from companies doing business with the government. He was later acquitted by the Supreme Court. His campaign fundraiser, Paulo Farias, was sentenced to house arrest and was found shot in 1996.
- 17.3. **Croatia:** in 2001, following the fall of the ruling Croatian Democratic Union and the death of its former defence minister, Gojko Susuk, Josip Gucic, a businessman and party insider made a deal with the Croatian authorities to reveal former illegal campaign financing in return for a lesser sentence. "What was known as 'CDU racketeering' ... was apparently the party's main fund-raising technique during its decade in power... The Ministry of Defence would not pay any of the companies with which it contracted. CDU would then send an emissary to the company to promise payment in return for a substantial contribution to the party.'
- 17.4. **Ecuador:** a 'donation for favours' scandal erupted after the presidential elections of 1998, involving an undisclosed donation of \$3.1 million to the Christian Democratic Party's candidate, Jamil Mahuad, from the owner of the Banco del Progreso. The Party was fined \$6.2 million.
- 17.5. **Germany:** in March 2002, allegations were made of illegal political donations involving a waste management

company in connection with contracts for the construction of a \$353 million waste-disposal plant in Cologne.

- 17.6. **India:** the Bofors Affair of 1987 and the Tehelka.com Affair of March 2001 both involved allegations of political donations for arms contracts.
- 17.7. **Indonesia:** the Bank Bali scandal of 1999.
- 17.8. **Italy:** the long-ruling Christian Democrats were engulfed and destroyed after the end of the Cold War by a torrent of allegations initially concerning Milan ('Tangentopoli' or 'Bribesville') and by the investigation known as 'Operation Clean Hands.' By 1994, the enquiry had claimed the lives of seven high-ranking officials who committed suicide while they were under investigation. In 2000, the former Socialist premier, Bettino Craxi, who had fled to avoid prosecution and who has been sentenced to jail in his absence, died in Tunis, still in exile.
- 17.9. **Japan:** alleged cases in the 1990s of 'donations for contracts' included (a) the conviction in 1998 of the Osaka oil dealer, Tzui Jun'ichi and (b) the 2000 scandal involving the alleged relationships between the former Minister of Construction, Nakao Eiichi and the Wakachiku Construction Corporation.
- 17.10. **Papua New Guinea:** Examples of 'grand corruption' have been reported including payments by foreign corporations of election expenses in return for licences as well as personal bribes to politicians. The payments came frequently from overseas logging companies.

17.11. **South Korea:** In 1996, former Presidents Roh Tae Woo and Chun Doo Hwan was sentenced to long terms of imprisonment and a fine of \$600 million. Among the offences, was the collection of a slush fund, two-thirds of which had gone into party accounts. The Hanbo Affair, 1997, involved allegations that the bankrupt conglomerate had receive special treatment in return for massive political contributions to then President Kim Young-Sam's 1992 presidential election campaign.

17.12. **Spain:** according to the scholar of political financing and Spanish cabinet minister, Pilar del Castillo, commissions of 2% to 4% paid to party political funds were acknowledged in 1991 in circles close to the building trade "as a common method to obtain work contracts."

17.13. **United Kingdom:** The 'Formula One Affair' of 1997 involved accusations that the newly-elected Labour Government had altered its policy on tobacco advertising on television during Grand Prix motor racing events to forward the commercial interests of a donor who had contributed \$1.55 million. Whether the donation had affected the Government's change of policy remained uncontested but the donation was returned.

18. The two notable features of 'donations for favours' are, first, that politicians in all parts of the world have been caught up in major scandals. Purity in political financing is not a topic on which the West is entitled to preach virtue to developing democracies.

19. Second, within particular countries, allegations frequently have concerned top politicians. They have included Vice-President Spiro Agnew (United States), members of the Bird dynasty (Antigua and Barbuda), Prime Minister Tony Blair (United Kingdom), Prime

Minister Benazir Bhutto (Pakistan), President Jacques Chirac (France), General Secretary of the North Atlantic Treaty Organisation Willi Claes (Belgium), Prime Minister Bettino Craxi (Italy), President Collor de Mello (Brazil), Prime Minister Rajiv Ghandi (India), Vice-President Alfonso Guerra (Spain), President Chun Doo Hwan (South Korea), Prime Minister Vaclav Klaus (Czech Republic), Economics Minister Otto Graf Lambsdorff (Germany), President Jamil Mahuad (Ecuador), President Carlos Andres Perez (Venezuela), Prime Minister Lyndon Pindling (Bahamas), President Carlos Salinas de Gortari (Mexico), Prime Minister Noboru Takeshita (Japan), President Roh Tae Woo (South Korea).

20. Contributions from disreputable sources: Even though there may be no evidence of an exchange of favours or of promises of future favours, the presumption is that tainted sources are likely to have tainted motives.
21. According to a scholarly estimate of 1960, perhaps 15% of the money for state and local campaigns in the United States was derived at that time from the underworld. There are widespread rumours about the involvement of criminal bosses in electioneering and in campaign financing in Russia. Some of the most dramatic and most fully established examples of criminal sources concern the financing of politics in Central and South America and in the Caribbean by drug dealers. On 21 June 1994, shortly after the presidential elections in Colombia, it became known that there existed a set of tapes whose contents suggested that money from drug-trafficking had financed President Ernest Samper's campaign. The director of Samper's campaign was jailed together with other senior campaign officials.
22. Spending of money on banned purposes (such as the buying of votes). This seems to occur most frequently in relatively poor countries. Candidates are under pressure to give treats to electors and to buy votes. This costly form of campaigning was common in Britain and the

United States in the nineteenth century and was featured in the novels of Benjamin Disraeli. In some urban areas of the United States, residual forms of vote buying persist. However, it is in Thailand, the Philippines, Bangladesh and other neighbouring countries that this practice flourishes and drives up the costs of electioneering. Research by the author has uncovered significant vote buying in countries ranging from Cambodia, Malaysia and Taiwan in Asia, to Cameroon, Kenya, Uganda and Zimbabwe in Africa, as well as Antigua and Barbuda, Costa Rica, Mexico and Surinam in the Americas, and even in Samoa in the Pacific.

23. 'Treating' is common in Uganda, where it involves 'the provision of ... soap, sugar, salt and alcohol'. In Bangladesh, the 'bribes start with tea, pan (betel-leaf) ... cigarettes, lunch ... a sheet of iron roofing ... giving cash to poor voters, etc.' In the 1996 elections in Suriname, a former Dutch possession in the Caribbean, the New Front 'was still handing out the traditional salt fish and rum.' In Bulgaria, a slogan of the party representing the Roma is 'Eat their meatballs but vote with your heart!' According to Anatoliy Romaniuk, a study of campaigning in a constituency near Lviv revealed that one candidate alone spent as much as \$100,000 on purchasing piglets to distribute to farmers in a bid for their votes.
24. In Thailand, it is money that exchanges hands. In the 1996 election, the amount required to buy a vote reportedly rose to \$ 4-12 (THB 100-300). In a neck and neck race in the North-East, the rate apparently reached \$39 (THB 1,000) per vote :

'There are at least two rounds of vote buying. The first round is called 'carpeting', which means giving a small amount of money ... to each voter as the candidate's self-introduction. For the last round, voters can obtain a higher sum depending on the degree of competitiveness among candidates in the constituency. It usually takes place on the night before the election, which is known as 'dog-barking night' because villagers are visited by so many vote buyers that their dogs bark the whole night.'

25. These forms of corrupt political funding refer narrowly to money for parties and for election campaigns. On a broader front, there are other kinds of political financing. To give one example, the recent political financing scandal in Peru involved a video record of money being given on behalf of President Fujimori to buy the votes of members of the legislature.

26. It would be possible to proceed at length with many further examples. They would merely consolidate the clear conclusion of cases such as those summarised above: corruption associated with the financing of political parties is a common and serious phenomenon. Such corruption may have far-reaching effects and may damage the entire democratic process.

POLITICAL FINANCE DISCLOSURE AS AN ANTI-CORRUPTION MEASURE.

27. There is a general consensus among political finance specialists in different countries and among national and international bodies that have considered the topic that the requirement for disclosure is the key form of regulation of political funding. Among other arguments for disclosure, it is widely cited as the best weapon against the corruption associated with money-in-politics. As summarised below, disclosure rules are the basic feature of international codes concerning political contributions.

28. However, it is realistic to recognise that the case for disclosure is not an absolute one. There are legitimate objections to disclosure rules on grounds of political principle and on practical grounds as well. The strength of the case against disclosure of political money varies according to the circumstances in each country. Scholars with experience of tyrannical regimes have tended to stress the dangers of openness.

29. This section will consider the cases for and against political finance disclosure rules and will then provide an assessment of them. Matters of principle will be listed as well as arguments about practicalities. My assessment, which accords with the main weight of international expert opinion, especially in Western democracies, is summarised as follows: disclosure of political accounts and of the identity of contributors should be the norm, secrecy should be the exception.

The case for disclosure.

30. The main *argument of principle* in favour of disclosure is that electors have a right to be properly informed about the candidates and parties for which they are being asked to vote. An essential element of this right to information is the right to know which financial interests are backing each side. A candidate who promises to restrict the monopoly power of oil corporations will be less than credible if it emerges that a high proportion of his (or her) campaign funds have been supplied by oil interests.

Practicalities:

"Sunlight is the best disinfectant.":

31. The view that transparency is key to anti-corruption, encapsulated in this well-known statement by US Supreme Court Justice Brandeis, is the fundamental tenet of most expert work on political corruption. If a businessperson wishes to receive a public contract in exchange for a large donation to a political party or to a candidate, the exchange of money for favour becomes far more difficult and dangerous for both sides if the transaction must be a matter of public information.

31.1. Vital public interest in clean elections and clean political parties. The control of corruption stemming from the financing of political parties and election campaigns by

means of mandatory disclosure is not only the most practical method available, it also is vitally important. This is because:

- (i) Such corruption - as shown in the previous section - runs both wide and deep.
- (ii) The perception among members of the public that the funding of politics is unclean may cause far-reaching damage to the democratic system. The severe political crises which affected Italy and Japan in the early 1990s resulted from political finance scandals.
- (iii) As suggested by The World Bank, anti-corruption programmes are likely to be ineffective if they focus exclusively on measures such as a meritocratic civil service and an effective, independent judiciary. There must also be what it calls "political accountability." This "political accountability" requires on the one hand a system of competitive and credible political parties and, on the other hand, it requires those parties themselves to be fully accountable. (See The World Bank, Anticorruption in Transition. Washington, DC: 2000, Chapter 4.)

31.2. Extreme measures of some politicians and contributors to conceal political payments. Strong evidence for the cleansing effects of disclosure is the length to which political leaders and their supporters are willing to go to hide certain political donations. As mentioned earlier, the murder of the Belgian politician, Andre Cools, seems to have been motivated by a determine to prevent political

contributions given in exchange for arms contracts from becoming known. In Ukraine, the concealment of political financing was an alleged reason for the Gongadze Affair. This Affair began on 16 September 2000, when the chief of an independent news web-site Ukrainska Pravda vanished. A headless body was later found and identified as his. The disappeared journalist, Georgi Gongadze, had been exposing the activities of business oligarchs in corruption relating to political financing. A tape recording of disputed authenticity implicated President Leonid Kuchma in his disappearance. The Affair led to major demonstrations.

31.3. Positive effects of press revelations. Further evidence for the argument that disclosure is the essential enemy of corruption is provided by the scandals that have followed revelations in the press about previously concealed sources of political money. The far-reaching political effects of press revelations about apparently corrupt political donations are demonstrated by Germany's Flick Affair (1981 onwards) and by the "Tehelka.com" scandal in India. "Tehelka.com" was an internet newspaper which, in March 2001, published interviews given by senior political figures to an undercover reporter disguised as a potential arms merchant. The disclosure of top politicians discussing the award of contracts in exchange for political donations was enough to lead to resignations, including that of the defence minister.

Improved public confidence in the political process.

32. It is not only the realities about corruption but the rumours about improper behaviour by politicians that must be reduced. This is especially the case in the early years after a transition to democracy.

The failure to disclose party accounts and the failure to reveal the identities of major donors leads to mistrust. It may even lead candidates who have been defeated in elections to dispute the legitimacy of the electoral process.

Support for political finance disclosure by public bodies and by leading scholars.

33. The above arguments have been given extra weight by a number of public bodies and scholars.

34. Committee on Standards in Public Life, The Funding of Political Parties in the United Kingdom. London: The Stationery Office, 1998 Vol. 1, Report Cm 4057-I, p. 45-47.

Objections to secrecy over the source and amount of donations...

If the identity of the generous giver is unknown ... it is impossible to allay the suspicion that each large giver is actuated by some improper motive and that the recipient political party has accepted some tacit obligation to one or more of such givers...

In summary, the advantages that can be claimed for transparency include the following:

- (1) the public and the media know who is financing each political party;
- (2) rumour and suspicion wither;
- (3) the possibility of secret influence over Ministers or policy is greatly diminished;
- (4) public confidence in the probity of the political process is raised.

35. The World Bank, Anticorruption in Transition. Washington, DC: 2000, 42:

Political Party Financing: Experience and Mechanisms ...

Ensure that all donations and other sources of party revenue are made public, that donors and the amounts of their donations are identified in the public record, and that candidates disclose links to lobbyists, as well as sources, types and amounts of support, both before and after elections.

36. United States Agency for International Development, Money & Politics Handbook: A Guide to Increasing Transparency in Emerging Democracies. Washington DC, draft of February 2003.

Our main premise is that disclosure provides the foundation or “cornerstone” upon which all other attempts to control political finance must rest. Moreover, transparency and openness are foundational principles for democracy, and key to the legitimacy of elected officials and the electoral and political processes of a nation...

One of the biggest fears for the long-range prospects of democracy in some countries is that illicit money has entered into the political mainstream elections process. Because political contests largely decide “who gets what in a society,” or how resources are divided within a nation, the stakes are very high and attract a lot of bidders, some of whom are illicit.

It is suspected for example, that organized crime has a major foothold in the elections of Eastern Europe. The amount of influence by a so-called mafia, whether a corporate or crime syndicate, has been said to dominate the donor lists of most political parties in the region. ... Likewise in South America it is also highly suspected that drug lords play a major role in money in politics and have a great say about the choice of leadership in some nations.

Though evidence has mounted from political scandals on all continents that some degree of money in politics is derived from funds that have been lied about, underestimated, hidden from taxes, laundered, or derived from criminal sources, the real fear is how much damage this will do in the long run to the quality of governance in those nations.

37. Keith Ewing (Professor of Constitutional Law, King's College, London), "Corruption in Party Financing: The Case for Global Standards." In Global Corruption Report, 2001. Edited by Robin Hodess. Berlin: Transparency International, 2001, p. 191.

The content of global standards...

Most agree that the starting point is transparency. There is a need above all for a regulatory standard that requires political parties and candidates for public office to account for their funds.

The case against disclosure.

38. *Arguments of principle* against disclosure include these.

39. Since it is standard democratic practice to safeguard the secrecy of the vote, it seems paradoxical, at first sight, that the right to contribute in secrecy should also be disputed.

40. The requirement to disclose arguably may deter would-be donors from giving money to the party or candidate of their choice. Insofar as political participation is desirable, measures which deter participation are undesirable.

41. There are also a number of practical reasons for criticising the mandatory disclosure of political accounts and donations.

41.1. Possible pressures on donors: Such pressures or alleged pressures take various forms in different countries. In rising order of severity, they may be classified as penalisation, harassment and violence.

41.2. Penalisation: A reason frequently cited in the past in the United Kingdom as an argument against enforced disclosure of political contributors was that local government authorities were likely to prevent corporations and individual donors known to contribute to their political opponents from obtaining construction contracts and other business contracts at their disposal. The revelations in the 1990s in Italy during the 'Tangentopoli' Affair proved that in that country, at least, such fears were well-founded.

41.3. Harassment: In some countries, those revealed to have donated to opposition parties have more than the loss of public contracts to fear. There are serious reports from

Ukraine, for example, that corporations revealed as donors to opposition parties were subsequently subjected to systematic harassment by government agencies and were accused of tax evasion and other alleged misdeeds as a punishment. It has been reported by opposition sources in Egypt that the country's reportedly strict rules about the disclosure of the identity of those donating even small amounts to political parties has the aim of deterring gifts to opposition parties.

41.4. Violence: In some extreme but by no means unusual circumstances, those known as donors to certain political parties risk kidnap and violence. At a recent international conference on political finance, a senior figure from Colombia justified a policy of secret political donations: he pointed out that in his country those contributing to parties committed to destroying the guerilla forces and the drugs barons would be signing their own death warrants.

42. Administrative problems:

42.1. Loopholes: 'Political finance' takes many forms and it is impractical to regulate them all. If laws requiring the disclosure of political accounts apply specifically to political parties and to candidates for electoral office, donors will merely re-channel their donations. The flow of money into the political arena may be compared to water running down a hill into a number of rivers. If one river is blocked, the flow is likely to carve out a new channel. In the same way, the introduction of new laws to restrict or control contributions to political parties or to campaigns may have the consequence of merely diverting the money through alternative or unexpected routes. For instance, political party funds are commonly subject to disclosure but the funds of partisan newspapers or think-

tanks are not. The effect is to encourage the growth of think-tanks and of media which function as political parties in disguise.

- 42.2. Evasion. Political parties and candidates commonly evade disclosure rules. According to the French scholar, Yves-Marie Doublet, the financial accounts which political parties are obliged to publish are works of fiction in France as everywhere else.
- 42.3. Poor enforcement and biased enforcement. The common evasion of disclosure rules results from the lack of capacity and the lack of will of electoral authorities in most countries to enforce the rules. Moreover, the existence of disclosure rules may lead to systematic unfairness: in countries where the authorities responsible for electoral administration are politically biased, the rule book may be thrown at opposition parties while pro-government parties and candidates are free to ignore the rules with impunity.

43. The problem of transition: In countries in which concealment of political accounts is the usual practice, political parties and candidates which act as pioneers in disclosing their finances arguably stand to suffer a disadvantage since they cannot rely on other parties to be equally virtuous.

Assessment.

44. The arguments for confidentiality cannot merely be brushed aside. Nevertheless, it is important to be clear about the status of the objections to disclosure. Do these objections amount to a root and branch demolition of the case for disclosure? Or do they merely show

that non-disclosure is reasonable in limited, exceptional circumstances?

45. In my view, which coincides broadly with what may be seen as the established view, it is indeed the case that transparency needs to be seen as the norm when it comes to political accounts and that those arguing for confidentiality need to make a substantial case for special exceptions. Given the well-grounded point about the corruption and the damage to the democratic process caused by certain secret political donations, the overall case for disclosure is a strong one. Thus the case for secrecy cannot be accepted lightly. Nor can arguments for confidentiality in limited, specified circumstances reasonably be used to justify a general case against disclosure.

46. Given the general presumption in favour of openness, the main arguments against disclosure are assessed as follows:

Arguments of principle.

47. Does the acceptance of the principle of ballot secrecy entail equal acceptance of a principle of secrecy of political donations?

48. The secrecy of the ballot is based on two conditions, neither of which necessarily apply to political contributions: (a) In most elections, there are thousands if not millions of electors. (b) The principle of "one person, one vote, one value" normally applies. This means that the impact of each individual vote is small and equal. When it comes to large donations to a political party or to a candidate, a single donation may provide a high proportion of the total and there may be relatively few large donations. It follows that a candidate or a political party may have reason to be far more subject to the influence of a single financial paymaster than of a single voter. Of course, the potential impact of a small donation will be similar to that of a single vote.

49. There is a clear conflict between the legitimate claim of personal privacy and that of the public right to be safeguarded against corruption and undue influence. The smaller the political donation, the stronger the relative weight of the claim of personal privacy. The larger the donation (both in absolute terms and relative to the total budget of a political party or candidate), the greater the weight of the public right to be safeguarded against undue influence.

50. It is not surprising that laws in many countries set a threshold above which donations must be declared. They include Australia, Canada, Denmark, Germany, Greece, Italy, Japan, Netherlands, New Zealand, Norway, Russia, Singapore, United Kingdom, United States. The level at which this threshold is set varies considerably but the principle is the same. For example, disclosure thresholds varied in 2000-1 in the above countries between the equivalent of one day's average income and 171 days.

51. Does the requirement to disclose political donations act as a deterrent to contributors? If so, does this matter?

52. Evidence about the deterrent effect of disclosure rules on potential donors is inconclusive. In the United States, the existence of strict disclosure rules for federal election campaigns has not prevented the buoyancy of contributions. In the United Kingdom, the introduction in 1967 of regulations requiring disclosure of corporate donations was followed by a decline in such donations but also by an increase in donations from individuals.

53. Without systematic comparative evidence, I would be prepared to accept the view that the requirement to disclose may act as a deterrent to donors. However, four points must be noted:

53.1. As noted later, disclosure does not involve only the disclosure of specific donations. It also - and much more

commonly - involves the disclosure of overall income and expenditure accounts of parties and candidates. Such disclosure does not affect individual donors.

- 53.2. The legal requirement to disclose the identity of specific contributors together with the amounts contributed by each affects all political parties. It is thus fair. Insofar as the requirement may benefit some political parties more than others, it may benefit opposition parties since large donors tempted by possible payoffs are especially attracted to giving to the governing party. (See, however, the next paragraph on violence and harassment.)
- 53.3. If the disclosure requirement deters those willing to give large donations in return for favours, this is no bad thing.
- 53.4. The introduction of disclosure requirements may encourage political parties to concentrate on raising funds from a large number of small donors rather than from a small number of large ones.

Practicalities.

54. Violence and harassment of donors:
 - 54.1. In conditions of extreme violence and of systematic repression of opposition political parties and candidates, there is a strong case for confidentiality of political donations.
 - 54.2. There is a reasonable case for relief from the requirement to disclose donor sources for political parties whose supporters are especially vulnerable to harassment even if supporters of other parties are not subject to the same

pressure. In a landmark case, the US Supreme Court accepted the argument of the Socialist Worker's Party, who brought an action to allow an exemption from the legal disclosure obligation on the ground that their backers would be harassed if their financial support was known. (Brown v Socialist Worker's '74 Campaign Committee, 450 US 87, 1982. See Clyde Wilcox, 'Transparency and Disclosure in Political Finance: Lessons from the United States.' Paper Presented to the Conference on Political Finance and Democracy in East Asia: The Use and Abuse of Money in Campaigns and Elections, National Endowment for Democracy and Sejong Institute, Seoul, June 28-30, 2001.)

- 54.3. However, the context of the above case must be understood. The experience of the McCarthy Era in the United States at the height of the Cold War in the early 1950s provided a reasonable ground for the Socialist Worker's Party to claim relief from the law of disclosure of the identities of its financial backers in 1974. A crucial point about this case is that it applied to a small party expressing what were considered to be extreme views. It did not provide a precedent for a wholesale evasion of the disclosure rules by mainstream parties.
55. The above paragraphs address the main objections to political finance disclosure. They do not attempt to discuss the more technical problems of administering political disclosure rules. The five principles set out in Section 2 attempt to give a balanced view about the desirable scope and limits of disclosure.

POLITICAL FINANCE DISCLOSURE LAWS AND CODES: A GUIDE TO INTERNATIONAL PRACTICE.

56. New laws about political finance are being introduced almost each month in different countries of the globe, often as the result of scandals. Therefore, any snapshot of the state of these laws throughout the world is bound to be somewhat outdated by the time it is published. The statistics given below, which are for laws in existence in 2000-1, provide a reliable general picture but do not account for the most recent changes in legislation in some nations.

57. Apart from new legislation, there is also a great deal of current activity when it comes to the formulation and introduction of new international conventions and codes of conduct about political finance.

58. The broad picture is as follows:

59. International organisations, including the United Nations, are currently paying increasing attention to the problem of political corruption. Though some of these bodies - especially the international financial institutions such as the International Monetary Fund and the World Bank - feel that they are precluded by their legal statutes from dealing directly with the issue of money-in-politics, it has become ever more obvious to them that it is impossible to formulate realistic anti-corruption strategies if they continue to ignore the funding of elections and of political parties.

60. The principle of transparency in political accounts is a prominent feature of recent international codes and conventions. It may reasonably be viewed as the international norm.

61. Legislation about disclosure in individual countries does not reflect the clarity of international conventions and codes. Legislative practice varies greatly. Whereas disclosure of political accounts is required in most countries in Europe, in economically-advanced nations outside Europe and in former Soviet countries, secrecy is still common in some other parts of the world. Moreover, the requirement to disclose

individual donations is less common than the requirement to disclose overall income and expenditure accounts by parties or by candidates for public office.

International conventions and codes of conduct.

62. The desirability and status of international conventions and codes of conduct concerning political finance is itself a matter of controversy. Scholars such as Professor Keith Ewing of King's College, London, have argued strongly for such codes, whereas the author of this opinion has been more cautious about such codes. However, the disagreements relate mainly to other measures (such as the proposal that foreign donations should uniformly be banned or that limits on campaign spending by parties and candidates should become the norm). The principle of transparency of political accounts is relatively - though not completely - uncontroversial.
63. At its summit meeting in July, 2003, the African Union adopted a Convention on Preventing and Combating Corruption and Related Offences. Article 10(b) states that each signatory is to adopt legislative and other measures "to incorporate the principle of transparency" into the funding of political parties.
64. The principle of disclosure of political party finances has featured in recent documents of the 45-nation Council of Europe, the Commission of the European Union, the Council of Presidents and Prime Ministers of the Americas (consisting of countries in North and South America), and the World Bank. Organisations producing similar recommendations include Transparency International and the Carter Center.

Disclosure laws

65. The author of this opinion has obtained information on political finance laws around the world. They include 114 countries categorised by Freedom House as 'Free' or 'Partly Free' (see 'Financing Politics: A Global View.' *Journal of Democracy*, 2002.) Of these 114 countries, (a) 62% required at least some form of disclosure in 2000-1. Many of these countries required the disclosure of overall income and expenditure accounts but not the disclosure of specific donations. However, (b) 32% of the countries required the disclosure of the identities of some or all individual and/or corporate donors to political parties or to candidates for public office.

66. These global statistics conceal significant variations. The overall figures are affected by the inclusion of a considerable number of micro-states, mainly small island nations in the Caribbean and in the Pacific in which political financing is virtually unregulated. Laws requiring the disclosure of individual donor identities and amounts donated are uncommon in Africa but are normal in both Western and Eastern Europe. Frequently, laws state that donations must be disclosed if they exceed a stated threshold.

67. Commonwealth countries in which the disclosure of the identity of some or all donors to political parties is required include the following: Australia, Canada, New Zealand, Singapore, United Kingdom. Other countries with similar disclosure requirements include Brazil, Czech Republic, Denmark, Germany, Greece, Ireland, Italy, Japan, Poland, Portugal, Russia, United States.