Public Funding of Represented Political Parties Act 103 of 1997 and the implementation of section 236 of the 1996 Constitution[1]

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1 INTRODUCTION

Section 236 of the 1996 Constitution[2] provides for the public funding of political parties as follows:

> "To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis."

Along with a number of other provisions in the Constitution, section 236 obligates Parliament to pass legislation to give effect to a broad constitutional provision. This obligation must be fulfilled "within a reasonable period of the date the new Constitution took effect".[3] In respect of section 236 this has been done by the adoption of the Public Funding of Represented Political Parties Act 103 of 1997, which was assented to by the President on 27 November 1997 and which, by proclamation on 14 August 1998, came into operation retrospectively on 1 April 1998.[4]

The Act provides a broad framework for the public funding of political parties. A Represented Political Parties' Fund is established for the purpose of funding political parties that participate in the National Assembly and provincial legislatures. Moneys will be appropriated to the Fund by Parliament but contributions and donations to the Fund could also originate

1 The initial report on which this paper is based, was prepared for a joint project of the Community Law Centre and the National Democratic Institute for International Affairs (NDI) on the public funding of political parties. The assistance of NDI and the instructive comments and suggestions given by Prof Fred Wertheimer (USA), Dr Menachem Hofnung (Hebrew University, Jerusalem), Mr Peter Milliken MP (Canada) and Mr Michael Stoddard (USA) are gratefully acknowledged.

2 The Constitution of the Republic of South Africa, 1996 Act 108 of 1996, referred to as the Constitution.

3 Item 21(1) Schedule 6 Constitution.

4 S 11(2) of the Act provides that in determining when the Act comes into operation, the President may, after consultation with the Minister of Finance, give it retrospective effect to a date not earlier than 1 April 1997.

from private sources within or outside the Republic. The Fund is managed by the Chief Electoral Officer, under the direction of the Electoral Commission. Every political party is entitled to be allocated moneys from the Fund for every financial year that it is represented in Parliament and/or a provincial legislature. The moneys received may be used by a political party "for any purpose compatible with its functioning as a political party in a modern democracy".[5] The Act also details persons who may not receive such moneys and purposes for which they may not be used. While the Act gives broad criteria for the proportional and equitable allocation of moneys to political parties, a committee of the National Assembly and the National Council of Provinces must determine the exact formula. The Act also contains detailed provisions for ensuring that political parties give adequate account of the appropriate use of the moneys.

The aim of this paper is to assess whether this Act has met the constitutional requirements of section 236 of the Constitution as well as, more broadly, the objective of enhancing multi-party democracy. In this regard it is useful to compare this Act with the party financing laws of Germany and Israel, two established multi-party democracies which have comparable electoral systems and where political parties are directly funded.[6]

2 OBJECTIVE OF THE LEGISLATION: "TO ENHANCE MULTI-PARTY DEMOCRACY"

The objective of the legislation – "to enhance multi-party democracy" – calls first for an examination of this concept within the meaning of the Constitution.

The model of multi-party democracy that underpins the Constitution is that of a political system in which more than one political party compete for political power and where the health and prosperity of the system are dependent on viable and vigorous parties which are able to solicit support from the electorate and provide a realistic alternative to the governing party. This model is apparent from the foundational values of the Constitution as well as the specific provisions establishing a parliamentary democracy.

One of the founding values of the Constitution is a "multi-party system of democratic government".[7] The first principle to give effect to this value is the freedom to establish political parties. The Bill of Rights specifically provides that, in exercising the freedom "to make political choices," every citizen has the right

"(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party, and

(c) to campaign for a political party or cause."[8]

5 S 5(1)(b).

6 In Israel the electoral system of proportional representation is based on a pure list system, while in Germany party lists are combined with constituencies.

7 S 1(d) Constitution.

8 S 19(1)

The representative function of political parties – to articulate and represent the political choices of citizens – is thus clearly established.

As the formation of political parties is the product of the voluntary exercise of a political freedom, the pluralistic nature of the South African society, divided along numerous lines, (which is also recognised in the Constitution[9]), will elicit different political choices and hence more than one political party.

The exercise of state power by political parties is legitimated through elections. Political parties compete for power in accordance with the Constitution's other founding values of "regular elections" based on "universal adult suffrage [and] a national common voters roll".[10] These basic democratic values are further enshrined in the Bill of Rights, namely the right to "free, fair and regular elections" for legislative bodies[11] and the right to a secret vote.[12]

The proper functioning of the formal institutions of democracy – the national and provincial legislatures – is premised on the notion that political parties other than the governing party play an essential role in the system of checks and balances. Apart from the usual oppositional role of minority parties in debating policy issues and performing a watchdog role over the executive, the Constitution provides that the rules and orders of the National Assembly must provide for "the participation in the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy".[13]

The bedrock of multi-party democracy is that all significant political choices are voiced in the legislatures. The formal guarantees for multi-party democracy are not sufficient by themselves to ensure this. In a market-orientated economy, the uneven distribution of money in society and hence to political parties, may result in some voices not being heard at all because of poverty, or other voices dominating because of wealth. In order to address the problem that political parties may not be able to perform their proper function in a multi-party democracy due to a lack of finances, the Constitution thus obligates the state to provide public funds for political parties. The formal constitutional values and guarantees are thereby supplemented by the material resources promised in section 236.[14] Although all parties benefit from public funding, it may enhance multi-party democracy by ensuring at least the survival of small parties.

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9 The preamble refers to "our diversity" and the "divisions of the past".

10 S 1(d) Constitution.

11 S 19(2).

12 S 19(3).

13 S 57(2). See also s 116(2)(b) for provincial legislatures. In addition, the leader of the largest opposition party in the National Assembly must receive recognition as the Leader of the Opposition (s 57(2)(d)). With regard to the National Assembly's power of appointment, all parties in the Assembly must be represented in proportion to their numbers on the committee that nominates persons as members of the state institutions supporting constitutional democracy (s 193(5)(a)).

14 The same principle applies to the functioning of the legislatures. The Constitution provides that the rules and orders of the National Assembly must provide for "financial

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The other principal reason for the public funding of political parties is that it enhances the integrity of the political system. It reduces parties' dependence on outside funding, which may lead to corruption and the manipulation of the political system by monied interests. Multi-party democracy is thus enhanced where public funding is coupled to public disclosure of party finances and limitations are placed on donations to, and spending by, a party. The competition between political choices is real when it can be said that the political playing field is level – there is equality of opportunity. Parties favoured by monied interests should thus not be able to smother other legitimate voices simply because of superior financial resources. Furthermore, by reducing the need to raise funds from the wealthy, public funding may also prevent that a party's agenda or actions are compromised. If multi-party democracy is the objective, then party funding should be approached in its totality.

While one of the aims of public funding is the economic survival of political parties, it may, if it becomes the sole source of party finances, undermine the very objective of multi-party democracy. Political parties are an expression of citizens's free political choices and they, the citizens, should retain ownership of their parties. Through public funding parties may become appendages of the state and independent of their members and supporters. The objective that parties articulate and represent the political choices of voters could thus be defeated if the vital citizen-party link is attenuated.[15]

If very small or micro parties are kept alive artificially by public funding, it could also undermine the stability of the political system. Given the very low threshold for entry into Parliament (0,25% of the votes or approximately 50 000 votes) the proliferation of micro parties may create unstable governments. The public funding of political parties should thus not operate to the detriment of the political system as a whole by encouraging and supporting very small or micro parties which represents a negligible, if not a temporary, voice of voters.

3 FUNDING

3.1 Purposes of funding

Political parties need funds for three main purposes. First and foremost, to fight an election campaign, second, to maintain a viable party organisation between elections, and third, to provide research facilities and

and administrative assistance to each party represented in the Assembly, to enable the party and its leader to perform their functions in the Assembly effectively" (s 57(2)(c) Constitution). See also s 116(2)(c) with regard to provincial legislatures.

15 In Germany the concept of "Parteifreiheit" underlies German Party Law of 1994. The principle holds that parties should not become appendages of the state and lose their representative function. The German Federal Court thus held in 1992 that the amount of public funding a party receives can never be more than 50% of its total income. The amount of public funding a party receives is thus calculated with reference to the number of votes received, the number of paid up party members and donations received (Party Law of 1994 art 18(1). See Gunlicks 1995).

other assistance for the leadership and elected representatives. These activities are interrelated; maintaining a party organisation between elections facilitates a better and potentially more successful election campaign. Research capacity is valuable both during an election campaign and in the inter-election period. For the purpose of enhancing multi-party democracy, public funding should ideally cover both operating and campaign expenses.

It should, however, be noted that not many countries support both operational and campaign expenses. Most often funding is limited to campaign costs. In Germany only operational costs are covered. Israel, on the other hand, covers both. Each party in the Knesset receives an annual amount calculated with respect to its number of members. In the election period a party receives a separate amount for campaign expenditure which, if the party's electoral support remains the same in the election, will be more than double its entitlement for operating expenses.[16]

The Act deals specifically with operating costs without excluding, however, the use of public funds during the early stages of an election campaign.

3.1.1 *Operating costs*

The Act has appropriately given a broad discretion to political parties for the use of public funding. Purposes which are regarded as "compatible" with the functioning of a political party "in a modern democracy", include the following:

"(i) the development of the political will of people;
(ii) bringing the political party's influence to bear on the shaping of public opinion;
(iii) inspiring and furthering political education;
(iv) promoting active participation by individual citizens in political life;
(v) exercising an influence on political trends; and
(vi) ensuring continuous, vital links between the people and organs of state."[17]

Expenditure in pursuit of these broad goals covers a wide variety of expenses. The Act wisely does not prescribe activities for which the funds may be used; rather it identifies those activities for which the funds may not be employed. There are four such categories.

First, public moneys may not be used

"for the purpose of directly or indirectly paying any remuneration, fee, reward, perquisite or other benefit to any person representing the party in the National

16 For election expenditures a party is entitled to a financing unit (NIS 1 161 000 as of 1 December 1996 which converts into US$356 000) for each member in the outgoing Knesset, added to the number of seats the party wins in the incoming Knesset, divided by two, along with an additional sum equal to one financing unit (s 3(b) Party Finance Law 1973). For operating costs a party receives monthly 5% of a financing unit for each member along with an additional sum equal to 5% of one financing unit (s 3(c)).

17 S 5(1)(b). The Israeli Party Finance Law of 1973 defines operational costs as expenses of a party "for the organisation of its activities, for propaganda and information and for the maintenance of organisational and ideological ties with the public, and includes liabilities incurred in respect of such expenses" (s 1).

Assembly, National Council of Provinces, any provincial legislature or any local authority, or who holds any other office of profit under the State, whether on the national, provincial or local sphere of government".[18]

It establishes a sound principle that the purpose of the Fund is not to supplement the income of persons who already receive remuneration from the state. The rule is specific and in most instances it would be clear to whom it applies although difficulties may arise with determining who holds an "office of profit under the State". As a party must report to the Electoral Commission on the purposes for which the public money have been used, the onus should be on the political party to indicate positively what the usual occupation of a paid official is and that he or she does not hold an office of profit under the state.

Second, public moneys may not be used

"with a view to financing or contributing to any matter, cause, event or occasion, whether directly or indirectly, in contravention of any code of ethics binding on the members of Parliament or of any provincial legislature, as the case may be".[19]

The provisions seek to ensure that political parties, apart from the public representatives, also abide by the parliamentary and provincial codes of ethics.

Third, public moneys may not be used

"directly or indirectly for the purpose of establishing any business or acquiring or maintaining any right or financial interest whatsoever in any business, or in any immovable property, except where the right or interest in the immovable property is to be used by the party solely for ordinary party-political purposes".[20]

Public funds may thus not be used for any money-making ventures as well as for speculation on the property market. Buying a building for party headquarters is, however, permissible.

Fourth, the Committee of the National Assembly and the National Council of Provinces is given the authority to proscribe any other purpose that is "incompatible with a political party's functioning in a modern democracy".[21]

As partisan interests may sway the Committee's definition of proscribed purposes, entrusting this task to the independent and detached judgment of the Electoral Commission would have been a preferable approach.

3.1.2 *Campaign costs*

The Act is clear that public funding is not to be used in the final stages of an election campaign. When Parliament and every provincial legislature are dissolved, political parties must close their books (dealing with the

18 S 5(3)(a).
19 S 5(3)(b).
20 S 5(3)(c). In the 1994 election, the Electoral Act 202 of 1993 (s 74(1)(b)) provided that no public funds could be "utilized for the purposes of entertainment or for the purchasing of any immovable property".
21 S 5(3)(d) read with s 10.

moneys they received from the Fund) 21 days before the polling day and repay to the Commission the unspent balances as at the date the books were closed.[22] This does not prevent the use of public money for campaign purposes. First, elections are usually called well in advance of the election date which gives a party ample time to spend its public funds well before the 21 day cut off date. Second, as a percentage of the public moneys (as determined by the parliamentary Committee)[23] may be carried over from one financial year to the next without affecting a party's entitlement for the next financial year,[24] a party may even build up an election war chest. Thus, public moneys may be spent for election purposes, provided it is done 21 days before polling day.

It is a pity that Parliament did not deem it fit to deal with the issue of campaign funding more directly. It is the most expensive item on any political party's budget and the enormity of the costs may both smother the voices of small, impoverished parties and lead to favour buying from the ruling party by monied interests. The failure to deal directly with election expenses will not contribute to the levelling of the political playing field at a time it matters most in a multi-party democracy.

3.2 Adequate level of public funding

The realisation of some classical first generation rights (such as the right to a free and fair election or a fair trial) requires the expenditure of adequate sums of public money. It can be argued that implementing those political rights which forms the basis of multi-party democracy – the right to form a political party, participate in its activities and campaign for it, likewise imposes financial obligations on the state. Indeed, section 236 of the Constitution was enacted to ensure that there is substance to the formal guarantees of multi-party democracy. This constitutional obligation thus entails the provision of funding which should be *adequate* for the enhancement of multi-party democracy.

The Act provides that Parliament, in its discretion, appropriates moneys to the Fund.[25] The wisdom of giving Parliament an unencumbered discretion may be questioned. Determining an adequate level of public funding is inherently a contentious issue. The allocation of public funding may be criticized for being either too little or too much. The object of the legislation may be defeated if the level is merely tokenist. At the same time public funding could be criticized for being a further carriage to the gravy train; accusations are easily levelled that public funding is symptomatic of political parties looking after their own interests at the expense of the truly needy. Furthermore, if the decision is made on an *ad hoc* basis, the process could also be open to political manipulation.

22 S 9(3). Where the National Assembly *or* a provincial legislature is dissolved, all parties represented in the dissolved legislature must close their books and repay unspent balance in proportion to their representation in the dissolved legislature (s 9(4)).

23 S 9(1)(a). In the draft regulations of the Joint Subcommittee of the Joint Rules Committee of 17 September 1998 the percentage is set at 50 (reg 9).

24 S 9(1)(b).

25 S 2(2)(a).

The question of who should determine how much money should be devoted to political parties, could have been addressed in a number of different ways. One approach is to fix the amount in legislation. In Germany the actual amount available to parties is determined by law[26] with the proviso that an independent committee may increase the amount to take into account inflation.[27] Another approach is to place the responsibility in the hands of an independent body. In Israel an independent committee, headed by a judge appointed by the President of the Supreme Court, determines the value of a financing unit and thus the extent of public funding.[28]

What options were open to the South African Parliament? In the Constitution the remuneration of persons holding elected political office has been depoliticized as far as possible. An Act of Parliament must establish a framework for determining (a) salaries, allowances and benefits of elected officials paid by the central government, and (b) the upper limits of salaries, allowances and benefits for elected officials in the other spheres of government.[29] This Act may be passed only if Parliament has considered the recommendations made by an independent commission created specifically for this purpose.[30] While Parliament has the final say in determining remuneration, it should be guided by the independent commission, the *raison d'etre* of which is to determine, on the basis of objective criteria, justifiable remuneration packages for elected officials. With regard to political office, the Constitution thus establishes a model with combines the two approaches outlined above; an Act of Parliament passed in the light of recommendations made by an independent, specialist body.

As the aim of political parties is ultimately to secure elected public office for its candidates, a similar approach would have been preferable when determining the level of public funding for political parties; while the amount of money should be determined by an Act of Parliament, it should be based on the recommendations of an independent, specialist body. The Electoral Commission could have fulfilled this specialist function.

4 BENEFICIARIES

4.1 "Political parties *participating* in national and provincial legislatures"

The Constitution provids that only those political parties that are "participating in national and provincial legislatures" are entitled to public funding. A narrow definition would entail that only parties who are elected to and participate in the processes of the legislatures are entitled to public funding. A broader definition would hold that political parties who participate

26 The Law on Political Parties as amended in 1994 establishes DM230 million as an absolute limit (art 18(2)).
27 Art 18(6) & (7).
28 Political Parties (Financing) Law of 1973 s 1a.
29 S 219(1).
30 S 219(2) & (3).

in elections in order to become members of legislatures, should also benefit from state assistance. The Act opted for the narrow definition; as the name of the Act states, entitlement to moneys in the Fund is only for political parties *represented* in the national and provincial legislatures.[31]

This rule, which excludes unsuccessful parties from public funding, does not undercut the enhancement of multi-party democracy. To gain a seat in the 400 member National Assembly a very low threshold of electoral support applies; a party needs only 0,25% of the votes cast (50 000 of the approximately 20 million voters). From a comparative perspective, South Africa's election threshold is one of the lowest in the world. Basing the funding threshold on the election threshold also makes it one of the most generous in the world.[32] By excluding unelected parties it cannot be said that only the large established parties are favoured; any party with a modicum of support will be represented in Parliament and thus receive funding.

By limiting funding to operating costs, the Act has sidestepped the issue of campaign costs for as yet unelected political parties. If campaign costs were covered, it could been argued that a broader definition of "participating" in the legislatures should apply; any party which gains a seat in the new legislature should be entitled to financial assistance for costs incurred during the election campaign.

To ensure a vibrant multi-party democracy, there must be scope for new parties to emerge. Public funding should not be such that established parties are entrenched in legislatures at the expense of new emerging parties which may represent the legitimate voice of a sizeable portion of the electorate. In principle new parties should have access to public resources including free media time.

Their funding must, however, comply also with the distribution requirement of equity and proportionality.[33] To comply with the principle of proportionality, any party, whether it was represented in a legislature or is new, should receive reimbursement for expenses incurred during the election campaign in proportion to its proven electoral support. Distributing public funds after the election result ensures that the principle of proportionality is respected. However, it poses the following difficulty for

31 S 5(1)(a).

32 The German Federal Constitutional Court held in 1968 that a funding threshold of 2,5% was too high while a 0,5% threshold passed constitutional muster (see Gunlicks 1995, 105). While the threshold for election to the 120 member Israeli Knesset is 1,5%, the funding threshold is 1%.

33 In the 1994 South African election this principle was not fully realised. Half of the "State Electoral Fund" for campaign expenses for political parties was distributed before the election as follows: an amount was allocated on an equal basis to all registered parties who showed "the potential support of at least two per cent of the voters" before the election or collected 10 000 signatures. The other half of the fund was distributed as follows: 50% was distributed equally amongst all parties who were entitled to at least one seat in a legislature while the remaining 50% was divided in proportion to the votes the parties received. This formula resulted that the ANC which won 62% of the vote did not receive considerably more than the PAC which attracted only 1% of the vote. See Friedman 1996: 172-173.

parties: they need money up front during the election campaign. Not many bank managers will be willing to gamble bank loans on the possible future electoral success of a party, particularly when that party tests the electoral waters for the first time. In Israel the problem is addressed in the following manner: For election expenses every party group in the Knesset gets a down payment of 60% of the entitlement for each Knesset member (a financing unit). Where a party is not represented in the Knesset, it can claim 60% of a maximum of 5 finance units on condition that it deposits a bank guarantee with the Chairman of the Knesset for that amount.[34] Should the down payment exceed the amount to which the party is entitled as determined by the election result, the party is liable to repay the down payment. This method of regulating down payments for election expenses against security appears to be a method which ensures that the principle of proportionality is maintained.

4.3 Parties participating in "national and provincial legislatures"

The phrase "political parties participating in national and provincial legislatures" is ambiguous. Does it mean that only parties which participate in both the national legislature and a provincial legislature are entitled to public funding? Or can the phrase be interpreted to include parties participating in the national *or* provincial legislatures? This question is important for a party which participates either at national or provincial level. The Act has interpreted this phrase inclusively – any party that is represented in the National Assembly or in any provincial legislature or both, is entitled to moneys from the Fund.[35]

There is, however, little indication how the money should be divided between the two spheres of legislatures. The Act provides that the prescribed formula for the allocation of moneys from the Fund must be based –

"(i) in part, on the principle of proportionality, taking into account, amongst others –

(aa) the relation that the number of such a party's representative bears to the membership of the National Assembly; or

(bb) the relation that the number of such a party's representatives in any provincial legislature bears to the sum of the memberships of all the provincial legislatures jointly; or

(cc) the relation that the number of such a party's representatives in [the National Assembly and all provincial legislatures] jointly bears to the sum of the memberships of all those legislative bodies jointly."

The use of the disjunctive "or" is clearly incorrect and should probably read "and". As a minimum, the Committee should take all three ratios into account, because a political party represented only in a provincial legislature is also constitutionally entitled to an allocation.

34 S 4(a2) Political Party (Finance) Act of 1973.
35 S 5(1)(a).

In the proposed formula, drafted by the Joint Subcommittee of the Joint Rules Committee of Parliament,[36] the following method is used. Ninety percent of the funds go to the political parties represented in the National Assembly and the provincial legislatures proportional to their representation in the National Assembly and all provincial legislatures. The remaining ten percent is divided proportionally between the nine provincial legislatures according to the number of members of each legislature. The amount allocated to each legislature is then divided equally among all the parties in that legislature. A party's allocations in terms of the "proportional" and "equity" formulae are then combined and paid into a party's bank account. No differentiation is thus made between national and provincial structures of a party. However, when it comes to repaying any unspent balance when an election is called for the National Assembly or in one province only,[37] the party must refund any unspent balance on the basis of the percentage of the party's members in the dissolved legislature against the overall number of all its representatives. This formula is based on the notion that there is a proportional distribution of the funds between the party structures in the National Assembly and the provincial legislatures. In practice, however, the allocated funds are controlled centrally.

The statutory division of funds between national and provincial legislatures may reflect the relative importance which a country attaches to provincial government. In Germany the level of funding for parties at *Land* (state) level is equal to that at national level – DM1 for each vote. However, where the amount to which all the parties are entitled is more than the absolute amount established by the Party Law, the excess is deducted from the parties' national organisations, leaving the *Land* parties' entitlement untouched.[38] In contrast, in South Africa there is no attempt to strengthen provincial structures of political parties by allocating moneys to them directly.

5 DISTRIBUTION FORMULA: "ON AN EQUITABLE AND PROPORTIONAL BASIS"

The most elusive part of section 236 is the criterion for the distribution of public funds. The requirement that allocations should also be "equitable" is not only at odds with the calculable element of "proportional", but also defies easy definition. It was therefore not altogether surprising that the Act skirted around the issue.

5.1 Proportionality

Proportionality lies at the heart of the Constitution's system of representative democracy,[39] and finds expression in the composition of the

36 Committee Minutes of 17 September 1998.

37 In terms of s 9(4).

38 S 19(8) Law of Political Parties.

39 The Constitutional Court has said in its *First Certification*-judgment that one of the fourteen "basic structures and premises of the constitutional text" was "representative

[continued on next page]

legislatures and their committees[40] and the funding of parties by the legislatures.[41] Proportionality should thus form the basis of any allocation of funds to political parties.

Given the constitutional requirement of distribution on an "equitable and proportional basis", the Act thus provides that the prescribed formula must be based, "in part, on the principle of proportionality, taking into account, amongst others, the size of a party's representation in the legislatures".[42] Measures which do not incorporate the principle of proportionality would be constitutionally suspect.[43] One example of a funding practice which conflict with this principle is the granting of lump sums.[44]

5.2 Equitable

The term "equitable" is neither self-explanatory nor defined in the Constitution.[45] It can, however, be given meaning in the context of section 236's objective – the enhancement of multi-party democracy. From a comparative perspective it would appear that deviation is allowed from the strict application of the proportionality principle where it is in support of small parties.

Multi-party democracy requires as a minimum that public funding should enable parties to articulate the full range of political choices. In this context small parties, while posing no viable alternative to the party in power, nevertheless play an important role of articulating the full range of political choices, debating policy issues and scrutinizing executive action. The other side of the coin is that public funding should not undermine the very principle of multi-party democracy. If a party with 70% of the vote also gets 70% of the funding, it could lead to the strengthening of that party to the detriment of others, resulting in the demise of multi-party democracy. It can also be argued that allocating to the majority party in power funding in proportion to the election results would, in view of the numerous political and other advantages of incumbency, result in disproportionate assistance to such party.

From a comparative perspective the funding of small parties disproportionate to their support, is not uncommon. In Germany, parties receive DM1,3 for every vote up to 5 million votes, and thereafter DM1 per vote.[46] This formula, while maintaining the broad principle of proportionality,

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government embracing multi-party democracy, a common voters' roll and, in general, proportional representation" (*In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) para 45).

40 See s 193(5)(a).

41 S 57(2)(c) and s 116(2)(c).

42 S 5(2)(a).

43 The German Federal Court held in 1992 that the granting to small parties of lump sums without reference to their actual electoral support was unconstitutional (Gunlicks 1995).

44 In the 1994 election an amount was allocated on an equal basis to all parties which met the 2% threshold of support as evidenced in credible opinion polls. The lump sum was supplemented by a further amount, which was based on success at the polls.

45 S 214 of the Constitution provides for the "equitable division of revenue raised nationally" in terms of an Act of Parliament. In determining the equitable division, Parliament must take into account a number of listed factors.

46 Five million votes represents 11% of the approximately 48 million votes in the 1994 German election.

ensures that small parties remain viable by treating them more generously. In Israel the proportional allocation of funds is supplemented as follows: each party is entitled to one financing unit (US$356 000) for every Knesset member plus another unit regardless of its size. This formula would obviously benefit a micro party the most (bearing in mind that the threshold for election to the Knesset is 1,5% of the votes).

The guidelines provided by the Act also suggest that, in the interest of multi-party democracy, it would be equitable to treat small parties more favourably than large ones. In addition to the principle of proportionality, the prescribed formula must be based –

"in part, on the principle of equity, taking into account, amongst others-

(aa) a fixed threshold for a minimum allocation to each of the political parties represented [in the legislatures]; or

(bb) a weighted scale of representation for an allocation to each of the political parties . . ."[47]

The Act thus gives the parliamentary Committee the choice to adopt either an Israeli model and give each party a minimum allocation, or a German model of a weighted scale. Adopting either of these principles have policy implications. The Israeli model benefits primarily micro parties by ensuring that each party in the legislatures, even with only one member, receives a base line of support equal to that of all other parties. Although micro parties perform an important articulation function, the very low threshold for entry into Parliament (0,25% of the vote) may produce a proliferation of micro parties which may undermine stability in Parliament itself.[48] It may also foster parochial provincialism. A German model of a weighted scale, on the other hand, does not benefit micro parties specifically, but favours small parties of some substance (for example, having up to 10% of the vote). This model is preferred because small parties are able to perform most of the parliamentary functions vital to a vibrant multi-party democracy. It is thus submitted that it would have been preferable that these policy choices be made in the Act by enacting a clear formula. It would also have provided more certainty for minority parties against quick changes to the formula which the more informal and expeditious method of decision making of the Committee makes possible.

The draft formula before the parliamentary Committee, supported by the two largest parties, the African National Congress and the National Party, opts for the lump sum approach. Ninety percent of the funds go to the political parties represented in the National Assembly and provincial legislatures proportional to their representation in the National Assembly and all provincial legislatures. The remaining ten percent is divided proportionally between the nine provincial legislatures according to the number of

47 S 5(2)(a).

48 Concentration of political power is of the widely recognised goals of an electoral system, see Krennerich 1996.

members. The amount allocated to each legislature is then divided equally among all the parties in that legislature. Applied to the present composition of the legislatures, the allocations will be as follows:[49]

	% representatives	% of funds
African National Congress	62,8	58,8
National Party	19,9	20,2
Inkatha Freedom Party	10,5	10,1
Freedom Front	2,8	4,2
Democratic Party	2,3	3,3
Pan Africanist Party	10	1,8
African Christian Dem. Party	0,6	1,3
Minority Party	0,1	0,4

The first question to be asked is whether this formula meets the "equitable" criterion set by section 236. Put differently, has the principle of proportionality been tempered sufficiently by the strengthening of smaller parties? While the equity component is absent or minimal for small parties with 10% of the vote, it is significant for the very small or micro parties. As no definitive definition of equity is possible, the Constitutional Court may well, in making this value judgment, defer to the will of Parliament in this instance.

The second question is whether the proposed lump sum formula enhances multi-party democracy within the South African context. In light of the imperative of nation building it does so in as far as it encourages parties to be represented in as many provincial legislatures as possible; parochial provincial parties do not benefit as much as broad based parties. The IFP thus gets less than its proportional share because it is represented only in two provincial legislatures. On the other hand, the formula may favour micro parties unduly.

The smaller the party, the greater is its share of the cake. Thus, the Minority Party with one representative in the KwaZulu-Natal Provincial Legislature receives four times the amount which is proportionally due to it. With one MPL out of total of 825 MPs and MPLs (0,1 %) it would receive 0,1 % of the 90% proportional allocation, plus, being one of seven parties in the KwaZulu Provincial Legislature, a seventh of KwaZulu-Natal's 19,9% of the 10% "equitable" allocation. This gives a total entitlement of 0,4% of the Fund. If there were less parties represented in the KwaZulu Provincial Legislature, the Minority Party's share would have been even greater.

Public funding may form a significant part of a micro party's overall funding, not only reducing its "Parteifreiheit", but also sustaining it artificially beyond its voters' appeal. Where coalition governments are formed (a prospect enhanced by the system of proportional representation), the proliferation of micro parties, fostered by public funding, may impact negatively on the stability of legislatures and governments. It is therefore submitted that a weighted scale, linked to a party's actual strength and

49 Table prepared by Mr Peter Hendrickse MP, member of the Committee.

producing more proportional results, would be more appropriate because it would strengthen small rather than micro parties.

6 MANAGING AND OVERSEEING PUBLIC FUNDING: THE ROLE OF THE ELECTORAL COMMISSION

The Electoral Commission is one of the state institutions whose task it is to "strengthen constitutional democracy in the Republic".[50] Apart from its function of managing elections,[51] ensuring that they are "free and fair",[52] the Constitution stipulates that the Commission may have "additional power and functions prescribed by national legislation".[53] In terms of the Electoral Commission Act[54] the Commission is assigned the responsibility of registering political parties.[55] It was thus fitting to entrust the Commission also with the management of the Represented Political Parties Fund. Its role is, however, limited to overseeing the financial administration of the Fund and the spending of allocated moneys by political parties. Granting it a broader role on the level of policy could have enhanced the legitimacy of public funding. The independent and detached judgment and expertise of the Commission could have been brought to bear on the size of the annual budget of the Fund and proscribed expenditures. This would have removed much of the public criticism that public funding of political parties is driven by political parties for their own interest.

The function of the Commission is to oversee the administration of the Fund and the use by parties of their allocated moneys. This is an important task because when public funds are spent by private institutions such as political parties, the public has a great interest that such funds have been correctly spent and adequately accounted for. The essential elements of the accounting system established by the Act are the following: Each party must appoint an office-bearer or official of that party as accounting officer, who must take responsibility for the proper management and accounting of the moneys received.[56] A separate bank account must be opened for keeping public money distinct from privately generated funds.[57] The accounting officer must keep separate books and records of account regarding the receipt and use of such moneys.[58] For each financial year the accounting officer must prepare a statement showing all amounts received by the party and how they have been applied.[59] These accounts must be audited by independent auditors who must specifically express an opinion as to "whether the allocated moneys were spent for purposes not

50 S 181(1)(f).
51 S 190(1)(a).
52 S 190(1)(b).
53 S 190(2).
54 Chapter 4 Act 51 of 1996.
55 See chapter 4.
56 S 6(1)(b).
57 S 6(1)(a).
58 S 6(2).
59 S 6(3).

authorised by this Act".[60] This report must be submitted to the Electoral Commission within three months after the end of a financial year.[61] In addition the Auditor-General may at any time audit a party's books and records of accounts dealing with moneys received from the Fund.[62] By way of enforcement, the Commission may suspend the allocation of funds to a party if it is satisfied on reasonable grounds that the party has failed to comply with the Act.[63] This may be done only if the Commission has informed the party of the proposed suspension and called for reasons why it should not proceed to do so.[64] The Commission must also recover from an accounting officer any moneys which were irregularly spent.[65] Finally, the Commission must report annually to Parliament regarding its management and administration of the Fund.[66]

7 CONCLUSION

In assessing whether the Public Funding of Represented Political Parties Act of 1997 meets the objective and requirements of section 236 of the Constitution, the conclusion is a qualified yes. Parliament has met the minimum constitutional requirements of the section but the Act falls short of giving full effect to the spirit and purport of section 236 by not addressing issues which are vital to the enhancement of multi-party democracy.

Parliament did not utilise this opportunity to link public funding of political parties with the disclosure and regulation of their private funding. The occasion on which public moneys are deposited in the private pockets of political parties provided the best opportunity to realise the public claim that full disclosure of private funding should be given in return.

The issue of campaign expenses has largely been avoided. As the most expensive item on a party's budget, it is a critical factor in the levelling of the political playing field. It is thus prone to have the most corrupting effect on political parties and the political process. The position of new parties during an election was also omitted. Without access to some public funding, it may be difficult for a new party to gain representation in the legislatures.

Given public sensitivity around public funding of political parties, the funding process would have benefited from the independent judgment and expertise of the Electoral Commission in advising about the size of the budget to be distributed and proscribed expenditures.

The Act has failed to deal adequately with the contentious issue of the formula for the allocation of funds to political parties. While the Act provides guidelines for the parliamentary Committee to determine such a

60 S 6(4).
61 S 6(4).
62 S 6(6).
63 S 6(7)(a)(i).
64 S 6(7).
65 S 7.
66 S 8.

formula, the policy choices implicit in it, should preferably have been established in the Act itself. While the draft regulations, prescribing the formula, should meet the constitutional standard of "proportional and equitable", a weighted scale may have produced a more appropriate result of strengthening small rather than micro parties.

In conclusion, while the Act has met the constitutional demands of section 236 of the Constitution, it is inadequate by itself to ensure a level political playing field in which multi-party democracy can thrive. At best, the Act should be seen to be an important first step in a long process of ensuring a vibrant multi-party democracy in South Africa.

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