Access of political parties to the media during election campaigns[1]

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1 INTRODUCTION

The indirect funding of political parties during election campaigns is a well-established principle in most democracies.[2] However, an investigation into the ways in which countries regulate and fund the access of political parties to the media – particularly the electronic media – reveals considerable differences between the practices in various democratic countries around the world. A wide range of mechanisms are employed by these countries to address vexing questions, such as whether political parties should have free or paid for access to the electronic and other media during election campaigns and if so, how such access should be regulated.

In South Africa, where there has been no tradition of democratic electoral politics and where the media has been used and abused in the past to serve the interest of the ruling National Party, the questions raised above are of particular importance. The fact that South Africa's 1996 Constitution orders the just and equitable funding of political parties by the state and thus places an obligation on Parliament to produce enabling legislation and regulations to give effect to this constitutional obligation, makes these issues even more pressing. In this article I will attempt to set out some guidelines for determining whether the law in South Africa should provide political parties with free access to the media, and if so, what form these provisions should take. In answering these questions, I will particularly be guided by the principles of the funding of political parties set out by the Constitution. I will also attempt to keep in mind another set of interrelated problems: First, the provisions should be judged within the practical political context in which all measures should aim to enhance the democratic nature of elections. Second, the measures cannot be formulated in a way which would contravene the constitutionally protected rights to equality, freedom of expression and privacy. Answers

1 A report prepared for a joint project of the Community Law Centre and the National Democratic Institute for International Affairs on the public funding of political parties.

2 In a survey by the United States Congress 18 of the 19 countries canvassed allow for some forms of indirect funding for political parties (Report for Congress 1995). Malaysia was the only country not to allow for any indirect funding of political parties.

regarding the former lies mostly in the purely political field, while answers to the latter are inextricably bound up with the legal issues surrounding the Bill of Rights.

2 PRESENT AND PROPOSED LEGISLATION

Neither the Independent Electoral Commission Act[3] in terms of which the 1994 election took place – nor the Electoral Commission Act[4] or the Public Funding of Represented Political Parties Act 103 of 1997 provides explicitly for indirect funding to political parties through free access to the media. The Independent Broadcasting Authority Act[5] does, however, regulate access of political parties to broadcasting during elections.

In terms of section 58 of the Independent Broadcasting Authority Act, any party election broadcast – defined as a direct address or message broadcast free of charge on a broadcasting service which is intended or calculated to advance the interest of any particular political party – is prohibited except during an election period and only where the broadcast is produced on behalf of a political party. No allowance is made for any free or paid political broadcasts on television. Trade unions, NGOs or other political interest groups are not given any free access to the media. Provision is made for free political broadcasts on public radio – but not television. In terms of section 59(1) and (2) of the Act, the Independent Broadcasting Authority has the power to determine the time to be made available to the political parties – including the duration and scheduling of these broadcasts – taking into account the financial and programming implications for the broadcasting service in question. Before making any such a decision, the Independent Broadcasting Authority is required to consult with the public broadcasters and all political parties but need not follow the advice or instructions of these parties. In making its decisions, section 59(4) of the Act directs the Independent Broadcasting Authority to have regard to the "fundamental principle that all political parties should be treated equitably". The Act does not bind private or community radio licensees to carry free political broadcasting, but section 59(8) of the Act provides that if they elect to do so, they will be bound by the provisions of the Act.

The Act makes a distinction between free political broadcasts and paid for political advertising. While the Act places specific duties on public radio to accommodate "political broadcasts", no sound broadcasting licensee – public or private – is required to broadcast political advertisements. However, if public or private radio stations elect to broadcast political advertisements, it is obligated to afford all other political parties a like opportunity.[6] But this freedom is restricted in as much as only advertisements submitted on behalf of registered political parties may be broadcast.[7] Trade unions, NGOs or other political action groups are prohibited

3 Act 150 of 1993.
4 Act 151 of 1996.
5 Act 153 of 1993.
6 S 69(1).
7 S 60(2).

from flighting any advertisements on the radio intended to influence the electorate. Lastly, broadcasters are prohibited from discriminating against any particular political party when it makes time available for political advertising.[8]

The legal regime created by the legislation is confusing in that it is uncertain what role the Electoral Commission should play in the regulation and enforcement of the provisions of the Act. While section 41(1)(a) of the Independent Electoral Commission Act of 1993 bestowed the power on the Electoral Commission to make regulations "governing the permissible nature and content of political advertising, which shall be determined and enforced by the [Electoral] Commission in conjunction with" the Independent Media Commission and the IBA, the Electoral Commission Act of 1996 is silent on this matter. The various Acts do not specify how the various bodies should work together and who should take ultimate control.

3 BASIC PRINCIPLE: EQUITABLE AND PROPORTIONAL FUNDING TO ENHANCE MULTI-PARTY DEMOCRACY

In order to give effect to the egalitarian ideal of one person one vote, it is imperative that the state assists in regulating and financing the access of all legitimate political parties to the electronic media during election campaigns. In a state in which market principles play an important role – like South Africa – money is king. This is also true in electoral politics. Because money is unequally distributed in society, persons or groups of persons or parties who have more wealth, can buy more goods, and this would then include more votes. Failure by the state to intervene in this matter will therefore undermine the democratic process and will promote the non-egalitarian idea that money can buy everything.[9] This problem is more acute in a country like South Africa with its apartheid history and the concomitant economic and social inequality of its people. Put differently, in order to guarantee a system in which electoral and government decision-making is based on the participation, deliberation and interests of all citizens rather than on the wealth of a few, a manner of interference by the state in electoral funding is required.[10]

It is therefore imperative that the South African state interferes – either directly or indirectly – to assure a truly democratic electoral process based on freedom and equality as envisaged by the Constitution. The aim of such interference must be to create the environment in which every citizen can enjoy sufficient equality in the political field to participate meaningfully in public elections as voters, speakers and candidates.[11]

South Africa's 1996 Constitution requires as much by stating in section 1 that the Republic of South Africa is one sovereign, democratic state founded on, amongst others, the value of –

8 S 60(3).
9 Raskin & Bonifaz 1994: 1162.
10 Raskin & Bonifaz 1994: 1163.
11 Raskin & Bonifaz 1994: 1164.

> "[U]niversal adult suffrage, a national common voters role, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."[12]

The Constitution furthermore stipulates clearly the basis upon which political parties should be funded. Section 236 declares:

> "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."

Decisions about indirect funding must therefore be premised on requirements of equity and proportionality. What does this mean? At the outset it must be stressed that the requirement of equity does not mean that the available funds and benefits should be divided equally among all the political parties taking part in the election regardless of their potential strength. This may be surmised by looking to the rest of the Constitution where the concept of equity is also employed. Notably section 214(1) of the Constitution states that provinces are entitled to an equitable share of the revenue raised nationally. Section 214(2) lists a number of factors to be taken into account when the equitable share of revenue is divided up but these factors relate specifically to the context of provincial and national needs and is therefore not directly relevant to the present enquiry. However, reading this section as a whole and taking into account the fact that economic disparities between provinces should be taken into account, it is clear that the concept of equity as used in the Constitution cannot be equated with the idea of equal treatment for all. Equitable, in this context therefore relates to fairness, to what is fair to all the parties, taking into account all the relevant factors.

Clearly, the most relevant factor to be taken into account is the relevant strength of the political parties. This much is acknowledged in the provision itself where it requires that the distribution must be both equitable *and proportionate*. The stronger a party, the more financial assistance it should be given.

However, this does not mean that any allocation of indirect funding – including decisions about the free access of political parties to the media – should follow a mechanistic approach in which each party will be entitled to a portion of the goods equal to its relative electoral strength as reflected in the number of the parties' elected representatives in the legislature. The provision that the funding decisions should enhance multi-party democracy means that the funding must not be organised in such a way that it will prevent smaller parties or newly formed parties from gaining access to the political process because of their lack of resources. In order to enhance multi-party democracy, smaller parties might have to be given a slightly larger portion of funding than their proportional strength might

12 The preamble to the Constitution also declares:
"We therefore, through our freely elected representatives, adopt this constitution as the supreme law of the republic so as to . . . [l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law."

otherwise have warranted in order to ensure that the bigger and more powerful parties do not prevent other voices from being heard.

In the light of this general principle, I suggest that the following four ground rules be applied when determining the regulation of free access to the electronic media by political parties during election campaigns:

First, larger parties should be entitled to more free time than smaller parties, but this access cannot be provided directly proportional to the electoral strength of each party. Second, in order to treat all parties equitably and to enhance multi-party democracy, the largest parties should more or less be treated equally in the allocation of free media time. In a country like South Africa where one party has overwhelming support, it is important to level the political playing field to give the major opposition party (or parties) a fair chance at challenging the hegemony of the majority party. Third, special provision should be made for newly formed parties or small parties to obtain free access to the media that might be disproportionate to its demonstrated strength. Once again, the enhancement of multi-party democracy and equity requires this. Fourth, this does not mean that parties with no serious chance of success at the polls should gain the right to have free access to media. Rules should be established to prevent such parties from exploiting the rules to gain access to free media.

4 RULES RELATING TO THE FREE ACCESS OF POLITICAL PARTIES TO ELECTRONIC BROADCASTING

Although the principles formulated above are somewhat vague, I believe they could serve as essential guidelines in the drafting of the nitty gritty rules and regulations regarding the free access of political parties to electronic media. I will use them specifically to try and answer some of the many pertinent questions regarding the free access of political parties to the media. Should we distinguish between the electronic media and other forms of media when we begin to regulate the access of political parties to the media? Should we distinguish between public broadcasters and private broadcasters. Should we restrict the access of political parties to the electronic media? And will any of these restrictions placed on electronic broadcasters face up to a constitutional challenge? I will attempt to answer these and other questions in the rest of this article.

4.1 Electronic broadcasting as special case

In almost every democracy a clear distinction is drawn between the electronic media – in which some government intervention is always allowed and, indeed, often required – and other forms of media such as newspapers and other forms of commercial communication – where government intervention is usually restricted. The premise of this distinction, it is said, lies in the nature of electronic broadcasting.

First, the distinction between electronic media and other forms of media is usually justified by pointing out that broadcasting frequencies are scarce and that the state therefore has an important role to play in regulating this scarce resource. Unlike newspapers, for example, the number of

potential electronic broadcasters are limited by the number of frequencies available for such broadcasts. It is therefore in the public interest to regulate electronic media, including the access of political parties to electronic media, to secure for the inhabitants of a country their right to free speech. This idea received its most eloquent expression in the United States Supreme Court case of *Red Lion v FCC,*[13] where the court rejected an attack by the Pennsylvania Radio station on the "fairness" doctrine[14] developed by the Federal Communications Commission (FCC) as a manifestation of the public interest. According to the Court the electronic media are unique; they are less like individual speakers and more like public meeting places. Speaking for the unanimous Court, Justice White continued:

> "Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favour of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the purpose of the First Amendment."[15]

It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[16]

The German Constitutional Court also accepted as constitutionally relevant the distinction between radio and television on the one hand and the press and other media on the other and referred to the scarcity of electronic signals as a prime reason for this distinction. In 1961 the Court stated that the freedom of expression guaranteed in section 5 of the Basic Law[17]cannot apply equally as between radio and television on the one hand and the press on the other. The state legislatures were required to draw up positive rules for the former to ensure that programmes were

13 395 US 367 (1967).

14 The "fairness" doctrine required radio stations to (1) devote a reasonable percentage of broadcast time to discussion of public issues and (2) assure fair coverage for each side (Barrow 1975: 366).

15 Quoted by Barrow 1975: 367.

16 Barrow 1975: 390; Raskin & Bonifaz 1994: 1197; Bollinger 1976: 4. This scarcity rationale is not convincing to everybody. Bollinger says that these distinctions – the exhaustion of a physical element necessary for communication in broadcasting as contrasted with the economic constraints on the number of possible competitors in the print media – is rather artificial when viewed from a freedom of speech perspective. Bollinger (1976: 4) writes: "There are good first amendment reasons for being both receptive to and wary of access regulation. This dual nature of access legislation suggests the need to limit carefully the intrusiveness of the regulation in order safely to enjoy its remedial benefits. Thus, a proper judicial response is one that will permit the legislature to provide the public with access *somewhere* within the mass media, but not throughout the press. The court should not, and need not, be forced into an all-or-nothing position on this matter; there is nothing in the first amendment that forbids having the best of both worlds."

17 S 5 of the Basic Law states in its first clause:
"Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of broadcasting by means of broadcasts and films are guaranteed. There shall be no censorship."

comprehensive and balanced, and that every significant political, social and cultural group had access to the media and was represented on their supervisory board.[18]

In view of the shortage of frequencies and the high cost of setting up broadcasting channels, regulation is necessary to ensure equality of access to the media.

Second, the nature of electronic broadcasting itself, is said to make it different from other forms of media. Thus the Italian *Corte Constituzionale* found in 1974 that broadcasting was an essential public service in a modern democracy, because it had the capacity to inform all citizens in a direct and immediate way. The activity could therefore be regulated by the state in the public interest.[19] Because of this special nature of electronic broadcasting, licences may be issued conditionally to ensure that each licensee acts within its mandate. In this view the issuance of broadcasting licenses can be viewed as bestowing a privilege, conditioned on a commitment of the licensee to assume those societal obligations the term defines. This "public interest" concept has combined the offering of a unique right with the acceptance of an equally unique responsibility, requiring of those authorised to operate a broadcasting service a degree of public accountability consistent with the influence they are thereby able to exert over community opinion and culture.[20]

It is therefore perfectly in order for the state to make a distinction between electronic media and other media, to force the electronic media to provide access to political parties – within strictly set rules – in order for them to reach and inform the electorate. In this regard, not only the access, but the content of that access and any other political broadcasting can be regulated by the state.

4.2 Free access for political parties to the electronic media during election campaigns

One of the basic assumptions regarding the state regulation of access to the media during election campaigns, is that electronic broadcasting – through radio, but particularly through television – is the most influential and therefore the most politically sensitive medium of communication in a modern democratic state.[21] Almost all democracies subsidise the broadcasting of political party propaganda on radio and television during elections campaigns.[22] For the various reasons set out below, I believe this is a sound approach.

18 12 BverfGE 205 261-62 (1961); Blair 1981: 176-183.

19 Decision 225/1974, [1974] Giurisprudenza constituzionale 1775.

20 Le Duc 1978: 131.

21 Lacalamita 1984: 543.

22 Ironically the United States – the so called "leader of the free world" – is one of the few countries which does not provide in any way for free party political broadcasts during elections, although the major television networks do organise presidential debates of the major presidential candidates.

First, the potentially huge influence of the electronic media on the electorate makes it imperative that political parties have some form of access to the electronic media over and above the general access generated by news and current affairs programming. If we accept that a free and fair election requires a well-informed electorate and if we further accept that voters in an effective democracy have a right to be informed, political parties should be given some access to the most effective medium of communication in order to inform the electorate of their policies and programmes. Where responsibility for informing the electorate is left to journalists on news and current affairs programmes, the dangers of favouritism and manipulation become more acute, thereby potentially depriving the electorate of their right to know. An outright ban on the access of political parties to electronic media is therefore unacceptable.

Second, once the principle of access is accepted, this access cannot be left to market forces alone as this would also subvert the idea of a free and fair election. Without free airtime, wealthy parties or parties with wealthy supporters will have an unfair advantage to bombard the electorate with their propaganda, while poor parties will not be available to make use of the very effective mediums to get their message across. Once it is accepted that parties should have access to electronic media, requirements of fairness and equality necessitate that at least some of this access should be in the form of free time.

A third aspect to be taken into account is that the absence of free airtime may potentially poison the well of political parties, as the parties may become hostage to the big money interests sponsoring their election campaigns. This is a problem which has become more acute with the advent of electronic media as this has hugely inflated the cost of elections. Because of the potentially huge influence of television and radio on the electorate, political parties are prepared to pay more and more to produce slick programmes to influence voters via the electronic media.[23] This, in turn, has placed more pressure on political parties to accept donations from private companies and individuals with vested interests. And in many parts of the world concern has been expressed that the open democratic system of electoral participation is in danger of being unduly influenced by such sponsorships.[24] Without some form of free access to the electronic media, political parties may be tempted to exchange money for political favours and the whole political process may become tainted in the process. Some form of free access of political parties to the electronic media during election campaigns has therefore become important to bring down the social cost of elections.

4.3 How? How much time? When?

If the idea of free airtime is accepted, the problem becomes how these benefits should be distributed among the political parties. Questions

23 Alexander & Shiratonii 1994: 77.
24 See e g the Australian Electoral Commission Annual Report 1993-94 (1994) xi.

regarding the time and length of political party broadcasts and who should qualify for admittance to the club of parties with free access to the electronic media and on what conditions, all become crucial. In the end the answers to these questions will depend on many factors, including the type of programme that parties are able to broadcast; whether direct broadcasting by parties and advertising is permitted; the medium of broadcast; the relative financial strength of the parties; and other relevant factors.[25]

The basic principle will remain that the allocation must be equitable and proportional and must enhance the promotion of multi-party democracy. From the discussion in part 3 of this article it must now be clear that the free broadcasting time can and should not be allocated to all registered parties on an equal basis despite the fact that in countries where the authorities have been unable or unwilling to determine the relative strength of the political parties contesting the election, this has been a popular solution.[26] An allocation on an equal basis will clash with the basic principles set out in South Africa's 1996 Constitution regarding the financing of political parties during election campaigns. It will also artificially boost parties who may have little or no support. Furthermore, if a large number of small parties take part in the election, it may inundate the airwaves with political propaganda which will confuse voters and dilute the effectiveness of the political speech of the more serious contenders.[27] On a practical level, electronic broadcasters dependent on advertising revenue will be debilitated because they will be forced to cede much of the lucrative prime viewing time for free to parties.[28] In short, an equal allocation of free airtime to all participating parties will not satisfy the constitutional requirement that funding to political parties should be equitable, proportional and aimed at enhancing multi-party democracy.

At the same time a mechanistic allocation of free air time in exact proportion to the strength of each party as it is reflected in its number of members elected to the legislature, will not be satisfactory. The requirement that any allocation of funds will also have to enhance multi-party democracy, means that unrepresented parties or parties with very small representations should also be given some free access once they have been able to demonstrate the seriousness of their mission. Allocating free time to incumbents only, will stifle competition from new rivals and will not enhance multi-party democracy. This principle was annunciated by the Supreme Court of Israel in a 1981 decision of *Augudat Derech Eretz et al v The Broadcasting Authority et al.*[29] In this case the Israeli Supreme Court

25 Sarkin 1994: 169.

26 Sarkin 1994: 168. This form of allocation was undertaken in the first democratic election in Namibia.

27 Sarkin 1994: 168. This happened in Chile in 1989 where 20 minutes were appropriated each day for party political broadcasting and after the time was divided up equally only a few seconds remained for each party. See also *Bullock v Carter* 405 US 134, 145 (1972) where the U.S. Supreme Court recognized a legitimate state interest in preventing the proliferation of "frivolous" candidates to avoid the "clogging of [the states] election machinery" and "voter confusion".

28 Alexander & Shiratoni 1994: 77.

29 35(4) PD 1(1981).

struck down an amendment to the Political Parties Financing Law, which decreased the broadcasting time previously allotted to new lists (in other words, parties who are not represented in Parliament) and increased the allotted time to lists which had representatives in the outgoing Parliament on the ground that it infringed the right to equality guaranteed by section 4 of Israeli Basic Law.[30] The Supreme Court held that the equality guarantee in the Constitution could not be seen in a formal mathematical way when applied in the context of elections. The equity required is substantive equality. In a judgment which neatly balanced the requirements of equatability and proportionality with that of the enhancement of multi-party democracy, Justice Barak explained that the starting point of different party lists was not uniform. A long list which existed before the election would usually require more time to explain its agenda, its shortcomings and successes. However, a new list does not have such a past record and therefore would not need the same amount of time to explain its agenda. To guarantee equal electoral opportunity, each party should be allotted an amount of time which will allow it to present its agenda to the voters in a reasonable way.[31]

In summary, some formula for the fair allocation of free time should be devised which would take into account various facets which must include, but should not be limited to, the relative strength of the parties involved. In devising such a system, care should be taken not to entrench the privilege of the incumbent parties *vis-a-vis* the newcomers.

Various countries deal differently with this issue. In Canada the electoral law provides that each registered political party gets at least two minutes of free broadcasting time between the 29th day before polling day and the second day before polling day. One qualification to this rule is that the amount of free broadcasting time so offered by a television network must not be less than the total amount that was granted by it in the previous general election. If the number of qualified political parties diminishes from one general election to the next, the remaining parties are entitled to divide up more time than they otherwise would have had.[32]

In Britain free broadcasts are made simultaneously on all channels. The time given is decided by a Committee on Party Political Broadcasts, consisting of representatives of the political parties, the BBC and the IBA. They take into account unpublished criteria, including, inter alia, votes received in previous election and number of candidates fielded (there must be at least 50 candidates fielded before a party will qualify for free air time).[33]

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30 Knessett 12 LSI 85 (5718/1957-58).

31 This basic principle was reiterated by the Canadian Supreme Court when it stated that equitable time does not mean equal time and that the Canadian regulations therefore did not require equal access to the electronic media by all political parties. See *Turmel v Canadian Radio- Television and Telecommunications Commission* 16 CRR 9 (1985).

32 Report of Congress 1995: 52.

33 Report of Congress 1995: 86. In the 1992 election, party election broadcasts were valued by the Public Policy Research Institute at 10 million pounds per party. See

[continued on next page]

In Greece only political parties and not candidates can advertise on radio and television and the advertising is free. The advertisements must be no more than one minute in length and may only be broadcast between programmes. The allocation of time among political parties is based on the size of the party in the previous dissolved Parliament. The three largest parties in the previous parliament are entitled to at least 38 minutes weekly on televised programmes. Transfer of time from one week to the next is allowed as long as it does not exceed 50 minutes. Unrepresented parties qualify for time if they have lists in at least 75% of the electoral districts.[34]

Israel has an interesting idea about free broadcasting on state television. Section 15(A)b of the Election (Modes of Propaganda) Law[35] provides that the Chairman of the Central Election Committee of Parliament shall, after consultation with that Committee and with the Director-General of the Broadcasting Authority, prescribe the times for election broadcasts on TV, their incorporation into the relevant TV programming schedule and the duration of the broadcasts prescribed for each party. Each registered party will get 10 minutes and each party already represented will get 3 additional minutes for each Member. Parties themselves finance the production of the slots.[36] For radio broadcasts every party is given 25 minutes and six additional minutes for every member. The Israeli system will be impractical in South Africa, not only because of the fact that there are three times as many parliamentarians in South Africa than in Israel, but also because the political landscape is much less fragmented in South Africa and is overshadowed by one or two large parties. This system will lead to an unfair (i e inequitable) weighting of free broadcasting time in favour of the large incumbent party.

Arguably the best solution for South Africa is provided by Spain, where the following formula provides for free time on television: 10 minutes for parties that did not take part or did not have representatives in previous elections; 15 minutes for parties who obtained less than 5% of the vote in the previous election; 30 minutes for parties who obtained between 5% and 20% in such an election; 45 minutes for parties or federations who obtained at least 20% in such an election. But free public media are provided only for parties or coalitions with candidates in more than 75% of the districts reached by the programming zone of the pertinent broadcaster.[37] This formula succeeds to treat major parties equally while it also allows considerable access for smaller or newly established parties in line with the requirements of proportionality and equity.

From the above examples, it is clear that the size of political parties, usually measured by looking at the amount of representatives in the

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House of Commons, Home Affairs Committee, *Funding of Political Parties*, HC 301 (1994) vii.

34 Report of Congress 1995: 94.

35 13 LSI 146 (5719/1958-59).

36 Report of Congress 1995: 114.

37 Report of Congress 1995: 178.

outgoing legislature, forms the basis of any distribution of free air time. However, this is never the only criterion. In order not to give too much of an advantage to incumbent parties, some sort of basic amount of air time is provided to all registered political parties who can show – usually with reference to the amount of candidates fielded in the election – that they are serious contenders for seats. It is contended that an arrangement which includes all these aspects would fulfil the requirements that funding should be equitable and proportional in a way which would enhance multi-party democracy. In South Africa with its pure proportional representation system, the number of candidates fielded in an election will not always be a good indication of the seriousness of the party. Another method such as the requirement of a number of signatures of support, might be required to disqualify parties with no serious intent from being given free access to the public broadcasters. I suggest that the signatures of 20 000 registered voters should be required before an unrepresented political party can qualify for free airtime.

In all the countries canvassed the allocation of airtime is not strictly determined by law but a discretion is usually placed in the hands of some sort of independent body which is then required to allocate air time according to an agreed on formula. Close co-operation between the independent body, the political parties and the broadcasters involved is necessary because of the strong commercial nature of electronic broadcasting – even of public broadcasters. Any decision regarding the free access of political parties to television broadcasts will inevitably have financial consequences for the broadcaster concerned. It is therefore imperative that both broadcasters and political parties are allowed to give input in allocation of airtime. The body who must oversee this process is usually one with special knowledge of broadcasting and the political, economic and constitutional issues at play.

In terms of television broadcasting, where more than one public broadcasting channel operates in a country, it is sometimes required that all the channels broadcast the party political broadcasts at the same time to enhance the impact of the broadcasts. Where different channels have different target audiences and where they reach different sections of the population, the requirements of equity and proportionality would necessitate such an arrangement. In South Africa with three public broadcasting television channels who reach different sections of the community, such an arrangement seems imperative.

Almost all the countries surveyed do not make any principled distinction between radio broadcasts and television broadcasts. Once the principle of free access is agreed on, political parties acquire a right of free access to both radio and television. A prohibition on the free access of political parties to television broadcasts, while allowing for free access to radio – as was the case in South Africa's 1994 election – would not seem to make sense as television is a more powerful medium than radio and therefore a more important tool for informing the electorate.

I therefore suggest that political parties should be entitled to free broadcasting time in prime time (between 7-9 on weekdays, that is Monday to Thursday) on all three television channels at the same time (that is the same programme is broadcast on all three channels) between the 29th

day before the election and the second day before the election in the following formula: 5 minutes for parties who did not take part in the previous election or did not gain any seats in Parliament in the previous election provided that they can produce a list of 20 000 signatures of registered voters; 10 minutes for parties who are represented in Parliament, but have obtained less than 5% of the vote in the previous election; 20 minutes for parties who have obtained between 5% and 20% of the vote in the previous election; 30 minutes to parties who have obtained more than 20% of the vote in the previous election.

The formula for public radio should be the same as for public television except for the fact that prime time differs (between 6 and 8 am and 4 and 6 pm).

The Electoral Commission should be tasked with the duty to divide the time over the 27 day period. In order to discourage slick and misleading "sound bite" advertising no broadcasts shorter than 3 minutes or longer than 10 minutes should be allowed. To this end, it would be helpful if the Electoral Commission established a directorate to oversee the division and administration of the free political broadcasts.

4.4 Privately-owned electronic broadcasters vs public broadcasters

In some countries where free access to electronic media is provided, a distinction is sometimes drawn between the public – usually state owned and subsidised – electronic media on the one hand, and privately owned commercial media on the other. Free access is then provided on the former while the latter is allowed to continue its normal programming. In South Africa the existence of a paid television channel such as M-Net, private broadcasters such as Midi television, and the recent process of deregulation of the air waves created a clear distinction between the public broadcaster in the form of the SABC and other, commercially driven, broadcasters who can again be subdivided into community broadcasters and those purely driven by the profit motive. The question is whether these broadcasters should be forced by regulation to allow for free access of political parties to their station.

Various countries deal differently with this issue. In the United States, where the Federal Communications Commission (FCC) issues broadcasting licenses and regulates electronic media, no free access by political broadcasters is required as there is no truly public broadcaster in the US. In some countries like Canada, private companies are not under an obligation to allow free access, but if they do provide free access, they are required by law to allocate the free time fairly among the parties in terms of the same formula used for public broadcasters.[38] In other countries, such as Greece, even private stations are required by law to allow free adverts by political parties which must be transmitted at the same time each day for each party.[39]

38 Report of Congress 1995: 52.
39 Report of Congress 1995: 94.

The principle distilled from these examples relates to the notion of electronic broadcasting as a public service which vests certain rights to be informed in the electorate.[40] In countries where an identifiable public broadcaster exists, this public service function will primarily be fulfilled by that public broadcaster. This will leave some freedom for the commercial and community-based broadcasters to decide for themselves, free from legislative coercion, whether they want to provide free access to political parties or not. This view was first stated by the German Constitutional Court in the *Fourth Television* case,[41] where the Court made a novel statement about the distinction between public and private broadcasters. Repealing its approach in earlier cases, the Court stressed the role of the media in providing information for the citizens and thus in contributing to the working of the democracy. These fundamental responsibilities (*Grundversorgung*) were to be discharged by the public broadcasting authorities, which were required to show a comprehensive range of balanced and impartial programmes as well as a full and accurate news service. Provided these requirements were met, private broadcasters could be allowed to operate under less onerous circumstances. This is because private broadcasters were dependent on advertising revenue and to impose on them the same programme obligations as apply to public broadcasters might make their activity commercially unviable. Public and private broadcasters are seen as performing complementary, rather than competitive, functions and in Germany this is constitutionally prescribed.

According to the German court, public broadcasters have the fundamental responsibility to inform and educate, and to provide a comprehensive service. Private broadcasters need not meet such high standards, but their relative freedom is allowed only because the public broadcasting authorities exist to discharge the fundamental responsibility of broadcasters in a modern democracy. Broadcasting freedom is not to be regarded as conferring an unlimited right on the part of the owners of private channels to show what they want. This is an instrumental freedom, subordinate to the freedom of expression also protected in section 5 of the German Basic Law which serves the values of a lively and informed democracy.

I find the German court's argument compelling and therefore think that it would be unwise to extend the obligation to provide free airtime to privately owned, commercial or community-based broadcasters. The principle should rather be that only the public broadcaster should be forced to provide free access. This does not mean that private electronic broadcasters should have a free reign. Provision should clearly be made that when private broadcasters decide to provide free time, they do this within the framework of what is equitable and proportional and in the interest of enhancing multi-party democracy. As long as M-Net is not allowed by its broadcasting licence to broadcast news and current affairs, they should clearly not be required to carry free party political broadcasting. However,

40 See the discussion in part 4.1 above, particularly the decision of the Italian Constitutional Court.

41 73 BverfGE 118 (1986).

where Radio 702 or any of the recently sold radio stations decide to report on the political campaign, they should be prohibited from providing a free platform for one or two parties only. In such a situation the broadcaster will opt to become part of a regime and will have to follow the same rules applicable to the public broadcaster.

4.5 Paid advertising

There is an inextricable link between the question of whether free access to the electronic media should be provided and whether parties should be allowed to flight paid political advertising on television and radio. The more free time is provided on television and radio, the more likely that paid adverts will be done away with.

Opponents of paid advertising say that an increased reliance on paid for advertising results in political parties beginning to rely on sponsorship of large corporations. They argue that political advertising should be banned to safeguard the integrity of the political system by reducing, if not eliminating, the pressure on political parties and candidates to raise substantial sums of money in order to engage in political campaigning on television and radio. The latter pressure is one which renders political parties vulnerable to corruption and undue influence by those who donate money. By banning paid for advertising, one aims to cleanse the electoral process of corruption by prohibiting political advertising in election periods and replacing it with regulated system of election broadcasts free of charge. A further advantage is that it will stop the trivialisation of politics which results from a situation where political parties fight ad wars on sound bite slogans. It also attempts to control the spiralling cost of elections. Paid adverts are not about free speech, it only gives access to those who can afford it.[42]

But others say that political advertisements by political parties and, what is more important, by other political interest groups, are essential for the operation of a multi-party democracy. Advertising has become one of the most potent forms of communication in the modern world and a ban on political advertising on television and radio will stifle political debate and discriminate against those groups and organisations who want to influence the electorate but who is not part of a political party. In *Australian Capital Television v Commonwealth*[43] the banning of paid for political ads during election campaigns was found to be unconstitutional by the High Court of Australia on exactly these grounds.

In Canada some of the problems relating to the trivialisation of politics are addressed by strict regulation of paid political advertising in terms of a formula similar to the one used for the allocation of free air time. Six and a half hours of broadcasting time are made available for purchase by all registered parties during the same period. This time is then divided equitably between the parties after agreement between the parties. These

42 Report by Senate Select committee 1991: 13.
43 66 *ALJR* 695 (1992).

negotiations are facilitated by the Independent Broadcasting Association. If no agreement can be reached, the IBA has the final say as to how the time should be allocated.[44]

It is a distinct possibility that an outright ban on paid for political advertising on radio and television could be declared unconstitutional by the Constitutional Court. This possibility would make some kind of controlled access to paid political broadcasts an attractive option in South Africa, despite the many potential negative consequences of allowing for paid advertising by political parties in the electronic media. Under such a regime, a restricted amount of time could be made available over all three channels of the public broadcaster and the political parties could then negotiate about how this time should be allocated to the parties. To ensure fairness and equity, the Independent Broadcasting Authority could play the role of facilitator in this process and could have the final say in a situation where the political parties fail to reach agreement.

However, private broadcasters should not be forced to take political adverts,[45] but once they agree to carry political adverts, they will have to do so within the rules of securing equity.

4.6 The constitutional hurdles in the regulation of access to the electronic media

The regulation of the access of political parties and other political interest groups to electronic media, cannot be divorced from the constitutional guarantees of equality and free speech. South Africa's 1996 Constitution guarantees both the right to equality[46] and the right to freedom of expression.[47] Where the regulations make distinctions between different parties, groups or individuals and provide preferential access to the electronic media for some, the constitutionality of such regulations could be challenged.

However, it would be a mistake to see the issue of government regulation of the media during elections as merely a question of the right to equality in competition with the right to free speech. As all rights in the Bill of Rights – including the right to freedom of speech – must in principle be protected equally for all citizens, the two sets of rights stand in a symbiotic relationship with each other. Sometimes it is exactly the requirement that the right to freedom of speech must be guaranteed equally for everyone,

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44 Report of Congress 1995: 52.

45 In *Columbia Braodcasting System Inc v Democratic National Committee* 412 US 94 (1973) the US Supreme Court decided that private broadcasters were under no obligation to take on political advertisements and could not be forced to do so by the FCC.

46 S 9 (1) proclaims that
"everyone is equal before the law and has the right to equal protection and benefit of the law . . ."

47 S 16 (1) declares that
"Everyone has the right to freedom of expression, which includes –
(a) freedom of the press and other media; [and]
(b) freedom to receive and impart information and ideas."

which would lead to constitutional problems for a specific measure.[48] We must ask: to what extent is the government required to interfere in the process in order to ensure meaningful democratic debate – substantive dialogue between candidates and parties and citizens about real problems confronting society – during election campaigns, and to what extent can each person meaningfully express him or herself in this process?

A very clear warning about the potential unconstitutionality of any regulation which favours incumbents is signalled in the case of *Australian Capital Television v The Commonwealth of Australia*,[49] where the issue of a ban on political speech by broadcasters before an election was considered. The case dealt with of the Australian Broadcasting Act of 1942[50] which was designed to establish a regulatory regime governing the broadcasting on television and radio of political advertisements and other matters. The principal elements are:

(1) the sweeping prohibition[51] – subject to certain exceptions including the broadcasting of news and current affairs items and talk back radio programs[52] – of the broadcasting during the election period of relevant material in relation to the parliamentary elections; and

(2) the imposition on broadcasters of an obligation to make available free of charge units of time for election broadcasts to a political party, person or group to whom the Australian Broadcasting Tribunal has granted such free time.[53]

The provisions were attacked as a severe infringement of the right to free speech because it was alleged that the provisions impair the freedom of citizens to discuss public and political affairs and to criticise the federal institutions by restricting the broadcasters right to broadcast and by restricting access of politicians to broadcasting.

Those who supported the law argued that the law was necessary to safeguard the integrity of the political system by reducing, if not eliminating the pressure on political parties and candidates to raise substantial sums of money in order to engage in political campaigning on television and radio, a pressure which renders them vulnerable to corruption and undue influence by those who donate money. The aim was to cleanse the electoral process from corruption by prohibiting political advertising in election periods and replacing it with a regulated system of election broadcasts free of charge, including the broadcast of policy launches. It was also aimed at equalising the process and at stopping the trivialisation of politics. It also attempts to control the spiralling cost of elections.

48 Tribe 1985: 188-220. Tribe argues that equality should be a central concern of free speech. Where some people are guaranteed a right to free speech in a way that others are not, a constitutional issue is at hand.
49 1992 CLR 106.
50 Part III D.
51 Ss 95B, 95C, 95D and 95E of the Act.
52 S 95A of the Act.
53 S 95H(1) of the Act.

Constitutionally, these arguments did not wash, as the Act did not allow for equality of access for all role players to the media, specifically because it gave preferential treatment to incumbents (90% of the proposed free air time was made over to incumbents while non-incumbents were awarded the other 10% at the discretion of the Tribunal).[54] This, according to the High Court, entrenched the status quo. It also did not allow scope for participation in election campaigns by persons who were not candidates or by groups who were not putting forward candidates for election. Trade unions and other political interest groups were also excluded from participating.

Justifying the Court's decision, Mason CJ stated that in a representative democracy, representatives in Parliament are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do. They therefore have a responsibility to take account of the views of the people. Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative democracy depends also upon free communication on such matters between all persons and other bodies in the community.[55] Only with the assistance of freedom of speech, of the press, and of association can people build and assert political power, including the power to change the men and women who govern them.

The Court used a proportionality test to determine whether restrictions imposed on an activity or mode of communication by which ideas and information are transmitted, was justified. It said one must weigh up the public interest in free communication against competing public interest which the restriction was designed to serve, and for a determination of whether the restriction was reasonably necessary to achieve the competing interest. If the restriction imposed a burden on free communication that was disproportionate to the attainment of the competing interest, then the existence of the disproportionate burden indicated that the purpose and effect of the restriction were in fact to impair freedom of communication. [56] The *raison d'être* of freedom of communication in relation to public affairs and political discussion was to enhance the political process (including the electoral process) thus making representative

54 S 6 Act 132.
55 At 138-139.
56 At 143-144.

democracy efficacious. The Act severely restricted freedom of communication in relation particularly to the electoral process, in such a way which discriminated against potential participants in that process, especially those not already represented in the process.

The Capital Television-case is a clear warning that the regulation of access to electronic media should always be done with a view to enhance multi-party democracy. Any regime which merely entrenches the status quo is in danger of not passing a test of constitutionality. A prohibition on access to the electronic media by non-political parties, such as trade unions, NGOs and other political action groups would therefore be unwise. A failure to accommodate non-represented parties in any regulatory scheme would also be dangerous.

5 CONCLUSION

In the South African context, the Constitution mandates the Electoral Commission (EC) to ensure that an election is free and fair while it directs the IBA to regulate broadcasting in the public interest to ensure fairness and diversity of views representing the South African society. Access to the electronic media by political parties during election campaigns fall within the line of duty of both institutions. A single co-ordinating body is advisable and the question is who should it be? The obvious candidate for this is the EC but no provision is made in the Electoral Commission Act for this role. While the IBA is specifically mandated to regulate the airwaves during elections, they are not constitutionally charged with ensuring the free and fairness of an election and the final decision about these matters should not lie with them. On the other hand, where broadcasting matters are at stake, the special knowledge and expertise of the IBA might be valuable to ensure that sound decisions are made regarding the access of political parties to the media. A solution could be to give the Electoral Commission the final say regarding all forms of financing of political parties, also all forms of indirect financing, including the regulation of free access to the electronic media. A member of the IBA could then become an *ex officio* member of the Electoral Commission with a specific brief to manage the process for the Commission. In this way, the Electoral Commission will retain final control and will be able to co-ordinate the various forms of funding for political parties, while the expertise of the IBA is retained.

In short, as the constitutionally mandated body, the Electoral Commission should have a final co-ordinating role in all decisions regarding the financing of political parties in accordance with section 236 of the Constitution. In exercising this power, the Commission should always apply the basic principles of equity and proportionality. Special care should be taken in fostering a culture of freedom and debate in which larger and smaller parties get a fair chance to put across their views and take part in the election campaign in a way that would enhance multi-party democracy.

Sources

Alexander Herbert E and Shiratoni R *Comparative Political Finance among Democracies* (1994) Claredon Press

Alexander Herbert E *Financing Politics: Money, Elections and Political Reform* (1992) Congressional Quarterly Publishers

Barrow J "The fairness doctrine: A double standard for electronic and print media" (1975) *Hastings Law Journal* 359

Blair Phillip M *Federalism and Judicial Review in West Germany* (1981) Claredon Press

Bollinger B "Freedom of the press and public access: Towards a theory of regulation of the mass media" (1976) *Michigan Law Review*

Lacalamita J "The equitable campaign: Party political broadcasting regulation in Canada" (1984) *Osgoode Hall Law Journal*

Le Duc Don R *Beyond Broadcasting: Patterns in Policy and Law* (1987) Longman Publishers

Le Duc Don R *Media Law and Practice* (1989) Longman Publishers

Raskin J & Bonifaz J "The constitutional imperative and practical superiority of democratically financed elections" (1994) *Columbia Law Review*

Sarkin J "The South African media in the transition to democracy" in Steytler, De Vos, Murphy and Rwelamira (eds) *Free and Fair Elections* (1994) Juta & Co

Tribe L *Constitutional Choices* (1985) Harvard University Press