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The Value of Political Equality – Comparing the Practices of the ECtHR and the Supreme Court of the United States

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Summary

Two of the most important values of modern democracies are political equality and freedom of expression. In the narrowest sense, political equality is realized by the “one person – one vote” rule, but the principle means more than this: it also involves, that everybody must have a real opportunity to influence the outcome of the elections, and everybody must have the possibility to seek after supporters. In the same time members of the public are entitled to receive information about the rival arguments in order to be able to form a well-founded decision at the end of the campaign. This definition proves, that freedom of expression is also inevitable in order to ensure a fair decision-making process.

In my paper I examine how the constitutional principle of political equality is presented in different European international law documents and in the practice of the European Court of Human Rights (ECtHR). I hypothesize that we can speak about a well-recognizable European approach towards campaign-financing and I examine whether this approach really prefers political equality, as opposed to the constitutional attitude of the United States, where freedom of expression prevails, when the two constitutional values collide.

Therefore in the first part of my paper I elaborate the idea of the “Europeanization” of norms on campaign financing, and I turn to the problems raised by these European “good practices”. Namely, I examine the attitude towards the collision of political equality and freedom of political speech. Then I shortly describe the relevant constitutional practice of the United States, which is often used as a sharp contrast. Finally I examine the *Animal Defenders International* decision of the European Court of Human Rights, which is often heralded as the European victory of political equality. As a conclusion, I find questionable, whether a blanket ban on corporate campaign-

spending, which was at stake in this particular case, can in fact foster the realization of political equality.

Preliminary Remarks: A European Regime of Campaign Financing?

In my paper I examine how the constitutional principle of political equality is presented in different European international law documents and in the practice of the European Court of Human Rights (ECtHR). I do this through focusing on the issues of campaign financing, especially on the problems of campaign spending and political advertising.

At first glance it seems that there exists a distinct European approach towards the problem, which prefers political equality, as opposed to the approach of the United States, where freedom of expression prevails, when the two constitutional values collide. But a close examination of the relevant case-law shows that this statement is not convincing enough. Due to the limits of the current paper, I use the recent *Animal Defenders International v. The United Kingdom* decision, as a core example.

I hypothesize that we can speak about a well-recognizable European approach towards campaign-financing. In the last decades a process of “Europeanisation” could be witnessed, and this process is characterized by a set of soft and hard law documents, issued by different institutions and bodies of the Council of Europe¹ and the European Union (EU).² The idea of interpreting these very diverse documents together might seem strange, but it is not unusual in the relevant literature.

Behind this approach we can find the consideration that the “European legal regime” does not exclusively refer to the legal system of the EU; the process of Europeanisation does not stop at the borders of the EU, and it has a very strong effect on the neighbouring countries. Thus, the dynamics of Europeanisation exceeds the narrow interpretation of the European integration.³ In

¹ Such as: Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns; Code of Good Practice in the Field of Political Parties by European Commission for Democracy Through Law (Venice Commission) CDL-AD(2009)002.; Guidelines and Report on the Financing of Political Parties by the Venice Commission CDL-INF (2001)8.; Opinion of the Prohibition of Financial Contributions to Political Parties From Foreign Sources adopted by the Venice Commission CDL-AD (2006)014.

² See especially: Regulation (EC) No 2004/2003 of the European Parliament and of the Council of 4 November 2003; Regulation (EC) No 1524/2007 of the European Parliament and of the Council of 18 December 2007 amending Regulation (EC) No 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding; Commission Delegated Regulation (EU, Euratom) 2015/2401 of 2 October 2015 on the content and functioning of the Register of European political parties and foundations.

³ Van Biezen I. – Molenaar F. The Europeanisation of Party Politics? Competing Regulatory Paradigms at the Supranational Level. *West European Politics*, 2012, 16 April, No. 3. p. 634.

many cases the institutions of the EU cooperate closely with the institutions of the Council of Europe, which encourages the spread of the ideals of campaign financing.⁴

This interpretation of Europeanisation is closely related to that, which can be described as the regional impact of states with strong democratic traditions.⁵ For instance, the democratic transition of the countries in Central – Europe was not fostered solely by the EU, but by other regional forms of cooperation, too.⁶ I agree with Timus, who states that however the EU has the leading role in the story of the European integration, when it comes to the principles of political campaigns, the influence of the Council of Europe, and especially that of the Venice Commission cannot be neglected.⁷

The European “Good Practices” on Campaign Financing

So, the various guidelines and recommendations issued by the different bodies of the Council of Europe, and the legal regulations of the European Union together construct a distinct set of rules. This can be expanded with the principles, which follow from the practice of the European Court of Human Rights (ECtHR).⁸ These documents and the respective practice of the Court construct together something, which can be called as the European “good practices” of campaign finance. These good practices seem to be determined to guarantee the realisation of political equality. The collision of the idea of political equality and freedom of expression can be detected especially in connection with two issues: these are the problems of private contributions and campaign spending. Considering the limits of this paper, here I choose to focus only on these proposals.

The problem of private financing is a controversial and complex one. Many European documents urge establishing financial caps on private donations and explicit prohibition on contributions from industrial or commercial corporations.⁹ The argumentation behind these solutions is to prevent the distorting influence of well-endowed interests in the political competition. According to this argument, interested money, especially corporate money can monopolize the “marketplace of ideas” and undermine the fair competition among the rival political

⁴ Timus N. The Impact of Democracy Promotion in Party Financing in the East European Neighbourhood. European Integration Online Papers, 2010, No. 3. p. 6.

⁵ Whitehead L. Democratic Regions, Ostracism and Pariahs. In: Whitehead L. (ed.) The International Dimensions of Democratization: Europe and the Americas. Oxford – New York: Oxford University Press, 1996, pp. 395-396.

⁶ Pridham G. The European Union, democratic conditionality and transnational party linkages: The case of Eastern Europe. In: Grugel J. (ed.) Democracy without Borders. Transnationalization and conditionality in new democracies. London and New York: Routledge, 1999, pp. 59-60.

⁷ Walecki shares this approach: Walecki M. The Europeanization of Political Parties: Influencing the Regulations on Political Finance. EUI Working Papers, 2007, No. 29. p. 2.

⁸ Van Biezen I. – Molenaar F pp.639-641.

⁹ Van Biezen I. Financing political parties and election campaigns – Guidelines. Strasbourg: Council of Europe Publishing, 2003, p. 30.

forces. John Rawls described this phenomenon as a distortion of democracy, “a kind of regulated rivalry between economic classes and interest groups in which the outcome should properly depend on the ability and willingness of each to use its financial resources and skills, admittedly very unequal, to make its desires felt.”¹⁰ But, in the same time financial contributions may help strengthening the relationship between a political party or candidate and its electorate and, in addition, contributions can be understood as a form of expressing political support, thus a way of expressing political opinion. Hence the question arises, whether these limitations are acceptable forms of restricting freedom of expression.

On the other hand, the documents on campaign financing often argue for limiting campaign spending in order to limit the importance of money in politics. Spending limits may be able to weaken the influence of money in politics, and eliminate the financial inequality among the competing parties. But limiting campaign-spending may restrict freedom of political speech. These spending limits may abridge the freedom of candidates and parties to express their political programmes, hence narrow the chance for voters to gather more information about a political issue. Moreover, limits on spending by third parties (restrictions on parallel campaigns) may also burden the freedom of expression of private individuals who wish to support a particular party or candidate.

All of the above described measures have the same ultimate aim: to guarantee the idea of political equality. Political equality in this sense means more than the well-known principle of “one person, one vote”. It involves, that everybody must have real opportunity to influence the outcome of the elections, and everybody must have the possibility to seek after supporters. In the same time members of the public are entitled to receive information about the rival arguments in order to be able to form a well-founded decision at the end of the campaign.¹¹ These arguments highlight the crucial importance of the freedom of expression during campaign-periods. Without this freedom, the fairness of political competition cannot be ensured. But all of these above mentioned values can evaporate if well-endowed interests have the opportunity to monopolize the “marketplace of ideas” and undermine the fair competition among the rival political viewpoints. But, while these limits aim to guarantee equality, they may restrict freedom of expression, as well. Therefore the real question is how to balance between these two, competing principles.

It is often argued that the European and the American approach offer different answers to this question.¹² As the relevant manual published by the Council of Europe points out, the “European approach has been to accept restrictions to campaign expenditure on the grounds that

¹⁰ Rawls J. *Political Liberalism*, Expanded Edition. New York: Columbia University Press, 2005, p. 361.

¹¹ Dawood Y. *Democracy, Power and The Supreme Court: Campaign Finance Reform in Comparative Context*. *International Journal of Constitutional Law*, 2006, No. 2. p. 280.

¹² The different attitudes are strongly highlighted by Jacob Rowbottom. Rowbottom J. *Animal Defenders International: Speech, Spending, and a Change of Direction in Strasbourg*. *Journal of Media Law*, 2013, No. 5. pp. 1-13.

freedom of expression does not entail the freedom to use wealth to get the less prosperous to listen to one's views. In addition, restrictions on campaign expenditures can be justified with a view to controlling the potentially disruptive role of money in politics." While European campaign finance is moving towards more restrictive regulation of campaign expenditure, this practice is in sharp contrast with the more permissive tradition in the United States, where spending by candidates is not limited (except for presidential candidates who voluntarily accept spending limits in exchange for public subsidies)."¹³

Equality in the Constitutional Practice of the United States

This myth of the so-called American approach, which so infamously prefers freedom of expression to the ideal of political equality, roots in the *Buckley v. Valeo* case.¹⁴ In *Buckley* the Supreme Court examined the Federal Election Campaign Act and struck down the limits on campaign spending. While arguing for the unconstitutionality of the spending limits, the judges phrased the well-known anti-egalitarian argument, according to which "the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the ... expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment..." But, as Ronald Dworkin highlighted, in the same decision the Court upheld the contribution limits, and "it can be justified only on the assumption that Congress has the power to limit the political activity of some people in order to safeguard the citizen equality of others."¹⁵

Other decisions of the U. S. Supreme Court underline more, how significant the ideal of political equality became in its practice. Stellar example of this development is the *Austin* decision,¹⁶ in which the Court argued that a regulation, which banned campaign-expenditures by profit-oriented corporations, could be justified, as it aimed a "different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form."

A weak majority overturned this decision recently in the *Citizens United* case¹⁷, stressing that "*Austin* interferes with the "open marketplace" of ideas protected by the First Amendment." This argument is based on the instrumentalist justification of freedom of expression. According to

¹³ Van Biezen p. 29.

¹⁴ *Buckley v. Valeo*, 424 US 1 (1976).

¹⁵ Dworkin R. *Political Equality*. In Dworkin R. *Sovereign Virtue. The Theory and Practice of Equality*. Cambridge – London: Harvard University Press, 2000, p. 373.

¹⁶ *Austin v. Michigan Chamber of Commerce*, 494 US 652 (1990).

¹⁷ *Citizens United v. Federal Election Commission*, 558 US 310 (2010).

the justices, freedom of speech makes it possible for the voters to gather information about the different viewpoints of the candidates, thus, guarantees the possibility of well-informed decision-making. Therefore, any regulation which limits the quantity of available speech on the marketplace of ideas endangers the decision-making process. In this sense even the ideas of corporations may prove valuable.

In the same time Justice Stevens in his concurring opinion stated that “the interests of nonresident corporations may be fundamentally adverse to the interests of local voters. Consequently, when corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears “little or no correlation” to the ideas of natural persons or to any broader notion of the public good. The opinions of real people may be marginalized.” Thus, those who argue for the ban on corporate spending, state that motivated corporate interests may be able to monopolize the marketplace of ideas, hence making it increasingly difficult for those with lesser financial resources to transmit their messages to the voters.

ECtHR: in Favour of Political Equality?

The problem of campaign spending is well-known in the case-law of the European Court of Human Rights (ECtHR), as well. Last time in the *Animal Defenders International v. The United Kingdom* case¹⁸ examined the Court the interference of a contracting state’s, namely the United Kingdom’s law on political activity with Article 10 of the Convention. The facts of the case were, as it follows, that a small civil organisation, an NGO, the Animal Defenders International, which had the aim of protecting the animals from abuse intended to begin a campaign under the name of “My Mate is a Primate” and wished to broadcast a short (20 seconds) television ad as part of this campaign. The British broadcasting authority found, that the ADI’s aims were “wholly or mainly political in nature” and prohibited the advertising under the Communications Act (enacted in 2003) which in its Article 321 prohibits broadcasting almost every form of political ads, not just in campaign periods but beyond those periods, and not just by public broadcasting services but by private broadcasters, too, in every kind of broadcast media. In brief, these rules can be considered as blanket ban on political advertising in broadcast media. The ultimate aim of the Act was to protect the integrity of the political debate in the society. Under this the legislator meant to prevent the distorting effect of huge amounts of money on the political decision-making process.

¹⁸ Judgment of European Court of Human Rights, Case: 48876/08 *Animal Defenders International v. The United Kingdom*

After the decision of the broadcasting authority the Animal Defenders issued proceedings seeking a declaration of incompatibility under Section 4 of the Human Rights Act and stated that the full prohibition on paid political advertising on television and radio was incompatible with Article 10 of the Convention. The Animal Defenders argued that the full prohibition was too widely defined and banned communication which should be protected under the Convention, so the ban must have been considered as disproportionate. But the British courts rejected the arguments of the NGO. In their decisions they stated that “the rationale for the prohibition was to preserve the integrity of the democratic process by ensuring that the broadcast media were not distorted by wealthy interests in favour of a certain political agenda”¹⁹ Baroness Hale, member of the House of Lords added that “our democracy is based upon more than one person one vote. It is based on the view that each person has equal value.” After these antecedents the NGO started proceedings in the ECtHR against the United Kingdom.

A highly divided Court concluded that the norms in question did not interfere with Article 10 of the Convention. In its argumentation the majority at first stated that the “essence of democracy is to allow diverse political programmes to be proposed and debated...” and that “situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audiovisual media ... undermines the fundamental role of freedom of expression in a democratic society”. Based on these principles the judges refused those arguments which called into question the proportionality of the rules at stake, stating that the prohibition was circumscribed to address the precise risk of distortion the State wished to avoid and that the rules in question were “considered to go to the heart of the democratic process.”²⁰ Paraphrasing the Animal Defenders’ argument that “the Government could have narrowed the scope of the prohibition to allow advertising by social advocacy groups outside of electoral periods”, the Court accepted the conclusions of the British judges that a less restricting rule would raise the risk that wealthy bodies with political agendas were able to circumvent the norms with the help of social advocacy groups created for that particular purpose. The Court also remarked that the Contracting States should be allowed to consider their own democratic visions when they regulate such advertising activity.

Conclusion

This decision of the ECtHR was heralded as the one, in which the European judges avoided the very pitfall, which trapped their American colleagues, and as a European victory of political

¹⁹ Ibid, [17].

²⁰ Ibid, [117].

equality.²¹ While in fact they did not do anything else but allowed a blanket ban on political speech – during and also outside campaign period. It is highly questionable, whether this approach could help to guarantee political equality. As I have already elaborated, political equality also ensures that everybody has the real opportunity to influence the outcome of the elections, or putting it differently: everybody must have real possibility to spread his or her views regarding to political questions. On the other hand, political equality means that everybody is entitled to receive information about the different, rival arguments in order to be able to form a considered decision at the end of the campaign. This blanket ban, which does not differentiate between corporations with deep pockets, which try and influence the elections in favour of purely economic interests and small, single issue groups, surely does not foster the realization of political equality in this sense.

²¹ See the early comment by Jacob Rowbottom: “The decision in Animal Defenders International has come as a surprise to me, but – and many will disagree with me on this point – it is a pleasant surprise. It is one in which the Strasbourg Court has moved away from its earlier jurisprudence and emphasized the importance of insulating political debate from the inequalities in wealth.” Jacob Rowbottom: Surprise ruling? Strasbourg upholds the ban on paid political ads on TV and Radio. Available: <https://ukconstitutionallaw.org/2013/04/22/jacob-rowbottom-a-surprise-ruling-strasbourg-upholds-the-ban-on-paid-political-ads-on-tv-and-radio/> [viewed 2016. 28 August]

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