

NORMATIVE ASPECTS OF CAMPAIGN REGULATION

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Abstract:

The electoral campaign as one of the prominent elements of present-day democracies attracts attention from numerous sides. The interesting feature in accompanying debates is that while suggesting certain legal and policy solutions, participants justify their legal and policy proposals by calling upon more abstract democratic values. The relation between concrete regulatory policies and intuitively shared understandings of democracy is the topic of this thesis. Thus, the work endorses a normative approach based on political theory, which makes a valuable supplement to the existing literature on the topic coming from the field of comparative politics or legal studies. The approach consists of firstly assessing the theoretical consistency of three influential normative models nowadays: majoritarian, partnership and deliberative democracy. By focusing on the relation that each of these conceptions have towards free speech I derive more general conclusions on the value and the importance they attach to liberty and equality as constitutive principles of democracy. Further application on campaign regulations reveals inherent gaps that the particular normative model of democracy can have in its premises. Finally, it is concluded that principles derived from the conception of deliberative democracy show the greater theoretical consistency and empirical applicability over the two other normative models. For that reason, they are suitable to be taken into account when considering various policy regulations on such intense political periods as electoral campaigns.

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INTRODUCTION

The most recent decision from January 2010 by the Supreme Court of the United States that ruled down all the limitations on campaign spending provoked an exceptionally heated debate. The broad range of sides interested in the issue involved argumentations coming from lawyers, philosophers, social scientists, policy makers, journalists and even President Obama. Regardless of the position taken, each of the involved sides justifies the legitimacy of proposed legal solutions concerning the particular design of campaign regulation by calling upon the more abstract values of democratic functioning. Precisely the relation between the proposed technical and legal mechanisms of campaign regulation and intuitively shared assumptions of democratic functioning is the topic of this work.

Campaign regulation became a relevant topic in political science at the beginning of the sixties (Heidenheimer, 1970) and since then it has been mostly covered in the literature as a subject of comparative political finance or comparative public policies (Alexander, 1976; 1989; Arnim, 2000; Austin and Tjernström, 2003; Heidenheimer, 1970; Nassmacher, 2000; Pinto Duschinsky, 1999; Walecki, 2006; Wilcox, 2001). As a result, the existing literature offers an extensive overview of the variety of regulative mechanisms comparing their historical developments, contextual difference and effects produced on the particular political system.

The second most common place to find the topic of campaign regulation is in the legal literature. Indeed, currently this field presents the richest source of various positions and viewpoints on the topic. Authors (Fiss 1996; Issacharof 2008; Neuborne 1999; Sunstein 1995) here analyze the particular laws and reforms from the point of view of other legal documents and examine whether they are in accordance with the Constitution in general. Although normative prescriptions are often involved, they are coming from the legal standpoint and are based on

certain intuitively shared values of democratic functioning. In other words, their prescriptions lack a strong background from the political science theory and philosophy.

Thus, although present in the majority of the literature on this topic, normative dimensions remained on the level of generally shared and self assuming phrases in introductory chapters. However, recently some of the prominent philosophical figures (Beitz, 1984; Cohen, 1996, 2001; Dworkin, 1985, 2000, 2006, 2010; Fiss 1996) have recognized that disagreements on legal and policy solutions entail a greater philosophical debate. These authors show that the question of campaign regulation involves different interpretations of how democracy should function especially in respect to how liberty and equality as the two most vital dimensions of democracy are balanced. Although providing exceptionally valuable theoretical insights on the dimensions of the problem, the literature usually tackles it as an exemplary case in the broader context and focuses primarily on the financial side of regulation. Approaching the issue of campaign regulation from the primarily normative side of political theory while incorporating both of its broad dimensions namely finance regulation and content regulation does not find a proper coverage.

In that respect, the purpose of this work is to provide an approach to campaign regulation through the systematical analysis of three predominantly influential conceptions of democracy in order to evaluate their implications on campaign finance and content regulation policies. By assessing the consistency of proclaimed values and practical implications of democracy in the interpretation of majoritarian, partnership and deliberative notion, I argue that principles derived from the deliberative concept, when applied on the campaign regulation, correspond in a most substantial way to the complexity of contemporary societies.

A further important point to notice is that the discussion in the thesis is mainly focused on campaign regulations in the United States and debates around the First Amendment. Nonetheless, I do believe that it is possible to draw more general normative conclusions which can be taken into consideration in any debate around campaign regulation issues. This presumption is justified with the fact the US is the pioneer country of political advertising in the form which is present nowadays. This accordingly, made many other countries where the influence was imported to share the same or similar controversies. Additionally, although due to the US constitutional specificity the First Amendment occupies an exceptional place in any debate of free speech, it cannot be ignored that at the same time it presents one of the most inspiring legal guarantees ever. As a result, basic ideas that are exposed in the First Amendment stretch as an inevitable part in legal documents all over democracies nowadays. For that reason, I believe that by examining the experience of the US with accompanying debates it is possible to draw more general conclusions. In other words, the aim is to form normative prescriptions which should be taken into account in the sense of general norms when legal and policy regulations on campaign regulations are considered. However, any further regulatory specifications must consider contextual variables such as political, electoral, legal and media system as well as the historical legacy and political culture in order to produce effective and legitimate solutions.

The structure of the argumentation in the paper is organized in the following way. In the first chapter in an introductory manner the main features of conceptions of democracy relevant for the topic of the discussion are presented. The purpose of this part is to understand how these conceptions interpret and balance notions of liberty and equality. It is important to notice that these dimensions are analyzed primarily through the prism of free speech because this is the crucial concept over which debate is led. This serves as a transition to the second part of the

thesis which discusses the value of free speech and offers arguments for extracting the electoral speech as a special category. Furthermore, this part gives an overview of existing campaign regulation from a broader perspective in order to familiarize the reader with some of the terminology which is used in the rest of the work. The third part of the thesis gives an extensive standpoint of each of conceptions of democracy in their relation towards campaign regulation. Furthermore, this part is divided in a way that firstly the majoritarian version is presented with its defense of the *laissez faire* approach towards both kinds of campaign regulation; finance and the content. The focus of the second subdivision is on the partnership democracy and arguments in favor of financial regulation of campaign which this conception shares with the deliberative democracy. On the other hand, the point of departure of these two notions is in the attitude that they have towards content regulation which leads to the third subdivision that presents in a greater detail deliberative concept, its arguments in favor of the content regulation and their realization in concrete regulatory solutions concerning both categories. Lastly, in the conclusion I defend the argumentation that principles derived from the deliberative notion provide the most substantial prescriptions for the regulation of the electoral campaign.

1. WHAT IS DEMOCRACY?

1.1 Normative models

Democracy as a term regularly used nowadays serves two purposes. The one is a descriptive which is used to separate certain systems from the others according to some procedural features and the other is evaluative which is used when a person wants to express satisfaction with the system that is perceived to function in a democratic way or to express dissatisfaction with the system that shows undemocratic characteristics (Encyclopedia of democratic thought, 2001). This work deals with democracy used in the latter sense of the term or with its normative dimension. Having in mind both dimensions of the normative approach, thus evaluative analysis and evaluative constructivism (Encyclopedia of democratic thought, 2001), this work appraises relevant normative models of democracy through the prism of campaign regulation. More precisely, it assesses their normative strength by evaluating the way in which vital dimensions of democracy that these models claim to promote reflect on campaign regulation.

Principles that are in the focus are liberty and equality, therefore both constitutive for democracy. Nevertheless, as the purpose of this work is not to provide an extensive overview of the relation of these two norms, the scope of the analysis is narrowed by approaching it through one of its derivative principles which is the value of free speech. This is necessary because the subject of campaign regulation inherently involves arguments coming from a wider debate on free speech. On the other hand, value of free speech entails the greater controversy on how liberty and equality should be balanced. This, in the same time reveals deeper disagreements how should a political system be arranged to be substantially democratic.

In other words, the logic goes in the following direction. Campaign regulation arrangements reveal the attitude towards free speech, which is in fact the position towards liberty and equality that is consisted in a more or less coherently elaborated theoretical unit such as a particular normative model of democracy. Regardless whether the normative model relies on an intuitive understanding or it is theoretically conceptualized, its prevailing influence can be visible by analyzing the rhetoric of certain legal and policy solutions.

In the context of debates on the First Amendment in general and campaign regulation, Dworkin (2000) theoretically divides these models into two broad categories. The first is classified as the *majoritarian* conception where the democratic ideal lies in the match between political decisions and the will of the numerical majority which is expressed through elections with the nearly universal suffrage (2006: 131). Within this it is possible to differentiate two versions of the conception; one denoted as a populist version which says that the state is democratic to the degree to which the government pursues laws and policies that are favored by the largest number of citizens at that time; and the other more sophisticated version that finds a state democratic when its institutions give citizens an opportunity to become informed and deliberate which allows a majority to select politicians whose programs match their will (Dworkin, 2000:357). Regardless of the version, there is no guarantee that a majority will decide fairly, moreover its decisions may clearly be unfair to the minority that the majority systematically ignores. Nonetheless, the unjust character does not make it less democratic (Dworkin, 2006: 131).

A rivaling conception is *partnership* democracy according to which democracy is governed by all the people acting together as full and equal partners in a form of collective self governance (Dworkin, 2000: 358). Unlike the majoritarian, the partnership conception

emphasizes the substantial character of democracy, not merely procedural. In that respect, decisions are perceived as democratic only when certain conditions are met to protect the status and interest of each citizen as an equal partner creating the conditions for the mutual attention and respect (2006:131).

The third conception is *deliberative* democracy which is in accordance with the partnership model, but goes a few steps ahead. In that respect, deliberative democracy implies an ongoing and independent association in which the justification of terms and conditions of this democratic and plural association is achieved through public agreement and reasoning of equal citizens (Cohen, 1997: 72). Accordingly, institutions are perceived as legitimate insofar as they provide a framework for a free public deliberation (Cohen, 1997: 72). In other words, the main presumptions are that members of a political community recognize each other as equals in a substantial and procedural sense in order to achieve deliberation based on a reasonable and rational argumentation. Lastly, the members are ready to act in accordance with the conclusions reached by deliberation and accept its decisions as authoritative (Cohen, 1997).

After a rough sketch of basis premises of nowadays most prominent understandings of democracy, the next step is to explain their relation towards equality and liberty as constitutive political ideals of mature democracies. Different understandings and emphases that majoritarian, partnership and deliberative democracy place on equality and liberty will serve as an introduction to the problematic relation towards free speech regulations proposed by these conceptions and consequently campaign regulations. Furthermore, the proposed regulations will be evaluated on the basis of consistency with the normative framework upon which they are based, but more importantly with the general defense of free speech expressed in personal autonomy and precondition for credible democracy arguments.

1.2 Concept of liberty

We can agree that the previously described conceptions share the recognition of equality and liberty as constitutive principles of democratic conduct. It is possible to characterize their constitutive character, as opposed to derivative, because they fulfill the criteria of authenticity, completeness and distinction (Dworkin, 1985:187). However, as these principles are often in a conflict, the resulting balance between them will be the product of different relative importance these conceptions attach to them.

Before analyzing the different relative importance of these conceptions towards equality and liberty, it is necessary to present these principles more in detail. As liberty will be presented slightly less extensive, I begin with this notion.

We can agree that liberty is not just a freedom (Dworkin, 2006), and in the core of the debate is its relationship with the personal responsibility. Dworkin (2006:69) defines liberty as a “right to do what you want with the resources that are rightfully yours”. This definition implies that although a person has a right to choose a life path that she or he finds rightful, it still finds its limits in damaging other. For Dworkin (2006:71) the distinction between personal and impersonal judgmental justifications is crucial in the defense of liberty. By making it, we are able to differ laws that violate dignity by intruding into personal responsibility in the choice of ethical values and those that present a form of collective responsibility in protection of non-ethical values.

Thus, freedom of speech is a form of liberty in its intrinsic sense, not only in the instrumental one (Sunstein, 1995: 28). It is intrinsically valuable because it enables an individual to develop personal capacities in an autonomous way which promotes “courage, self-mastery [and] virtue” (Sunstein, 1995: 28). That is why every attempt to limit the range of expression is

perceived as a paternalistic intrusion in somebody's autonomy and a possible "slippery slope" for further restrictions. Furthermore, as speech is only an expression it cannot cause direct harm, which is why the contextual circumstances that can lead to harmful effects should be a subject of restriction. And lastly, as an answer to injustice that certain forms of speech can cause, the only allowed solution is to answer with more speech.

In conclusion, restrictions on free speech and consequently on campaign regulation need to show that they do not intervene with the personal autonomy and responsibility in choosing the ethical path of life of an individual if they tend to be acceptable.

1.3 Concept of equality

The concept of political equality presents an even more controversial notion. For the beginning I start with the theoretical framework developed by R. Dworkin (2000), after which I continue with the interpretations of deliberative democracy with emphases on J. Cohen's analysis.

Hence, while interpreting the value of political equality we are confronted with two different approaches. The first one is denoted by Dworkin (2000: 185) as *dependent* conception that judges the best form of democracy by its likelihood to produce substantive decisions while treating its community members with equal concern. In that respect, a community that cherishes democratic feature as free speech is valued because it is more likely to distribute material resources and other opportunities in a more egalitarian way (2000: 186).

On the other hand, *detached* interpretation judges the fairness of democracy by looking only at the process and evaluating whether its features distribute political power in an equal way, not what results it promises to produce (2000: 186). In that sense, freedom of speech helps to make political power more equal. However, any democratic process has both distributive and participatory consequences. Distributive consequences will be fixed according to the decision

dividing resources into public or private, regulating transfer, taxation and regulating the compensations and constrains (2000: 186). Participatory consequences, on the other hand, result from the character and distribution of political activity. Dworkin (2000: 187) identifies three kinds of participatory consequences that need to be taken into account by an egalitarian community. They include namely symbolic ones which are consequences of declarative manner. Then the second are agency consequences which connect politics for each individual with her or his moral experience. Lastly there are communal consequences which consist in the impact of the political process in creating a cohesive and fraternal political community (2000: 187).

Thus, both of these conceptions emphasize the equality of political power. But what is political power? A useful analytical distinction that helps to answer this question and which was afterwards accepted from the many authors (Cohen 1997: 2001, Knight and Johnson, 1997) that re-think the concept of political equality is offered once again by Dworkin (1985). Therefore, he divides political power along two dimensions: a horizontal and a vertical one. On the horizontal dimension we compare the power of different private citizens or groups of citizens, while on the vertical a comparison is done between the powers of a private citizen with an official.

A further important and influential distinction is made between *equality of impact* and *equality of influence* (2000: 191). More precisely, impact in politics is the difference that one can make by voting or choosing one option over the other, while the influence is not only the difference one can make on her or his own but as well the persuading power on others to believe and choose what she or he does.

The analytical distinction offered by Dworkin (1985) serves as a well designed tool for further evaluation of the relation towards political equality by different interpretations of democracy. In that sense, we can notice the compatibility of the detached version with the

majoritarian ideal, while the notion of partnership would demand either a combination of the detached version and dependent or it can rely simply on the dependent. This assessment is possible to make if we look closer on the emphases that these two versions of political equality place on consequences of the political process. In that sense, the dependent version blurs the distinction between political equality and other aspects of egalitarian theory including participatory goals assuming its interconnectedness (Dworkin, 2000: 188). On the other hand, the detached version assumes a sharp split between political equality and other forms of substantive equality (Dworkin, 2000: 192). While it is possible to agree on the equality of impact on the horizontal level which is expressed in the nearly universal suffrage, nowadays the more serious problem presents criticism about unfair influence that certain individuals or companies have over the political process. On this challenge the detached version does not offer a satisfying answer.

On the other hand, deliberative democracy as an ideal of political legitimacy (Besson and Martí, 2006: xv) perceives political equality as the most fundamental condition for deliberation (Bohman and Regh, 1997: xxii). In that sense, authors on deliberative democracy go beyond demands for building equality into procedures and ideals because it is self understood that procedural equality in a sense of equality to participate in a political decision making is crucial for democratic legitimacy and ask for the greater substantial equality (Bohman and Regh, 1997: xxii).

Cohen (2001) sees the structure of the principle of political equality in three components. They include the equal right of participation, equally weighted voices and equal opportunities for effective political influence (2001: 49). This last norm, the equal opportunity for political influence, presumes an *autonomous* importance to political equality. Thus, it goes beyond detached or dependent importance to political equality and demands besides the electoral

influence, a right for the public influence as well (2001: 52). In other words, deliberative democracy perceives political equality as a substantial and intrinsic norm which needs to be understood in a complex way.

In the interpretation of Knight and Johnson (1997), this ideal is equal opportunity for access to political influence, while for Bohman (1997) it is equally effective social freedom. In that respect, the concept of deliberative democracy with its emphases on equality, liberty, pluralisms and deliberative form of communication, which implies rational persuasion based on the force of arguments, will have significantly different demands in free speech regulation than the majoritarian, but as well the partnership conception.

To recapitulate, the majoritarian conception focuses exclusively on the procedural side of the democratic process while ignoring the substance and outcome. Accordingly, the relation of majoritarian conception and equality goes in the line with the detached conception of equality which does not take into account participatory consequences of the political process or political equality is the sense of equality of influence. On the other hand, partnership and deliberative democracy place focus on the substantial side of the political process, but differ in emphases that they place on political equality. Hence, while partnership democracy goes in line with the dependent understanding of democracy recognizing the importance of equality of influence besides merely equality of impact insisting on the participatory consequences, deliberative democracy; besides that, asks for equal rights of participation, equally weighted voices and equal opportunity for effective not only electoral, but public political influence (Cohen, 2001). The next step is to understand in what way these different positions shape propositions for free speech regulations in order to understand the link between normative models of democracy and campaign regulation.

2. DEMOCRACY AND FREE SPEECH

2.1 Value and the special guarantee

Free speech is perceived to be a major liberal value (Haworth, 1998:16) and nowadays it is read as a bulwark of democracy (Neuborn, 1999: 1070). Its most debated and in the same time most inspiring guarantee is expressed in the First Amendment of US Constitution with the words “The Congress shall make no law abridging the freedom of speech or of the press” (Sunstein, 1995: xi). Formulated in this way, the First Amendment imposes barriers to official censorship, forbids the government from ordaining any official orthodoxy and prevents the majority from entrenching their own preferred positions (Sunstein, 1995: xi). Its creator James Madison pictured it as the life cycle of a democratic idea (Neuborne, 1999: 1069). This idea starts with the formation of the individual belief that is communicated to others through speech and press and which consequently provokes collective action by assemblies and associations and finally establishes itself into public policy (Neuborne, 1999: 1069). Hence, by emphasizing the public character and interaction with others it endorses a conception of democracy which encourages rather than suppresses the diversity of opinions and creates preconditions for social deliberation.

But why is it important to protect a special value of free speech? What are the moral and political principles behind it? Although there is a vast amount of literature elaborating on this issue, I summarize the most influential arguments. Besides James Madison (1788), the most influential writings on freedom of speech in the liberal thought include Milton’s (1644) *Aeropagatica* and the classic defense of Mill (1859) in *On Liberty*. Hence, for Mill free speech has an instrumental value (Dworkin, 1985: 185) because it enables the discovery of truth through collision of opinions that takes place when ideas are freely discussed (Haworth, 1998:4).

Furthermore, in the core of free speech guarantee is the protection of the individual's autonomy in a sense of making autonomous decisions about politics, religion, economics and lifestyle without the government's intrusion (Neuborn, 1995:2) that makes the basis of the liberal neutrality argument. Nonetheless, in the further argumentation it will be necessary to keep in mind the theoretical distinction and the balance between the listener's and the speaker's autonomy in order to assess in a more complex way the autonomy argument in general.

The following arguments in favor of the free speech guarantee are endorsed by Dworkin (2006) and rely on two dimensions of human dignity. They are namely recognition of intrinsic value of each human life and personal responsibility for a life to be lead. In that sense, freedom of speech is a crucial factor in protecting human responsibility to identify and seek value in their lives and secondly this freedom is a key condition for realization of the substantial conception of democracy (Dworkin, 2006: 153). Thus, it is important to recognize not only the purpose of the constitutional right to protect private interests and private rights, but as well a purpose to ensure discussion and debate of people with genuinely different positions in the public sphere (Sunstein, 1995: 241).

However, even though different conceptions recognize the value of free speech as a crucial civil liberty that cherishes the personal autonomy, responsibility and expression as well as its instrumental value in truth finding and disclosing injustice or corruption of the government, these conceptions have remarkably different interpretations how this is to be realized. More precisely, the most prominent theoretical debate nowadays is about the disagreement on how the legal design of the guarantee should look like.

An instructive theoretical categorization of arguments against free speech regulation is offered by Cohen (1993). Hence, the author names the first strategy of argumentation minimalist

because it focuses purely on the bad that that is prevented by the stringent protection of free speech and it argues that the expression unlike the action cannot be in itself harmful (1993: 218). Moreover, the harm can result only in the conjunction with the circumstances which are possible to restrict without abridging the expression itself (1993: 218). Besides that, the regulation can serve as an excuse for the government or anybody in power to silence the critique and other possibly subversive acts. The other category of the argumentation is maximalist which emphasizes that benefits of the free speech guarantee override the costs (1993: 220).

However, there is considerable part in the debate of those who consider that the free speech guarantee has other dimensions to take into consideration besides the speaker's autonomy. These arguments emphasize the instrumental purpose of free speech in realizing a democratic and deliberative form of self government, but as well detrimental and silencing effects which result from the absolute interpretation of free speech guarantee.

Sunstein (1995) divides general free speech regulations in three broad categories. The first one includes content neutral restrictions meaning that the content is irrelevant whether the speech should be constrained (1995: 11). The second category includes viewpoint-based restrictions which are especially dangerous because by restricting a speaker's view the government can silence the debate side (1995: 12). The third category includes content based restrictions in which the degree of neutrality depends whether they are view point neutral or view point based restrictions on the content of the speech (1995: 12).

From the view of deliberativists certain forms of speech prevent or usurp some individuals or whole groups from the participation in the deliberation debate. This especially refers to categories such as libel, hate, racist and sexist speech or "fighting words". More in particular, the enemy of individual freedom and autonomy is no longer perceived to be the state,

but the fellow citizens. This is an especially present argument in contemporary prevalingly multicultural societies in which hateful or humiliating speech coming from certain parts in the society can seriously undermine self-respect of minorities (Smith, 2009: 163) and consequently discourage them from taking part in the political process or even public life. Moreover, in most of the cases this manner of expression does not provide any arguments nor is it elaborated in a way that it is possible to fight it back in a reasonable way. By holding these characteristics it is questionable how this expression-speech cherishes personal autonomy (either of the speaker or the listener), how does it contribute to the finding of the truth and how it enables a deliberation process.

That racist and xenophobic expression presents a serious threat for human rights is recognized by the United Nations in the International Convention on the Elimination of All Forms of Racial Discrimination (CEDR) (1965/1969). The mentioned convention in its article 4 explicitly states that:

[s]tate parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement [...]

A similar logic is expressed by the European Court of Human Rights which holds that “certain restrictions to speech might be necessary in a democratic society” (Bowman v.UK, 1998). However, as it is necessary to bear in mind the historical legacy and constitutional landscape while analyzing the legal solutions, it might be more instructive to turn to Canada while comparing free speech guarantees with the First Amendment of United States.

Thus, the United States did sign, but never ratified the CERD precisely because of preoccupations with the article 4. On the other hand, Canada, a country with a similar

constitutional landscape under its Criminal Code, declares as a criminal offense “advocating genocide or inciting hatred against any particular group – defined as being on based on race, ethnicity, color, religion or sexual orientation” (Smith, 2009: 155).

These arguments find its expression in writings of many critiques of libertarian free speech regulation. This side of the debate (Meiklejohn 1965; Fiss 1996, 1997; Sunstein) emphasizes that the First Amendment was not designed exclusively to protect personal autonomy, under which they refer to speaker’s autonomy, but to contribute to the creation of conditions which enable citizens to make quality democratic decisions.

In Fiss’s (1994) interpretation a state should intervene to create conditions suitable for public deliberation even if that includes restrictions on some speech in order to enhance the relative voice of others. In other words, the state is legitimized to impose caps on the election spending and restrictions on hate speech or pornography because this contributes to the generally more inclusive public discourse and fights the otherwise silencing effect for groups concerned.

The silencing effect, according to Fiss (1994:16) takes place in the case of hate speech in a way that it “diminish[es] the victims” sense of worth and therefore prevents them in taking the active part in the political process as well as in public life. A similar logic applies to pornography which by reducing women to sexual objects reduces their credibility and lowers their self-esteem. As a result, they are not expected to contribute nor they feel capable for contributing to the public discussion (Fiss, 1994:16). Furthermore, in the case of campaigns, Fiss (1994; 1997) argues that unlimited election spending enables economically affluent to monopolize media and other public sphere which results in the restricted agenda discussion and limited number of opinions and ideas discussed. Accordingly, the value pluralism as well as all the societal

diversity in terms of ethnic, gender and economical status, will not have the voice to express their positions.

Further critical standpoints on the role of free speech guarantee and its impacts on societal relations coming not directly from deliberative democracy, but legal feminists and authors that deal with multiculturalism are presented by MacKinnon (1991; 1995; 1996) and Parekh (2001). The mentioned authors assess the free speech from the prism of power relations which this guarantee preserves or undermines. For MacKinnon (1991) this guarantee impacts differently the group that is in power to speak and the other which is not. For instance, pornography and hate speech cause real harm and therefore should not be treated merely as an expression, but as an action with damaging consequences. In case of pornography this is the legitimization of the abuse of women and internalization of gender inequalities, while in the case of hate speech this includes a whole range of physiological consequences.

Parekh (2001) extends this logic on group defamation and suggests that the criminality of libel as an exception of free speech guarantee should be applied in this case as well because it damages group's public reputation and social status.

From the arguments presented, it is clear that the debate on free speech entails numerous points of view and valid claims. As this work approaches to the issues of free speech through the prism of campaign regulation, it is necessary to see how the presented arguments can be accommodated within the framework of existing regulations as well as what are the following controversies. Nonetheless, for the argumentation in favor of campaign finance and content regulation it is crucial to show that electoral speech as form of political speech can be treated as a special context in which certain restrictions that are not allowed usually can be permissible. That

is why the following step is to make a link between arguments in favor of regulation or deregulation of free speech in general with the electoral speech in particular.

2.2 Electoral speech

Electoral campaigns involve a political speech which, according to some authors, deserves even more stringent protection of the First Amendment because during that period all the possible resources should be directed in order to achieve as broad range of ideas discussed as possible. Moreover, political speech as such demands the highest possible protection to escape censorship of the government and to be able to disclose misuses and corruptions.

However, there are valid arguments claiming that electoral period requires a special regulation which can and should differ from the general free speech norms (Briffault 1999; Issacharoff 2008; Thompson 2004)

The logic of this argument is exposed in BCRA¹ from 2002 in which the election period is defined “as a period of greater regulatory authority over electioneering communications that are likely aimed at affecting voter choices in elections” (Issacharoff, 2008:104). Or as Briffault (1999: 149) puts it “election-related activity is focused on persuading voters to make a choice among contending candidates shortly before a precise date on which they have a political obligation to choose”.

¹ Bipartisan Campaign Reform Act (2002) designed to solve two major issues of US campaign finance regulation; soft money and issue advocacy (Holtz-Bacha and Kaid, 2006:40)

But what is the ground for defending the exceptional character of the electoral speech in relation to the other forms of political speech in general?

Thus, the election period is not yet another arena for a public discussion, but rather a time period for voters to make a limited and until the next elections irrevocable decision among presented options. Thompson (2004) identifies temporal properties of the election period which should justify different standards of regulation. These properties include namely periodicity in a sense that of intervals in which citizens vote. Then simultaneity meaning the range of time in which citizens vote and finality which refers to the extent to which the result of their votes is conclusive until the next elections (Thompson, 2004: 51)

In particular, the last temporal characteristic or the finality of results justifies different standards applied on the regulation of the speech in the campaign. More precisely, the dimension of finality has two aspects. The first one is that debates of the debate during the electoral time have a foreseeable time for the conclusion, and the second is that they result in decisions which are binding for all citizens (Thompson, 2004: 61, 62). These characteristics separate the election time from the ordinary political discussions and indeed can be considered as a part of the government and not merely as the influence towards government in which every citizen has an interest in the integrity of the process and right for the participation in setting the standards to the control (Thompson, 2004: 62).

In other words, this logic of argumentation leads us to what Schauer and Pildes (1999) name as “electoral exceptionalism”. The exception in this case is of course in the relation to the guarantee of free speech in the First Amendment. Under this exception it would be permissible to impose spending caps or requirements for the disclosure and certain content regulations.

But, would this be indeed an exception to the norms of the First Amendment? Or to put it differently, is there something what can be called a general or a unitary sphere of free speech (Schauer and Pildes, 1999) to which regulation of the election period would stand as an exemption?

The answer is negative. There is no standard and unitary conception of the political or free speech. While judging the applicability of the First Amendment, various settings and contexts are taken into account. Thus, the election speech is merely one among the various settings in which political speech can take place. Accordingly, the addressed regulations take into account specifics of the institutional, field or media context (Schauer and Pildes, 1999:111).

Furthermore, if the election rules “vindicate collective interests as well as individual rights” (Briffault, 1999: 136) it is essential to connect its regulation with values that are intrinsic to election such as political equality, taking an active part in the process of government, deliberation and informed choice. For that purpose, contribution limits and restrictions on corporate and union donations intend to prevent the distortion of electoral result in a less representative way than its popular climate while the requirements for disclosure make the whole process transparent.

Moreover, regulation of other areas of elections such as eligibility to participate, disclosure requirements, rights related with balloting (who has a right to cast a ballot, names of candidates, place of balloting), size of the voting unit show that the particular character of the elections has been recognized and that it functions on stricter criteria than usual political or public conduct. Thus, if it is legally recognized to demand disclosure obligations, then it seems inconsistent and unjustifiable to refuse special treatment of the electoral speech in a form of restrictions on expenditures or specific content regulation.

But, as I already mentioned in the beginning, there are arguments claiming that precisely due to the critical importance of the campaign period the place should be less regulated and leave the door open for all kinds of opinions and positions. Thus, we can say that there are different interpretations what “electoral exceptionalism” exactly means. That is why it is necessary it is necessary to analyze the particular values on which these conception call upon in order to be able to assess the plausibility of presented arguments and logical consistence of the campaign regulation proposals.

At this point, it is useful to present forms in which campaign regulations can come. Or, in which forms nowadays it is allowed to transmit the electoral speech and messages of political communication. Based on the following classification, it will be possible to translate abstract norms of democratic functioning into concrete solutions of the electoral campaign sphere.

2.3 Existing campaign regulation forms

The political communication, especially in the context of electoral campaigns and political advertising has a prevailing importance in nowadays democracies. By definition, political advertising includes every controlled message via any channel that is designed to promote political interests of individuals, parties, groups, governments or any other organization (Holtz-Bach and Kaid, 2006:4). However, by the time it became apparent that this domain needs to be regulated in order to ensure relatively balanced electoral field for various political options (Scammell and Langer, 2006: 68).

As the topic of this work refers to normative dimensions of the campaign regulation, I will not go too far into technical peculiarities. However, as throughout the work various regulations are mentioned as well as solutions and recommendations, it is necessary to present at least some kind of overview. Nonetheless, what is important to emphasize in any discussion on

this issue is that it is needed to bear in mind contextual differences while assessing the existing solutions from country to country. For that purpose, I will firstly present variables that need to be taken into account while judging either the practical or the normative side. After that, I precede with the clarification of the two main dimensions of the campaign regulation that make the crucial distinction in theoretical considerations; content and finance regulation.

Thus, in order to interpret features of the political communication and accompanying regulation properly, distinct variables of national backgrounds need to be considered. These variables include in the first place political and electoral systems which consequently determine the role and the importance of parties and candidates. So, in European countries with parliamentary systems the prime minister as a leading figure and parties have prevailing importance, while in the United States the cabinet is less important and a decisive role is played by presidents. This feature is reflected for instance in the fact that only in the United States candidates finance for themselves television advertising (Holtz-Bach and Kaid, 1995: 11)

A second important variable to be considered is the media system. This refers to the media system in general as well as to the broadcasting system and the importance of different media for the audience (Holtz-Bach and Kaid, 1995: 12). For instance, commercial broadcasting and competition have a long tradition in US unlike in the most of the European countries where the public broadcasting plays a significant role as well.

This on the other hand, influences the character of political broadcasting as the third important feature. Political broadcasting refers whether political advertising is financed privately or publicly or some sort of combination of these two, if the political advertising is disseminated through public or private channels or both, if there is a possibility for the free purchase and on what basis as well as if there are certain content or time restrictions.

In addition to these it is necessary to add the character of the legal system (civil law or common law), historical legacy, political and civil culture.

2.3.1 Campaign finance regulations

The first category and in the same time most controversial and most debated part of the campaign regulation is its financial side. Sources of campaign finance can be divided on private funding and the public ones. The last category, the public funding in the sense of donations from the state budget is a relatively recent phenomenon² (Petak, 2001: 37). Nevertheless, the two ways of finances do not exclude each other and very often a combination of both is in use³.

From the non direct financial founding, there is a possibility for a free media access intended only for the electoral purpose. Other non direct sources of founding include tax relieves and/or tax credits which are used for instance in Germany and Canada in order to disperse the sources and in that way prevent the monopoly of big donors and corruption (Petak, 2001: 42). In addition, in the United States a way of non direct financing are so called “party taxes” (Petak, 2001: 42).

Thus, these are the ways through which parties and candidates can get funds for their functioning and promotion. However, as these activities include very often significant amounts of money which has a growing curve by the years, it is of paramount importance for the health of the democratic process to have some kind of the surveillance on the flows of money.

² Petak (2001:37) lists Costa Rica and Argentina as pioneers of this type of regulation which started with this practice during the fifties of the last century

³ Public financing although widespread and preferred over exclusively private funding, needs strong and detail disclosure requirements to avoid often corruption scandals which for instance occurred in France or Germany recently (Petak, 2001)

According to the IFES Training in Detection and Enforcement (TIDE) Program (2002), basic ways of campaign finance regulation include some of the following forms. This is in the first place the ban of corruption and other illegal practices as the vote buying, then the demand for the public disclosure, limitations on contributions and expenditures, forbiddance of certain kinds of donations (such as anonymous or donations by foreign donators or business corporations), public subsidies, rules of advertising and the control of the (mis)use of public administrative resources.

To conclude, all of these measures in order to become realized and accepted from the general public as well as from the political elite, needed and still do need a normative justification. In fact, all the legal documents concerning the practical measures of regulation call upon the protection of certain democratic values. However, as we will see in the rest of the work, values as well as the interpretation of them and means how they should be best protected vary significantly.

2.3.2 Campaign content regulations

The second category is the content restriction which does not share the same range of acceptance as the limits on finances. This is because it involves a delicate balance between restrictions of free speech and expression on the one hand, and introducing the rules in political communication which would enable fair ground of electoral battle and inclusion of various voices on the other. For that reason only a limited number of countries have serious limitations on the content of political advertising.

The content restrictions can come in two forms. One category includes the regulation of the format under the explanation of ensuring that a message with a serious political content is disseminated, and the other involves restrictions on the content that aim to prevent messages

with the improper or illegal material (The Electoral Knowledge Network, last visited May 21, 2010). The former includes the proscribed length of spots and other advertising forms, while the latter may include prohibition of negative adds or the combination of political advertising with other commercial content⁴.

As it is mentioned at the beginning, while assessing different kinds of regulations, it is necessary to bear in mind the national backgrounds with all of their distinctive features such as the character of the political, electoral, media and legal system, political culture and various historical legacies. That is why content regulations in certain countries call upon the prevention of the uncontrolled commercialization under the influence of “modernization” (Swanson and Mancini, 1996) and “Americanization” (Holtz-Bach and Kaid, 1995) of political communication. Others countries with the restrictions on the hate speech aim to prevent mobilization on violence as it is the case in divided countries which recently went through ethnical and other conflicts (The Electoral Knowledge Network, last visited May 21, 2010).

Regardless of the particular cause, each of these regulatory practices, if it aims to be accepted by the society in general and as well as defended as a legitimate legal solution, needs to have attached more abstract values. These values are usually directed to fulfill a more substantial functioning of democracy. In other words, these legal solutions are perceived to have an instrumental purpose in order to enhance political equality, liberty, participation or expression. Hence, the purpose of this work is to question whether the implications of these technical solutions match the proclaimed principles, to what degree are they consistent with other values and lastly how do they correspond to contemporary societal needs. As I refer mostly to the

⁴ In this respect, France seems to be an interesting example because their rules imply that no more than forty percent of the content can be based on film footage neither are they allowed to use national symbols such as flags or anthems or to show the place where officials do their duties (Holtz-Bach and Kaid, 1995: 17).

debates in the United States, reached conclusions indeed reflect the needs of the American system. Nonetheless, as the topic of this work is normative dimensions, implications are valid for the contexts of other contemporary societies and reached conclusions can serve as a basis when campaign policies are considered. As I said in the beginning, this link is possible to make because the US are a pioneer country in political advertisement which had tremendous impact on all the other countries. In the same time the First Amendment makes one of the most influential and inspiring legal solutions ever whose main ideas stretch in legal documents of all liberal democracies. For these grounds, it is reasonable to draw general normative conclusions applicable in any debate over campaign regulation. Nonetheless, it is equally important to note that any further regulatory specifications need to bear in mind system variables which have to be considered when designing effective and acceptable solutions.

3. NORMATIVE MODELS OF DEMOCRACY IN RELATION TO CAMPAIGN REGULATION

3.1 Majoritarian conception

Democracy is the government by the people and in the interpretation of the majoritarian concept, its ideals are realized when political decisions match the will of the majority (Dworkin, 2000). Within this normative framework, a citizen is perceived as a passive judge in the political process that needs to be as free as possible to collect as broad range of information as possible to decide to whom to give her or his vote. The literature commonly refers to this model as an aggregative model of democracy (Cohen 1996; Mouffe 2000).

Within the majoritarian conception, free speech has an important role. It is perceived as a value that needs to be cherished in order to enable citizens to inform themselves as fully as possible and based on that make individual and collective choices (Dworkin, 2000: 358). The best way to provide an opportunity for the full information is to permit anybody that wishes to address to the public whatever she or he has to say, in whatever length and regardless how unpopular this message may be seen by the government or fellow citizens (Dworkin, 2000: 359).

Sunstein (1995) describes this type of regulations that permits nearly absolute freedom of speech as a “marketplace of ideas” which is lead by the “invisible hand”. Hence, it functions on the principles of a private market meaning that one’s message will be heard if she or he has enough money to send it through communicational means. In that sense, a legal proposal to limit campaign donations because it enables some to exercise significantly greater political influence than others is perceived as a paternalistic attempt of government to limit what public can hear. In the core of the majoritarian conception is a strong notion of political neutrality and liberal individualism.

3.1.1 Argumentation in favor of unregulated campaign finance

In that respect, the majoritarian concept tests any reform on electoral system by asking if the structure reveals what a majority of citizens would choose after fullest possible opportunity for information and reflection (Dworkin, 2000: 359). Moreover, what would be conditions to provide fullest possible range of information and enable citizens to vote according to their “authentic” interests? In that sense, is it permissible to restrict overall volume of speech, as it would be with proposed limitations on spending, and thus alter the public opinion? The answer on the last question is negative. There is no ground within the majoritarian conception that would justify expenditure limits. The clearest example of this position can be found in the Buckley verdict⁵ itself:

In the free society ordained by our Constitution it is not the government, but the people-individually as citizens and candidates and collectively as associations and political committees-who must retain control over the quantity and range of debate on public issues in a political campaign. (in Dworkin, 2000: 362)

Therefore, democracy itself is best protected by forbidding the government to limit or control political speech under the excuse of protecting democracy (Dworkin, 2000: 353).

Besides the merely normative assumptions, for which the aggregative concept is not keen anyways, proponents of the majoritarian conception in the campaign regulation often call upon the empirical studies that claim the costly affects of restrictions.

One of the examples of the libertarian defense of unregulated campaign finance is offered by Smith (1996). Hence, the author firstly challenges what he sees as commonly accepted facts on campaign finance. These namely include the thesis that too much money is spent in

⁵ Buckley v. Valeo (1976), a decision by the Supreme Court of United States which imposed limits on contributions, but ruled that the money has a translation function and should be granted the protection of the First Amendment. In that sense candidates do not have limitation on spending. For all the mentioned reasons, it is considered as a “landmark case” in the US legal system (Schneider, 1976)

campaigns, then that small contributions are better than the larger ones and that money buys elections and corrupts politicians (Ortiz, 1996; 96). By calling upon certain empirical evidences such as that there is no meaningful relationship between campaign contributions and patterns in legislative voting, Smith (1996; 108) argues that the listed theses are false or unsupported assumptions.

That is why Smith (1996:110) opts for a *laissez faire* approach to the campaign finance because, among other things, the regulation favors incumbents and status quo by making it harder to raise funds for newcomers. Besides that, restricted contributions are likely to decrease people's ability to monitor representatives and keep them from shirking (Ortiz, 1996: 96). And it would open a possibility for bribery and circumvent of the regulation.

An instructive study from a public choice perspective on campaign finance is done by Abrams and Settle (2004). Thus, by presenting interesting data, the authors test the hypothesis on the timing and likely causes to bring a regulation law, concretely in this case BCRA from 2002, which restricts contributions and expenditures and the causes of the rise in campaign spending. The authors conclude that regulations of campaign spending that are below the equilibrium make parties and candidates more likely to avoid the regulation (2004: 394). In result, this increases unofficial spending and asks for further regulation. Furthermore, restrictions on spending might result in "redistributional effects by altering election outcomes, heighten the relative importance of voting blocs and reduce voter turnout" (2004: 394). Consequently, every regulation designed by regulators themselves should be seen with caution. In that way, it can be predicable that possible reform for public finance in the USA will be supported by Democrats and opposed by Republicans merely because it is in their personal interest less than a public concern. A solution proposed by Abrams and Settle (2004: 396) is that instead of regulation on finance and content,

strong disclosure requirements would do the better job in the interest of the greater public and society.

A similar logic of the argumentation implies to the other part of the campaign regulation which is a content regulation. For that purpose, I will firstly present a defense of unregulated content of the campaign, after which I proceed with the arguments that question and undermine the presented defenses.

3.1.2 Arguments in favor of unregulated campaign content

The same refers to the content regulation of the campaign. The majoritarian conception with its strong notion of neutrality and relying on the liberal individualism leaves the advertisement content to be judged by an individual. Although there can be bad consequences caused by false speech or hate speech, the regulation would bring more harm.

As it is mentioned in the beginning, it is possible to classify these arguments in the categorization offered by Cohen (1993). Hence, the first strategy of argumentation can be identified as minimalist because it focuses purely on the bad that that is prevented by the stringent protection of free speech and it argues that the expression unlike the action cannot be in itself harmful (1993: 218). Moreover, the harm can result only in the conjunction with the circumstances which are possible to restrict without abridging the expression itself (1993: 218). Besides that, the regulation can serve as an excuse for the government or anybody in power to silence the critique and other possibly subversive acts. The other category of the argumentation is maximalist which emphasizes that benefits of the free speech guarantee override the costs (1993: 220).

Translated in the context of content regulation of the campaign, arguments against it have some of the following forms. Thus, restrictions on the content, are not necessary because voters

often do not believe everything they hear during the campaign or at least take it with a precaution (Marshall, 2004: 297). Furthermore, a discovery that a candidate hides or lies on something can serve to her or his opponent as a great chance to expose it and gain votes by showing the other side as not trustworthy and an unreliable impostor (Marshall, 2004: 297). By doing so, voters would be actually better informed about candidates and options to choose for their representatives.

Additionally, restrictions on campaigns mean restrictions on the political speech which is a category especially sensitive under the free speech guarantee. The electoral campaign is not less than a battle and in the heat of that battle, candidates will get tempted to say something false, derogatory or offensive about her or his opponent (Marshall, 2004: 297). However, it is up to the other side to answer and to convince the audience by the strength the argument that the presented statements are not true and why is this so. Furthermore, leave up to the government to decide what is true and what is false and what is moral and what not seems to be especially dangerous from several reasons. Firstly, taking the “truth-finding” function from citizens is perceived to be a paternalistic attempt of government’s involvement which is at odds with the value of free speech and the personal liberty. Secondly, it leaves open a possibility for a partisan abuse (Marshall, 2004: 299). As it is often very hard to estimate whether a certain advertisement or a speech is fake or true, a permitted disclosure of the opponent or an insult, a factual thing or a hyperbola the doors are open for a suspicion that the committee or a court that will take the decision might be biased or under the political pressure to take a side.

Therefore, the side of the debate which is against content regulation provides a strong argumentation why we should reject the restriction. This is primarily because we have at stake some of the arguments which are in the core of the special status of free speech guarantee as the

autonomy and truth seeking argument. As the content regulation of the campaign can include restrictions on both; on the content and on the view point which are the categories especially sensitively protected under the free speech guarantee, all interested sides in the debate on campaign regulation are very careful and reluctant when it comes to the content regulation. Nevertheless, it remains to see why there is a significant number of authors that consider content regulation necessary for the well functioning of democracies, what is their line of argumentation and what are the boundaries of regulation.

Responses to the majoritarian conception and its libertarian proposals for the *laissez faire* approach to the regulation of the campaign's content and finance has been critically assessed from various directions. For the purpose of the context, this work will present two theoretical conceptions, namely partnership democracy and deliberative democracy which answer critically to the challenge posed by proponents of the majoritarian view. In that sense, firstly the partnership conception with its main features is presented. In this part, along with the deliberative they reexamine majoritarian assumptions on campaign finance regulation. However, the point of departure of the partnership conception from the deliberative is in this case the content regulation which is why the content regulation is presented in the third part on deliberative democracy.

3.2 Partnership conception

Partnership conception insists on meeting certain conditions for a more substantial version of democracy. These conditions are expressed in its three dimensions which are popular sovereignty, citizens equality and democratic discourse. Accordingly, partnership democracy offers a “discriminatory strategy” which does not allow any regulation of speech that would

damage citizen sovereignty or equality thus it does not support restrictions on for instance discussion of sex affairs of officials or racist or sexist speech (Dworkin, 2000: 370). However, it allows repairing democracy on dimensions that will not “substantially damage” either sovereignty or equality. Therefore it permits ceilings on campaign expenditures because it mends significant citizen inequalities as long as they do not reduce criticism of government or introduce new inequalities (Dworkin, 2000: 370). In other words, it is necessary to introduce a balance which would enable greater equality in the society. The balance means that the free speech in a form of paid expenditures and contribution in electoral campaigns is permitted to limit because it would not interfere into the regulation of the content and in that way open a possibility for a government to avoid criticism or to damage the concept of personal autonomy. However, although it would restrict the overall quantity of speech, it would enhance equality and possibility of each citizen to take an active role in the political process.

It is important to highlight the role of the citizen in these conceptions. Hence, it is assumed that citizens in mature democratic societies have two main roles: those of judges of political contests in competitive elections, and those of participants in the political competition. The majoritarian conception of democracy recognizes only the first function, while for the partnership notion both of these functions play equally important roles. Precisely this differentiation seems crucial for Dworkin’s (1985; 1996; 2000; 2006;) critique of the “individual-choice” conception of politics (Ortiz,1996:96). The former conception makes mistake in taking into account merely the function of the citizen as a listener and a judge who can choose on the “market place of ideas” (Sustain, 1995) what to hear. It is wrong because the well functioning of the democratic politics assumes equality of opportunity to participate in the politics and to compete for the attention of others. In Dworkin’s terms (2000), by adopting a

detached conception of the equality, the majoritarian model ignores depended notion of equality and participatory consequences of the political process. In other words, the majoritarian conception lies on faulty assumptions of the democratic functioning.

3.2.1 Partnership and deliberative arguments in favor of campaign finance regulation

A concern that the well functioning of democracy is endangered by the dominance of the small and economically privileged caste which undermines the concept of self-government finds support from many philosophers, lawyers and a significant number of citizens. The majoritarian reading of the First Amendment clashes with some of the basic facts present in contemporary societies.

As the defense of unregulated campaign finance is presented mostly through the work of Smith (1996) and as his writings hold many of the arguments that are commonly used by other proponents of libertarian approach, I begin with the reassessment of his work.

Firstly, let us assume for the sake of theoretical examination that the Court is right and that money indeed has a “translation function” or in other words that the money is speech which therefore can be considered as an issue of the First Amendment. I deliberately emphasize to a certain extent arbitrary character of this judgment because there are valid reason to cast a doubt on it. For instance, although the money makes a significant part of the electoral campaign, it is far from the truth that this is the only mean through which somebody’s message can be delivered. Neuborne (1999: 27) identifies journalistic reportages and comments, talk shows, mass meetings as costless forms of communication. Besides these, one should definitely list endless possibilities of expression on Internet as a costless or with the minimum costs mean for the promotion or subversion of certain political options. Hence, it is not true that without money there would not be a chance for participation in the political discussion.

However, as I said at the beginning, let's assume for the sake of a thought experiment that the money and speech equation does have a certain validity this still is not the reason to boldly refuse regulation of the expenditure and contribution limits. Why? Because the limitations on the quantity of speech, unless they have unreasonably low ceiling, as Abrams and Settle define under the equilibrium point (2004: 394), do not prevent the message to sent to the public, only that it does not repeat endlessly. To express this mechanism Neuborne (1999:26) is using the analogy of regulation the volume of a sound truck.

On the other hand, many authors (Dworkin 2000; Cohen 2001; Sustain 1996) justify the regulation of the money and its implication on speech as relatively mild or at least uncontroversial because they do not entail restrictions on the content or the view point of the speaker. But, the underlying logic in the majoritarian conception bases its defense by ignoring the more complex role of the citizen. Not only that, but by focusing exclusively on the passive role of a judge and by ignoring the active role of the participant, it misinterprets the autonomy argument in favor of the special free speech guarantee. The misunderstanding or the partial interpretation is done by neglecting the other side of the autonomy argument which is autonomy of the speaker.

However, although the defenders of unregulated campaign finance often call upon the audience's interest to hear as broad range of information as possible to take a right decision on the Election Day, I consider this a faulty and misjudged assumption.

First of all, in the Court's verdict the difference was not made between individual, associations and corporation's donations. This kind of verdict provokes various constitutional as well as theoretical questions to be considered. Hence, under the First Amendment individuals have broad freedom of speech guarantee in order to express freely their opinions and ideas alone

or joined in an association of likeminded citizens by using the means of its own. Corporations on the other hand, do not have ideas or means of their own. Instead of that, corporations promote financial ideas created by their managers and using the money of their stakeholder which may not support the views that are promoted on their expense (Dworkin, 2010). Consequently, corporate advertising will give a misleading picture because it suggests that more people support a certain view than it is actually. In other words, the argument that the *laissez faire* approach is in the interest of the electoral body because it opens a possibility to collect as broad as possible range of information, in this case works the other way around. By giving the same status to corporations and individuals and their association which have incomparably greater economic power, the “marketplace of ideas” results in the monopoly. As a consequence, the agenda that has been set will reflect a narrow range of interests imposed by the wealthy ones while the broader public remains silent. In other words, the truth finding and autonomy arguments that justify the special status of the free speech guarantee do not give an explanation why corporations would have the same status as individuals. Moreover, as the arguments show by allowing the big economical discrepancies and inequalities to lead political debates, these values are endangered. This line of argumentation is recognized in a country which shares similar constitutional guarantees as USA. In that sense, Canada accepts an equality model of political campaigns (Issacharoff, 2008:131). The assumptions of this model are best expressed in the words by the Canadian Supreme Court:

[Egalitarian model of elections] is premised on the notion that individuals should have an equal opportunity to participate in the electoral process [...egalitarian model of elections] promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to detriment of others with less economic power [...] this in turn enables voters to be better informed; no voice is overwhelmed by another. (in Issacharoff, 2008:129)

This leads to the conclusion that the domination of corporations in the campaigning process results in the distortion or skewing of the political agenda (Neuborn, 1999:1072). In other words, there is a threat that the political decision will reflect the need of the economically powerful caste. This claim contradicts Smith's (1996) argument that there is no firm empirical evidence that money buys elections and that money corrupts politicians, to be more precise that the correlation between the biggest fund raisers and winners is not the same as the causation. Although Smith (1996: 107) is right by pointing out on the need not to confuse simple correlation with causation and to be aware of other factors as ideology, party affiliation, and political views, there are studies done on this issue which refute these claims. For instance, D. Mueller (2003: 445) builds his work on the assumptions of *homo economicus* who is a rational donor and investor. By referring on studies done by Grier and Munger (1991), Stratmann (1996b) and Poole and Romer (1985), Mueller (2003) instigates that donors expect candidates to promote the position that they prefer, but that candidates (in this case congressman) feel the obligation to return the favor, especially when the electoral race is close. Additionally, Stratmann (1998 in Mueller, 2003: 444) finds that the biggest contributions go to bank committees, which is an indication of the long term relation based on the exchange and weakening of ideological reasons. In favor of that goes the study of Langbein (1993 in Mueller 2003:445) who analyzed patterns of gun control voting behavior in Congress. Hence, the author (Langbein, 1993 in Mueller 2003:445) finds that more money the supporter of guns possession would receive he or she would less likely distance from this position. But, Langbein (1993 in Mueller 2003:445) also finds that weapon organization would give money to the politicians with the opposite positions on gun control and as a result these politicians were likely to distance themselves from their

original position. This finding goes in favor of the assumption that money influences voting patterns more than ideology or other factors.

Furthermore, the widespread notion that the official politics follows the interests of a small economically privileged part of the society and in that way distorts the political agenda results in cynicism and distrust of the general public (Neuborne, 1999:1055). This feeling of resentment and accordingly one might argue one of the reasons of the low turnout finds its empirical support. Indeed, the data shows that for instance in the United States in 1996 only 0.1 percent of the population gave more than 1000 dollars to candidates and parties (Cohen, 2001:56). Moreover, the biggest share in campaign donations was from the business sector that oversized the labor in the relation 11:1 and ideological groups by 19:1 (Cohen, 2001:56). The presented data seriously undermines the judgment of the Court as well as some of proponents of the view that money has a translation function of ideological and other political preferences into the support for the position that comes closest to the one preferred by the voter. What truly determines whether citizens will express their support through financial donations is their economical ability rather than the concern for the general political interest (Verba, Schlozman and Brady in Cohen, 2001:56). Moreover, it is clear that such a small sample of the population cannot be representative and indeed it shows to have for instance more conservative views on economic issues (Verba, Schlozman and Brady in Cohen, 2001:56). To remind once more on the studies referred by D. Mueller (2003:445), these donors expect from politicians to follow their (economic) interests and politicians in a significant number and considerably often do so more on a more regular basis than following the expected ideological path.

When these trends are put within the frame of democratic theory, one realizes that the political equality in the interpretation of the majoritarian conception is reduced simply to the

equal right for the participation, but completely ignoring other dimensions as equally weighted voices and equal opportunities for effective political influence which make a more substantial notion of political equality. Furthermore, this reduced version is not a suitable concept for contemporary democratic societies which are marked by numerous socio-economical, cultural, ethnical and other differences which ask for the representation of their interests and active share in the participation. Of course that many of these constellations have interests different than merely economical, however precisely the economical abilities make the ground of many of them and mean a precondition to be heard.

For a more substantial option which comes closer to the concept of democratic self-governing opt both partnership and deliberative democracy. Indeed, deliberative democracy wants to distance from what they identify as an “aggregative conception of democracy” (Cohen, 1996) and its tendency to reduce it merely to the procedure as it conceptualized in the work of Joseph Schumpeter (1947) *Capitalism, Socialism and Democracy* or Anthony Downs’s (1957) *An Economic Theory of Democracy*. But, when these concepts are seen through the prism of campaign regulation they tend to disagree on the parts that should be regulated, but as well on the proposed solution for the issues on which they theoretically agree. Primarily, the point of the departure of partnership from the deliberative democracy is in the attitude towards the content regulation. Therefore, it remains to see from the normative side which options better capture the complexity of the contemporary political and social life, but as well to assess the consistency of the proposals with the concepts of political equality and liberty.

For that purpose, I proceed by introducing the concept of deliberative democracy, its basic premises that are relevant for the context of campaign regulation, its arguments and accordingly related contra arguments.

3.3 Deliberative conception

The main features of the deliberative conception of democracy have been exposed in the part which discusses the notion of political equality in the light of various interpretations. As the principle of political equality plays a crucial role in this concept, it is worth to mention once again its main characteristics before going into greater detail in analyzing its general theoretical assumptions.

In order to actualize the democratic deliberation, political equality is considered as the fundamental precondition (Bohman and Rehg, 1997: xxii). This is why deliberativists move beyond the aggregative model of democracy which requires that the equality is build into procedures and demand a greater substantial equality (Bohman and Rehg, 1997: xxii; Cohen 1996; 1997; 2001).

For Knight and Johnson (1997), as well as Cohen (1996; 1997; 2001) this ideal is equal opportunity for access to political influence, while for Bohman (1997) it is equally effective social freedom or an “equal capability for public functioning” (1997: 322).

Now it remains to see in what way such a complex interpretation of the political equality is related with the other features of deliberative democracy and why is such a paramount importance attached to it. In that sense, the main notions of the conception will be presented after which its implications on campaign regulation are analyzed with some of its critiques.

For the concept of deliberative democracy the central point is a public sphere through which a rational and argument reasoning is exercised in order to base authority and legitimacy (Benhabib, 1996; Cohen, 1988; Habermas, 1996; Rawls, 1993). Thus, deliberativists initiate the debate by questioning the mechanisms of democratic legitimacy (Cohen, 1996) and ask for their public justification (Rawls, 1997). For Rawls (1993; 1997; 2001) the justification depends on the

agreement in judgment concerning at least the constitutional essentials in spite the fact of value pluralism. Furthermore, the mechanism of public justification requires from citizens as rational and reasonable individuals to defend their conceptions on an argumentative basis which would create preconditions for an overlapping consensus over the particular conception by reasoning through reflective equilibrium (Rawls, 1993; 1997; 2001)⁶.

A basic consequence of such reasoning is that often individual judgments in the light of other views need to be suspended, revisited or withdrawn in a purpose of achieving a rational agreement (Rawls, 1996; 2001). Benhabib (1996: 71) sees this requirement on an individual as necessary reflexivity or as a claim of “articulating good reason in public” to fellow citizens. This would mean in practice, that a person while endorsing her judgments would be forced to shape her views coherently in order to defend it, but as well to consider her arguments from a standpoint of all involved (Benhabib 1996: 72).

Cohen (1996; 1997; 2001) goes into further analysis of the mechanisms how to realize the democratic collective choice as an institutionalized tie between deliberative justification and exercise of political power. Thus, if we reject procedural criteria of justice endorsed by aggregative democracy because of the lack of substantial democratic dimensions, the question remains how to provide democratic legitimacy in spite of the complexity of distinct and incompatible backgrounds? According to Rawls and Cohen (1996;1997;2001) deliberative democracy offers a framework of social and institutional conditions for enabling the public discussion among free and equals which links the authority to exercise political power with the public reasoning among active participants, associations and networks (Cohen, 1996:99).

⁶ Overlapping consensus and reflective equilibrium are forms of reasoning based on the premise of reasonable agents that have developed a sense of justice and necessary balance in expressing their convictions and judgments in an argumentative manner while taking into account opposing and conflicting views (Rawls, 2001: 29-35)

In order to realize the public reasoning in this manner certain procedural preconditions need to be fulfilled (Benhabib, 1996; Cohen, 1996, 1997, 2001). From the primary importance is that the procedure is lead by norms or equality and symmetry (Benhabib, 1996:70) and that participants regards themselves as free and equals⁷. Furthermore, participants in the discussion are guided by principles of “deliberative inclusion” (Cohen, 1996: 100) and “articulation of good reason in public” (Benhabib, 1996:72). In practice this means that a citizen is required to provide acceptable reasons while defending the conception that is favored by herself or himself and consider this argumentation from the standpoint of all involved. Due to the norms of equality and symmetry each and every person should have the same chance to initiate, debate and question topics and themes of the communication as well as its conduct and the application (Benhabib, 1996:70). Lastly, participants are ready to accept the result of the deliberation as authoritatively binding because those who are governed by the collective decision find the bases of those decisions acceptable (Cohen, 1996:100, 102).

But before drawing the implications for the campaign regulation and presenting some of critiques of deliberative democracy, it is important to emphasize that the presented norms and process are not expected to happen in some sort of fictional collective deliberative assembly. On contrary, this conception favors and encourages “plurality of modes of association” (Benhabib, 1996: 73). This plurality captures political parties, various civil and social movements, initiatives and similar forms of social and political engagement which reflect diverse and conflicting character of the society. However, here procedural solutions of the conflict accommodation and expression of frustrations require mutual contents, challenge and argument.

⁷ “Free and equal” as an often used phrase in the context of democratic deliberation means that individuals are free in the sense that no comprehensive moral, religious or philosophical doctrine is a defining condition or the authority to exercise the political power and they are equal since each is recognized to have capabilities to participate in the debate aimed to authorize the exercise of the political power (Cohen, 1996: 96).

To conclude, the aim of deliberative democracy is to create conditions for generating “communicative power” among free and equal citizens in order to tie the democratic legitimacy with the general moral theory (Benhabib, 1996: 70). These normative assumptions form a discourse model of ethics which says that decisions are valid if they are reached through the process of deliberation among all of those affected by its consequences (Benhabib, 1996: 70). By recognizing this, it is clear that besides the norm of political equality, the value of free speech and its guarantee is an indispensable feature of the deliberative process as a prerequisite of creating the platform for discussion and debate among people genuinely different in their positions (Sunstein, 1995: 241). However, its main feature is a rational argumentation which distinguishes deliberation from other forms of communication based on irrational persuasion and the use of coercion and threats (Besson and Martí, 2006: xvi). These assumptions, as well as a more demanding conception of political equality make the deliberative interpretation of democracy open for more regulations on speech especially when it comes to the campaign expenditures, propaganda, hate, sexist or false speech.

These are the general features of the concept which incorporate both; deliberation in the basic structure (Rawls, 1997) or its extended version that includes public sphere and civil society (Benhabib, 1996; Young, 1996). Nonetheless, to link principles of deliberative democracy on the electoral campaign I introduce slightly reformulated ideal of deliberative democracy. In other words, in order to develop a deliberative ideal of electoral campaign, besides acceptance of the above mentioned criteria of deliberation it is instructive to consider features of the model introduced by Mansbridge J. et al. (2010) in *The Place of Self-Interest and the Role of Power in Deliberative Democracy*.

Thus, as the title suggest, this model departs from the deliberative ideal in the classic sense with the claims that the expression rather than suppression of self-interest and the role of power are compatible with the deliberative democracy. In that sense, it tends to incorporate *the political* in the deliberative theory to make it more applicable for the context of contemporary democratic societies. In other words, as many legitimate democratic forms nowadays contain negotiation, voting, bargaining and the use of power for realization, this model aims to show the compatibility of these genuinely non-deliberative forms of conduct by demanding that deliberation precedes their legitimization.

In that purpose Mansbridge J. et al. (2010) develop a model which includes non-coercive forms of negotiation that incorporate the expression of self-interest and conflict of interests, but are based on all the other principles of deliberation above mentioned. This model includes four types of communicative agreement that are in contrast with the classical deliberation⁸. These are namely convergence, incompletely theorized agreements, integrative negotiation and fully cooperative distributive negotiation⁹.

I fully agree with authors that it is necessary to include the forms because in contemporary societies certain issues cannot be handled only by deliberation, but require for

⁸ The classic ideal of deliberation excludes self-interests, it is based on reason, and after deliberation conflicting interests converge on the one option which best displays common good (Mansbridge et al., 2010: 66). Nonetheless, writings on deliberative democracy in this paper are mostly based on the “expanded classical model” which moves from strict requirements of “the reason” in a sense of unitary conception and asks for mutual justification of conflicting positions (Mansbridge et al., 2010: 67)

⁹ Deliberation in convergence includes the agreement of participants on some issues without having significantly diverging starting position. The second form of non-coercive communicative agreement includes incompletely theorized agreements which refer on the situation in which conflicting opinions are present from the beginning, but participant agree on a single outcome from different reasons. The third form is integrative negotiation which is similar to the previous form because it includes the coordination of conflicting opinions in the beginning to result in a one solution, but it includes the self-interests in the material sense. The last one refers to fully cooperative distributive negotiation which starts with conflicting interests but after deliberation which incorporates interests as well as principles of mutual justification and respect participants reach an agreement that all interested sides consider fair (Mansbridge et al., 2010: 71, 72)

instance voting as method of decision (2010:75). But, what is crucial to recognize here is that deliberation necessary anticipates in clarifying standpoints. In that sense, an expression of self-interests can be welcomed as a valid claim and valuable information for justification of some policies and rejection of other. However, the self-interest still requires an expression in a manner of mutual justification and acceptance of *the other* as free and equal to classify as “deliberatively constrained self-interest” (2010: 77).

Other important feature which departs from the classical model of deliberative democracy is acceptance of power in general as constitutive of any form of social conduct including deliberation. However, what needs to note here is that this excludes power in a coercive sense which is defined as the use of threat of sanction, use of force against other people’s interest which includes for instance lying¹⁰ (2010: 81). Power is acceptable in the form of keeping deliberation in order and creating conditions for it. Another reason why power should be incorporated is that decisions made through deliberative or other methods very often need coercion to be implemented in democracies. However, legitimacy of these coercive non-deliberative methods depends on the degree to which the agreement on these methods and reasons approached the deliberative ideal.

A common legitimate democratic form of decision making with non-deliberative character is for instance voting. This method is accepted because due to the size of contemporary societies it is way which enables inclusion and equality in decision-making on a large scale. However, in order to incorporate this non ideal and non-deliberative method into the concept of

¹⁰ Lying is considered to be power in the coercive sense because it makes one person to act in way that is detrimental to her or his interest and in way which otherwise this person would not choose to follow (Mansbridge et al, 2010: 81).

deliberative democracy it is required that deliberation structures the process and anticipates it (Mansbridge et al., 2010:88, 89).

In other words, by structuring the process and the content of the electoral campaign in a deliberative manner, voting as genuinely non deliberative method can be incorporated in the model of deliberative democracy. In this way the legitimate use of coercion as a necessary result of voting gains the justification which departs from the merely aggregative number of votes and approaches to the ideal of deliberative democracy in non ideal conditions of today's societies.

Other important feature that makes the ideal of deliberative negotiation suitable for the application on campaign regulation is because campaigns inherently include the self-interest and power interplay. Nonetheless, although this model admits these features as immanent of social interactions, it requires from them to be structured in a deliberative manner. That is why the principles endorsed by this conception are used to make an argumentation for the campaign finance and content regulation. In this way, the proposed regulatory terms introduced in this paper make a link between normative ideals of democracy and constraining conditions of political and social reality.

3.3.1 Critique of the concept

Concept of deliberative democracy finds many proponents, but as well many critics on its account. For the purpose of the topic, the existing criticism will be presented by focusing on two directions of it. The first one is from the liberal and libertarian side which object deliberative democracy possible endangering of individuals rights and burdening of personal liberties. This point of view is presented through the writing of Schroeder in the interpretation of N. Kinkopf (2002) in the article *Deliberative Democracy and Campaign Finance Reform*. Although this piece does not represent an influential and famous critique of deliberative concept, it finds its

place in this thesis because it is one of the rare works which focuses argumentation precisely on constitutional deliberation and the subject of campaign finance.

The second direction of critique comes from the concept of radical democracy which questions the practical possibility of the realization of ideals of rationality and consensus. Basic objections are presented through the work of C. Mouffe (1996; 2000; 2004).

Firstly the critique from the libertarian view is presented with the response to it, after which the concept of radical democracy with the accompanying conclusive comment.

As the deliberative democracy is occupied with the question how to provide a justification for the exercise of political power in spite the fact of value pluralism, the judicial decision making seems to be an instructive example to analyze its applicability and accompanying problems. Thus, Schroeder and Kinkopf (in Kinkopf, 2002) find that the request coming from deliberative democracy proponents for regulating the campaign in order to eliminate the excessive influence of the wealth in the political process shows an internal theoretical inconsistency. This is because every government's intervention to restrict expenditures would limit the quantity of speech which is incompatible with the idea of deliberation. In other words, as the deliberation process occurs through reasoned argument then the public should be left to judge as unreasonable or unpersuasive a certain argument no matter how often or how loud is repeated. On the other hand, if it is necessary to restrict the expenditures on speech then the basic premise of deliberative democracy that the decision making process can be govern by the public reason fails. What is more realistic in Schroeder's and Kinkopf's view is to recognize that citizens do not actively engage in the discussion on public matters and that is why the private pursues should be encouraged because they distract broader public from paying attention on public issues (Kinkopf, 2002: 154).

I do not consider Kinkopf's critique to provide convincing argumentation against deliberative conception of campaign regulation. Generally speaking, what seems to be the case is that the author confuses the cause and the consequence. More precisely, the claim that citizens do not engage in discussion on public matters seems more as a consequence of unequal opportunities for the participation. Moreover, the author does not refer on the main premise of deliberative concept which is a demand for political equality in terms of equal right of participation, equally weighted voices and equal opportunities for effective political influence.

It seems unquestionable that it is left up to the reasonable individual judgment to evaluate the communicated message, but the problem is that because of the monopolistic influence of economically powerful caste messages on the agenda will be of the restricted range. Moreover, for a rational judgment it is not necessary to hear the message infinite number of times, but to hear in the light of various and opposing sides which reflect the fact of reasonable pluralism of contemporary societies. Thus, if we leave the financing of political messages only up to private corporate or individual donations the agenda will necessarily reflect a limited range of debate while the majority will remain silenced.

To conclude, Kinkopf's critique of deliberative regulation of campaign finance does not offer substantial and persuasive arguments. Moreover, authors ignore some of the most important premises of the conception such as the notion of political equality and communicative power of different and opposing views. As a result, the critique does not leave many arguments that should be taken into account while considering practical implication of deliberative democracy.

Quite different style of criticism comes from the conception of radical democracy which questions the practical possibility some of main premises of deliberative democracy such as ideals of rationality and consensus. Objections on the deliberative concept are that contemporary

societies should rather acknowledge the impossibility of achieving full rational consensus, and instead of that recognize ineradicability of antagonism as the model of radical democracy and agonistic pluralism suggests. Deliberative attempts for achieving the “final rational resolution” are not only mistaken, but dangerous because they results in hegemony, put constraints on the political debates and privilege the hierarchy of the central liberal democratic values instead of promoting pluralism (Mouffe, 2000:9). In other words, Mouffe agrees with deliberativists that the aggregative model is not an adequate model of democracy, but finds their solutions which stress impartiality and rationality to be contra – productive and impossible to actualize. Instead, she suggests, we need a model which puts a struggle of power and antagonism in the center. Otherwise, as she concludes in the article *Democracy in Europe: The Challenge of Right-wing Populism* societies nowadays are inevitably confronted with the democratic deficits, apathy and the emergence of radical parties.

Cammaerts (2007) in *Jamming the political: beyond counter-hegemonic practices* translates Mouffe’s vision of agonistic pluralism in terms of political communication. Thus, premises of radical democracy find its expression as jamming techniques which in a subversive manner answer on the perceived hegemony and challenge the dominant discourse by using humor, mockery, satire and parody (Cammaerts, 2007:4) . They are directed towards “the society at large or governments, towards changing values or behaviors and even at times against minorities or common enemies” (2007:1). The actors that use these techniques are various activists, civil society organizations, but as well political parties. In this manner, they realize what Mouffe names the mobilization of passions and disagreements in the public sphere.

The contribution which Cammaerts (2007) makes in translating abstract theoretical principles in contemporary political communication practices seems for the discussion in this

work especially valuable because it involves the important distinction between electoral speech and general political communication. On the example of “jamming the political” it is clear how an effective transmission of political message does not need official channels of political communication which usually require a lot of money. But what is important to notice here is that although this presents an example of political speech, standards of deliberations are less stringent than in the case of electoral campaign speech which involves clearly defined set of rules. In other words, “jamming” and similar techniques make a valuable part of the more general civic culture (Dahlgren, 2005: 156). Whether and to what degree norms of deliberative democracy can be applied in this sphere is the topic which outgrows the scope of this work.

But, as a more general response to Mouffe’s critique I answer that the remark for bringing back the political and conflicted is encompassed in the model of deliberative negotiation. Precisely because of the antagonistic relations in the society and the possibility of imposing the hegemony of one group over others, deliberative democracy insists on reasonable justification of the authorization to exercise the political power (Cohen 1996; 1997; 2001). Nonetheless, the criticism from the side of radical democracy would make sense if we would witness over rationalized political discourse which is a situation that does not find the empirical or the theoretical support. For all reasons, I consider that deliberative democracy in its ideal of deliberative negotiation incorporates *the political* in democratically legitimate structures in a more consistent and structured way.

3.3.2 Applications in campaign finance and content regulation

But how do represented features of deliberative democracy apply on campaign regulation norms? Firstly, as it is mentioned before in the work, deliberative democracy shares with the partnership conception the standpoint on the campaign finance regulation. In other words, the critique of the

libertarian interpretation of free speech guarantee with its implications on campaign expenditures and contributions that is present in the part on partnership democracy is valid here as well. Moreover, having in mind the autonomous importance of political equality, as well as the emphases on the equal opportunities for effective political influence with the encompassed idea of political fairness it is to expect requests for the greater regulation (Cohen, 1996; 1997; 2001).

Hence, translated into practical circumstances it means that as the money is the major source to realize somebody's political influence, the current system is unjust because it prevents the majority of the people to practice their active political participation in form of candidacy to hold the office, to support certain political options, join with others like-minded citizens into some form of political association or transmit the political message.

From the normative point of view deliberative conception gives a second level importance to arguments questioning whether politicians indeed return favors for the money received or to the what extent this is true or untrue; as well as do incumbents favor finance regulation and/or is there too much or too little money spent for the election campaign? What matters the most is that the system which is designed in a way that economical resources ensure the rights of political and social participation contradicts the basic principles of democracy equality.

On the other hand, deliberative concept departs from the partnership idea of democracy in the question of the content regulation (Cohen 1996, 1997, 2001; Fiss 1989,1996; Meiklejohn 1965; Sunstein, 1995, 1996). The underlying justification of this standpoint is based on the arguments which emphasize the "silencing effect" that certain forms of speech have on individuals and whole groups which consequently excludes them from the process of public and political participation. Further basis assumption for the argumentation to make is that it considers

political decision as legitimate only if they were brought through the process of public reasoning assuming deliberative and collective reasoning in which participants defend their standpoint by the force of reason and argument. These features separate deliberation from other forms of communications which are based on the use of threats, persuasion or deceptions.

In addition to these characteristics, it needs to bear in mind the purpose of the election campaign as a mean through which political parties and candidates present themselves to the ethnically, religiously, economically and societal diverse electoral body. In this process, citizens need to have as broad as possible range of information and ideas presented to judge which party or candidate best “aggregates and articulates” (Huggins and Turner, 2002: 353) their societal and economical interests, but as well to have an opportunity to actively participate in the form of running for the office or joining with likeminded citizens in some sort of political association. In that sense, the electoral campaign and its accompanying debates, discussions through media or public spaces embodies an ideal of democratic deliberation. Precisely due to this, it is crucial to enable effective political equality in order to bring on light variety of opinions and make possibility for the every voice considered with the decisions to be heard. This line of reasoning is in accordance with the reformulated ideal of deliberative democracy (Mansbridge et al., 2010) which seeks to incorporate non-deliberative democratic mechanisms in the concept of deliberative democracy. In that sense, it is necessary to design the electoral campaign according to deliberative standards in order to legitimate decision made by the voting as non-deliberative method and their implementation by the use of coercion.

When it is applied in practice the following assessments can be made. Hence, if one of the main premises of the democratic theory in general, but as well proponents and opponents of regulation are that the electoral campaign serve to inform the electoral body then we can agree

that the use of false advertisements distorts this process (Marshall, 2004: 285). Moreover, it can be perceived as a use of coercive power antithetical to deliberation because it makes a person act in a way that is detrimental to her or his interests (Mansbridge, 2010: 81). This on a large scale occurs when due to misinformation and deception, voters' give their vote to the certain candidate based on false premises and in that way reflect distorted preferences of the electorate.

Furthermore, some of arguments in favor of deregulation is that although the use of lies and false speech is not something that should be encouraged, legal restrictions on it would only do more harm which is why it is better to respond with the more speech. However, this may result in the downgrading of the debate in a form of a vicious cycle of the attack and defense, while the real purpose of the campaign which is to inform the electorate on major political issues would be neglected (Marshall, 2004: 285).

As a contra argument on the claim that the regulation of campaigns is not necessary because the voters are anyways used to the use of lies, hyperbolas and other exaggeration and therefore do not take seriously everything being said during the electoral period one can put widespread cynicism and disappointment of the electoral body with the electoral process. When accompanied with the non transparent finances, some authors argue this might lead to the low turnout on elections (Fiss, 1996; Marshall, 2004). Consequently, this undermines the very basis of democratic functioning and legitimacy of political decision making.

Lastly, false statements as well as attacks based on somebody's religion, gender or ethnic background can cause serious personal harm without any contributions to the quality of the debate in a sense of exposed information or ideas. Or to refer on Sunstein(1995:25), the absolute approach which protects the speech that "promotes few or none goals for which speech is

protected, and that causes serious social harms” seems to be in the discrepancy with the needs of social and political reality

3.3.3 Practical solutions proposed

Further step is show some of the existing solutions which can be supported by the norms promoted in this paper. In that sense, I firstly present practical implications for the financial side of regulation, therefore the ones that are shared by the partnership as well as deliberative concepts. Further I proceed with regulations on the content of the campaign which can be supported from the deliberative point of view.

In terms of finance regulation of electoral campaign, the partnership as well as deliberative concept agree that one of the means to raise the voice of less privileged and enhance equality in the political arena is besides the limitations on contributions and expenditures (Ackerman2002; Cohen 1996, 2001; Dworkin 2010; Fiss 1997) to subsidize the financing activities through the public financing programs in the form of the support to candidates and parties, free media access or by the use of vouchers. To the mentioned ones, I would add the ban on corporate donations and the use of tax relieves and/or tax credits in order to disperse the sources and in that way prevent the monopoly of big donors and corruption.

To conclude, the private financing of campaign activities should make a limited portion and it should be supplemented with some of the described regulations. In that way, the range of information available would not decrease, but it would involve finances from various sides. This accordingly would limit the monopoly in setting the agenda of issues discussed because the influence would necessary disperse. Nonetheless, it is crucial to point out on the measure around which there is more or less agreement from all sides and this is the disclosure requirement. The

precise and specific regulation of this norm is the essential factor in combating corruption on which all ways of financing are vulnerable.

According to the assessment that the electoral campaign presents an ideal type of democratic deliberation its regulation should reflect complementary principles. For that reason, electoral speech that includes lying, discrimination, stigmatization or disdain of individuals and groups based on their gender, race, ethnicity, religion or sexual orientation does not fulfill the stringent criteria of the free speech guarantee and it should be banned from the use in the electoral campaign. As the basic challenge of modern democratic societies is how to assure that ethnical, religious, economic, social and other parts of society have equal possibilities of participation in electoral process and consequently decisions that concern their wellbeing (Nassmacher, 2003:1) then campaign should not serve as a mean by which certain religious or ethical groups can serve as a regular political scapegoat. A recommendation that a proper response to this sort of speech is only more speech seems especially inconvincible in nowadays context because targeted groups mostly cannot respond due to their social or economic position.

To conclude, the fear that is present and often mentioned when campaign regulations are concerned in the case of described regulatory mechanism seems not to be grounded. Indeed, because of the special character of campaign period and significance for the overall democratic process restrictions on the content and finance do not entail the ban in general of similar activities.

CONCLUSION

The debate which is led over campaign regulation indeed entails much more than mere legal and policy disagreements on how to design a system which will successfully combat corruption and introduce transparency into the whole process. The underlying logic of the discussion reveals that sides involved base their arguments on different understandings of the proper democratic arrangement. In other words, we are back to the unsolved question: what is democracy? By presenting three currently dominant versions of the answer to this question namely majoritarian, partnership and deliberative one, the conclusion is that by judging from the electoral campaign point of view the deliberative ideal offers the most suitable response.

In other words, the paper supplements the existing literature on the subject of campaign regulation that in most of the cases includes comparative politics or legal studies perspective with the approach that is based primarily on political theory and aimed to offer a normative account on both regulatory dimensions meaning campaign finance and content. This kind of approach was necessary because most of the debates included normative remarks which remained on the level of intuitively shared assumptions of proper democratic functioning. Relying on the work of political philosophers that recognized the broader implications of the issue, it was possible to build a systematical account of general evaluative and prescribing principles on the matter of campaign regulation.

This paper draws the following conclusions. Based on the interpretation of two constitutive dimensions of democracy which are liberty and equality through the value of free speech, I argue that when it comes to the question of campaign finance regulation partnership and deliberative conception offer a more substantial answer than the competing majoritarian version. It is simply because the later fails to include political equality in terms of equal

opportunities to influence political decisions and realize the political participation in a greater degree than merely casting the vote. Furthermore, it misinterprets the liberty in the sense of a personal autonomy because it focuses only on the speaker's autonomy while the proper understanding needs to take in account the speaker's and the listener's autonomy as well. All things considered, solutions proposed by deliberative and partnership democracy which allow caps on spending and various schemes of public and dispersed financing have my full support.

Furthermore, by looking at the character of the electoral campaign I assess that in the context of contemporary democracies they have the purpose to embody in a limited period of time an ideal type of deliberation. This assumption is based on the model of deliberative negotiation which accept features of self-interest and power in order to incorporate deliberative method with other democratic, but not genuinely deliberative methods such as voting and/or negotiation. Indeed, as then campaign has the potential for a deliberative character, it needs to be regulated in a way that it offers as broad as possible range of opinions and gives an equal opportunity for the participation of everybody concerned with the decisions made. In that sense, besides the regulation of finance it is justifiable and legitimate to restrict certain forms of content which promote ethical, racial or other forms of hate which can seriously prevent individuals and whole groups from taking part in the process, while it does not contribute in any form to the argumentative discussion suitable for the limited pre-election period.

Lastly, although the topic of this work has a relatively narrow scope, an approach to it requires that the context with broader issues is considered. That is precisely why the paper leaves open for further analysis some of the related and important questions. This includes, for instance, theoretical considerations for a particular set of regulatory measure of a certain country. This would be a challenging and interesting direction of analysis because it requires balancing

between general principles and contextual specification for a complete, acceptable and effective regulatory arrangement. Or, another line for further research would be to examine how these principles reflect on blurred areas between campaign activities and usual political expression such as examples of issue advocacy or third party finance.

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