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Conclusion: Four recommendations to improve digital electoral oversight in the UK

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Abstract: *To conclude this special section, this article looks at the possible avenues for regulatory reform in the field of digital campaigning. Diagnosing the need for a multi-layered approach, we argue that action is needed from government, regulators, companies and civil society. Taking each actor in turn, we consider the kind of change needed, the prospects for reform, and outline four recommendations for change.*

Key words: Regulation, digital campaigning; recommendations; electoral oversight

Electoral regulation emerges from these four papers as an area requiring urgent treatment. Data-driven campaigning, oversight of third-party activities, rewriting of expenditure regulations and electoral observation, the spread of nefarious content, targeted political advertising and the role of social media have all been exposed as issues requiring attention. They also require new technological and methodological capacity on the behalf of government and all bodies with responsibility for the scrutiny of electoral processes, particularly regulators. We conclude this special section by distilling out the proposals made in each paper and putting forward four concrete recommendations for action on the behalf of government, regulators, companies and civil society.

The need for alterations in the way we oversee and regulate elections comes largely from the rapidly changing use of digital technology over the last ten years, in which electoral politics has shifted online. Campaigning inside and outside election periods has moved on to digital platforms, bringing several major changes to the institutional landscape of electoral politics. The lines between traditional party politics and third parties have become blurred, requiring a shift in the whole way that we consider electoral organisations (as Rowbottom has discussed). Similarly, the period of electoral campaigning activity has expanded, indicating a need to regulate continual campaigning activity (not just a brief window leading up to polling day). Election periods are strangulated by

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surges in harmful, hateful and misleading content, as Neudert has described, while the widespread availability of almost costless campaigning and vastly cheaper advertising channels has rendered expenditure limits derisory. Meanwhile technological tools such as machine learning have made the mechanics of campaigning ever more opaque, offering mounting challenges to the scrutiny of procedures (as Wagner has discussed).

Over time, electoral regulation and laws have been introduced in incremental piecemeal fashion, creating what the Law Commission recently described as a 'complex, voluminous and fragmented' landscape.[i] As policy makers contemplate a reaction to the injection of technology into elections there is a risk that they may further complicate systems of oversight. Whilst recognising this danger, the papers in this special section have shown an urgent need for change. Issues of transparency underpin much of what are wrong with electoral design and regulation, as Power has made clear, and are a major challenge for public awareness, as discussed by Neudert. Digital phenomena therefore need to be recognised in systems of regulation, but as these papers indicate, there are many different actions that the government and regulators could take to improve oversight of online election campaigns.

In this conclusion, we argue that there is an urgent case for the regulation of digital campaigning. Yet, far from diagnosing a simple solution, we argue that, in focusing on different institutions, the four papers within this special section illustrate the importance of a multi-layered approach to the oversight of elections. No one body, or law can achieve substantive change alone, and while the actions of one or another digital platform may be highly significant – Facebook, for example, owns both WhatsApp and Instagram, so decisions made there are particularly important – change in one company alone will never be enough. Nefarious content will simply move between platforms, and campaign practices will evolve and shift. Pressures for change must apply across companies, and involve multiple institutional actors, including citizens themselves.

1. Action from Government

During the period in which political campaigning and political parties have been transformed through widespread use of social media, the accumulation of electoral law has been piecemeal, incremental and incredibly slow. As noted in the Introduction, even where action has been pledged, as in the government's commitment to implementing digital imprints as requested by the Electoral Commission, and the plans for Ofcom to acquire new powers to act as the online harms

regulator, little tangible change has been enacted. The 'need to continually update the processes for oversight and sanction that exist to uphold core democratic ideals' noted in the Introduction (Dommett) has not been fulfilled. Consequently, changing modes of campaigning and the legal framework are diverging, rendering necessary a comprehensive rewriting of electoral law regarding campaigning, political parties, third parties, periods between elections and expenditure limits. Without such change, there is a risk that confidence in the electoral process will start to be eroded, having significant implications for electoral participation and perceived legitimacy.

We propose a wholesale rewriting of electoral law. As outlined by Rowbottom, there is a need to clarify and simplify existing regulation so that campaigners do not have to navigate complex tiers of regulation. There is also, as both Rowbottom and Power suggest, a need to think further about transparency, to ensure that additional insight is offered into campaign spending and activity by a range of different organisations. We therefore agree with the Law Commission that there is a need to rationalise the current laws governing elections into a single, consistent legislative framework governing all elections[ii] And yet we argue that further attention needs to be paid to how to compel and oversee digital campaigning activity. Whilst proposals for a digital imprint are to be welcomed, further data gathering and reporting is required for online electoral oversight.

In making this point, we recognise the longstanding calls from the Electoral Commission for an increased remit and power to oversee digital activity. The Electoral Commission was created with weak powers, and their capacities have been fundamentally challenged by the rise of digital technology. As a result, the Electoral Commission needs more powers, more along the lines of the Information Commissioners' Office (ICO). These should include the power to gather more insight on digital activity and spending through financial declarations and invoices, to issue larger fines for breaches of electoral law, and to compel information disclosure from platform companies. Calls for these powers have been repeatedly outlined and endorsed, indicating widespread support for these forms of change.[iii]

In adding our voice to calls for electoral law to be updated we recognise that this is the most unlikely of our recommendations to be actioned. Electoral regulation is rarely top of an incoming government's 'to do' list, especially when the government has been embroiled in various tussles over the role of activities on Facebook during the referendum campaign. So even as the UK government starts to emerge from the current global public health and economic crisis of 2020, electoral law is unlikely to be a priority. One hope is that in the new landscape, where so much of

everyone's social, economic and political activity has moved online during lock-down, is that central government will recognise the urgent need for new regulatory capacity that incorporates technological understanding. Given the weight of the current crisis situation that sits on the shoulders of the ICO (particularly with regard to contact tracing) it seems a good moment to start to distribute powers and capabilities more evenly across existing regulatory bodies.

Recommendation 1: wholesale rewriting of Electoral Law, with an increase in powers to the Electoral Commission, along the lines of the ICO.

2. Action from regulators

In addition to action from Government, regulators themselves can also take action to respond to the challenges posed by digital technology. As outlined by Chris Gorst at the workshop preceding this special issue, regulators can endeavour to practice anticipatory regulation that aims to be 'flexible, collaborative and innovative'.[iv] This raises the question, what could regulators do to change their own activities and processes to be better equipped to respond to digital technologies? Whether thinking about the Electoral Commission, ICO, Ofcom, Advertising Standards Agency (ASA), Competition and Markets Authority (CMA), Equality and Human Rights Commission (EHRC) or the many other regulatory bodies found within government, it's clear that all regulators face similar challenges, as the markets and societal activities that they regulate are being transformed by digital platforms and the ubiquitous use of data-intensive tools and technologies. All regulators therefore need, as Neudert suggests, to upskill themselves, collaborate, engage in long-term thinking and horizon scanning and put pressure on the government to make necessary legislative change.

At present, we have little understanding of where regulators lack appropriate expertise and capacity to respond to digital technologies and where examples of best practice lie. There are, however signs that regulators face challenges in attracting and retaining expertise and staff who possess pertinent digital expertise. There is accordingly a need, as the House of Lords Select Committee on Democracy and Digital Technologies has recently suggested, to conduct a review of regulatory digital capacity across the CMA, ICO, Electoral Commission, ASA and Ofcom to determine levels of digital expertise and where internal investment may be needed.[v]

There are some signs that regulatory bodies can develop informal practices that help to promote an anticipatory approach by sharing expertise and collaborating to resolve common challenges. The ICO has led the way in pioneering this approach, in the creation of the 'AI in regulation' working group, where they bring regulators together to discuss issues in common, such as data sharing and linking, and the protection of vulnerable groups. This group is attended by key regulators including the ASA, the CMA and Ofcom (although not the Electoral Commission), providing a forum for sharing expertise around artificial intelligence. This model provides a possible template for similar anticipatory practices in relation to digital election campaigns, recognising that responsibilities cross institutional boundaries and that pertinent expertise lies in different regulatory bodies. The idea of a committee of regulators who share best practice and conduct horizon scanning activity therefore provides an important means of pooling resources and expertise to tackle key issues of electoral regulation.

The need for greater collaboration is not only beneficial for sharing capacities and skills, it also provides an important mechanism for tackling sensitive and challenging topics. The issues that surround digital campaigning are often controversial, with trends such as misinformation, fact checking and data misuse challenging to regulate. This trend has already been observed, with a 2019 BBC News Item reflecting that when presented with the issue of political advertising '….the regulators made various sounds that bore a striking resemblance to what you heard the last time you were juggling a hot potato….The Electoral Commission said its focus is campaign finance; the Information Commissioner's Office (ICO) said its focus is personal data; The Advertising Standards Authority (ASA) said it doesn't do political ads.'[vi] By creating committees of regulators, (or 'regulatory liaison committees') with shared oversight for such issues, not only would resource and skills be shared, but political exposure would be minimised, allowing regulators to act on presently challenging issues. This approach has been advocated by the House of Lords Select Committee on Democracy and Digital Technologies who have recommended the creation of a regulatory committee composed of the ASA, the Electoral Commission, Ofcom and the UK Statistics Authority who 'should co-operate' to collectively enforce a code of conduct on political advertising.[vii] Recognising existing examples and these recommendations, we propose:

Recommendation 2: The creation of a regulation liaison committee, that brings together the key regulators involved in electoral regulation – the ICO, OFCOM, the ASA, and the Electoral Commission - to address key issues of electoral regulation and oversight.

3. Action from companies

The actors with the most capacity to influence immediate change are the digital platforms themselves, especially Facebook. The design, content moderation policies and internal policing of their platforms shape electoral politics in every country where they operate. Indeed, in non-English speaking countries with weak states unlikely to intervene, their influence proceeds more or less unchecked. Although much criticised for tackling issues too little and too late, many platforms have taken some kind of measures to tackle various problems relating to electoral politics. For example, Facebook has started producing a transparency report, has opened up advertising libraries, set up partnerships with factchecking organisations, worked with and to some extent opened up to university researchers and developed a 'trusted information' indicator for news items. Twitter has now embarked on a campaign to flag misleading information and incitement to violence, even applying these labels to some of President Trump's more outrageous claims on their platform.

Initiatives from Facebook and Twitter are examples of companies setting the agenda both in terms of what is made transparent, but also around what counts as 'political' – so companies can provide information and set the terms of acceptable practice. Indeed, Facebook recently published what it called a 'white paper' on content moderation on the regulation of online harm,[viii] opening it up for public consultation. The key issue here is that companies are playing the dominant role in policing what is and isn't allowed, including for elections. Furthermore, while doing so they are guided by a US perspective and international, not national policies and norms.

We recommend that the welcome, but modest, initiatives towards transparency of the platforms themselves should be expanded and regularised, moving 'from transparency to accountability', following some of the recommendations of *Glasnost! nine ways Facebook can make itself a better forum for free speech and democracy*,[ix] an independent report that was produced by a joint Stanford-Oxford team after discussion with Facebook and other platforms. Both Power in this volume and others elsewhere have pointed to the potential limitations of transparency,[x] but if used carefully it can be a principle that will 'deliver greater confidence in the electoral process'. If it is to be so used, as Power suggests, then it must apply not only to political advertising, but also to the curation and delivery of news feed, and the processes of content moderation. In addition to these transparency measures it is, however, necessary to advance mechanisms for accountability by creating national

oversight bodies for electoral processes, involving regulators, researchers and civil society organisations nominated by national governments.

Will companies do this? Given that political advertising represents a relatively small proportion of their revenue model, especially when set against the huge reputational damage that their role in politics has brought to them, to Facebook especially, there might well be scope for such a change. Platforms have shown more willingness in recent years to address public concerns around activities on their platforms. There have been moves to work more with academic researchers, civil society groups (particularly with respect to hate speech, for example) and government organisations, such as the Department for Digital, Culture, Media and Sport (DCMS), the parent regulator for Ofcom and the ICO. And yet, as discussed further in the next section, much of this change has been a response to public pressure. As commercial companies that are driven by financial rather than democratic imperatives, there are reasons to be sceptical that platforms will fundamentally alter their activities. However, the changes made to political advertising transparency in response to pressure from policy makers (such as the US Honest Ads Act)and civil society (such as the principles outlined by Mozilla) indicate that these bodies may react to external pressures.

Recommendation 3: platforms should expand and regularise their efforts towards transparency and develop systems for accountability and oversight. These systems should be overseen by national advisory groups composed of regulators, academics and civil society representatives who advise, investigate and report on company practices.

4. **Action from civil society.**

Legal, regulatory and platform change will not alone achieve lasting protection of the electoral environment. Now that political processes rely so heavily on digital technology, understanding how they are shaped by such technology - including related phenomena such as online hate and targeted advertising –- is a crucial element of citizenship education. Public understanding is important both for raising awareness, but also for mobilising political pressure for change (as discussed above). Whilst recent public opinion research conducted by DotEveryone has shown growing public understanding of how technology works, they also found people's understanding to be shallow, and to contain many gaps.[xi] This indicates the need for new efforts to improve public understanding of digital technology, specifically around its uses in election campaigns.

Civil society organisations are already conducting important work in this area. Who Targets Me have created browser extensions that allow people to monitor the ads that are being targeted at them on Facebook, and have made the case for greater platform transparency. Full Fact have performed a fact checking role, working closely with Facebook to flag misinformation online. The Open Rights Group have campaigned on privacy and free speech online, focusing on data use at elections. Groups such as Tell Mama have also highlighted Islamophobia and drawn attention to hate speech and abuse online. These organisations collect and distribute vital insights into online electoral (and non-electoral) activity, raising public awareness of digital practices and concerns, and creating political pressure by lobbying for change from government and companies.

Public understanding and political pressure can also be exerted through public service journalism. The stories run by Pro Publica and Channel 4 News, for example, during the aftermath of the Cambridge Analytica scandal, resulted in Facebook thanking publicly (on Twitter!) journalists for raising issues and forcing them to improve their act.[xii] Other coverage of online election advertising by the BBC, Buzzfeed and First draft, similarly raised public awareness of misleading third party campaign groups at the recent general election.

Pressure can also be mobilised by the public themselves. Campaigns to 'delete Facebook' and to boycott certain social media platforms can create pressure that leads to change. And yet, such actions require understanding. Calls for digital literacy campaigns have become a recurring feature of recent political debate, with, for example, the DCMS Select Committee, House of Lords Communication Committee and Children's Commissioner calling for digital literacy to be the 'fourth pillar' of education alongside reading, writing and maths. Whilst some changes have been made to integrate computer literacy skills into the national curriculum, the breadth of information given to children – let alone the insights offered to adults – is minimal. There is accordingly a need to devise and roll out mechanisms for increasing citizen knowledge.

One mechanism for increasing public understanding comes in the form of public awareness campaigns. As noted in the introduction, the ICO has already conducted a 'Your Data Matters' public awareness campaign that was seen to successfully increase public understanding of data use. Other regulators or actors within the electoral landscape have not, however, conducted similar activities to increase public awareness of digital election activity. Recognising this absence, we suggest that the ICO, ASA, Ofcom and the Electoral Commission should come together to develop a campaign explicitly aimed at improving public understanding of the role digital

technology can play in elections. Such an initiative could involve detailed work on transparency through explainability, as the ICO have also done (working with the Alan Turing Institute) in Project Explain.[xiii] This recently published report is based on extensive citizen juries and other research to understand what the public expect in terms of explainability of processes, services and decisions made with machine learning algorithms across sectors, in their use in financial services and medical treatments for example. A similar methodology could be used for the specific area of elections, identifying the kind of information people feel they need to possess. This could lead to projects focusing on the use of algorithms by political parties and other campaigning organizations; the mechanics of online political advertising, or the content moderation policies of digital platforms companies.

Recommendation 4: A public awareness campaign to enable citizens to understand and scrutinise electoral processes and be able to navigate the landscape of political information both outside and inside election periods, involving civil society groups and funded by regulators.

The actions proposed by these recommendations are not trivial. Asking for a rewriting of electoral law, regulatory collaboration, forcing the huge global digital platforms to open up their processes, and getting the general public to care about electoral regulation in the immediate aftermath of the global pandemic and economic depression are all major tasks. All of them require a technological and methodological 'tooling up' for government departments and regulatory bodies. New central agencies like the Centre for Data Ethics and Innovation, and particular departments such as the Department for Digital, Culture, Media and Sport, can play an important role in driving change, but it is vital that any reaction to digital technology is not made by government alone. As the discussion above has revealed, a multi-layered approach to the oversight of elections is required that sees government, regulators, companies and civil society play a role. Whilst by no means easy to engender, pursuing these forms of change is as critical as it is challenging. The issues highlighted in these papers cast doubt on Britain's ability to hold free and fair elections, a definitional cornerstone of what it means to be a democracy. Currently, global platforms are setting the agenda while public sector agencies watch on helplessly. We hope that a combination of the relatively (in comparison with the importance of the issue) modest and manageable recommendations put forward here might go some way to redressing the balance.

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[i] Law Commission. (2020) *Electoral Law: Final Report*, London: Law Commission, p.1.

[ii] Ibid, p.185.

[iii] The Electoral Commission. (2018) *Digital Campaigning: Increasing Transparency for Voters*, London: Electoral Commission.

[iv] Quotation from the 'Regulatory Innovation' workshop, Wednesday 22nd January 2020.

[v] House of Lords Committee on Democracy and Digital Technology. (2020) *Digital Technology and The Resurrection of Trust*, London, House of Lords, p.53.

[vi] Rajan, A. (2019) 'Who will regulate digital political ads?', BBC, available here: https://www.bbc.co.uk/news/entertainment-arts-49278999, accessed 2.6.2020.

[vii] House of Lords Democracy and Digital Technology Committee. (2020) *Final Report*, p.21.

[viii] Bickert, M. (2020) *Charting a Way Forward: Online Content Regulation*, Facebook, available here: https://about.fb.com/news/2020/02/online-content-regulation/, accessed 2.6.2020.

[ix] Garton Ash, T., Gorwa, R. and Metaxa, D. (2019) *Glasnost! Nine ways Facebook can make itself a better forum for free speech and democracy*. Oxford: Reuters Institute for the Study of Journalism.

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[xi] DotEveryone. (2020) *People, Power and Technology" The 2020 Digital Attitudes Report*, London: DotEveryone.

[xii] Margetts, Helen. Rethinking democracy with social media. *Political Quarterly*, 2018, vol. 90.

[xiii] Information Commissioners' Office. (no date) 'Explaining decisions made with AI', available here: https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/explaining-decisions-made-with-artificial-intelligence/, accessed 2.6.2020.