Introduction: Regulation and Oversight of Digital Campaigning – Problems and Solutions

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Abstract: The regulation of digital technology is gaining increased attention within policy making circles. With growing recognition of the power held by digital media companies and the need to enforce democratic values online, policy makers are reviewing opportunities for oversight. Introducing a special section looking at the regulation of digital election campaigning, this article reviews the case for regulatory reform, the proposed type of regulatory change, and the practice of regulatory innovation. Noting the pace of digital change, it argues that there is a need to think more extensively about the design of any regulatory response in order to prevent systems of oversight from becoming obsolete.

Key words: Regulation; Digital Campaigning; Elections; Innovation; Oversight

Digital technology has become an engrained part of politics. As seen at the 2019 UK General Election, politics is increasingly played out online – with social media campaigns, advertising and video content providing important mediums through which politicians and campaigners can connect with citizens. As these techniques have been rapidly normalised as a part of contemporary political activity, it's easy to forget how new the use of much of this technology is. Just five years ago, the Internet was being used in far less sophisticated ways. Political parties and campaigners were familiarising themselves with Facebook and Twitter, and online advertising was barely discussed. Indeed, the 2015 General Election was pronounced 'the social media election that never was'.[i] Today, however, online tools are widespread, and it is not only politicians who use them. A range of individuals and groups, in the UK and beyond, can engage in political processes online. Whilst in many ways a boon to democratic politics, these trends have raised numerous concerns, with scholars and practitioners alike warning about the Internet's wider implications. Whether pointing to the potential for foreign interference, data misuse or misinformation, there have been urgent calls to respond to what is often seen as a fundamental threat to democracy.

In diagnosing this threat, much recent attention has been paid to the need for regulation, as there is recognition that existing systems are not equipped to tackle developments online. Whilst democratic processes are often subject to strict systems of oversight in the offline world, online

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we encounter an unregulated political 'Wild West'. This is because many electoral rules and oversight systems were written at a time when floppy disks and dial-up internet, not smart phones and extensive data access, were the norm.[ii] As a result, online political advertising, the role of paid social media influencers, geographically targeted messaging, and many other digital activities are currently unregulated. Faced with this reality, it is vital to think further about the need for regulation, exploring the boundaries of existing regulation, areas for possible change, and principles for shaping future regulatory practice.

Within this special section, we focus attention on the significance of digital technology for the regulation and oversight of electoral processes, but the articles raise a series of questions about regulatory change that resonate with a range of other fields. The need to adapt and evolve in response to technology is a requirement of any regulatory system, hence the findings of these articles will be of interest not only to scholars of electoral politics, but also to those interested more broadly in regulation and policy change.

The articles in this special section focus primarily on developments in the UK, but the question of online regulation has far wider resonance. As the use of technology continues to grow, countries around the globe will need to consider how to adapt or develop systems of oversight to account for the possibilities of digital technology. It is also not just individual countries that need to change, international organisations and alliances will also need to respond because digital technology is not geographically bounded. People can access the web around the globe and national borders do not operate online as they do in the physical world. As such global corporations such as Facebook or Google can change the rules of the game with limited recourse to particular national preferences, and individuals in one country can attempt to exert influence on democratic processes elsewhere. These possibilities mean that national governments need to work together to think about regulation, and that isolated national reforms are unlikely to eradicate problematic practices online.

This special section brings together a group of leading experts who look at the issue of electoral regulation afresh. Each focusing on the challenge digital technology is posing for current systems of oversight and accountability, these articles map the impetus for change, the options for innovation, and the norms that should guide future regulatory practice. These pieces are informed by the scholarly and practical experiences of each of the authors, but also by a specialist workshop conducted ahead of this special issue. Sponsored by Political Quarterly, and hosted by the House of Lords Select Committee for Democracy and Digital Technology, the Turning Institute and the Crick Centre, we gathered together a group of regulators, platform representatives, third sector actors and academics for a two-hour workshop. Entitled 'Regulatory Innovation: Identifying

regulatory strategies for responding to digital campaigning trends' in January 2020. The session considered the challenges facing regulators, and the specific means by which regulators could bring about change. To foreground these contributions this introduction sets the backdrop to current debates, outlining the case for regulatory reform, the proposed type of regulatory change, and the practice of regulatory innovation.

The case for regulatory reform

In recent years, the case for reforming current systems of electoral regulation has been articulated not only in the UK, but around the world. Highlighting concerns with electoral integrity and democratic processes, developments on the Internet are seen to have rendered existing systems of oversight ill-equipped to uphold longstanding democratic norms. The idea of free and fair elections, an absence of foreign interference, and citizens' right to privacy and consent are particularly seen to be under threat from developments online.

Particularly notable when looking at recent debates around elections and digital technology is the widespread consensus for change. Whilst differing in precise prescriptions for what needs to happen, a vast number of politicians, regulators and civil society organisations have diagnosed an urgent need for regulatory reform. Indeed, reviewing recent inquiries in the UK it is possible to identify high profile reports from the DCMS Select Committee inquiry into 'Disinformation and 'fake news'', a new all-party parliamentary group on Electoral Campaigning Transparency, the Electoral Reform Society, the Constitution Society, the Law Commission, the Oxford Technology and Elections Commission and the Open Rights Group. In addition, similar reports have emerged internationally, with leading interventions made by the Kofi Annan Foundation and the European Commission.

These reports differ in focus, but common to each is the idea, articulated by Kofi Annan, that because 'technology does not stand still; neither can democracy'.[iii] In this sense, there is a need to continually update the processes for oversight and sanction that exist to uphold core democratic ideals. At present, however, existing structures are seen to lack the flexibility to adapt and accommodate to trends online. Often designed in a pre- or less sophisticated digital era, many existing structures are not able to easily accommodate recent developments. Whilst true for many regulatory systems, in the context of elections this rigidity is seen to be particularly problematic because technology has had a significant impact on the nature of election campaigns.

Historically political parties have dominated the electoral process, being the key institutions through which political messages were disseminated and activism was organised. Whilst by no

means the only avenue for electoral engagement, systems of electoral oversight were designed to reflect the activities of these bodies, resulting in regulatory procedures focused on party and candidate financial reporting (to ensure parity in terms of resource expenditure). In addition, scrutiny of data use and consent procedures have tended to focus on major political institutions, with small organisations or isolated individuals not subject to systems of regulatory oversight (as their activities fall below reporting thresholds). With the advent of digital technology, however, the norms of electoral campaigning and activity have begun to change. Technology has made it easier than ever for individuals and small groups to organise and gain an audience for their message. With the emergence of social media channels, that provide low cost forums for advertising and organic message dissemination, individuals seeking to promote a political cause or belief can now organise more easily themselves. Whilst often previously reliant on established institutions (like parties) to get a message out, now people can communicate with ease. Moreover, their activities can be more spontaneous. Rather than needing to develop infrastructure through which to communicate ideas, individuals can now engage in what Helen Margetts et al. have called 'tiny acts',[iv] dipping in and out of politics by using existing digital infrastructure. In addition, political systems have also become more porous, as it has become easier for citizens in different locations to play a role in politics beyond their immediate community. In this way, citizens in the south of a country can play a role in northern political campaigns, or people in different countries can use technology to try and influence electoral outcomes elsewhere. These changes have significant consequences for existing systems of oversight and accountability, as many established mechanisms are not designed to capture such actions and have few means by which to detect and sanction problematic activities. As such existing regulatory systems are not equipped to reflect the new reality of digital politics.

Recognising these trends and their significance for current systems of oversight, much attention has been directed to the problematic practices that can be facilitated by the Internet. In particular, commentators have highlighted concerns about the capacity of digital technology to enable foreign interference, the promotion of mis- or disinformation, online harm (especially against children), hate speech, and financial misconduct (circumventing spending electoral limits by campaigning online). In this way, the Digital, Culture, Media and Sport (DCMS) select committee accused Russia of using technology for 'meddling in elections and planting disinformation, in an attempt to 'weaponise information' and sow discord in the West'.[v] As a result of this threat, they called for the Government to consider 'whether current legislation to protect the electoral process from malign influence is sufficient', noting that '[l]egislation should be in line with the latest technological developments, and should be explicit on the illegal influencing of the democratic

process by foreign players'.[vi] In this way, new capacities are seen to be unlocked by digital technology that require an urgent response.

Evidence of the precise impact of phenomena such as misinformation or microtargeted campaigning on electoral outcomes (and citizen behaviour) has, however, yet to emerge. Whilst academic work is currently underway to investigate the impact of these processes, emerging studies are far from conclusive and it is by no means clear that scholarship will be able to determine precisely what impact digital activities have. Whilst potentially lessening the impetus for regulation, it is important to recognise the significance of public perceptions. Recent public opinion research has shown growing levels of public concern about the possible impact of technology on democracy. The Electoral Commission, for example, have reported public concern about practices such as targeted advertising and data misuse, whilst other surveys have shown increasing unease about disinformation. These views matter because they have important implications for the perceived integrity of elections.[vii] It is vital for democratic systems to retain public confidence in order to maintain legitimacy and ongoing support, making it important for governments to tackle trends that may undermine public confidence. This line of thinking was advanced by the all-party parliamentary group for electoral campaigning transparency which argued that '[d]emocracy will only function if the public is confident that elections and referenda are being policed effectively and that the playing field is level'.[viii] In line with this thinking, an absence of concrete evidence around effect is not required to drive action, evidence of growing public concern alone indicates a need for reform. For this reason, there is widespread support for urgent regulatory reform that brings existing systems of oversight in line with the affordances of digital technology.

The proposed form of regulatory change

Having reviewed the case for change, it is notable that precise diagnoses of what needs to be altered vary. Indeed, a review of recommendations conducted by the author of 14 Government reports found 230 discrete recommendations relating to digital issues, and little consensus as to how regulatory systems needed to be updated to respond to technology.[ix] Despite this dissensus, there are, however, some principles or initiatives around which support has coalesced.

First, recognising the rise of digital technology, many calls have been made for existing systems of regulatory oversight to be expanded to take account of the digital realm. As indicated above, much regulatory oversight was created in a pre-digital era and hence there is a need to expand regulators' remit to cover developments on the Internet. In this way, the Electoral Commission have, for example, called for an existing provision for imprints on all offline campaigning material to be

extended to cover content online. This change would mean that all digital material would have to contain an imprint saying who is behind the campaign and who created it. Elsewhere, those campaigning for the regulation of online political advertising have called for existing principles regulating offline political advertising to be applied online. The Coalition for the Reform of Political Advertising, for example, have called for the regulation of online political advertising content by either expanding the remit of the Electoral Commission, the Advertising Standards Authority, the Election Committee of Ofcom, or by founding an alternative body. In these ways, calls have been made to update existing rules to reflect the online world by extending current systems of oversight.

Second, and looking beyond existing systems, there have been some calls for the creation of new structures. Particularly focused on debate around the Online Harms White Paper, a number of actors have called for a regulator to be established that has new powers and regulatory remit to tackle problematic trends online. Envisaged to focus not just on elections and democratic processes, calls have been made for a new regulator that will implement, oversee and enforce new codes of conduct that will govern online environments and behaviours. It has been argued that a new digital regulator is needed to promote education and awareness raising about online safety, adopting a proactive approach to think about and address developments in the digital world. Looking beyond existing structures and systems of oversight, calls for this form of response have attempted to reframe how digital is viewed, focusing on overarching issues and concerns rather than seeking to update specific regulatory jurisdictions.

Third, debate has also focused on the need for increased transparency, extending existing provisions to provide more information about what is happening online. Calls for transparency have been made by a number of different organisations. The DCMS select committee, for example, argued that what was needed was 'the enforcement of greater transparency in the digital sphere, to ensure that we know the source of what we are reading, who has paid for it and why the information has been sent to us. We need to understand how the big tech companies work and what happens to our data'.[x] Elsewhere, the Information Commissioners' Office called for a public information campaign aiming to 'increase transparency and build trust and confidence amongst the electorate in how their personal data is being used during political campaigns'.[xi] This logic underpins calls for initiatives such as online political advertising archives which provide information about the number, cost and targeting of political adverts placed online. Whilst calls for transparency often request different kinds of information – variously specifying the need for greater financial, source, data and targeting information to be made available[xii] – this response is

seen to be vital for allowing citizens to understand what is happening, and for the detection of problematic practices by civil society and regulators. Transparency is therefore seen as a means by which to secure greater accountability, ensuring that trends online are understood and can be effectively regulated.

Whilst other specific proposals have been made, these three responses have dominated debate so far. Much attention has therefore been paid to which response can most effectively tackle problematic practices, with a raft of different proposals for change made. To date, however, limited progress has been made towards enacting change. Whilst the Government have committed to implementing digital imprints, and plans have been announced for OfCom to acquire new powers to act as the online harms regulator, little tangible change has been enacted. Considering this limited progress, it is interesting to consider whether responses to the challenges posed by digital could be made by regulators themselves, or whether governmental action is required to bring about change.

The practice of regulatory innovation

The practice of regulation is often neglected in debates around regulatory change and reform, but the question of how regulators operate and adapt is critical to thinking about the way in which digital developments can and need to be responded to. Whilst it can be easy to presume that regulators are equipped with the knowledge, skills and capacity to tackle new and emerging practices, this situation is by no means guaranteed. Indeed, it is likely that many regulators – that were created before the disrupting effect of digital technology – do not possess the specialist knowledge and skill set required to regulate developments online. Such competencies have to be fostered, but in order to determine where investment is needed and how regulatory competencies need to change, it is vital for regulators to adopt a future looking, anticipatory approach to regulation. In other words, regulators need to focus not only on performing their job in the here and now, but also need to invest time in thinking about the future regulatory landscape. Such thinking is vital to ensuring that regulators are clear about where future issues are likely to emerge, allowing them to reflect on where new skills and understanding need to be cultivated to effectively regulate such activities.

In bringing together regulators at our workshop, these ideas were of keen interest to those in the room. Numerous interventions recognised the need to adapt regulatory structures and processes, building greater familiarity with digital tools and anticipating future forms of digital change. Evident not only amongst regulators, but also industry actors and civil society organisations, there

was a desire to think and reflect on how regulators themselves could change in response to digital. Whilst often feeling constrained in their ability to act pre-emptively, there was significant interest in examples of best practice, and widespread recognition that, as digital was not a static phenomenon, a philosophy of ongoing change needed to be engrained.

Whilst discussed with enthusiasm within our workshop, it is, however, notable that limited attention has been paid to the need for such changes in the calls for reform discussed above. Whilst diagnosing problems and proposing (often legislative) solutions, few policy makers, civil society organisations or indeed regulators, have reflected on the need to change the way regulatory bodies themselves operate.

In thinking about this gap, there are, however, a few examples of organisations thinking about the need for this kind of change. Recent work from Nesta, presented at the workshop by Chris Gorst, highlighted the need to think about 'anticipatory regulation'. Whilst not specific to the realm of online political campaigning, or even to digital technology, these ideas suggest the importance of seeing regulation not as a fixed activity that oversees a particular, static set of phenomena, but rather as a dynamic and fluid activity where what is being regulated, and how regulation occurs shifts over time. To promote this form of regulation, Nesta argues that there is a need for regulators to adopt a flexible, collaborative and innovative approach that allows regulators to fight the present, rather than the last war. Outlining six principles, they argue that regulators needed to be:

1. Inclusive and collaborative, in engaging the public and diverse stakeholders where new technologies and how they are deployed raise ethical issues, and in leveraging the capabilities of businesses, cities and civil society to secure policy goals.
2. Future-facing, in developing resilient, adaptive strategies that can cope with the inherent uncertainty of fast-changing markets.
3. Proactive, in engaging with innovators and innovation early in the cycle to provide predictability and enable timely, proportionate responses to issues that may scale rapidly.
4. Iterative, in taking a test-and-evolve rather than solve-and-leave approach to novel problems, for which there may be no established playbook.
5. Outcomes-based, in focusing on validating companies' efforts to achieve well-defined goals, rather than setting rules, and particularly on incentivising platforms to support regulatory objectives.
6. Experimental, in facilitating diverse responses to regulation of early-stage opportunities and risks, and where national or global policies and standards are still to be established.[xiii]

In a similar manner, DotEveryone have also called for a shift in how regulators themselves behave. Advocating for an 'Office for Responsible Technology' they have argued that there is a need to promote a future-looking regulatory approach that will 'put UK regulators at the forefront of emerging regulatory approaches, shifting away from retrospective, command-and-control regulation towards the agile and intelligent approach digital technologies require'.[xiv]

These ideas suggest that regulatory change doesn't only arise from legislative reform, but can also result from a shift in regulators' own practices. Within our workshop, a number of examples emerged of these principles already being put into practice. In relation to inclusive, collaborative working, for example, regulators reflected on the advantages of working together to address shared problems. The AI working group, for example, was cited as an example of good practice that brings together regulators and external experts to share information on how they are engaging with AI. Elsewhere, examples of sandbox events between regulators, industry representatives and experts were cited as a vital way of identifying, understanding and responding to emerging issues. Such practices suggest that examples of anticipatory practice can be found, and yet these activities were by no means universal.

Whilst attracted to the idea of a future-facing, proactive regulatory model, issues of resource (in terms of staffing and finance), legislative remit, and capacity were seen to prevent this type of approach. Regulators reflected that they often lacked staff with specific expertise, and did not possess the resource necessary to hire those with computational and data analytics skills (who were often attracted to higher-paid industry posts). Alternatively, they explained that their legislative foundation inhibited their capacity to change by establishing tight remits and allowing limited opportunity to adapt and evolve. Additionally, some workshop participants reflected on the significance of regulator size, noting that larger, more established regulators often lacked the capacity to be nimble and adapt, making it hard to anticipate and proactively respond to technological change. What became clear, therefore, is that whilst attracted to the idea of more responsive regulatory practices, regulators are not always able to behave in this way.

In reflecting on the practice of regulation, the workshop highlighted an often neglected element of regulatory reform, looking beyond a focus on threats and legislative response to consider how regulators may be able to change the way they operate. In emphasising this focus it is, however, evident from the above discussion that further reflection is needed to determine the barriers to, and opportunities for this type of regulatory approach. Whilst some examples of best practice can be found, it is clear that these principles are not entrenched regulatory norms. This makes it important to consider how regulators can change their activities and where governmental action

may be needed to encourage this approach. Such thinking is vital to ensuring that any response to digital technology does not only respond to present trends and activities, but looks ahead to develop future-proof reactions that are able to address technological developments we cannot yet foresee. Given that just five years ago, the Internet was seen to play a marginal and largely insignificant role in election campaigns, it's clear just how quickly things can change. What appears, therefore, to be required, is a concerted evaluation of how regulation can continually evolve and change to prevent systems of oversight from becoming obsolete.

The special section

In the articles that follow, each author picks up upon the themes and ideas raised in the above discussion.

First, Lisa-Maria Neudart examines the hurdles to regulatory innovation in the UK. Highlighting the need for reform caused by the algorithmic spread of nefarious content, non-transparent political advertising, obscure campaign spending and reporting and opaque data-driven campaigning, she discusses the significance of institutional structures, organizational processes, and regulatory functions for regulatory innovation. In conclusion, she argues there is a need for regulators to become tech-savy, to use evidence-based insights and to take an anticipatory stance towards technological change.

Second, Jacob Rowbottom explores the regulation of third party campaigners. With growing coverage of the role played by third party campaigners in the recent 2019 General Election campaign, his article explores the history of regulation, tracing the complex web of existing electoral law. Considering the forms and consequences of future regulation, he casts light on the role of third party campaigns and the challenges of regulating their activity.

Third, Sam Power explores the history of electoral finance regulation to draw lessons for debates around digital campaigning regulation. Focusing on the aims of regulatory reform, he considers the impact of increasing transparency around digital campaigning. Drawing lessons from the Political Parties, Elections and Referendums Act 2000 he argues that more information can have perverse effects, and may in fact drive public concern. On this basis he asserts the need to think about the impact of future regulation and discusses the potential for reforms to have unintended side effects.

Fourth, Ben Wagner explores the role played by electoral observers and considers the challenges they face in monitoring often opaque online election campaigns. Exploring the regulation of illegal

content he considers existing international regulatory efforts and reflects on the general and specific challenges of overseeing online activity. The article asks whether and how electoral observation should adapt to digital technology and considers the resources such regulation would need.

Finally, Helen Margetts and Katharine Dommett conclude by looking at the possible avenues for regulatory reform in the field of digital campaigning. Diagnosing the need for a multi-layered approach, their article argues that action is needed from government, regulators, companies and civil society. Reflecting on the prospects for reform they make four recommendations designed to bring about change.

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[v] Digital, Culture, Media and Sport Select Committee. (2019) *Disinformation and 'fake news': Final Report:* Fifth Report of Session 2017–19. London: Stationary Office, p.69.

[vi] Ibid., p.71.

[vii] Kofi Annan Foundation, (2020), p.27.

[viii] APPG on Electoral Campaigning Transparency. (2020) *Defending our Democracy in the Digital Age: Reforming rules, strengthening institutions, restoring trust*, available here: https://fairvote.uk/wp-content/uploads/2020/01/Defending-our-Democracy-in-the-Digital-Age-APPG-ECT-Report-Jan-2020.pdf, p.1

[ix] For more information see my personal website. Link to the database is available here: http://www.katedommett.com/uploads/1/1/2/7/112786573/recommendations_made_on_digital_-_final.xlsx.

[x] Digital, Culture, Media and Sport Select Committee. (2019) p.5.

[xi] Information Commissioners' Office. 2018. *Democracy disrupted? Personal information and political influence.* London: Stationary Office, pp.4-5.

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