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# Regulating Political Advertisement in the United Kingdom: A Case for Extending the Statutory Ban of Political Advertisement on Television and Radio to Digital Platforms

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## ABSTRACT

*The question of political advertising on digital platforms continues to divide stakeholders; major players in this industry have adopted differing policies with regards to this type of advertising. This paper argues that it is time for lawmakers in the United Kingdom to consider a statutory ban on political advertising on digital platforms similar to the one imposed on television and radio broadcast as per the Communications Act 2003. Given the possible analogy between traditional broadcasting content and platform content, it is now untenable to apply distinct regulatory regimes. Additionally, there are clear drawbacks in leaving online platforms free to self-regulate on this issue. Combined, the similarities between platforms and traditional broadcasters and the flaws of self-regulation provide an argument in favour of extending the ban on political advertising to digital platforms.*

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## INTRODUCTION

*‘While internet advertising is incredibly powerful and very effective for commercial advertisers, that power brings significant risks to politics, where it can be used to influence votes to affect the lives of millions’.<sup>1</sup>*

The question of political advertising continues to divide digital platforms which host them.<sup>2</sup> Whilst Twitter has banned all political advertising,<sup>3</sup> Facebook’s position tends to change depending on the situation.<sup>4</sup> Google, on the other hand, aims for the middle ground; the platform imposes restrictions on the use of targeted political advertisement without prohibiting it outright.<sup>5</sup>

Contrastingly, political advertisement on television and radio in the United Kingdom is strongly regulated as a result of a legislative prohibition. As such, current debates on online content moderation raise an important question. Should political advertisement on digital platforms available to a UK-based audience be regulated in a way similar to television and radio under the Communications Act 2003?

To answer this query, this paper will first outline – in Section I – the United Kingdom’s current regulatory regimes applicable to political advertising on both television and radio broadcast and digital platforms.

In Section II, an analogy between television and radio broadcasting content and content on digital platforms will be drawn. This will include an analysis of the

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<sup>1</sup>Jack Dorsey (*Twitter*, 30 October 2019) <<https://twitter.com/jack/status/1189634360472829952>> accessed 14 January 2020.

<sup>2</sup>Political advertising, in the context of television and radio broadcast as well as on digital platforms, specifically refers to paid-for content made available to users.

<sup>3</sup>Dorsey (n 1).

<sup>4</sup>Tech Crunch, ‘Facebook will turn all US political advertising off again after Georgia runoffs’ (*Tech Crunch*, 6 January 2021) <<https://techcrunch.com/2021/01/05/facebook-political-ad-ban-returns-after-ga-runoffs/>> accessed 26 January 2021.

<sup>5</sup>Scott Spencer, ‘An update on our political ads policy’ (*Google Blog*, 20 November 2019) <<https://www.blog.google/technology/ads/update-our-political-ads-policy>> accessed 14 January 2020.

viewership shift towards digital platforms, the impact of online curated content, as well as the common concerns over political advertising on television and radio and digital platforms.

Given this analogy, the self-regulatory regime for political advertisement on digital platforms can be criticised as unjustified as well as inadequate. Section III will outline the flaws of self-regulation by digital platforms in the context of political advertisement, noting specifically the absence of transparency and accountability. Additionally, the platforms' lack of effective regard to fundamental human rights is contrasted to the active scrutiny in UK Parliamentary processes. Current failings of the regulatory approach to digital advertising will thus be used to outline a potential solution: extending the prohibition of political advertising on television and radio in the UK to digital platforms. However, it must be noted from the outset that, whilst this paper advocates for a regulatory regime similar to the one applicable to television and radio broadcast, specificities for the implementation and enforcement of such a proposal in the UK are outside of its scope.<sup>6</sup>

Throughout this essay, the term 'traditional broadcasters' is used to refer to television and radio in the UK. Additionally, the term 'digital or online platform' is used interchangeably to refer to a variety of Internet actors which rely on advertisement as their business model. These include search engines (e.g. Google or Yahoo!), social media platforms (e.g. Facebook, Twitter, or OkCupid) and digital marketplaces or service providers (e.g. Amazon, Airbnb, or Uber). There are countless platforms which could be discussed. However, subsequent examples focus on Google, Youtube, Facebook, and Amazon as key players in their respective markets.<sup>7</sup>

## I. DIFFERING REGULATORY APPROACHES TOWARDS POLITICAL ADVERTISING

Before discussing the regulation of political advertising on television and radio in contrast to online platforms in the UK, it is important to understand the

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<sup>6</sup>For example, whether an independent regulator should be set up to enforce an online ban or whether existing regulators, such as the Advertising Standard Authority or the Office of Communications (Ofcom), should be granted statutory powers to enforce it.

<sup>7</sup>Yochai Benkler and others, *Network Propaganda* (OUP, 2018) 360.

different approaches to regulation in general. Finck outlines three broad categories.<sup>8</sup>

First, she sets out the traditional command-and-control approach, where a legislator issues a law which can be accompanied by a sanction for non-compliance.<sup>9</sup>

Finck describes the second approach, self-regulation, as a group of private actors adopting common standards and guidelines that they themselves enforce. These groups become the ‘relevant rule-makers’.<sup>10</sup>

Finally, co-regulation is described by Finck as ‘regulated self-regulation’. This consists of a system where non-public actors are to achieve public policy objectives set out by the legislator. However, co-regulation does not only represent a scenario where private stakeholders (i.e. digital platforms) are free to implement policy objectives whichever way they wish. At times, this may involve a legislation establishing an independent body with statutory powers to develop codes of conduct for actors in the concerned sector, as well as, regulate and enforce compliance.<sup>11</sup>

Although Finck distinguishes among these regulatory approaches, regulation can also be seen as a continuum, where no concrete barriers exist between categories outlined above.<sup>12</sup> Defining modes of regulation remains an ongoing debate.<sup>13</sup> For simplicity, the term ‘regulation’ will be used to cover both command-and-control, as well as co-regulatory approaches (unless specified). In

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<sup>8</sup>Michèle Finck, ‘Digital Regulation: Designing a Supranational Legal Framework for the Platform Economy’ (2018) 43(1) *European Law Review* 47, 48  
<<https://uk.westlaw.com/Document/I818FC9F0112011E8BD569716240FCA92/View/FullText.html>> accessed 25 November 2019.

<sup>9</sup>*ibid* 51.

<sup>10</sup>*ibid* 53-54.

<sup>11</sup>*ibid* 58-59.

<sup>12</sup>Julia Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a ‘Post-Regulatory’ World’ (2001) 54(1) *Current Legal Problems* 103, 110  
<[https://moodle.lse.ac.uk/pluginfile.php/355170/mod\\_resource/content/1/Julia\\_Black\\_paper\\_final.pdf](https://moodle.lse.ac.uk/pluginfile.php/355170/mod_resource/content/1/Julia_Black_paper_final.pdf)> accessed 26 April 2020.

<sup>13</sup>*ibid* 104.

contrast, 'self-regulation' will be used to describe 'option zero', where there is an absence of legislative or governmental intervention.<sup>14</sup>

The UK's regulatory approach to political advertisement in traditional media is straightforward: there is a statutory ban enforced by an independent regulator (sub-section A). However, there is no prohibition in relation to political advertising online (sub-section B).

### ***A. Statutory control of political advertisement on television and radio***

The decision to ban political advertising on television and radio in the UK dates back to the 1950's, when commercial television first emerged.<sup>15</sup> The latest statutory development in relation to this prohibition was in 2003, with the enactment of the Communications Act 2003.

This Act was passed despite the Minister in charge being unable to make a declaration of compatibility with the European Convention on Human Rights (ECHR), and in particular, the right to freedom of expression (Article 10 ECHR)<sup>16,17</sup> This is nonetheless authorised under Section 19 of the Human Rights Act 1998 (HRA).<sup>18</sup>

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<sup>14</sup>Christopher Marsden, *Internet Co-regulation* (CUP, 2011) 228.

<sup>15</sup>Tom Lewis, 'Animal Defenders International v UK: sensible dialogue or a bad case of Strasbourg jitters?' (2014) 77(3) MLR 460, 460-461 <<https://doi.org/10.1111/1468-2230.12074>> accessed 4 November 2019.

<sup>16</sup>Article 10 of the ECHR on Freedom of Expression states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

<sup>17</sup>Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (OUP, 2006) 1015.

<sup>18</sup>Section 19(1)(b) states that the Minister of the Crown must 'make a statement to the effect that although he is unable to make a statement of compatibility the government

Section 319 of the Communications Act 2003 imposes a duty on Ofcom, the UK's communications regulator, to review broadcasting content to ensure 'that advertising that contravenes the prohibition on political advertising set out in Section 321(2) is not included in television or radio services'.<sup>19</sup> In turn, Section 321(2) outlines a prohibition of political advertising in television and radio services. This includes advertisement by a body 'whose objects are wholly or mainly of a political nature'<sup>20</sup> or advertisement with a 'political end'.<sup>21</sup> Finally, Section 321(3)(a) to (g) provides a non-exhaustive list of definitions to clarify the meaning of 'political nature' and of 'political end'.

The ban on political advertisement in television and radio broadcast is, therefore, considered a co-regulatory approach,<sup>22</sup> as the legislative ban is enforced by an independent regulator with statutory powers: Ofcom.<sup>23</sup>

### ***B. Political advertising on digital platforms***

Contrastingly, there is no statutory framework for online political advertisement, whether that is for video-sharing platforms,<sup>24</sup> social media platforms, or search engines.<sup>25</sup>

In the UK, the Advertising Standard Authority (ASA) is responsible for regulating non-broadcast *commercial* advertising,<sup>26</sup> leaving online *political* advertising largely unregulated. As such, no public authority or independent

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nevertheless wishes the House to proceed with the Bill' without it hindering the possibility of the Bill becoming an Act of Parliament. See Section IV.C.i. for further discussion on this.

<sup>19</sup>Communications Act 2003, s 319(2)(g).

<sup>20</sup>*ibid* s 319(2)(a).

<sup>21</sup>*ibid* s 321(2)(b).

<sup>22</sup>Digital, Culture, Media and Sport Committee, *Disinformation and 'fake news': Final Report* (HC 2017–19, 1791) paras 195–196.

<sup>23</sup>Communications Act 2003, s 319.

<sup>24</sup>The EU Audiovisual Media Services Directive, as transposed into UK law through the Audiovisual Media Services Regulations 2020, does not address political advertising.

<sup>25</sup>Ofcom, 'Addressing harmful online content: A perspective from broadcasting and on-demand standards regulation' (*Ofcom*, 18 September 2018) 16 <[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0022/120991/Addressing-harmful-online-content.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0022/120991/Addressing-harmful-online-content.pdf)> accessed 4 November 2019.

<sup>26</sup>Digital, Culture, Media and Sport Committee (n 22) paras 195–196.

regulator prescribed through statutory provisions oversees the latter. ASA has specifically excluded political advertising on the Internet from its regulatory scope.<sup>27</sup> According to Guy Parker, CEO of ASA, this is because political parties have not agreed to comply with the advertising codes.<sup>28</sup>

Thus, rules for non-broadcast political advertising are formulated and applied by digital platforms through self-regulation.

## II. AN ANALOGY BETWEEN ONLINE PLATFORMS AND TRADITIONAL BROADCASTERS

The highest court of law in the UK at the time, the House of Lords, confirmed the lawfulness of the prohibition set out in the Communications Act 2003 in the *Animal Defenders* case.<sup>29</sup> The House of Lords assessed the legality of the legislative ban on political advertising as a result of proceedings initiated by Animal Defenders International, a non-profit organisation whose campaign seeking to ‘achieve changes in law and public policy’ on the treatment of primates was deemed to breach the ban by the Broadcast Advertising Clearance Centre.<sup>30</sup> Whilst assessing the proportionality of the legislative ban, the House of Lords considered this restriction of the right to freedom of expression (Article 10 ECHR) to be necessary and proportionate to prevent distortions of political debates.<sup>31</sup> Lord Neuberger of Abbotsbury, in particular, highlighted ‘the potential mischief of partial political advertising’ and the need to protect voters from this.<sup>32</sup> The Court also stressed the fact that television and radio were the ‘most influential’ media at the time to justify the specific scope of legislative restriction.<sup>33</sup>

This outcome was approved by the European Court of Human Rights (ECtHR), where the majority focused on the margin of appreciation granted to the Westminster Parliament in deciding what was necessary and proportionate to

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<sup>27</sup>ibid para 202.

<sup>28</sup>Commercial advertisers have to agree to be regulated by ASA. Regulation is thus on a voluntary basis. See ibid para 203.

<sup>29</sup>R (*on the application of Animal Defenders International*) v *Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

<sup>30</sup>ibid [1]-[4].

<sup>31</sup>ibid [50]-[51].

<sup>32</sup>ibid [28].

<sup>33</sup>ibid [30]-[32].

safeguard democracy in the UK.<sup>34</sup> This meant rebutting the Applicant's claim that it is illogical to regulate television and radio broadcast but not the Internet (for the same reasons as the House of Lords).<sup>35</sup>

Reluctance to regulate online behaviour in a similar way to television and radio stems, in part, from the idea that individual digital content cannot be classified as broadcasting. Instead, some view it as an expression of individual free speech that should not be restricted except under narrowly defined conditions. Smith's rationale for this argument, for example, is that digital platforms do not have the same power of persuasion as traditional broadcasters.<sup>36</sup>

However, in the sections below, it is argued that functions performed by digital platforms are increasingly similar to those of traditional broadcasters. As a result, these platforms have become as influential as television and radio broadcasters in shaping information flows.<sup>37</sup> Bearing in mind that the ban on political advertisement in traditional broadcasting was deemed proportionate because of this medium's influence<sup>38</sup> at the time,<sup>39</sup> it now seems arbitrary to regulate political advertisement on television and radio without considering political advertisement on digital platforms.

An analogy between television and radio, and digital platforms can be drawn. This is apparent in the shift in viewership from television and radio towards digital platforms as these media increasingly converge. This has enabled the latter to influence its users (sub-section A). The analogy is also visible from the development from chronological to curated online content (sub-section B).

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<sup>34</sup>*Animal Defenders International v United Kingdom* [2013] ECHR 362 [108]-[109].

<sup>35</sup>*ibid* [117]-[119].

<sup>36</sup>Graham Smith, '*Speech is not a tripping hazard - response to the Online Harms White Paper*' (Cyberleagle, 28 June 2019) 15-16 <<https://www.cyberleagle.com/2019/06/speech-is-not-tripping-hazard-response.html>> accessed 25 November 2019.

<sup>37</sup>Emily Laidlaw, *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (CUP, 2015) 205.

<sup>38</sup>In this context, 'influence' entails having a determinative impact on, and potentially changing, an audience's views and opinions.

<sup>39</sup>Although the *Animal Defenders* case before the ECtHR dates back to 2013, the dispute over the Communications Act 2003 began in 2005 and the UK House of Lords rendered its judgment in 2008. The judgments were thus delivered before the impact of major developments undergone by digital platforms (between late 2000s-early 2010s) could be quantified.

Finally, the analogy can also be derived from common concerns linked to political advertising on television and radio, and on platforms (sub-section C).

### ***A. Influencing potential of digital platforms due to media convergence***

Six years after the ECtHR *Animal Defenders* decision,<sup>40</sup> it is possible to adduce ‘evidence of a sufficiently serious shift in the respective influences’ of online platforms.<sup>41</sup> Users are increasingly relying on digital routes to access content, threatening the historical prevalence of traditional broadcasters.<sup>42</sup> Pariser finds evidence of the potential for online platforms to influence and shape public life in the recent convergence of traditional broadcasting content and digital content.<sup>43</sup>

Figures relating to news consumption in the UK reflect the convergence between traditional broadcasting (television and radio) and online platforms. The UK’s communications regulator, Ofcom, has outlined that whilst television remained the primary outlet for news consumption in the UK in 2019, this has decreased since 2018 (from 79% to 75% of adults). In contrast, social media platforms (e.g. Facebook) are increasingly popular for news (from 44% in 2018 to 49% in 2019).<sup>44</sup> It is important to note that the gap between these figures (consumption on television as opposed to consumption on social media platforms) is narrowing over time.

Laidlaw warns that this shift in viewership does not reflect the Internet’s ability to replace traditional media. Instead, the two are working towards a similar goal: increasing access to information and public participation.<sup>45</sup> Content on digital platforms is increasingly similar to that found traditionally on television and radio. For example, users are able to access news, films, or television shows on platforms. Regulation of broadcasting under the Communications Act 2003

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<sup>40</sup>*Animal Defenders International* (n 34).

<sup>41</sup>Laidlaw (n 37) 16.

<sup>42</sup>Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press, 2015) 95.

<sup>43</sup>Eli Pariser, *The Filter Bubble: What the Internet Is Hiding from You* (Penguin Books, 2011) 50.

<sup>44</sup>Ofcom, ‘News Consumption in the UK: 2019’ (Ofcom, 24 July 2019) 7-8 <[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0027/157914/uk-news-consumption-2019-report.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0027/157914/uk-news-consumption-2019-report.pdf)> accessed 24 November 2019.

<sup>45</sup>Laidlaw (n 37) 32.

has even extended to online platforms providing access to live television, such as Amazon Prime.<sup>46</sup> However, considering this ongoing shift in viewership, regulating online platforms should not simply stop at live television.

The convergence in media demonstrates the increasing influence of digital platforms.<sup>47</sup> As viewers turn to those, rather than traditional broadcasters, it can be argued that digital platforms have the ability to similarly impact their opinions. As such, there are limited reasons to solely regulate political advertisements on television and radio.

### ***B. Digital platforms: from mere communications conduit to curated content***

Technological developments undergone by digital platforms indicate their similarity to traditional broadcasters. As they host and organise content to create an ‘engaging flow’, their curation resembles that of a traditional broadcaster.<sup>48</sup> Algorithmically generated content has become the main business model undertaken by digital platforms (sub-section (1)). This shift from chronological organisation should be considered evidence of their transformation from ‘pull’ technology, where user initiates what content will be ‘pulled’ from a server by the platform,<sup>49</sup> into ‘push’ technology, where content is generated without any action by the user (sub-section (2)).<sup>50</sup>

#### *(1) Curated content as a business model*

Online platforms were initially considered to be mere conduit of information or communications. These platforms provided access to content in a chronological manner without filtering it.<sup>51</sup>

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<sup>46</sup>Ofcom (n 25) 15-16.

<sup>47</sup>Jacob Rowbottom, *Democracy Distorted: Wealth Influence and Democratic Politics* (CUP, 2010) 242.

<sup>48</sup>Tarlerton Gillespie, *Custodians of the Internet* (Yale University Press, 2018) 41.

<sup>49</sup>Ramaprasad Unni and Robert Harmon, ‘Perceived Effectiveness of Push VS. Pull Mobile Location-Based Advertising’ (2007) 7(2) *Journal of Interactive Advertising* 28, 30 <<https://doi.org/10.1080/15252019.2007.10722129>> accessed 25 November 2019.

<sup>50</sup>Pariser (n 43) 67.

<sup>51</sup>Gillespie (n 48) 43.

By 2001, Amazon became one of the first businesses to profit from curating online content.<sup>52</sup> The strategy of using algorithms to organise content was subsequently adopted by various digital platforms such as Facebook, Google, and Youtube. Facebook's first algorithm, 'EdgeRank', was introduced in late 2006, before implementing a more sophisticated personalisation algorithms to curate content.<sup>53</sup> Similarly, by 2008, Google relied on algorithms to filter and arrange content.<sup>54</sup>

Personalised content for users has become a main source of profit for digital platforms; consumer engagement is crucial to their business model and growth strategy.<sup>55</sup> Additionally, as digital platforms are dependent on advertisement for revenue, they use algorithmic feeds as a selling point for advertisers. Platforms with the most data acquired through machine learning technologies can target users more effectively and gain the trust (and money) of online advertisers.<sup>56</sup>

According to Gillespie, these strategies provide evidence that a 'media commodity' is now generated by online platforms.<sup>57</sup>

## *(2) From pull to push media*

Digital platforms can no longer be considered mere 'conduits' of information as they filter and organise content. The change in delivery from a chronological list to algorithmically curated content changes the way users should characterise digital platforms. They are no longer passive; some sources of information may even be hidden from the user's feed whilst others are made to appear more prominently.

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<sup>52</sup>Pariser (n 43) 28-29.

<sup>53</sup>ibid 37-38.

<sup>54</sup>ibid 33-38.

<sup>55</sup>Digital, Culture, Media and Sport Committee, *Disinformation and 'fake news': Interim Report* (HC 2017-19, 363) para 64.

<sup>56</sup>Pariser (n 43) 40.

<sup>57</sup>Gillespie (n 48) 41.

As such, what used to be considered pull technology has now become a mix of push and pull technology.<sup>58</sup> There is a range of tools used by platforms that should be considered push technologies. For example, this is the case of Youtube's 'LeanBack' function, where suggested videos play in a consecutive chain without users actively intervening. Consequently, this function strongly resembles television broadcast.<sup>59</sup> In a similar way, targeted advertising based on users' geographical location is another example of push media on platforms such as Facebook.

The dichotomy between push and pull media, where push media is considered to have influencing power which pull media lacks, was key in the decision to prohibit political advertising only on traditional broadcasting.<sup>60</sup> However, as reliance on algorithms was only just developing by the time the *Animal Defenders* case reached the House of Lords,<sup>61</sup> their ability to influence users may not have been foreseen by the judges.

Thus, it is argued that there are now limited reasons to treat online platforms differently to traditional broadcasters if the former curates and personalises content for its users just as much. An analogy can be drawn between television and radio, and platforms.

### ***C. Common concerns with regards to political advertisement***

In parliamentary debates leading up to the enactment of the Communications Act 2003, particular attention was given to the proposed ban on political advertising. According to Tessa Jowell MP, Secretary of State for Culture, Media and Sport at the time, the prohibition was crucial to circumvent threats to democracy that television and radio posed as a result of its influence on society.<sup>62</sup>

However, in light of the abovementioned convergence, Benkler asserts that these concerns are as present on digital platforms as they are on traditional

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<sup>58</sup>Unni (n 49) 30.

<sup>59</sup>Pariser (n 43) 67-8.

<sup>60</sup>R (*on the application of Animal Defenders International*) (n 29) [30]-[32].

<sup>61</sup>*ibid.*

<sup>62</sup>HC Deb 3 December 2002, vol 395, col 788.

broadcast.<sup>63</sup> These notably include the possibility of wealth inequalities (sub-section (1)) and of broadcaster partiality (sub-section (2)) distorting the democratic debate.

*(1) Wealth inequalities in democratic debates.*

During the parliamentary debates over the Communications Act, the ban on political advertising on television and radio was described as a measure to protect democratic debates from being distorted by wealth inequalities. It aimed to ensure that organisations and individuals were granted equal opportunities regardless of funding.<sup>64</sup> The House of Lords similarly concluded that the ban was necessary in a democratic society to prevent political parties from turning elections into auctions. The majority was concerned that without the prohibition, the ‘power of the purse’ would be leveraged to give prominence to a specific political party over another with limited resources.<sup>65</sup> Baroness Hale warned against an electoral system that resembled the one in the United States of America, where billions are spent by pressure groups to advertise political messages through highly influential media.<sup>66</sup>

Thus, the increase in online advertising spending is cause for concern as, according to Rowbottom, ‘wealth directly determines which view will get a hearing’.<sup>67</sup> Ofcom published a report indicating the drastic increase in online advertising spending from £5,338 million in 2011 to £11,553 million in 2017. In contrast, television and radio advertising remained relatively constant between 2011 and 2017 (Table 1 below).<sup>68</sup> These numbers include spending for commercial and political advertising.

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<sup>63</sup>Benkler (n 7) 351.

<sup>64</sup>Lewis (n 15) 461.

<sup>65</sup>R (*on the application of Animal Defenders International*) (n 29) [28].

<sup>66</sup>*ibid* [47]-[48].

<sup>67</sup>Rowbottom (n 45) 25-26.

<sup>68</sup>Ofcom, ‘Communications Marketing Report’ (*Ofcom*, 2 August 2018) 76 <[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0022/117256/CMR-2018-narrative-report.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0022/117256/CMR-2018-narrative-report.pdf)> accessed 24 November 2019.

**Table 1: UK advertising spend 2011-2017 (£ million). Source: Ofcom (Open Data).<sup>69</sup>**

	TV	News- papers (print)	Mag- azines (print)	Radio	Out of home	Cinema	Direct mail	Online
2011	4,873	3,272	1,089	590	981	188	2,109	5,338
2012	4,708	2,855	932	595	1,044	232	2,022	5,862
2013	4,741	2,534	825	564	1,039	194	2,007	6,569
2014	4,928	2,312	751	595	1,054	203	1,950	7,584
2015	5,264	2,047	682	612	1,094	246	1,977	8,913
2016	5,216	1,737	611	635	1,158	258	1,785	10,382
2017	4,897	1,433	505	644	1,144	260	1,753	11,553

There is also evidence that spending on political advertising (specifically) has significantly increased. Analysing advertisement by political parties on Facebook demonstrates that whilst £1.3 million was spent for the 2015 UK general election, this increased to £3.2 million for the 2017 election.<sup>70</sup> As these numbers only reflect the use of one online platform, political advertisement spend on all platforms combined is expected to be much higher. Additionally, these figures are specific to spending by political parties when in reality, some political advertisements are funded by non-political groups and individuals.<sup>71</sup>

There is thus a risk of the democratic debate being distorted by disparities in spending power. As figures overall escalate, political groups with less resources will be unable to reach the electorate as well as better funded ones. Rowbottom warns that this is particularly true of targeted political advertising, which enables

<sup>69</sup>Download the data here: Ofcom, 'The Communications Market 2018: Data downloads' (*Ofcom*, 2 August 2018) <<https://www.ofcom.org.uk/research-and-data/multi-sector-research/cmr/cmr-2018/data-downloads>> accessed 26 January 2021.

<sup>70</sup>Digital, Culture, Media and Sport Committee (n 22) [200].

<sup>71</sup>ibid [204].

‘wealthy advertisers to buy up spaces for all the various niche audiences and reach a mass audience in total’.<sup>72</sup>

(2) *Due impartiality and designer bias*

The ban of political advertising on television and radio also aimed at guaranteeing broadcaster impartiality to ensure that democratic processes were not hindered.<sup>73</sup> This was emphasised in *Animal Defenders* (House of Lords).<sup>74</sup> Lord Bingham established that broadcasters had a duty to present the ongoing democratic debate with political impartiality as they exert influence over viewers.<sup>75</sup> The ban was thus a way of ensuring that political advertising did not hinder due impartiality required of traditional broadcasters under the Communications Act 2003.<sup>76</sup>

Democratic debates have been increasingly present on digital platforms as the Internet enhances access and participation.<sup>77</sup> However, platforms hosting political content have the potential to influence and, at times, manipulate these debates through their design.<sup>78</sup> This is the case, for example, when political advertisements of a certain leaning are hidden whilst political advertisements of another leaning are made more apparent. Lessig’s infamous slogan, ‘code\_is law’, reflects this: a coder’s design decides what values are represented on the platform.<sup>79</sup> As such, content generated algorithmically can reflect the designer’s views.<sup>80</sup>

Additionally, visibility of advertisement on platforms can be artificially manipulated by designers. This is particularly true of search engines which rank results, such as Google.<sup>81</sup> An advertiser that pays more will see their content be

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<sup>72</sup>Rowbottom (n 47) 238-240.

<sup>73</sup>Fenwick and Phillipson (n 17) 997.

<sup>74</sup>R (on the application of *Animal Defenders International*) (n 29).

<sup>75</sup>ibid [28].

<sup>76</sup>Communications Act 2003, s 320.

<sup>77</sup>Laidlaw (n 37) 26-27.

<sup>78</sup>ibid 35.

<sup>79</sup>Lawrence Lessig, *Code 2.0* (Basic Books, 2006) 6.

<sup>80</sup>Pasquale (n 42) 38.

<sup>81</sup>Rowbottom (n 47) 224.

more visible to a wider variety of users, even if it is made clear by platform designers that they are sponsored to avoid misleading users.

Rowbottom asserts that, whilst designer bias (where content on platforms reflects the designer's views) has not yet become a pressing issue in the UK, the discretion afforded to designers to interfere with content accessed by users is concerning.<sup>82</sup> This content moderation demonstrates that platforms should not be considered neutral as, in the words of Gillespie, this is a myth.<sup>83</sup>

Digital platforms do not have the same impartiality duty as broadcasters. However, they shape the way society thinks and functions through design, such as through the placement of targeted advertisement.<sup>84</sup> The Cambridge Analytica scandal provides an illustration. Cambridge Analytica's business involved collecting and analysing user data to predict their ideological beliefs.<sup>85</sup> They subsequently relied on Facebook's algorithmic design to target specific Facebook users with highly relevant political advertisement to influence voting habits.<sup>86</sup> Although the impact of micro-targeted political advertising in swaying elections and referendums can be difficult to quantify,<sup>87</sup> Pariser asserts that consumption of information which reflects existing beliefs can entrench confirmation biases.<sup>88</sup> Therefore, due impartiality of digital platforms may be crucial in preventing distorted debates.

An analogy between traditional broadcasters and online platforms can be derived from their common concerns in relation to the impact of political advertising.

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<sup>82</sup>ibid 224-225.

<sup>83</sup>Gillespie (n 48) 14.

<sup>84</sup>Cass Sunstein, *Republic.com 2.0* (Princeton University Press, 2007) 112-113.

<sup>85</sup>Information Commissioner's Office, 'Investigation into the use of data analytics in political campaigns' (ICO, 6 November 2018) 36 <<https://ico.org.uk/media/action-weve-taken/2260271/investigation-into-the-use-of-data-analytics-in-political-campaigns-final-20181105.pdf>> accessed 13 April 2020.

<sup>86</sup>Digital, Culture, Media and Sport Committee (n 55) paras 97-101.

<sup>87</sup>Information Commissioner's Office (n 85) 19.

<sup>88</sup>Pariser (n 43) 88-89.

### III. SHORTCOMINGS OF SELF-REGULATION: LEGISLATION AS A SOLUTION

The possible analogy between television and radio and online platforms makes the different regulatory approaches to broadcast and non-broadcast political advertising increasingly difficult to justify. Similarities between traditional broadcasters and digital platforms, as well as the influence the latter have over users, demonstrate that a distinct regulatory regime for online platforms is no longer tenable. Regulatory approaches offline and online should not be drastically different, as this makes compliance more difficult for those targeted by legislation (e.g. broadcasters which also produce digital content).<sup>89</sup> Thus, there is reason to end the 'laissez-faire' attitude towards political advertisement online.<sup>90</sup>

It must be noted that the discussion below does not aim to condemn self-regulation on a general basis. There are benefits to this regulatory regime. For example, self-regulation can enhance innovation and coordinate industry standards in a way that command-and-control cannot due to absence of expert knowledge.<sup>91</sup> Additionally, self-regulatory mechanisms have a degree of legitimacy in the cyberspace, as evidenced by user consent.<sup>92</sup> As such, certain sectors may effectively rely on self-regulation.<sup>93</sup> However, it is argued that this is not the case in relation to online political advertisement.

Instead, shortcomings of self-regulation in this specific sector (online political advertisement) provide an argument in favour of extending the ban to digital platforms, as will be argued below. Whilst academics highlight various

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<sup>89</sup>Andrew Murray and Chris Reed, *Rethinking the Jurisprudence of Cyberspace*, (Edward Elgar Publishing, 2018) 192-193.

<sup>90</sup>Benkler (n 7) 368.

<sup>91</sup>Finck (n 8) 53.

<sup>92</sup>Murray and Reed (n 89) 52-53.

<sup>93</sup>Joseph A Cannataci and Jeanne Pia Mifsud Bonnici, 'Can Self-Regulation Satisfy the Transnational Requisite of Successful Internet Regulation' (2003) 17(1) *Int'l Rev LComputers & Tech* 51, 52 <<https://heinonline.org/HOL/P?h=hein.journals/irlct17&i=52>> accessed 25 November 2019.

concerns linked to self-regulatory strategies adopted by digital platforms, only three will be detailed in light of space constraints.<sup>94</sup>

Firstly, lack of transparency in the self-regulatory approach to targeted advertising will be discussed (sub-section A). Similarly, there is evidence of lack of accountability of digital platforms for content or behaviour which negatively affects users (sub-section B). Finally, it will be demonstrated that this self-regulatory approach does not protect human rights as adequately as strategies which include statutory intervention (sub-section C).

### ***A. Transparency in targeted advertising***

Transparency is crucial, especially in relation to digital platforms and self-regulation, as it enables user trust.<sup>95</sup> As such, transparency in online advertising has recently improved. Certain platforms, such as Facebook or Google, label sponsored content along with the entity or individual responsible for its upload.<sup>96</sup> However, these measures are not prescribed by UK law,<sup>97</sup> they are a result of strong criticism and a US Statute (applicable to content on these platforms accessed by US users).<sup>98</sup> As such, not all digital platforms provide these details, which leads to the absence of uniformity.

Additionally, it is argued that these transparency steps, where applied, are not sufficient. Crucial information remains concealed, such as details on the functioning of algorithms and targeted audience.<sup>99</sup>

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<sup>94</sup>Others include, notably, legal certainty, the prohibition of arbitrary decisions or access to justice. See Karen Yeung, 'Algorithmic regulation: A critical interrogation' (2018) 12(4) *Regulation & Governance* 505 <<https://onlinelibrary.wiley.com/doi/pdf/10.1111/rego.12158>> accessed 3 December 2019.

<sup>95</sup>See The Electoral Commission, 'Digital campaigning - increasing transparency for voters' (The Electoral Commission, 13 August 2019) <<https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/changing-electoral-law/transparent-digital-campaigning/report-digital-campaigning-increasing-transparency-voters>> accessed 4 January 2020.

<sup>96</sup>Pariser (n 43) 232.

<sup>97</sup>The Electoral Commission (n 95).

<sup>98</sup>Pasquale (n 42) 71.

<sup>99</sup>Pariser (n 43) 232.

This lack of transparency is enhanced by the opaque nature of algorithms (sub-section (1)). Similarly, digital platforms have limited incentive to make such information available to the public, as it remains their main business strategy (sub-section (2)). Due to these two considerations, recommendations for absolute transparency in online political advertising are unlikely to be effective, as elaborated upon below. There is, thus, an argument in favour of extending the ban on political advertising on traditional broadcasting to online platforms (sub-section (3)).

*(1) Opacity in algorithmic feeds*

Algorithmic decision-making processes remain obscure for the most part. At times, a lack of transparency is caused by the nature of this complex, autonomous technology; by processing personal data, algorithms can identify patterns invisible to the human eye.<sup>100</sup> Other times, digital platforms have refused to provide insight into how their ranking algorithms function.<sup>101</sup>

Firstly, there is an inherent opacity in the way algorithms function on digital platforms. Those in charge of algorithms' internal operations do not always control their effects. Auerbach, a former software engineer for Google, asserts that employees designing algorithms are incapable of providing insight into how the programs function.<sup>102</sup> Algorithms can sift through content and pick out the most relevant at a speed that humans cannot sustain. As a result, society is faced with decisions made by technologies that cannot be verified, even by their designers.<sup>103</sup>

However, algorithms are not only opaque in nature. Platforms relying on algorithms also keep details of the algorithmic procedures, as well as the

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<sup>100</sup>Mireille Hildebrandt, 'Who is Profiling Who? Invisible Visibility' in S Gurtwirth and others (eds), *Reinventing Data Protection?* (Springer, 2009) 242.

<sup>101</sup>Pasquale (n 42) 66.

<sup>102</sup>David Auerbach, 'The Code We Can't Control' (Slate, 14 January 2015) <<https://slate.com/technology/2015/01/black-box-society-by-frank-pasquale-a-chilling-vision-of-how-big-data-has-invaded-our-lives.html>> accessed 4 January 2020. See also: Pariser (n 42) 202.

<sup>103</sup>Select Committee on Communications, *Regulating in a digital world* (HL 2017–19, 299) paras 88–95.

information obtained from them, hidden from public scrutiny.<sup>104</sup> Hildebrandt labels this situation, where users are profiled by digital platforms but have no knowledge of the data being gathered, ‘invisible visibility’.<sup>105</sup> Similarly, they cannot access information detailing how this data is processed by algorithms to generate targeted content.<sup>106</sup> Facebook, for example, conceals this information: it blocks tools which aim to help users understand micro-targeting, such as ‘Who Targets Me?’.<sup>107</sup>

Similarly, this growing ‘Black Box Society’, as Pasquale labels it, maintains users (and authorities) in the dark as to what content is promoted and what content is concealed on an online platform.<sup>108</sup> By keeping processes obscure to users and regulators and leveraging information asymmetries, digital platforms gain considerable power.<sup>109</sup>

Thus, platforms are reluctant to modify their strategies even if this leads to public criticism over the lack of transparency.

*(2) Limited incentive in sharing business strategies*

There are limited incentives for digital platforms to reveal how their algorithms generate targeted advertisement. This is primarily due to the competitive advantage they gain from keeping their business model obscure.

As mentioned previously, the digital world is greatly commercialised. Selling advertising space is now a key source of revenue for digital platforms.<sup>110</sup> By relying on trade secrecy, platforms claim that this lack of transparency is necessary for their economic viability and simultaneously protects algorithms from being manipulated.<sup>111</sup> Despite criticism that these arguments are a means of ‘deflecting

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<sup>104</sup>Pasquale (n 42) 3-4.

<sup>105</sup>Hildebrandt (n 100) 240-241.

<sup>106</sup>Select Committee on Communications (n 103) para 89.

<sup>107</sup>Digital, Culture, Media and Sport Committee (n 22) paras 226-227.

<sup>108</sup>Pasquale (n 42) 71.

<sup>109</sup>Yeung (n 94) 518.

<sup>110</sup>Digital, Culture, Media and Sport Committee (n 55) para 70.

<sup>111</sup>Nicholas Diakopoulos, ‘Algorithmic Accountability’ (2015) 3(3) *Digital Journalism* 398, 403 <<http://dx.doi.org/10.1080/21670811.2014.976411>> accessed 3 December 2019.

scrutiny',<sup>112</sup> they have enabled platforms to keep their algorithms secret in practice.

Additionally, platforms understand that the power of persuasion in targeted advertising loses its value as users become aware of it.<sup>113</sup> As a result, they conceal how and when their algorithms operate, even where they claim to be transparent in curating content. For example, Facebook's 'Most Recent' function still algorithmically curates the flow of content rather than generating it in chronological order.<sup>114</sup>

Thus, platforms which have built their business strategy on keeping algorithmic processes from public scrutiny, whether that is by users or regulators, have limited reasons to accept requests for further transparency.

*(3) Transparency concerns driving the case in favour of a ban*

As such, recommendations for absolute transparency in online political advertising, as proposed by the Digital, Culture, Media and Sport Committee,<sup>115</sup> are unlikely to be effective in increasing users' trust in digital platforms.

Advocating for further transparency would not provide a better understanding of algorithms curating content, nor would it successfully reduce concerns linked with targeted political advertising online.<sup>116</sup> This is partly due to the complexity in monitoring algorithmic decision-making, but is also accentuated by the fact that platforms are unlikely to provide additional information on how they maintain their competitive advantage.

Instead of increasing transparency, self-regulation by digital platforms has facilitated and encouraged opacity. Thus, it is argued that a prohibition of political advertising on digital platforms may be necessary to address concerns over lack of transparency, such as distorting political debates without users being aware.

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<sup>112</sup>See Pasquale (n 42) 15.

<sup>113</sup>Pariser (n 43) 122-123.

<sup>114</sup>Pasquale (n 42) 70.

<sup>115</sup>Digital, Culture, Media and Sport Committee (n 22) paras 211-212.

<sup>116</sup>Pasquale (n 42) 8.

### ***B. Accountability for digital content***

Accountability ensures that decisions made by relevant stakeholders do not hinder democracy. This is particularly important where stakeholders, such as digital platforms, have regulatory functions.

A major drawback to self-regulation by digital platforms is that these actors may not be held responsible for their, or their users', actions. As platforms are crucial in facilitating communications between individuals, such unfettered power is concerning.<sup>117</sup>

Unlike traditional broadcasters, which are scrutinised by an independent regulator, the complexity behind algorithms help digital platforms escape accountability.<sup>118</sup> As such, external parties, such as users or public authorities, can difficultly hold platforms and campaigners responsible for curated content and targeted political advertising (sub-section (1)). Similarly, 'option zero' as a regulatory approach can lead to lapses in due process. Platforms deliver their own justice as they see fit.<sup>119</sup> This leads to limited enforcement measures, accentuating lack of accountability (sub-section (2)). It is thus possible to argue in favour of a statutory ban (sub-section (3)).

#### *(1) The link between absence of transparency and accountability*

A crucial reason for the lack of accountability of digital platforms is linked to the fact that they also lack transparency. As algorithmic processes are not disclosed for reasons of trade secrecy, users have little knowledge of when and how digital platforms intervene to deliver curated content.<sup>120</sup> Moreover, without transparency, users cannot scrutinise the way in which they are micro-targeted by political advertisers.<sup>121</sup> These campaigners and digital platforms are not held

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<sup>117</sup>Select Committee on Communications (n 103) para 43.

<sup>118</sup>Pasquale (n 42) 60.

<sup>119</sup>ibid 95.

<sup>120</sup>Rowbottom (n 47) 225.

<sup>121</sup>Yeung (n 94) 516-517.

responsible by external parties for content which may negatively impact the democratic debate, such as political misinformation.<sup>122</sup>

Even where platforms do provide reasoning for algorithmic decision-making, such as an explanation for ranking a specific post higher than another, they only provide one factor in the process. They avoid explaining crucial aspects of the decision: other factors considered and how these were weighed.<sup>123</sup> Thus, users cannot effectively appeal against decisions as they lack knowledge of the full process.<sup>124</sup>

Finally, opacity in algorithmic processes may also facilitate lack of accountability over sponsored content on digital platforms. As targeted political advertising increasingly becomes a normality,<sup>125</sup> those not targeted, including journalists or other political parties, will not be able to cross-check political campaigns at stake. They will be excluded from the audience experiencing the advertisement and will not be able to hold the platform, or the campaigner, accountable.<sup>126</sup> This is especially true of ‘dark ads’ which target a very narrow audience and are not scrutinised by the general public.<sup>127</sup>

Thus, lack of transparency in curated content and micro-targeted advertisement on digital platforms accentuates the issue of lack of accountability by external actors.

## *(2) Limited enforcement measures by self-regulating platforms*

In addition to the lack of scrutiny by external parties, platforms have been criticised for failing to self-regulate adequately. With ‘option zero’, platforms fail

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<sup>122</sup>Independent Commission on Referendums, ‘Report of the Independent Commission on Referendums’ (The Constitution Unit, UCL, July 2018) [14.9] <[https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/ICR\\_Final\\_Report.pdf](https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/ICR_Final_Report.pdf)> accessed 18 January 2020.

<sup>123</sup>Pasquale (n 42) 149.

<sup>124</sup>Pariser (n 43) 132.

<sup>125</sup>Independent Commission on Referendums (n 122) para 14.1.

<sup>126</sup>Pariser (n 43) 156.

<sup>127</sup>Benkler (n 7) 274.

to hold users accountable for sponsored content and, notably, political advertising.<sup>128</sup>

Digital platforms tend to administer mild sanctions where targeted advertisement breach terms and conditions. Even this is done reluctantly.<sup>129</sup> As a result, self-regulation lacks effective sanctions for harmful behaviour, such as misinformation and malign manipulation by political advertisers targeting specific audiences.<sup>130</sup>

The Digital, Culture, Media and Sport Committee provides case studies to exhibit platforms' reluctance in imposing sanctions. For example, in the past, Facebook has failed to hold users accountable unless major breaches of rights were made public, causing reputational damage to the digital giant and attracting scrutiny by public authorities.<sup>131</sup> The Cambridge Analytica scandal is evidence of this. According to the Information Commissioner's Office, Facebook repeatedly failed to safeguard their users' personal data.<sup>132</sup> The company also failed to prevent collection of data contrary to its own terms and conditions. Additionally, it did not take adequate steps to stop Cambridge Analytica's misuse of personal data to manipulate specific audiences through micro-targeted political advertisement.<sup>133</sup> Despite this, the senior managers failed to warn CEO Mark Zuckerberg when they first noticed this concerning activity.<sup>134</sup> According to the Committee, this is evidence that the company did not take the breach seriously and sought to 'conceal knowledge of and responsibility for specific decisions'.<sup>135</sup>

Finally, under Article 14 of the EU e-Commerce Directive, as transposed into UK law, platforms are not liable for hosting illegal content shared by

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<sup>128</sup>Individuals and/or entities.

<sup>129</sup>Valerie Verdoodt, 'Strengthening advertising self-regulation to ensure meaningful protection for children in the digital environment' (2018) Working Paper, 20 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3460508](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3460508)> accessed 20 November 2019.

<sup>130</sup>Digital, Culture, Media and Sport Committee (n 55) para 205.

<sup>131</sup>Digital, Culture, Media and Sport Committee (n 22) paras 133-134.

<sup>132</sup>Information Commissioner's Office (n 85) 38-39.

<sup>133</sup>Benkler (n 7) 276-279.

<sup>134</sup>Digital, Culture, Media and Sport Committee (n 22) paras 62-63.

<sup>135</sup>*ibid* para 30.

European users unless made aware of it.<sup>136,137</sup> This can result in platforms lacking commitment towards scrutiny.<sup>138</sup>

Therefore, platform self-regulation can lead to inadequate enforcement measures.

*(3) A ban to combat accountability concerns*

The link between transparency and accountability has significance. If transparency cannot be improved, further accountability is similarly difficult to achieve.

Platforms have proved reluctant to effectively sanction improper conduct. Finck mentions that ‘isolated self-regulation’ – or ‘option zero’ – has a tendency of leading platforms to consider their economic interest over public interest. Their review mechanisms, if any, fail to replicate traditional legal safeguards, such as a balancing of the countervailing interests at stake. Therefore, independent intervention is necessary for meaningful accountability.<sup>139</sup>

Thus, extending the ban on political advertising to digital platforms may provide a solution. This can reduce concerns of lack of accountability for political advertisement which influence political debates and electoral processes.<sup>140</sup>

***C. Human rights: a balancing exercise better achieved through legislation***

Lack of transparency and accountability mentioned above also casts doubts on the ability of self-regulated platforms to balance the users’ rights adequately.

Human rights are as relevant online as there are offline. Digital platforms have enhanced each user’s right to freedom of expression.<sup>141</sup> Additionally, the

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<sup>136</sup>i.e. criminal or terrorist content.

<sup>137</sup>Council Directive (EC) 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (e-Commerce Directive).

<sup>138</sup>Cannataci (n 93) 52.

<sup>139</sup>Finck (n 8) 13-14.

<sup>140</sup>Independent Commission on Referendums (n 222) para 14.31.

<sup>141</sup>See Sunstein (n 84) 191.

right to participation<sup>142</sup> is facilitated by the Internet as access to information and debates has never been easier.<sup>143</sup> These rights are crucial in relation to online political advertising. As such, they are the focus of the discussion below. It must be noted that various other rights, although not discussed, are relevant, such as the right to informational self-determination or non-discrimination.<sup>144</sup>

Digital platforms also pose a threat to these rights. Uncontrolled freedom of expression online can facilitate harmful speech (e.g. inciting criminal activity).<sup>145</sup> Additionally, Laidlaw mentions that the right to participation can be hindered by the way platforms are organised.<sup>146</sup> Algorithmically curated feed can enclose users within 'filter bubbles' and shield them from alternative opinions. This can subsequently skew democratic debates; individuals never see their views being challenged and are equally unable to challenge opposing opinions.<sup>147</sup>

Legislating to ban political advertising online may be a solution as Parliament is better placed to balance rights at stake (sub-section (1)). Similarly, a public authority or independent regulator responsible for enforcing such a legislation would have a duty to respect human rights, unlike platforms under 'option zero'. Thus, although public authorities can at times impact fundamental rights, it is argued that they are better placed to regulate online content than digital platforms (sub-section (2)).

*(1) Parliament better at balancing rights*

According to the House of Lords in *Animal Defenders*,<sup>148</sup> great weight ought to be accorded to a decision by Parliament to legislate. Despite awareness of the potential violation of Article 10 ECHR, Parliament considered a prohibition of

<sup>142</sup>The opportunity to participate in decisions that affect one's life is an inherent part of a democracy. According to Waldron it is fundamental to human rights. See Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115(6) Yale L.J. 1346 <<https://digitalcommons.law.yale.edu/ylj/vol115/iss6/3>> accessed 5 November 2019.

<sup>143</sup>Laidlaw (n 37) 26-27.

<sup>144</sup>See, for example, Gillespie (n 48).

<sup>145</sup>Sunstein (n 84) 175-176.

<sup>146</sup>Laidlaw (n 37) 30.

<sup>147</sup>Pariser (n 43) 5.

<sup>148</sup>R (*on the application of Animal Defenders International*) (n 29).

political advertising on television and radio necessary to safeguard democracy. As such, Parliament's ban was not to be 'lightly overridden'.<sup>149</sup>

In the ECtHR, the majority highlighted the 'exceptional examination' of the ban in Parliamentary processes. The proposed ban was reviewed and approved by several Select Committees, as well as specialised bodies prior to the enactment of the Communications Act 2003.<sup>150</sup> This included the Joint Committee on Human Rights which ensures that bills do not disproportionately infringe fundamental rights.

The HRA provides additional protection. Under Section 19(1), a statement must be made as to whether a bill is compatible with the ECHR. Although it does not prevent an incompatible bill (Section 19(1)(b)), this Section enables additional safeguards. It fosters greater Parliamentary scrutiny and human rights considerations. Ministers responsible for the bill must demonstrate and convince reviewers that restricting rights is nonetheless necessary in a democratic society, as well as proportional.<sup>151</sup>

Post-legislative human rights scrutiny is also made possible under the HRA. Domestic courts can interpret statutes in a way that is compatible with rights enshrined in the ECHR.<sup>152</sup> Alternatively, the judiciary can make a declaration of incompatibility if the legislation cannot be interpreted compatibly with the ECHR (and outside of the scope of permitted derogations for qualified rights like Article 10).<sup>153</sup> Additionally, any declaration of incompatibility or contentious decision may make its way to the ECtHR, providing further international scrutiny.<sup>154</sup>

Accordingly, statutory scrutiny ensures that Parliament legislates in a way which guarantees that any impact on rights, such as the right to participation, is not disproportionate to the aim of the legislation.

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<sup>149</sup>*ibid* [33].

<sup>150</sup>*Animal Defenders International* (n 34) [114].

<sup>151</sup>Richard Bellamy, 'Political constitutionalism and the Human Rights Act' (2011) *International Journal of Constitutional Law* 9(1) 86, 111 <<https://doi.org/10.1093/icon/mor024>> accessed 14 January 2020.

<sup>152</sup>Human Rights Act 1998, s 3(2).

<sup>153</sup>*ibid* s 4.

<sup>154</sup>Bellamy (n 151) 96-97.

Whilst this discussion focused on legislative power rather than online platforms, it provides insight into Parliament's ability to balance human rights considerations effectively. However, the same cannot be said of self-regulatory approaches. Digital platforms do not undergo such rigorous scrutiny whilst regulating political advertisement.<sup>155</sup>

*(2) Public authority duty to respect human right*

Private bodies, unlike public authorities, do not have a duty to respect fundamental rights.<sup>156</sup> As such, self-regulatory approaches by platforms do not necessarily safeguard users' rights.

Instead, digital platforms, such as Facebook, strive to make advertising space indispensable to political campaigners.<sup>157</sup> Their primary aim is to develop a functional business model through advertisement and/or data collection<sup>158</sup> rather than preventing distortion to political debates (for the most part).<sup>159</sup> They see self-regulation as a commercial advantage rather than a method to safeguard the users' fundamental rights.<sup>160</sup>

This is particularly concerning as the self-regulatory approach to regulating online content grants platforms a 'pseudo-judicial' role. These actors address complaints by users, such as requests to review an advertisement's placement, without having to consider the impact on human rights.<sup>161</sup> Thus, users' right to participation can be negatively impacted by these platforms without consequences. Accordingly, the outcome is a regulatory structure that is not 'human rights-compliant'.<sup>162</sup>

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<sup>155</sup>Laidlaw (n 37) 181-182.

<sup>156</sup>Lucie Audibert and Andrew Murray, 'A Principled Approach to Net Neutrality' (2016) 13(2) *Scripted* 119, 134 <<https://script-ed.org/?p=3149/>> accessed 5 November 2019.

<sup>157</sup>Benkler (n 7) 271.

<sup>158</sup>Gillespie (n 48) 35.

<sup>159</sup>As mentioned in the Introduction, certain digital platforms prohibit online political advertising (e.g. Twitter).

<sup>160</sup>Marsden (n 14) 180.

<sup>161</sup>Laidlaw (n 37) 212.

<sup>162</sup>*ibid* 225.

A legislation prohibiting political advertising on digital platforms would necessarily entail a mechanism for enforcement. This could be achieved by a public body with statutory powers.<sup>163</sup> Alternatively, a statute could ensure that platforms have a duty to respect fundamental human rights. They would be classified as a private body performing the function of a public nature rather than a private one. Under Section 6 HRA, it is unlawful for a public authority or a private body performing a public function to act incompatibly with a Convention right.<sup>164</sup> Thus, regardless of whether this regulatory approach is conducted by a public authority or not, a legislation banning political advertisement would entail a duty to respect rights enshrined in the ECHR.

## V. FURTHER CONSIDERATIONS

The argument in favour of a statutory ban on online political advertising can be challenged. For example, one might query whether it could be effective in practice in light of the Internet's borderless nature.<sup>165</sup>

However, it is not unconceivable that political advertising targeting UK users online be prohibited. The possibility of locating users in the cyberspace through geo-identification technology diminishes the argument that the Internet has no frontiers.<sup>166</sup> The outcome of the Yahoo! case provides an example: the platform was able to block users located in France from accessing Nazi auction sites and ensure compliance with the French anti-Nazi legislation.<sup>167</sup>

Of course, this discussion merits further investigation. However, the enforcement of a statutory ban on online political advertising falls outside of the scope of this paper.

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<sup>163</sup>In a way similar to Ofcom following Section 319(2)(g) of the Communications Act 2003.

<sup>164</sup>Human Rights Act 1998, s 6(1)-(3).

<sup>165</sup>Luis Felipe Alvarez Leon, 'The Digital Economy and Variegated Capitalism' (2015) 40(4) Canadian Journal of Communication 637, 648-649 <<https://www.cjc-online.ca/index.php/journal/article/view/2952/2654>> accessed 24 November 2019.

<sup>166</sup>Jack Goldsmith and Tim Wu, *Who controls the Internet? Illusions of a borderless world* (OUP, 2006) 59-60.

<sup>167</sup>*ibid* 5-7.

## CONCLUSION

Self-regulation of online political advertisement by digital platforms stands out in contrast to the statutory ban on political advertisement on television and radio in the United Kingdom.

Bearing in mind the increasing similarities between traditional broadcasters and digital platforms, it is argued that it is now untenable to apply distinct regulatory regimes. There is evidence of a shift of influence from traditional broadcasters to digital platforms as a result of a convergence in media. Online platforms now curate content in a way similar to television and radio. As such, platforms should be considered ‘push’, rather than ‘pull’, media technologies. This entails similar threats to democratic debates, such as distorting them as a result of wealth inequalities or political impartiality.

Self-regulation for online political advertising is a flawed strategy. Digital platforms lack transparency to build trust with their users and public authorities. Moreover, this approach leads to a lack of accountability for conduct which may harm political debates. Instead, legislation can ensure that fundamental rights are better protected than when regulation is undertaken by a profit-driven platform.

Combined, the similarities between platforms and traditional broadcasters, and the flaws of self-regulation compared to a regulatory approach involving legislation, provide an argument in favour of extending the ban on political advertising to digital platforms. Whilst other regulatory approaches are available, it is argued that as long as sections 319 to 321 of the Communications Act 2003 remain in force, political advertisement on platforms should be similarly prohibited.

