

Electoral freedom in the age of big data: an historical critique*

SUMMARY: 1. Introduction and methodological remarks. – 2. The origins and the meaning of electoral freedom. – 3. The regulation of media and mass media influence on the election. – 4. From electoral propaganda on the internet to the social media: what has changed in the relationship between electors and their representatives. – 5. Is electoral freedom truly jeopardized by the use of big data algorithms with political and electoral purposes? – 6. Conclusive remarks.

1. The recent and discussed case of Facebook - Cambridge Analytica had the result of giving a clear empirical evidence of how big data regulation may be relevant with respect to the democratic processes.

The scandal started in March 2018, after that the Guardian and the New York Times reported that a data analytics firm named Cambridge Analytica had harvested millions of users' data from Facebook profiles and used them to broadcast messages with political contents aimed at influencing electors political choices during the American Presidential Elections of 2016 and the Brexit Campaign in the UK, by virtue of the use of big data algorithms¹⁸⁸.

Such use of systems of data recollection explicitly addressed to broadcast political contents (often combined with the use of fake news¹⁸⁹) to selected categories of electors, in order to meddle in political choices seems to have opened broad and multifaceted scenarios in the debate on electoral regulation and the protection of electoral freedoms.

In this perspective and in the attempt of underlining the most relevant aspects of the matter for constitutional law, we may indeed speculate on whether:

- a) the meddling in public elections by virtue of the use of big data algorithms is a real new threat for the health of modern democracies;
- b) the traditional paradigm of electoral freedom may be considered adequate before the increasing of external influence on election;
- c) a new regulation of electoral meddling by virtue of big data algorithms is needed or the regulation of such phenomenon may be connected to the traditional legal discipline of media influence on the elections and / or political propaganda.

In order to correctly approach the above mentioned aspects, it is although necessary to clarify the definitions of the expressions «electoral freedom» and «big data».

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It seems that the method allegedly used often implied the creation of fake social media profiles which were used to spread political contents and fake news about electoral competitors to selected categories of electors. See R. J. GONZALES, *Hacking the citizenry?* in *Anthropology today*, XXXIII, June 2017 and J. CARVALKO, *Defending against opaque algorithmic meddling in free elections*, in *Technology and society magazine*, June 2018, p. 30. For a more detailed outline on the case and the activity of Cambridge Analytica.

189 See with respect to the most recent works on the matter G. PITRUZZELLA, O. POLLICINO, S. QUINTARELLI, *Parole e potere. Libertà d'espressione, hate speech e fake news*, Milano, 2017.

Electoral freedom is a well-known and broadly used basic constitutional concept, deeply rooted in the western liberal tradition since the XVIII Century revolutions¹⁹⁰.

For the sake of brevity¹⁹¹ and in order to resume the key components of electoral freedom, it might be opportune to move from a simpler and more solid foundation, which might be actually offered by [Article 21 of the Universal Declaration of Human Rights](#)¹⁹². Indeed said article envisages the right to free and genuine elections and might be seen as a good synthesis of some of the most widespread and universally accepted principles of democratic processes.

Following the structure of Article 21, electoral freedom refers, on the one hand to the right of electors to express a free political choice without any external interference (genuineness of vote).

On the other hand, of course, electoral freedom is also referred to the need to ensure that any political competitor in the election may act in equal conditions (*par condicio* and equality of arms).

Finally, the guarantee of electoral freedom is also connected to the establishment of legal mechanisms of voting which ensure the realization of the above mentioned principles and also remedy to any possible distortion of same (guarantee of free voting procedures).

As per the definition of «big data algorithms» it might be useful to make reference to a well-known definition coined by anthropologist Justin Lane who describes big data as «*massive amounts of electronic data that are indexable and searchable by means of computational systems (...) stored in on servers and analyzed by algorithms*¹⁹³». Another important aspect we have to bear in mind is also the industrial dimension of the big data, as a market in which firms such as Facebook, Google and Twitter have the possibility of sharing and selling to third parties a huge amount of data harvested from their users¹⁹⁴.

Even though the use of big data with political purposes inspired a broad debate in legal doctrine¹⁹⁵, it appears that, somehow, the actual significance of many problems related to the impact of technological developments on fundamental processes of functioning of the State might be hard to evaluate with the eyes of a contemporary observer, as any historical phenomenon which is approximate in time.

In such perspective it might be opportune, indeed, to peruse the matter by virtue of an historical point of view, focusing the analysis on the progressive development of the principle of

190 See *ex multis* G. CHIARA, *Titolarità del voto e fondamenti costituzionali di libertà ed eguaglianza*, Milano, 2004; F. LANCHESTER, *Voto (diritto di)*, in *Enciclopedia del diritto*, XLVI, Milano, 1993; G. SCHEPIS, *Elezioni (storia dei sistemi elettorali in Italia)*, in *Enciclopedia del diritto*, XIV, 1965.

191 Clearly a complete analysis of the issue should require a deeper effort which is inconsistent with the aim of the present paper.

192 «*Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Everyone has the right to equal access to public service in his country. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures*».

193 J. E. LANE, [Big data and anthropology: concerns for data collection in a new research context](#), in *Journal of the Anthropological Society of Oxford-online*, January 2016, p. 74.

194 See J. E. LANE, *cit.*, p. 74-88.

195 See G. BELL, *The secret life of big data*, in T. BOELLSTORFF, B. MAUER (eds.), *Data now bigger and better*, 2015, Chicago, p. 7-26; V. M. SCHONBERGER, K. CUKIER, *Big Data: a revolution that will transform how we live, work and think*, Boston, 2013.

electoral freedom and correspondent legal regulation of the external influences on elections, with special reference to the influences of the media.

Hence the paper, moving from the above mentioned theoretical and methodological premises, aims at giving some brief conclusions on the possible intersections of electoral freedom and the use of big data algorithms to orientate political choices in the light of the historical roots of the principle of electoral freedom and the various examples of the regulation of external influences on national elections. Moreover it will be also necessary to speculate on whether the problem of the misuse of big data algorithms with the purpose of meddling in the elections shall be considered as a real and new threat for electoral freedom and electoral systems or it might be treated as another chapter in the evolution of legal regulation of mass medias influence on electoral processes.

2. We can easily affirm that the concept of electoral freedom¹⁹⁶ truly represents one of the key and basic principles of modern democracies¹⁹⁷. Such principle indeed, in its first meaning, has been originally designated with reference to the need of protecting electors from any possible improper influence and limitation that could jeopardize the genuineness of their political choice.

Under this point of view it is possible to read all of the traditional guarantees of electoral rights such as the secrecy of vote, which was perceived, since the French Revolution, as the most important defense for the new electors¹⁹⁸.

Notably the French Revolution with its rupture with the *Ancien Régime* represented a key moment for the debate on electoral systems design as well as the perfect «*humus*» for the raise of the public theories on the set of warranties that have to be ensured in order to pursue the guarantee of electoral freedom during the elections¹⁹⁹.

Under a different point of view, the concept of electoral freedom was also intimately linked to the idea of universal suffrage. On the one hand, as affirmed by Huard, «*il y a suffrage universel quand aucune condition d'âge autre que la majorité légale et aucune condition financière n'est imposée pour participer au scrutin*²⁰⁰». In other words, in order to actually achieve universal suffrage it is

196 Hereinafter the reference to electoral freedom must be interpreted as inclusive of the set of principles envisaged under Article 21 i.e. genuineness of vote, equal access to elections, and fairness and freedom of the voting procedures (see *supra* p. 2).

197 With respect to the close relationship between electoral freedom and democracy see H. KELSEN, *I Fondamenti della democrazia* (1929), Bologna 1966; N. BOBBIO, *Il futuro della democrazia*, Torino, 1995; M. LUCIANI, *Il voto e la democrazia*, Roma, 1991.

198 Nevertheless it is opportune to mention some relevant opinions of important authors of the age such as J. J. Rousseau, who believed that the secrecy of vote may also lead to the diffusion of the corruption in the public offices in particular if accompanied by the lack of efficient instrument of prevention of the abuses. The lack of secrecy anyhow is also strictly connected with the idea of vote as a public function, involving a view of the voter as a citizen who is performing a constitutional function instead of a simple individual (see the following footnote).

199 Notably, since the French Revolutionary Convention of 1792, the right to vote has been indicated properly as a *droit* (i.e. individual right), and by virtue of such nature it had to be accompanied by a set of warranties aimed at ensuring that it could be freely exercised by the citizens. The opposite model that envisages the vote as a *fonction*, i.e. a public function, laid the foundation for the raise of systems of restricted suffrage based on minimum wage or capacity of the electors (e.g. in reading and writing).

200 R. HUARD, *Le suffrage universel en France (1848-1946)*, Paris, 1991, p. 25, reported by M. ROSPI, *La tutela della segretezza del voto e l'evoluzione della democrazia. Uno studio di diritto comparato*, IV seminario annuale del Gruppo di Pisa, Università Roma Tre, 18 September 2015 available at www.gruppodipisa.it.

mandatory to ensure that no conditions are envisaged in order to grant the right to vote to the electors²⁰¹.

On the other hand, universal suffrage could only be achieved if the electors could count on the fact that they were able to vote in the lack of external pressure and consequences due to the choices expressed.

In this respect, the set of warranties linked to the right to vote such as the secrecy of vote²⁰², the lack of burdens of age²⁰³ and wage that we can connect to electoral freedom, had to be considered as necessary also in order to achieve the universal suffrage²⁰⁴. Hence, their protection truly represented, under such perspective, a basic constitutional objective.

Nonetheless, the contradictory relationship between universal suffrage and the provision of conditions of wage and capacity to have access to elections represented a typical feature in the debate on electoral rights in the centuries XVIII and XIX²⁰⁵. The actual realization of the revolutionary principle of equality was in fact hindered by a bourgeois ruling class with oligarchic and homogeneous purposes which was interested in maintaining the control of society²⁰⁶. Said contradiction progressively disappeared with the effective extension of suffrage and the crystallization of the principles addressed to guarantee electoral freedom, in general terms, from the first decades of the twentieth century.

The centrality of the principle of electoral freedom for modern democracies is, as we said, well known and commonly accepted within constitutional doctrine. As per the Italian constitutional experience, such centrality²⁰⁷ is also well testified in the [Preparatory Papers of the Italian Constitutional Assembly](#), in which it has been defined as an «objective liberty of exercising the right to vote for the benefit of electors that the authorities of the State have the task to ensure²⁰⁸». In this respect, while it is clear that public authorities have to ensure the lack of illegitimate pressure and influences on electors, it is opportune to point out that another significant issue connected to electoral freedom is actually the identification of those influences that might be considered as legitimate²⁰⁹.

The prior interest of the legislator in such respect is clearly to avoid those influences that may jeopardize the free and genuine expression of voter's choice as well as punishing those attempts of interventions aimed at interfere in the suffrage²¹⁰.

201 See E. BETTINELLI, *Diritto di voto*, in *Digesto - Discipline pubblicistiche*, Torino, 1990, p. 7.

202 The principle was also included in the French Constitution of 1795.

203 Except for legal age envisaged for the access to vote.

204 Notably in the lack of such guarantees many electors could have been forced to renounce to their right to vote due to the concerns on the consequences of the votes expressed.

205 See M. S. GIANNINI, *Il pubblico potere*, Bologna, 1986; C. MORTATI, *Le forme di governo. Lezioni*, Padova, 1973.

206 F. LANCHESTER, *Stato (forme di)*, in *Enciclopedia del Diritto*, Milano, XLIII, p. 803.

207 See in such perspective C. LAVAGNA, *Istituzioni di diritto pubblico*, Torino, 1985, p. 525; L. PALADIN, *Diritto costituzionale*, Padova, 1991, p. 292. Said authors make reference to electorate freedom as the most significant and general feature of the suffrage.

208 Free translation of the declaration made by Umberto Merlin. See [Atti dell'Assemblea costituente, II, Roma, 1951](#).

209 See. F. LANCHESTER, *Voto (diritto di)*, in *Enciclopedia del diritto*, XLVI, Milano, 1993, p. 8.

210 It is properly the area of intervention of the electoral felonies which under Italian law are mainly regulated by the [Statute no. 61/2004](#).

Finally another public interest connected to the guarantee of electoral freedom, as we said, is the need of avoiding that some particular political forces may illegitimately benefit from undue advantages on other political parties. It is indeed the dimension of electoral freedom to which we referred in terms of guarantee of the fairness of the electoral competition or *par condicio* and it is basically the main ground in which we may move the debate on big data influences on elections.

In this respect, legal doctrine agrees in individuating in the preparatory phase to elections a key moment for the actual guarantee of electoral freedom, both on the side of genuineness of the choice of voters and the fairness of the electoral competition²¹¹.

The regulation of electoral propaganda (i.e. the activity that political bodies carry on in order to convince the subjects entitled to vote²¹²) is, in such perspective, one of the most important concerns of the legislators with respect to the purpose of avoiding information asymmetries and ensuring a more conscious choice for the electors.

In order to carry on our analysis it is then opportune to dwell on the subject of the historical evolution of the regulation on political propaganda. Such reconstruction, however, has to consider that in those legal systems inspired to the principle of free elections, electoral propaganda has to be seen both as a fundamental liberty as per political entities rights as well as a possible threat to the rights of voters also subject to constitutional protection²¹³.

3. The history of the regulation of political propaganda may be linked, for our purposes, to the history of the technological development of the media and the mass media and their use to broadcast political contents aimed at convincing the electors to take a particular political decision.

Clearly the media have always existed but it is basically from the XX Century that they have reached a communicative capacity such as to be denominated as mass media²¹⁴.

Radio and television have led to a new and broader connection between audience and broadcasters of contents including, of course, messages with political and electoral purposes.

The potentiality of the new mass media and their possible use in order to influence the course of elections was immediately clear also to the different legislators with respect to the regulation of electoral propaganda.

In general terms, as anticipated in the former paragraph, the regulation of political and electoral propaganda²¹⁵ is basically focused on the goal of avoiding illegitimate influences on the election as well as ensuring the effectiveness of the principle of the equality of arms, which would

211 See E. FERRIOLI, *La disciplina delle campagne elettorali e referendarie*, in R. NANIA, P. RIDOLA, *I diritti costituzionali*, Torino, 2001, p. 623; S. BAGNI, *La propaganda elettorale tramite internet: quale disciplina*, in *Dir. informatica*, I, 2004, p. 634. Another term which is commonly used in legal doctrine in this respect is «equality of chances» of any participant to the electoral competition. Said expression clearly shows the link between electoral freedom and the constitutional principle of equality.

212 See F. LANCHESTER, *Propaganda elettorale*, in *Enciclopedia del diritto*, XXXVII, Milano, 1988.

213 F. LANCHESTER, *Propaganda elettorale*, cit., p. 8.

214 See for further remarks on the topic R. BIANCO, *Diritto delle comunicazioni di massa*, 2007, Bari. See also G. BUSINO, *Propaganda*, in *Enciclopedia Einaudi*, Torino, 1980 for a broader historical reconstruction. According to the latter indeed the real origins of propaganda have to be found as well during the French Revolution in which for the first time such phenomenon became a stable and developed component of political competition.

215 For a definition of such expressions see E. BETTINELLI, *Propaganda*, in *Digesto - Discipline pubblicistiche*, Torino, 1997.

be violated if a political body may count on a particular advantage on competitors provided by the control of the mass media²¹⁶.

However, since political propaganda represents a fundamental right directly linked to the right to free expression, the legal discipline of electoral propaganda has to ensure that such liberty is balanced with the above mentioned principles connected to electoral freedom²¹⁷.

In this respect, as per Italian regulation of the matter²¹⁸, it is possible to affirm that such balance has been pursued according to two different types of regulation linked to the different stages of the electoral process²¹⁹.

The first type of regulation refers to the last phase of the election and basically consists in the provision of a period of electoral silence aimed at granting the electors a short period to process the electoral choice without further direct influences by political competitors.

The second type of regulation deals with the need of ensuring the *par condicio* of political competitors that is granting all the participants the same chances in terms of use of mass media to broadcast political contents. Such exigence is indeed pursued by virtue of the provision of time limitations for the broadcast of electoral spots on radio and television as well as the introduction of a maximum number of political messages per day²²⁰.

With reference to the above mentioned profiles, the main stages of the regulation on media influence on elections in Italy may be individuated as follows: as per the so-called electoral silence, the Italian statute no. [212/1956](#)²²¹ had already established a legal discipline of electoral propaganda and political communication which envisaged some rules on the use of campaign advertisement and posters during the 30 days before the elections and introduced at [Article 9](#)²²² the so-called electoral silence²²³ during the day before the elections and the day of the vote²²⁴.

Notably, such discipline was not applicable to electoral propaganda on radio and television, with the consequence of an important gap in the regulation of propaganda. Only in 1975²²⁵ with the

216 See F. LANCHESTER, *Propaganda elettorale*, cit., p. 9.

217 The opinion is also confirmed by the jurisprudence of the Italian Constitutional Court that affirmed the need of protecting the liberty of choice of electors, who have the right to express their political opinion rationally. In this respect, the Court stated that the persuasive strength of television (also with respect to the other mass media) may jeopardize the free capacity of choice of the electors because of its pervasive nature. Said characteristics, according to the Court, shall therefore justify a strict regulation of the use of the television to broadcast political contents (see *ex multis* Constitutional Court no. [48/1964](#), [225/1974](#) and [148/1981](#)).

218 For sake of brevity the paper focuses on the evolution of the legal discipline of the matter under Italian law but many of the remarks may be extended to other legal systems.

219 See S. BAGNI, cit., p. 633.

220 Cf. S. BAGNI, cit., p. 634.

221 Named «*Norme per la disciplina della campagna elettorale*».

222 Which has been deeply modified by Article 8 of the [Statute no. n. 130/1975](#).

223 During the electoral silence it is forbidden to carry on campaign speeches and electoral caucuses as well as organizing any form of political propaganda within 200 meters from the places in which the voting operation will be held.

224 In general terms, with respect to the electoral silence, see G. MAZZOLENI, *La comunicazione politica alla vigilia della seconda Repubblica*, in *Problemi dell'informazione*, 1993, from p. 212.

225 Between those regulations it is opportune to make reference to the important decision of the Italian Constitutional Court [no. 48/1964](#) in which the Court stated that the limitations to political propaganda were in line with the provisions of the Constitution and, moreover, such limitations do not affect freedom of speech and have to be referred to the principle of the *par condicio* and / or equality of chances which has also a constitutional foundation. See F.

[Statute no. 103/1975](#) a first (and probably incomplete²²⁶) regulation of the matter has been achieved²²⁷.

Another important step in the evolution of the regulation of political propaganda may be seen in the approval of the Statute no. [515/1993](#)²²⁸ which was inspired by the purpose of providing a general and organic discipline propaganda (in all of its forms)²²⁹ including specific rules on acquisition and access to the press²³⁰, the other mass media as well as mechanisms of public audit²³¹. Even though the Statute represented an important stage in the progressive regulation on propaganda on the media, soon it became clear that the provisions included therein were unsuitable for an effective guarantee of the *par condicio* and the genuineness of vote. Hence, some significant amendments were introduced by the Legal Decree no. [83/1995](#)²³² and finally by the Statute [no. 28/2000](#).

Such Statute has represented a new kind of approach to the regulation of propaganda since it envisaged a set of rules which were applicable to all electoral campaigns and political communications for the whole year²³³. Basic principles of the new regulation, according [to Article 1 of the Statute](#) were indeed: the guarantee of the *par condicio* and impartiality with respect to all political subjects, the promotion of the free access to the media for political communication and the regulation of the use of the media during electoral campaigns²³⁴.

Finally, as per the last examples of political propaganda and use of mass media it is opportune to mention the Statute [no. 313/2003](#) which included a set of provisions finalized to ensure the *par condicio* with respect to local radio and TV broadcasters, and the Statute [no. 215/2012](#). The latter has amended the [Statute no. 28/2000](#) with the introduction of provision aimed at promoting *par condicio* in terms of gender representation with reference to the access to mass media propaganda²³⁵.

LANCHESTER, *Propaganda*, cit., especially the footnote 58, for further remarks on the case and its impact on Italian regulation of propaganda.

226 See C. CHIOLA, *Disciplina della propaganda elettorale delle emittenti private*, in *Il diritto delle radiodiffusioni e delle telecomunicazioni*, Milano, 1984, p. 2.

227 The Statute also instituted a parliamentary commission (Commissione parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi), also known as Commissione di Vigilanza Rai with functions related to the audit of the national television and radio services and regulation of *par condicio* and political propaganda.

228 Named «Disciplina delle campagne elettorali per l'elezione alla Camera dei deputati e al Senato della Repubblica».

229 See R. BORRELLO, *Stampa e par condicio: riflessioni critiche sulla vigente disciplina*, in *Giur. cost.*, 3, 2008, p. 2769.

230 An important measure included under the Statute was the prohibition for the press to publish electoral provisions and statistics on electoral intentions within the 15 days before the elections.

231 Article 2 of the Statute included for instance the prohibition during the 30 days before the elections to broadcast all forms of messages of political propaganda on newspapers, television and radio with the exception of those political contents that ensured the realization of the *par condicio* principle such as political debates, conferences and other events with the presence of political competitors. Said Article would have been repealed by [Statute no. 28/2000](#).

232 Also commonly named as «Decree Gambino».

233 Not only with respect to the period before the elections.

234 For a more detailed review on the Statute see R. BORRELLO, *Oggetti politici e trasmissioni radiotelevisive: prime riflessioni comparatistiche sulla legge n. 28 del 2000*, in *Giur. cost.*, 1, 2000, p. 635.

235 See R. BORRELLO, *Stampa e par condicio: riflessioni critiche sulla vigente disciplina*, in *Giur. cost.*, 3, 2008, p. 2769.

4. The diffusion of the internet and its use to broadcast political and electoral messages addressed to users truly represented a sort of revolution in the debate on the regulation of influences on electors and freedom of vote²³⁶.

Since the second half of the nineties political parties massively used internet as a tool for electoral propaganda²³⁷, even in the lack of a relevant regulation of the matter. As per Italian legal system indeed, neither the above mentioned [Statute no. 28/2000](#) nor the most recent measures adopted, such as the [Legislative Decree no. 44 del 2010](#)²³⁸, have provided an organic legal discipline of the electoral propaganda on the internet²³⁹.

Notwithstanding the above remarks, it is opportune to add that in some cases a partial regulation of single aspects of the matter has been achieved by virtue of several rulings issued by the Italian Data Protection Authority especially with reference to the use of massive email-spamming of political contents to users in the imminence of the elections.

In such concern, since the 2005 the Authority has been affirmed some important principles related to the broadcast of political messages directed to influence the electorate by email, sms, fax to electors, affirming the need of a previous and explicit consent of voters as well as the disclosure of the privacy policy of the broadcaster²⁴⁰.

Moreover, another aspect which is worth pointing out is the difficulty of legislators to adapt to the internet revolution the traditional principles on *par condicio* in the use of communicative tools for the political bodies and genuineness of vote. It is self-evident indeed that on the one hand, the traditional legal solutions such as electoral silence and limitation of broadcasting of political messages are hardly applicable to the internet in the age of the so-called «e-democracy²⁴¹». On the other hand, due to the deep differences between the internet and the traditional mass media, the regulation of the latter is as well hardly subject to an extension to the political propaganda on the internet.

The delay and the difficulties of the legal regulation of propaganda on the internet has been confirmed also by the critical issue of the increasing use of social networks to broadcast political contents to users and in general as a basic tool of modern political communication.

The topic of the diffusion of the social networks and their use to pursue political goals, however, offers the chance to reflect on a broader issue, which seems to be critical also in order to duly approach the matter of the use of big data algorithms to meddle in the elections.

236 See *ex multis* A. VALASTRO, *Internet e strumenti partecipativi nel rapporto tra privati e amministrazioni*, in M. NISTICÒ, P. PASSAGLIA (eds.), *Internet e Costituzione*, Torino, 2014; S. RODOTÀ, *Tecnopolitica*, Bari-Roma, 1997.

237 See S. BAGNI, *cit.*, p. 629 who refers to the broad use of internet since the campaign for the elections of 2004 in Italy.

238 Which included the definition of media audiovisive services that, however, is not applicable to internet websites.

239 As it has been observed by P. COSTANZO, *Quale partecipazione politica attraverso le nuove tecnologie comunicative in Italia*, in *Dir. informatica*, I, 2011, p. 21.

240 See *ex multis* the so-called «Authority's Prescriptions» ex Article 154, par. 1 of the [Legislative Decree no. 196 del 2003](#) dated 11.02.2010 and the relevant considerations in P. COSTANZO, *Quale partecipazione politica attraverso le nuove tecnologie comunicative in Italia*, *cit.*, p. 23. With respect to the most recent documents adopted by the Authority, see «[Provvedimento in materia di trattamento di dati presso i partiti politici e di esonero dall'informatica per fini di propaganda elettorale](#)» dated 6th March 2014.

241 See for a more detailed analysis of the issue P. COSTANZO, *Profili costituzionali di internet*, in E. TOSI (eds.), *I problemi giuridici di internet. Dall'E-commerce all'E-Business*, Milano, 2003, p. 89.

In this respect, indeed, the matter deals with one well-known topic in current constitutional debate on political parties and technological development: internet does not simply represent a new tool to communicate but it has deeply changed the basis of the democratic relationship between the electors, their representatives and intermediate bodies such as political parties²⁴².

If it is true that, on the one hand, internet has provided the political bodies with a powerful tool to influence voter's opinions, it is opportune to remark that, on the other hand, with the use of the internet and the social networks the electors have found a way to directly connect with their representatives and gained several new methods of participation in the democratic processes²⁴³.

In other words internet has deeply impacted democracy in a variety of ways and it seems that, regardless of our efforts, it is impossible to reconnect the previous changes in mass media evolution from newspapers to the radio and from the radio to the television²⁴⁴ to the internet revolution.

5. It appears that the use of big data algorithms to meddle in the elections and influence key portions of the electorate has to be perused bearing in mind the above mentioned premises and remarks, with respect to the ongoing revolution of democratic relationship that internet and social network have triggered.

The brief review of the historical evolution of the regulation of external influences on elections demonstrated that the main aims of legislator connected to electoral freedom were focused on realizing *par condicio* / equality of arms of political competitors and protecting the genuineness of vote, basically with the selection of those influences that could be considered inadmissible and / or illegal.

In this respect we have firstly to speculate on whether the big data phenomenon, as shown in the Facebook – Cambridge Analytica case, may truly have a serious impact on the above mentioned principles and, in the positive, what can legislators do in order to prevent the violations of same. As per the realization of *par condicio* between political competitors, it seems that even the massive forwarding of political contents by virtue of the use of big data algorithms, does not entail particular problems as long as all electoral competitors may have access to the tool. It is the case of the appointment of data analytics firms like Cambridge Analytica that have been working on behalf of political bodies since quiet long time²⁴⁵.

In such perspective indeed the use of internet and big data algorithms may simply be seen as another example of technological development of electoral propaganda, that does not impact, in standard conditions (i.e. when all actors have the same possibility of access) on electoral freedom.

242 The literature on the matter is abundant. See T. E. FROSINI, *Internet e democrazia*, in *Dir. Informatica*, 2017, p. 657; P. MARSOCCI, *Lo spazio di Internet nel costituzionalismo*, in *Costituzionalismo.it*; U. ALLEGRETTI, *Democrazia partecipativa*, in *Enc. dir.*, 2011, p. 295.

243 Notably internet helped in achieving transparency as it has also provided electors with the tools to verify the information provided by their representatives.

244 See M. BASSINI, *Partiti, tecnologie e crisi della rappresentanza democratica. Brevi osservazioni introduttive*, in *Diritto pubblico comparato ed europeo*, 2015, p. 867.

245 See J. NAUGHTON, *Us Elections 2012: is Facebook the "Real Presidential Swing State"?*, in *Observer*, 2, September 2012 who explains how even during the 2012 Presidential Elections in the US, the Democratic Party has invested a huge amount of money aimed at set up a program of targeted propaganda and user's data analysis on social media, also with the help of specialized firms.

Of course the guarantee of equal access represents a basic condition in such perspective and shall be treated within the debate on transparency and impartiality of the internet, which however does not fall within the object of the present article²⁴⁶.

The impact of big data algorithms used with electoral purposes on the genuineness of the vote on the other hand, seems to have opened more complex issues. Firstly, also in this case we can argue that the attempt of influencing electors with various means does not represent a novelty in the history of democracy. Hence, as we said, under such point of view we are simply dealing with a more accurate example of technological improvement of those means of influence.

Nevertheless the issue seems to be more complicated especially when approached in connection with the broader debate on the on-going challenges that the social networks and the internet have brought with respect to the traditional guarantees of electoral freedom, particularly the secrecy of vote. The number of available information of electors, indeed, has reached severe dimensions and such amount of data may have a direct impact also with reference to the electoral process. Notably several companies have developed complex algorithms capable to elaborate accurate previsions, also in terms of opinions and political preferences, just requiring a relatively small number of user's information.

On the other hand we also have to point out that in many cases it is the same population of the social networks that agrees to express and share political opinions on the internet (e.g. comments on blog or media website, inscription to groups on social media). This disclosure clearly has the effect of providing precious and useful information for big data analysts (and hence for the political bodies that hire their services) and often produces the effect of affecting the secrecy of vote.

In such perspective we also could remark that some of the traditional guarantees of freedom of vote such as the same secrecy, which were designed within an oligarchic society with a significant distance between representatives and the electoral bodies, seem to need now to be adjusted to the current status of electoral competition. Of course this does not mean that such guarantees are useless. On the contrary, it has to be enhanced with respect to the current problems that we are facing nowadays.

In other words the right of expression, which includes the right to express of political opinions using a social network, has to be protected with a set of measures pursuing electoral freedom that should also prevent the misuse of user's information to possibly influence the electors. In this concern, indeed, it seems that it is within the protection of personal data of internet users that we should study the issue of the modern regulation of genuineness of vote, with the purpose of condemning the illegitimate harvesting of data and other violations that may help in providing information that could be used for political profiling or with the purpose of meddling in the elections²⁴⁷.

In such respect, however, we have to point out that, as noticed in the previous historical reconstruction, the protection of the genuineness of electors choice has been always achieved with a

246 With reference to the matter see P. COSTANZO, *Quali garanzie costituzionali per gli interventi rimediali in rete*, in *Dir. Informatica*, 2013, p. 17; C. ROSSELLO, *La governance di internet tra diritto statale, autodisciplina, soft law e lex mercatoria* in *Dir. comm. internaz.*, 2006, 1, p. 45.

247 However it is opportune to point out that it is not possible to do much in those cases in which the sharing of personal information and opinions correspond to the consent and the free will of the users.

selection of those influences that could be considered as illicit. Thus, modern legal regulation aimed at protecting electoral freedom should probably focus mainly on the persecution of illicit methods of data collection, breaches in users privacy²⁴⁸ and cyber-attacks during elections instead of attempting to regulate the thousands of possible factors of influence on electors that may come from internet, social network and big data algorithms.

6. The case of Cambridge Analytica seems to have put in light how big data algorithms may be used with political purposes and possibly in the attempt of meddling in the elections. Nevertheless many authors seriously doubt about the effective benefits of the use of such tools for the political campaigns²⁴⁹.

However for the reasons indicated in the present papers it seems it is possible to affirm that we are actually facing a new stage in the evolution of technological tools applied to electoral propaganda.

Nevertheless, as we have said, the phenomenon has to be also studied with reference to the profound changes that have affected the relationship between electors and their representatives due to the raise of the internet and the social network and their use in the democratic processes.

It seems indeed that the very same concept of electoral freedom has changed in view of the current and different needs of the electors that legislators have to fulfil with the adoption of a suitable legal regulation. In this concern it appears that the most urgent needs of electors linked to the promotion of «modern electoral freedom» deal with the protection of personal data and privacy of the users on the internet.

Hence when we try to speculate on possible legal measures to adopt in such purpose it is probably in the above mentioned areas that an actual intervention of legislators is needed. On the other hand, other useful legal tools may be represented by the regulation of political parties misconducts involving the use of data harvested with methods lacking in transparency.

It is the case of the amendment that the EU Commission is currently drafting to EU party funding rules with the purpose of imposing fines on political parties who misuse personal data of the electors to carry on their campaigns²⁵⁰. The measure is supposed to be applicable to the parties

248 Making reference to legal evolution of the matter in Italy it is interesting to remark that even with regards to electoral propaganda by email and sms from 2005 the first important contribution in the development of regulation was provided by the Italian Data Protection Authority on the ground of privacy and protection from data breaches instead of the ground of regulation of political propaganda *tout court*. Under such point of view the current *status* of legal regulation, with the lack of a discipline of electoral propaganda carried out with the use of big data and social network has several common elements with the above mentioned period. Hence maybe the legal solution adopted in such period may be of use also with modern challenges to electoral freedom.

249 It is doubtful that a concrete contribution to the victory of Donald Trump has come from the contribute of the data analysis of Cambridge Analytica. Firstly it is proved that similar methods were used also by the democrats and since Barack Obama victory of 2012 in which social network were massively used to carry on the campaign. Secondly the same tools have been used also to support Hilary Clinton's campaign which also made broad use of data analysis with political purposes. See in this respect R. J. GONZALES, cit., p. 11 and other authors mentioned in the paper such as E. HERSH, *Hacking the electorate*, Cambridge, 2015.

250 Even though the draft is not yet available several sources reported the news in the first weeks of August 2018 see e.g. [EU targets European political parties that misuse voters' data, in Financial Times, 26th of August 2018](#) and [L'Ue vuole evitare un'altra Cambridge Analytica: multe ai partiti che usano i dati per la propria campagna, in La Repubblica, 27th August 2018](#).

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that use data harvested by virtue of illegal methods or privacy breaches and other circumstances similar to the Facebook-Cambridge Analytica scandal to carry on their campaign.

Moreover the regulation might include provisions focused on preventing political micro-targeting on social networks i.e. the practice of sending targeted and political messaging to users without their consent.

The Commission is also working on a set of recommendation to Member States in order to ensure the promotion of the highest level of transparency in political propaganda also under national legislations.

Such measures represent a new interesting type of approach to the matter since they are based on the *ratio* of keeping political parties liable for the use and the abuse of personal data with respect to electoral propaganda. Moreover the risk to pay the fine²⁵¹ may conduct the parties to avoid hiring certain data analysts in case of doubts on the transparency of the methods used by the latter to harvest and process data.

Finally a possible area of intervention could be the provision of legal mechanisms aimed at reducing the impact of fake news and the use of fake profiles to broadcast targeted political contents, forcing social networks and web corporations to promote a more effective control on online contents²⁵².

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251 The amount of the fine, according to available sources, might be in the range of 5 per cent of the annual budget of a political party.

252 In such perspective many social media like Twitter have recently increased their efforts in identifying and removing fake profiles especially when they are used to broadcast political and targeted messages and terrorist propaganda and violence. It seems then that the Cambridge Analytica case has triggered a change of approach of social media like Twitter to political propaganda. See [Twitter, sospesi altri 486 account "manipolatori", in La Repubblica, 28th August 2018](#).