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# 8 Democracy, Electoral Institutions, and Digital Platforms in Latin America

*Gaspard Estrada*

## Introduction

This chapter presents a study into the role of digital platforms<sup>1</sup> in electoral campaigns and their regulation (or rather the inadequacy of that regulation) by electoral institutions in Latin America. Following the so-called third wave of democratisation in the region (Huntington, 1991), the bodies in charge of organising elections have played a key role in the construction of Latin American democracies. Indeed, in societies marked by weak institutions (Brinks et al., 2020) and distrust towards the state (Guemes, 2016), the elaboration and application of clear rules for the electoral game have been one of the main challenges for these bodies. It is not only a matter of organising elections in such a way that votes can be counted reliably, but also of allowing the electoral contest to take place in conditions of fairness for candidates and their political parties, while maintaining transparency in campaign financing and spending. Contrary to what has happened in the United States and Western Europe,<sup>2</sup> Latin American electoral bodies have asserted their centrality in the institutional construction of the region's democracies (Freidenberg, 2022, Nohlen et al., 2007), using their normative influence at the national and regional levels (Uribe, 2022), thereby increasing their prerogatives regarding campaign oversight and control.

However, the emergence of digital platforms as a part of the electoral arena has changed this paradigm. Their readiness to apply the concept of “freedom of speech” to their business model (and more generally, their defence of this concept in opposition to the demands of governments and regulators), together with the lack of transparency in their operation and decision-making, has disrupted the institutional arrangements in place in most Latin American countries, while their role has become increasingly important in recent years. Electoral bodies, whose work has also been impacted by this transformation, have tried to respond using their normative instruments. However, the mechanisms developed over the last 40 years seem ill-adapted to facing the challenge posed by the emergence of digital platforms in electoral campaigns: on the one hand, digital platforms have become actors in electoral litigation by deleting posts or even accounts

on the grounds of the “violation of the platform’s terms of use”, rather than by referring to the jurisprudence used by the electoral bodies. As a result, electoral bodies have lost some of their centrality in the regulation of election campaigns, even though this is their *raison d’être*. On the other hand, when electoral bodies respond to this new situation, the criteria they use for removing posts, accounts, or even suspending the activity of a whole digital platform raise concerns among organised civil society (especially journalists’ and human rights associations), who view such moves as attempts at “censorship”. The timing of judgements by the electoral authorities concerning content disseminated via social networks also raises questions, since that judicial procedures do not follow the same rhythms or timescales as social networks. In this sense, candidates’ campaign teams may prefer to win an election, even if it means being convicted later for offences related to the misuse of social networks.

The role and authority of electoral bodies are evolving, and not in the direction they want. Consequently, their desire to regulate digital platforms in order to maintain the institutional architecture of election regulation in Latin America is producing a heated debate, both inside and outside social networks, with varied outcomes.

To explain this situation, this chapter will review the origin and development of digital platforms as instruments for political representation, before focusing on the evolution of the role of electoral bodies in the context of the political transition in Latin America, and especially their affirmation of their role as institutions in charge of guaranteeing fairness and transparency in electoral campaigns. Finally, after a presentation of the main axes of the current debate on the regulation of digital platforms by electoral institutions in Latin America, we focus on four cases in the region: Colombia, Peru, Mexico, and Brazil.

## **Digital Platforms: A Remedy for the Crisis of Democratic Representation?**

In April 2022, during a conference at Stanford University, former President Barack Obama spoke out on the growing nexus between technology and democracy, making clear his position in favour of the regulation of large digital platforms in order to avoid the “decline”<sup>3</sup> of American democracy and, more generally, of democracy at the global level. This statement was viewed with surprise by much of the media because Barack Obama and his presidency had until then seemed to foster an idyllic vision of digital platforms as actors of change in favour of progressive agendas. Indeed, social networks were fundamental in the construction of the former president’s presidential aspirations, in three respects: the structuring and mobilisation of his militant base against the Democratic Party establishment, the obtaining of resources to finance his campaign, and – after he had won the primary elections to become the official Democratic candidate – the dissemination of his political message against his Republican

adversary (Katz et al., 2013). Once in office, his administration promoted the growth of digital platforms, while the latter continued to enhance their image as actors of political change, both in developed countries, where they facilitated movements such as #MeToo, and in developing countries, particularly during the social mobilisations of the Arab Springs in 2011, which led to the fall of several authoritarian regimes in North Africa and the Middle East. At a time when criticism of political and economic elites was growing, in the context of economic and social crises resulting from the collapse of the international financial system in 2008–2009, the emergence of new forms of activism and collective action – the result, paradoxically, of a sum of individual acts on social networks – made it possible to imagine a new political order in which digital platforms would be a catalyst for increased social participation (Castells, 2012).

From this “techno-optimistic”<sup>4</sup> perspective, this new era could help to resolve one of the greatest challenges facing democracies: that of representation. According to the theory of “polyarchy” (Dahl, 1961, 1971), the coexistence of different political groups can prevent power imbalances from enduring over time, insofar as competition between interest groups makes it possible to exercise a certain type of control, thus contributing to creating a system in which every citizen can be heard. Over time, however, governmental structures seem to move away from ordinary citizens and towards the most powerful individuals. In this sense, the horizontal logic of digital activism would seem to offer the possibility of reinstating a pluralist ideal. The central argument used by advocates of this perspective is based on the reduction of the costs of participation and social coordination, as well as the creation of more direct channels of communication between “the people” and their rulers thanks to the emergence of digital platforms, which would therefore make it possible to overcome power imbalances (Pickard, 2006; Earl & Kimport, 2011; Margetts et al., 2016).

### **The Polysemy of the Concept of “Freedom of Speech” in Characterising the Functioning of Digital Platforms in Political Life**

This “techno optimist” discourse went hand in hand with a broader narrative around the defence of the concept of “freedom of speech”, which became a key term in the narrative concerning the development and defence of digital platforms. Proponents of the first digital platforms shared a perception of states as being inefficient – and to some extent responsible for an estrangement between “the people” and their elites – a fact which contributed to the prevalence of libertarian ideals in public discourse about such platforms (Schradié, 2019). Given the attachment of such ideals to improving social participation, it was paradoxical that these same arguments accompanied the growth of Donald Trump’s community of followers on some of these platforms during the 2016 election cycle, which was partly built on the use of “fake news” and disinformation

campaigns, but was also stimulated by the functioning of algorithms aimed at maximising advertising revenue (Edsall, 2021); thus, in the name of “freedom of speech”, digital platforms simultaneously prioritised private profit while weakening democracy in the United States and internationally. While the case of the 2016 US presidential election, revealed in the wake of the “Cambridge Analytica affair”,<sup>5</sup> is now widely known, it is worth noting that, prior to Donald Trump’s rise to power, most academic work in the social sciences devoted to the study of social networks tended to focus mainly on progressive movements (Pickard, 2006; Pickerill, 2006) to the detriment of more conservative movements, whose capacity for online and offline mobilisation was highlighted during the 2016 election cycle. Indeed, Jen Schradie’s (2019) research on the structuring of the digital activism of progressive and conservative activists in North Carolina in the early 2010s highlights the distinct approach used by conservative digital activism, whose growth – and subsequent electoral success – is largely due to the hierarchical functioning of conservative movements, contrary to the “techno optimist” ideal that assumes that the political use of digital platforms results in a horizontalisation of power relations. In short, the narrative of digital platforms as a factor for positive change in the functioning of democracy gave way to one in which increased political polarisation, lack of transparency, and misinformation take centre stage (Schradie, 2019).

This polysemy of the concept of “freedom of speech” with regard to the use and development of digital platforms also has an impact on a fundamental issue in the democratic life of a country: that of the link between money and politics in electoral campaigns (Falguera, 2015). One of the main political messages espoused by the digital activists linked to the Democratic Party, who contributed to the success of Howard Dean’s pre-campaign in 2004 (Kreiss, 2009) and then to Barack Obama’s presidential victory in 2008 (Kreiss, 2012), was concerned with a desire to break with the traditional model for the financing of electoral campaigns, which is mainly linked to the traditional financiers of political parties in the United States: lobbies and large corporations. In their view, digital platforms would help to give candidates (and by extension, citizens) back their “freedom of speech”, which had been appropriated by lobbies and interest groups, by making it possible for any individual to donate money – even modest sums – to the campaign. However, it was similarly on the grounds of avoiding “restriction of free speech” that the US Supreme Court ended restrictions on private campaign financing in 2010, following the famous *Citizens United vs. Federal Election Commission* decision,<sup>6</sup> which had the effect of significantly increasing the incestuous link between money and politics. While there is no evidence that digital platforms were responsible for this change in case law, it is clear that these companies – as well as their leaders – benefited greatly from this ruling, as they subsequently became major donors to US election campaigns, and went on to spend millions of dollars on lobbying campaigns aimed at preventing regulation or antitrust legislation from impacting their business models (Lima, 2022; Evers-Hillstrom, 2021).

In light of such contradictory uses and consequences of the concept of “freedom of speech”, it seems that its very ambiguity reflects the difficulty of defining the role of digital platforms in our societies, particularly during electoral campaigns. As digital platforms develop new tools, their capacity to influence the political–electoral game increases, thus transforming them into non-identified “political actors” in democracies, with their own agenda-setting capacity and their own interests to defend (Bossetta, 2020; Popiel, 2022; Tarrant & Cowen, 2022).

Faced with these new “political actors” with the capacity to influence the electoral game (whether in terms of the fairness of electoral contests, the transparency of financing, or the dissemination of information), the institutions in charge of organising, controlling, and supervising elections have been unable to generate a regulatory framework capable of exercising jurisdictional or merely light-touch control over digital platforms, which are for-profit companies and therefore have different interests from those of regulatory institutions. This combination of the functioning of digital platforms and the activities (or inadequacies) of electoral bodies have gradually produced ever greater conflicts of interest. Such grey areas are proliferating, to the point of raising doubts about the future functioning of democratic institutions.

The emergence of COVID-19 added to this challenge. The adoption of social distancing and movement restriction measures resulted in fewer rallies and campaign events taking place in the streets, and more interactions taking place over social media. While this paradigm shift in electoral campaigning had already been on the rise for some years, the effects of the pandemic represented a considerable transformation. Traditionally, the political parties (and their party structures), together with the traditional media (print, radio, and television), played the role of intermediary between the candidate and voters. Now, however, the role of digital platforms is becoming central to this relationship.

### **The Gradual Strengthening of Latin American Electoral Institutions**

In Latin America, the debate on the functioning of institutions (in this case, electoral institutions) is particularly relevant because of their central role in the processes of democratic transition that began in the 1980s. Indeed, in order to build democracies, it is necessary to establish political regimes characterised by certainty in the rules and uncertainty in the results (Przeworski, 2019). This entails, first of all, political actors acknowledging their electoral victories and, more importantly, their electoral defeats. However, throughout much of the twentieth century, the history of elections in Latin American was characterised by a lack of credibility in electoral processes, when they existed at all. Given the existing level of distrust, and the precarious state of the rule of law and institutions in many countries in the region, the newly empowered legislatures created autonomous

electoral bodies, seeking both to isolate them from the executive branch and to create a bureaucracy specialised in the organisation and conduct of electoral processes (Jaramillo, 2007, Zovatto, 2018). To reinforce the credibility of these processes, specialised courts were established to adjudicate electoral litigation (Jaramillo, 2007). By generating a legal and institutional framework, the aim was to give guarantees to all actors that the vote would be free, secret, and counted in a transparent and regular manner.

In addition to setting out how votes would be counted, it was also necessary to clarify what the rules of the game would be with regard to campaigning (Bjornlund, 2004). In this context, most Latin American countries initially adopted the “American” model. While the academic literature highlights that the process of “Americanisation”<sup>7</sup> of electoral campaigns is a phenomenon found in most Western democracies (Farrell, 1996; Norris, 2000; Plasser, 2000), in Latin America the so-called “professionalisation” and “Americanisation” of campaigns was replicated with greater emphasis than in other regions.<sup>8</sup> Latin American legislators, partly influenced by the large US political foundations and the arrival of US political consultants linked to them, gave a major role to electoral broadcasting on radio and television as a means of disseminating the candidates’ political messages (Plasser, 2000). The adoption of this model led to opportunities for candidates to obtain resources to finance their campaigns (especially from private companies), the absence of limits on political–electoral expenses, and the possibility for third parties to obtain airtime in the media, to be used either in favour of or against a candidate.

However, contrary to the idea established by the academic literature, which suggests that institutional stability is an indicator of democratic consolidation (Lijphart, 1995; Norris, 2011), in Latin America legislators have taken the opposite path of pursuing successive reforms of electoral institutions, whether to accommodate their own interests and preferences (Calvo & Negretto, 2020, Weyland, 2011), or to improve democratic institutions, or both (Freidenberg, 2022, Freidenberg & Došek, 2016, Freidenberg & Uribe, 2019). Furthermore, these reforms have not been initiated only by political elites, as electoral bodies have also played a role in the activism aimed at changing Latin American electoral laws (Uribe, 2022).

Thanks to their institutional design, and especially the considerable extent of their autonomy in some countries, electoral bodies in Latin America have acquired a constitutional and political relevance of their own, which distinguishes them from their counterparts in other regions of the world. While electoral bodies do not legislate, they may have resources for promoting legislative change in electoral matters, when political conditions permit. This has enabled Latin American electoral bodies to act as promoters and facilitators of the dissemination of ideas, norms, and regulatory projects. At the same time, the existence of international organisations that bring together electoral bodies at the regional level has led to the exchange of experiences and learnings that can then be incorporated into domestic legislation (Uribe, 2022).

The electoral reforms carried out in Latin America since the beginning of the political transition at the end of the 1970s have focused on four main issues: guaranteed access of candidates to the media; equal distribution to candidates of free media time; reduction in the duration of the campaign; and finally, greater regulation of opinion polls and electoral surveys (Cáceres, 2022). Thus, although the “American” model of electoral campaigns has been maintained in the region, several of its central components, such as the absence of limits on political–electoral spending, or the possibility for candidates to obtain private resources to finance their campaigns, have been increasingly regulated (Scherlis, 2022). In some countries in the region, private campaign financing has disappeared entirely, thus helping to increase the fairness of Latin American electoral contests, whereas in the United States, the removal of the limit on private campaign financing during Barack Obama’s term in office had the opposite effect.

This regulatory dynamic was particularly reflected in the crown jewel of the “American” model, that is, the broadcasting of political messages on radio and television (campaign “spots”). Between 1978 and 2018, some 53 electoral reforms were carried out to regulate political parties’ access to the media during election time (Cáceres, 2022). As time went by, reform activism increased: whereas in the 1980s only 6 reforms took place, in the 1990s this number rose to 14. During the decade 2000–2010, 20 reforms were passed, and from 2010 to the present there have been 14 amendments (Cáceres, 2022). The “American” model of electoral campaigns has thus gradually given way to a distinct “Latin American” model, which combines the strong presence of political marketing at the core of campaigns (together with the hiring of external consultants) with a robust regulatory system with power over campaign financing, candidates’ access to the media, and limitations on contributions to campaigns by private actors. In this sense, it could be said that the influence of electoral bodies has been aimed at increasing equity in the face of the triptych of factors that contribute to unlevelling the political field in an electoral competition (Levitsky & Way, 2010): disparity in candidates’ resources, differentiated access to the media, and unequal access to the law.

### **The Challenge to the “Latin American” Model of Electoral Campaigning Posed by Digital Platforms**

The advent of digital platforms such as Facebook, Twitter, WhatsApp, or Telegram has brought with it a substantial change in information consumption patterns, as well as in electoral decision-making processes. With more than 390 million users (Insider Intelligence, 2021), Latin America is, after Asia, the second region in the world in terms of social media use. Despite unequal access to the Internet, growth projections continue to increase. However, this growing use has gone hand in hand with a worrying change in the pattern of information consumption, and particularly a declining trust in news, which has been demonstrated by several indicators over

recent years. According to the annual study by the Reuters Institute for the Study of Journalism at Oxford University (Newman, 2022), on average, only 42% of respondents globally trust the news in 2022. The results across Latin America show significant contrast: Brazil, with a level of trust of 48%, is the only country with a result above the global average. Argentina, on the other hand, has the worst score in the region, at 35%. The figures for trust in the news in Peru (41%), Chile (38%), Colombia (37%), and Mexico (37%) are all below the world average.

This downward trend is accompanied by a gradual loss of interest in political news in Latin America. Brazil is the country where the situation is worst, where 54% of the adult population avoid political news, well above the world average of 38%. Five years ago, 27% of Brazilians preferred not to consume news, slightly below the world average at that time, which then stood at 29%. The situation has also worsened in Argentina: 46% say they avoid news content, up from 31% in 2017. The other countries surveyed in the region were Chile (38%), Colombia (38%), Mexico (37%), and Peru (37%). Varied reasons are given for this news aversion: 43% of respondents complain about repetitiveness, especially in coverage of politics and the COVID-19 pandemic, while 29% say they are tired of the news, while another 29% say that they do not trust it.

These numbers have a direct consequence for candidates: the main instrument of political messaging in Latin American campaigns, the TV and radio spot, is losing its audience and its persuasiveness, as voters are increasingly uninterested in news and traditional media. Frustration with politics and the increase in social polarisation in the region (Shifter, 2020), which had already manifested itself before the pandemic in the large demonstrations that occurred across large parts of Latin America in the second half of 2019, have contributed to these trends, as have the lockdown and social restriction measures linked to COVID-19. In this context, the teams in charge of political campaigns have increased spending on advertising on digital platforms, making the latter a central element of their electoral campaigning strategies.

The main problem with this development is that electoral campaigns are entering a digital arena in which there is a lack of clarity with regard to the principles that have guided the construction of a “Latin American” model of electoral campaigns: that is, the existence of binding mechanisms to regulate the duration of campaigns and the space allocated to candidates on media platforms, as well as the supervision of the use of the public funds that are allocated to them. These mechanisms, however, run up against the positioning of digital platforms as staunch defenders of “freedom of speech”, in the broad sense of the term: digital platforms therefore oppose the existence of regulatory mechanisms aimed at managing the public statements of the candidates who use these platforms, as well as the role of external bodies in supervising their work, whether in terms of campaign financing or the fight against disinformation. Some digital platforms have similarly used the principle of “freedom of speech” to justify their

willingness to disseminate advertising that contains misleading information. Finally, it should be remembered that it was on this same principle that the US Supreme Court ruled in favour of removing any limits on private contributions from companies, which allowed the owners of digital platforms to become major donors to electoral campaigns in that country.

Unlike radio or television, whose operation presupposes a degree of state control (the operators of radio and television stations, which are mainly privately owned in Latin America, hold contracts for the use of publicly owned electromagnetic frequencies, which thus allows electoral authorities to define regulations both for their broadcasting and for monitoring campaign content),<sup>9</sup> social networks do not depend on state authorisation to operate. Furthermore, the transnational nature of these platforms prevents electoral authorities from fully carrying out the task of monitoring and supervising campaigns because, on the one hand, some of the social networks used by candidates (such as WhatsApp, Signal, and Telegram) do not allow access to their data, and, on the other hand, there are no uniform rules at the international level for contracting advertising space for political campaigns on social networks. If we add to this the proliferation of “fake news” and disinformation campaigns – whose impact has been multiplied by the power of social networks – we are faced with a situation in which the electoral authorities in charge of organising, supervising, and controlling electoral campaigns find themselves without adequate instruments to carry out their main mission.

This is currently the main problem faced by Latin American electoral bodies. The academic literature on this subject considers that the regulation of digital platforms in electoral campaigns does not lie at the “heart of the electoral system”, in Lijphart’s sense, as it is not part of the process of formulating or reforming the principle of representation, the electoral formula, the size of electoral districts, the electoral threshold, or the size of legislative chambers (Lijphart, 1995; Nohlen, 2004). However, the capacity of these companies to influence electoral processes – in their role as intermediaries between candidates and voters, in their financing of campaigns, and in their lobbying and influence over legislation, as we will see below, and even as actors of electoral litigation through the enforcement of their “terms of use” – transforms them into central actors in campaigns. In this sense, their ability to influence the rules – or rather, the absence of rules – also transforms them into central actors in defining the “electoral system”, that is, the set of rules that allows votes to be converted into seats or positions of power, and that therefore determine who are the winners and losers of elections (Bowler & Donovan, 2012).

### **Latin American Electoral Authorities vs. Digital Platforms: Who Wins? Evidence from Colombia, Peru, Mexico, and Brazil**

Most electoral bodies reacted to this new reality using the same institutional toolbox that they had traditionally used for regulating the broadcasting

of radio and television spots. This includes (1) the establishment of judicial regulation, thereby creating case law in electoral matters, and (2) the signing of cooperation and self-regulation agreements (this time with digital platforms, instead of chambers of commerce or groups of radio and television broadcasters) to create a regulatory framework without imposing binding rules. However, as we will see below, although the electoral authorities continued their reformist activism, the difficulties that they encountered in adapting their regulatory frameworks to digital platforms have resulted in a loss of centrality and capacity on the part of electoral authorities in electoral litigation.

The act of establishing norms and rules involves defining what it is possible to do, and what it is not possible to do. This presupposes, first of all, that it is possible to determine what content can be considered as political campaigning, and not just as an individual's personal expression. The first action undertaken by electoral bodies in this domain was therefore to attempt to regulate the use of digital platforms for political messaging during campaigns, and thus to incorporate them in their regulatory framework.

Thus, in Colombia, the National Electoral Council (CNE) issued resolution 2126–2020<sup>10</sup> regarding an investigation into one of the candidates for mayor of Tarqui (Huila) in the October 2019 elections, because he had used his personal Facebook account in May 2019 to promote his candidacy outside the terms allowed for campaigning for those elections. The CNE decided not to sanction the candidate, but changed its doctrine by decreeing that digital platforms are media just like radio and television, and that they would therefore be regulated in the same way, especially with regard to the time allowed for advertising during an election campaign. However, the resolution does not specify the criteria for determining whether some particular content on a social network is of a “political” nature, which therefore limits its applicability (or its “discretionality”, as it is viewed by critics of this regulation). The central argument presented by the electoral arbiter for not making this distinction in the resolution refers to the need to balance respect for the fairness of electoral processes with the “right to freedom of speech, information and communication” – an issue which particularly arises in the case of social networks.

Something similar happened in Peru. The Peruvian Congress voted in 2020 to reform the Law on Political Organisations,<sup>11</sup> notably the part relating to the financing of such organisations. This reform defines the conditions in which parties and their candidates can purchase advertising space on digital platforms for their campaigns, and empowers the National Office of Electoral Processes (ONPE) to organise such campaigns. The new regulation sets a ceiling of up to three social networks for the daily contracting of advertising, that is, a given political party can broadcast electoral messaging on, for example, Facebook, YouTube, and Twitter (or another combination), every day, from 60 days before general elections until two days before the vote (at which point campaigning activity must stop). It

is no coincidence that this is the same regulatory period as that used for the broadcasting of election spots on radio and television. Another important aspect of the text is the introduction of the principle of equality and non-discrimination in political messaging, specifying that there should be no messages that are “sexist, racist, or based on gender stereotypes that harm or undermine the political participation of women and other groups”. However, just as in Colombia, Peruvian legislation does not specify how to identify this type of offence, nor how to control statements made on social networks, which therefore makes it difficult to enforce.

These two cases highlight the difficulty of applying the law when it comes to digital platforms. Furthermore, in cases where content published on a digital platform is deemed to be against the law, the question arises of who should be penalised: the author of the content, the digital platform, or the candidate who has benefited (or more than one of these)? In the case of Mexico, in 2021, the National Electoral Institute (INE) fined the Movimiento Ciudadano party €2.66 million (*La Silla Rota*, 2021), and also levied a fine of €21,000 against its candidate for the governorship of the state of Nuevo León, Samuel García, for posts made on social networks by the candidate’s wife, the influencer Mariana Rodríguez. The INE identified 45 photographs and 1,300 posts on Rodríguez’s Instagram account as being of a political nature, with an estimated advertising value – according to the INE – of €1.3 million euros, which the campaign did not pay for or report as expenditure. The INE decided that these publications went beyond a show of free speech or solidarity with her husband. The majority of the INE’s members considered Rodríguez’s status as a natural person with commercial activities to be proven, which therefore prevents her from contributing in kind to political campaigns. INE pointed out that Rodríguez was registered with the Tax Administration Service (SAT) for her business activities in advertising services, and that her name was registered as a trademark with the Mexican Institute of Industrial Property (IMPI). In support of his decision, one of the INE’s electoral councillors stated that it was not Mariana Rodríguez’s personal support for her husband that was being sanctioned, but rather the use of her means of work to deploy an advertising and electoral campaign strategy in favour of the candidate Samuel García.

However, this view was shared neither by Mariana Rodríguez nor by her husband. It also met with opposition from the Electoral Tribunal of the Mexican Federation (TEPJF), the judicial body in charge of controlling INE’s actions. The magistrates of the TEPJF decided that the influencer’s publications were covered by the exercise of her freedom of speech, arguing that

in the new form of communication through social networks, (Mariana) decided to share different aspects of her personal life, so that, in effect, after reviewing the publications, it can be seen that they are part of the exposure of her daily life.

The debate around the defence of “freedom of speech” in electoral campaigns has thus also become a central issue in Latin American electoral litigation, notably to the detriment of the agenda-setting capacity of electoral bodies to regulate digital platforms, in the face of the creation of case law favourable to the defence of “freedom of speech”.

This example is also interesting because it highlights the problem of the temporality of the implementation of judicial procedures. Indeed, the rhythm and timescales of electoral campaigns on social media are not the same as those of the judicial system designed for ruling on propaganda aired on radio and television. In this sense, the immediacy of social networks makes the applicability of legal decisions much more difficult, especially when one wishes to respect the rule of law and criminal procedure. In this case, the court decision was issued after the end of the election campaign. This situation effectively incentivises candidates to violate the law, if the penalty is only financial and does not affect the outcome of the election.

From this point of view, the example of the evolution of the regulation of fake news by the Brazilian Superior Electoral Court (TSE) is relevant. The 2018 presidential election was marked by the systematic sending of fake news via various digital platforms.<sup>12</sup> The problem for the candidates’ legal teams, from a legal point of view, was that of detecting the existence of these illegalities, because some of these platforms, such as Telegram or WhatsApp, operate in a closed manner. And once such illegalities have been identified, it remains very difficult to establish their cause, from a legal point of view, without the cooperation of the digital platforms. This prevented the candidates’ legal teams from being able to present strong enough cases to be judged in time by the electoral authorities.

However, several news reports<sup>13</sup> documented how the use of WhatsApp was decisive in Jair Bolsonaro’s victory (Avelar, 2019). Shortly after the election, and following the scandal unleashed by revelations in the press, a WhatsApp representative accepted that his company had allowed illegal group messaging to take place during the 2018 presidential campaign in Brazil (Campos Mello, 2019). Thus, the press somehow replaced the judicial authority in enabling the action of digital platforms in preventing the dissemination of fake news.

The weakness of the TSE in this area was reinforced when, paradoxically, some of these posts were censored by WhatsApp itself. Instead of referring posts to the electoral authorities as violations of the electoral code, WhatsApp executives based their decision on a “violation of the platform’s terms of use” (not coincidentally, after the press revelations had already emerged). This decision effectively presupposed that Brazilian electoral law has a lower rank than the rules established by the platform itself, with the result that an electoral dispute becomes a matter of private law, in which there is no possibility for appeal, nor for asserting any kind of legal basis on which to defend oneself. For some, the adoption of such a measure is necessary for combating the spread of “fake news”. But for others, WhatsApp’s decision constitutes a breach of the principle

of “freedom of speech”, which, paradoxically, has been central to the narrative in defence of digital platforms.

Faced with this challenge, the TSE decided to become much more assertive in their judicial decisions, not only with a view to protecting the Brazilian electoral system and its democratic institutions, but also with a view to maintaining its centrality and agenda-setting capacity in relation to digital platforms, delivering timely responses to the requests made by candidates’ legal teams. TSE judges supported the drafting of a bill by Congress to prevent disinformation via social media (anti “fake news” law). This bill, which was approved by the Senate in 2020, was the object of multiple modifications in the Chamber of Deputies. As the possibility of seeing this law passing became more concrete, Jair Bolsonaro tried to publish a decree (“Medida Provisoria”, in Portuguese) to give the executive the power to regulate the content of digital platforms. However, in the face of increasing pressure from the media, prominent members of the opposition, and organised civil society (and digital platforms), both legal initiatives failed.

Faced with this situation, the TSE reacted, using new powers that the court had granted itself in 2019,<sup>14</sup> which allow it, in effect, to act as an investigator, prosecutor, and judge in some cases. The inquiry rapporteur, Justice Alexandre de Moraes, issued several controversial decisions following the beginning of these proceedings. In his first decision, the magistrate ordered Facebook and Twitter to block access to the accounts of 16 individuals being investigated for allegedly spreading disinformation and hate speech online. However, despite these accounts being blocked at the national level, users outside of Brazil, or those who use a Virtual Private Network (VPN), continue to be able to access them. Justice Moraes requested a global suspension of the accounts after realising that his earlier request had a more limited impact than intended.<sup>15</sup> Facebook and Twitter criticised the decision.

Nevertheless, Justice Moraes maintained his use of these new judicial tools, aiming to reinforce the centrality of the Brazilian Judiciary in electoral litigation, and to reduce the time taken to reach judicial decisions so as to make them more effective during the 2022 electoral campaign. The lawyers driving the candidates’ legal teams understood this new reality and decided to create specific taskforces aimed at creating lawsuits combating the spread of fake news, and demonetising pages that distributed false content in social media. As they were prevented from receiving remuneration for the reproduction of fake material, producers of this type of content saw their funding dry up. Consequently, it was no longer worth participating in the production and dissemination of fake news.<sup>16</sup>

## **Conclusion**

These four cases show the complexity of the work of electoral bodies in regulating electoral campaigns in the digital age. The Brazilian TSE, the

Mexican INE, the Colombian CNE, and the Peruvian ONPE are all facing the emergence of digital platforms as competitors in the field of electoral regulation – a field in which electoral bodies had previously held a monopoly. Just as electoral bodies had, during the previous 40 years, used their ability to introduce reforms to reinforce their prerogatives and thus create a “Latin American” model of electoral campaigns, based on the regulation of elections, fairness in the treatment of candidates, and the increased transparency of electoral spending, these institutions reacted to this situation by creating new regulations in electoral law, strengthening their prerogatives, and trying to put limits on electoral communication via digital platforms. However, the particular functioning of social networks, which does not lend itself to the sort of regulation used for campaigning activities on radio and television, caused the reformist activism of the electoral authorities to have little influence on the impact of digital platforms in Latin American electoral campaigns. A recurring problem is the scope of the law provided by the electoral authority. The will to combine “freedom of expression” with the regulation of the media exposure of candidates – as happens on radio and television – prevents this norm from being applied effectively, as we saw in the case of Peru and Colombia. Another problem in the implementation of this regulatory framework is linked to the time required for judicial processes. As we saw in the cases of Mexico and Brazil, if there is no capacity for the electoral authority to act before the election, and if the penalty provided by law is limited to a financial fine, this law can ultimately be considered as an incentive to circumvent the law, considering that non-compliance will have only a marginal cost for the candidate. Finally, when an electoral body is confronted with the impossibility of obtaining an expansion of its judicial powers by the Congress, and instead decides to grant itself new powers to combat disinformation effectively, the outcome can be positive (as the Brazilian case) – but with a cost: it may attract criticisms that it is overstepping its remit, violating the rule of law, and restricting “freedom of speech”. Perhaps, with today’s tools, this is the only solution to the problem of regulating digital platforms, and therefore avoiding even greater democratic backsliding in Latin America.

## Notes

- 1 When we refer to “digital platforms”, we are thinking in particular of the so-called GAFAMs (based on the initials of Google, Apple, Facebook, Amazon, and Microsoft), which control most of the social networks present in the Western digital ecosystem. In these cases, the shareholding control of these companies is in private hands, which is not the case for the large Chinese or Russian technology companies, whose ownership is directly or indirectly in the hands of the Chinese and Russian governments respectively.
- 2 This concentration of responsibilities in one or two bodies in electoral matters differs from most European countries and the United States, where these prerogatives tend to be fragmented vertically or horizontally. In France, the fragmentation is vertical: it is the Ministry of the Interior, under the executive

power, that oversees the organisation of electoral processes, together with the municipalities, while the National Commission of Campaign Accounts and Political Financing (an autonomous body) oversees the financing of parties and candidates. Finally, the Constitutional Council (the highest legal authority of the country) oversees the judicial control of the regularity of the electoral process. In the United States, fragmentation occurs at the horizontal level, since each state has its own electoral law, as well as its own agency in charge of electoral processes, whose leader is elected directly by the citizens, giving rise to its politicisation. The Federal Election Commission is responsible for enforcing federal campaign finance laws. Finally, it is the media that declares the winners of elections, in a process that is not governed by law.

3

If we do nothing, I'm convinced the trends that we're seeing will get worse. [...] In some cases, industry standards may replace or substitute for regulation, but regulation has to be part of the answer. [...] As the world's leading democracy, we have to set a better example. We should be at the lead on these discussions internationally, not in the rear. Right now, Europe is forging ahead with some of the most sweeping legislation [in years to] regulate the abuses that are seen in big tech companies.

(excerpt from Barack Obama's speech at Stanford University, 21 April 2022. <https://barackobama.medium.com/my-remarks-on-disinformation-at-stanford-7d7af7ba28af>)

4 For a broader discussion of the debate on “techno optimism”, see Danaher (2022).

5 *The Guardian* (UK), *The Cambridge Analytica Files*. [www.theguardian.com/news/series/cambridge-analytica-files](http://www.theguardian.com/news/series/cambridge-analytica-files), accessed 28 July 2022.

6 Cornell Law School, *Citizens United v. Federal Election Comm'n (No. 08-205)*. [www.law.cornell.edu/supct/html/08-205.ZS.html](http://www.law.cornell.edu/supct/html/08-205.ZS.html)

7 We are here using Plasser's definition of the “American” campaign model (2000, p. 3):

Americanisation is a process of directional (unidirectional) convergence. From this angle, the central parameters of the actions of European and Latin American political communication actors resemble the communication process in the US. This results in a directional (one-way) convergence between US and European or Latin American electoral communication, in which – regardless of the institutional constraints of the competitive political situation – foreign communication actors adopt central axioms and strategic parameters of the actions of US actors.

8 However, it is worth noting that, while the regulatory framework of Latin American electoral campaigns tends to replicate the “American” model (in particular, the centrality of the communication of the candidate's message through electronic media and the hiring of external consultants for campaigns), their content and strategies for disseminating political messages have tended to differ over time from the “American” model. See Boas (2016).

9 This state control allowed, for example, the establishment of the Free Electoral Advertising Time (HGPE) system in Brazil, as well as the mechanisms for monitoring electoral advertising in Mexico, which became the responsibility of the National Electoral Institute after the electoral reform of 2007.

- 10 “Uso de redes sociales con fines electorales sí se considera propaganda política”. A summary can be found here – [www.cne.gov.co/prensa/comunicados-oficiales/309-uso-de-redes-sociales-con-fines-electorales-si-se-considera-propaganda-politica](http://www.cne.gov.co/prensa/comunicados-oficiales/309-uso-de-redes-sociales-con-fines-electorales-si-se-considera-propaganda-politica) – and the full text of the resolution can be found here – [www.cne.gov.co/component/phocadownload/category/129-2020](http://www.cne.gov.co/component/phocadownload/category/129-2020)
- 11 Full text available here: [www.scribd.com/document/476606708/TEXTOFINAL-FINANCIAMIENTO-DE-ORGANIZACIONES-POLITICAS-pdf](http://www.scribd.com/document/476606708/TEXTOFINAL-FINANCIAMIENTO-DE-ORGANIZACIONES-POLITICAS-pdf)
- 12 [www.thedialogue.org/analysis/how-much-is-fake-news-influencing-latin-elections/](http://www.thedialogue.org/analysis/how-much-is-fake-news-influencing-latin-elections/)
- 13 See, in particular, the report in *The Guardian*, “WhatsApp fake news during Brazil election ‘favoured Bolsonaro’” ([www.theguardian.com/world/2019/oct/30/whatsapp-fake-news-brazil-election-favoured-jair-bolsonaro-analysis-suggests](http://www.theguardian.com/world/2019/oct/30/whatsapp-fake-news-brazil-election-favoured-jair-bolsonaro-analysis-suggests)), and an article in the Brazilian newspaper *Folha de São Paulo*, “Documento confirma oferta ilegal de mensagens por WhatsApp na eleição” ([www1.folha.uol.com.br/poder/2018/10/documento-confirma-oferta-ilegal-de-mensagens-por-whatsapp-na-eleicao.shtml](http://www1.folha.uol.com.br/poder/2018/10/documento-confirma-oferta-ilegal-de-mensagens-por-whatsapp-na-eleicao.shtml)).
- 14 Federal Supreme Court inquiry n.4781 <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5651823>
- 15 [www.dw.com/en/brazil-top-court-sets-precedent-by-banning-global-access-to-social-media-accounts/a-54452807](http://www.dw.com/en/brazil-top-court-sets-precedent-by-banning-global-access-to-social-media-accounts/a-54452807)
- 16 <https://piaui.folha.uol.com.br/o-qg-lulista-contras-fake-news>

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