

Executive summary

Misinformation on the social media, online hate speech and attempts to manipulate public opinion through bots or false accounts present a major challenge to modern societies. This study explains – from the point of view of Swiss law – the constitutional basis and limits of a government response to questions that affect the very principle of freedom of expression in a democratic system.

Given the numerous disruptive factors, ensuring a free, open and pluralistic public debate in the digital environment – and thereby safeguarding its vital role in a democratic state – is a daunting task. The challenge must be addressed while respecting the freedom of communication. The protection afforded to exercising this freedom online must be equal to that which applies offline, and must be defended both against any unwarranted state intervention and against any distortion on or by the platforms. Only in this way can the necessary pluralism of public debate be properly guaranteed.

A consensus currently seems to be emerging that platforms should make their algorithms transparent. This measure is grounded on there being sufficient public interest and appears to be proportionate, given the dominant position of these platforms and their systemic role in public debate.

A more ambitious goal – but one that would still conform to the freedom of communication – would be to require the platforms to observe political, ideological and religious neutrality, to make such neutrality transparent and verifiable, and to promote the right to reliable online information. The Declaration on Information and Democracy, which Switzerland signed in 2019 with some thirty other states and which was initiated by the non-governmental organisation Reporters Without Borders, is a move in this direction.

The use of instruments such as social bots and false accounts in the context of popular votes should be prevented. If technically feasible, such use should be prohibited. Existing law already obliges the authorities to react and rectify facts when grossly incorrect information has been disseminated across the networks.

In passing legislation, it is essential for the state to take account of the danger of private censorship that is inherent in any regulation imposed on online public communication. Thus the norms that define illicit content must be made as precise as possible so that platforms are not encouraged to remove statements that are legitimate – or only potentially illicit – simply in order not to expose themselves to legal risk.

The platforms' civil and criminal liability for user-generated content must be carefully defined. The courts must retain an acceptable level of control over the platforms, especially in cases where a proper assessment of the circumstances and a weighing-up of interests is required in order to determine whether the content is illegal or not; control of content should not be left to the platforms themselves, given the dominant and systemic role they play in the digital sector.

Policies for moderating the platforms' content could make it difficult for them to exercise the freedom of communication. They should be devised in the framework in co-regulation standards requiring the platforms to themselves respect the principles enabling an online public debate to develop as freely as possible.

The mandate bestowed on radio and television by Art. 93 (2) of the Constitution does not provide any hard-and-fast constitutional basis for regulating digital platforms. In principle, this mandate can only apply to radio and television. The current constitutional basis does not allow for the freedom of expression of other actors to be restricted by such a mandate. Any regulation of the platforms must therefore observe the usual restrictions imposed by the freedom of expression as defined in Arts. 16 and 17 of the Constitution.

The government must support the media financially to protect the public's right to receive pertinent, diversified and reliable information. This support, however, must fully respect the editorial freedom of the media and must not enable the state to influence editorial content.