12 The guarantee of political rights in view of misinformation

Is new regulation needed for Swiss referenda?

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Introduction

In the age of the internet and social media, democracy in general and Swiss referenda procedures in particular are being challenged in new ways: political information increasingly reaches us via platforms such as Facebook and new messenger apps. The information feed is often governed by algorithms, which are not transparent. More personalised information bears the risk of filter bubbles or echo chambers (Sunstein 2017). New phenomena emerge that are connected with social media, such as social robots or trolling. Many independent newspapers disappear because they find no way to adapt economically to the rapid and massive change of the public sphere. Finally, the linkage between social media and fake (political) news is a much-discussed topic in Switzerland and elsewhere (Renwick and Palese 2019, 5 ss., 17 ss; Fichter 2017; Sunstein 2017).[1] Of course, the internet and social media create opportunities for democracy by fostering transparency and the control of the government, for example by filming infringements by police. The political sphere has, at the same time, become more vital due to new forms of civic participation and interaction between individuals (see, e.g., Graf and Stern 2018; Fichter 2017).

In view of these challenges and opportunities created by the internet and social media, is there a need for new regulation to prevent misinformation during referenda? This question is particularly interesting in Switzerland,[2] as we not only have many referenda, and therefore many examples of judicial control of such procedures (see, Martenet in this volume), but we also have a lot of empirical knowledge about how voters form their political opinions. Since 1977, the scope, impact, and significance of the various sources of information in Switzerland have been empirically investigated by means of follow-up surveys after each vote at

1 See e.g., Committee on Foreign Relations United States Senate, 2018. *Putin's asymmetric assault on democracy in Russia and Europe: implications for U.S. national security*, Washington, D.C.: U.S. Government Publishing Office.

2 For an overview of Swiss democracy in international comparison, see Kübler 2019.

the federal level.[3] The surveys explore, for example, the importance of different sources of information, and regularly reveal the particular importance of the Federal Council's referendum booklet. The booklet is a source used by up to 90% of the voters[4] while print media and television are also very important sources of information. According to surveys, the influence of social media on voters is relatively less significant. For example, in the vote on 10 June 2018 on the Gambling Act, only 20% of voters stated that they had used social media as a source of information. This figure is surprisingly low, especially since the most controversial issue was the introduction of internet blocking measures.[5]

In this article, we will focus primarily on questions related to Article 34(2) of the Federal Constitution, which protects the freedom of the citizen to form an opinion and to give genuine expression to his or her will. We will explore the need for changes to information conveyed by public authorities ("Misinformation from *public authorities*") and private actors ("Misinformation from *private* actors") in the time before a referendum. We will not take the broader approach and explore changes in other areas that would have an impact on the quality of the public debates. Nevertheless, we will give a brief and incomplete overview of the actual state of the discussion in the three areas in which action or regulation against misinformation might make the most sense ("Quality of the political discourse and education").

Quality of the political discourse and education

The current Swiss discussion about new regulation for referenda procedures

All discussion about regulation of referenda procedures is to some extent related to the quality of the political discourse.[6] This section is limited to a discussion of those points with the most direct impact, which are not extensively discussed in later sections.

3 For detailed information on each vote at the federal level, see the internet site of the research project VOTO, https://www.voto.swiss [accessed 6 April 2020]. For an assessment and actual references to empirical studies, see Kriesi 2016, 19 ss. For an actual oversight over the use of internet and social media in the forefront of Swiss referenda see Kleinen-von Königslöw 2018.

4 In 2018, e.g., votes at the Federal level took place on four dates. Between 86 and 90% of the voters used the booklet as a source of information: https://www.voto.swiss [accessed 6 April 2020].

5 Milic, T., Reiss, T. and Kübler, D., 2018. VOTO-Studie zur eidgenössischen Volksabstimmung vom 10. Juni 2018, 12, https://www.voto.swiss/wp-content/uploads/2018/07/VOTO_Bericht_10.06.2018_DE.pdf [accessed 6 April 2020].

6 The interrelation of a concrete vote on a popular initiative, the quality of the debate and the question as to whether the procedural rules should be changed is revealed e.g., by Boillet, 118.

There is a general need to foster transparency in Swiss politics, as there are currently no legal provisions regarding transparency of the financing of political parties at the federal level. A relevant popular initiative has been submitted to federal authorities: the initiative "For more transparency in policy financing (the Transparency Initiative)", asks the Confederation to take legal measures that require the disclosure of the financing of political parties and campaigns with regard to elections to the Federal Assembly and votes at federal level.[7] A parliamentary commission drew up an indirect counterproposal and submitted it for public consultation on 7 May 2019.[8]

Other requests aim, for example, to increase transparency about conflicts of interest,[9] to prohibit interference in political processes by foreign persons,[10] to preclude authorities from participating in public debates regarding referenda,[11] to ensure that government addresses the problem of misinformation,[12] to ensure that government informs in a way that is understandable for people with reduced capacities,[13] and that government subsidizes private initiatives like "Easyvote" for votes on all governmental levels.[14]

In our view, the fostering of transparency of political procedures in Switzerland is pressing. It is true that the implementation of such rules presents special

7 See https://www.admin.ch/opc/de/federal-gazette/2018/5623.pdf. [accessed 6 April 2020], for a critique of the Council of Europe, see Fünfter Zwischenbericht über die Konformität der Schweiz, Transparenz der Parteienfinanzierung, Jun. 2018, GrecoRC3(2018)7.

8 See https://www.parlament.ch/press-releases/Pages/mm-spk-s-2019-05-07.aspx?lang=1031 [accessed 6 April 2020].

9 Interpellation 18.3706 Glättli Balthasar: Transparenz über Mitgliedschaften und andere Interessenbindungen von Bundesrätinnen und Bundesräten sowie von Kandidatinnen und Kandidaten für den Bundesrat?, https://www.parlament.ch/de/ratsbetrieb/curia-vista [accessed 6 April 2020].

10 Parlamentarische Initiative 18.423 Fournier Jean-René: Keine fremden Eingriffe in die Schweizer Politik!; Interpellation 18.3577 Regazzi Fabio: Ausländische Finanzierung von Unterschriftensammlungen für Referenden und Volksinitiativen. Eine Gefahr für unsere direkte Demokratie?, https://www.parlament.ch/de/ratsbetrieb/curia-vista [accessed 6 April 2020].

11 The popular initiative "People's sovereignty instead of authority propaganda" sought to amend Art. 34(2) of the Federal Constitution. It was rejected on 1 June 2008 by 63.8 per cent of the votes. For an actual example of a postulation in the same direction, see 18.3940 Interpellation Bigler Hans-Ulrich: Politpropaganda aus der Bundesverwaltung, https://www.parlament.ch/de/ratsbetrieb/curia-vista [accessed 6 April 2020].

12 Interpellation 18.3448 Marchand-Balet: "Fake-News" und die Schweizer Demokratie; Postulat CVP-Fraktion 19.3435: Volksabstimmungen: Das Stimmvolk muss korrekt durch den Bundesrat informiert werden; Interpellation 19.3430 Egger Mike: Täuschung der Stimmberechtigten bei den Abstimmungen über bilaterale Verträge und Schengen? https://www.parlament.ch/de/ratsbetrieb/curia-vista [accessed 6 April 2020].

13 Motion 18.4395 Rytz Regula: Leichte Sprache in Abstimmungserläuterungen und weiteren Informationen des Bundes, https://www.parlament.ch/de/ratsbetrieb/curia-vista [accessed 6 April 2020].

14 Postulat 17.4046 Seiler Graf Priska: Easyvote in allen Gemeinden, https://www.parlament.ch/de/ratsbetrieb/curia-vista [accessed 6 April 2020].

challenges in Switzerland in light of direct democratic rights, but these challenges can be managed. The existing regulation in some cantons and the above-mentioned counterproposal are good examples of (mostly small) steps in the right direction.[15]

Regulation of mass media

Functioning mass media are vital for democracies in territorial states. How the mass media are regulated is, therefore, relevant for all democracies (Müller 2009, 91 ss., Holznagel 2009), and particularly important in a small country such as Switzerland, where the public is divided into different language areas.

Holznagel (2018, 18) accurately points out that the most effective weapons against "fake news" from Switzerland and abroad are credible media offers. A very important decision in this respect has been, in our view, the rejection of the popular initiative "Abolition of Billag fees" in spring 2018. The initiative called for the abolition of radio and television reception fees that are used to finance the Swiss Broadcasting Corporation. It also required that the federal government not subsidize other radio and television stations. The adoption of the initiative would have seriously harmed media diversity and opinion-forming in Switzerland. For a relatively small, multilingual country like Switzerland, with its institutions of direct democracy, a diverse range of media in all language-parts is particularly important and cannot exist without governmental support. Moreover, Article 4 of the Federal Radio and TV Act, an important legal provision against misinformation, states that programs with information content must present facts and events appropriately, so that the public can form its own opinion (see Martenet in this volume)[16].

Political education

Open societies depend on open people. The importance of political education for democracy cannot be emphasised enough. In the age of new media, it is

15 For references, see Vorentwurf und erläuternder Bericht der Staatspolitischen Kommission des Ständerates vom 29. April 2019, Parlamentarische Initiative Mehr Transparenz in der Politikfinanzierung, https://www.parlament.ch/de/organe/kommissionen/sachbereichskommissionen/kommissionen-spk/berichte-vernehmlassungen-spk/vernehmlassung-spk-19-400 [accessed 6 April 2020]. So also the actual assessment of the GRECO: 6th Interim Compliance Report of Third Evaluation Round, 9 September 2019, https://www.coe.int/en/web/greco/-/switzerland-publication-of-the-6th-interim-compliance-report-of-third-evaluation-round [accessed 6 April 2020].

16 Due to the transformation of mass media, the Federal Council plans to replace the Radio and TV Act with a new law on electronic media. The Federal Council started a public procedure on the draft in June 2018. The duty to appropriately inform remains unchanged, see Art. 7 of the draft, https://www.bakom.admin.ch/bakom/de/home/das-bakom/organisation/rechtliche-grundlagen/vernehmlassungen/vernehmlassung-zum-neuen-bundesgesetz-ueber-elektronische-medien.html [accessed 6 April 2020].

important that we learn to deal with associated opportunities and risks.[17] To carry out the educational mandate in this respect is a central task of the State,[18] but the possibilities of fostering political education just by drafting laws is limited (Tschannen 1995, 414, Haller et al. 2013, 74).

Conclusion

One of the backbones of democracy is a functioning public sphere. In this sense, three axes must be highlighted: political procedures need to become more transparent, the Swiss State has to continue to support mass media in order to ensure its credibility, and political education must be encouraged.

Following this general overview, this chapter discusses the particular topic of referenda and the main question as to whether new regulation is needed to address misinformation from public authorities and private actors.

Misinformation from *public authorities*

The caselaw: from the prohibition of intervention to the duty to participate

What is the role of public authorities before a referendum? The starting point is the protection of free decision-making processes by Article 34(2) of the Federal Constitution. This provision aims to protect open and pluralistic public debates, which lead to rational decisions by the voters. What is the basic problem of all official information before a referendum? On the one hand, voters need elementary information about the voting subject. On the other hand, such information can easily turn into indoctrination or paternalism. In short: information from public authorities is always caught between the public's need for clarification and the danger of manipulation.

According to the jurisprudence of the Federal Supreme Court, public authorities have to remain silent about *elections*. The current organs of government have no say about the appointment of personnel for a new term of office (Steinmann 2014, 786). During the run-up to popular *votes*, the role of public authorities is very different. They may inform the public about the date and issue of the vote, and have an advisory function.[19] Public authorities regularly inform the public with a

17 For a practical example with references to empirical studies, see Hauk 2018. The empirical study of Latzer et al. 2017about the degree of trust in different sources of information on the internet in Switzerland yields interesting results. Websites of authorities, paid mass media, and results of search engines are mostly rated as trustworthy. Sites of for-free-media (Gratiszeitungen), post of friends on social media platforms, and user-generated content, in general, are less trusted sources of information.

18 See the report of the Federal Council of November 2018, Politische Bildung in der Schweiz - Gesamtschau, https://www.newsd.admin.ch/newsd/message/attachments/54481.pdf [accessed 6 April 2020].

19 ATF 118 Ia 259, at para. 3. See, e.g., Martenet and von Büren, 59 ss.

referendum booklet; the constitutionality of such elementary information is widely accepted. Participation by public authorities that is in addition to the booklet, for example, through speeches, interviews, and participation in televised debates, is of a different nature. Whether or not such participation is legal has been debated (Boillet 2016, 123 s., Besson 2003, 113 ss.). Until recently the caselaw of the Federal Tribunal generally precluded such participation: it was only exceptionally compatible with Article 34(2) if there were valid reasons for additional information. Such valid reasons existed if a correction of misleading private or official information was necessary; if new facts relevant to the decision became known; or, if – due to the complexity of the subject of the vote – additional information was required.[20] There was no valid reason to intervene if a proposal was particularly controversial or if the authorities wished to persuade the voters to accept it.[21]

Over the last 10 to 20 years the caselaw of the Federal Supreme Court in this matter has fundamentally evolved.[22] A decision from March 2019 clearly demonstrates that the Court now adopts a very different view of information from public authorities before referenda.[23] Such information is no longer only exceptionally but, in principle, regularly admissible. The decisive question is not *if* public authorities can intervene in the public debate, but *how* they inform. The information has to be objective, transparent, and proportionate.[24] Authorities have to exercise restraint. The goal of the information must be a better-informed public (Müller et al. 2008, 623 ss.). It remains impermissible for authorities to inform only in order to win the vote.[25]

We welcome this fundamental shift in the Federal Supreme Court's caselaw. Responsive democracy requires constant communication between citizens and authorities. This dialogue must not be interrupted in the period before popular votes. Authorities should be ready for voters searching for information. Since they follow the progress of legislative proposals from beginning to the end, they have access to specific information that may be useful to close information gaps for voters. In addition, as we explain in the section "New regulation" later, regular participation of public authorities can be an important measure against misinformation from private actors. Government should not regulate or preclude misinformation from private actors. Rather, it should counter such misinformation

20 For a helpful summary of the caselaw, see Federal Supreme Court, 18 Jul. 2008, 1C_412/2007, ZBl. 2010, 507 at para. 6.2. and Besson 2003, 116 ss.

21 For references to the caselaw see Besson 2003, 119 s.

22 See Martenet and von Büren, 63 s., Steinmann 2014, 788, Tschannen 2015, 713, Töndury 2011, 349, Seferovic 2018, 94 ss. with further indications.

23 Federal Supreme Court, 2 Feb. 2019, 1C_24/2018 at para. 6.3. (unpublished decision), where the Court stated that the public authorities have been entitled to inform the public "without further ado" ("ohne weiteres") about a referendum with a press release. For the most recent published decision, see ATF 145 I 175 E. 5.1 (with references).

24 See the chapter written by Vincent Martenet in this book.

25 ATF 112 Ia 332, at para 4.d. On one hand, this restriction of the motives to inform is an important and useful guide for the informing authority itself. On the other hand, it is evident that this motivational criterion is not very suitable for the judicial review.

with correct and comprehensive information: "(T)he remedy to be applied is more speech, not enforced silence".[26]

In sum, a necessary and fundamental change to the caselaw definitively and clearly took place with the latest ruling of the Federal Supreme Court. This is a significant and positive step towards an understanding of information from public authorities, which is adapted to today's circumstances. The new caselaw demands an active and regular participation of public authorities before each referendum. Such active participation is an important tool against misinformation from private actors, as long as public authorities inform in an objective, transparent, and proportionate way. In this respect, the regulation of caselaw regarding Swiss referenda requires no longer fundamental change. Nevertheless, we demonstrate in "Incomplete judicial control of public information" that the judicial protection with respect to referenda has some shortcomings.

Information in practice: more interactive information tools needed

We have already described the legal framework of official information. But what does it look like in practice? How do authorities actually participate in referenda campaigns? How important for the voters is the information from the public authorities? How do the authorities react to the changed communication conditions, e.g., to new media? The following remarks refer only to federal-level information practices. The information practices of authorities at cantonal and communal levels may differ greatly from those practices adopted at the federal level (see Martenet in this volume).

Article 11(2) APR provides that a brief, factual explanation by the Federal Council is to be attached to the voting proposal. These explanations also take into account the views of important minority parties. Since September 2018, the explanations provided to voters have been given a new look: in addition to improving the presentation of the information, greater attention has been paid to the balancing of information.[27] Opponents and supporters of the bill now have exactly the same amount of space to present their arguments for and against the bill (1.5 pages each). A QR code on the booklet leads to an explanation video,[28] which is also offered in sign language to meet the needs of persons with reading and writing disabilities.[29] These are welcome changes.

26 Concurring opinion of Judge Brandeis in *Whitney v. California*, 274 U.S. 357, 377 (1927), still fundamental to today's doctrine and practice of freedom of speech in the United States. See Müller and Schefer, 349 s.

27 For explanations regarding the new design and an informative retrospective view of the booklet, see Federal Chancellery, Abstimmungsbüchlein: Design 2018 und Rückblick, https://www.bk.admin.ch/bk/de/home/dokumentation/Abstimmungsbuechlein_Design.html [accessed 6 April 2020].

28 The use of such videos is, in principle, constitutional, see ATF 145 I 1 E. 5.

29 For a further demand, see Motion 18.4395 Rytz Regula: Leichte Sprache in Abstimmungserläuterungen und weiteren Informationen des Bundes, https://www.parlament.ch/de/ratsbetrieb/curia-vista [accessed 6 April 2020].

For every vote, members of the Federal Council hold an official radio and TV speech, deliver other public speeches, and give interviews on the voting documents. All official voting information, as well as background information, FAQs, and links are to be found on the official homepage. To a certain extent, the authorities are also reacting to the transformation of the public sphere with its trends towards messengerisation and platformisation: some of the authorities use e.g., short news services such as Twitter. However, the interactivity of the information offered still lags behind the needs of the public. For example, the new "VoteInfo" app is not interactive. Paid information, such as advertisements and billboard advertising, is hardly ever used.[30]

In our assessment, information emanating from the federal authorities is convincing in general.[31] Official communication on referenda always comes more or less in the same way. With several voting dates, the procedure is well known. This uniformity helps to build trust. Over time, the authorities have adapted their communication behaviour to the conditions and information needs of the voters. For example, voters nowadays rightly expect the government to provide a homepage with additional information. Until now the activities on social media were fairly limited and typically meant to call attention to additional official information available online. Some participants are thereby motivated to leave their information bubble from time to time.

Authorities must, despite their obligation of restraint, try to reach the public with their information. If government wants to be heard, it has to offer interactive methods of communication. We will make suggestions below as to how an interactive information platform could look. In other words, authorities must adapt to changes to the political discourse. Nowadays, exhaustive information about the referenda must be easily accessible on the government website. The website must not only contain all official information, but it must also contain balanced additional material. Finally, government should offer and use interactive tools.

New regulation

No need for new regulation against misinformation from public authorities in general

Discussions surrounding new Swiss regulation against misinformation in the age of new information technologies raise concerns mainly regarding the handling of misinformation from private actors (see below) as opposed to misinformation by public authorities.

30 For an overview of the strict legal rules developed by the Federal Supreme Court on forms of classic active advertising, see Besson 2003, 281 ss.

31 For references to criticism with specific details, see, e.g., Boillet, 122 or Besson 2003, 300, 308, 407.

In view of recent developments in the caselaw of the Federal Supreme Court, no new legislation is necessary to protect against misinformation by the authorities in general. The Federal Constitution itself already excludes such misinformation.[32] Public authorities are, therefore, not allowed to misinform the public. In the current political discussion, it is sometimes asserted that the quality of the information of the Federal Council needs improvement.[33] We believe that the best reaction to this discussion is to guarantee judicial control of all information by public authorities in the run-up to referenda (see below).

Authorities must be able to react adequately and flexibly to new communication realities. Whenever the legislator has dealt with official (mis)information, it has mostly repeated the abstract legal principles deriving from the caselaw of the Federal Supreme Court.[34] While not harmful, this brings little concrete added value in practice.

On the other hand, statutory regulation makes sense for elementary information regularly provided by the authorities (Besson 2003, 385). How far in advance and according to what criteria are voting dates set? Who determines when and according to what criteria the referenda questions are determined? Who formulates the referendum booklet? When is it published and sent to voters? To what extent should initiative and referendum committees have their say in the explanations regarding the vote? What official information must be published regularly on the internet?[35] The more the procedures are rule-based, the greater the chance that those involved will be able to recognize decision-making procedures and votes as fair. At least at the federal level, the appropriate rules are in place today.[36]

Incomplete judicial control of public information

(a) General rule: existing legal protection

The judicial remedies for misinformation before and after referenda have already been discussed in this book (Martenet in this volume). In principle, the Swiss Federal Tribunal is competent to examine if public authorities

32 Nevertheless, from a didactical perspective, the formulation of Art. 34 of the Federal Constitution is not completely convincing. For a proposal of reformulation, see, Besson 2018.

33 See, e.g., Postulat CVP-Fraktion 19.3435: Volksabstimmungen: Das Stimmvolk muss korrekt durch den Bundesrat informiert werden; Interpellation 19.3430 Egger Mike: Täuschung der Stimmberechtigten bei den Abstimmungen über bilaterale Verträge und Schengen? https://www.parlament.ch/de/ratsbetrieb/curia-vista [accessed 6 April 2020].

34 See, e.g., Art. 10a para. 2 of the Federal Act on Political Rights (APR), 17 Dec. 1976, RS 161.1.

35 For a detailed presentation that distinguishes between different forms and means of information, see, Besson 2003, 227 ss. Some actors demand, that complete information about the drafting process of a particular law should be available on the web. Transparency International, Lobbying in der Schweiz, Feb. 2019, https://transparency.ch/wp-content/uploads/2019/02/Bericht-Lobbying.pdf [accessed 6 April 2020].

36 See Art. 10 ss. APR. For the cantonal level, see Grisel 2004, 119.

misinformed the public. The relevant caselaw of the Swiss Federal Tribunal is voluminous,[37] and the Court has examined, for example:

- voting material,[38]
- the formulation of the voting question,[39]
- the referendum booklets,[40]
- the information emanating from public authorities in the run-up to referenda in general,[41]
- the information concerning not only ballot votes but also votes on meetings,[42]
- the information at the federal[43] and cantonal[44] levels,
- information emanating from public authorities regarding votes that they organize themselves or votes that take place in other public corporations.[45]

1 Overall, the caselaw demonstrates that the question as to whether public authorities misinformed the public in the lead-up to referenda is a legal question that courts are apt to address.

(b) Important gap: no legal protection against acts of the Federal Council

There is an important gap in the legal protection against misinformation emanating from public authorities. Article 189 Section 4 of the Federal Constitution states that "[a]cts of the Federal Assembly or the Federal Council may not be challenged in the Federal Supreme Court. Exceptions may be provided for by law". Such acts may not be directly challenged in the Federal Supreme Court, nor may they be made the subject of proceedings. The extent of the exclusion must be determined in each individual case by interpreting Article 189(4) of the Federal Constitution. According to the caselaw of the Federal Supreme Court, the referendum booklet of the Federal Council itself and the statements of individual federal councillors, which essentially reflect the content of the booklet, cannot be challenged. Other information from federal authorities such as the content of the homepage of a specific federal office, tweets or speeches of members of the federal administration, or an explanatory film, may be challenged, as long as the

37 See, e.g., ATF 145 I 1; 143 I 78; 139 I 2; 138 I 61; 136 I 389; 136 I 404; 135 I 292; 132 I 104; 130 I 290. For more references, see Steinmann and Mattle, 1140 ss., Steinmann 2014, 787 s. For an exhaustive account of the older caselaw, see Hiller 1990, 79–431.

38 See, e.g., ATF 141 I 221; 139 I 2; 136 I 139; 130 I 290.

39 See, e.g., ATF 106 Ia 20; 121 I 1.

40 See, e.g., ATF 139 I 2; 138 I 61; 136 I 389; 132 I 104; 130 I 290.

41 See, e.g., ATF 145 I 207; 145 I 1; 143 I 78; 138 I 61.

42 See, e.g., ATF 139 I 2, Federal Supreme Court, Nov. 1, 2017, 1C_319/2017 (unpublished decision).

43 See, e.g., ATF 145 I 1; 145 I 175.

44 See, e.g., ATF 139 I 2 and for an account of an actual example in which a vote on the communal level has be annulled, see Glaser and Lehner 2019.

45 See for both constellations, e.g., ATF 145 I 1; 145 I 175.

examination by the Court would not be materially equivalent to an examination of the content of the referendum booklet.[46]

(c) Judicial remedy against misinformation of the Federal Council in exceptional cases

The information booklet of the Federal Council cannot as such be examined by the Federal Tribunal. Nevertheless, in two recent cases, the Federal Tribunal, some years after a vote, examined if the voters had the necessary information overall to make an informed decision.[47] From this perspective, the booklet has a great deal of weight. In both cases, the Federal Tribunal stated that, due to misinformation by the Federal Council in the information booklet, Article 34(2) of the Federal Constitution had been violated. In both cases, the Court did not formally examine the information provided by the public authorities. Rather it examined if the democratic process, seen as a whole, was fair enough. In the most recent case regarding the vote about the initiative against "penalisation of marriage" the Federal Tribunal even decided to invalidate the vote (Martenetin this volume).[48] Although this is a strong signal for the federal authorities to be very careful when they inform the public, it is important to understand that the judicial review could only take place because the underlying situation was very particular. In short, there is still no legal remedy against alleged misinformation emanating from the Federal Council.

(d) Assessment

The judicial remedies are insufficient when it comes to misinformation by the Federal Council. Despite that, based on a separation of powers argument, the legislator has deliberately refused to enact judicial remedies against misinformation by the Federal Council (see Krause 2017, 131 ss.). In the face of widespread criticism, the draft of the Federal Act on the Federal Court (AFC),[49] which is actually being discussed in parliament, does not foresee more judicial remedies in the realm of political rights.[50] Such rem-

46 ATF 145 I 1 para. 5.1.3. In practice, it is often difficult to make this distinction. In the cited case the court had to examine an animation on the official site of the Federal Chancellery. This video, which aimed to explain the referendum booklet in an easy, accessible manner, was not formally adopted by the Federal Council. For this reason, the Federal Supreme Court examined the form and content of the video, insofar as the content did not correspond to that of the referendum booklet. For more insights regarding the distinction, see Steinmann, 1148, Besson 2006a, 428 s. and Besson 2006b, 229 ss.

47 ATF 138 I 61; 145 I 207. For more details see Martenet in this volume.

48 ATF 145 I 207.

49 Federal Council, Botschaft zur Änderung des Bundesgerichtsgesetzes, 15 Jun. 2019, BBl 2018 4605.

50 Boillet, 130 ss. For complete actual references to the doctrine and to the criticism of the Federal Court on the judicial remedies against votes at the federal level, as well as critical official reports, see Steinmann and Mattle, 1137 s., in particular footnote 381; 1194, and 1366 ss. For recent portrayals of the critiques relating to appeals against elections and the stages of appeal, see Tornay Schaller 2017 or Schaub 2019.

edies should not be limited to the cancellation of voting results: the right to demand that federal authorities correct or complete false information is also important.[51] The fact that, in an exceptional situation, the Federal Tribunal invalidated a vote due to misinformation by the Federal Council[52] should not be over-analysed: it does not show that the existing judicial remedies work. Rather it demonstrates that there is regularly a need for judicial remedies against errors in the booklet. The far-reaching participation of the Federal Council in the democratic process is only legitimate if its objectivity, transparency, and proportionality can regularly be checked not only by an alert public, but also in legal proceedings. In the long run, such independent checks strengthen trust not only in the fairness of the political proceedings, but also in the informing authorities.

Misinformation from *private* actors

The following addresses the guarantee of political rights in face of misinformation provided by private actors. Based on a critical examination of Swiss caselaw and government strategy, proposals are made to address the difficulties associated with the dissemination of misinformation by private actors.

Introduction

If we summarise the legal framework *de lege lata* discussed above,[53] we observe that Article 34 of the Federal Constitution also aims to protect the right to form an opinion without interference by private actors.

In the event that misinformation is spread by private actors, Article 34 of the Federal Constitution imposes two types of obligations on the State. Firstly, it is the duty of the State to protect the right to form an opinion during the campaign (Besson 2003, 356). The Federal Supreme Court directly deduced, from Article 34 paragraph 2, the authorities' obligation to intervene in order to ensure that the voters' process of forming an opinion is properly carried out.[54] Where misleading facts are spread by individuals, authorities are responsible for remedying the situation. In this respect, authorities have considerable discretion in determining the need and, where appropriate, the remedy.[55] It is also well established

51 Boillet, 131, Besson 2003, 388, with references to the caselaw regarding referenda at the cantonal level.

52 ATF 145 I 207.

53 See the chapter written by Vincent Martenet.

54 Federal Supreme Court, Jan. 1, 2019, 1C_665/2018 (unpublished decision), at para. 5.1; ATF 140 I 338, at para. 5.3.

55 Federal Supreme Court, 1 Jan. 2019, 1C_665/2018 (unpublished decision), at para. 5.1; Federal Supreme Court, 20 Jan. 2011, 1C_472/2010, at para. 4.3 in *Zentralblatt* 112/2011 375.

that authorities' duty of intervention is subsidiary. Indeed, they are only required to intervene when misleading propaganda is not counterbalanced either by information previously provided by the authorities or by information from civil society (Martenet and von Büren 2013, 77). It is only if the people's process of forming an opinion is altered and if the authorities are not able to take the necessary measures during the campaign, that it is up to the State, in a second stage, to cancel the vote, provided that a certain number of conditions are met: citizens have to be deceived by facts that are sufficiently important and that are published so late during the campaign that it is no longer possible to verify them.[56] In practice, the invalidation of a vote is only pronounced with restraint, that is, when it is very likely that the interference with the forming of an opinion has taken place and when this interference could not be rectified before the vote.[57] To date, very few votes have been cancelled (Pirker 2017, 1378).

When it is a question of information shared by private actors, the emergence of social media as part of political campaigns raises new difficulties. In its 2017 report on social media, the Swiss government noted that the role of social media developed particularly during a campaign regarding a controversial 2016 initiative by the conservative right-wing party.[58] The report also underlined the risks that these types of media can create by secretly influencing the forming of political will.[59] In this light, it is necessary to examine the extent to which existing legislation and related caselaw are sufficient and whether or not new regulation in this field is required.

Suggestions for dealing with new forms of misinformation

In its 2017 report, the Swiss government highlighted new dangers that could undermine the process of formation of democratic will. It notably refers to:

1) *trolling*, defined as the process by which a troll "interferes with the communication of others in a prolonged and destructive way",[60]
2) *social robots*, defined as programs that mimic human behaviour,[61]
3) and most importantly *fake news*, defined as "false factual statements (misinformation) expressed in bad faith and disseminated for the purpose of political manipulation, financial interests or other personal reasons, and which draw their power from the new dynamics of social networks, such as anonymity of authors, attention paid to surprising things, viral diffusion,

56 Federal Supreme Court, 1 Jan. 2019, 1C_665/2018 (unpublished decision), at para. 5.1; ATF 135 I 292, at para. 4.1; ATF 119 Ia 271, at para. 3c.
57 Federal Supreme Court, 1 Jan. 2019, 1C_665/2018 (unpublished decision), at para. 5.1; ATF 135 I 292, at para. 4.1; ATF 102 Ia 264, at para. 3.
58 Conseil fédéral 2017, para. 2.4.2.
59 Conseil fédéral 2017, para. 2.4.2.
60 Conseil fédéral 2017, para. 2.4.1.
61 Conseil fédéral 2017, para. 2.4.4.

etc.)".[62] Although the government is well aware of the "general tendency to influence or even manipulate political discourse through misinformation" as well as the fact that foreign states are considering legal measures against the negative effects of this disruption, it has come to the conclusion that it is sufficient "to observe developments in this field".[63] Is such an approach justified or, on the contrary, is there an urgent need for legislation similar to that of many neighbouring states? In any case, an analysis seems necessary, and different approaches may be considered: firstly, we will examine the potential for self-regulatory measures, the federal government having determined in its report that such measures should be promoted and observed from the start. We will then discuss whether current caselaw can be adapted to deal with misinformation spread by individuals. Finally, various regulatory proposals will be considered.

Self-regulation

The self-regulation of platforms can be promoted by states in order to preserve the freedom of expression.[64] The following measures might be mentioned as examples:[65]

- the removal of illegal content, including hate speech;
- the flagging of false news;
- the deletion of fake accounts, whether they are manually or automatically administrated; and,
- the development of artificial intelligence tools to track down misinformation.

Although it still seems difficult at this stage to judge the impact of these measures (Renwick and Palese 2019, 46),[66] we believe it is worth debating whether or not to leave the responsibility for moderation in the hands of the platforms themselves. There is, of course, the risk that an algorithm is badly designed which might then lead it to discriminate (Wardle and Derakhshan 2017, 64). In this sense, it was also observed that it is possible to misuse the system by tricking algorithmic filters (Syed 2017, 351). For all of these reasons, the European

62 Conseil fédéral 2017, para. 2.4.3.
63 Conseil fédéral 2017, p. 2.
64 "The good practices examined here are those that avoid chilling effects on freedom of expression and combat disinformation while ensuring other concerns like data privacy", European Commission 2018, 14.
65 For a detailed presentation of self-regulatory measures, see European Commission 2018, 14–17. See also Niklewicz 2017, 33–7; Renwick and Palese 2019, 44–7; Syed 2017, 353–5; Wardle and Derakhshan 2017, 57–64.
66 Some authors, however, have already observed that the presence of warnings caused untagged stories to be seen as more accurate (Pennycook, Bear, Collins and Rand 2019).

Commission proposed an EU Code of Practice on Disinformation[67] to guide the online platforms, the leading social networks, the advertisers and advertising industry in order "to increase online transparency and protect citizens" (European Commission 2018, 2)[68] but also stresses the importance of the states themselves adopting the necessary measures to guarantee the democratic process (European Commission 2018, 3).

In view of these considerations, it seems that Switzerland cannot simply "observe developments in this field".[69] And this seems to be especially the case since states have a positive obligation to guarantee the right to freedom of expression. According to the European Court, states do indeed have an obligation "to create a favourable environment for participation in public debate by everyone".[70] In the same way, Special Rapporteurs on Freedom of Expression made a Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda. While they stress that platforms must adopt certain responsibilities and take certain measures to ensure not only a wide variety of sources of information and ideas but also opportunities to disseminate them, they insist mainly on states' responsibility to promote an environment that is favourable to freedom of expression. States should, in particular, "consider other measures to promote equality, non-discrimination, inter-cultural understanding and other democratic values, including with a view to addressing the negative effects of disinformation and propaganda".[71]

In Switzerland, such an obligation is also based on Article 34 of the Federal Constitution (Pirker 2017, 1373; Martenet and von Büren 2013, 76). In our view, it is, therefore, impossible to simply consider self-regulatory measures without monitoring compliance. It is, instead, necessary to examine whether adapting the caselaw or adopting new regulation is necessary in order to uphold the guarantees originating from Article 34 of the Federal Constitution.

Evolution of the caselaw

In response to the spread of misinformation by private actors, the Swiss government has found that a legislative amendment is not yet necessary.

67 https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation.

68 The result does not seem to live up to expectations, see https://ec.europa.eu/digital-single-market/en/news/first-results-eu-code-practice-against-disinformation.

69 *See supra*.

70 ECtHR 14 Sept. 2010 – 2668/07 – Dink/Turkey, para. 137. For an analysis, see McGonagle 2015, 9–35.

71 The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration On Freedom Of Expression And "Fake News", Disinformation And Propaganda: https://www.osce.org/fom/302796 [accessed 6 April 2020].

In our opinion, if we maintain the current legislation, we at least have to adapt the caselaw. According to the caselaw, false or misleading information interferes with democratic debates since it is likely to influence the forming of popular will but is no longer likely to be rectified. This is the case when blatantly inaccurate or misleading information is spread during the campaign at a time so close to the polling date that the campaign's other actors no longer have the possibility of denying this misinformation, respectively that citizens no longer have the possibility of obtaining information from other reliable sources.[72]

We believe that in the context of social networks and the spread of misinformation, caselaw must be developed in such a way that in order to admit that false or misleading information can no longer be corrected by debate, the misinformation has to have been spread on a massive scale, while the moment of its sharing is no longer of any importance. In such a case, this false information cannot be rectified during the debate – no matter when it was shared – and it must be admitted that the process of forming popular will is flawed.

If it is established that the process has been massively disrupted, then it is up to the Federal Court to annul the vote. In this respect, the procedure derived from Article 34 of the Federal Constitution has an advantage: it prevents difficulties linked to the identification of people hiding behind a publication, as well as difficulties relating to the enforcement of a sanction in the internet's domain and the data that is often located abroad (Egli and Rechsteiner 2017, 251 and 254; Conseil fédéral 2015, 4). Indeed, the judicial procedure is directed towards the voting results and is based on information regarding which citizens have been notified.[73]

In spite of this, we previously noted that the cancellation of a vote occurs only in very rare instances since it can raise important problems from the point of view of legal certainty.[74] This means that the Federal Court intervenes only in a restrictive manner (Martenet and von Büren 2013, 75), which leads us to believe that there is a need to develop new tools, specifically linked to the Swiss democratic process.

New regulation

Several states have decided to adopt specific regulation to combat misinformation[75]. However, any attempt to regulate this field is very delicate:[76] as Jan

72 Federal Supreme Court, 1 Jan. 2019, 1C_665/2018 (unpublished decision), at para. 5.1; ATF 135 I 292, para. 4.1; ATF 119 Ia 271, at para. 3c.

73 ATF 135 I 292.

74 ATF 138 I 61, at para. 8.7.

75 See the chapters written by Thomas Hochmann, Bernd Holznagel and Maximilian Hemmert-Halswick, Alan Renwick and Michela Palese, and Patrick Taillon. See also Parliamentary Assembly of the Council of Europe, Resolution 2281 (2019), Social media: social threads or threats to human rights?

76 "Government or EU regulation of disinformation can be a blunt and risky instrument", European Commission 2018a, 19.

Kleijssen, the Director of the Information Society and Action against Crime Department of the Council of Europe reminds us:

> When we speak about freedom of expression today, we often hear a 'but' – and then mention is made of 'hate speech' and 'fake news'. At the Council of Europe, we believe that we have to be very careful with that 'but' after freedom of expression. We are talking about one of the most important foundations of democracy, one of the most important foundations of democratic security.".[77]

Moreover, if we consider that misinformation spreads faster than real information and that citizens are more inclined to read misinformation as well as information that reinforces their opinion (Vosoughi, Roy and Aral 2018), any legislation that seeks to impose the removal of misinformation runs the risk not only of restricting freedom of expression but also of missing its mark. If we take a closer look at Switzerland's situation, a potential first step could be the adoption of regulation intended to guarantee greater transparency.[78] In this sense, it seems particularly legitimate to regulate the issue of political advertising on social media as well as by imposing an obligation of transparency on it.[79] Such an obligation could also apply to social robots (European Commission 2018a, 23; Fuchs 2017, 153). Switzerland may indeed require platforms to allow for the identification of social robots, a process that is considered to be technically possible (Fuchs 2017, 153).[80] In this respect, research shows that it is more effective to create a certain scepticism regarding misinformation by ensuring the transparency of its source rather than by refuting its content (Wardle and Derakhshan 2017, 67).[81] For example,

> when bot accounts who originated a rumour appear to be based in a country other than the one connected with said rumour, it could prove to be a faster way of encouraging scepticism in the audience than debunking the fact itself.
> (Wardle and Derakhshan 2017, 67)

Beyond the need for transparency, we are of the opinion that several measures are necessary to guarantee compliance with Article 34 of the Federal Constitution, more particularly to ensure that the voting results are the fruit of a proper process.

77 Jan Kleijssen, the Director of the Information Society and Action against Crime Departmentof the Council of Europe quoted in: Wardle and Derakhshan 2017, 72.

78 One of the recommendations of the European Commission is "to enhance transparency of the online digital ecosystem", European Commission 2018a, 22. See also Renwick and Palese 2019, 48–56.

79 The EU Code of Practice on Disinformation could be used as a model here (in particular chap. II.B.). See also Renwick and Palese 2019, 51–52.

80 The EU Code of Practice on Disinformation could also be used as a model here (in particular chap. II.C.).

81 See also The EU Code of Practice on Disinformation, chap. II.D.

Considering that legislation requiring the withdrawal of information, on grounds that it is false, is counterproductive and even potentially contrary to freedom of expression, we believe it is preferable to develop tools aimed at offering reliable sources of information to citizens. Beyond private initiatives such as fact-checking,[82] the federal law on political rights must evolve in order to achieve such an objective.

As a reminder, authorities are required to inform voters "on an ongoing basis regarding the objects submitted to the federal vote" (Art. 11 para. 1 PRA), to respect "the principles of completeness, objectivity, transparency and proportionality" (Art. 10a para. 2 PRA) and finally to make the necessary corrections if private actors spread obviously false or misleading content.[83] In accordance with Article 11 para. 2 PRA, the text to be voted on is accompanied by brief explanations from the Swiss government, which must also present the opinion of important minorities or of the committee itself in the case of a popular initiative or referendum.

In our opinion, in order to guarantee continuous information, misinformation shared by private actors must be fought with better information originating from the authorities. In this sense, it is necessary to give authorities real means to rectify this spread of misinformation: the first step would be to allow the information channel to evolve: alongside the explanatory referendum booklet drafted by the federal government, which is a source of information for up to 90 per cent of citizens,[84] official explanations should also be posted on an online portal (Graf and Stern 2018, 72).

Such a process would have the advantage not only of allowing the authorities to make changes by adding extra information during the campaign in order to rectify any misinformation shared by private actors,[85] but also of promoting a participatory approach by allowing questions to be asked and their answers publicly released (Graf and Stern 2018, 72). As noted by Graf/Stern, it would also be imaginable to integrate politically independent, certified fact-checking organizations into the platform in order to further increase the quality of the debate (Graf and Stern 2018, 73). In our view, such a modernisation of the information channel could limit the impact of the spread of misinformation by private actors. However, such a development also implies that the necessary rectifications be effectively made by the Swiss government. Should this not be the case, we believe it is important to allow citizens to require said rectifications.

Considering that the cancellation of the vote does not constitute a satisfactory solution with regard to the guarantee of political rights (as it can only be pronounced in very rare cases),[86] we think it is necessary to propose new measures.

82 See the chapter written by Laurent Bernhard.

83 Federal Supreme Court, Jan. 20, 2011, 1C_472/2011 (unpublished decision), at paras. 4.3 and 5.

84 See footnote 3.

85 One could even imagine that Switzerland participates in the "Rapid Alert System" proposed by the European Commission, European Commission 2018, 7.

86 See, nevertheless, Lubishtani and Flattet 2019, 721–2, who propose a codification of the caselaw.

Indeed, it should be possible to address judicial authorities in order to complain about the inaccuracy and inadequacy of the information in question and to be able to require not only the cancellation of the vote, but also additional information from authorities in order to rectify misinformation disseminated by private actors (Besson 2003, 388; Boillet 2016, 131).

In concrete terms, it would be necessary to amend the Federal Act on Political Rights as well as the Federal Act on the Federal Court[87] in order to continue this movement fully dedicated to judicial protection for federal political rights on the model of cantonal law (Grodecki 2013, 171). In other words, voters could require that the Swiss government complete or modify the information posted on the online platform dedicated to the popular vote (Besson 2003, 388; Boillet 2016, 131). In case of refusal, an appeal to the Federal Court against the decision of the federal government, along the lines of Article 80 para. 2 APR and Art. 88 para. 1 letter b AFC should then be possible (Conseil fédéral 2013, 8174). The suspensive effect would only be pronounced upon request, according to the appeal's chances of success (Boillet 2016, 131).

Conclusion

Switzerland has extensive experience with referenda. Voting is part of Swiss citizens' political culture and the guarantee of political rights is recognized at the constitutional level. However, the development of social media is changing the rules of the game and raising new challenges that need to be addressed.

We have seen that one of the main sources of information is the information shared by authorities. In this regard, the practice according to which such official information is required to be objective, transparent, and proportionate works well. We have also noted that the importance given to official information must respect the principle of equal opportunities. The new official explanatory booklet is an improvement in this direction since it gives equal importance to information whether it originates from the Federal government, the initiative or the referendum committees. On the other hand, we have observed that judicial control at the federal level must be improved so as to enable citizens to challenge, before the Federal Court, acts emanating from the federal government.

With respect to information shared by private actors, freedom of expression must remain protected in accordance with the Federal Constitution and the ECHR. In this sense, it is essential to avoid any new regulation aimed at censoring private actors. On the contrary, misinformation must be fought with better information. Therefore, our suggestion is to allow authorities to react to misinformation spread by private actors and to create a new judicial channel requiring authorities to provide the necessary information.

87 Loi fédérale sur le Tribunal fédéral [Federal Act on the Federal Supreme Court] 17 June 2005, RS 173.110.

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