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# CONSTITUTIONAL RIGHTS IN THE DIGITAL CONTEXT

Constitutional Rights in  
the Digital Context

Exploring a Translation of  
the Constitutional Political Rights  
into the Digital Sphere

Natalie Pompe

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Natalie Pompe

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# List of Abbreviations

ACM	Association for Computing Machinery
AHV	Alters- und Hinterlassenenversicherung (Old-Age and Survivor's Insurance)
AJP	Aktuelle Juristische Praxis
ALJ	Austrian Law Journal
art.	article
BAKOM	Bundesamt für Kommunikation
BB	Betriebsberater
BBl	Bundesblatt
BD&S	Big Data & Society
BGE/BGer	Urteil des Schweizerischen Bundesgerichts
BIG DATA SOC	— Big Data and Society
BVerG	Deutsches Bundesverfassungsgericht
BvR	Entscheidungen des Deutschen Bundesverfassungsgerichts
CCPR	Covenant on Civil and Political Rights
CT	Communication Theory
DJ	Digital Journalism
DÖV	Die Öffentliche Verwaltung
DRS	Radio der deutschen und rätoromanischen Schweiz
DuD	Datenschutz und Datensicherheit
DUV	Deutscher Universitätsverlag
ECtHR	European Court of Human Rights
EDPL	European Data Protection Law Review
E-Voting	electronic voting
E.	Recital ('Erwägung')
ECJ	Court of Justice of the European Union
ed/eds.	editor/editors
edn	edition
EIT	Education and Information Technologies
et seq/seqq	and following
Ethics Inf Technol	— Ethics and Information Technology
EU	European Union
FDPIC	Federal Data Protection and Information Commissioner
Fög	Forschungszentrum Öffentlichkeit und Gesellschaft
GLJ	Georgetown Law Journal
IAM	Institut für Angewandte Medienwissenschaft
ibid	ibidem

ICO	Information Commissioner's Office
IDIS	Identity in the Information Society
IJC	International Journal of Communication
ILJ	Italian Law Journal
Int'IJ. Press/Politics	— International Journal of Press/Politics
InTer	Innovations-und Technikrecht
IPR	Internet Policy Review
JCA	Journal of Consumer Affairs
JP	Journal of Pragmatics
KJ	Kritische Justiz
lit.	litera
LR	Law Review
Media Cult. Soc	— Media Culture & Society
MIT	Massachusetts Institute of Technology
MLR	Modern Law Review
N/n	note/footnote
NJW	Neue Juristische Wochenschrift
NMS	New Media & Society
NZZ	Neue Zürcher Zeitung
OJ	Official Journal of the European Union
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
p/pp	Page/pages
para.	Paragraph
PP	Perspectives on Politics
Ref Serv Rev	Reference Services Review
RIFP	Reuters Institute Fellowship Paper
RSR	Reference Services Review
Sci Adv	Science Advances
SR	Systematische Sammlung des Bundesrechts
SRG	Schweizerische Radio- und Fernsehgesellschaft
SVPW	Schweizerisches Jahrbuch für politische Wissenschaft
TMLR	The Modern Law Review
UN	United Nations
UNO	United Nations Organisation
US	United States (of America)
vol	volume
vs	versus
ZBl	Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht

Ziff.	Ziffer
ZSR	Zeitschrift für Schweizerisches Recht
ZUM	Zeitschrift für Urheber- und Medienrecht



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# I. Preface

Data-driven business models, digital consumerism, and automated and self-learning technologies are only a few digital phenomena that have disrupted the social reality on which the evolution of constitutional rights has been based. Academics have addressed the influence of technologies on the attention, decisions, and opinions of individuals and the question of whether such effects are of legal relevance.<sup>1</sup> Moreover, scholars have argued that the Internet negatively affects democracy as it offers the possibility to become insulated from contradicting information and opinions and does not provide a suitable framework for deliberation.<sup>2</sup> Personalised information distribution enhances this trend that has been dubbed '*filter bubble*'.<sup>3</sup> These concerns are relevant to democracy because the resulting fragmentation of information may hinder democratic discourse through the lack of a common informational basis.<sup>4</sup> Lack of a common informational basis is, however, not the only possible limitation on the preconditions for democracy. Limitations on individuals' freedoms, such as insufficient protection of political personal data, inevitably affect the democratic collective, as democracy relies on active, reflective, and informed citizens in exchange with each other. As Swiss democracy relies on an active, responsible citizenry that differentiates between a private self and a responsible citizen, a broad perspective on possible democratic deficits is needed. These examples show that digitalization has created a variety of regulatory questions which are relevant from a constitutional-rights perspective as well as from a democratic viewpoint. As a more practical example, on February 13, 2022, the Swiss electorate rejected a proposal for regulation in the online media sector. There is no consensus among scholars as to whether there is a

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1 See for instance Dirk Helbing and others, 'Why We Need Democracy 2.0 and Capitalism 2.0 to Survive', in Dirk Helbing (ed.), *Towards Digital Enlightenment: Essays on the Dark and Light Sides of the Digital Revolution* (Springer 2016) 121, 156.

2 Christoph B Graber, 'Personalisierung im Internet, Autonomie der Politik und Service public', in: sic! – Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht 5/2017, 257-270; Christoph Bezemek, 'Digitalisierung und Selbstbestimmung', in: ALJ 2/2017, 135-139.

3 Eli Pariser, *Filter Bubble* (Carl Hanser 2012); Cass R Sunstein, *Republic.com 2.0* (Princeton University Press 2002).

4 See Christoph B Graber, 'Personalisierung im Internet, Autonomie der Politik und Service public', in: sic! – Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht 5/2017, 257-270; Christoph Bezemek, 'Digitalisierung und Selbstbestimmung', in: ALJ 2/2017, 135-139.

constitutional basis for regulating the online media space at all and how this digital information sphere should be regulated in the future.

The aforementioned examples of regulatory questions show that digital developments may not only open up regulatory gaps but also raise the question of the transferability of existing legal frameworks into the digital world as well as questions of democratic deficits.<sup>5</sup> This leads to the question of whether there are regulatory gaps in responding to new risks. Nevertheless, the regulatory questions are often discussed in isolation and the discussions are not embedded in a constitutional-rights framework that takes the risks and peculiarities of the digital space into account. The constitutional political rights protect and implement the foundations of democracy and thus, risks to democracy should be addressed within an assessment of the protective content of the political rights. For this reason, the study at hand focusses on assessing how the constitutional political rights shall find their effect within the digital sphere. In what follows, I outline how this question will be addressed and how the paper is structured.

In general, the existing constitutional rights and legal theory apply as they do within the physical world. The legal theories that have been established based on physical-world experiences are, however, not transferrable to the digital sphere to address every constitutional risk. Constitutional rights predate the creation of the new public sphere in the digital world and the technologies that are used today. While discussing the research question, it must be noted that legal decisions and considerations are balancing exercises. Legal norms of the constitution enshrine values, safeguard interests, and contain rules that pursue certain objectives. If values and interests contradict each other or are mutually exclusive, a balancing decision is necessary. Digital questions are often situated in a complex matrix of conflicting interests of multiple actors and challenge the traditional constitutional way of balancing conflicting interests.<sup>6</sup> More so than in the physical world, within the digital space multiple constitutional rights are often engaged at the same time and multiple actors are involved. This makes it difficult to balance interests with reference to the established constitutional formulae.

The present work focuses on the legal analysis of constitutional law in the digital sphere with a view to its functions for a democratic society. The following two assumptions derived from democratic theory provide valuable perspective for research:

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5 See Urs Saxer 'Von den Medien zu den Plattformen, Regulierung öffentlicher Kommunikation im Zeichen der digitalen Revolution' in Christian von Coelln, Karl-Nikolaus Pfeifer and Karl-Eberhard Hain (eds.), *Schriften zum Medienrecht und Kommunikationsrecht* (Moor Siebeck Tübingen 2023).

6 See chapter V.B.

First, the functioning of a democratic society depends on individuals making conscious use of their autonomy. Consequently, the government ought to guarantee and adequately protect individuals' autonomy through individual subjective rights and freedoms. The individual's freedoms also include the freedom not to make use of their freedoms and rights. Thus, the acknowledgment of individuals' autonomy and freedoms at the same time excludes the possibility for the government to actually guarantee the functioning of the collective, which depends on active participation by individuals. From the democratic foundations is thus derived an obligation to secure the autonomy against newly arising threats and to create and secure the conditions for the functioning of a continuously evolving democratic society.

Second, the public sphere is essential for the existence of an active political citizenry that exercises power over decision-making processes and has a legitimising effect for the distribution of power in a democracy.<sup>7</sup> Thus, the establishment of functioning public spheres which individuals have equal access to and where their rights and freedoms are protected is of critical importance for (Swiss) democracy.

Both of these assumptions of democracy theory depict the interconnection between the collective and individual autonomy that is also expressed within the constitution. SALADIN sees the relationship between the state and the individual freedoms as a reciprocal relationship and at the same time as self-sufficient legitimacy.<sup>8</sup> The constitution is issued in the context of the exercise of political rights. At the same time, political rights are guaranteed in the constitution, and other constitutional rights enable the democratic system to function. According to the preamble of the Swiss constitution, the constitution was renewed in 1999 with the aim of strengthening freedom, democracy, independence, and peace in solidarity.<sup>9</sup> Whilst the constitution itself does not define its understanding of democracy, the constitution uses legal instruments to regulate the internal relationship between personal autonomy and democracy.<sup>10</sup> According to TSCHANNEN, the relationship between the constitution and the concept of democracy is understood in such a way that the constitution is an open-ended set of norms. The main function of the constitution is not to enact the highest normative values, but instead to rationalise

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7 Ralf Heming, *Öffentlichkeit, Diskurs und Gesellschaft, Zum analytischen Potential und zur Kritik des Begriffs der Öffentlichkeit bei Habermas* (DUV 1997) 5.

8 Peter Saladin, *Grundrechte im Wandel* (Stämpfli 1982) 284.

9 Federal Constitution of the Swiss Confederation of April 18, 1999 (BV).

10 See art. 195 BV and art. 148 para. 1 BV; Andreas Glaser and Andreas Kley, 'Demokratie' in Giovanni Biaggini, Thomas Gächter and Regina Kiener (eds.), *Staatsrecht* (3rd edn, Dike 2021) N 71 et seqq.

power and create a basic political consensus on how the legal order is to be established.<sup>11</sup> Thus, in my view the new risks arising from technologization should be viewed from a wider democratic perspective.

Traditionally and historically constitutional rights are understood as human rights in the form of subjective rights granted to individuals. These rights have been employed to counterbalance the delegation of power from the sovereign to governmental institutions. However, even in the original form of constitutional rights, their scope has been protected not only by subjective rights granted to the individual. MÜLLER has drawn attention to the institutional and collective nature of constitutional rights. He claims that constitutional rights should be understood and interpreted as objective and fundamental principles in a specific society within its political system.<sup>12</sup> Constitutional rights are principles of order whose effect must permeate all areas of law.<sup>13</sup> Consequently, in Swiss literature an institutional understanding of constitutional rights has prevailed alongside a subjective understanding.<sup>14</sup> Moreover, such an understanding of constitutional rights concerns first and foremost the protection of private individuals from state intervention. However, for the constitutional rights to apply throughout the legal system, as also indicated in art. 35 BV, the state must create the conditions for the exercise of the constitutional rights.<sup>15</sup> The view of constitutional rights as an expression of the understanding of democracy in Switzerland shows their cross-cutting character.<sup>16</sup> As already stated, this work mainly examines the constitutional legal content of political rights in the digital space. The perspective that is

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11 Pierre Tschannen, *Stimmrecht und Politische Verständigung* (Helbing & Lichtenhahn 1995) 241.

12 Jörg P Müller, *Die Grundrechte der Verfassung und der Persönlichkeitsschutz des Privatrechts* (Stämpfli 1964) 163 et seqq.; Jörg P Müller, *Soziale Grundrechte in der Verfassung?* (2nd edn, Helbing & Lichtenhahn 1981) 5; Jörg P Müller, *Elemente einer schweizerischen Grundrechtstheorie* (Stämpfli 1982) 8 et seqq.

13 René A Rhinow, *Grundrechtstheorie, Grundrechtspolitik und Freiheitspolitik*, in Huber H (ed.), *Recht als Prozess und Gefüge, Festschrift für Hans Huber zum 80. Geburtstag* (Stämpfli & Cie 1981) 427, 432 et seqq.; Patricia Egli, *Drittwirkung von Grundrechten, Zugleich ein Beitrag zur Dogmatik der Grundrechtlichen Schutzpflichten im Schweizer Recht* (Schulthess 2002) 137.

14 René A Rhinow, *Grundrechtstheorie, Grundrechtspolitik und Freiheitspolitik*, in Huber H (ed.), *Recht als Prozess und Gefüge, Festschrift für Hans Huber zum 80. Geburtstag* (Stämpfli & Cie 1981) 427, 430, 436; Peter Saladin, *Grundrechte im Wandel* (Stämpfli 1982) 292; Jörg P Müller, *Elemente einer schweizerischen Grundrechtstheorie* (Stämpfli 1982) 8 et seqq.; Jörg P Müller, *14* (2nd edn, Helbing & Lichtenhahn 1981).

15 Georg Müller, 'Schutzwirkung der Grundrechte' in Detlef Merten and Hans-Jürgen Papier (eds.), *Handbuch der Grundrechte; Grundrechte in der Schweiz und in Liechtenstein* (Dike 2007) 60.

16 Art. 35 BV.

applied in this research takes into account the outlined democratic content and an expanded perspective on the constitutional rights. The interpretation of just one constitutional right in isolation and its transfer into the digital sphere might fall short of addressing systemic risks emanating from the digital sphere. The constitutional rights and freedoms have been put in place to enable the functioning of a collective in which each individual is considered autonomous and equal. New regulations must be able to fit in in such a way that the scope of constitutional rights can be implemented in the best possible way. This means that the balancing of interests takes place at the right level in the appropriate way. Thus, it is required to assess which aspects of the doctrine of the existing constitutional rights do not fit the existing constitutional risks and how these should be further developed.

Clearly, any legal question in the digital sphere involves several legal jurisdictions as the digital sphere is a global one. Assessing how the national law should respond to arising challenges, however, requires an institutional understanding of constitutional rights as well as a technical and economic understanding of the digital actors and processes that influence the establishment of constitutional rights and the functioning of democratic processes. In what follows, the systemic context of the constitutional rights that are affected by the digital transformation is highlighted and principles for the further development of legislation and regulation in the digital sphere are discussed.

The present thesis is structured as follows. In a first section, a few changes in social reality that are of relevance to democracy are summarised. Certainly, this outline of changes is not exhaustive; rather, I have tried to highlight the aspects relevant to the questions arising in digital governance. This chapter is followed by a theoretical section on the principles of democracy and how they are expressed and protected within the constitutional content of political rights. Moreover, I discuss the challenges of digitalization against the background of the existing legal doctrine. One important challenge that is identified is related to new opportunities based on personal data analytics. Another part of the challenge to democracy is that the political citizen is confronted with a new world of information, which is comparable neither to the conditions of the radio and TV sphere nor to the traditional mass media world. Following these two points, I discuss in chapter IV.C.3 how the institutional content of political rights interconnects within the constitutional right to informational self-determination. There have been a few attempts in recent years to find suitable solutions for regulating the online media sphere, although no regulatory proposal has yet been accepted by the sovereign. In chapter V, the basic rights of communication are addressed, highlighting how these rights enable the exercise of democratic rights. The digital sphere comes

with completely different dynamics and risks, which renders it difficult to find a regulatory approach suited to the online media sphere. For this reason, discourse principles are used as guidelines for the further interpretation of the constitutional rights in the digital sphere. There is an ongoing discussion on how to regulate the digital information sphere. For this reason, I elaborate on the institutional content of political rights in the digital sphere.<sup>17</sup> In a final chapter, the issue of balancing multiple conflicting constitutional interests is addressed. Such an approach also allows discussing which principles are relevant to deriving governmental obligations to protect the political content of constitutional rights within the digital sphere.<sup>18</sup>

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17 See chapter VI.B.

18 See chapter VI.B.

## **II. Societal Changes Caused by Digitalisation and Emerging Technologies**

The digital domain has joined other public spheres where both political and non-political communication can occur. However, the digital domain exhibits significant differences as compared to the one created by the analogue mass media. This chapter aims to review the processes and actors within the digital domain that will be further discussed within the subsequent constitutional analysis. The digital domain is dominated by global actors governing the processes of information distribution according to their own norms that ultimately serve their chosen business model. This shift has an impact not only on the economic situation of traditional information gatekeepers but also on how information is sourced, created, edited, and distributed. Visibility and attention are currently among the most valuable and yet scarce goods in the new information era. In the remainder of this chapter, these aspects will be discussed in further detail.

### **A. Disrupted Traditional Gatekeepers: a New Economic Landscape for Journalistic Work**

The digital transformation makes all types of information, regardless of its quality, readily available at a very low cost. While, in 1991, Swiss citizens mostly relied on print media to form their opinion regarding upcoming national elections,<sup>19</sup> digital media outlets are now among the most important sources of such information. The consumption of information and politically relevant communication has shifted into the digital domain, while free availability of information has decreased citizens' willingness to pay for information.

These changes in consumer behavior with regard to information consumption have also changed the conditions for journalistic work. In the analogue world, the autonomy of communicative spheres has been protected by

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19 See VOX-Analyse der Nationalratswahlen 1991, 50 et seqq.

constitutional communicative rights in order to create a functioning information market. Autonomy within public domains is one of the preconditions for accountability within a democracy. Protected by freedom of the media, journalists and mass media fulfil the role of public watchdogs within a democracy. Put differently, freedom granted to the media acts has a protective function not only for the constitutional communicative rights, but also for every other constitutional right. In order to be exercised, these freedoms require certain preconditions and infrastructures. How deliberation can take place within the digital domain largely depends on the specific medium that enables and mediates the information domain. Furthermore, the question of which regulatory instruments shall enable such exercise depends on the technicalities of the new gatekeepers of information, as well as on the economics associated with these gatekeepers.

Along with changing citizens' reading, listening, and watching habits, digitalization has also affected the economic starting point for journalistic work and has given rise to a new field of competition. In digital journalism, fewer financial resources are available to invest in the quality of journalistic work, and there is a reported lack of well-educated journalists.<sup>20</sup> In recent years, gross advertising revenues of print media have dramatically decreased. For instance, as of 2015, print media revenues in Germany were lower by EUR 1.8 billion than in 2006.<sup>21</sup> Similarly, in 2021, the advertising revenue of information journalism in Switzerland amounted to CHF 1'910 million, which is 17% less than in 2020.<sup>22</sup>

Furthermore, research has concluded that there is additional time pressure and workload due to cross-media distribution. As a result, journalists tend to consider less diverse viewpoints in their journalistic research.<sup>23</sup> Further surveys concluded that the time available to journalists for research has been reduced, especially as concerns journalists working for daily newspapers as compared to weekly publications. Time pressure also has an adverse impact on the necessary network that a journalist needs to maintain. Furthermore, the introduction of new options of information distribution has also created additional pressure on journalists to constantly fill channels with content. In short, a major problem in present-day journalism is that more

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20 Fög, *Qualität der Medien* (Schwabe 2021); Fög, *Qualität der Medien* (Schwabe 2020).

21 Statistica, 'Werbeumsätze der Zeitungen (nur Print) in Deutschland in den Jahren 2003 bis 2019' (*Statista*, September 2021).

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22 Fög, *Qualität der Medien* (Schwabe 2021) 19 et seqq.

23 Guido Keel and others, *Auswirkungen des Internets auf die journalistische Praxis und berufskulturelle Normen, Bakom Schlussbericht* (IAM Institut für Angewandte Medienwissenschaft 2010) 9.

output is expected while fewer resources are available, and that the expectations regarding content are less connected with a certain quality. Other changes in journalists' work caused by the digital transformation are related to the pressure to publish almost simultaneously with current events.<sup>24</sup> Researchers have also criticized a co-dependency between news outlets and 'copy-paste journalism' that emerged because of economic changes.<sup>25</sup> Indeed, journalists' observing the work of others and adapting their own accordingly is not a new trend of the Internet. However, this trend has a negative impact on the diversity of perspectives considered in reporting work.

The exponential increase of the amount of available information requires not only individuals, but also journalists to appropriately filter information. Journalists are challenged to select and assess the relevance of information they get access to. The economic problems caused by the digital shift have been reported to result in superficial journalistic research largely based on online information.<sup>26</sup> For the same reason, there is also a trend to create demand-driven news. In this respect, algorithmic functionalities play an increasingly important role in the production of media content. Due to digital gatekeepers' use of algorithms, the production of information has become complex, with fragmented audiences and ever more technological tools at the disposal of various actors. Such algorithms are used to estimate the demand for certain information.<sup>27</sup> The use of such algorithms in the realm of journalism is even more controversial. Algorithms analysing big data sets (demographic, social, and political criteria) dictate where local news outlets should be established and maintained, which content is to be created, and which consumers it should be distributed to.<sup>28</sup> Many other news distributors and creators rely on behavioural analysis of their users, as well as on feedback loops.<sup>29</sup>

The digital shift has also created a new economic pressure for news outlets and organisations to seek new revenues and cut costs. Driven by this pressure, media organisations make use of automation during the process of creating

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24 Ibid 8.

25 Ibid 31.

26 Guido Keel and others, *Auswirkungen des Internets auf die journalistische Praxis und berufskulturelle Normen, Bakom Schlussbericht* (IAM Institut für Angewandte Medienwissenschaft 2010) 8 et seqq; the authors pointed out that Google searches replace the journalistic research process, which has a negative effect on journalistic depth, quality, and diversity.

27 Philip M Napoli, 'Automated Media: An Institutional Theory Perspective on Algorithmic Media Production and Consumption' [2014] 24 CT 348.

28 Joseph Tartakoff, 'AOL's Patch Aims to Quintuple Size by Year-End' (*The Guardian*, August 17, 2010).

29 Philip M Napoli, 'Automated Media: An Institutional Theory Perspective on Algorithmic Media Production and Consumption' [2014] 24 CT 349.

information. While algorithmic software can indeed be useful for journalistic research work in terms of data comparison and analysis, what is relevant from a constitutional and democratic perspective is the use of algorithmic software to create information content on its own. Furthermore, it is also relevant that algorithmic software is used to predict the demand for and interest in information. To make decisions about information production, news organisations employ predictive algorithms based on user behaviour data. The comprehensive feedback loops within the digital infrastructure are based on, for instance, page views, ratings, and the time spent on a specific post as the input data that—based on an algorithm’s predefined criteria— influence the content of new information.<sup>30</sup> As a result, the economic pressure has resulted in both gatekeepers and journalists treating the demand and interest in the market as decisive factors for their work.

## B. Algorithmic Decision-Making within Journalistic Work

Recent scholarly publications in the field of media studies draw attention to so-called algorithmic journalism, which can distort the democratic function of the media.<sup>31</sup> Algorithms can be used to create news content faster, on a larger scale, and in a greater number of languages, and even personalise the content to the individual’s reading interests.<sup>32</sup> Such algorithmically-created content remains a human-driven creation and, accordingly, does not eliminate the conscious decision-making involved in the writing process. However, the human role in algorithmic content creation becomes rather indirect. Some news agencies publish algorithmically created content even without prior human approval or editing.<sup>33</sup> Importantly, algorithmically generated content cannot provide explanations for new societal phenomena, establish causalities, or

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30 Chris W Anderson, ‘Deliberative, Agnostic, and Algorithmic Audiences: Journalism’s Vision of Its Public in an Age of Audience Transparency’ [2011] 5 *IJOC* 529 et seqq.

31 Also referred to as ‘quantitative journalism’ or ‘robot journalism’. Chris W Anderson, ‘Towards a Sociology of Computational and Algorithmic Journalism’ [2012] 15 *New Media & Society* 1005, 1021; Mark Coddington, ‘Clarifying Journalism’s Quantitative Turn: A Typology for Evaluating Data Journalism, Computational Journalism and Computer-Assisted Reporting’ [2015] 3 *DJ* 331, 348.

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32 Andreas Graefe, *Guide to Automated Journalism* (Tow Center for DJ 2016).

33 Reg Chua at the Newsrewired conference in London on February 8, 2017, cited in Alexander Fanta, ‘Putting Europe’s Robots on the Map: Automated journalism in the news agencies’ [2017] Reuters Institute Fellowship Paper 24, 11.

raise questions of public concern.<sup>34</sup> Accordingly, this form of news creation is better suited for fact-based information where no specific journalistic research is required and where the reader does not expect sophisticated narration.<sup>35</sup>

Due to the progress of natural language generation in present-day computational linguistics, texts can now be produced in an automated form from digital structured data. Journalistic work has been enhanced by automated writing platforms.<sup>36</sup> The legal and ethical challenges associated with algorithmic journalism are related to the level of data input, the economic aims of the algorithm, algorithmic authority, objectivity, bias in the data sets, transparency, as well as the reasoning embedded in the journalistic algorithm.<sup>37</sup> Furthermore, in case of misinformation, questions of accountability can also arise. The use of artificial intelligence in the field of journalism amplifies the concerns mentioned.

GRAEFE predicts that the future version of algorithmic news coverage will in all probability be created according to the readers' interests and reading habits, which would lead to further personalisation of information consumption.<sup>38</sup> Personalised content is drastically reduced by means of which algorithmic software reduces the costs and increases the speed of information production. Moreover, there have been scholarly discussions on whether news on demand, created by algorithmic software based on provided personal data on reading interests, could establish itself as a new trend.<sup>39</sup> Furthermore, future versions of algorithmic content creation will also be capable of handling more input data and creating extended links between events and integrate additional items.<sup>40</sup> At present, there is a lack of understanding of the extent of automated journalism. Algorithmic news creation has not been

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34 Andreas Graefe, *Guide to Automated Journalism* (Tow Center for DJ 2016).

35 Ibid.

36 see David Caswell and Konstantin Dörr, 'Automated Journalism 2.0, Event-Driven Narratives, From Simple Descriptions to Real Stories' [2018] 12(4) *Journalism Practice*, 2.

37 Paul Bradshaw, 'Data Journalism' in Lawrie Zion and David Craif (eds.), *Ethics for Digital Journalists: Emerging Best Practices* (Routledge 2014) 202 et seqq.; Tarleton Gillespie, 'The Relevance of Algorithms in Media Technologies. Paths Forward in Social Research' in Gillespie T, Boczkowski P and Foot K, (eds.), *Media Technologies. Paths Forward in Social Research* (MIT Press 2012) 167 et seqq; Andreas Graefe, *Guide to Automated Journalism* (Tow Center for DJ 2016), 35; Konstantin Nicholas Dörr and Katharina Hollnbuchner, 'Ethical Challenges of Algorithmic Journalism' [2017] 5 (4) *DJ*, 404, 406.

38 Andreas Graefe, *Guide to Automated Journalism, Guide to Automated Journalism* (Tow Center for DJ 2016) 23.

39 James Kotecki, 'New Data-driven Writing Platform Enables Professionals to Create Personalized Content at Unprecedented Scale' (*Cision PRWeb*, 20 October 2015).

40 Alexander Fanta, 'Putting Europe's Robots on the Map: Automated Journalism in the News Agencies' [2017] 9 *RIFP* 24, 16.

properly addressed within academia,<sup>41</sup> and public debate about automated journalism is dominated by the fear that this technology will further eliminate journalistic jobs.<sup>42</sup> However, an argument in favour of algorithmic content creation is that, using it for certain tasks, journalists could better focus on their more important cognitive and research work.<sup>43</sup>

In 2017, the Federal Council took notice of the increasing impact on, or manipulation of, political discourse through misinformation and use of algorithms. This phenomenon is promoted by the peculiarities of social media, such as more anonymity of authorship and increased interest in seemingly unbelievable, surprising content (mechanism of the attention economy). Fake news might be spreading differently in that such news is now automatically generated by programs (so-called 'social bots'). Social bots influence the extent to which information actors can reach their target audience. Quantitative research has concluded that via social bots a misrepresentation of popularity may be created.<sup>44</sup> Overall, the spread of misinformation is not a new phenomenon. However, while in the analogue world, the spread of misinformation was possible with advertisements and flyers or other forms of anonymous dissemination, in the digital era, such misinformation mainly occurs through (fake) individuals, represented by social profiles (or social bots). The Federal Council considered it appropriate to monitor these developments.<sup>45</sup> As of 2017, the Federal Council saw no need for regulatory action.<sup>46</sup>

## C. Governing Information Flow: Digital Gatekeepers

In recent years, a variety of digital gatekeepers have joined traditional information gatekeepers. This section will briefly outline some changes in the information distribution flow that are of significance to democracy. To this end, the gatekeeping theory as developed by media science will be addressed. The theory of gatekeeping is a useful method to describe changes of legal relevance in

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41 Andreas Graefe, *Guide to Automated Journalism* (Tow Center for DJ 2016).

42 Arjen van Dalen, 'The Algorithms behind the Headlines' [2012] *Journalism Practice* 6 (5-6) 648; Matt Carlson, 'The Robotic Reporter Automated Journalism and the Redefinition of Labor, Compositional Forms and Journalistic Authority' [2014] 3 DJ 416.

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43 Andreas Graefe, *Guide to Automated Journalism* (Tow Center for DJ 2016).

44 Tobias R Keller and Ulrike Keller, 'Social bots in election campaigns: theoretical, empirical, and methodological implications' [2019] 36(1) *Political Communication* 171 et seqq.

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45 Federal Council, 'No new regulatory requirement for social media' 10. Mai 2017.

46 Ibid.

the digital domain. The classic gatekeeping theory has been developed to provide a solid framework for analysing the selection and control of public news.<sup>47</sup> As it is impossible for an individual to become aware of all relevant events, the gatekeeper aims to exercise control over the information dissemination. Therefore, digital gatekeepers have a significant impact on the information received by the audience and exercise certain control over public domains.<sup>48</sup>

The gatekeeping theory has been developed to describe and analyse the role of media as gatekeepers of information. Considering that the flow and structures of the new digital information domains are relevant for democracy, it is important to take into account the conclusions from the gatekeeping theory. A gatekeeper controls information distribution by facilitating or constraining information diffusion.<sup>49</sup> The traditional gatekeeping theory associates this role primarily with journalism. Accordingly, traditional gatekeepers are journalists, editors, and media companies that create a public mass-media domain and, by doing so, influence the agenda of the general social and political discourse. With the progressing digitalisation, new digital gatekeepers have joined traditional journalists. Most digital gatekeepers make use of automation and self-learning algorithms that have partly replaced conventional editorial and journalistic decision-making processes. Since the processes in the digital domain are dynamic and inter-correlating,<sup>50</sup> some questions have emerged regarding the new phenomena in information diffusion where already published information is reposted, shared, or commented on. In addition, the exponential growth of information producers has also led to a loss of information control monopolies.

In the selection process of a traditional news gatekeeper, information selection occurs at the following two stages of news production: the entrance and the exit. At the former stage, information is selected based on journalistic criteria that are influenced by both routines and political or commercial agendas of

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47 The gatekeeping theory has been originally developed by Lewin to analyse social changes which can be significantly influenced and promoted by specific actors. Within the framework of field theory ('Feldtheorie'), he postulates that the social behaviour of individuals significantly depends on their social environment. See Kurt Lewin, 'Frontiers in Group Dynamics. II Channels of Group Life; Social Planning and Action Research' [1947] 1 HR 143, 153; Julian Wallace, *Gatekeeping im Wandel; Akteure, Plattformen und Gatekeeping-Mechanismen in digitaler Nachrichtendiffusion* (Universität Zürich 2018) 14.

48 Julian Wallace, 'Modelling Contemporary Gatekeeping. The Rise of Individuals, Algorithms and Platforms in Digital News Dissemination' [2017] 6 DJ 274, 293.

49 Pamela J Shoemaker and Tim P Vos, *Gatekeeping Theory* (Routledge 2009) 21.

50 Julian Wallace, *Gatekeeping im Wandel; Akteure, Plattformen und Gatekeeping-Mechanismen in digitaler Nachrichtendiffusion* (Universität Zürich 2018) 2 et seqq.

individual journalists or their employers. This stage of the selection process has been strongly impacted by the transition to the digital domain. Contrary to traditional gatekeepers, digital gatekeepers do not need to apply strict gatekeeping practices to uphold a certain reputation. For this reason, WALLACE has argued that the role of the so-called gate-watcher emerges, as journalists' and editors' control shifts to conveying relevant information and is no longer focused on access to information. The selection process in the digital domain is influenced by users themselves, who have the possibility to critically examine journalism for objectivity. The selection process by users has a similar function to that of journalism in the publication of information.<sup>51</sup> It might also be fair to conclude that data analytics of news consumption has partly replaced the need to uphold a certain reputation of a gatekeeper.

In a further development of the gatekeeper theory, scholars have included the user or reader as a gatekeeper as a reaction to digital changes.<sup>52</sup> In this process, a user is considered to be active, as for instance the information labelled as 'most popular' is transferred back to the media channel.<sup>53</sup> Put differently, visibility of information can be generated by users in a digital environment by means of personal data management. In the gatekeeping theory, this development has been referred to as 'user-generated visibility'.<sup>54</sup> The possibility of sharing information as a user and the perception of the determined newsworthiness before publication interacts with the user's perception of personal relevance.<sup>55</sup> As audiences have gained the ability to not only comment on information presented by journalists, but also to share it with others, journalists' perceptions of newsworthiness of an event interact with those of readers. The integration of the user within the gatekeeping process occurs through the exercise of personal data rights.

As demonstrated by the brief overview of the gatekeeping theory in the digital domain provided above, the disclosure, distribution, and use of personal data becomes a decisive criterion for digital communication markets. Therefore, what information is consumed depends on the digital infrastructure, gatekeepers and the algorithms they use, as well as on how an individual shares their own personal data. Consequently, personal data management as protected by the right to informational self-determination becomes a decisive

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51 Ibid 22.

52 Jane B Singer, 'User-Generated Visibility: Secondary Gatekeeping in a Shared Media Space' [2014] 16 NMS 57.

53 Pamela J Shoemaker and Tim P Vos, *Gatekeeping Theory* (Routledge 2009) 121.

54 Jane B Singer, 'User-Generated Visibility: Secondary Gatekeeping in a Shared Media Space' [2014] 16 NMS 57.

55 Ibid; Pamela J Shoemaker and Tim P Vos, *Gatekeeping Theory* (Routledge 2009) 124.

factor within the distribution process of online information and acquires a new role within the constitutional scope of communicative freedoms.<sup>56</sup> This development is one crucial change that sets apart digital and analogue information distribution.

Social media platforms have the power to structure their own infrastructures and set their own rules to determine how the discourse unfolds on their platforms. Certain market players have created a form of self-regulation concerning political information.<sup>57</sup> For instance, Google has limited the possibilities of micro-targeting in political contexts.<sup>58</sup> In its turn, Twitter has banned political advertising on its platform.<sup>59</sup> Likewise, Facebook has developed a system of authorisation for political advertising, and political advertising is labelled as such to Facebook users. Facebook defines what they qualify as political advertisements as follows: ads about social issues, elections or politics that are made by, on behalf of, or about a candidate for public office, a political figure, a political party or advocates for the outcome of an election to public office; or ads about social issues, elections, or politics that are about any election, referendum, or ballot initiative, including election campaigns; or ads about social issues, elections, or politics that are about social issues in any place where the ad is being placed or regulated as political advertising.<sup>60</sup>

Social media outlets such as Twitter and Facebook depend on traditional media platforms because a significant part of the shared information is sourced from large media houses.<sup>61</sup> Irrespective of the outlet channel, professional journalism depends on editorial staff equipped with sufficient resources. Within social media, algorithmic selection shapes not only information consumption, but also communication and dynamic content-sharing between individuals. Social media platforms are technical systems that usually employ algorithmic curation to organise and disseminate information to their users.<sup>62</sup> This characteristic of algorithms within social media platforms has led to

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56 See chapter IV.C. and V.C.

57 See Urs Saxer, 'Von den Medien zu den Plattformen, Regulierung öffentlicher Kommunikation im Zeichen der digitalen Revolution' in Christian von Coelln, Karl-Nikolaus Pfeifer and Karl-Eberhard Hain (eds.), *Schriften zum Medienrecht und Kommunikationsrecht* (Moor Siebeck Tübingen 2023) 77.

58 Marie-Astrid Langer, 'Google beschränkt Microtargeting für politische Werbung' NZZ (San Francisco November 21, 2019).

59 Twitter, 'Richtlinie für Twitter Ads' (2022).

60 Facebook, 'Business Help Center' (2022).

61 Robert W McChesney and John Nichols, *The Death and Life of American Journalism: The Media Revolution that Will Begin the World Again* (Nation Books 2010).

62 Emilee Rader and Rebecca Gray, 'Understanding User Beliefs About Algorithmic Curation in the Facebook News Feed' (Annual ACM Conference, April 18, 2015).

them being defined as algorithms with a governing power.<sup>63</sup> Facebook is the most prominent example of a social network site. Similarly to news recommendation systems, the Facebook algorithm has the goal of connecting people with information that they are interested in consuming. The newsfeed algorithm has the design goal of showing users content that is important to them and, moreover, the content that generates the most interaction among users. Due to these design goals of the Facebook algorithm, the output of the ranking algorithm (e.g., highly ranked popular posts) becomes part of the input data thereafter.<sup>64</sup> Consequently, consumption and interaction within the platform system affect which information users see. This algorithmic trait is part of almost all social media platforms where commercial, personal, and political information also circulates.

Machine learning techniques are another approach widely used to detect information trends, values, and other characteristics based on data analytics. In order to enhance the commercial value of a search engine, companies are using machine learning for pattern detection to identify spam and low-quality pages so that humans do not have to look at those pages or materials. Machine learning is one piece of the puzzle of the decisive algorithm of search engines. Machine learning is also widely applied by digital market players such as search engines to find the maximum value of personalisation. Machine learning adds another layer to the existing personalisation. Although this group of methods is focused on information related to consumerism, it can also be applied for political purposes.<sup>65</sup>

In the present-day world, digital media consumption dominates as the most relevant and widely used source of information. The use of media is individualised and unbundled from journalistic criteria of relevance. In the digital domain, there is a dynamic process among personal data, economic incentives, digital infrastructure, information content, algorithmic selection, and numerous criteria determined by the digital gatekeeper. While there emerges the question as to how the content of constitutional rights can be enforced in the digital domain, it is clear that the right to data protection has become a decisive criterion for the distribution of information in the digital domain. This role of the possibility to manage one's personal data granted by

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63 See for instance Francesca Musiani, 'Governance by Algorithms' [2013] 2(3) IPR.

64 Emilee Rader and Rebecca Gray, 'Understanding User Beliefs About Algorithmic Curation in the Facebook News Feed' (Annual ACM Conference, April 18, 2015).

65 See Urs Saxer, 'Von den Medien zu den Plattformen, Regulierung öffentlicher Kommunikation im Zeichen der digitalen Revolution' in Christian von Coelln, Karl-Nikolaus Pfeifer and Karl-Eberhard Hain (eds.), *Schriften zum Medienrecht und Kommunikationsrecht* (Moor Siebeck Tübingen 2023), VIII and 157.

the constitutional right to informational self-determination is not present in the more traditional domains of the press, radio, and television, where there is no such sophisticated analysis of the demand for specific information. Therefore, it appears to be appropriate to examine the connection between constitutional rights against the background of democracy theory as a foundation to discuss the emerging digital challenges.

Legal challenges arising from technical changes primarily revolve around two key issues: determining the applicability of existing legal theories to the specific problem at hand, and striking a balance between conflicting interests on a horizontal level to arrive at a suitable digital governance. These questions necessitate a discussion that takes into account the relationship between the democratic framework and the constitution itself as well as the various aspects of each constitutional right and their interdependencies. A recent expert report from the Alexander von Humboldt Institute for Internet and Society highlighted the need for explicit regulation in certain sub-areas within the digital domain.<sup>66</sup> The examples mentioned are content involving criminal offenses and elements that pose a threat to democracy. Other pertinent examples include legal restrictions on extremist content, political micro-targeting, and state-directed propaganda.<sup>67</sup>

Another report by BAKOM concluded that there is currently a lack of empirical clarity regarding how platforms and digital intermediaries influence the formation of political opinions and the quality of political knowledge among the voting population.<sup>68</sup> The report also addresses the issue of insufficient transparency among digital market actors, particularly concerning the algorithmic distribution of information and the use of bots. The report further states that in Switzerland, there is a lack of regulation pertaining to online misinformation or the accountability of digital gatekeepers in cases of misinformation, and requirements to create transparency are lacking.<sup>69</sup>

In the next chapters, I will assess, firstly, how the above-mentioned trends affect the content of constitutional rights, and secondly, whether the constitutional rights need to be expanded by further regulations against the background of their democratic function.

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66 Stephan Dreyer and Wolfgang Schulz, 'Künstliche Intelligenz, Intermediäre und Öffentlichkeit' (Bericht an das BAKOM, March 20, 2019).

67 Ibid.

68 BAKOM, 'Intermediäre und Kommunikationsplattformen'.

69 Ibid.



# III. Contextualising Constitutional Political Rights within Swiss Democracy

Constitutional law legitimises the existing political order by subordinating the exercise of power to the law. The constitution is hierarchically the highest enactment of the legal order and it contains the democratic will of the people as well as the basic consensus of society. The democratic will is formed within the public sphere as protected by constitutional rights and expressed through political rights and processes. The hierarchy of norms is accompanied by a cascade of legitimation, which must be taken into account when interpreting the role of law in the digital space.<sup>70</sup>

## A. Foundations of Democratic Theory

In order to systematically and comprehensively classify the new legal challenges arising from digitalisation, an analysis taking the democratic background into account is necessary. Understanding political rights in their democratic function requires the integration of the theory of discourse ethics. The following two chapters situate the theory of discourse ethics and the political rights within a systemic context. This context should be of guidance for the further development of the law in the digital context. In what follows, a definition of democracy is first provided, followed by a discussion of the theory of deliberative democracy. This knowledge is helpful in discussing the basic political rights in their democratic context in order to assess regulatory gaps.

Etymologically, *democracy* means ‘rule by the people’.<sup>71</sup> Democracy is an interpretative term and most of the definitions relate to the term ‘democratic’. Three different approaches to defining ‘democratic’ can be distinguished:

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70 Pierre Tschannen, *Stimmrecht und Politische Verständigung* (Helbing & Lichtenhahn 1995) 218.

71 The term is derived from the Greek word *dēmokratiā*, which is a combination of the two terms *dēmos* (‘people’) and *kratos* (‘rule’). See Roald Dahl, *Oxford Encyclopedia* (Oxford University Press 2019).

firstly, ‘democratic’ describes decision-making processes in which all members participate equally. Secondly, the term ‘democratic’ defines the decision-making process of the political citizenry in which all citizens have the right to actively participate in the common decision-making process and to control the exercise of political authority. Thirdly, the term ‘democratic’ defines the normative ideal of a societal way of living that is inclusive, deliberative, egalitarian, and free from suppression and exploitation. The first definition relates to democracy in a general, procedural sense; the second definition relates to democracy in a state-related and political sense; and lastly, the third definition relates to a normative ideal of a society.<sup>72</sup>

There is a thesis that a democratic system better supports human dignity, individual freedom, and personal autonomy than any other societal systems.<sup>73</sup> This thesis derives from the argument that democratic processes require the protection of individual freedoms, as such processes depend on individuals making use of their rights and freedoms.<sup>74</sup> Democratic theory presupposes that individuals have an interest in their own freedom and, more importantly, that every individual has the capacity to exercise autonomy.<sup>75</sup> According to DAHL, an autonomous person decides upon their own morality and based on a process of reflection, deliberation, consideration, and scrutiny, as self-government requires self-governed choice. The fact of people living in associations already presupposes the existence of some principles that are collectively binding and provide a framework of social cooperation. Another assumption of democratic theory is that, since individuals’ capacity for autonomy and their interest in personal freedom are acknowledged, the individuals will inevitably have diverse and sometimes conflicting interests. As a consequence, a conflict between freedom and equality becomes evident. By granting each individual the same access and means to participation in the collective decision-making process, it grants each individual the same amount of individual freedom and thus respects every individual as equal. Democracy is constituted by the values of autonomy and equality and is as such intrinsically valued. Art. 7 BV, which enshrines the protection of human dignity, mirrors this value and protects individuals’ dignities as un-

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72 Francis Cheneval, *Demokratiethorien zur Einführung* (Junius 2015), 19 et seqq.

73 Robert Dahl, ‘Procedural Democracy’ in Peter Laslett Peter and James Fishkin (eds.), *Philosophy, Politics & Society* (OUP 1979) 88.

74 Ibid.

75 It should be noted that there are different theories of democracy. See Francis Cheneval, *Demokratiethorien zur Einführung* (Junius 2015); David Held, *Models of Democracy* (3rd edn, Stanford University Press 2006) 260.

conditionally equal to each other.<sup>76</sup> The constitutional protection of human dignity includes the protection of self-determination of the individual as an intrinsic value. The protective content of constitutional human dignity encompasses the individual creation of one's own life and includes its protection if necessary.<sup>77</sup> The protection of one's own individual autonomy and the equality of each individual shows that individual and collective autonomy are interrelated and tied together. Granting self-governing power to every individual alike is thus rooted in the assumption that every individual has the capacity to reason and the capacity to engage in reflective decision-making. Consequently, an individual is limited in their autonomy when they are subject to powers that remain obscure. In other words, an individual cannot be considered self-governing if significant influences on the decision-making processes are not transparent to the individual. The same rationale shall apply to the autonomy of the collective when the process of collective decision-making is subject to influences that remain invisible.<sup>78</sup> Thus, political authority is only legitimate if the citizens are collectively regarded as the ultimate sovereign power and all delegated power remains accountable towards the sovereign. Hence, the duty to give a part of the power to the government corresponds with the rights of the rule of law, transparency, and accountability and is in essence the recognition that the collective is politically sovereign. This understanding that different legal instruments enable the functioning of democracy by protecting individuals' autonomy to enable a self-governing system underlies the present research.

The procedural definition of democracy implies that democracy is not an instrument to achieve a result that is considered correct.<sup>79</sup> This definition aims at a quality of a process that is aligned with democratic values.<sup>80</sup> The procedural understanding of democracy implies normative principles that are constitutive for an inclusive, fair and balanced process of decision making, such as the freedom to express one's own opinion, freedom of assembly and association, and principles of equality and non-discrimination.<sup>81</sup> Due to

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76 Eva M Belser and Eva Molinari, 'Art. 7 BV' in Bernhard Waldmann and others (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 51.

77 Ibid N 59.

78 This democratic principle is mirrored in the legal principles of fair hearing (see art. 25 para. 2 BV) that includes transparency of the judiciary to the public (art. 30 para. 3 BV) as well as the principle of freedom of information (art. 6 FoIA).

79 Francis Cheneval, *Demokratietheorien zur Einführung* (Junius 2015) 27 et seqq.

80 Robert Dahl, 'Procedural Democracy' in Peter Laslett Peter and James Fishkin (eds.), (OUP 1979) 97.

81 Francis Cheneval, *Demokratietheorien, zur Einführung* (Junius 2016) 37.

the mutual requirement, HABERMAS uses the term ‘*Gleichursprünglichkeit*’ for the mutual importance of democracy and human rights.<sup>82</sup> A definition of democracy as a procedural term without constitutional rights is not coherent. The constitutional rights that are inherent to a democracy justified by its procedure are limited to the constitutive requirements of a fair and collective consultation and decision-making process. A strictly result-oriented definition of democracy that anticipates a specific result and structures the processes accordingly, in contrast, undermines the concept of democracy. The procedural definition of democracy has been proven to be the basic definition of democracy.<sup>83</sup> As a consequence, the processes and conditions that determine the legitimacy of legal enactments and the significant changes in the digital sphere shall be a focus in the following chapters.

## B. Deliberative Discourse Theory

The theory of deliberative discourse as a subcategory of democratic theory is focused on public discourse, public deliberation, citizens’ participation in public communication, and the interaction between deliberation and decision-making. HABERMAS and RAWLS are major theorists in the field of deliberative democracy. Discourse theory has a broad following among Swiss legal scholars, because the country’s political system appears as an embodiment of deliberative theory or, as it is also called, consensus-oriented democracy.<sup>84</sup> Thus, the author discusses the arising challenges against the background of the deliberative concept of democracy.

### 1. Foundations of Deliberative Democratic Theory

The principle of democracy represents the legal form of the principle of discourse. The principle of discourse grants everyone the right to equal subjective freedom of action. Individual autonomy and collective autonomy are equally produced in the discourse about public co-existence. The law legitimises itself as a means of securing private and public autonomy at the same time.<sup>85</sup> Thus, the legitimacy of a legal order depends equally on its securing of the individual autonomy of all citizens and their collective autonomy. Citizens

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82 Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Springer 1992) 112.

83 Francis Cheneval, *Demokratiethorien, zur Einführung* (Junius 2015) 38 et seqq.

84 See Alexander Mistic and Nicole Töpferwien, *Constitutional Law in Switzerland* (Stämpfli 2018) 70; Luc Gonin, *Droit constitutionnel suisse* (Schulthess 2021) 507 et seqq.

85 Jürgen Habermas, *Die Einbeziehung des Anderen: Studien zur politischen Theorie* (Suhrkamp 1996) 298.

are only autonomous if the addressees of the law can at the same time see themselves as its authors.<sup>86</sup> This is the normative ideal of the democratic concept. When social and technological changes threaten private and public autonomy, democratic deficits must be detected.

The discourse is the focal point of deliberative democracy as an immediate inner connection between people's sovereignty and constitutional rights. The discourse ethics formulated by HABERMAS is the starting point of deliberative discourse theory. According to discourse theory, the ideal requirements for a 'herrschaftsfreie Diskussion' must be created in order for the argument for the public good to prevail.<sup>87</sup> The underlying assumption of this theory is that the arguments within the public sphere matter more than the individual's interests and perspectives. This assumption has been considered as not realistic, as individual interests often play a more important role than rational argumentation in a discourse.<sup>88</sup> However, the core assumption of deliberative democracy is that by means of an unhindered and free discourse in the public sphere, an understanding and consensus can be reached and societal solutions can be found. According to the argumentation of deliberative theorists, forms of consent in society can be achieved with adequate deliberation procedures that meet the demands of reason as well as a democratic legitimacy.<sup>89</sup> There are various aspects and positions of deliberative theorists. However, two distinct bodies of thoughts can be distinguished: one is strongly influenced by RAWLS and the other one by HABERMAS. On the one hand, HABERMAS includes in his theory unofficial communication outside the institutional discourses, such as communication within social movements. On the other hand, RAWLS draws a narrower picture of the deliberative discourse in reference to the official institutions. HABERMAS' theory of deliberative discourse is thus more applicable in an analysis of the digital sphere. His theory is strongly focused on the importance of the public sphere, whilst RAWLS' theory emphasises aspects of reason in deliberative decisions and assumes the possibility of an objectively fair and correct solution in political decisions.<sup>90</sup> The general right to vote is legitimised by the equivalence of the judgment of each individual, but this judgment is significantly improved

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86 Ibid 251.

87 Jürgen Habermas, *Faktizität und Geltung* (Suhrkamp 1992) 135.

88 Andrea Töndury, 'Gekaufte Politik? Die Offenlegung der Politikfinanzierung als Erfordernis politischer Chancengleichheit' [2018] 1 ZBL 119, 570.

89 Carole Pateman, 'Participatory Democracy Revisited' [2012] 10 PP 8.

90 John Rawls, *A Theory of Justice* (Belknap Press of Harvard University Press 1999); John Rawls, *Lectures on the History of Political Philosophy* (Harvard University Press 2007).

through the public discourse under the conditions according to deliberative discourse theory.<sup>91</sup>

The theory of deliberative democracy grants particular importance to the public sphere compared to the liberal concept. The public sphere takes an active role before political decisions. The public sphere is also thought to counterbalance powers. Democratic opinion formation not only exercises political power, but also programs the administrative power. What underlies a public discourse is information. Information is the basis of one's own construction of reality and the enabler of a discourse to negotiate societal structures. The traditional gatekeepers play a significant role for the public discourse as they create the abstract public sphere in which information is selected and disseminated. The public sphere created by the mass media has gained independence from the political and economic system.<sup>92</sup> Clearly, the opinions disseminated in the public sphere cannot rule on their own, but they are viewed as being able to direct the administrative power.<sup>93</sup>

## 2. Deliberative Discourse Theory by Habermas

The understanding of the relationship between individual and public autonomy is central to the present discussion. This relationship is also situated in the wider context between the rule of law, democratic principles, and the constitutional rights. HABERMAS claims that the principle of discourse can only take the form of a principle of democracy through the law by creating a system that brings private and public autonomy into a relationship of mutual prerequisites. Discourse is not the exercise of power that can substitute for administrative power, but has an influence on it that has a legitimising effect. This legitimising effect derives from the assumption that every individual is autonomous and thus no individual or group can claim control or power over others. Thus, the public sphere where the discourse can take place is essential in deliberative theory. However, HABERMAS does not clearly define the requirements for a deliberative discourse. Each citizen shall have equal access to the discourse. Their power to contribute to the discourse is essential for each citizen to understand themselves as co-authors of laws to which they are subject as addressees.<sup>94</sup>

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91 Jürgen Habermas, *Die Einbeziehung des Anderen: Studien zur politischen Theorie* (Suhrkamp 1996) 277; Francis Cheneval, *Demokratiethorien zur Einführung* (Junius 2015) 44.

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92 Frank Janning, *Das politische Organisationsfeld: Politische Macht und soziale Homologie in komplexen Demokratien* (Springer 1998) 510.

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93 Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechtes und des demokratischen Rechtsstaats* (VS Verlag für Sozialwissenschaften 1992) 364.

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94 Jürgen Habermas, *Die Postnationale Konstellation: Politische Essays* (Suhrkamp 1998) 160 et seqq.

Deliberative democracy is the concrete form in which the ideal of discourse can be put into practice. It combines the moral demands of discourse with the compromises that have to be made if there is no prospect of consensus between interests.<sup>95</sup> Deliberative democracy is also possible in the intercultural pluralism of rationalities and without the precondition of the liberal concept of reason. In this context, HABERMAS differentiates himself from RAWLS. According to HABERMAS, discourse creates the concept of reason through discursive processes and reason is not a requirement of the participants.<sup>96</sup>

The concept of the public sphere is crucial to the theory of deliberative democracy. According to HABERMAS, the public sphere is the area in which civil society is involved with the basic elements of the state. The societal structures find their justification in the framework of the public sphere, because in the public sphere the deliberative processes are then translated into applicable frameworks and institutions.<sup>97</sup> The public sphere consists of the direct and mediated discussions of the ‘critically thinking’ individuals who thereby form a public opinion and are thus in a position to execute pressure on the political system without formally becoming a part of it.<sup>98</sup> According to HABERMAS, the public sphere has four main functions: 1) the public sphere is the foundation for the development of an active citizenship; 2) it is where the common good is being defined 3) the public sphere guarantees transparency through mediated publicity; and 4) the public sphere acts as a guarantee for the democratic principle of political competence.<sup>99</sup>

The notion of civil society is used by HABERMAS in connection with the role of the public. HABERMAS claims that the discourse justifies participation, which is kept in the public domain for the ‘rediscovery of civil society’. In short, civil society is incomprehensible without public conditions of communication. He also defines civil society as the social basis of an autonomous public sphere. HABERMAS even connects the term of the ‘public sphere’ with

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95 Jürgen Habermas, *Die Einbeziehung des Anderen: Studien zur politischen Theorie* (Suhrkamp 1996) 284.

96 Philippe Mastrorandi, ‘Zur Legitimierung von Rechtsstaat und Demokratie’, in Peter Hänni (eds.), *Mensch und Staat, Festgabe der Rechtswissenschaftlichen Fakultät der Universität Freiburg für Thomas Fleiner zum 65. Geburtstag* (Schulthess 2003) 534.

97 Theodora Papadopoulou, *Deliberative Demokratie und Diskurs, Eine Debatte zwischen Habermas und Rawls* (Universität Tübingen 2005) 121.

98 Peter Dews, ‘Faktizität, Geltung und Öffentlichkeit’ in Christoph Demmerling, Andrea Marlen Esser, Petra Gehring and Christoph Menke (eds.), *Deutsche Zeitschrift für Philosophie* (Akademie-Verlag 1993) 362.

99 Jürgen Habermas, *Die Einbeziehung des Anderen: Studien zur Politischen Theorie* (Suhrkamp 1996); Ralf Heming, *Öffentlichkeit, Diskurs und Gesellschaft: Zum Analytischen Potential und zur Kritik des Begriffs der Öffentlichkeit bei Habermas* (DUV 1997) 5.

deliberative communication, discourse-oriented activities, and the principle of democracy itself.<sup>100</sup> The principle of democracy encompasses the concepts of autonomy, freedom, and the rule of law as the requirements for a functional society. The public sphere further functions as a guarantee for a framework where reasonable thought should rule the political sphere. The public sphere is related to the reality that should be understood as a structure for communication.<sup>101</sup>

HABERMAS categorises different kinds of public spheres in his theory. He distinguishes between episodic publics, occasional and arranged publics, and the abstract public sphere. In his original work, HABERMAS makes a distinction between the public sphere in the world of letters, the so-called cultural sphere, and the political public sphere. Based on the analogue perspective, he identifies a critical debate in the world of letters and a rational-critical debate in the political public sphere. He sees the cultural sphere as the precursor to the political sphere. The cultural sphere is defined by its inclusiveness and is an apolitical sphere to discuss and deliberate matters of common concern. The abstract public sphere brings together isolated readers, viewers, and listeners through the mass media that are actually located across wide geographic areas. HABERMAS defines an abstract public sphere of isolated readers, listeners, and viewers scattered across wide geographic areas or even around the globe.<sup>102</sup> Thus, the mass media are considered essential for this deliberative effect within this public sphere. In this respect, the digital sphere has the same effect as the mass media. HABERMAS claims that mediated political communication in the public sphere can facilitate deliberative legitimisation processes in complex societies only if a self-regulating media system gains independence from its social environments. In addition, the anonymous audience must give feedback to an informed elite discourse and a responsive civil society is required for deliberation.<sup>103</sup> He evolved his theory from an analogue perspective; nevertheless, the rationale is applicable to different public spheres that facilitate communication, too. Digital communication has made this structure of mediated communication somewhat simpler,

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100 Ibid 33; see also Theodora Papadopoulou, *Deliberative Demokratie und Diskurs, Eine Debatte zwischen Habermas und Rawls* (Universität Tübingen 2005) 39.

101 Theodora Papadopoulou, *Deliberative Demokratie und Diskurs, Eine Debatte zwischen Habermas und Rawls* (Universität Tübingen 2005) 39.

102 Bjarki Valtýsson, 'Digitising Habermas, Digital public sphere and networked publics' in Mark Murphy (ed.), *Habermas and Social Research, Between Theory and Method* (Routledge 2017) 91 et seqq.

103 Jürgen Habermas, *Die Einbeziehung des Anderen: Studien zur Politischen Theorie* (Suhrkamp 1996).

but the dependencies and asymmetries within the digital sphere create more complexity. Digital means of communication facilitate the interconnectedness of individuals in the abstract public sphere. For HABERMAS the concept of the public sphere means inclusive critical discussion, free from social and economic coercion, in which individuals are equal to one other in the process of reaching an understanding on a common concern.<sup>104</sup> These ideas have found their way into the understanding of constitutional political rights.<sup>105</sup>

The public sphere functions as a normative principle that is defined by the rationalisation of political action by discourses focused on the public good. Within the public sphere (*allgemeine Öffentlichkeit*), new problems can be addressed in an unhindered manner, where self-evident discourses can be held in a broader and more expressive way and where collective identities can be articulated more freely compared to regulated public spheres. For the normative principle to work, certain conditions have to be ensured that also require legal regulation. How the requirements of a public sphere are protected will be shown in chapter V.

There is an internal relationship between private and public autonomy that HABERMAS has addressed specifically. He argued that this relation requires a set of abstract rights that citizens must recognise if they want to regulate their life together by means of legitimate positive law. This system of rights which each concrete democratic regime must appropriately elaborate and specify delineates the general necessary conditions for institutionalising democratic processes of discourse in law and politics. To summarise, these rights fall into five broad categories. The first three are the basic negative liberties, membership rights and due process rights that together guarantee individual freedom of choice, and thus private autonomy. The fourth, rights of political participation, guarantees public autonomy. Each of these categories is indispensable and cannot simply be reduced to another: without the first three sets of rights, there is no private autonomy (and thus no free and equal subjects of law), but without the fourth set, the laws and rights guaranteeing private autonomy are merely paternalistic impositions rather than expressions of self-governance. Rights of political participation enable citizens themselves to shape and further define the rights they enjoy and thus to become the authors of the laws to which they are subject as addressees.<sup>106</sup>

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104 Judith Bessant, 'Working with and thinking against Habermas' in Craig Calhoun (ed.), *Habermas and the Public Sphere* (MIT Press 1992) 75, 78.

105 See chapter III.D.4.

106 See Jürgen Habermas, *Die Einbeziehung des Anderen: Studien zur Politischen Theorie* (Suhrkamp 1996).

Democratic theory has been put in to practice through various institutions and regulations. The constitutional content of political rights serves as a guarantee to come as close as possible to the democratic ideals. However, the democratic content is not only realised through political rights, but also through other constitutional rights and their interaction in practice. The legal system finds legitimacy in the protection and equality of individual autonomy and in the collective deliberative exchange. These democratic principles have found expression, for example, in the legal principle of equal access to political information, in the legal protection of individual opinion-formation, and in numerous institutions that seek to protect political opinion-formation from power asymmetries. In what follows, the legal implementation is presented more concretely in order to discuss where risks have arisen from digital and technological developments.

### C. The Peculiarities of Swiss Democracy

Within this chapter, the peculiarities of the Swiss democratic system are addressed. Many of the democratic principles outlined above can be found in the legal system that underlies Swiss democracy. As mentioned, the Swiss democratic system is understood as a deliberative democratic form or also labelled as a consensus democracy.<sup>107</sup> It will be outlined how HABERMAS' assumptions about the public sphere and its different functions can be found in the legal doctrine in Switzerland. In order to answer today's regulatory questions in the context of the new digital media spheres, it seems useful to consider the theories of deliberative democracy.

In the Swiss democracy, the voters are sovereign. Switzerland's democracy is a unique combination of direct and representative democracy, with the voters having the right of final decision in constitutional and legislative matters.<sup>108</sup> The Federal Constitution does not contain a definition of Swiss democracy, but rather its specific character results from the summary of individual provisions. The parliament or National Council is elected by the voters and the sovereign has direct democratic instruments, the popular initiative and the right to referendum.<sup>109</sup> Art. 148 of the Constitution stipulates that the Federal Assembly shall exercise supreme authority in the Confederation.<sup>110</sup>

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107 See Daniel Kübler, 'Schweizerische Demokratie im internationalen Vergleich' in Oliver Diggelmann, Maya Hertig Randall and Benjamin Schindler (eds.), *Verfassungsrecht der Schweiz*, Band 1 (Schulthess 2020) 317, 325 et seqq.

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108 See art. 195 BV and art. 148 para. 1 BV.

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109 Art. 149 para. 2 BV; Art 138-141 BV, Art 148 para. 1 BV.

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110 Art. 148 BV.

Although the Federal Constitution lacks a formal commitment to the principle of democracy, the basic democratic character of the Federal Constitution is beyond question. BIAGGINI assumes that citizenship comes with a political responsibility due to the direct-democratic instruments of the political rights. According to the prevailing doctrine, the political rights serve first and foremost to legitimise state action. In more detail, the political rights also serve as a supplement and corrective to parliamentary inaction and thus as an instrument of control.<sup>111</sup> Within the latter function of the political rights lies an understanding of voters as political citizens with an active political responsibility.

Against this background, the functioning of the Swiss system depends on an active and self-responsible citizenship. Art. 6 BV states the structural principle that all individuals are self-responsible and contribute according to their capacities to the goals of the state and society.<sup>112</sup> Thus, the model of democracy depends on cultural resources and societal preconditions that the state itself cannot guarantee. Additionally, the preconditions are subject to constant change.<sup>113</sup> In order to maintain the preconditions of deliberative discourse and thus the basic prerequisites of democracy (and thus also the legitimacy of law), legal protections must be adapted to changes where necessary.

The understanding of democracy on the municipal level as the original form of Swiss democracy is linked to the autonomy granted to each municipality. The autonomy of the community is only possible in a decision-making process based on equality and freedom. The municipality is called the primordial cell of democracy, in which self-government originates and citizens' freedom is expressed. A diverse and lively democracy is practised in the municipalities, in which the people have extensive influence and control possibilities through direct participation in the municipal assembly or through elections and votes at the ballot box.<sup>114</sup> As already stressed in the definition of democracy, there is connection between personal freedoms and the democratic system. The municipal assembly comes close to the ideal of the deliberative democratic model where every citizen can access the communicative sphere

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111 Giovanni Biaggini, 'Die Bundesverfassung' in Giovanni Biaggini, Thomas Gächter and Regina Kiener (eds.), *Staatsrecht* (3rd edn, Dike 2021) N7 et seqq.

112 Art. 6 BV has no binding normative effect but is considered as a valuable guidance for interpretation. Moreover, this article of the Constitution is considered to have an educational character (Thomas Gächter and Stephanie Renold-Burch, 'Art. 6 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N7.

113 Christoph Graber, 'Law, Society and Direct Democracy' in Marc Tommen (ed.), *Introduction to Swiss Law* (Carl Grossmann 2018) 115, 118 et seqq.

114 Nando Stauffer von May, *Regionale Aufgabenerfüllung und demokratische Rechte* (Stämpfli 2018).

that is created and information and opinions are exchanged in a direct manner.<sup>115</sup> The Swiss democratic system has evolved historically with the municipal assembly as the original version of democratic decision-making. This assembly is defined by granting access to all citizens, and each citizen has a right to be heard and to actively participate in the discussions. The municipality has the advantage of being close to the citizens, information is distributed first-hand, and the citizens can experience the decision-making processes directly.<sup>116</sup> Moreover, the institution of the municipal assembly has a legitimising effect for the decisions taken when the electorate is considered as the sovereign. It becomes clear that Switzerland's democracy in its original form comes close to the desired abstract ideal of deliberative democracy. Moreover, the functioning of democracy on the municipal level shows that democracy lives and depends on the individuals actively exercising their individual rights and freedoms. Against this background, the role of the public sphere in developing an active political citizenry becomes more obvious. The concept of democracy is one of a system that is capable of reacting to new dangers, dynamically adapting the legal system, and enabling change in social values.

The theoretical ideal of self-government shall also be discussed at this point. Discourse ethics works with an ideal image to be aspired to and is based on hypotheses. Furthermore, the thesis of self-government is limited by characteristics of positive constitutional law.<sup>117</sup> The limitations are imposed by the institutions for the protection of constitutional rights, constitutional jurisdiction, and also by representative elements. TSCHANNEN argues, for example, that the implementation of the majority principle contradicts the self-government thesis according to which all the interests of individuals should be equally important.<sup>118</sup> However, a legitimising process based on the basic democratic assumptions needs to be found in which opposing interests of individuals are weighed up against each other. Adherence to the procedural side of the democratic theory assumptions (everyone has access to the process) thus justifies the loss of absolute equality of interests in implementation.

Since there is no identity between the population and the government, and a discrepancy between the voters and the electorate, the idea of democratic self-government is more of a model than a lived reality. Although the theory of

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115 BGE 121 I 138 E. 4.

116 Ibid.

117 René Rhinow, 'Grundprobleme der schweizerischen Demokratie' [1984] II ZSR 111, 199 et seqq.; Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing & Lichtenhahn 1995) 245.

118 See Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing & Lichtenhahn 1995) 245.

discourse has found its way into legal doctrine and is inherently linked to it, the theory is a model to strive for, which clearly assumes a discrepancy between theory and reality.

## D. Legal Theory of Constitutional Political Rights

Swiss democracy is a combination of a direct and a representative democracy.<sup>119</sup> Constitutional political rights cannot be analysed in an isolated manner, as they are based on democratic principles and the rule of law.<sup>120</sup> Embedded within this understanding, the political rights have a substantive legal value. The basic principles of a democratic order are based on the following freedoms and principles: the principle of equality<sup>121</sup>, good faith and the prohibition of arbitrariness<sup>122</sup>, the constitutional rights of communication<sup>123</sup>, freedom of assembly<sup>124</sup>, freedom of association<sup>125</sup>, and the participation of political parties in the opinion-forming process of the politically entitled citizenship.<sup>126</sup>

The rights of political participation do not only establish opportunities for participation; the voters are regarded as an organ of the government. BIAGGINI derives this political responsibility from the direct-democratic instruments of the political rights. Some cantonal constitutions and municipal-level regulations underline the direct and indirect exercise of power by the sovereign citizenry. The constitution of the Canton of Zurich defines the democratic exercise of state power in the following way: 'Die Staatsgewalt beruht auf dem Volk. Sie wird von den Stimmberechtigten und den Behörden ausgeübt.'<sup>127</sup> At the level of the commune the original 'cell' of Swiss democracy can be found.<sup>128</sup> The municipal citizenry decides in principle at the municipal assembly. The municipal assembly has extensive powers in legislation, financial

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119 See art. 195 BV and art. 148 para. 1 BV.

120 Anina Weber, *Schweizerisches Wahlrecht und die Garantie der politischen Rechte* (Schulthess 2016) 39.

121 Art. 8 BV.

122 Art. 9 BV.

123 Art. 16 et seqq. BV.

124 Art. 22 BV.

125 Art. 23 BV.

126 Bernhard Maag, *Urnenwahl von Behörden im Majorzsystem* (Norderstedt 2004) 46; Anina Weber, *Schweizerisches Wahlrecht und die Garantie der politischen Rechte* (Schulthess 2016) 39.

127 Art. 1 para. 3 Cantonal Constitution Zurich of February 27, 2005.

128 Zaccaria Giacometti, *Staatsrecht der Schweizerischen Kantone* (Polygraphischer Verlag 1979) 537.

policy, and administration. The individual voters have a right to make motions and to be heard in the process.

The right to the autonomous formation of political opinion and to an undistorted vote (Art. 34 para. 2 BV) is protected by the constitution and is divided into various parts. One part of this is the prohibition of intervention by private parties and the prohibition of intervention by the authorities in the free formation of political will. Another protected aspect is the secrecy of voting and elections. The fact that the secrecy of voting and elections is enforced in its formal nature (and that even the possibility of a violation of the secrecy of voting is considered a violation) shows that political rights are treated differently from civil liberties in their constitutional rights content.<sup>129</sup> In other words, there is no balancing of interests against private interests. Several aspects that are relevant for the present analysis will be summarised in the following.

### 1. The Right to Vote

The system of direct democracy is understood as a self-government of the people. From the perspective of Swiss democracy, constitutional rights are the driving force behind the political process. The contribution of constitutional rights is to guarantee the openness and rationality of the decision-making process.<sup>130</sup> The guarantee of political rights takes over the main part of this task, as the sovereign citizenry exercises decisive power through different instruments of participation.<sup>131</sup> The political rights enshrined in art. 23 BV are rights that grant voters direct and legally binding participation in governmental decision-making processes. The instruments of this participation are popular elections, referendums, popular initiatives, and referendums.<sup>132</sup>

The inclusion of art. 34 BV in the Federal Constitution of 1999 represented an important political development.<sup>133</sup> Previously, political rights had been protected as unwritten constitutional rights.<sup>134</sup> The Federal Supreme Court

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129 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 134; Cornel Borbély, *Der Grundsatz der geheimen Abstimmung, unter Berücksichtigung des E-Votings* (Stämpfli 2005) N 83.

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130 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 225.

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131 See Pierre Tschannen, 'Schutz der politischen Rechte' in Detlef Merten and Hans-Jürgen Papier (eds.), *Handbuch der Grundrechte; Grundrechte in der Schweiz und in Liechtenstein* (Dike 2007) N 3 § 220.

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132 Art. 138-142 BV.

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133 Art. 34 BV; see Anina Weber, *Schweizerisches Wahlrecht und die Garantie der politischen Rechte* (Schulthess 2016) 20.

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134 Pierre Tschannen, 'Art. 34 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 1.

formulated that no voting or election result shall be accepted that is not a reliable and uncompromised expression of voters' free will.<sup>135</sup> The Federal Supreme Court has subsequently substantiated this guiding principle and derived individual claims from it.<sup>136</sup> The sovereign electorate needs to express its will freely and undisturbed. The freedom to vote is a necessary requirement to enable the expression of voters' freely formed opinion. The protective purpose of art. 34 BV is based on an understanding of democracy that focuses not only on the formal correctness of the decision-making process but also on its material quality.<sup>137</sup> Political justice should be sought through the constituent participation of citizens in a discursive process.<sup>138</sup> Consequently, Art. 34 BV demands both freedom of participation in the political process and freedom of decision-making in the political process.<sup>139</sup>

Freedom to vote ensures that individuals can form their own individual opinions and express their political opinions without external control. This constitutional right ensures the participation in democratic processes shielded from social, political, and economic power.<sup>140</sup> The voters must be able to form their opinions independently from constraints and manipulation by the government or private parties.<sup>141</sup> In this context, the question arises as to when excessive influence exists and how individuals' political agency must be protected in the digital media space.

The free and unhindered process of opinion-formation is not just protected during the actual election or voting but also in the run-up to an election

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135 BGE 75 I 244; 119 Ia 271 E. 3a; 130 I 290 E. 3.1.

136 Examples are BGE 119 Ia 167 E. 1d; 95 I 223 E. 4; see also Pierre Tschannen, 'Schutz der politischen Rechte' in Detlef Merten and Hans-Jürgen Papier (eds.), *Handbuch der Grundrechte; Grundrechte in der Schweiz und in Liechtenstein* (Dike 2007) N 34 et seqq. § 220.

137 Pierre Tschannen, 'Art. 34 BV' in Bernhard Waldmann, Eva M Belser, and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 2.

138 see BGE 111 Ia 201 E. 4b; Pierre Tschannen, 'Art. 34 BV' in Bernhard Waldmann Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 2.

139 Pierre Tschannen, 'Art. 34 BV' in Bernhard Waldmann Bernhard Waldmann, Eva M Belser, and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 2.

140 see also BGE 124 I 55 E. 2; Jörg Paul Müller, 'Geschichtliche Grundlagen, Zielsetzung und Funktionen der Grundrechte' in Detlef Merten and Hans-Jürgen Papier (eds.), *Handbuch der Grundrechte; Grundrechte in der Schweiz und in Liechtenstein* (Dike 2007) N 37 zu § 202. In this judgement, the Federal Supreme Court states that this constitutional right shall also guarantee that economic dependencies do not develop into political dependencies.

141 Michel Besson, *Behördliche Information vor Volksabstimmungen, Verfassungsrechtliche Anforderungen an die freie Willensbildung der Stimmberechtigten in Bund und Kanton* (Stämpfli 2002) 8.

or vote. The constitutional rights of communication but also political rights guarantee the unhindered and free will-formation process before the actual voting activity.<sup>142</sup> The principle that there is no prescribed way to form a political opinion is protected by art. 34 BV. The freedom to choose the method of forming one's own political identity and opinion counterbalances potential forms of danger arising from the accumulation of power to influence opinions in a one-sided manner.<sup>143</sup>

## 2. The Role of the Freedom to Vote in Swiss Democracy: a Doctrinal Perspective

A human act becomes a governmental act by expressed assignment of this quality by a legal norm. State organs are institutions constituted by individuals for the creation of the will of the state. The people sustaining a state organ are assigned to the task by organizational rules. They carry out the sovereign acts in a prescribed form such that the result of this assignment can be directly considered the legitimate will of the community. Considering the electorate as having the competence of an organ, only what has been negotiated using the correct procedure can be regarded as the will of the organ.<sup>144</sup> In consequence, a voter who signs an initiative acts in their function as an organ of the state even if the initiative does not progress for lack of signatures. According to legal theory, the state organ is made up of the entire electorate and not just those citizens who actually participate in the political process. Political rights are to be regarded as the exercise of political authority.<sup>145</sup> This dogmatic classification already indicated that the understanding of political rights as only subjective public interests is considered outdated.<sup>146</sup> In modern constitutional law, the right to vote is no longer regarded as so-called subjective public law. In this context, TSCHANNEN stresses that the terms 'Wahl- und Abstimmungsfreiheit', 'Stimmrechtsfreiheit' oder 'Stimmfreiheit' undermine the public side of the political rights.<sup>147</sup> However, legal clauses on the right to referendum are framed

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142 Ibid; BGE 150 I 17 E. 4.1

143 Andrea Töndury, 'Gekaufte Politik? Die Offenlegung der Politikfinanzierung als Erfordernis politischer Chancengleichheit' [2018] ZBl 119, 571.

144 Christof Tobler, *Der Stimmzwang in den schweizerischen Kantonen* (Buchdruckerei E Löpfe-Benz 1945), 5 et seqq.

145 Ibid 28 et seqq.

146 Pierre Tschannen, 'Art. 34 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 3; Georg Jellink and Walter Jellink, *Allgemeine Staatslehre* (O. Häring 1966) 559.

147 Pierre Tschannen, 'Art. 34 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 12.

as rights.<sup>148</sup> Political rights serve both the public interest and the individual interest and therefore are also considered as the exercise of political authority.<sup>149</sup> This view is known as the dualistic theory.<sup>150</sup>

For some scholars, the understanding that the individual acts within their personal freedoms and at the same time fulfils a public function is contradictory. A doctrinal differentiation between the content of the political participation and the formal participation seems to provide a solution for this conflicting classification. This view assumes that during the exercise of political rights, a distinction should be drawn between two successive stages. In the first step, there is the individual who asserts their subjective right to be recognised as a voter. Voting then constitutes the state function.<sup>151</sup> Another body of thought sees the dogmatic solution in distinguishing between the formal participation in the political process and the content of the political expression. The individual element receives a different justification. With regard to the content of the political exercise, the individual is sovereign and acts within their autonomy regarding the content of the vote.<sup>152</sup> In a democracy, the recognition of the highest possible number of citizens as active political participants is constitutional and accordingly, their admission to the resulting functions is a *sine qua non* condition and cannot be achieved by establishing a subjective right.<sup>153</sup> Consequently, the public function of the political rights is an essential part of the functioning of the Swiss democracy.

The importance of political rights for Switzerland is also underlined by the fact that voting rights laws and ordinances have material constitutional status.<sup>154</sup> The protection of concrete political rights does not entail any substantive requirements for the implementation of political rights. Freedom of choice and voting is about the way in which concrete political rights are exercised. It must be possible to exercise these rights in such a way that free decision-making and undistorted voting are possible. At the same time, however,

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148 See Art 138 BV.

149 Christof Tobler, *Der Stimmzwang in den schweizerischen Kantonen* (Buchdruckerei E Löpfe-Benz 1945) 47.

150 See Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 19.

151 Christof Tobler, *Der Stimmzwang in den schweizerischen Kantonen* (Buchdruckerei E Löpfe-Benz 1945) 49.

152 Dieter von Schindler, *Über die Bildung des Staatswillens in der Demokratie: eine staatsrechtliche Studie* (Schulthess 1921) 76.

153 Christof Tobler, *Der Stimmzwang in den schweizerischen Kantonen* (Buchdruckerei E Löpfe-Benz 1945) 49.

154 BGE 42 I 52; see Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 30 et seqq.

strict observance of specific political rights is also a precondition for free and open decision-making. Art. 34 BV guarantees political rights to the extent established by federal and cantonal law. The existence of political rights in the Confederation is enshrined in Art. 138-142, 143 and 149 BV. The purpose of Art. 34 BV is to place the participation rights laid down in other norms under the protection of the Confederation, which can be called upon individually and guaranteed by the courts.<sup>155</sup>

The democratic system in Switzerland derives from the notion of a mature citizenry and assumes citizens' ability to make political decisions. Only thereby is it possible to assume a political system that functions on the basis of the capacity of citizens to freely form their own political opinions.<sup>156</sup> According to the Federal Supreme Court, Swiss democracy trusts the citizen to differentiate between the different opinions, to choose among the opinions, to recognise exaggerations, and to decide rationally.<sup>157</sup> The freedom of will and expression in the political sphere depends on certain conditions, and the law cannot conclusively guarantee their fulfilment. In this context, TSCHANNEN notes that this is an idealistic image of a citizen. There are no more convincing alternatives in sight and the law is therefore based on a fictitious image of the citizen.<sup>158</sup> The philosophical understanding of citizenship in a democracy and the historical development of Swiss democracy underline the importance of upholding the idealistic image of citizenship. The rule-of-law principles and legal certainty are, however, barriers to the sovereignty of the right to vote. The predictability of the law is a necessary requirement for a democratic society and can potentially counterbalance the collective sovereignty. In other words, the development of society and adaptation of the law take place in tension between autonomy and predictability of the law.<sup>159</sup>

### 3. Obligation to Vote

In Switzerland, political rights are part of the classic constitutional matters, in which the cantons have considerable room for regulation. For instance, the canton of Schaffhausen has imposed an obligation to vote on their citizens.

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155 Pierre Tschannen, 'Art. 34 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 13.

156 Ibid.

157 BGE 98 Ia 73 E. 3b; 135 I 292 E. 4.1.

158 Pierre Tschannen, 'Art. 34 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 31.

159 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 221.

The obligation to vote arises only when positive law imposes it.<sup>160</sup> For example, according to Art. 23 para. 2 KV SH, citizens in the canton of Schaffhausen are obliged to vote. The obligation to vote illustrates that participation rights have a dual function. It is not only the right of citizens to vote, but the voters also represent an organ of the state.<sup>161</sup> There is no voting obligation at the federal level, as neither the Federal Constitution nor the PRA establishes any political obligations. The obligation to vote has existed in the canton of Schaffhausen since 1876 and is, accordingly, also referred to as a political tradition. The obligation to vote is part of the political culture in Schaffhausen and aims at ensuring a high voter turnout.<sup>162</sup> While Schaffhausen has established a voting obligation with the threat of a fine,<sup>163</sup> other cantons have legally anchored voting obligations. The canton of Argovia also obliges its citizens to vote in accordance with § 59 para. 2 KV AG. The possibility to establish a legal obligation to vote is an expression of the organ's function.<sup>164</sup>

The argument that the understanding of the electorate as an organ of the state justifies the obligation to vote is also criticised. The obligation to vote requires only formal participation and not casting a valid vote.<sup>165</sup> Only as an obligation to participate is the obligation to vote compatible with art. 34 BV. If the content of the vote remains an act of free will and conscience, the obligation or compulsion to vote can only relate to the external activity, the voting procedure.<sup>166</sup> Nevertheless, the obligation to vote shows the importance of the freedom to vote and the protection of the required conditions. In my view, this importance should be taken into account in the balancing of interests within new regulatory proposals. I comment on the balancing of several conflicting interests in chapter VI.B.

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160 Andreas Kley, *Grundpflichten Privater im schweizerischen Verfassungsrecht* (Schweizerisches Institut für Verwaltungskurse 1989) 161.

161 Andreas Kley, *Grundpflichten Privater im schweizerischen Verfassungsrecht* (Schweizerisches Institut für Verwaltungskurse 1989) 159.

162 Kurt Nuspliger, 'Bern und Schaffhausen in guter Verfassung: Zwei neuere Kantonsverfassungen im Vergleich' [2005] 106 ZBl 393, 397.

163 Art. 6 Gesetz über die vom Volke vorzunehmenden Abstimmungen und Wahlen sowie über die Ausübung der Volksrechte vom 15. März 1904 des Kantons Schaffhausen.

164 Pierre Tschannen, 'Art. 34 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 13.

165 Andreas Kley, *Grundpflichten Privater im schweizerischen Verfassungsrecht* (Schweizerisches Institut für Verwaltungskurse 1989) 154.

166 Christoph Tober, *Der Stimmzwang in den schweizerischen Kantonen* (Buchdruckerei E Löpfe-Benz 1945) 59; see Lukas Schaub, 'Die Stimmpflicht als "Nudge": Der Versuch einer regulatorischen (Neu-) Einordnung' [2017] 118 ZBl 583, 595.

Even though studies show that an obligation to vote enhances voting participation, an obligation to vote does not guarantee the functioning of the democratic participation.<sup>167</sup> The direct-democratic instruments require compliant participation actions. The canton of Schaffhausen has the highest proportion of void votes in Switzerland. This shows that the functioning of democracy depends on an active citizenry. Consequently, the prevailing view is that political rights have a distinct institutional dimension. This dimension derives from the fact that political rights end in decisions created through formalised procedures that are binding on the community.<sup>168</sup>

#### 4. Regulatory Protection of the Unhindered Will-Formation Process

Article 34 para. 2 BV also protects free and unimpeded communication in the run-up to elections and votes.<sup>169</sup> Within the framework of the Federal Constitution of 1874, this guarantee was developed by the Swiss Federal Court in a rich jurisprudence and guaranteed as unwritten constitutional law.<sup>170</sup> The constitutional right protects the freedom of a citizen to form their own opinion autonomously.<sup>171</sup> Accordingly, the principle of legislation lies in the autonomy of the will.<sup>172</sup> KANT also understood autonomy as self-legislation of reasonable thought.<sup>173</sup>

Possible influences on the free and unhindered opinion formation process can derive from the state or from private individuals. Interventions by private actors are protected within the scope of the basic rights of communication and thus a possible conflict of interest arises. Political discourse is not subject to any constitutional rules of decency. The constitutional political rights are not violated by exaggerations, dismantling, and polemics.<sup>174</sup> The

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167 Lukas Schaub, 'Die Stimmpflicht als "Nudge": Der Versuch einer regulatorischen (Neu-) Einordnung' [2017] 118 ZBl 583, 595.

168 See Gerold Steinmann and Michel Besson 'Art. 34 BV' in Ehrenzeller Bernhard and others (eds.), *St. Galler Kommentar, Die Schweizerische Bundesverfassung* (Dike 2023) N 6 et seqq.

169 Jörg Paul Müller and Markus Schefer, *Grundrechte der Schweiz, im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* (4th edn, Stämpfli 2008) 611.

170 BGE 121 I 138 E. 3; 131 I 85 E. 2.4.

171 Art. 34 para. 2 BV.

172 Markus Schefer, *Die Kerngehalte von Grundrechten, Geltung, Dogmatik, inhaltliche Ausgestaltung* (Stämpfli 2001) 109.

173 Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press 1785) 64; Markus Schefer, *Die Kerngehalte von Grundrechten, Geltung, Dogmatik, inhaltliche Ausgestaltung* (Stämpfli 2001) 109.

174 See BGE 119 Ia 271 E. 3a.

Federal Supreme Court relies on the conscious, healthy, and critical judgment of the people.<sup>175</sup> The legal system assumes that the democratic discourse is adequately protected by interventions by the competent authorities to correct the relevant information.<sup>176</sup> In the case of misinformation during the campaign period, the authorities have an obligation to correct the relevant information in order to prevent public opinion-formation from being misled.<sup>177</sup> The Federal Supreme Court has strict requirements for the justification of a cancellation of a voting result. The court assumes that the electorate is able to recognise exaggerations and is also able to detect misleading and false information.<sup>178</sup>

The opinion-formation process is primarily a matter for society. TSCHANNEN assumes, however, that the free and unhindered opinion-formation and expression of political will are not possible without a minimum of official information from governmental stakeholders.<sup>179</sup> In order for voters to be able to make their decision based on a free and unhindered opinion-forming process, TSCHANNEN sees information prepared by the authorities as the first prerequisite.<sup>180</sup> Prior to voting, the authorities must inform the voters of the date, content, and purpose of the ballot. If the level of knowledge in the public debate is insufficient, they are obliged to intervene further. In this case, the authorities must include in the discourse the information that the voters need for a comprehensive and undistorted decision-making process.<sup>181</sup> In the run-up to voting, the authorities are allowed to provide explanations of the voting process, additional documents, and recommendations. The information must be objective.<sup>182</sup> During campaigns, the public authorities are only allowed to

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175 BGE 98 Ia 73 E. 3b; 135 I 292 E. 4.1.

176 Pierre Tschannen, 'Art. 34 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 37.

177 BGer 1C\_472/2010 of January 20, 2015, E. 4.3.2; Pierre Tschannen, *Staatsrecht der schweizerischen Eidgenossenschaft* (5th edn, Stämpfli 2021) § 52 N 1879 et seqq.

178 See BGE 135 I 292 E. 4.1; 119 Ia 271 E. 3b.

179 Pierre Tschannen, *Staatsrecht der Schweizerischen Eidgenossenschaft* (5th edn, Stämpfli 2021), § 52 N 1887.

180 Pierre Tschannen, 'Art. 34 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 33.

181 Jörg P Müller and Markus Schefer, *Grundrechte der Schweiz, im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* (4th edn, Stämpfli 2008) 618.

182 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 102; Vincent Martenet and Théophile von Büren, 'Art. 34' in Vincent Martenet and Jacques Dubey (eds.), *Commentaire Romand, Constitution Fédérale* (Helbing Lichtenhahn 2021) N 97.

influence the opinion formation process in exceptional cases.<sup>183</sup> The recent tendency is that the requirements for the justification of an intervention have become less strict. Such interventions must, however, be objective and transparent.<sup>184</sup> The underlying reason for this restriction is that opinion formation in a democracy should be governed by the actors in society and private individuals. The right of private individuals to influence the process of public opinion-formation is also protected by the constitutional communication rights.<sup>185</sup> Interventions by private parties are exceptionally inadmissible in the case of misleading information shortly before the vote.<sup>186</sup> In a recent case, the Federal Supreme Court left the question open as to whether private financing of campaigns may be restricted.<sup>187</sup>

Jurisprudence treats interventions by the press as interference by ordinary private actors.<sup>188</sup> Freedom of the press ought to act as a patron saint.<sup>189</sup> TSCHANNEN comments on the fact that although the content section of news is open to the parties, substantial control is in the editorial section.<sup>190</sup> The Federal Supreme Court relies on the balancing power of 'external press pluralism'; the sheer number of politically divergent press titles is supposed to provide sufficient opportunities to contradict one-sided information.<sup>191</sup> The court notes that networked online information distribution and new reading habits by citizens have changed things. The court expressed the hope that the new information gatekeepers will give different political sides and actors the same opportunities to express themselves, especially if these information bodies have a regional or local monopoly.<sup>192</sup> With the power of the digital sphere and the difference in the governing rules and incentives, it is questionable whether the freedom of the press and external press pluralism can outweigh the pitfalls of

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183 BGE 119 Ia 271 E. 3b; 114 Ia 427 E. 4c; 147 I 194.

184 BGer 1C\_412/2007 of July 18, 2008, E. 6.2; see also Pierre Tschannen, *Staatsrecht der schweizerischen Eidgenossenschaft* (5th edn, Stämpfli 2021) § 52 N 1.

185 Yvo Hangartner, Andreas Kley and Nadja Braun Binder, *Die demokratischen Rechte in Bund und Kantonen der Schweizerischen Eidgenossenschaft* (Schulthess Zürich 2023) N 2590 et seqq.

186 BGE 119 Ia 271 E. 3c.

187 BGE 125 I 441 E. 3b.

188 Pierre Tschannen, 'Schutz der politischen Rechte' in Detlef Merten/Hans-Jürgen Papier (eds.), *Handbuch der Grundrechte; Grundrechte in der Schweiz und in Liechtenstein* (Dike 2007) § 220 491, N 71 zu § 220.

189 Pierre Tschannen, 'Art. 34 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 38 Art. 34 BV.

190 Ibid.

191 BGE 98 Ia 73 E. 3b.

192 BGE 117 Ia 41 E. 5a; see BGE 118 Ia 259 E. 3.

interventions by private actors, as will be discussed in chapter V.II. Furthermore, the new gatekeepers have joined the traditional gatekeepers of the mass media in the digital sphere as outlined above.<sup>193</sup> Whilst editorial power over information selection used to be held by the mass media, this power has further shifted to new, global gatekeepers. Thus, the government faces the difficulty of subjecting the new digital gatekeepers to legal rules.

The influence of a private individual is always inadmissible if any inadmissible means has been used. Examples of inadmissible means that violate art. 34 para. 2 BV are intimidations, threats, and bribery.<sup>194</sup> If the result of a vote has been influenced by such means in a significant manner, the voting result must be annulled. Significant deception of the electorate is another case of inadmissible influence in the run-up period. The deception must be in relation to a factual statement. Furthermore, the deception must happen shortly before voting so that correction by private individuals is not possible.<sup>195</sup> As the last requirement, it must be highly probable that the deception had a decisive effect on the voting result.<sup>196</sup> In the event of serious infringements of voting rules as well as the dissemination of false or misleading information shortly before the vote, the authorities may be obliged to intervene even without a legal basis.<sup>197</sup> If the authorities fail to comply with this obligation, a repetition of the vote can be requested. However, the requirements to prove undue influence on the decision-making process are strict. In its judgment of February 3, 1939, the Swiss Federal Court overturned an election and considered a private influence on an election at the municipal level to be serious private influence.<sup>198</sup> However, the Federal Supreme Court has not subsequently overruled a vote in the new case law.<sup>199</sup> MÜLLER and SCHEFER support the strict requirements to prove undue influence by a private party on the decision-making process, as the democratic system assumes that voters are capable of correctly identifying

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193 See chapter II.

194 Michel Besson, *Behördliche Informationen vor Volksabstimmungen, verfassungsrechtlichen Anforderungen an die freie Willensbildung der Stimmberechtigten in Bund und Kantonen* (Schulthess Bern 2002) 357.

195 BGE 135 I 292 E. 4.1.

196 BGE 119 Ia 271 E. 3c; Michel Besson, *Behördliche Informationen vor Volksabstimmungen, verfassungsrechtlichen Anforderungen an die freie Willensbildung der Stimmberechtigten in Bund und Kantonen* (Schulthess Bern 2002) 362.

197 BGer 1P.99/2003 of July 20, 2007, E. 4.2; see Jörg P Müller and Markus Schefer, *Grundrechte der Schweiz, im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* (4th edn, Stämpfli 2008) 618.

198 See 'ZBl 1939 p. 249' cited in BGE 118 Ia 259 E. 3.

199 See Jörg P Müller and Markus Schefer, *Grundrechte der Schweiz, im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* (4th edn, Stämpfli 2008) 618.

the exaggerations or inaccurate statements that frequently occur during voting or election campaigns.<sup>200</sup>

Considering the new possibilities of political data analysis and the personalised possibilities of influencing political opinions, it seems necessary to clarify when an influence is no longer in conformity with constitutional rights. Since the new threats come from private actors, the question is how constitutional rights work on a horizontal level and how they are enforced on a horizontal level.

## 5. Promoting Discourse-Incentivising Legal Institutions

In addition to the legal instruments to protect the unhindered will-formation process, there are also discourse-incentivising institutions. The relevance of such discourse-intencivising institutions should also be discussed with a view on the digital sphere and whether there is an obligation to translate and adapt such institutions to the digital sphere.

The understanding of democracy as self-governance in the form of an inclusive discourse of all citizens is also enabled by institutions that promote discourse among individuals. The separation of powers, the right to a fair hearing, the federal multi-centrality, as well as the autonomy of the municipalities are examples of institutions that structurally incentivise discourse.<sup>201</sup> The federal system has also been seen as incentivising a discursive deliberation.<sup>202</sup>

Creating the connection to the above overview of the democratic system, TSCHANNEN transfers the assumptions of the ideal discourse situation to the constitutional claims. He establishes three parallels to the right to vote: first, the right to vote is structured as freedom of participation, which is why everyone must be able to participate in the discourse. Second, the protected political rights includes the claim that the results of votes are only recognised if they reliably express the free will of the voters. Last, if, within certain limits, the right to vote protects the actual preconditions of free and genuine expression of will and therefore the asymmetries of the real discourse situation are of

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200 BGE 98 Ia 73 E. 3b; Jörg P Müller and Markus Schefer, *Grundrechte der Schweiz, im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* (4th edn, Stämpfli 2008) 618.

201 Pierre Tschannen, *Stimmrecht und Politische Verständigung* (Helbing Lichtenhahn 1995) 391; see Rainer J Schweizer, 'Entstehung und Entwicklung des Schweizerischen Föderalismus' in Oliver Diggelmann, Maya Hertig Randall and Benjamin Schindler (eds.), *Verfassungsrecht der Schweiz, Band I*, (Schulthess 2020) 531, 563.

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202 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 391; Jörg P Müller, 'Versuch einer diskursethische Begründung der Demokratie' in Walter Haller and others (eds.), *Im Dienst an die Gemeinschaft: Festschrift für Dietrich Schindler zum 65. Geburtstag* (Helbing Lichtenhahn 1989) 617, 625.

constitutional relevance. These are internal and external constraints which could prevent the voter from exercising their discursive rights. It is precisely discourse ethics that seeks to dismantle these limitations.<sup>203</sup> TSCHANNEN argues that, since voting rights elude dogmatically unambiguous classification, the right to vote is a guarantor of democratic structures and processes.<sup>204</sup>

In the context of the public side of political rights, TSCHANNEN discusses their possible horizontal effect. Due to the public side of the right to vote, voters have an extended right to appeal.<sup>205</sup> In addition, acts of private individuals that interfere with the voting processes are prosecuted to a certain extent under criminal and civil law.<sup>206</sup> Furthermore, the rules on reporting by radio and television would reduce the risk of horizontal impairments. The authorities can intervene in the aftermath of misleading propaganda on the street, at events, and in the press. He ascribes a limited horizontal effect to the right to vote in the field of the press based on the assumptions on the possibilities of horizontal restrictions of the constitutional political rights.<sup>207</sup> Furthermore, TSCHANNEN claims that the constitutional interest of the political rights should include a reasonableness of the decision-making processes. This interest applies to the decision-making process and concerns political fairness and equal opportunities of politicians. In its structure, democracy contains an underlying discourse ethic that at least encourages the consultation of discourse ethics as a critical guidance for the further development of the law.<sup>208</sup>

Interestingly, TSCHANNEN discusses extended claims to information by virtue of the political rights. He understands the concept of transparency ('Öffentlichkeitsprinzip') as a certain distribution of information, namely an even distribution based on free information flows. In other words, the principle of transparency concerns the dismantling of information asymmetries and information advantages. Information advantages lead to unequal power relations, which TSCHANNEN discusses in the context of the relationship between state and citizen. Information advantages allow unnoticed interference in civil liberties. Consequently, such asymmetries must be counteracted.<sup>209</sup> TSCHANNEN also criticises the fact that the courts do not recognise the

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203 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 393 et seqq.

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204 Ibid 16.

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205 Art. 82 lit. c BGG.

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206 Art. 279 and Art. 173 SCC; Art. 28 ZGB.

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207 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 24 et seqq.

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208 Ibid 394 et seqq.

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209 Ibid 424.

power-building effect of information asymmetries.<sup>210</sup> This effect is more challenging in the digital sphere than in the analogue world.<sup>211</sup> He further claims that weaknesses in the political process, as revealed by new research, should be interpreted in a discourse-ethical manner.<sup>212</sup> Freedom of participation requires the openness of decision-making structures. This means different things depending on the stage of the political process: egalitarianism and publicity among the actors are necessary for the decision-making process. The principle of egalitarianism takes up the idea that the practical discourse should be real, with the immediate presence of the arguing parties.<sup>213</sup> For the expression of opinions, the instruments must be content-neutral, because this is the only way to achieve a comprehensive discourse.

The question arises primarily as to whether the state has to create a discursive institution tailored to the digital readership because the readership of political information is now concentrated in the digital sphere and this sphere does not facilitate external information pluralism in a manner comparable to the traditional media sphere.

According to TSCHANNEN, the cultural mandate ('Kulturauftrag') of politics is to create preconditions in the relevant areas of the political process so that a sufficient degree of communicative action can be maintained and developed. In other words, TSCHANNEN discusses the possibilities of a discourse-ethical legal development in the phase of free will formation. He sees it as the task of the law to guarantee the general conditions of symmetry and autonomy of the discourse. Under certain circumstances, this means building up a sufficient degree of publicity. It is also necessary to teach the ability to engage in discourse. Part of this mandate is the education system. Democracy is highly dependent on independence of thought. The cultural mandate of politics demands the development of a political public sphere, a space in which discursive discussion can take place. Only in a space of unhindered and free communication flow can the political process utilise the potential for innovation and societal progress. What is relevant for the present research is in particular TSCHANNEN's claim that political communication must be able to establish itself in such a way that it can counterbalance the systemic forces such as administration, association structure, and economic factors. The communicative action of the collective should have a real chance to balance institutional

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210 Ibid 429.

211 See chapter II and chapter V.C..

212 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 404.

213 For instance Jürgen Habermas, *Diskursethik* (Suhrkamp 2009); Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 394.

power.<sup>214</sup> Structurally, a political public sphere is a network for communicating content and opinions. In other words, it is a social space consisting of forums such as demonstrations, podium events, publications, and media events where information and opinions can be exchanged.

The distinction between the individual as private individual and consumer and their role as politically responsible citizen that is evident in the doctrinal understanding of constitutional rights is also found in TSCHANNEN'S argumentation.<sup>215</sup> In the following paragraphs the governmental instruments that protect the free and unhindered political will-formation process are summarised. The changes in the digital sphere can only be discussed against the background of the philosophical concept of democracy as well as the historical development of Swiss democracy.

According to the consistent jurisprudence of the Federal Supreme court, Art. 34 para. 2 BV makes it a right of every Swiss voter that no voting result will be accepted that is not based on the free will of the voters that has been expressed reliably.<sup>216</sup> The right protects the free and unhindered will-formation process. The right to the preservation of voting secrecy allows citizens to build their own opinion without external influence and free from external pressure.<sup>217</sup> Voting secrecy not only provides protection against active notice of a political expression, but also requires the government to make arrangements such that the voters can trust in the anonymity of their votes.<sup>218</sup> The right to the preservation of voting secrecy is formal in nature.<sup>219</sup> Based on the legal aspect, voting secrecy is already violated when there is the mere possibility that third parties can obtain notification of the content of the vote.<sup>220</sup>

In the year 1972, the Swiss Federal Court decided in the case of *Aschwanden* on the legal nature of voting secrecy.<sup>221</sup> The appellant claimed that her

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214 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 405 et seqq.

215 Ibid 407 et seqq.

216 BGE 124 I 55 E. 2a; 121 I 138 E. 3.

217 BGE 104 Ia 215 E. 2b 223; Pierre Tschannen, 'Schutz der politischen Rechte' in: Detlef Merten and Hans-Jürgen Papier (eds.), *Handbuch der Grundrechte; Grundrechte in der Schweiz und in Liechtenstein* (Dike 2007) N 53 § 220.

218 Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR-Commentary* (2nd edn, 2005) Art. 25 N 34.

219 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 134; Cornel Borbély, *Der Grundsatz der geheimen Abstimmung, unter Berücksichtigung des E-Votings* (Stämpfli 2005) N 83.

220 Tomas Poledna, *Wahlrechtsgrundsätze und kantonale Parlamentswahlen* (Schulthess 1988) 262.

221 BGE 98 Ia 602 E. 10a.

right to secrecy of the vote had been violated because the polling station was arranged in such a way that office members could observe the voters while they were filling out the ballot papers.<sup>222</sup> In other words, the appellant claimed only that there was the possibility that her right to voting secrecy could be violated. The Swiss Federal Court affirmed the violation of voting secrecy and elaborated that the requirements to secure voter confidentiality must be strict.<sup>223</sup> The court affirmed the formal nature of the right as it argued that it is irrelevant whether the content of the vote has actually been noticed or not. In other words, the risk that the vote may be noticed by a third person violates voting secrecy and as a consequence the result of the poll cannot be accepted.<sup>224</sup> The active concealment of the vote by a citizen could itself be perceived as a political statement. Hiding one's own vote could be perceived by third parties as the attempt to express an opinion deviating from the majority.<sup>225</sup> Thus, voting secrecy needs to be guaranteed by the government and responsibility for it cannot be imposed on the voter instead. In another judgement, the Federal Supreme Court stressed that voting secrecy must be protected in practical manners if the voting conditions change.<sup>226</sup>

The principle of voting secrecy needs to be protected before, during, and after the voting procedure.<sup>227</sup> The unhindered will-formation process in the run-up to polls must be adequately protected by the authorities.<sup>228</sup> If in the days or weeks leading up to the poll the citizens had to make their opinions known, manipulation towards a particular opinion would be possible in a more targeted manner. Accordingly, the freedom to vote would be limited as the principle of the voting secrecy would not be protected in an adequate manner.<sup>229</sup> In the aftermath of the poll, the secrecy of the vote must apply as in the run-up

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222 Ibid.

223 Ibid E. 10b.

224 See Pierre Tschannen, *Staatsrecht der Schweizerischen Eidgenossenschaft* (5th edn, Stämpfli 2021) § 52 N 1957 et seqq; Nadja Braun Binder, *Stimmgeheimnis: Eine rechtsvergleichende und rechtshistorische Untersuchung unter Einbezug des geltenden Rechts* (Stämpfli 2006) 181.

225 Cornel Borbély, *Der Grundsatz der geheimen Abstimmung, unter Berücksichtigung des E-Votings* (Stämpfli 2005) N 92.

226 BGE 98 Ia 602 E. 10b.

227 Tomas Poledna, *Wahlrechtsgrundsätze und kantonale Parlamentswahlen* (Schulthess 1988) 260; Nadja Braun Binder, *Stimmgeheimnis: Eine rechtsvergleichende und rechtshistorische Untersuchung unter Einbezug des geltenden Rechts* (Stämpfli 2006) 183.

228 Ibid 182.

229 Cornel Borbély, *Der Grundsatz der geheimen Abstimmung, unter Berücksichtigung des E-Votings* (Stämpfli 2005) N 94.

to the poll. Voting secrecy thus entails the duty of the authorities to ensure that polling stations are suitably equipped to protect the individual votes.<sup>230</sup> In the analogue world, the claim has been that the government is to ensure the confidentiality of votes by using ballot papers, envelopes, and lockable ballot boxes. The ballot papers must be designed and arranged such that no conclusion can be drawn as to an individual's vote.<sup>231</sup> The scope of protection of voting secrecy comprises directly and indirectly enforceable parts.<sup>232</sup> The right to cast one's vote without third parties gaining knowledge of the content of the vote is directly enforceable.<sup>233</sup> Voting secrecy must protect the person entitled to vote against the state as well as against third parties. BRAUN argues that prior to the casting of a vote, the individual is only indirectly protected, by the fact that those entitled to vote cannot under any circumstances make a binding commitment to cast a vote in a particular manner.<sup>234</sup>

The introduction of postal voting in 1966 was already criticised at that time, as it was feared that voting secrecy could not be fully guaranteed. The argument is that ballot papers might disappear unnoticed and the absence of influence on voters while filling out the ballot papers cannot be guaranteed.<sup>235</sup> However, in the municipalities the secrecy of the vote is not legally protected.<sup>236</sup> There is a connection between the secrecy of the vote and the ability to influence voters. Since a vote already cast cannot be influenced, this is in any case only relevant with regard to upcoming votes. The political process thus assumes anonymity during the opinion-formation process and an effect of the political constitutional rights on the horizontal level in the digital sphere is to be questioned. I discuss such effect in chapter VII.

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230 BGE 98 Ia 602 E. 10b 612; Pierre Tschannen, 'Schutz der politischen Rechte' in Detlef Merten and Hans-Jürgen Papier (eds.), *Handbuch der Grundrechte; Grundrechte in der Schweiz und in Liechtenstein* (Dike 2007) 508.

231 Tomas Poledna, *Wahlrechtsgrundsätze und Kantonale Parlamentswahlen* (Schulthess 1988) 267; Nadja Braun Binder, *Stimmgeheimnis: Eine rechtsvergleichende und rechtshistorische Untersuchung unter Einbezug des geltenden Rechts* (Stämpfli 2006) 180.

232 In detail see Nadja Braun Binder, *Stimmgeheimnis: Eine rechtsvergleichende und rechtshistorische Untersuchung unter Einbezug des geltenden Rechts* (Stämpfli 2006) 158 et seqq.

233 Tomas Poledna, *Wahlrechtsgrundsätze und Kantonale Parlamentswahlen* (Schulthess 1988) 260.

234 Nadja Braun Binder, *Stimmgeheimnis: eine rechtsvergleichende und rechtshistorische Untersuchung unter Einbezug des geltenden Rechts* (Stämpfli 2006) 183.

235 Ibid 160 et seqq.

236 Giorgio Malinverni and others, *Droit constitutionnel suisse, Volume I l'Etat* (4th edn, Stämpfli 2021) N942 et seqq.

## E. Changes in the Digital Space Relevant for the Scope of the Constitutional Political Rights

As explained in the previous chapters, the legal system in Switzerland is based upon an established and well-proven system of sovereignty. According to democracy theory, citizenship cannot be understood without the necessary prerequisites of a functioning communicative public sphere. Furthermore, the democratic system is based on and legitimised by individuals taking charge of their autonomous capacities. The concept of democracy is a structure that allows society to continuously translate its societal changes and cultural shifts into legal norms.<sup>237</sup> This is a system in which the addressees of the law can view (hypothetically) themselves as co-authors of the law. In the following paragraphs, significant changes occurring in the digital domain that are of relevance from a democratic viewpoint shall be discussed.

### 1. Navigating the Impact of Networked Information Dissemination

Digital innovation has driven readership to digital channels and has complicated the business model of traditional newspapers. Journalistic work has been impeded by insufficient resources and increasingly the supply of information is personalised to the interests of the readership. Personalisation takes place not only at the level of distribution, but data analytics also influences the creation of journalistic output. The dominant gatekeepers of the digital sphere distribute information according to completely different criteria than the traditional gatekeepers, and additionally, data analysis plays a role in the relevant decision-making process. New, global gatekeepers of information govern the distribution of information according to their own norms that ultimately serve their business model.<sup>238</sup> Whilst the business of the press has been connected to the democracy-supporting tasks of creating and distributing democratically relevant information, the digital gatekeepers such as search engines and social media platforms have a different business model.

The vast amount of available information is one of the most significant differences between the traditional media landscape and the digital media landscape. The Internet and networked information technologies have made it easier to become an information producer, and various new gatekeepers

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<sup>237</sup> See Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing & Lichtenhahn 1995) 533.

<sup>238</sup> See chapter II.C.

have joined the information market. However, the reach of new information producers depends on new criteria that are different from the criteria that determined the visibility of information in the analogue world. The evolution of networked information-sharing tools has made it easier to reach a great number of consumers independently of the credentials that determined the credibility of a source in the analogue era.<sup>239</sup> Consequently, digital information is more prone to being incomplete, not objective, inaccurate, or even false in comparison to traditional news sources. Traditional media outlets function on the conditions of a reputational brand and of information scarcity. They filter information professionally and have a commercial incentive to uphold their credibility standard in order to be regarded as a reliable gatekeeper.<sup>240</sup> In chapter II, I have outlined how the dissemination of information by algorithmic filtering is affected by commercial incentives of the gatekeeper and the capacity of other commercial players to make use of the filtering processes. In addition, the sheer volume of information and consumership becomes a commercial asset due to the possibility of making commercial use of data. Scholars have stressed that digital information can lack traditional authority indicators such as author identity or reputation. Within social media applications, the credibility of information is evaluated in a different manner that often undermines traditional authorities.<sup>241</sup> The new economic situation for journalists, the lack of resources for the research part of journalism, the involvement of algorithms in content creation, the analysis of reading behavior to meet the consumer's interests, and the governing power of digital gatekeepers over the visibility of information are all phenomena that stand in contrast to the ideal discourse situation. According to HABERMAS, a public sphere in collective autonomy can define the common good if transparency can be guaranteed by a mediated publicity.<sup>242</sup> This is present when a certain independence of deliberative processes from their social environment can be ensured. This independence has been disrupted in the digital sphere by new power relations. Whether the deviation from an ideal discourse situation requires intervention by the state is difficult to define. Opinion formation is a complex process with psychological and social components that is very difficult to capture quantitatively. The danger that filter bubbles due to algorithmic selection pose to democratic autonomy is therefore very difficult to define.

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239 Miriam J Metzger and Andrew J Flanagan, 'Credibility and trust of information in online environments: The use of cognitive heuristics' [2013] 59 JP 211.

240 Ibid 212.

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241 John W Fritch and Robert L Cromwell, 'Delving deeper into evaluation: exploring cognitive authority on the Internet' [2002] 30(3) Ref Serv Rev 243.

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242 See chapter III.B.2.

The problem of selecting information based on one's own preconceptions was debated even before digitalisation. HERTIG pointed out as early as 1982 that the information provided is perceived before making political decisions with an existing predisposition.<sup>243</sup> Already in the pre-digital era, empirical research showed that the actual communication phase or information-consumption phase takes place selectively and interpretatively on the basis of one's own predisposition. HERTIG pointed out that the post-communicative phase is also characterised by selective memory and people thereby primarily process the information that is relevant for their own decision-making process. An empirical study of 1000 voters showed that 40% of the voters changed their minds within a few days of consuming new information.<sup>244</sup> For this reason, it appears difficult to evaluate whether from a constitutional rights perspective the digital developments require regulatory intervention to create or protect the conditions for the functioning of democratic processes.

Quantitative research carried out in recent years about potential dangers of filter bubbles resulting from algorithmic information selection have so far provided little concrete evidence of the existence of filter bubble.<sup>245</sup> However, filter bubbles exist among small segments of the population, especially those with little political interest and those who derive information from few sources. These diversity constrictions are not due to algorithmic information distribution.<sup>246</sup> A comparative study found that automated news aggregators and editorial selection decisions reveal comparable diversity.<sup>247</sup> A quantitative analysis showed that the sharing of news recommendations in social media networks is of greater relevance to constitutional rights than algorithmic selection. The networks of users within social media have a stronger filtering effect than algorithmic selection. Fragmentation can be empirically observed among populist and politically extreme attitudes as well as among supporters of conspiracy theories.<sup>248</sup>

The German Constitutional Court also made a statement about the changes in the distribution of information in a decision in 2018. The court stressed

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243 Hans P Hertig, 'Sind Abstimmungserfolge käuflich? Elemente der Meinungsbildung bei eidgenössischen Abstimmungen' [1982] 22 SVPW 35, 40.

244 Ibid.

245 Stephan Dreyer and Wolfgang Schulz, 'Künstliche Intelligenz, Intermediäre und Öffentlichkeit' (Bericht an das BAKOM, March 20, 2019).

246 Ibid 17 et seqq.

247 Frederik J Z Borgesius and others, 'Should We Worry About Filter Bubbles?' [2016] 5 IPR 1.

248 Stephan Dreyer and Wolfgang Schulz, 'Künstliche Intelligenz, Intermediäre und Öffentlichkeit' (Bericht an das BAKOM, March 20, 2019).

that algorithmic filtering by digital gatekeepers does not serve the pluralism of opinions, as its purpose is a one-sided business model.<sup>249</sup> The court further outlined that filtered information depends on various factors that complicate the distinction between facts, opinions, information, and advertisements.<sup>250</sup> This conclusion contrasts with the assumption of the legal framework of political rights that the Swiss electorate is capable of recognising exaggerations and is also able to detect misleading and false information on its own.<sup>251</sup> Within the digital environment, it has become more difficult to judge information and to differentiate between misinformation, exaggerations, and opinions. The Federal Supreme Court assumed within the pre-digital reality that ‘external press pluralism’ is sufficient as a balancing power to provide for adequate opportunities to counteract one-sided information bias.<sup>252</sup> With the digital shift, the possibility for external press pluralism depends heavily on technical gatekeepers that do not function as democratic watchdogs. Furthermore, the networked communication technologies have increased the difficulty of determining the credibility of a source. In contrast, within the traditional media environment, a limited number of sources were available and the barriers for publication and dissemination were comparably high. Moreover, the credibility of sources was associated with features such as formal positions indicating training, and education.

The digital sphere and the emergence of new gatekeepers have disrupted the information sphere of the broadcasters that are subject to the principles of objectivity and diversity of information. The purpose of the prohibition of political advertisements on broadcasting services has been to create equal opportunities for political opinions or parties, respectively, to reach voters. Within the digital domain, among the variety of gatekeepers, there is no equality in creating visibility for a topic of collective interest, nor transparency on underlying business interests or political interests. Due to the new technologies, the criteria that determine visibility depend on the rationales of digital gatekeeping processes, the attached economic incentives, and personal data analysis.

Based on the outlined changes, the question arises as to whether the state has to take action to protect the conditions for a deliberative political discourse in the digital sphere. So far no state guarantee for a deliberative discourse has been recognised by case law. However, as will be addressed in chapter V.I,

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249 BVerG, Ruling of the first senate from July 18, 2018, 1 BvR 1675/16.

250 Ibid.

251 BGE 135 I 292 E. 4.1.; see chapter III.D.4.

252 BGE 98 Ia 73 E. 3.

some scholars have established such a guarantee against the background of the changed circumstances due to digitalisation. The state finds its own justification in the assumption of everyone's innate autonomy and capacity to partake within a collective autonomy. In this sense, the state must create the conditions to enable and protect collective autonomy. Intervention by the authorities in the autonomous will-formation process has been about guaranteeing a pluralistic decision-making process, not about guaranteeing discourse autonomy. The legal theory outlines that deliberation requires an information environment that makes it possible to judge available information in terms of its objectivity and enables equal access to visibility for political opinions. The focus lies on a functioning journalistic market and on the visibility of a pluralistic set of opinions.

The previous problem concerned in particular the external aspect of political will formation, and thus the conditions that allow will formation in a way that corresponds to the Swiss system. Chapter III.D addressed the requirements for a collective autonomy to create an information and communication system, which, as a result, creates a collective autonomy by means of legal and institutional instruments. As explained in chapter III.D, *Article 34 BV* guarantees political rights in an abstract manner and establishes the essential principles of democratic participation. *Article 34 BV* ensures the required openness of debate for the democratic process and the legitimacy of direct democratic decisions.<sup>253</sup> The guarantee provided by *Article 34 BV* has a fundamental character, with its specific content derived from institutional law (state organizational law).<sup>254</sup> This law should adapt to new challenges that threaten the protected content of the constitutional right in question. Accordingly, possible new regulatory should be implemented at the federal level to ensure a nationwide interpretation of new laws. The openness for debate as protected by *Article 34 BV* is not a defined legal term, and this openness depends on the social and technological environment of the debates. From a constitutional perspective, the openness of the debate is protected, and whether or not an individual themselves is 'open for an inner or outer debate' is not of constitutional relevance.

In other words, whether or not an individual remains in a filter bubble by choice is not relevant from a constitutional rights perspective, since the option to remain in a filter bubble already existed (and was tolerated) before algorithmic information distribution. From a constitutional perspective, it seems, therefore, sensible to assess which technological, economic, and social

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253 BGE 150 I 17 E. 2.1.

254 BGE 150 I 17 E. 4.1; BGE 147 I 420 E. 2.1.

developments are, in fact, relevant and to develop guidelines based on the democratic principles established within Switzerland to assess future state intervention (see chapter VI.B).

## 2. Safeguarding the Requirements for Independent and Unhindered Will-Formation in the Digital Sphere

The Swiss political system is based on an understanding of the sovereign electorate being capable of making political decisions in reflective exchange with other citizens and on the basis of diverse and objective information that is provided. The complexity of information available in the digital sphere is problematic not only in terms of the assumption that the legal system is in place, but also in terms of the assumption that there is a protected space in which voters form their own opinions freely and independently. The combination of available personal data online and new innovations to analyse the personal data creates new opportunities for political nudging. The media and academia have been discussing the effect of political profiling since the 2016 U.S. presidential election. Technology-driven campaign tools are discussed under the term ‘microtargeting’.<sup>255</sup> This innovation has allowed voters’ political interests and psychological profiles to be analysed. Political messages can be personalised accordingly. In 2016 the Swiss journal ‘Das Magazin’ reported about the role of Cambridge Analytica in the U.S. presidential election in 2016. The claim was that Cambridge Analytica had used advanced data analytics and employed psychometric microtargeting to nudge voters towards a positive outcome for Donald Trump.<sup>256</sup>

Political nudging and targeting are not a novelty of the digital sphere.<sup>257</sup> The large amount of personal data available online and innovation in data analytics allow, however, for more precisely targeted political advertising and messaging and in a more unconscious form. In addition, innovations based on machine learning enable precise emotional analysis based on, for instance, text or voice analysis. The input data is obtained by following the online behaviour of citizens or by purchase of anonymised datasets.<sup>258</sup> In addition, the

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255 Tomas Söbbing, ‘Der Datenskanal bei Facebook und die rechtliche Zulässigkeit von künstlicher Intelligenz (KI) zur Beeinflussung der politischen Willensbildung (sog. Microtargeting) [2018] InTeR 182 et seqq.

256 Carole Cadwalladr, ‘The Great British Brexit Robbery: How Our Democracy was Hijacked’ (*The Guardian*, May 7, 2017).

257 See Hans P Hertig, ‘Sind Abstimmungserfolge käuflich? Elemente der Meinungsbildung bei eidgenössischen Abstimmungen’ [1982] 22 SVPW 35 et seqq.

258 Ayman Farahat and Michael C Bailey, ‘How Effective Is Targeted Advertising?’ (21st Conference on www, New York, 2012); Micheal M Franz, ‘Targeting Campaign Messages. Good for Campaigns But Bad for America’ in Travis N Ridout (ed.), *New Directions in Media and Politics* (Routledge 2019) 103, 117.

possibility of re-identification with anonymised data by means of data analytics generates even more data on the input side. There is a variety of companies offering similar services as Cambridge Analytica in the field of political analytics, including some with a target market in Switzerland.<sup>259</sup> For instance, the company Novalytica in Switzerland has analysed publicly available data relevant to influencing certain political campaigns. The data are, for example, about the distribution of religious views by village or income level of households in certain regions and so forth. Accordingly, the software may give clear indications as to where which political message should best be placed.

KROTZEK is a scholar who has analysed the effects of political profiling, in particular the efficiency of psychometric targeting in the political context. One of his studies concluded that a voter's feelings towards a candidate can significantly improve if the advertisement is adjusted to their personality profile. However, the congruence of advertisement with the personality profile does not positively affect the propensity to vote for that candidate. The study was conducted within the US concluded that microtargeting has a great potential to sway the evaluation of candidates but less potential to change political convictions.

The question of political microtargeting is situated at the intersection of global trends within economic freedom, the autonomy of national democracies, and the protection of personal autonomy and individual freedoms. Research conducted by PAPAKYRIAKOPOULOS (and others) exemplifies this field of tension. PAPAKYRIAKOPOULOS conducted an empirical analysis to test the effect of political microtargeting techniques. The aim of their research was to gain insights about the possibility of political nudging on the basis of publicly available data that is legally processed. They analysed the activity of 1'206'740 users of 570 public Facebook pages connected to Germany's major political parties with 250'000 Facebook posts with over 6 million likes linked back to them. On most of the social media platforms, users consent to commercial use of their disclosed personal data. The study shows that on Facebook an extensive dataset for potential microtargeting in German politics is available that can be analysed in a legally compliant manner. The data analysis by means of machine learning of 570 German political pages allowed the detection of 58'000 cross-pressured users. Thus, the possibility to extract political data on individuals from publicly available data is not to be underestimated.<sup>260</sup>

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259 Examples are the following companies Clarity Campaigns, Bluelabs, Deep Root Analytics, Targeted Victory, Novalytica.

260 Orestis Papakyriakopoulo and others, 'Social media and microtargeting: Political data processing and the consequences for Germany' [2018] 5 BIG DATA SOC 3 et seqq.

Another possibility of influencing opinion formation without personal data is by means of so-called ‘shadow profiles’. Shadow profiles can be constructed without permission from the data subject and for individuals who might not even be users of the service from which the data is collected. GARCIA has empirically tested the hypothesis of the establishment of shadow profiles by applying principles from network science and measuring how personal attributes of users are related to their friends on social networks.<sup>261</sup> The social network Friendster announced in 2011 that it was discontinuing its service, and the Internet Archive retrieved the information of more than 100 million users. GARCIA evaluated the first 20 million accounts, among which 6 million users had public friendship lists and 3.3 million had public personal information. From the available information, the researcher processed the personal data for criteria such as gender and relationship status. The researcher explains the phenomenon of ‘shadow profiles’, i.e., that the analysis of patterns of revealed relationship statuses that existed in the network revealed personal information of non-users through the available contact lists of users. The results of the analysis indicate that personal data of non-users of Friendster could have been predicted on the basis of the data shared by Friendster users. Consequently, this analysis shows that even not using social networks at all does not prevent new actors from extracting personal information about individuals. The widespread adoption of information technologies turns personal information into a much more pervasive and diffuse element in comparison to the analogue world.<sup>262</sup>

The above discussion has shown that a variety of legal instruments are used to protect the political identity and the capacity to form a political opinion in an undistorted way. The right to appeal against a voting result is granted as a subjective (defensive) right to every legitimate voter.<sup>263</sup> This protective instrument corresponds with the function of the electorate as an organ. Furthermore, the government is obliged to actively protect the secrecy of voting at the procedural level. This protection is enforced in a formal manner.<sup>264</sup> Furthermore, by penalising certain behaviours of manipulating voting procedures, criminal provisions also protect the unhindered will-formation process.<sup>265</sup> An active obligation is placed upon the government to intervene if

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261 David Garcia, ‘Leaking privacy and shadow profiles in online social networks’ [2017] 3 *Sci Adv* 1.

262 *Ibid* 4.

263 Art. 89 para. 3 BGG; 116 Ia 359 E. 3a.

264 BGE 98 Ia 602 E. 10b.

265 Art. 279 SCC and Art. 173 SCC.

misinformation dominates the public sphere shortly before the ballot.<sup>266</sup> Lastly, data protection regulations are another instrument to protect the scope of the political rights, as they apply within the public sphere for governmental bodies as well as third parties on the horizontal level. Political personal data is classified as sensitive personal data.<sup>267</sup> The FDPIC has issued a guideline concerning personal data in the context of elections and voting.<sup>268</sup> The guidelines of the FDPIC are viewed as an interpretative aid. Apart from the generally applicable principles of data protection, the FDPIC draws particular attention to the principle of transparency.<sup>269</sup> The FDPIC thus argues that there must be transparency about which methods are used to influence political opinions in order for political decisions to have legitimacy. Furthermore, the FDPIC points out that the processing of political personal data must be proportionate, without providing relevant criteria to assess the proportionality. Due to their classification as sensitive personal data, these may only be processed if, in the political context, the individuals concerned have given their explicit, self-determined, and sufficiently informed consent for their use. Declarations by which persons merely accept terms of use in a general manner do not constitute explicit consent. The same applies to statements subscribing to or commenting on the concerns and content of actors on social platforms, for example. Moreover, consent can only refer to one's own data. Informed consent also requires that interested individuals are fairly and fully informed about the processing of their data and the functioning of the analytical methods used for this purpose, including automations and artificial intelligence, prior to registration.<sup>270</sup> Providing fair transparency requires, especially in the political context, that data subjects are not influenced by misleading or false information about senders and sources or, in the case of individual communication, also whether they are interacting with a human being or an automated program. Complete information also includes information about the processing of data that has been enriched and evaluated with information from social media.<sup>271</sup> In this context, data protection rights are instru-

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266 Art. 3 lit. c FADP.

267 *Ibid.*

268 FDPIC, 'Guide by the data protection authorities of the Confederation and the Cantons on the application of data protection laws to the digital processing of personal data in connection with elections and voting in Switzerland', p. 12.

269 FDPIC, 'Guide by the data protection authorities of the Confederation and the Cantons on the application of data protection laws to the digital processing of personal data in connection with elections and voting in Switzerland', p. 12.

270 *Ibid.* 11.

271 *Ibid.*

mental in protecting the unhindered political will-formation process. However, the FDPIC also draws attention to opposing interests such as the interests of political parties to conduct campaign and marketing efforts. A political party may purchase a database originally constructed for marketing purposes by a data dealer and may legitimately use it to send out voting recommendations. The FDPIC considered that the interest of the party overrides the breach of data protection rights in this example.<sup>272</sup> In chapter IV.C.3, I further discuss the interconnectedness of the scopes of the political rights and data protection rights. Nevertheless, considering the importance of the protection of unhindered will-formation, I would regard the data protection rights as the overriding interest in the example given by the FDPIC.

Furthermore, the federal system of Switzerland has an influence on the regulation of voting secrecy. For the municipal level, the Federal Supreme Court has affirmed the compatibility of open voting with voting secrecy whilst considering the increased possibility of social pressure being exerted. At the municipal level with open voting in a municipal assembly, voters' political identity is exposed by the act of voting itself. One argument is that the discourse and everyone's access to it is of greater value and that citizens receive the information directly.<sup>273</sup> Nevertheless, this jurisprudence has been criticised.<sup>274</sup> It is noted that one exposes one's political opinion in a municipal assembly to fewer people than one would at the cantonal or federal level, if the voting procedure at those levels had the same open format. Furthermore, the greater anonymity at the cantonal and federal level would create an undefinable risk whilst at the municipal level the citizens are more or less familiar with those to whom they expose their opinions and thus disclose sensitive personal data. In other words, at the municipal level an element of mutual transparency and a certain level of trust exist that cannot be assumed at the cantonal or federal level. The difference in regulation shows that the threat that necessitates regulation stems from an informational asymmetry where the individual is unaware of who has access to their sensitive personal data at a given point in time. The historical analysis of BRAUN BINDER on the principle of voting secrecy supports this conclusion.<sup>275</sup> In other words, the purpose of voting secrecy is

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272 Ibid.

273 BGE 121 I 138 E. 4.

274 Cornel Borbély, *Der Grundsatz der geheimen Abstimmung unter Besonderer Berücksichtigung des E-Voting* (Stämpfli 2005) 70; see also Pierre Tschannen, 'Art. 34 BV' in Bernhard Waldmann, Eva M Belsler and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 45 Art 34 BV.

275 Nadja Braun Binder, *Stimmgeheimnis: Eine rechtsvergleichende und rechtshistorische Untersuchung unter Einbezug des geltenden Rechts* (Stämpfli 2006) 225 et seqq.

to protect against the extension of economic and social dependencies into the political sphere.<sup>276</sup> At the same time, the regulations have grown historically and mirror the Swiss understanding of sovereignty. According to this logic, political identity would have to be protected in a stricter manner in the anonymous global cyberworld.

The analysis has shown that digitalisation has created a new situation with new possibilities to influence individuals' opinion formation in a targeted manner. Academic voices have mostly addressed the question of the permissibility of microtargeting on the basis of data protection law.<sup>277</sup> However, data protection law has been created mostly in the context of safeguarding individual interests rather than collective democratic ones. Thus, it will be analysed in the next chapter how the constitutional content of political rights can be adequately taken into account within data protection law to respond to the new risks.

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276 Pierre Tschannen, 'Art. 34 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 45 Art 34 BV.

277 See Tomas Söbbing, 'Der Datenskandal bei Facebook und die rechtliche Zulässigkeit von künstlicher Intelligenz (KI) zur Beeinflussung der politischen Willensbildung (sog. Microtargeting) [2018] InTeR 182 et seqq.

## IV. A Democratic Lens on the Right to Informational Self-Determination

The challenges to personal political autonomy outlined above are connected with personal data and new opportunities of data analytics. Data protection and its further development and implementation in the digital sphere are already a field of research for itself. In the following, an outline of this field of research will be presented, in order to provide a democratic perspective on it as the next step. Furthermore, the connection between the right to informational self-determination and constitutional political rights will be presented. In chapter III.E, it has already been outlined that data-based targeting for political reasons is of constitutional relevance.

In recent years a variety of concerns have been raised about the use of personal data within society<sup>278</sup> and within academic discussions.<sup>279</sup> On the occasion of the rise of ‘Big Data’ scholarly work has focused on the pitfalls of the data protection framework and the vulnerability of the individual in terms of enforcing data protection within the digital sphere.<sup>280</sup> With the subsequent innovations in artificial intelligence the possibilities of gathering information about an individual have drastically increased. The concerns raised about these developments are an occasion to assess the legal instruments that protect

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278 See for instance Mitchell Alan, ‘Rethinking Personal Data: Strengthening Trust’ (*World Economic Forum*, 2012).

279 See for instance Adrienne Fichter, ‘Ich Sehe Etwas, Das Du Nicht Siehst’ in Adrienne Fichter (ed.), *Smartphone-Demokratie* (NZZ Libro 2017) 120 et seqq; Paul Ohm, ‘Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization’ [2010] 57 UCLA LR 1701; Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data: A Revolution That will Transform How We Live, Work and Think* (John Murray 2013); Lorenzo Magnani, ‘Abducting Personal Data, Destroying Privacy: Diagnosing Profiles Through Artefactual Mediators’ in Mireille Hildebrandt and Katja De Vries (eds.), *Privacy, Due Process and the Computational Turn: The Philosophy of Law Meets the Philosophy of Technology* (Routledge 2013); Mireille Hildebrandt, ‘Profiling: From Data to Knowledge: The Challenges of a Crucial Technology’ [2006] 30 DuD 548; Derecho Y Política 27; Paul De Hert and Serge Gutwirth, ‘Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of the Power’ in Erik Claes, Antony Duff and Serge Gutwirth (eds.), *Privacy and Criminal Law* (Antwerp 2006).

280 Mireille Hildebrandt, ‘Profiling and the Rule of Law’ [2008] 1 IDIS 55.

informational autonomy. TAMO-LARRIEUX has presented a valuable overview of the legal concerns about data processing that she categorised according to the stages of data processing: 1) data collection, 2) data analysis, 3) data use, and 4) data erasure or data storage.<sup>281</sup> In the context of these different stages of data processing the following concerns can be summarised.

At the point of data collection, the required consent for data processing is usually obtained within the terms and conditions users have to agree to. The paradox that people call for strengthening data protection online and at the same time broadly share personal information is discussed as the ‘privacy paradox’.<sup>282</sup> This development indicates the power of the digital market players. Further concerns that are addressed in academic publications are the lack of transparency, an imbalance of power<sup>283</sup>, informational asymmetry, and a lack of autonomy to exercise adequate control with respect to the collection of data.<sup>284</sup>

At the point of data analysis, the legal and ethical concerns relate to the resulting asymmetry of the knowledge that is gathered,<sup>285</sup> error-prone analysis, biases within the analytics that can translate into automated decision-making processes,<sup>286</sup> and a de-humanisation with respect to the underlying value of the data. With respect to the use of data analytics, scholars are concerned with a lack of transparency of automated decision-making processes, discrimination, manipulation within relationships characterised by informational and/or power asymmetry, and the lack of autonomy with respect to use of the results of data analytics.<sup>287</sup> The use of data analytics influences the

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281 Aurelia Tamò-Larrieux, *Designing for Privacy and its Legal Framework, Data Protection by Design and Default for the Internet of Things* (Springer 2018) 7.

282 Patricia A Norberg, Daniel R Horne and David A Horne, ‘The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors’ [2007] 41JCA 100 et seqq.

283 Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data—A Revolution That Will Transform How We Live, Work, and Think* (John Murray 2013) 17; Tal Z Zarsky, ‘Desperately Seeking Solutions: Using Implementation-Based Solutions for the Troubles of Information Privacy in the Age of Data Mining and the Internet Society’ [2004] 56 MLR 13, 26 et seqq.

284 Aurelia Tamò-Larrieux, *Designing for Privacy and its Legal Framework, Data Protection by Design and Default for the Internet of Things* (Springer 2018) 7.

285 Mireille Hildebrandt, ‘Defining Profiling: A New Type of Knowledge?’ in Mireille Hildebrandt and Serge Gutwirth (eds.), *Profiling the European Citizen: Cross-Disciplinary Perspectives* (Springer 2008) 17 et seqq.

286 See for instance Tal Z. Zarsky ‘Desperately Seeking Solutions: Using Implementation-Based Solutions for the Troubles of Information Privacy in the Age of Data Mining and the Internet Society’ [2004] 56(t) Maine Law Review 13, 51 et seqq.

287 Aurelia Tamò-Larrieux, *Designing for Privacy and its Legal Framework, Data Protection by Design and Default for the Internet of Things* (Springer 2018) 7.

sphere of the political will-formation process<sup>288</sup> as well as the freedom of communication online.<sup>289</sup>

Regarding the possibility of data storage, HILDEBRANDT address the lack of autonomy that can result in a self-fulfilling prophecy.<sup>290</sup> Another problem with data storage is possibilities of re-identification of anonymised data.<sup>291</sup> In this context, the lines between legal and ethical concerns are blurred as the legal relevance is difficult to substantiate.

Scholars either question the entire concept of granting autonomy over one's own personal data to the data subject,<sup>292</sup> or they doubt that the FADP and the GDPR can ensure the protection of the constitutional scope of informational self-determination in the digital sphere.<sup>293</sup> Furthermore, scholarly publications within this field have increasingly drawn attention to the public value of privacy rights and data protection rights. Scholars claim that privacy and data protection have a democratic value and that the current legal framework does not protect this value in an adequate manner in the digital sphere.<sup>294</sup> Nevertheless, there is little discussion of what exactly the democratic content of the right to informational self-determination is and how such a constitutional content shall be protected in the digital sphere. It seems, therefore, appropriate to take a democratic perspective on this constitutional right. On the one hand, this is because collective interests are also protected through this right. On the other hand, a further development of the doctrine against the background of the possibilities of implementation and the new risks is necessary.

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288 See chapter III.E; Lennart J. Krotzek, 'Inside the Voter's Mind: The Effect of Psychometric Microtargeting on Feelings Toward and Propensity to Vote for a Candidate' [2019] *International Journal of Communication* 3609, 3622; Orestis Papakyriakopoulos and others, 'Social media and microtargeting: Political data processing and the consequences for Germany' [2018] *BD&S* 9.

289 See for instance Bozdog Engin 'Bias in algorithmic filtering and personalization' [2013] *Ethics Inf Technol* 209, 209 et seqq.

290 See Mireille Hildebrandt, 'Profiling and the Rule of Law' [2008] 1 *IDIS* 55.

291 ICO, *Anonymisation: managing data protection risk; code of practice*.

292 Hans Peter Bull, *Sinn und Unsinn des Datenschutzes* (Mohr Siebeck 2015), Florent Thouvenin, 'Datenschutz auf der Intensivstation' [2019] 19(4) *Digma*.

293 Cécile de Terwange, 'The Right to be Forgotten and Informational Autonomy in the Digital Environment' in Alessia Ghezzi, Ângela Guimarães Pereira and Lucia Vesnić-Alujević (eds.), *The Ethics of Memory in a Digital Age* (2014 Palgrave Macmillan).

294 Mireille Hildebrandt, 'Profiling and the Rule of Law' [2008] 1 *IDIS* 55; Dirk Helbing, *Digital Democracy* (Democracy 2.0, 3.0, 4.0) in Dirk Helbing, *Next Civilization, Digital Democracy and Socio-Ecological Finance – How to Avoid Dystopia and Upgrade Society by Digital Means* (Springer 2021) 249, 249 et seqq.

## A. Legal Theory on the Right to Informational Self-Determination

The protection of one's own self-determined life is at the heart of a democracy and is protected by a variety of legal instruments.<sup>295</sup> In the following sections, the different constitutional rights that protect the individual's agency are briefly outlined with a focus on the right to informational self-determination. The author views the concept of informational self-determination from a democratic perspective. A democratic perspective requires the understanding of the principles of protecting the rule of law and the sovereignty of the people. Nevertheless, the regulations for the protection of one's own personality development and the right to a private life have been developed mostly in the context of protecting the freedoms of individuals.

The Swiss constitution of 1874 contained a guarantee of the protection of personality with the constitutional right of 'personal freedom'.<sup>296</sup> This right is not a protection of one's own personality, but a protection of those aspects which are of elementary importance for the development of the personality of the individual.<sup>297</sup> Art. 10 para. 2 BV guarantees a comprehensive right to determine one's own life in its elementary manifestations. Art. 13 para. 1 BV also protects the self-determined development of the personality, but in a narrower area than Art. 10 para. 2 BV. The right to private life guarantees an area of individual personality development protected from external interference. Consequently, the right to private life is often understood as a subcategory of the protection of self-development of one's own personality.<sup>298</sup> The following elements are considered elementary for the autonomous development of one's own personality: the choice and maintenance of personal relationships, the protection of social reputation, the freedom of sexual development, self-determined decisions about abortion, knowledge of one's own origin, self-determined termination of one's own life, and the postmortem protection of one's own personality.<sup>299</sup>

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295 See Art. 7 BV; Eva M Belser and Eva Molinari, 'Art. 7 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 59.

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296 BV version dated May 29, 1874.

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297 Jörg P Müller and Markus Schefer, *Grundrechte der Schweiz, im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* (4th edn, Stämpfli 2008) 138.

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298 BGE 133 I 77 E. 3; Jörg P Müller and Markus Schefer, *Grundrechte der Schweiz, im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* (4th edition, Stämpfli 2008), 139.

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299 Jörg P Müller and Markus Schefer, *Grundrechte der Schweiz, im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* (4th edition, Stämpfli 2008), 138.

The connection between democracy as a system that protects the dignity and self-determination of every individual equally and seeks to establish a governing system among the interests of the individuals, and the concept of privacy is also contained in the protection of human dignity by Art. 7 BV. Human dignity is violated when the privacy of a person is affected in a particularly severe way.<sup>300</sup> In my view, this protective aspect of data protection needs to be further defined in relationship to advancing technologies.

On an international level, art. 8 of the European Convention on Human Rights (ECtHR) protects everyone's right for their private and family life to be respected, including protection against intrusions into one's privacy by governmental bodies or by other individuals.<sup>301</sup> This right provides the protection of one's personal data, one's physical and moral integrity, as well as the right to establish relationships. Art. 7 of the Charter of Fundamental Rights of the EU protects the right to privacy while the right to control personal data is separately enshrined in art. 8 of the Charter.<sup>302</sup>

The constitutional right to the protection of one's privacy is enshrined in Art. 13 BV. Each person has the right to respect for their private life, their family life, and their home. Pursuant to Art. 13 para. 2 BV, every person is entitled to protection against the misuse of their personal data. Within the constitution, the right to respect for one's private life and to protection against misuse of one's personal data is enshrined under the header of 'privacy protection'.<sup>303</sup> There is dispute in the doctrine as to whether Art. 13 para. 2 BV is to be understood as a comprehensive guarantee of autonomy over any processing of one's personal data or whether it is a protection against misuse of personal data.<sup>304</sup> However, it is clear that self-determined action requires a certain control over one's personal data.

The right to informational self-determination originated in a constitutional risk that was seen in the relationship between the state and the citizen.<sup>305</sup> Today, risks rather stem from the relationships between private parties and

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300 Eva M Belser and Eva Molinari, 'Art. 7 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 61.

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301 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECtHR).

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302 Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

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303 See Art. 13 BV.

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304 See Eva M Belser, 'Zur rechtlichen Tragweite des Grundrechts auf Datenschutz: Missbrauchsschutz oder Schutz der informationellen Selbstbestimmung?' in Astrid Epiney, Tobias Fasnacht and Gaëtan Blaser (eds.), *Instrumente zur Umsetzung des Rechts auf informationelle Selbstbestimmung* (Schulthess 2013) 19 et seqq.

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305 BGE 128 II 259. E. 3.2.

market players. With the introduction of art. 13 para. 2 BV, the right to data protection is now independently protected and is part of the general right to respect for one's privacy.<sup>306</sup> Art. 13 para. 2 BV is particularly relevant against the background of the fact that numerous instances of data processing by private and governmental parties have led to an increased need for protection of the individual.<sup>307</sup>

According to the wording of Art. 13 para. 2 BV, everyone has the right to protection against misuse of their personal data.<sup>308</sup> The prevailing opinion interprets this provision as a comprehensive right to informational self-determination both vis-à-vis state authorities and vis-à-vis information-processing by private individuals.<sup>309</sup> Understood as personal data sovereignty, this right includes comprehensive control over the processing of one's personal data, independent from the value of personal information.<sup>310</sup> The individual determines whether their personal data can be processed for specific purposes and can withdraw their consent at a later point.<sup>311</sup> The FADP reaffirms this comprehensive understanding of Art. 13 para. 2 BV. The comprehensive understanding of the state's duty to protect in Art. 13 para. 2 BV corresponds to the constitutive-institutional understanding of constitutional rights. According to this understanding, authoritative decisions must be implemented in the entire legal system, as data protection is understood as a cross-sectoral task of the state.<sup>312</sup> As a consequence, the state must provide effective protection of this constitutional right against public authorities as well as against private parties.<sup>313</sup> Art. 13 para. 2 BV addresses the legislator, who is required

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306 Ibid E. 3.2; Oliver Diggelmann, 'Art. 13' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 32.

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307 Rolf H Weber, 'Neue Grundrechtskonzeptionen zum Schutz der Privatheit' in Rolf H. Weber (ed.), *Datenschutz – Zum Aufstieg einer neuen Rechtsdisziplin* (Schulthess 2015) 30.

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308 Patricia Egli, *Drittwirkung von Grundrechten, Zugleich ein Beitrag zur Dogmatik der Grundrechtlichen Schutzpflichten im Schweizer Recht* (Schulthess 2002) 164.

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309 Ibid 165; Eva M Belser, Astrid Epiney and Bernhard Waldmann, *Datenschutz, Grundlagen und Öffentliches Recht*, (Stämpfli 2011) N 86 § 6.

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310 Eva M Belser, Astrid Epiney and Bernhard Waldmann, *Datenschutz, Grundlagen und Öffentliches Recht*, (Stämpfli 2011) N 60 § 6.

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311 Maya Hertig Randall and Julien Marquis, 'Art. 13' in Vincent Martenet and Jacques Dubey (eds.), *Commentaire Romand, Constitution Fédérale* (Helbing Lichtenhahn 2021) N 62.

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312 BGE 143 I 253 E. 3.3 257; Patricia Egli, *Drittwirkung von Grundrechten, Zugleich ein Beitrag zur Dogmatik der grundrechtlichen Schutzpflichten im Schweizer Recht* (Schulthess 2002), 165 et seqq.

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313 Patricia Egli, *Drittwirkung von Grundrechten, Zugleich ein Beitrag zur Dogmatik der grundrechtlichen Schutzpflichten im Schweizer Recht* (Schulthess 2002) 165.

to ensure effective safeguards in the relationships between private individuals and public authorities as well as between private parties on the horizontal level. The concept of informational self-determination incorporates a negative right granted to the individual as well as a constitutional obligation for the state to protect against private impairments.<sup>314</sup>

The definition of the protective scope of art. 13 para. 2 BV posed difficulties to legal doctrine even before digitalisation. It has been argued that the wording in the constitution is misphrased.<sup>315</sup> Certain authors have pointed out that art. 13 para. 2 BV does not describe the object of protection, nor does it contain information about the purpose of protection.<sup>316</sup> According to GÄCHTER/EGLI, this constitutional article cannot be understood as codifying a comprehensive sovereignty over personal data.<sup>317</sup> It is argued that the protection of personality is also reasonably limited in legal practice. In this context, it is argued that only the elementary phenomena of personality development are legally protected, and no general freedom of action is protected. BELSER also points out that the broad scope of the protection of informational self-determination creates a problem in the digital sphere. BELSER argues that Art. 13 para. 2 BV should be understood as protection against misuse of personal data, not as granting comprehensive autonomy over personal data.<sup>318</sup> Similarly, THOUVENIN suggests a solution to the challenges related to data protection with an interpretation of this constitutional right that is oriented toward protection against negative consequences.<sup>319</sup>

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314 Ibid 165; Oliver Diggelmann, 'Art. 13 BV' in Bernhard Waldmann and others (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N9.

315 Philippe Meier, *Protection des données; fondements, principes généraux et droit privé* (Stämpfli 2011) 65; Eva M Belser, 'Zur rechtlichen Tragweite des Grundrechts auf Datenschutz: Missbrauchsschutz oder Schutz der informationellen Selbstbestimmung?' in Astrid Epiney, Tobias Fasnacht and Gaëtin Blaser (eds.), *Instrumente zur Umsetzung des Rechts auf informationelle Selbstbestimmung* (Schulthess 2013) 19, 33.

316 Eva M Belser, 'Zur rechtlichen Tragweite des Grundrechts auf Datenschutz: Missbrauchsschutz oder Schutz der informationellen Selbstbestimmung?' in Astrid Epiney, Tobias Fasnacht and Gaëtin Blaser (eds.), *Instrumente zur Umsetzung des Rechts auf informationelle Selbstbestimmung* (Schulthess 2013) 19, 34.

317 Regina E Aebi-Müller, *Personenbezogene Informationen im System des Zivilrechtlichen Persönlichkeitsschutzes* (Stämpfli 2005) 288; Thomas Gächter and Philipp Egli, Gächter T and Egli P, 'Informationsaustausch im Umfeld der Sozialhilfe' [2020] Jusletter, September 6, 2020.

318 Eva M Belser, 'Zur rechtlichen Tragweite des Grundrechts auf Datenschutz: Missbrauchsschutz oder Schutz der informationellen Selbstbestimmung?' in Astrid Epiney, Tobias Fasnacht and Gaëtin Blaser (eds.), *Instrumente zur Umsetzung des Rechts auf informationelle Selbstbestimmung* (Schulthess 2013) 19, 34 et seqq.

319 Florent Thouvenin, 'Datenschutz auf der Intensivstation' [2019] 19(4) Digma 212.

According to the prevailing understanding of Art. 13 para. 2 BV, any type of personal data processing must comply with the requirements of Art. 36 BV.<sup>320</sup> This constitutional scope of protection is primarily protected through the FADP and the cantonal data protection laws. The general principles of the FADP are the main instruments to enforce the right to informational self-determination that apply to private data processors and governmental processors.<sup>321</sup> The collection of personal data must be carried out in good faith and must be proportionate.<sup>322</sup> Personal data may only be processed for the purpose indicated at the time of the collection and must be transparent to the data subject.<sup>323</sup> In order for the principles to be translated into legal reality, appropriate organisational and procedural conditions must be ensured.<sup>324</sup> The instruments further include the obligation to register the data file with the data protection officer and a right granted to the individual to access their personal data that was collected.<sup>325</sup>

The scope of art. 13 para. 2 FADP encompasses a right to legal enforcement. This part of the content is directed at the legislator to protect against abusive data processing by private individuals. The guarantee of a right to informational self-determination is not absolute and restrictions of this right must meet the requirements of Art. 36 BV.<sup>326</sup>

As outlined within the introductory chapter, digitalisation and the amount of available data have changed the value and potential of personal data. In data analytics, data that was not previously linked is combined and correlated, which can lead to new findings that can create new social, economic, and political value. New self-learning algorithms enable new insights, which can hardly be predicted without data processing. Such data processing can be applied in various areas such as personalised medicine, stock exchange trading, and political advertising. The vulnerability of the protection of informational self-

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320 Jörg P Müller and Markus Schefer, *Grundrechte in der Schweiz, Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* (Stämpfli, 4th eds., 2008), 164 et seqq.; Eva M Belser, 'Zur rechtlichen Tragweite des Grundrechts auf Datenschutz: Missbrauchsschutz oder Schutz der informationellen Selbstbestimmung?' in Astrid Epiney, Tobias Fasnacht and Gaëtin Blaser (eds.), *Instrumente zur Umsetzung des Rechts auf informationelle Selbstbestimmung* (Schulthess 2013), 19, 33; BGE 147 I 346.

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321 Art. 2 FADP.

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322 Art. 4 para. 2 FADP.

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323 Art. 4 para. 3 FADP.

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324 Botschaft zum Bundesgesetz über den Datenschutz (DSG), BBl 1988 413, Ziff. 213.3, 433.

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325 Art. 29 para. 1 lit. b FADP; Art. 11a FADP.

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326 Eva M Belser, 'Der Grundrechtliche Rahmen des Datenschutzes' in Eva M Belser, Astrid Epiney and Bernhard Waldmann, *Datenschutzrecht, Grundlagen und öffentliches Recht*, (Stämpfli 2011) N86 § 6.

determination by data protection rights has been addressed since the early years of these technological advances, and some scholars now even question the legal concept of data protection itself. For instance, HÄRTING claims that the instruments of the current data protection framework are not suitable for the Internet sphere and therefore create legal uncertainty.<sup>327</sup> BULL questions the concept of informational self-determination itself and stresses that given the amount of personal information circulating, one cannot assume that anyone ever knew who had knowledge of their personal data. The author argues that this detailed knowledge based on personal data is irrelevant as long as the possession of information by third parties does not have an adverse effect on the individual.<sup>328</sup> WEBER also argues that the subjective-legal approach to constitutional rights can no longer be maintained in order to achieve the necessary level of protection against the new digital threats. He argues that it is mainly the transmission processes that must be considered worthy of protection by the regulatory authorities.<sup>329</sup> Due to the challenges of digitisation, a future-oriented model of constitutional rights must be discussed.

Within Swiss legal theory, there is no consensus on the conceptual basis of the data protection rights. According to THOUVENIN, it is questionable whether data protection is based on the protection of personal freedom, the protection of privacy, the protection of the right of personality according to Art. 27 ZGB, or on the protection of constitutional rights.<sup>330</sup> A few scholars view the right to informational self-determination as a *lex specialis* in relation to the rights to the protection of personality.<sup>331</sup>

At the European level, the EU-specific catalogue of constitutional rights recognised by EU law makes a distinction between the respect for privacy and personal data protection.<sup>332</sup> FUSTER claims in an international analysis that

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327 Nico Härting, 'Starke Behörden, schwaches Recht – der neue EU-Datenschutzentwurf' [2012] BB (8) 456, 640.

328 Hans Peter Bull, *Sinn und Unsinn des Datenschutzes* (Mohr Siebeck 2015) 21 et seqq.

329 Rolf H Weber, 'Synchronisierung von Technologie und Regulierung zur Schaffung sachgerechter Datenschutzstandards' in Volker Boehme-Nessler and Manfred Reh-binder (eds.), *Big Data: Ende des Datenschutzes?*, SRP – Schriften zur Rechtspsychologie Nr 15 (Stämpfli 2017) 55, 55 et seqq.

330 Florent Thouvenin, 'Datenschutz auf der Intensivstation' [2019] 19(4) Digma 207.

331 BGE 128 I 63 E. 3.168 et seq.; Giovanni Biaggini, *Bundesverfassung der Schweizerischen Eidgenossenschaft und Auszüge aus der EMRK, den UNO-Pakten sowie dem BGG* (2007 Zürich) Art. 13 N2; Eva M Belser, 'Der grundrechtliche Rahmen des Datenschutzes' in Eva M Belser, Astrid Epiney and Bernhard Waldmann, *Datenschutzrecht, Grundlagen und öffentliches Recht* (Stämpfli 2011) 36.

332 Art. 7 of the European Charter of Fundamental Rights of the European Union protects the respect for private and family life and Art. 8 of the European Charter of Fundamental Rights protects the right to the protection of personal data.

it is a misconception that the protection of personal data is derived from privacy and that these rights are comparable or similar.<sup>333</sup> She argues, however, that the right to privacy is relevant for the interpretation of personal data protection. The right to data protection is autonomous from the right to respect for private life as it can be applied in an independent manner. The relationship between two autonomous rights can, however, still be instrumental.<sup>334</sup>

In what follows, the emergence and development of the right to informational self-determination will be summarised and a democratic perspective will then be adopted in order to examine the right to informational self-determination more closely.

## B. Development and Regulatory Amendments

The concept of informational self-determination was initially developed by the Swiss Federal Supreme Court with reference to a landmark decision of the German Constitutional Court in 1983.<sup>335</sup> The subject of the famous census ruling in Germany that the Swiss Federal Supreme Court referenced was a population census which resulted in a public debate about data protection.<sup>336</sup> The possibilities of data collection were regarded as innovative in 1983. The data collection generated fears in Germany society about the uncontrollable proliferation of private data. Clearly, it was not data collection itself but rather the storage, further usage, and analysis of the data that might create threats to the right to private life. The Court's analysis was based on the evolution data analytics in the 1980s. Consequently, the right to informational self-determination was established against the background of the data analytics capabilities in the 1980s. In its analysis, the court considered the technical innovations that allow unlimited storage and use of personal data a special danger to the general right to freedom of self-development and the right to informational self-determination. Furthermore, the court addressed new possibilities to create profiles on the basis of new data storage and analysis potentials in relation to the informational asymmetries. Already in the 1980s, when data analysis was, compared to today, in a primitive form, the court outlined the danger of psychological pressure based on the creation of profiles without the knowledge of data subjects. According to the wording of the judgement, the individual has

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333 Gloria G Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Springer 2014) 268, 271.

334 *Ibid* 270.

335 BGE 128 II 259 E. 3.2 268.

336 BVerfG, Judgment of First Senate of December 15, 1983–209/83–, para. 1 et seqq.

the right to decide about the disclosure and usage of their personal data.<sup>337</sup> Against the backdrop of modern data processing possibilities, this right includes the protection against unrestricted collection, retention, processing, and transfer of personal information. Individual self-determination requires the freedom of choice to take or refrain from taking specific actions, including the possibility to act according to the decision taken.

With the proposal for the data protection law in 1988, the Federal Council also referenced the German Census ruling.<sup>338</sup> The need for data protection at the time was explained by referring to how individuals feel if they lack transparency about what personal data is known by others or the government. When an individual has no oversight on who holds and processes personal data about them, the individual may feel insecure. The Federal Council further explained that many people find it problematic to be no longer able to keep track of who is processing all the data about them. The legislator considered that the concerned individual does not appreciate, for example, when information about their employment is used in another context.<sup>339</sup> Against the background of the possibilities of data processing in 1988, the Federal Council stated that the individual is no longer in a position to predict who processes which data about them, where, and for what purposes.<sup>340</sup>

The evolution of the right to informational self-determination shows that data protection has been coupled with the right to privacy.<sup>341</sup> Moreover, the systemic understanding of informational autonomy is that it is one of the five parts of Art. 13 BV.<sup>342</sup> The other parts are all mentioned in Art. 13 para. 1 BV, namely the right to respect for private life, the home, and confidentiality of postal and telecommunications services. Within the Constitution, the protection against misuse of one's personal data is enshrined in paragraph 2 of art. 13 under the title 'privacy protection'.<sup>343</sup> The FADP is understood as a concretisation of the constitutional right to personal freedom, privacy, and protection against abuse of data protected in art. 10 para. 2 and art. 13 of the Federal Constitution and the protection of personality under private law in

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337 BVerfG, Judgment of First Senate of December 15, 1983–209/83–, para. 1 et seqq.

338 Botschaft zum Bundesgesetz über den Datenschutz (DSG), BBl 1988 413, Ziff. 1.1.1, 416.

339 Ibid Ziff. 1.1.1, 414.

340 Ibid 416.

341 Gloria González Fuster summarised and evaluated the emergence of personal data protection in the European Union: Gloria G Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Springer 2014), (see in particular 268 et seqq).

342 Oliver Diggelmann, 'Art. 13 BV' in Bernhard Waldmann and others (eds.) *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N8.

343 Art. 13 BV.

art. 28 et seqq. ZGB.<sup>344</sup> According to the prevailing opinion, the concept of informational self-determination is understood to be embedded in the general constitutional protection of personality rights, where this concept supplements the constitutional protection in the area of data processing.<sup>345</sup> The Federal Supreme Court also finds it difficult to distinguish between personal freedom, informational self-determination, and the right of personality. In BGE 128 I 63, the Federal Supreme Court assigned the processing of personal data to the scope of protection of personal freedom.<sup>346</sup>

In May 2018, the European Data Protection Regulation came into force at the European level. Already in 2011, the Federal Council decided to revise Switzerland's Data Protection Act of 1992. When the EU published its data protection regulation in 2016, the National Council wanted to include it in the revision of Switzerland's data protection law. The revision of the Swiss Data Protection Act entered into force in 2023.<sup>347</sup> The Data Protection Act was revised mostly due to technological developments. In substance, the legislator did not deviate from the original concept of informational self-determination, and the majority of the norms have not changed significantly. The information obligations and the transparency instruments are underlined, and a stronger distinction is made between the handling of personal data by private actors and the handling of personal data by the state.<sup>348</sup> In addition, data processors are subject to enhanced duties of care, especially with respect to data security.<sup>349</sup>

According to Art. 22 FADP, a data protection impact assessment must be carried out if a data processing may entail a high risk to the personality or constitutional rights of the data subject. A high risk results from the type, scope, circumstances, and purpose of the processing when new technologies are used.<sup>350</sup> A high risk exists in the case of extensive processing of sensitive personal data and if extensive public areas are monitored.<sup>351</sup> If the impact

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344 Bruno Baeriswyl, 'Big Data zwischen Anonymisierung und Re-Individualisierung' in Rolf H Weber and Thouvenin Florent (eds.), *Big Data und Datenschutz – Gegenseitige Herausforderungen*, (Schulthess 2014) 45, 47; Florent Thouvenin, 'Erkennbarkeit und Zweckbindung: Grundprinzipien des Datenschutzrechts auf dem Prüfstand von Big Data' in Rolf H Weber and Thouvenin Florent (eds.), *Big Data und Datenschutz – Gegenseitige Herausforderungen* (Schulthess 2014) 61, 69.

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345 Eva M Belser and Eva Molinari, 'Art. 7 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N37.

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346 BGE 128 I 63 E. 3.1 69; also BGE 128 II 259 E. 3.2; 148 II 349 E. 4.1.

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347 FADP.

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348 See FADP.

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349 See Art. 7 FADP.

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350 Art. 22 para. 1 and 2 FADP.

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351 Art. 22 FADP.

assessment shows that the planned processing, despite the measures envisaged by the data controller, will still result in a high risk to the personality or constitutional rights of the data subject, the data controller must first obtain the opinion of the FDPIC. If the FDPIC has objections to the data processing, they will propose additional measures to the data controller.<sup>352</sup> The consequence of this regulation is that a risk impact assessment must be carried out in the case of extensive processing of political personal data. If a data protection officer has been appointed, consultation with the FDPIC can be dispensed with.<sup>353</sup> This creates the situation that an internally appointed data protection officer weighs up conflicting interests without any transparency being established. Large-scale analyses of political personal data can have an influence that is relevant from the perspective of discourse ethics. Accordingly, the author suggests that in any case of such political personal data analytics, transparency should be ensured by reporting to the FDPIC.

The author has pointed out that the right to informational self-determination and its enforcement is of relevance for the political rights. Furthermore, the right is related to human dignity. Since there is controversy about the dogmatic classification and the further development of the right to informational self-determination, a democratic perspective on the right may provide indications for the further development of this right.

## **C. Examining the Democratic Values within the Right to Informational Self-Determination**

Within the legal theory about the rights to privacy and data protection, a variety of theories, classifications, and aspects of the concepts of privacy and data protection have evolved. Among scholarly voices, there is no consensus regarding the scope of protection of data protection and its underlying value.<sup>354</sup>

In this chapter, the author addresses the role of the different aspects of the individual in a democratic context, the doctrine in this context, and how these might possibly respond to technological innovations. The norms that protect the individual's agency concern different aspects of the individual and the right to informational self-determination takes on an important role in this context.

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352 Art. 23 para. 3 FADP.

353 Art. 23 para. 4 FADP.

354 See chapter IV.A.

As an introductory example, two different dogmatic concepts of privacy shall be outlined. The first concept is autonomy-privacy. In essence, it protects the self-determined agency of individuals that requires other actors to retreat in order not to constrain this agency. The second basic idea of privacy relates to identity and dignity-privacy.<sup>355</sup> At its core, it protects certain social norms that are regarded as fundamental to the identity and dignity of the individual in a civilised society, such as public prestige or the need to protect one's own identity. According to POST, the tension between these basic ideas is caused by the fact that the protection of identity and dignity tends to require an active and formative state, whereas the protection of privacy as autonomy requires above all the restraint of the state.<sup>356</sup> POST's assumption shows that within legal theory, there is a tendency to interpret the scope of protection of a constitutional right in relationship with the implemented protective instrument(s). Such interpretations create the difficulty of defining the scope of the constitutional rights independently from their practical implementability. For this reason, I argue that an analysis of the protective content of the right to informational self-determination should be embedded in its democratic function and take into account the vulnerability that the processing of personal data creates for the individual and for other constitutional interests.

### **1. The Dignity Aspect as Protected through the Right to Informational Self-Determination**

From a philosophical viewpoint, the right to informational self-determination as a constitutional right protects the individual in its autonomy, which is connected to human dignity. Not only have there been cases where human dignity has been violated by surveillance; the GDPR explicitly established the connection between human dignity and data protection law in its art. 88. Art. 88 GDPR clarifies that human dignity is one of the interests protected by the GDPR. As already outlined in chapter III.A, Art. 7 BV, which enshrines the protection of human dignity, mirrors this value and protects individuals' dignities as unconditionally equal to each other.<sup>357</sup> The constitutional protection of human dignity includes the protection of self-determination of the individual as an intrinsic value. The protective content of consti-

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355 Robert C Post, 'Three Concepts of Privacy' [2001] GLJ 2087.

356 Ibid; see also Oliver Diggelmann, 'Art. 13 BV' in Bernhard Waldmann and others (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 7.

357 Eva M Belser and Eva Molinari, 'Art. 7 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 51.

tutional human dignity encompasses the individual's agency and includes its protection if necessary.<sup>358</sup>

Legal theory reasons that the right to protect one's own privacy and personal data is derived from human dignity. The interpretation of the constitutional protection of human dignity within art. 7 BV includes the protection of self-determination and considers severe limitations on self-determination and privacy as a violation of human dignity. From a legal perspective, human dignity is an undefined (or undefinable) legal term and a philosophical concept, but all constitutional rights are rooted in an understanding of each individual's human dignity.<sup>359</sup> The philosophical body of thought creates a clearer connection between legal norms and autonomy: personal autonomy is what grounds the capacity to claim freedoms. Human beings cannot be considered to be able to claim freedoms unless they are considered autonomous. Thus, within private law, the protection of one's personality is protected for its own sake.<sup>360</sup> The challenge of finding adequate legal protections for the concepts of autonomy and human dignity is thus not a novel phenomenon of the digital era. However, as new threats are arising, it is necessary to draw attention to the underlying aspects of human dignity within the right to informational self-determination. The anchoring in human dignity has the consequence that a core content of informational self-determination exists. The further development of this right must be carried out in alignment with the protection of human dignity. In cases where human dignity is affected by a processing of personal data, the right to informational self-determination has to create the necessary transparency. In this context, a compromise in enforcement due to the difficulty of implementation in the digital would thus result in a violation of the rule of law. In addition, this aspect of human dignity within the right to informational self-determination also shows why it is insufficient for the further development of this law to focus only on specified negative consequences.

Human dignity is the starting point of the constitutional rights and is also relevant for the interpretation of the constitutional rights insofar as within each right the inviolable core can be determined on the basis of human dignity.<sup>361</sup> Within the discussion on the protection of individuals' agency and freedoms against new risks arising from newly developed technologies, a

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358 Ibid N 59.

359 Jörg P Müller, *Die Grundrechte der Verfassung und der Persönlichkeitsschutz des Privatrechts* (Stämpfli 1964) 67.

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360 Ibid 67.

361 Jörg P Müller, 'Grundlagen, Zielsetzung und Funktionen der Grundrechte' in Detlef Merten and Hans-Jürgen Papier (eds.), *Handbuch der Grundrechte, Grundrechte in der Schweiz und in Liechtenstein* (Dike 2007) N 13 § 202.

particular focus shall be on where human dignity is affected, and in such cases enforcement of uncompromised agency over one's personal data is required to create the necessary transparency. An example of this is the analysis of emotions on the basis of voice recordings, body temperature, or facial expressions. Under the revised FADP, biometric data processed to uniquely identify an individual is considered sensitive personal data.<sup>362</sup> This classification ensures the necessary transparency on possible infringements of other rights, such as the protection against discrimination or damage to reputation. Depending on how and for what purposes they are applied, such innovations create a vulnerability that may directly affect or compromise human dignity.

## 2. Safeguarding Identity through the Right to Informational Self-Determination

One possible violation of the right to informational self-determination derives from the use of personal information to make decisions about individuals without their participation in the decision-making process. This aspect of the constitutional right is also illustrated in the Art. 15 of the revised FADP, which establishes consultation obligations and increased information obligations for automated individual decisions based on personal data. It is therefore assumed that the right to informational self-determination provides the control of aspects of a person's own identity and thus protects their legitimate interest in being free from unreasonable constraints on the construction of their identity. As a consequence, the right to identity and the right to informational self-determination are considered to be linked to the concept of identity. The concept of identity has been defined as the right to have the attributes or facts of personality that are considered unique to an individual and recognised by others. Italian jurisprudence has added a social dimension for the right to identity and describes the characteristics as 'the right everybody has to appear and to be represented in social life [...] in a way that fits with [...] his or her personal identity'.<sup>363</sup> According to this definition, the right to identity grants a right to develop one's own personality and is at the same time linked to the image that one wants to have in society. DE ANDRADE concludes that based on this conceptualization, the right to identity is limited or affected when one's own indicia are used without authorisation in a way that cannot be reconciled

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362 See Art. 3 lit. c para. 4 FADP.

363 De Andrade NN Gomes, Oblivion: The Right to be Different ... from Oneself: Re-Proposing the Right to be Forgotten, in Ghezzi Alessia and others (eds.), *The Ethics of Memory in a Digital Age* (Palgrave Macmillan 2014) 65, 68.

with the identity that one wants to convey.<sup>364</sup> As a consequence, the individual must have the opportunity to correct their externally perceived identity. The concept of identity thus creates a bridge between the capacity to create an identity and what is perceived from the outside as an identity. Both concepts are legally protected by the right to a private life, the protection of one's personality, and the right to informational self-determination.<sup>365</sup>

The right to be forgotten is illustrative of the link between the concept of autonomy and identity. In the *Google vs. Spain* case, the ECJ strengthened the individual's informational self-determination against the background of the identity perceived in the digital realm by means of search engines.<sup>366</sup> The right to be forgotten serves a substantive identity interest that operates to enforce the right to identity also in contrast to one's own past identity. The Data Protection Directive of the European Union and the FADP in Switzerland predate not only the Internet era, but also the European Charter of Fundamental Rights. Thus, the development of enhanced data analytics as it exists today could not have been foreseen at that time. In 2014 the ECJ decided on the *Google vs. Spain* case and highlighted the right to informational autonomy by establishing the 'right to be forgotten' on the basis of the Data Protection Directive 95/46/EC. The right to data protection is not enshrined as an absolute right in the European Directive, as the processing of personal information is possible in the absence of consent when it is necessary for specific objectives. In that sense, the Directive requires a balance to be struck between conflicting rights in each individual case. Such balancing of interests also takes place in the application of the FADP.<sup>367</sup> The judgement established a right to have search results delisted based on art. 12(b) and 14(a) of the Data Protection Directive. The temporal aspect within this case shows that with the evolution of technologies, new criteria will be continuously developed within the application of the right to informational self-determination. The possibility to request a delisting of search results has been called a 'right to be forgotten'. Within the balancing of interests, the Court clarifies that the right to be forgotten does not amount to an obligation to delete search results, but to an obligation to seek a fair balance

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364 De Andrade NN Gomes, *Oblivion: The Right to be Different ... from Oneself: Re-Proposing the Right to be Forgotten*, in Ghezzi Alessia and others (eds.), *The Ethics of Memory in a Digital Age* (Palgrave Macmillan 2014) 65, 68.

365 See Florent Thouvenin and others, 'Normative Concepts of Information Management', in Florent Thouvenin and others (eds.), *Remembering and Forgetting in the Digital Age. Law, Governance and Technology Series* (Springer 2018) 15 et seqq.

366 *Google Spain SL v. Agencia Española de Protección de Datos*, May 13, 2014, C-131/12 (ECJ).

367 See e.g. BGE 148 I 233 E. 5.

between the interests of internet users in having access to the information and the data subject's constitutional rights guaranteed by articles 7 and 8 of the Charter. Art. 17 of the GDPR now provides a digital right to be forgotten to tackle the source of the problems of de-contextualised stored data and personal data processing.

The right to be forgotten has a wider scope and purpose as a concern about the link between the past and the present at a conceptual level.<sup>368</sup> As the recognised right relates to informational autonomy, it is one dimension of the protection of individual self-determination. In other words, the right to be forgotten is the recognition of the right to be different from one's past self (as an individual making conscious choices about oneself).<sup>369</sup> Thus, DE ANDRADE concludes that the broader set of rights under which the right to be forgotten operates are the right to personal data protection, the right to privacy, and the right to identity. The established case by the Court lays out a specific process to de-link search results with the goal of protecting a substantive interest or right. The right to be forgotten pursues a substantive identity interest that operates to enforce the right to identity. Besides an interest in the right to identity, the right to be forgotten pursues the right to be different from one's own past personality. This understanding draws attention to the fact that the de-construction of a past identity is necessary in order to construct a new one. The right to identity concerns all personal facts that are capable of transmitting an image to the public that is not correct according to the individual concerned. DE ANDRADE argues that the right to be forgotten must be associated with the right to identity instead of the right to privacy to protect the personal information that has become untruthful or false. Linking the right to be forgotten with the right to identity brings within its scope certain information that it would not normally cover if it were conceptualised as a privacy right or derived from the right to privacy.<sup>370</sup> At this point, DE ANDRADE makes the legitimate point that the right to informational self-determination (as encompassing the right to be forgotten) pursues the interests of the right to identity.

A right to the deletion of personal data is now expressed in art. 25 para. lit. c FADP and expressly guaranteed in connection with lawsuits arising from the protection of personality rights according to art. 28, 28a, 28g-28l ZGB.

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368 Cécile Terwangne, 'The Right to be Forgotten and Informational Autonomy in the Digital Environment', in Ghezzi Alessia and others (eds.), *The Ethics of Memory in a Digital Age* (Palgrave Macmillan 2014) 82 et seqq.

369 Ibid 82 et seqq.

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370 De Andrade NN Gomes, 'Oblivion: The Right to be Different ... from Oneself: Re-Proposing the Right to be Forgotten', in Ghezzi Alessia and others (eds.) *The Ethics of Memory in a Digital Age* (Palgrave Macmillan 2014) 44 et seqq.

Against the background of the preceding analysis, data autonomy creates the legitimate freedoms that can only be afforded against conflicting interests, and such a balance is to be struck in each individual case. The possibilities of data retention and further analysis against new data sets change how the balance is struck with conflicting rights and interests. As a consequence, the right to informational self-determination creates the necessary transparency to balance conflicting rights and interests that can be of constitutional relevance. The concept of identity includes a temporal element. Personal data as derived from internal aspects of identity are subject to change. The link between autonomy, the agency to create and re-create one's identity, and the concept of informational self-determination shows that the right is anchored in the autonomy of the individual and should not be seen as a consequence of the protection of personality. This aspect of the right to informational self-determination is also reflected in the new provision in the revised FADP on profiling (art. 4 lit. c FADP). This addresses the vulnerability of autonomy over one's identity that can arise from the fact that a data processor holds a vast amount of personal data about a data subject.

### **3. Ensuring Unhindered Political Will-Formation through the Right to Informational Self-Determination**

The FADP affords enhanced protection to sensitive personal data and personality profiles. Art. 3 lit. c FADP defines sensitive personal data by means of an exhaustive list. Information on the religious, ideological, and political views or activities of the data subject, personal information on health and genetic data, biometric data, data on administrative or criminal prosecutions and sanctions, and data on social assistance measures are sensitive personal data.

Political decision-making requires the consumption of information that nowadays predominantly takes place online. As outlined in chapter II, data analytics of political information consumption is part of new business models. As a consequence, a new threat has evolved that not only concerns the concept of informational self-determination but also affects the constitutional scope of the political rights. The secrecy of voting in particular protects not only the individual interests but also the collective legal interest of the unhindered deliberation process.<sup>371</sup> Due to the innovations of political targeting, the scope of protection of the political rights is affected by personal data processing but is currently protected by the right to informational self-determination.

In the 1988 consultation on the Data Protection Act, a majority rejected a Data Protection Act that would cover both the private sector and the federal

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371 See chapter III.D.5.

administration. With regard to the main issue, it was argued that data protection in the federal administration and in the private sector are conceptually different, and that regulation of both areas is hardly possible in a single decree. Furthermore, it was argued that a common standardisation would lead to a complication of the law.<sup>372</sup> The Federal Council rejected this objection and argued that the purpose of the law, e.g. the protection of personality from personal data violations, is the same in the Federal Administration and in the private sector. The most important principles of data protection law must also apply in both the private and public sectors. It was therefore argued that it is desirable that the same authorities are responsible for assessing data protection issues in both areas. Their power to intervene in the private sector was supposed to be much more limited, however. At that time, it was considered that this would be the best way to ensure a harmonious and coordinated development of personal data protection law on the horizontal level.<sup>373</sup> It seems possible that this decision has been the reason that public interests have been neglected in the further drafting of the law. The author has established in chapter III.D and chapter I.V.C that the protection of political personal data connects to the exercise of the right to vote. To this extent, the constitutionally protected scope of free opinion formation is also protected by the instrument of informational self-determination.

By granting the individual agency over their politically relevant personal data, a right to transparency about the processing of this information is granted. The scope of voting secrecy is thus protected by the right to informational self-determination on the horizontal level. Voting secrecy as a legal instrument is the implementation of the collective interests enshrined in the political rights. Such political rights are instrumental to the self-governance of a society as outlined in chapter III.D. Thus, in my view, the discussion of further development of the right to informational self-determination concerning political personal data needs to take the parameters of voting secrecy into account. Voting secrecy (the protection of voting activity as a form of sensitive political information) is protected in its formal nature. As the principle of voting secrecy extends before and after the poll, the legal asset is protected by the data protection framework.<sup>374</sup> Applying the doctrine of the protection of one's personality to the concept of informational self-determination undermines the underlying value of the political rights within this complex balance of interests.

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372 Botschaft zum Bundesgesetz über den Datenschutz (DSG), BBl 1988 413, 431.

373 Ibid.

374 See Ralph Doleschal and David Rumer, 'Anspruch auf Wahrung des Stimmgeheimnisses im bundesgerichtlichen Verfahren' in Andrea Good and Bettina Platipodis (eds.), *Direkte Demokratie, Herausforderungen zwischen Politik und Recht* (Stämpfli 2013) 87.

The objection could be raised that only the actual vote is covered by the scope of constitutional protection. A teleological interpretation, especially against the background of the deliberative theory of democracy, contradicts this argument. What is protected is the unhindered decision-making process, and the legislator has used various legal instruments to protect this unhindered sphere.<sup>375</sup> It is clear that in this context there must also be a process of weighing up interests, where individual interests in personalization, the economic freedom of the gatekeepers, and the right to freedom of information are opposed in an matrix of interests. The balancing of these interests is one part of the challenge, and transparency problems precede it.

At the moment, data protection experts carry out this balancing of interests in practice, predominantly using a risk-based approach. Accordingly, it seems necessary to specify criteria for balancing interests. Furthermore, the author recommends that when political personal data is intentionally collected and processed within large data sets, this data collection should be required to be reported to the FDPIC and an impact analysis should be submitted for approval. A data protection officer (external or internal to the company) does not appear to be the appropriate regulatory instrument to weigh public-law interests against private ones without corresponding guidelines.

#### **4. The Transparency Aspect as Protected through the Right to Informational Self-Determination**

Experts in data protection law are having to deal with a variety of applicable regulatory norms and a quickly evolving jurisprudence. Scholars have drawn attention to the fact that the enforcement of complete data protection compliance is unrealistic. Consequently, scholars have concluded that the understanding of the right to informational self-determination as complete autonomy over personal data should not be upheld. The right to informational self-determination should be reframed against the background of the arising risks.<sup>376</sup>

Moreover, data protection rights are a vulnerable concept due to the individual-rights framework. Tying the affordance of protection to individuals' rights makes the protection uncertain. The framework of subjective individual rights places the enforcement of the right to privacy in the hands of the individual concerned. HILDEBRANDT similarly elaborated that the affordance of privacy rights depends on social values and the sense of self. Furthermore, the public value of privacy rights is affected by the limited affordance of privacy

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<sup>375</sup> See chapter III.D.

<sup>376</sup> See for instance, Hans Peter Bull, *Sinn und Unsinn des Datenschutzes* (Mohr Siebeck 2015), Florent Thouvenin, 'Datenschutz auf der Intensivstation' [2019] 19(4) *Digma*; see chapter IV.A.

rights at a larger scale. She further elaborates on the limitations to the rule of law due to informational asymmetries online that affect individuals' autonomy.<sup>377</sup> The transparency that the concept of informational self-determination creates is an important part of the rule of law in a democracy. In the actual affordance of the individual rights, this does not mean the protection includes a comprehensive protection of one's personal data. However, especially in the pre-digital world, the concept of personal data sovereignty was a simple instrument to grant transparency to the individual when an abuse could possibly take place. The additional rights in the event a data controller takes autonomous decisions on the basis of personal data illustrates this transparency-function of data protection rights.<sup>378</sup> In such cases, the data subject has a right to be heard and the data controller needs to actively inform about autonomous decision-making processes.<sup>379</sup> Concluding from this constitutional context, the transparency aspect needs to be enforced without compromise if a core aspect of another constitutional right might be violated.

## 5. Data Protection Challenges in Innovation and Legislation

The fears and concerns related to data analytics and emerging technologies have, among other things, driven the recent revisions to data protection law in Europe. These driving concerns have been related to different constitutional-rights interests (for instance some of them were of political nature, some of them stand in connection with the interference with physical integrity, and so forth). In practice these different underlying interests have not been properly taken into account and are not reflected in the revised act. As a consequence, there is not enough guidance on how conflicting interests should be balanced in particular cases. Rather, the data protection supervisory authorities respond in a reactive manner to arising risks. For example, three data protection supervisory authorities in Europe decided in 2022 that the use of Google Analytics as a cookie does not meet the level of protection required by the GDPR anymore, even when the data transfer is based on a concluded standard contractual clause. Legal practice in Switzerland adapted to these decisions.<sup>380</sup> This has resulted in high costs for companies to comply with the ever-changing data

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377 See Mireille Hildebrandt, 'Profiling: From Data to Knowledge: The Challenges of a Crucial Technology' [2006] 30 DuD 548; Mireille Hildebrandt, 'Profiling and the Identity of the European Citizen' in Mireille Hildebrandt and Serge Gutwirth (eds.), *Profiling the European Citizen* (Springer 2008); Mireille Hildebrandt, 'Law as Information in the Era of Data-Driven Agency' [2016] 79 TMLR 1.

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378 Art. 14 FADP; Art. 22 GDPR.

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379 Art. 14 para. 2 FADP.

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380 David Rosenthal, 'How to Legally use Google Analytics in Europe'.

protection requirements. At the same time, there is also greater uncertainty for experts in data protection law as there is a lack of guiding criteria for weighing up interests and assessing risks in the particular case.<sup>381</sup>

The democratic lens on the right to informational self-determination in this chapter has highlighted different aspects and functions of this constitutional right. This democratic lens has led to certain conclusions about the theoretical level of this right. They are summarised in what follows.

A part of the protected scope of the right to informational self-determination connects to the rule of law, especially its function of protecting human dignity and its transparency function to unravel potential violations of other constitutional rights. Since the right to informational self-determination protects a part of human dignity and at the same time fulfils an essential transparency function, the further development of this constitutional right cannot be oriented (only) towards the negative consequences. As already mentioned, this approach has been proposed in academia.<sup>382</sup> Moreover, these aspects of the right to informational self-determination suggest disconnecting the right to informational self-determination from the right to privacy and understanding this constitutional right as an independent constitutional right instead.

Furthermore, the democratic view has provided further insights on how conflicting interests should be balanced. The author suggests that depending on which aspect of the right to informational self-determination is engaged, different parameters should apply in practice. If the processing of personal data amounts to a violation of human dignity, there is no space to strike the balance in favor of a contradicting interest. Consequently, the first evaluation should be about this relational aspect. There is a need to create guidelines on the violation of human dignity by emerging data-driven technologies. Moreover, if political autonomy is engaged, legal theory on political rights should be consulted when balancing conflicting interests. If the autonomy to create and re-create one's identity is compromised, probably new parameters need to be developed to strike an adequate balance in each case. Such parameters could be introduced to the FADP.

As has been shown within this chapter, the right to informational self-determination is understood either as informational sovereignty or as protection against abuse on the basis of the processing of personal data. Furthermore, this constitutional right is seen either as an outflow of the general protection of personality or as connected with the right to privacy. The right to informational

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381 David Rosenthal, 'Datenschutz und KI: Worauf in der Praxis zu achten ist' [2022] *Jusletter IT*, April 22, 2022.

382 Florent Thouvenin, 'Datenschutz auf der Intensivstation' [2019] 19(4) *Digma* 212.

self-determination has different facets and has been greatly challenged by the rapid development of new technologies and business models. The existing theory of this right no longer provides for conclusive solutions. Some scholars have called for a reinterpretation of the right to informational self-determination under the conditions of the information society, or for changes and extensions of the tools of protection for this constitutional right.<sup>383</sup> Furthermore, there are authors who dismiss the right to informational self-determination as a legal misconstruction.<sup>384</sup> Their arguments concern in particular the relationship between scope of protection on the one hand and intervention on the other hand.

The questions that arise regarding data protection in the digital sphere or the concept of informational self-determination are numerous. However, within this chapter various aspects of the right to informational self-determination have been discussed that are of relevance for the further development of this constitutional right. The transparency function of this right is necessary for the enforcement of various interests relevant to constitutional rights. Against the background of the functions of the right to informational self-determination previously outlined, the author recommends disentangling the right to informational self-determination from the protection of personality. Furthermore, I propose to define the protective content of the right to informational self-determination as ‘an impermissible vulnerability resulting from the processing of personal data that has constitutional significance’. By this definition, the constitutional content would not be understood as a comprehensive sovereignty of the individual over their data, as the implementation of such an understanding is practically impossible. At the same time, with this definition the constitutional right is not limited to protection against misuse and would include vulnerabilities of the individual created by personal data processing.<sup>385</sup> If, from the point of view of the content of constitutional political rights, an inadmissible vulnerability of the independent formation of political opinions has been brought about on the basis of data processing, adequate protection would have to be implemented to prevent such vulnerability. If a

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383 See Maximilian von Grafenstein, ‘Refining the Concept of the Right to Data Protection in art. 8 ECFR – Part II’ [2021] 2 EDPL 190; Florent Thouvenin, ‘Datenschutz auf der Intensivstation’ [2019] 19(4) Digma.

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384 Karl-Heinz Ladeur, ‘Das Recht auf informationelle Selbstbestimmung: Eine juristische Fehlkonstruktion?’ [2009] 2 DÖV 45 et seqq.

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385 Diggelmann also views the interpretation that the right to informational self-determination to protect only the misuse by means of personal data processing is a too narrow interpretation, Diggelmann O, ‘Art. 13 BV’ in Bernhard Waldmann, Eva M Belsler and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 33.

vulnerability that directly affects human dignity arises through the processing of personal data, the standard of art. 7 BV should be applied. The proposed definition also appears to be in line with the need for continuous development of the content of this constitutional right as technologies evolve, allowing for the interest in innovation to be balanced against other interests. As technology develops, these interests must be protected such that the right balance is struck between innovation, economic interests, and the interests of informational self-determination. Within this process, the democratic interests in the right to informational self-determination should be considered in the context of further technological developments. The proposed definition of the protected content of the constitutional right would allow for an adequate balancing of conflicting interests, and more guidance on how to balance the interests would have to be developed. The revised FADP strengthens existing data protection rights but retains the same governance instruments as the previous version. However, it still lacks comprehensive guidelines at an abstract and doctrinal level for balancing conflicting interests in the course practical implementation, especially when multiple constitutional rights are at stake. The FADP neither clarifies how the protective scope of the relevant constitutional article should be interpreted nor resolves ongoing disagreements in legal scholarship. Due to the legal uncertainty within academia about the definition of the scope of the constitutional right, there continues to be a variety of recommendations for data protection measures at both the cantonal and federal levels, perpetuating a fragmented and challenging regulatory landscape.

The latest revision of the FADP has strengthened existing data protection rights, however, the revised version uses the same governance instruments as the previous one. Nevertheless, there remains a notable absence of comprehensive guidelines on an abstract and dogmatic level to govern the balancing of conflicting interests during practical implementation, particularly when multiple constitutional interests are involved.



## V. Constitutional Protection of Communicative Public Spheres

The newly created media spaces with their own self-created governance pose a challenge to the law as to how they can be regulated, with which instruments, and how new regulations can be reconciled with existing legal doctrine. One of the open questions is how discourse autonomy can be protected and ensured in digital spaces. In this context, the preliminary questions are whether the legislator has a constitutional basis to regulate at all in the field of online media and which regulatory instruments serve to protect the object of protection of the constitutional communicative rights. The Federal Council has initiated a discussion on the regulation of communication platforms, and academic reports are currently being compiled in this context. One of the options being evaluated is a possible regulation of digital communication platforms. This includes the evaluation of financing traditional newspapers. Furthermore, the risks to be addressed in this context are in particular misinformation, hate speech, lack of transparency, and insufficient journalistic standards within the information sphere of digital platforms.<sup>386</sup>

The exchange of information, opinion formation, and the possibility to state one's own opinion are indispensable for a functioning democracy.<sup>387</sup> Swiss democracy understood as a deliberative model of democracy protects the autonomy of communicative spheres at the constitutional level. The communicative rights serve the development of the individual's agency and protect the public sphere for a deliberative exchange. The autonomy of the public sphere(s) within a self-governed democracy is a precondition for its functioning. The Federal Supreme Court has described the right to freedom of opinion as the 'fondement de tout Etat démocratique'.<sup>388</sup> Against the background of the theory of deliberative discourse, the constitutional communication rights enable the deliberative discourse by creating public spheres and are thus requirements

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386 Federal Council, 'Der Bundesrat will breite Diskussion zur Regulierung von Kommunikationsplattformen' November 17, 2021.

387 BGE 96 I 586 E. 6; BGE 147 I 194; see also BGE 149 I 2 E. 3.3.6.

388 Ibid.

for the functioning of collective autonomy.<sup>389</sup> The content of communicative rights in the digital sphere shall thus be discussed within their democratic context.

In this chapter, the constitutional structure of protection and the underlying rationales will be explained. The Swiss Constitution guarantees different basic rights to unhindered communication in art. 16–18 and 20–23 BV. Besides their function at the level of the collective, the constitutional communicative rights are regarded as an essential foundation for the development of the individual's identity within a society.<sup>390</sup> The constitutional rights of free communication comprise different rights that each protect different forms of communicative autonomy. Art. 17 BV protects the dissemination of information in the press and other media. Art. 17 and art. 93 para. 3 BV protect the freedom of radio and television. The freedom of information in art. 16 para. 1 and para. 3 BV secures the freedom to receive information and access to information. Art. 20 and art. 21 BV protect scientific freedom and artistic freedom. Furthermore, the freedom of communication through association is protected by art. 22 BV. As already explained in chapter III.D.4, the formation of opinions in the run-up to elections and votes is protected (additionally) by the political rights (art. 34 para. 2 BV). Furthermore, the freedom to express one's opinion by filing a petition with the authorities is protected by the freedom to petition in art. 33 BV. Commercial statements are protected as part of art. 27 BV. The regulatory instruments vary across the different public spheres. In the following sections, the different instruments are summarised with a particular focus on highlighting the digital challenges within a relational matrix of a variety of gatekeepers, content producers, and recipients.

## A. Constitutional Protection of Autonomous Communication Spheres

According to art. 16 para. 1 BV, freedom of expression is guaranteed. Paragraph 2 of this article guarantees the right of everyone to freely form, express, and impart their opinions.<sup>391</sup> Art. 16 para. 3 BV protects the right to freely receive information and to gather it from generally accessible sources. The freedom to form one's own opinion is a central human need and a requirement for

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389 See chapter III.B.

390 Jörg P Müller and Markus Schefer, *Grundrechte in der Schweiz. Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* (4th edn, Stämpfli 2008) 347.

391 BGE 132 I 256 E. 3; 130 I 369 E. 2; 127 I 164 E. 3a.

one's own personality.<sup>392</sup> The freedom to express one's opinion is considered an extension of the freedom of thought.<sup>393</sup> The freedom of opinion serves the emotional, intellectual, and social development of an individual.<sup>394</sup> Its scope of protection includes the communication of the totality of human thought and all means of communication.<sup>395</sup> The protection is independent from the content of expressed thought and the chosen means of expression.<sup>396</sup>

The freedom to form and express an opinion is important for societal development as it provides impulses for change and dissent. Generally, the constitutional rights of communication serve the essential human need to express oneself to others and to engage with others through communication. Thus, the freedom of expression is fundamental for a democracy. It allows for criticism and dissent and thus promotes innovation and progress in society.<sup>397</sup> According to legal theory, only a well-informed citizenry, confronted with multiple opinions, is capable of the reflection and deliberation that makes democratic decisions seem legitimate.<sup>398</sup> The acceptance of democratic decisions also depends on the extent to which minority opinions can be expressed.<sup>399</sup> As a consequence, the communicative freedoms have a privileged position based on their function for democracy.<sup>400</sup> In the concept of deliberative democracy, the public sphere is seen as the foundation for the development of an active citizenry and as a guarantee for transparency provided to the sovereign through the mediated publicity.<sup>401</sup>

Within the scope of freedom of expression, the *forum internum* can be distinguished from the *forum externum*. The *forum internum* concerns the internal processing of thought and forming of opinions by an individual. It grants

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392 BGE 96 I 586 E. 6.

393 Walter Berka, *Medienfreiheit und Persönlichkeitsschutz. Die Freiheit der Medien und ihre Verantwortung im System der Grundrechte* (Springer 1982) 103.

394 Maya Hertig, 'Art. 16 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 3.

395 BGE 127 I 145 E. 4a.

396 *Ibid*; 138 I 274 E. 2.2.1.

397 Maya Hertig, 'Art. 16 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 4.

398 Maya Hertig, 'Art. 16 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 3; Christoph B Graber, 'The Future of Online Content Personalisation: Technology, Law and Digital Freedoms' [2016] Zurich University i-call working paper 2016/01, 1, 7.

399 Maya Hertig, 'Art. 16 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 3.

400 BGE 127 I 145 E. 4b.

401 Ralf Heming, *Öffentlichkeit, Diskurs und Gesellschaft, Zum Analytischen Potential und zur Kritik des Begriffs der Öffentlichkeit bei Habermas* (DUV 1997) 5.

a protection against all pressure to conform with an opinion, to change one's opinion, or to have an opinion at all.<sup>402</sup> The forum externum includes the right to express one's opinion and to communicate one's opinion to third parties.<sup>403</sup> The right not to be forced to express one's opinion is protected as well.<sup>404</sup>

The freedom of expression includes the freedom of the press and protects everyone's right to express their thoughts by means of the printing press. Freedom of opinion in the narrower sense presupposes freedom of information, as the individual must be able to rely on a great deal of factual material in forming their opinion and in reviewing their opinion once it has been formed.<sup>405</sup> The underlying assumption of this constitutional right is an image of the citizen who is characterised by an independent way of thinking and reasoning. The citizen who expresses their own opinion is thus connected to the democratic state that values each opinion equally.<sup>406</sup>

The freedom of expression is primarily protected by defensive rights. However, obligations to implement active measures can be derived from this constitutional right as well. The state is obliged to take appropriate measures to realise the freedom of opinion where the free exchange of opinions and information is hindered by social and economic circumstances.<sup>407</sup> In this context, the Federal Supreme Court has pointed to the third-party effect of constitutional rights. There is an objective-institutional side to the constitutional communicative freedoms, which also have a third-party effect in order to realise the pluralistic competition of information for a functioning democracy.<sup>408</sup> For example, the state is obliged to take precautionary measures to ensure the safety of threatened journalists.<sup>409</sup> Furthermore, the freedom of expression may also give rise to a right to use public property and thus give rise to active obligations.<sup>410</sup> Thus, in the regulation of online media, the focus

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402 Maya Hertig, 'Art. 16 BV' in Bernhard Waldmann and others (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 14; Christoph B. Graber, 'The Future of Online Content Personalisation: Technology, Law and Digital Freedoms' [2016] Zurich University i-call working paper 2016/01, 1, 7.

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403 Gillberg v. Sweden, no. 41723/06 (ECtHR Judgement of April 3, 2012) Ziff. 86.

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404 Ibid.

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405 Rolf Bloch, *Der Doppelcharakter der individuellen Freiheitsrechte, als Schutz des Einzelnen und als institutionelle Garantie der Demokratie* (Arnaud Druck 1954) 35.

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406 Ibid 35.

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407 For instance BGE 136 I 167 E. 2.2; Verein g. Tierfabriken (VgT) v. Schweiz, no. 32772/02 (ECtHR Judgement of June 30, 2009).

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408 BGE 136 I 167 E. 2.2.

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409 Özgür Gündem v. Turkey, no. 23144/93 (ECtHR Judgement of March 16, 2000).

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410 See for instance BGE 138 I 274 E. 2.2.

is on the objective-institutional side of the constitutional rights.<sup>411</sup> The author has outlined the effect of the constitutional political rights within the communicative sphere in chapter III. and V.B. The content of politically relevant information is treated differently in legal practice in the sphere of the press and the sphere of television and radio compared to commercial information or other information shared for entertainment purposes.<sup>412</sup> It therefore seems important to define the effect of the democratic content of basic political rights in online media regulation. In this context, attention shall be drawn to the fact that the different spheres created by different gatekeepers such as the press, radio and television broadcasters are regulated differently. In the following paragraphs, the different legal instruments for the protection of communicative freedom are outlined in connection with their democratic relevance.

### 1. Preserving the Autonomy of the Press

The freedom of the media is a central condition for the freedom of opinion.<sup>413</sup> The unhindered flow of information and exchange of opinions in a democratic society lies at the core of communication.<sup>414</sup> The constitutional court reasoned in this context that especially in a semi-direct democracy, the media act as information carriers or as a bridge between an informed community and the public.<sup>415</sup> The media enable the creation of a public sphere for the integration of political communities and the articulation of minority opinions. Furthermore, the media are also an indispensable means of permanent public criticism and control of power.<sup>416</sup> The ECtHR has described this role of the media as a ‘public watchdog’ for society.<sup>417</sup>

The doctrine has attributed different functions to the press media. By providing information about economic processes, the media help individuals cope with daily life challenges. The media create market transparency, which benefits the individual consumer but also the overall economic interest.<sup>418</sup> Furthermore, the media fulfil an integrity function. The integrity function is

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411 Markus Schefer and Raphaela Cueni, ‘Öffentlichkeit im Wandel: Überlegungen aus grundrechtlicher Sicht, Studie zu Handen des BAKOM’.

412 BGE 39 I 585 E. 2.

413 Art. 16 BV; see BGE 117 Ia 472 E. 3c; 137 I 8 E.2; BGer 2C\_59/2010 of June 2, 2010, E. 2.2.

414 BGE 137 I 8 E. 2.5.

415 BGE 104 Ia 377 E. 3a; see also Yvo Hangartner, ‘Unabhängigkeit vom Staat und Staatlichen Unternehmen als Voraussetzung der Medienfreiheit’ [2005] 14 AJP 1183, 1184.

416 BGE 137 I 209 E.4.2 211; 137 I 8 E.2.5 12; Peter Nobel and Rolf H Weber, *Medienrecht* (3rd edn, Stämpfli 2007) 44.

417 *Lingens v. Austria*, no. 9815/82 (ECtHR Judgement of July 8, 1986); *Observer and Guardian v. The United Kingdom*, no. 13585/88 (ECtHR Judgement of November 26, 1991).

418 Judgement of the German Federal Court of Justice, December 9, 1975, BGHZ 65, 325, 332.

about fostering commonalities and integration in a pluralistic society.<sup>419</sup> In line with this function, the traditional gatekeepers of information are not supposed to intervene directly in a targeted manner in the political discourse.<sup>420</sup> Rather, the role of the media lies in enabling voters, parliaments, and governments to form opinions.<sup>421</sup> For a long time, the press media were the actors whose content (information, entertainment, advertising) was most effective in reaching a large audience. In recent years, digital gatekeepers have overtaken the press with regard to the extent of their reach, even when they do not produce their own journalistic information. As outlined in chapter II, digitalization has changed not only readers' behavior and the distribution of information but also the working conditions of journalists.

Within the legally protected freedom of the press, diversity is not constitutionally required.<sup>422</sup> Instead, it is assumed that diversity will be maintained in any case if the market functions properly. However, the link between economic competition and publicist diversity has not been empirically proven.<sup>423</sup> Democratic theory assumes that with functioning public spheres, diversity of information and opinion exists as a consequence.

## 2. Ensuring Programme Autonomy in Broadcasting

Legislation concerning radio and television is a federal matter and the regulatory competence is comprehensive.<sup>424</sup> Radio and television contribute to education and cultural development, to the free formation of opinions, and to entertainment. They are required to take the specific characteristics of Switzerland and the needs of the cantons into account. Events shall be presented in an appropriate manner and diversity of opinions must be taken into account.<sup>425</sup>

The comprehensive federal competence to regulate in the realm of the electronic media of radio and television allows a deviation from the competitive

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419 Peter Hettich and Mark Schelker, *Medien im digitalen Zeitalter, Neugestaltung des Programmauftrags aus ökonomischer und rechtlicher Sicht* (Dike 2016) 41.

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420 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing & Lichtenhahn 1995) 193 et seqq.

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421 *Ibid.* 194.

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422 Patricia Martina Hager, *Rundfunkvielfalt und Medienkonzentration, Rechtliche Mechanismen zur Sicherung der Diversität in Radio und Fernsehen* (Schulthess 2016) 8.

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423 The assumption that market competition creates diversity in journalistic content is also criticised. See for example Hanspeter Kellermüller, *Staatliche Massnahmen gegen Medienkonzentration* (Schulthess 2007) 31; Bernd Weber, 'Medienkonzentration, Marktzutrittsschranken und Publizistische Vielfalt', in Günther Rager and Bernd Weber (eds.), *Publizistische Vielfalt zwischen Markt und Politik, Mehr Medien – mehr Inhalte?* (Econ-Verlag 1992) 251, 255.

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424 Art. 93 BV.

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425 Art. 93 para. 2 BV.

principle.<sup>426</sup> The constitutional rights of communication give the state a mandate to realise the requirements of the communicative rights with regulations relevant to communication, even among private individuals.<sup>427</sup> Social developments need to be considered in interventions in the media sector.<sup>428</sup> In the context of recent developments, it seems particularly important that technological developments and possibilities are considered.

Media freedom has a programmatic layer, as the factual preconditions of democratic media must be protected.<sup>429</sup> Scholars see it as the legislator's obligation to actively ensure the diversity of the media that make the various opinions, information, and viewpoints available to the public.<sup>430</sup> When using regulatory instruments, the state must take into account other constitutional rights such as economic freedom. Furthermore, the measures must be applied independently of the content that is distributed.<sup>431</sup> These limitations are enshrined in art. 93 para. 2 BV, the statutory programme principles in the RTVA,<sup>432</sup> and the performance orders to the broadcasters (art. 24, 41, 43 RTVA). Political advertising is forbidden.<sup>433</sup> The underlying reasons for this prohibition are to avoid the asymmetries that would arise since advertising time on television is substantially more expensive than advertising in print and to allow the press to function with sufficient revenue.<sup>434</sup> This regulation appears in line with the democratic content of political rights, which aim at ensuring equality in political discourse and dismantling economic asymmetries.<sup>435</sup>

For the same reason, programmes related to the exercise of political rights may not be sponsored.<sup>436</sup> The Federal Supreme Court sees it as the duty of radio

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426 Urs Saxer, 'SRG ohne Grenzen? Rundfunkfremde Aktivitäten der SRG unter dem neuen RTVG' (2011) 1 ZSR 694; Peter Hettich and Mark Schelker, *Medien im digitalen Zeitalter. Neugestaltung des Programmauftrags aus Ökonomischer und Rechtlicher Sicht* (Dike 2016) 43.

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427 Stephan C Brunner and Herbert Burkert, 'Art. 17 BV' in Bernhard Ehrenzeller and others (eds.) *Schweizerische Bundesverfassung* (eds.) (Schulthess 2014) N 34; Peter Hettich and Mark Schelker, *Medien im digitalen Zeitalter, Neugestaltung des Programmauftrags aus ökonomischer und rechtlicher Sicht* (Dike 2016) 44.

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428 Peter Hettich and Mark Schelker, *Medien im digitalen Zeitalter. Neugestaltung des Programmauftrags aus ökonomischer und rechtlicher Sicht* (Dike 2016) 43.

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429 Jörg P Müller and Markus Schefer, *Grundrechte in der Schweiz. Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* (4th edn, Stämpfli 2008) 475.

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430 *Ibid* 475.

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431 BGE 120 Ib 142 E. 3.

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432 RTVA.

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433 Art. 10 para. 1 lit. c RTVA.

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434 Pierre Tschannen, 'Art 34 BV', in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 40.

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435 See chapter III.D.4.

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436 Art. 12 para. 5 RTVA.

and television to report in a transparent manner and in a variety of ways in the run-up to elections and votes.<sup>437</sup> The Federal Supreme Court, for example, considered this responsibility to have been violated when the DRS channel broadcasted a portrait of an incumbent, in which he appeared in a one-sided positive light, six days before the elections to the Fribourg State Council. The Court ruled that in this case the channel violated the programme regulations because there was no critical standpoint expressed and the broadcast was likely to impair the equality of opportunity among the candidates by not giving the viewer a more comprehensive picture.<sup>438</sup>

The programmes which are subject to the RTVA have to contribute to the unhindered formation of opinions, to entertain, and to provide diverse and correctly researched information.<sup>439</sup> The programmes are subject to the principle of diversity and objectivity.<sup>440</sup> Supervisory intervention by the state in the pluralistic opinion-forming process can only be justified within the framework of a balancing of interests between the broadcaster's freedom to broadcast programmes on the one hand and the public's freedom of information and other constitutional rights on the other.<sup>441</sup> The supervision by the government is limited to a legal control, and intervention is only justified if the minimum requirements with regard to the principles of fairness, transparency or diversity have been violated.<sup>442</sup> According to the principle of objectivity, the facts and opinions conveyed must enable the viewer or listener to form their own opinion.<sup>443</sup> This principle is violated if the consumer is improperly informed, as they can no longer form their own accurate impression on the basis of the provided information if essential circumstances are concealed by the presentation of the information. Furthermore, the diversity principle aims to prevent one-sided tendencies in the formation of opinions by radio and television. It obliges the audio-visual media system as a whole to reflect political and ideological diversity.<sup>444</sup> In this context the principle refers to the programmes as a whole.<sup>445</sup> For political reasons, the principle of diversity applies more strictly in the run-up to elections and votes as the principle is intended to prevent the

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437 BGE 134 I 2 E. 3.3.2.

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438 Ibid E. 4.2.1.

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439 Art. 3 para. 2 RTVA; BGE 134 I 2 E. 3.1.

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440 Art. 4 para. 1 RTVA; Art. 4 para. 1 RTVA; BGE 134 I 2 E. 4.2.1.

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441 BGE 133 II 136 E. 5.1; see Urs Thönen, *Politische Radio- und Fernsehwerbung in der Schweiz* (Helbing & Lichtenhahn 2004) 41.

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442 BGE 131 II 253 E. 3.4; 131 II 253; 139 II 519 E. 4.2.

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443 BGE 139 II 519 E. 4.2.

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444 BGE 138 I 107 E. 3.

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445 BGE 134 I 2 E. 4.2.1.

formation of public opinion from being influenced unilaterally. The Federal Supreme Court connects this requirement with the constitutional principle that voters' political decisions should be based on a process of opinion formation that is as free and comprehensive as possible.<sup>446</sup> Thus, the provision is closely connected with the scope of protection of the constitutional right to vote.<sup>447</sup> The broadcasting law therefore requires that candidates and parties have access to the audio-visual media according to objective criteria.<sup>448</sup> The journalistic duties apply in a stricter manner if a contribution is of a political nature.<sup>449</sup> In the assessment of contributions, the decisive criterion is the effect on the public, not the subjective assessment of the broadcaster.<sup>450</sup>

The regulation of radio and television autonomy has been guided by collective interests. and the objectives of the scope of the political rights find expression within the regulation of the communicative sphere of radio and television. These collective interests also include the notion that no dominant individual or group should be able to autonomously influence the opinion-formation of the collective. In this sense, legal rules of discourse have been established in the field of radio and television, and the principle of equal access to opportunities to influence the public discourse has been legally enshrined.

A licence is required in advance under art. 10 et seqq. RTVA for broadcasting services. With this performance mandate, the state regulates the autonomy of radio and television. In this context, TSCHANNEN stated that the sphere of radio and television, which is situated between the state, organisers, and citizens, cannot be regulated with only the justiciable content of constitutional rights.<sup>451</sup> In other words, the power to influence the opinion of radio and television consumers needs to be balanced with other legal instruments than only subjective legal rights granted to the individual. Programme autonomy regulated by the RTVA must be considered as a form of organised media freedom tailored to the media form of television and radio that implements democratic principles.<sup>452</sup> It is now necessary to find a form of organised media freedom tailored to the online media.

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446 BGE 98 Ia 73; 134 I 2 E. 4.2.1.

447 See chapter III.D.1.

448 BGE 97 I 731 E. 3; BGE 124 I 55 E. 5.

449 BGE 134 I 2 E. 4.2.1; 138 I 107 E. 3.

450 Ibid.

451 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing & Lichtenhahn 1995) 120.

452 See Jörg P Müller, *Die Grundrechte der schweizerischen Bundesverfassung* (Stämpfli 1991) 207 et seqq.; Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing & Lichtenhahn 1995) 120.

## B. Autonomy through Communication

The protected freedom of communication has not only an individual and a social function, but also a political one. As outlined in chapters III.A and III.D, political authority is legitimate only if the citizens are collectively regarded as the ultimate sovereign power and the delegated power remains accountable.<sup>453</sup> The duty to give a part of the power to the government corresponds with the rights of the rule of law, transparency, and accountability and is in essence the recognition that the collective is politically sovereign.<sup>454</sup> Freedom of expression allows the creation of public spheres and public opinion and thus enables this democratic control function. The communicative freedoms create legitimacy for the power of the government. As already outlined, the constitutional scope of the communicative freedoms is not limited to individual freedoms but extends to regulate different spheres to enable their democratic functions. Consequently, transparency and accountability have emerged as fundamental principles guiding the regulation of public information spheres. As TSCHANNEN (cited in chapter III.D.4) aptly illustrates, the principle of transparency, as a horizontal effect of political rights, plays a pivotal role in dismantling information advantages and asymmetries.<sup>455</sup> While this is evident in the regulation of radio and TV, its significance is further enhanced in the realm of online media regulation.

### 1. Safeguarding Political Autonomy

The essential role of the legal instruments that create and protect a free exchange of information is foundational for Swiss democracy. Public opinion is multi-layered and subject to constant change. Through the influence of public opinion, the sovereign exerts constant influence on the state.<sup>456</sup> As outlined, the legislator uses different instruments to achieve this ideal of a free and functioning information sphere and takes the structure of the distribution medium into account. The possibility for communicative exchange is a prerequisite for the unhindered political decision-making process. The constitutional right to vote ensures that individuals can form their own opinions and express their political opinions without control. Participation in the democratic processes

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453 Francis Cheneval, *Demokratietheorien zur Einführung* (Junius 2015) 27.

454 See chapter III.A.

455 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 424.

456 Rolf Bloch, *Der Doppelcharakter der individuellen Freiheitsrechte, als Schutz des Einzelnen und als institutionelle Garantie der Demokratie* (Arnaud Druck 1954) 45.

should be shielded from social, political, and economic power,<sup>457</sup> and it is a legal challenge to secure this shielded sphere within the digital sphere. As outlined, the free and unhindered process of opinion formation is protected in a particularly strict manner in the run-up to elections.<sup>458</sup>

The regulation of broadcasting providers has already illustrated the connection between the scope of the political rights and communicative autonomy. Political information is protected by additional regulatory instruments in both the sphere of the press and the sphere of radio and television.<sup>459</sup> Both the constitutional rights of communication and the political rights guarantee the unhindered and free will-formation process before the actual act of voting.<sup>460</sup> Restrictions on political expression are thus subject to stricter conditions.<sup>461</sup> Furthermore, the political rights protect equal access to political discourse. In political communication, attention must be paid to the feasibility of this equality, which is why the fact that there are de facto structural imbalances is relevant from the perspective of political rights.<sup>462</sup> Moreover, the specific medium for access to the political discourse is of relevance. The exercise of basic communication rights for political purposes has been given a privileged position by the Swiss Federal Court.<sup>463</sup> The use of infrastructure for political purposes also expresses this privilege. Due to their democratic relevance, statements on topics that appear to be of interest to the social debate are particularly well protected.<sup>464</sup> At the international level as well, criticism and different

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457 see also BGE 124 I 55 E. 3; Jörg P Müller, 'Geschichtliche Grundlagen, Zielsetzung und Funktionen der Grundrechte' in Detlef Merten and Hans-Jürgen Papier (eds.), *Handbuch der Grundrechte; Grundrechte in der Schweiz und in Liechtenstein* (Dike 2007) N 37 zu § 202. The Federal Supreme Court states that this constitutional right shall also guaranty that economic dependencies do not develop into political dependencies. See Pierre Tschannen, 'Schutz der politischen Rechte', in Detlef Merten and Hans-Jürgen Papier (eds.), *Handbuch der Grundrechte; Grundrechte in der Schweiz und in Liechtenstein* (Dike 2007) N 34 et seqq. § 220.

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458 See chapter III.D.5; Ralph Doleschal and David Rumer, 'Anspruch auf Wahrung des Stimmgeheimnisses im bundesgerichtlichen Verfahren' in Andrea Good and Bettina Platipodis (eds.) *Direkte Demokratie, Herausforderungen zwischen Politik und Recht* (Stämpfli 2013) 87; Cornel Borbély, *Der Grundsatz der geheimen Abstimmung, unter Berücksichtigung des E-Votings* (Stämpfli 2005) N 83.

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459 See chapter V.A.

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460 Michel Besson, *Behördliche Information vor Volksabstimmungen, Verfassungsrechtliche Anforderungen an die freie Willensbildung der Stimmberechtigten in Bund und Kanton* (Stämpfli 2002) 8.

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461 BGE 124 I 55 E. 2; 145 I 1; see chapter III.D.4.

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462 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing & Lichtenhahn 1995) 289.

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463 BGE 97 I 893 E. 4.

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464 BGE 131 IV 23 E. 3.1; 39 I 585 E. 2.

opinions in public affairs are the focus of the protection of basic communicative rights.<sup>465</sup> Thus, the communicative freedoms overlap with the (possible) legal claim to reduce the internal and external constraints that prevent a voter from exercising a discursive right and expressing their political will. Such right would connect discourse ethics with the constitutional rights.<sup>466</sup>

Structural imbalances inherent within different media spheres are relevant from both a political-rights perspective and the perspective of the freedom of the media. As part of the freedom of the media, internal media freedom is also protected. In particular, the position of journalists vis-à-vis publishers is a key issue in this context. The starting point here is that the necessary freedom can only be afforded within a free internal structure of the press.<sup>467</sup> A further relationship of dependency that affects the inner freedom of the media is the media's dependency on advertising contracts. The majority of the press is dependent on revenue generated from advertisements. This creates the danger that economic pressure can influence the editorial orientation of the press.<sup>468</sup> Nowadays, the shrinking revenue from advertisements is rendering it difficult to uphold a journalistic business at all. The lack of transparency on these dependencies and the dependency on business models that influence what information is conveyed is therefore not a novel topic concerning only the digital sphere. Even the strong influence of the television was discussed under the aspect of the increased influence on opinion-formation.<sup>469</sup> As Switzerland does not yet have specific regulations for social media and other online platforms, only self-regulation of the platforms prevails. As already explained in chapter II.C, certain platform providers have (self-)regulated political information independently within their platform. Some have banned political advertising completely and others apply a labelling system to political advertising.

POSTMAN expressed some interesting points on the impact of the medium on discourse in the period before the digital transformation. He put forward the thesis that the form or medium essentially determines the content. Furthermore, expressed thoughts inevitably become the content of a culture. At the level of innovation that was marked by television, it was already clear that

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465 See for instance *Stoll v. Switzerland*, no. 69698/01, Judgement of December 10, 2007; *Lingens v. Austria*, no. 9815/82, Judgement of July 8, 1986.

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466 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 393.

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467 Jörg P Müller and Markus Schefer, *Grundrechte in der Schweiz. Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* (4th edn, Stämpfli 2008) 478.

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468 *Ibid.*

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469 BGE 98 Ia 73 E. 3c.

this new gatekeeper was changing the structure of discourse.<sup>470</sup> The form or gatekeeper strongly determines how information is perceived.<sup>471</sup> Regulatory endeavours thus need to take the particularities of the medium into account. According to the doctrine of the political rights, the communicative realm should be as free from financial biases as possible, and asymmetries of power should be limited. The underlying assumption of this ideal situation of discourse is that in a deliberative democracy the deliberation leads to a more critical assessment of information and that by means of public debate misinformation can also be detected.<sup>472</sup> However, the information asymmetries in the digital sphere are quite different from those in the spheres of TV or newspapers. For example, a platform can also capitalise on the sale of anonymised data and/or meta-data. There is a commercial interest in data, for example on correlations between the consumption of political information and the geographical location or what people with certain political opinions tend to buy and where. This means that advertising can already be adapted on the basis of such information. The platform provider profits financially in such a case, even though it lacks the structural prerequisites to create a mediated deliberative discourse. In such a case, the financial benefits and the responsibility of the democratic function no longer coincide. The regulatory model of radio and TV and its doctrine are not transferable to the digital sphere, as the power imbalance is very different.

Another interconnection between the scope of the political rights and the communicative sphere lies in the protection of political personal data, as personal data has become a decisive factor in the distribution of information online. With the instrument of informational self-determination, the political identity finds protection in the digital sphere.<sup>473</sup> The instrument of informational self-determination gives the individual a right to gain transparency over the management of personal data. The protection of political personal data aims at shielding the individual from external influences on their opinion formation process.<sup>474</sup> As outlined in chapter V.C., the difficulty of enforcing one's right to informational self-determination in the digital sphere is relevant for both the communicative freedoms and political rights. Moreover, when political advertising is personalised on the basis of additional data, the

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470 Neil Postman, *Wir amüsieren uns zu Tode: Urteilsbildung im Zeitalter der Unterhaltungsindustrie* (Fischer 1985) 34.

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471 Ibid 83 et seqq.

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472 See chapter III.

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473 See chapter IV.C.3.

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474 See chapter III.

platform provider gains additional money without performing the function of a journalistic gatekeeper. The problem of this influence on the political discourse is on the one hand the lack of transparency on this influence and on the other hand that the financial incentives are not linked to journalistic criteria.

The advantages of the direct democracy lie in the learning process as enabled by the public debates.<sup>475</sup> The previous chapters highlighted the importance of the public sphere and its constitutional role for this purpose. The constitution protects various forms of autonomous communicative spheres, all of which are relevant for the functioning of democracy. Whilst the constitutional rights have been rooted in the understanding that autonomy requires legal protection, autonomy is also enabled and created through communication. By protecting the spheres for deliberation, the communicative freedoms protect one of the most important aspects of the functioning of a democratic system, the formation of public opinion, which acts as a check on governmental power. Furthermore, the dogmatic analysis shows that the regulatory instruments mostly come into play in situations of power asymmetries. The autonomy over one's political identity as protected by the regulation on political personal data as well as voting secrecy are examples of instruments to limit such power asymmetries. Any further development of the communicative freedoms in the form of additional laws should aim to counteract power asymmetries. The question thus arises in particular as to how the asymmetries within the digital sphere can be reduced, how the existing ones made largely transparent, and how functioning business models for those who enable the democratic function of political information autonomy can be created.

## 2. The Discourse-Incentivising Role of the Communicative Constitutional Rights

The preceding chapters on democratic theory and the outline about the constitutional rights show that the rights to privacy and to informational self-determination, the constitutional communication rights, and the political rights and obligations are interconnected to enable a functioning democratic society. In HABERMAS' theory, the public autonomy serves as a bridge between the individual and the social collective.<sup>476</sup> In SUNSTEIN's theory, social order, common social experiences, and a common informational basis serve the same purpose. Social order is based on a shared social reality that can be created by the

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475 Wolf Linder and Sean Müller, *Schweizerische Demokratie, Institutionen – Prozesse – Perspektiven* (4th edn Haupt Verlag 2017) 336.

476 See Jürgen Habermas, *Die Einbeziehung des Anderen: Studien zur politischen Theorie* (Suhrkamp 1996).

government, by media content, or interactions.<sup>477</sup> This discourse-incentivising effect of the communicative sphere is enabled by the political rights and the communicative freedoms. These instruments should therefore be adapted to the functioning of the digital sphere so that this function continues to be realised. Data-driven and personalised information distribution situate the discourse-incentivising effect at the intersection of the right to informational self-determination, the political rights, and the constitutional protection of autonomous communicative spheres. This emerging power relationship triggers new legal questions that are discussed in the following chapter.

## C. Regulatory Challenge: Safeguarding the Interests enshrined within Communicative Freedoms in the Digital Spheres

The possible regulation of digital information spheres has been discussed for a few years and yet in Switzerland there is still no regulation proposal for the online media sphere that resonates with the sovereign. The rapid changes in digital communication are the subject of many scholarly publications focused on the constitutional communication rights.<sup>478</sup> Regulatory questions arise on the intersection of different legal traditions and a global marketplace of cyberspace. Currently, there is a growing concern regarding how multiple conflicting constitutional interests can be effectively addressed in the digital sphere. Regulation within the digital information sphere should respond to the changes and risks outlined in chapter II and yet create an adequate balance between all constitutional interests involved.

Several scholars have undertaken the task of adapting existing legal theories on constitutional communication rights to the digital context. MÜLLER and SCHEFER suggest a transfer of the existing legal theory whilst creating categories depending on the nature of online information or communication. According to MÜLLER and SCHEFER, the freedom of the media (art. 16 BV) applies to all Internet sites that are openly accessible.<sup>479</sup> Additionally, different

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477 Just Natascha and Latzer Michael, 'Governance by Algorithms: Reality Construction by Algorithmic Selection on the Internet' [2016] *Media Cult. Soc.*, 10.

478 See for instance Walter Berka, 'The Free Speech Debate: Bedarf die Meinungsfreiheit einer Neuvermessung?' in Walter Berka, Michael Holoubek and Barbara Leitl-Staudinger (eds.), *Meinungs- und Medienfreiheit in der digitalen Ära: Eine Neuvermessung der Kommunikationsfreiheit* (Manz'sche Verlags- und Universitätsbuchhandlung 2017) 1, 3.

479 Jörg P Müller and Markus Schefer, *Grundrechte in der Schweiz. Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* (4th edn, Stämpfli 2008) 447.

expressions and opinions are to be judged according to their constitutional relevance. If radio or television programmes are broadcasted via the Internet, the regulation on radio and television must be applied.<sup>480</sup> Disputes of opinions in the run-up to votes are governed by criteria developed in the context of the political rights.<sup>481</sup> If a regulation of the online media is aimed for, the analysis presented in chapter III is pertinent concerning information of political relevance. According to prevailing opinion, the freedom of association is considered inapplicable to interactive online communication.<sup>482</sup> ZIMMERLI and MANFRINI argue that it may be appropriate to extend the reach of the constitutional right to freedom of assembly to interactive online communication.<sup>483</sup> Nevertheless, this doctrinal classification does not result in the enforcement of relevant constitutional interests in the digital realm. Instead, it raises the question of the impact of constitutional rights on digital gatekeepers and the possibility of establishing an indirect effect.<sup>484</sup> Similarly, SAXER points out that at this point in time, a new normative framework for the digital communication is required.<sup>485</sup>

Instead of focusing on the indirect effect of subjective constitutional rights, it appears more appropriate to examine how Switzerland's democratic values and constitutional interests can be translated into national legislation that are applicable to digital gatekeepers as well. This discussion primarily addresses the institutional dimension of constitutional communication rights and ultimately aims to guide the legal developments.

The institutional dimension of the communicative freedoms has the function to enable the autonomy of the political communication. The Swiss legislator has established a distinction in the governance of information based on its political relevance, and has implemented separate measures to protect commercially-relevant information. In addition, the legislator has relied on the medium as a distinguishing criterion for regulating different spheres of communication.

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480 Ibid.

481 Ibid.

482 Ulrich Zimmerli, 'Versammlungsfreiheit' in Detlef Merten and Hans-Jürgen Papier (eds.), *Handbuch der Grundrechte, Grundrechte in der Schweiz und in Liechtenstein*, N 15 zu § 219, 478.

483 Ibid.

484 See for instance Urs Saxer, 'Zensur durch Twitter & Co.? Zur Grundrechtsbindung und zur Regulierung sozialer Netzwerke' *medialex* 6 [2020] *medialex*.

485 Urs Saxer, 'Von den Medien zu den Plattformen, Regulierung öffentlicher Kommunikation im Zeichen der digitalen Revolution' in Christian von Coelln, Karl-Nikolaus Pfeifer and Karl-Eberhard Hain (eds.), *Schriften zum Medienrecht und Kommunikationsrecht* (Moor Siebeck Tübingen 2023) 28.

In the digital sphere, information is distributed via various gatekeepers, and non-commercial information is also distributed for commercial purposes. Commercial expressions are safeguarded under the principle of economic freedom. In legal terms, a distinction is made between expressions of opinion, which fall under the umbrella of press freedom, and announcements intended for commercial purposes. In situations where there are no idealistic interests explicitly tied to the expression of opinion for constitutional purposes, but rather a overriding material interest in utilising the press for commercial gain, the information is protected by the principle of economic freedom.<sup>486</sup> According to the practice of the Swiss Federal Court, pure advertising posts<sup>487</sup>, commercial advertisements in newspapers with editorial contributions<sup>488</sup>, publicly displayed commercial advertisements and advertisements on radio and television<sup>489</sup>, posters, or entries in electronic directories are protected by economic freedom.<sup>490</sup> According to SCHEFER and MÜLLER, the long-standing practice of classification should persist in the digital realm. The constitutional right safeguarding commercial statements aims to ensure a functioning market, while the protection of statements and information driven by idealistic interests primarily serves democratic purposes. Treating both types of information equally, SCHEFER and MÜLLER assert, would fail to address the specific challenges and issues associated with the distinct scopes of these constitutional rights.<sup>491</sup> This line of reasoning is to be supported, although it must be noted that the economic incentives in the digital realm are difficult to comprehend and the lines between facts, opinions, and advertisements are blurred within digital information spaces.<sup>492</sup>

At the international level, political targeting is considered to be political communication as protected by art. 10 of the EU Charter of Fundamental Rights.<sup>493</sup> The European Court of Human Rights has considered the paid political advertisement of a political party on television during an election as

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486 BGE 127 II 91 E. 4a; 128 I 295 E. 5a; BGer 2A.787/2006 of June 13, 2007, E. 3.

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487 BGE 96 I 586 E. 4b; 120 Ib 150 E. 2b.

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488 BGE 116 IV 371 E. 2c.

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489 BGE 118 Ib 356 E. 4b.; 127 II 79 E. 4b/bb; 127 II 91 E. 4a.

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490 Jörg P Müller and Markus Schefer, *Grundrechte in der Schweiz, Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* (Stämpfli, 4th eds., 2008), 367.

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491 Jörg P Müller and Markus Schefer, *Grundrechte in der Schweiz, Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakte* (Stämpfli, 4th eds., 2008) 367.

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492 Bretil Cottier, 'Art. 16' in Vincent Martenet and Jacques Dubey (eds.), *Commentaire Romand, Constitution Fédérale* (Helbing Lichtenhanhn 2021) N 26 et seqq.

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493 Tom Dobber, Ronan Ó Fathaigh and Frederik J B Zuiderveen, 'The Regulation of Online Political Micro-Targeting in Europe' [2019] 8 IPR.

political speech.<sup>494</sup> This categorisation is consistent with case law on the freedom of expression, where the European Court on Human Rights has ruled that the posting of comments in the run-up to an election<sup>495</sup> and posting of links to online videos by political parties<sup>496</sup> are protected by the freedom of expression. VESTING argues that the forms of communication on the Internet should be subsumed under the ‘broadcasting’ term in the sense of art. 5 para. 2 GG.<sup>497</sup> He considered the concept of broadcasting to be a dynamic term in constitutional law that is subject to a functional interpretation.<sup>498</sup> MECKLENBURG addresses the differences between online communication and conventional mass media and argues that the Internet merely constitutes a platform that enables the exchange of information that is not restricted in terms of subject matter or content.<sup>499</sup>

The existing legal theory on the constitutional communicative rights does not seem to cover the complexity of online communication and gatekeepers, nor does it provide an adequate framework to respond to the existing constitutionally relevant risks. MECKLENBURG argues that the special features of communication on the Internet must be taken into account, and that it must be examined whether the constitutional rights and the dogmatic concepts are transferable. The options seem to narrow down to classifying online communication either as an expression of individual opinions, and thus protected by the freedom of expression, or as a medium comparable to the broadcasting services.<sup>500</sup> However, LADEUR asserts that the objective-legal dimension of broadcasting freedom can still be applied to the digital sphere in terms of its organizational and procedural aspects. The challenges of preserving and ensuring diversity impact the system architecture, freedom of access, and openness to new applications and formats. LADEUR argues that media law’s performance should align with the precautionary principle found in environmental law. By imposing barriers on private actions under conditions of limited uncertainty, potential damage can be prevented. Additionally, LADEUR emphasises that, similar to environmental law, media law should embrace openness and

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494 TV Vest v. Norway, no. 21132/05 (ECtHR Judgement of December 11, 2008).

495 Savva Terentyev v. Russia, no. 10692/09 (ECtHR Judgement of August 28, 2018).

496 Magyar Jeti Zrt v. Hungary, no. 11257/16 (ECtHR Judgement of December 4, 2018).

497 See Thomas Vesting, ‘Der öffentlich-rechtliche Rundfunk im Internet – Ausübung der Rundfunkfreiheit’ in Christa-Maria Ridder and Helmut Kohl (eds.), *Funktionen des öffentlichrechtlichen Rundfunks, Symposion zu Ehren von Klaus Berg* (Media Perspektiven 2003) 36 et seqq.

498 Ibid.

499 See Wolfgang Mecklenburg ‘Internetfreiheit’ [1997] ZUM 521 et seqq.

500 Ibid.

a willingness to learn in response to uncertainties. Considering the new communication infrastructures, LADEUR suggests that it is evident and logical to further develop the objective-legal dimension of media freedom based on the new technological possibilities.<sup>501</sup>

The consideration of the technological dynamic is necessary to include the constitutional interests of the freedom of communication. In my view, it is important to effectively translate the interests inherent to constitutional political rights into the governance of online media. The objective dimension of communication rights aims to facilitate their democratic function, particularly by establishing the necessary conditions for autonomous political communication. To uphold the dogmatic classification within the digital space is challenging since digital companies often disseminate information with both factual and idealistic content indirectly for their business purposes. Furthermore, the economic interests that underlie digital information systems and data-driven businesses are particularly complex and often not transparent. As already outlined in chapter II and III.E, data-driven digital companies capitalise on personal data, which they partly obtain by providing free content.

The German Constitutional Court has also weighed in on the question of appropriate analogies between the public sphere of the press and the digital sphere.<sup>502</sup> In a decision on broadcasting contributions, the court commented on the issue of provider diversity in the online market. In this decision, the court emphasised that diversity among online providers cannot be equated with content diversity alone. Moreover, the court highlighted the role of social media and algorithms in shaping this distinction. The court firmly rejected the use of an analogical conclusion drawn from the print media market to determine the role of public broadcasting. In this context, the court examined the method of calculating remuneration in the digital sphere and analyzed the business model's impact on democratic discourse. Unlike the print media, where advertising prices are based on newspapers' circulation size, the Internet operates on performance-based models. Instead of advertisers paying a flat rate for placing an advertisement, the amount they pay depends on the model and on how many users actually see the advertisement, how many click on it, and how many subsequently purchase something. Consequently, providers have a significant vested interest in ensuring that recipients see their advertisements,

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501 Karl-Heinz Ladeur, 'Die "objektiv-rechtliche Dimension der Rundfunkfreiheit" unter Bedingungen von Multimedia – Zu einer Theorie der Ausübung von Grundrechten in Kommunikationsnetzwerken in Heiko Faber and Götz Frank (eds.), *Demokratie in Staat und Wirtschaft, Festschrift für Ekkehart Stein zum 70. Geburtstag* (Mohr Siebeck 2002) 67, 73 et seqq.

502 BVerG, Ruling of the first senate from July 18, 2018, 1 BvR 1675/16.

often resulting in the use of ambiguous headlines and deliberate clickbait tactics to entice users to click on relevant articles.<sup>503</sup>

The protection of the different constitutional-rights interests within digital communication spheres is difficult because the legal construct is based on assumptions on the media market that no longer hold. The summary of digital trends has shown that not only digital gatekeepers but third parties as well have the possibility to affect the process of information distribution. Furthermore, the digital actors also apply their own additional rules to the information distribution process, for instance, of search engines that do not link low-quality sites.<sup>504</sup> None of these characteristics are present in the sphere of newspapers, radio, or TV. The starting point for the dogmatic differentiation between different gatekeepers has been that within press content a distinction can be made between objective information, opinion, and advertising. This distinction is no longer obvious in the digital space. The regulation of the broadcasting services has taken the specificities of the distributing medium into account. This dogmatic structure also assumes that there is a clear separation between the distribution of information by newspapers on the one hand and by radio or television on the other hand. Both the press players and the broadcasting providers also operate in the digital space and use digital gatekeepers. Thus, this separation does in fact no longer exist in its previous form given the complex structures in the digital sphere, and the previous dogmatic classification becomes difficult to uphold and enforce.

The autonomy of the sphere created by the press is primarily governed by rights granted to the individual. Such regulation functioned well as long as newspapers were able to operate as sustainable businesses. The emergence of online media has rendered traditional newspapers' business models unsustainable, leading to the need for new legal regulatory instruments. In the context of the sphere of radio and television, TSCHANNEN commented that this public sphere cannot be regulated only by means of individual subjective rights to align with the democratic principles.<sup>505</sup> Given the power imbalance inherent to the relationship between radio and television and their listeners or viewers, institutional regulations are necessary. The digital spheres, however, are characterised by even more complexity than the relationship between state, citizen, and broadcasting organisers. Establishing appropriate regulations in

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503 See also Camillo Gaul, 'Öffentlich-rechtlicher Rundfunk im Internet – überflüssig oder dringend geboten?' *JuWissBlog* Nr. 5/2019 v. (January 15, 2019).

504 See chapter II.C.

505 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing & Lichtenhahn 1995) 120.

the digital realm requires a comprehensive analysis of the intricate dynamics involving multiple digital gatekeepers operating on information-driven business models. This examination must consider factors such as opacity and power imbalances. Within the digital sphere, information is susceptible to manipulation by various gatekeepers, their business models, and the collection of users' personal data. These influences further shape the flow of information and intersect political advertisements and algorithmic selection.<sup>506</sup> Consequently, the feasibility of applying existing legal frameworks to the present challenges appears very limited.

The above discussion has highlighted the challenges in defining the specific scope of constitutional communication rights in the digital realm, particularly evident in recent regulatory attempts and proposals. These efforts have underscored the difficulty of finding a legal framework that effectively addresses the issues pertaining to online media. The objective of such regulation should be to promote information diversity and ensure the integrity of journalistic work, as well as to address the risks outlined and summarised in the preceding chapter III.E.

The utilization of legal theory to address the challenges in the digital sphere presents a significant issue. The possible regulation of the digital information sphere has been discussed for a few years. In 2000 there was a consensus that digital media were not within the regulatory scope of the RVTG.<sup>507</sup> In the same year, the Federal Council regarded the extension of the RTVA to digital media as critical. This was primarily due to the fact that the regulatory competence in the radio and television sector were tied to a specific performance mandate of the public service whilst the work of the press is protected by the freedom of the media.<sup>508</sup> SAXER also sees the analogies between the online media and the press or radio and television as critical, as online services create a new, independent problem situation and he regards online services as a hybrid media form.<sup>509</sup> Furthermore, in the current information landscape, print, online, and broadcasting interconnect, as the same information is distributed through different channels. Originally, the legislator assumed a clear separation between the press on the one hand and radio and television on the other hand.<sup>510</sup>

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506 See chapter III.E.

507 Federal Council 'Stellungnahme des Bundesrates vom 28.06.2000 zur Motion 00.3144' (Parlament, 2019).

508 Ibid.

509 Urs Saxer, 'Die Online-Zuständigkeiten des Bundes' [2017] AJP 2017 334, 338.

510 Ibid.

In the year 2000, the instrument of the parliamentary motion was used to request a new legal regulation of press subsidies and a total revision of the RTVA in one code. The underlying notion at the time was that the media act should ensure the elimination of monopolistic structures in the press, radio, TV, and online sectors.<sup>511</sup> The Federal Council pointed out at that time that the prevention of actors gaining dominant positions in the media market is regulated by competition law and the broadcasting authorities, and considered the existing regulations as sufficient.<sup>512</sup> In 2018, a draft for a new electronic media law was presented by the Federal Council.<sup>513</sup> However, on August 28, 2019, the Federal Council decided not to pass the proposed federal law on electronic media. The purpose of the proposed law would have been to promote diversity in the Swiss media market by regulating the media content provided by the SRG and the licensed radio and television programmes.<sup>514</sup> In particular, the regulation would have made it possible for the SRG to expand to the online sector. In this context, there have been inquiries regarding the legitimacy of art. 93 BV as a constitutional basis for extending the regulations to the online sector.<sup>515</sup> The main criticism of this proposal was that restoring competition in the market is necessary and in such an endeavour private media providers should play a visible role.<sup>516</sup> Moreover, the proposed regulation would have created a power-asymmetry in the media system that did not align with the democratic principles.<sup>517</sup>

On April 29, 2020, the Federal Council suggested a bundle of measures to support the media on the basis of art. 93 BV.<sup>518</sup> The Parliament and the Transport and Telecommunications Committee subsequently approved the proposal.<sup>519</sup> The legislation proposes support for online media and general measures

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511 Motion Fehr Hans-Jürg *Mediengesetz*, 00.3144, March 24, 2000.

512 Stellungnahme des Bundesrates zur Motion Fehr Hans-Jürg *Mediengesetz*, 00.3144, March 24, 2000.

513 The consultation process took place between June and October 2018, see Bakom, ‘Vernehmlassung zum neuen Bundesgesetz über elektronische Medien’ [2019].

514 revBGeM, Art. 1.

515 Bericht über die Ergebnisse des Vernehmlassungsverfahrens zum Vorentwurf des Bundesgesetzes über elektronische Medien, 6.

516 Dachorganisation der Schweizer KMU, Stellungnahme des Schweizerischen Gewerbeverband zum neuen Bundesgesetz über elektronische Medien.

517 Ibid 2.

518 Botschaft zum Massnahmenpaket zugunsten der Medien vom 29. April 2020, 37, BBl 2020, 4531.

519 SDA-Meldung, ‘Nationalrat stockt Unterstützung für Medien deutlich auf’ (*Parlament*, March 2, 2021); SDA-Meldung, ‘Ständerat stockt indirekte Presseförderung im Medienhilfspaket auf’ (*Parlament*, June 18, 2020).

in favour of electronic media whilst preserving the independence of the media.<sup>520</sup> The Federal Council's proposals include an expansion of indirect press subsidies and further support for online media.<sup>521</sup> This proposal was opposed by a referendum and rejected by the voters on February 13, 2022.<sup>522</sup>

As the risks and problems within the digital sphere and the traditional newspapers have not changed, it seems reasonable to discuss the proposed media package with a view on the next regulatory attempt. The proposal included the extension of indirect press promotion to all daily and weekly newspapers. An annual sum of CHF 30 million would have been used for the promotion of online media. The proposal was intended to help the media, which already generate income from their readers, to expand their online content. There was supposed to be a clear separation between the editorial part and advertising, in addition to support for self-regulatory institutions, national news agencies, and further training.<sup>523</sup> Moreover, the Federal Council envisages that IT projects should be supported.<sup>524</sup> As an example, the Federal Council mentioned that the development of a common platform could be supported that would serve as a shared infrastructure for journalism.<sup>525</sup> Furthermore, the example of a mobile platform for the media including a payment application and content management were mentioned.<sup>526</sup> Funding would have been allocated for digital infrastructures provided such infrastructures meet the following conditions: firstly, the digital infrastructure enables or optimises the procurement, production, or dissemination of journalistic content or makes it easier to source.<sup>527</sup> Secondly, the infrastructure contributes to journalistic diversity.<sup>528</sup> Art. 1 of the proposed BFOM would have delegated to

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520 Federal Council, 'Bundesrat verabschiedet Massnahmenpaket zugunsten der Medien', Medienmitteilung des Bundesrates April 29, 2020.

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521 Botschaft zum Massnahmenpaket zugunsten der Medien vom 29. April 2020, BBl 20.038.

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522 Bundeskanzlei, 'Volksabstimmung vom 13.02.2022' (April 22, 2022).

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523 Botschaft zum Bundesgesetz über ein Massnahmenpaket zugunsten der Medien, BBl 2020, 4541, Art. 76, 76a.

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524 Botschaft zum Bundesgesetz über ein Massnahmenpaket zugunsten der Medien, BBl 2020, 4541.

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525 Art. 76c Entwurf Bundesgesetz über ein Massnahmenpaket zugunsten der Medien, BBl 2020, 4541.

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526 Botschaft zum Massnahmenpaket zugunsten der Medien vom 29. April 2020, 37, BBl 2020, 4522.

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527 Art. 76c para. 2 lit. a Entwurf Bundesgesetz über ein Massnahmenpaket zugunsten der Medien, BBl 2020 4541.

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528 Art. 76c para. 2 lit. b Entwurf Bundesgesetz über ein Massnahmenpaket zugunsten der Medien, BBl 2020 4541.

the Federal Council the responsibility to specify the criteria for supporting paid online media and the specific requirements if the resources are not sufficient for all applicants.<sup>529</sup> In the latter case, prioritisation would have been applied, with preference given to infrastructures that are open to all electronic media on reasonable and non-discriminatory terms.<sup>530</sup> Taking into account the analysis of political rights and democratic discourse, this preference should be regarded as a strict requirement, given that it entails the allocation of governmental resources and thereby involves interference in the market. The proposed regulation provided for support to digital infrastructures if they have not yet received other public financial support and require such support for economic reasons. Funding also was to be provided for IT solutions that serve to prepare, publish, and distribute professionally produced journalistic content that is relevant for democracy. Within this context, the Federal Council regarded art. 93 BV as providing for regulatory competence in the online sector.<sup>531</sup> Nevertheless, there is still no consensus among legal scholars as to whether this constitutional article is a sufficient basis for such regulation.<sup>532</sup> The anchoring of the new legislation in art. 93 BV was derived from a teleological interpretation, which has to meet the challenges of social and technical changes.<sup>533</sup> The Federal Council referred to the prevailing doctrine in this context, namely BIAGGINI, GRABER, STEINER, ZELLER, and DUMERMUTH.<sup>534</sup> SAXER has disagreed with this view and pointed out that art. 93 para. BV cannot cover the digital shift conclusively. Art. 93 para. 1 BV primarily regulates radio and television and does not mutate into a general federal responsibility for the

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529 Draft Bundesgesetz über die Förderung von Online-Medien (BFOM).

530 Botschaft zum Massnahmenpaket zugunsten der Medien vom 29. April 2020, BBl 2020, 4522.

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531 Ibid 4531.

532 Martin Dumermuth is of the opinion that the current art. 93 BV is sufficient to subsidise online content. However, he sees no possibility of deriving press subsidies from art. 93 BV (Martin Dumermuth, 'Die Zuständigkeit des Bundes im Bereich der elektronischen Medien nach Art. 93 BV' [2016] ZBl 7). Urs Saxer, on the other hand, warns against an overly broad interpretation of art. 93 BV. This is because the digital development could not have been foreseen at the time this article was written (Urs Saxer, 'Die Online-Zuständigkeiten des Bundes' [2017] AJP 334, 336).

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533 Botschaft zum Massnahmenpaket zugunsten der Medien vom 29. April 2020, BBl 2020, 4531.

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534 The Federal Council referred to Christoph B Graber and Thomas Steiner, 'Art. 93 BV' in Bernhard Ehrenzeller and others (eds.), *St. Galler Kommentar, Die Schweizerische Bundesverfassung* (Dike 2014) N12; Franz Zeller and Martin Dumermuth, 'Art. 93 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N12; Martin Dumermuth, 'Die Zuständigkeit des Bundes im Bereich der elektronischen Medien nach Art. 93 BV' [2016] AJP 335; Giovanni Biaggini, *BV Kommentar* (2nd edn, Orell Füssli 2017) Art. 93, N 5.

media sector even in times of rapid changes.<sup>535</sup> An explicit legal basis for a performance mandate in the press sector is missing.<sup>536</sup> SAXER argued that even at the constitutional level the law shows a separation between print and broadcasting, which has led to completely different regulations.<sup>537</sup> SAXER argues accordingly that there is no general federal competence in media policy.<sup>538</sup> Furthermore, critics pointed out in the parliamentary discussion that the delegation criteria were not detailed enough.<sup>539</sup> This opinion is to be supported.

Art. 93 para. 3 and art. 17 BV guarantee the independence of radio and television and of the media in general. The state may not offer media services. Furthermore, art. 93 para. 4 BV requires that the position of other media such as the press must be taken into consideration. Art. 93 BV does not in principle give the legislator the power to regulate the press. However, the Federal Council argued that indirect subsidies for the press are permitted, provided that they remain marginal and essentially serve to support the electronic media.<sup>540</sup> The funding for online media would have been provided from general federal funds because the Federal Council considers financing from Serafe to be inadmissible, as there would be no sufficient factual connection between the person liable to pay and the persons benefiting from media content that is funded.<sup>541</sup> It is questionable whether, from a democratic perspective, the use of the funds collected by Serafe appears justified for the purpose of maintaining the conditions for a deliberative discourse, and whether individuals can be granted decision-making power over its actual utilization. This could be achieved through technical instruments.

Within the proposed regulation, traditional regulatory instruments are combined with technical instruments. By indirectly subsidising platforms, the state supports the emergence of new public spheres enabled by IT projects or

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535 Urs Saxer, 'Die Online-Zuständigkeiten des Bundes' [2017] AJP 334, 336.

536 Peter Hettich, 'Regulierung von audiovisuellen Abrufdiensten (Video On Demand) – Nur eine Frage des Nachvollzugs der neuen europäischen Richtlinie 2007/65/EG?' [2007] ZBL 349, 354; Urs Saxer, 'Die Online-Zuständigkeiten des Bundes' [2017] AJP 334, 336.

537 Ibid.

538 Ibid.

539 National Council, 'Frühjahrssession 2021, Zweite Sitzung am März 2, 2021 zum Massnahmenpaket zugunsten der Medien': Rutz Gregor argued in this session that there is no market failure in the online sector and considers state intervention to be delicate and not legally supported, since there is a diversity of content. Gregor Rutz also emphasised that Art. 93 BV does not provide any constitutional competence for the proposed state intervention.

540 Botschaft zum Massnahmenpaket zugunsten der Medien vom 29. April 2020, BBL 20.038, 4533.

541 Ibid 4534.

platforms in which individual rights are exercised and public opinion formed. In determining the relevant funding criteria, a variety of constitutionally relevant interests need to be balanced. As seen within chapters II and III.E on the changes in the digital sphere, the technological infrastructure, the underlying economic model, and how personal freedoms can be exercised within the digital sphere influence and shape the public discourse. It would have been a novelty, however, that the technological infrastructure was to be (partly) funded from governmental funds. This example illustrates the challenge that any application of the constitutional rights to the digital sphere needs to take into account the technological infrastructures, the underlying economic incentives, and social trends.

In recent years, there have been notable regulatory efforts at the European level that warrant discussion at this point. One such initiative is the Digital Market Act, adopted by the European Parliament, with the objective of enhancing data accessibility and transparency.<sup>542</sup> However, it is important to note that this act does not address crucial issues like misinformation and transparency in political targeting. To tackle these concerns, the Code of Practice on Disinformation and the European Democracy Action Plan have been introduced to target these specific areas.<sup>543</sup> Another significant development occurred on September 16, 2022, when the European Commission presented the European Media Freedom Act. This legislation aims to establish a set of rules to safeguard media pluralism and independence within the European Union.<sup>544</sup> Additionally, the European Commission has proposed further laws to regulate political advertising, electoral rights, and party funding. This proposal tackles the intricate task of regulating political speech in a complex technological information environment, with the aim of enhancing transparency, accountability, and fairness in democratic processes. The proposal complements the Digital Services Act, which imposes certain transparency obligations for online intermediaries concerning online advertising. The regulation seeks to establish clear rules for online political advertising, including requirements for disclosing paid advertisements and sponsorship information. They also aim to safeguard electoral rights by protecting the integrity of elections, combating disinformation, and ensuring equitable access to information. Currently, the European Parliament and the Council are engaged in discussions regarding

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542 Digital Markets Act.

543 European Commission, Code of Practice on Disinformation and the European Democracy Action Plan.

544 Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, November 25, 2021, COM/2021/731 final.

these proposals. Given the understanding of democracy in Switzerland, it appears appropriate to consider timely Swiss regulation on this topic, aligning with the ongoing developments at the European level.

The subsequent section draws conclusions regarding the necessary approach to achieve a constitutional-rights balance at the horizontal level within the digital sphere. Regulations within in the media field should respond to a variety of constitutional risks whilst considering the dynamic social and technical developments. The current media law as well as the doctrine related to it cannot be applied to the digital gatekeepers without adaptations, and there is a lack of a coherent system of norms that is suited for the future challenges.<sup>545</sup> Moreover, regulatory interventions within the sphere of online media should be interpreted with a view to the communicative freedoms, taking into account their democratic value. It appears sensible to derive democratic principles from democratic theory as well as from the current regulations and tailor them to address the challenges posed by the digital landscape.

In the first chapter, I have explained how the constitutional political rights become effective within the regulation of information gatekeepers and in interrelation with the communicative freedoms. Based on the preceding analysis, the following principles have been identified, which shall be guidelines for the evolution of the constitutional content of communicative freedoms:

- the democratic principle of preventing non-transparent power asymmetries in the political opinion-forming process in different information spheres;
- the protection of autonomy of information spheres in which
  - i) it is possible to assess the objective content and reliability of available information independently,
  - ii) it is possible to differentiate between facts, opinions, and political advertisements among the information provided, and
  - iii) there is transparency on the use of technology in the creation process of journalistic information;
- the protection of the principle of equal access to diverse information<sup>546</sup>;

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545 See Urs Saxer ‘Von den Medien zu den Plattformen, Regulierung öffentlicher Kommunikation im Zeichen der digitalen Revolution’ in Christian von Coelln, Karl-Nikolaus Pfeifer and Karl-Eberhard Hain (eds.), *Schriften zum Medienrecht und Kommunikationsrecht* (Moor Siebeck Tübingen 2023) 157.

546 Saxer also interprets the safeguarding of diversity of content, including the means of expression and access to information, as a duty of the state considering the democratic importance. See Urs Saxer ‘Von den Medien zu den Plattformen, Regulierung öffentlicher Kommunikation im Zeichen der digitalen Revolution’ in Christian von Coelln, Karl-Nikolaus Pfeifer and Karl-Eberhard Hain (eds.), *Schriften zum Medienrecht und Kommunikationsrecht* (Moor Siebeck Tübingen 2023) 44.

- the assumption of each citizen having a critical, independent, and questioning consciousness, and protection of this consciousness against unconscious, intrusive influence;
- the principle of voting secrecy as a form to protect the individual opinion formation against influence within asymmetric power relationships.

When addressing challenges within media regulation, it appears essential to embed the discussion within an appropriate regulatory framework. This process involves weighing various interests of constitutional relevance against each other. To achieve a balance among these multiple constitutional interests, the democratic principles listed above should serve as a guiding framework. Specifically, it is important to define the impact of constitutional interests related to political rights within the context of communicative freedoms and in addressing digital risks. Additionally, it is necessary to understand the effect of constitutional interests linked to political rights within the realm of the right to informational self-determination.

## VI. An Extension of Constitutional Political Rights into the Digital Space?

In the previous chapters, I have addressed risks to democracy arising from the digital domain and subsequently elaborated on the protected content of constitutional political rights. The protected content of political rights unfolds within communicative domains and intersects with data protection rights in the digital domain. The question of how the content of political rights shall be protected within the online communicative sphere is particularly interesting at this point in time, as currently the regulation of the online media domain is being discussed.

The institutional side of the communicative rights interconnects with the discursive interest of political rights, and different governing rationales have been used to protect this interest within the domain of the press, on the one hand, and that of radio and television, on the other hand. As political rights serve to guarantee democratic principles, the scope of protection of political rights should be assessed taking their democratic role into account. Such a lens allows for considering democratic deficits and for going beyond transferring the current regulations into the digital world, considering specific risks and innovations in the digital sphere. To date, there has been no specific proposal to regulate disruptive technologies such as artificial intelligence by the Swiss legislator. In the opinion of the author, the question of how the constitutional content of political rights can be adequately taken into account within new regulations should be included within these present regulatory discussions. To address the question of the constitutional protective content of political rights within the digital domain, the analysis cannot be limited to a punctual regulation of detected risks to individual rights and interests. Rather, the risks for political rights need to be assessed in a systemic manner considering the subjective content, the institutional content of political rights, as well as interdependencies in the digital space. In this context, TEUBNER argued that the questions of the applicability of constitutional rights in the digital domain are not a matter of transferring public law into the private sphere, but rather

an autonomous reconstruction of constitutional rights within the digital domain.<sup>547</sup> WEBER correctly points out that digital governance has to be a multilayered process and is, in addition, situated within a globalising trend.<sup>548</sup> Before I further elaborate on how the democratic interests enshrined within political rights shall be constructed within the digital domain in practice, in what follows, I summarise the findings on relevant digital changes from the previous chapters.

## A. Summary of relevant Societal Changes from the Lens of Democratic Principles

The digital domain has become a space where individual freedoms are exercised, and where political opinion is formed. The processes and dynamics of the digital domain significantly differ from the traditional gatekeepers and simultaneously affect the business model of traditional gatekeepers. While new digital actors outperform traditional media outlets in reaching consumers, these actors do not establish the same level of trust as traditional media outlets. Moreover, the lines between the domain of the traditional press and the digital domain are blurred, and these areas become interconnected. The recent trend towards availability of information for free through digital gatekeepers has affected the business of the analogue press and worsened journalists' working conditions. The need to simultaneously report on global events and constantly fill the digital channels with content has reduced available resources for journalistic research. As a result, content producers have been confronted with the need to customise the content to meet the demand and interests within the market. This trend has led to the emergence of different forms of copy-paste journalism, and the use of artificial intelligence within journalistic work is continuously increasing. Due to the changed working conditions, traditional gatekeepers also widely use algorithms in the processes of creating content, distributing information, and market analysis of consumer behavior. Such decision-making processes are fairly disconnected from editorial or journalistic criteria that previously determined the visibility of information in the domain of traditional newspapers.<sup>549</sup>

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547 Gunther Teubner, 'Horizontal Effects of Constitutional Rights in the Internet: A Legal Case of the Digital Constitution' [2017] ILJ 3, 193, 195.

548 Rolf H Weber, 'Proliferation of "Internet Governance"' in Urs Gasser and others (eds.), *Internet Monitor 2014: Reflections on the Digital World: Platforms, Policy, Privacy, and Public Discourse* (Berkman Research Publication 2014) 138.

549 See chapter II.B and II.C.

The analysis of the distribution processes of search engines and social media platforms has revealed that, in contrast to traditional gatekeepers such as the press, radio, and television, the filtering process of information mainly occurs at the distribution point, rather than at the access point of information. The selection process during distribution is performed by new gatekeepers and depends on personal data of the users, user collaborative data, such as collective recommendation systems, as well as the algorithmic selection that primarily serves the business model of the digital market players.<sup>550</sup> Personal data management and thus the exercise of the right to informational self-determination play an active role in the distribution process in the digital domain. In contrast, neither personal data nor (real-time) collective filtering data are decisive factors for information distribution in the domains of the traditional press, radio, and television.<sup>551</sup> Therefore, there are some difficulties associated with transferring the existing legal theory on communication freedoms into the digital domain. Another concern with this development is that the right to informational self-determination is dogmatically understood as a constitutional right that protects individual interests and is seen as being connected to the protection of one's personality and the right to privacy. Nevertheless, the exercise of this right as personal data management is decisive for the flow and creation of information. Such influence might have to be balanced to protect the collective, democratic interests.

In chapter III.E, I have outlined that empirical analysis in the pre-digital era demonstrates that information consumption is a selective process that occurs interpretatively based on individual predispositions. Overall, selective information consumption and predispositions are not a new phenomenon of the digital era. However, within the digital domain, this selection takes place mainly in the process of distribution by the digital gatekeeper, which makes it more difficult to intervene within the digital domain using regulatory instruments (e.g., if corrective information is needed in the event of misinformation). Algorithmic selection depends on the personal data input, collaboratively created data, and the gatekeeper's business model. Such a selection process differs from a selectively working memory and reading behaviour. In addition, the selection process is characterised by a lack of transparency with regard to the precise criteria that determine distribution to the individual reader. In the pre-digital era, selective memory and reading behaviour were argued to be counterbalanced by the pluralistic supply of information. Although the concerns that individuals are enclosed in filter bubbles in the digital space have

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550 See chapter II.B. and II.C

551 See chapter II.

not been empirically proven, there are issues with diversity, choice, and agency in the context of digital information. In the vast digital domain, the diversity of available information and opinions is not suited to fulfil the function of external press pluralism of counterbalancing one-sided information, misinformation, or exaggerations. Due to their underlying business models, digital gatekeepers do not serve the purpose of creating an external pluralism of opinions comparable to the pluralism present in radio and television.<sup>552</sup> The German Constitutional Court has stressed this conclusion that the diversity of online content cannot be equated with the desired external press pluralism. Furthermore, the court reasoned that the digital information market has complicated the distinction between facts, opinion, information, and advertisements.<sup>553</sup> The constitutionally protected content of the political rights depends on the functioning of the public domain as protected by the communicative freedoms. The diversity within the information domains is an instrument to counterbalance an accumulation of power or one-sided information supply.<sup>554</sup>

The digital trends may lead to a weakened informational basis for democratic processes. Within the digital sphere the underlying market incentives of new platforms and digital agents remain hidden to the individual reader. For this reason, scholars have argued that with the role of algorithmic selection, a second-order governing power arises and that the self-serving character of digital gatekeepers is opposed to constitutional-democratic values.<sup>555</sup> The emerging use of artificial intelligence in this field is likely to increase these particular concerns. Traditional journalism has been heavily disrupted in the digital realm due to the growth of new content providers and new means to create visibility. Some of these shifts have resulted in a reduction of media quality and decreased willingness to pay for information. The use of personalised, algorithmic information distribution is not transparent to the user. This creates the danger that the gatekeepers may influence the formation of political opinions.

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552 See chapters II.C, III.E.

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553 BVerG, Ruling of the first senate from July 18, 2018, 1 BvR 1675/16.

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554 See chapters III and V.B.

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555 See Francesca Musiani, 'Governance by Algorithms' [2013] 2(3) IPR; Christoph C Graber, 'The Future of Online Content Personalisation: Technology, Law and Digital Freedoms' (Zurich University, 2016).

## **B. Guidelines for Translating Constitutional Interests into the Digital Sphere**

The analysis of the new gatekeepers within the digital domain has demonstrated that new gatekeepers and algorithmic functionalities have created a complex and dynamic network that blurs the boundaries between content producers, gatekeepers, and readers. The factors governing online information distribution are dynamic and constantly influence each other, and there is a wide variety of governing actors including journalists, bloggers, platforms, digital media businesses, Internet users, social bots, and search engines, to name a few.<sup>556</sup> This complexity already makes it challenging for users to consciously judge the quality and objectivity of information on their own. Furthermore, the use of algorithms further reduces transparency as, by nature, algorithms are dynamic and determined by a data input that constantly changes. Unlike traditional newspapers, none of the new market players assumes the role of creating a mediated publicity in the sense of democratic theory. Furthermore, the commercialisation of datasets that provide insights into consumer-behaviour has become a lucrative business opportunity, which often remains intransparent to the public. The same holds for political personal data and political collective data. These developments are of importance to democracy but are not directly addressed under the current constitutional rights framework.

As the traditional press uses digital gatekeepers to reach a wider audience, while digital gatekeepers also depend on traditional press content published through their infrastructure, different communicative domains become closely intertwined. Furthermore, the data analytics of reading behaviour has an impact on what kind of content is created. In the traditional regulatory framework for the press and the broadcasters, journalistic actors are assumed to be able to economically sustain themselves without support from the state. Furthermore, while previously it was assumed that the protection of the domain of the press through subjective rights would ensure a functioning press market that provides access to pluralistic content, due to the digital transformation this is no longer the case.

At present, there is an ongoing debate on the regulation of online media, as well as unresolved questions on how to regulate the use of artificial intelligence. Furthermore, since the new Federal Data Protection Act entered into force in September 2023, businesses are having to gain experience with their

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556 See chapter II.

own data protection officers for the first time.<sup>557</sup> In the context of these regulatory questions, the constitutional interests enshrined within political rights need to be adequately taken into account within new regulations concerning online media and the question of how constitutional interests should be adequately balanced against each other needs to be addressed.

### **1. Exploring the Legal Theory on the Horizontal Effect as Guideline**

Since jurisprudence can only react to new risks selectively, there emerges the need to embed the coming digital regulation in the constitutional-rights doctrine in a manner suited to the risks and opportunities in digital world. The corresponding weighing of interests should consider both technological developments and the interdependencies between the constitutional rights and the enacted regulations. Both the subjective and the institutional side of constitutional rights are affected by the technological innovations. Political discussions of new regulations frequently take place without clear legal doctrine in the background, and significant uncertainties within academic discussions remain. Accordingly, several current regulatory questions and political discussions related to technologization could benefit from a better grounding in basic legal theory. For instance, if technological infrastructure for online media is financed with state funds, the regulatory issues lie at the intersection of communication rights, the interests enshrined within political rights, and the requirements of the right of informational self-determination (e.g., the technical requirements of privacy by design and privacy by default).

In the previous analysis, I provided an overview of the challenges of translating the existing constitutional framework into the digital context. This review demonstrated that, in certain areas, the law is evolving in response to technological innovation and social changes and is mostly focused on strengthening individual freedom rights in the digital domain. However, in the digital realm multiple legitimate interests from different actors are colliding. Not only the subjective content of constitutional rights, but also their objective-institutional content needs to find protection within the digital sphere. Most importantly, an adequate balance needs to be achieved between competing constitutional interests, and systemic risks should be prevented. Indeed, the translation of the current scope of constitutional rights protection requires balancing a variety of rights of different actors because the constitutional risks

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557 Federal Council, 'Neues Datenschutzrecht ab 1. September 2023', Medienmitteilung des Bundesrates, August 31, 2022.

of advancing digitalization are often situated between complex constitutional-rights relationships on the horizontal level.<sup>558</sup>

Any regulation within the digital domain should be tailored to the specific processes, actors, and conflicting interests. Furthermore, the peculiarities of Swiss democracy and the constitutional interests enshrined within the political rights should be addressed in the upcoming regulatory discussions.<sup>559</sup> In this context, it should also be established whether there are any answers in the constitution itself or in the existing doctrine on the horizontal effect of constitutional rights. The assessment of multiple conflicting interests is not new within jurisprudence.<sup>560</sup> For instance, following art. 35 BV in practical concordance, the Federal Supreme Court not only examined a demonstration permit according to the standard of permissible restrictions of constitutional rights, but also weighed up various basic-rights concerns between the demonstration organisers and third parties, such as tourists or landowners.<sup>561</sup> Yet there is no established procedure to balance multiple constitutional interests in such complex cases within the current legal theory.

Focusing on the horizontal effect of the constitutional rights, art. 35 BV includes a governmental obligation to respect constitutional rights in regulating relationships among private individuals.<sup>562</sup> According to art. 35 para. 1 BV, the state must, if necessary, create the conditions for the actual exercise of constitutional rights. For instance, the freedom of assembly can only be exercised if the state permits the use of public spaces for demonstration purposes.<sup>563</sup> However, if the scope of the norm is justiciable, an active regulatory task can only be derived directly from the constitution. A norm is justiciable if its normative content can be determined by arguments of constitutional law so that no political judgement is necessary for its implementation within the framework of the applied law.<sup>564</sup> As demonstrated by the preceding analysis, the

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558 See also Jörg P Müller, 'Entstehung und Entwicklung der Grundrechte in der Schweiz' in Oliver Diggelmann, Maya Hertig Randall and Benjamin Schindler (eds.), *Verfassungsrecht der Schweiz* (Schulthess 2020) Band II, 1167, 1189 et seqq.

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559 See chapter III.C.

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560 See e.g. BGE 147 I 463.

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561 BGE 127 I 164 E. 5c 172.

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562 Bernhard Waldmann, 'Art. 35 BV' in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 10 Art. 35 BV.

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563 BGE 127 I 164 E. 3b.

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564 Jörg P Müller, 'Allgemeine Bemerkungen zu den Grundrechten' in Daniel Thürer, Jean-Francois Aubert and Jörg P Müller (eds.) *Verfassungsrecht der Schweiz / Droit constitutionnel suisse* (Schulthess 2001) 621 et seqq; Rainer J Schweizer, 'Art. 35 BV' in Bernhard Ehrenzeller and others (eds.), *St. Galler Kommentar, Bundesverfassung* (Dike 2023) N 23.

normative content of the constitutional rights within the digital domain cannot be determined without a political judgement.

According to art. 35 para. 3 BV, the authorities must ensure that constitutional rights also become effective among private individuals. While the theory of indirect third-party effect aims at a uniform application of all constitutional rights, art. 35 para. 3 BV only provides for a third-party effect if a constitutional right is suitable for it.<sup>565</sup> The Federal Supreme Court has explicitly recognised this protective dimension of constitutional rights in recent case law without commenting on its exact scope.<sup>566</sup>

According to the theory, the horizontal effect is applied only in rare cases based on art. 35 BV and thus provides limited guidance for the digital challenges outlined above. Furthermore, this dogmatic figure does not include the objective-institutional aspect in the balancing exercise.<sup>567</sup> In summary, art. 35 BV provides no indication as to how to deal with systemic challenges in the relationship between multiple constitutional interests. Notwithstanding, several authors have dealt with a broader understanding of constitutional rights, which concerns their effect among private individuals. In the next chapter, I discuss this point in further detail.

## 2. Examining a Multidimensional Effect of the Constitutional Rights in the Digital Domain

The digital changes as compared to the analogue world outlined above reveal the interconnectedness of different constitutional interests and the challenge to find an adequate balance between different interests. Within academia, several researchers have proposed an expanded understanding of the constitutional rights to address the conditions of the digital domain and identified systemic challenges. This conclusion stems primarily from systemic risks recognised in different fields, which have resulted from a narrow understanding of constitutional rights. TEUBNER, one of the scholars who have stressed the need for an understanding of constitutional rights that encompasses their collective-institutional dimension in the digital context and addresses complex cases, argued that the application of constitutional rights in horizontal relationships is insufficient to respond to new threats in the digital domain. He argued that an institutionalisation of the public sphere is necessary, as mere protection

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565 See Patricia Egli, *Drittwirkung von Grundrechten, zugleich ein Beitrag zur Dogmatik der Grundrechtlichen Schutzpflichten im Schweizer Recht* (Schulthess 2002), 153.

566 BGE 119 Ia 28 E. 2.

567 See also Gunther Teubner, 'Horizontal Effects of Constitutional Rights in the Internet: A Legal Case of the Digital Constitution' [2017] 3 ILJ 193, 200.

of individuals' rights is not sufficient.<sup>568</sup> Rather, the focus should be on the specific dangers that the digital architecture creates for constitutional interests. In the traditional horizontal-effect doctrine, TEUBNER saw the problem that the subtle causes of collective-institutional constitutional rights violations are overlooked as the focus remains on the players with the most social power.<sup>569</sup>

An expanded understanding of the effect of the constitutional rights is, however, not a new phenomenon of the digital space. For instance, drawing on the example of the triangular relationship between art sponsors for reputational purposes, art, and constitutional rights, GRABER highlighted the problems arising from a limited understanding of constitutional rights as subjective rights. According to GRABER and TEUBNER, the example of art sponsorship by companies as a means to improve their corporate image illustrates a triangle between art, money, and constitutional rights. The commercial sponsors gain power from the success of art by means of marketing and create dependency for artists on their sponsorship. Thus this form of sponsorship has been criticised as endangering artists' freedom. TEUBNER and GRABER considered the relationship between art and the economy to touch upon a key area of constitutional rights, even if the classical view of constitutional rights as rights granted to the individual would disagree.<sup>570</sup>

According to GRABER and TEUBNER, the dimension of constitutional rights should include private governance. They outlined four fundamental changes required for this new understanding of constitutional rights: firstly, constitutional rights need to be extended to guarantee the freedom of discourses. Secondly, since the new risks do not emanate from the government, the new understanding of constitutional rights has to be effective against social systems with totalising tendencies. Thirdly, in this context, the focus should be on the media of communication of social power. Lastly, the proceduralisation of constitutional rights could be the means to guarantee discursive autonomy.<sup>571</sup>

Following GRABER and TEUBNER, if collective actions endanger social institutions, constitutional rights need to have a protective effect on the horizontal level.<sup>572</sup> In my analysis, I demonstrated that new collective actions as part of digital business models affect constitutionally relevant interests in ways that are currently not regulated. Similarly, TEUBNER claimed that collective

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568 Gunther Teubner, 'Horizontal Effects of Constitutional Rights in the Internet: A Legal Case of the Digital Constitution' [2017] 3 ILJ 193.

569 Ibid 198.

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570 Christoph B Graber and Gunther Teubner, 'Art and Money: Constitutional Rights in the Private Sphere?' [1998] 18 OJLS 61.

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571 Ibid.

572 Ibid 61 et seqq.

actions that make sense economically corrupt democratic institutions by creating information asymmetries and limitations on the collective side of constitutional rights.<sup>573</sup>

As TEUBNER has aptly formulated, current regulatory questions in the digital domain are a matter of creating an order that would ensure that all constitutional interests have the best possible chance of realisation. In this context, it seems important to develop new processes at the doctrinal level for how the balancing of interests should occur on the horizontal level. TEUBNER argues that, as a first step, the specific risks of the infrastructure and processes should be known and made transparent. In a second step, the core area of constitutional rights need to be defined in order to determine how organisations and processes should be structured to align with the constitutional framework. Furthermore, he also argued that the scope of protection of constitutional rights should be widened to include all media based on communication between users with expansive tendencies. Since the lack of transparency in the digital governance structures remains a constitutional question of democracy, in order to institutionalise the public domain, the specific dangers emanating from the digital structures need to be analysed.<sup>574</sup>

MÜLLER is another scholar who has commented on complex balancing exercises on the horizontal level and the construction of constitutional protection in the digital domain. He concluded that, in order to balance multiple conflicting constitutional interests, the guiding principles should be autonomy and human dignity.<sup>575</sup> Furthermore, within this academic discussion, KARAVAS addressed the issue of whether the government is in a position to make decisions under the complex conditions of the digital domain for the common good. He further stated that the obligations of the state should no longer be understood as those of a paternalistically acting state, as this concept stems from a subjective understanding of constitutional rights. He suggested that the state obligations to protect might include incentives to generate 'risk knowledge' and new procedural forms of self-observation and external observation of non-transparent production processes. Obviously, implementation of such governmental obligations requires a new cooperative relationship

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573 Gunther Teubner, 'Horizontal Effects of Constitutional Rights in the Internet: A Legal Case of the Digital Constitution' [2017] 3 ILJ 193, 200.

574 Gunther Teubner, 'Horizontal Effects of Constitutional Rights in the Internet: A Legal Case of the Digital Constitution' [2017] 3 ILJ 193, 193 et seqq; see also Gunther Teubner / Isabell Hensel, 'Matrix Reloaded; Kritik der Staatszentrierten Drittwirkung der Grundrechte am Beispiel des Publication Bias' [2014] 47 KJ 152.

575 Jörg P Müller, 'Grund- und Menschenrechte' in Oliver Diggelmann, Maya Hertig Randall and Benjamin Schindler (eds.), *Verfassungsrecht der Schweiz* (Schulthess 2020) Band II, 1167, 1189.

between the state and the private sector. Moreover, governmental decisions should be framed as open to revision.<sup>576</sup> In my view, the development of risk knowledge is an important aspect that should be continuously pursued, especially considering the lack of transparency about violations of collective constitutional rights interests.

In chapters III.B and III.D.4, I have outlined how the unhindered will-formation process and the expression of the sovereign's will are the subjects of protection of the political rights. One underlying assumption in this area is that individuals can judge information and opinions according to their objective content and that, within a functioning information domain, deliberative discussions are incentivised. The current regulation thus relies on people's healthy and critical judgment and the assumption of the existence of external press pluralism within a functioning information market. Each individual's critical mind-set and external press pluralism are assumed to fulfil a balancing function against one-sided information, misinformation, and polarisation. Furthermore, external press pluralism is expected to balance individuals' tendency to consume information within the same information bubble that aligns with their preconceptions. Accordingly, the exercise of political rights in Switzerland requires the existence of a functioning, diverse information market. This requirement has been protected by legislators by means of various legal instruments. For instance, the unhindered formation of political opinions and/or identities has been protected by voting secrecy, criminal provisions, as well as regulation on political personal data.<sup>577</sup> In a wider context, autonomous political development is also protected by the regulation of communicative spheres.<sup>578</sup>

The assumption of the multi-dimensional nature of constitutional rights can be supported in view of the analysis in the proceeding chapters. As discussed in the previous chapters, the autonomy of discourse is the pivotal point of Swiss democracy. The constitution embeds itself as an instrument in the democratic principles, with the political rights being the guarantor of democratic principles.<sup>579</sup> Taking this point further, the connection between the concept of democracy and constitutional rights suggests that state power can legitimise itself only with the safeguarding of democratic principles. The analysis of the political rights in chapter III demonstrated how the democratic principles have been enshrined within the law: the political rights primarily serve

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576 Vagias Karavas, 'Digitale Grundrechte, Elemente einer Verfassung des Informationsflusses im Internet (Nomos 2009) 57 et seqq.

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577 See chapter IV.C.3.

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578 See chapter V.B.

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579 See chapter III.D.

to legitimise state action and are instruments of democratic control. The legitimacy of the power of the state requires the autonomy of the individual and the autonomy of discourse. Therefore, I see the collective-institutional side of political rights as a constitutional obligation to secure the conditions that allow for an autonomous discourse. Consequently, such an obligation would not only result from an extended understanding of the constitutional rights; instead this understanding can already be derived from the content of the political rights. Similarly, TSCHANNEN argued that—considering that voting rights elude dogmatically unambiguous classification—the right to vote is a guarantor of democratic structures and processes.<sup>580</sup> As the distribution and exchange of information have shifted to digital domains, there emerges the question as to how the protective content of the autonomy of discourse can be established in the digital domain through legal instruments.

A reconstruction of constitutional rights in the digital domain needs to address the horizontal enforcement of the protective content of the political rights. The question is what guiding principles can be derived from the previous analysis for the further development of digital governance. The first point in my analysis is that not only the subjective content of constitutional rights, but also the corresponding collective-institutional content needs to be reconstructed within the digital domain. Regulatory instruments must be adapted to the existing risks, and the balancing of interests needs to take place at the right level to allow for adaptivity to ongoing rapid innovation. Furthermore, an important principle in a democracy is the continuity of law. Accordingly, despite the need to respond to complex constitutional challenges and fast-paced technological developments, this response should also be based on the long time horizon of a democracy that has historically evolved to withstand economic and political demands of a short-term nature. Protection of trust in the permanence of the legal system, the rule of law, and the basic democratic values should also be considered whilst adopting new, innovative laws. With regard to the task of weighing up in complex constitutional cases, MÜLLER has stated that, in such assessments, the guiding principles in terms of both civil and political rights should be human dignity and autonomy.<sup>581</sup> It is therefore questionable how the principles of dignity and autonomy can be of more actionable guidance. This question will be addressed in what follows.

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580 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 16.

581 Jörg P Müller, 'Grund- und Menschenrechte' in Oliver Diggelmann, Maya Hertig Randall and Benjamin Schindler (eds.), *Verfassungsrecht der Schweiz* (Schulthess 2020) Band II, 1167, 1189 et seqq.

## 2.1. Guidelines for Translating the Scope of the Political Rights into the Digital Sphere

The question now arises as to which guidelines can be derived from the scope of the political rights to address the regulatory challenges previously outlined. In the remainder of this chapter, I will address the challenge of microtargeting and the upcoming regulation of the online information sphere, while at the same time attempting to outline guiding principles from the preceding analysis.

Dogmatically, political rights are understood to be enforceable only against the state. Constitutionally protected rights in Switzerland are those that exist according to the regulations at the federal level, in the cantons, and in the municipalities.<sup>582</sup> Now that new risks are arising from the private sector, the question that needs to be addressed is how to respond in regulatory terms. In order to define the effect of political rights in the digital domain, it is necessary to translate democratic principles and the constitutional-rights content of political rights into a dynamic technical reality. Furthermore, it is equally necessary to define their effect within the sphere of the right to informational self-determination and constitutional communicative freedoms.

The discussion of possible limitations of political rights in the digital domain concerns both internal and external aspects of the free formation and expression of one's political will and opinions. While the changes in the digital information domain concern external conditions, the possibilities of microtargeting and political nudging based on personal data relate to the internal aspect. The possibilities of influencing the unhindered formation of political opinion based on political personal data have significantly changed. For instance, micro-targeting has been used on a large scale in national elections in the UK and in the Netherlands.<sup>583</sup> Micro-targeting is a challenge that is situated between different constitutional interests, as the scope of freedom of expression is engaged as well as the scope of data protection laws (especially concerning the identity-aspect as protected through data protection law<sup>584</sup>), and there are collective-democratic interests involved. In an analysis of the legislation of several European countries, DOBBER/FATHAIGH and ZUIDERVEEN BORGESIOUS concluded that the individual is not adequately protected against

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582 See chapter III.D.

583 Nick Anstead, 'Data-driven campaigning in the 2015 UK general election' [2017] 22(3) *Int'l J. Press/Politics*, 294 et seqq.; Tom Dobber and others, 'Two crates of beer and 40 pizzas: the adoption of innovative political behavioural targeting techniques' [2017] 6(4) *IPR*.

584 See chapter III.E.

micro-targeting.<sup>585</sup> In the European context, DOBBER/FATHAIGH and ZUIDERVEEN BORGESIOUS reached the conclusion that micro-targeting is regulated mostly by the GDPR, yet collective interests in the freedom of expression and democratic interests have not been sufficiently considered in crafting the GDPR. Similarly, considering the risks of advancing technologies to target and nudge individuals without adequate transparency tools, the ICO also saw the need to create a *Guidance for the Use of Personal Data in Political Campaigning*.<sup>586</sup> As discussed in chapter III.E, the FDPIC has issued a corresponding guideline on the use of personal political data in connection with votes and elections.<sup>587</sup> Even though the guideline has been updated to address advanced technologies, it seems that clearer guidelines to address the balancing exercises between multiple conflicting constitutional interests are required in this context.<sup>588</sup> In my view, the aspects of the right to informational self-determination outlined in chapter IV.C (e.g., transparency function) should be referenced in the guidelines of the FDPIC, as these differentiations can be a helpful guide on how to balance multiple constitutional interests. Additionally, I suggest using the different functions of the right to informational self-determination as guidelines for the upcoming new regulations that are inevitable in the realm of artificial intelligence, cybersecurity, and regulatory responses to the emerging use of technologies in the communication sector.

Based on the consideration of the peculiarities of Switzerland's democracy, I conclude that, within the exercise of balancing interests, the dogmatic nature of voting secrecy and its role for the direct-democratic instruments should be taken into account. The scope of voting secrecy was initially designed to prevent social and economic dependencies from influencing and limiting the exercise of political rights. Moreover, voting secrecy is protected in its formal nature.<sup>589</sup> This interpretation of voting secrecy is aligned with the classification of political personal data as sensitive personal data, but this regulatory instrument seems insufficient. Moreover, a conclusion drawn in

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585 Tom Dobber, Ronan Ó Fathaigh and Frederik J B Zuiderveen, 'The Regulation of Online Political Micro-Targeting in Europe' [2019] 8 IPR.

586 ICO, *Guidance for the use of personal data in political campaigning*.

587 FDPIC, 'Guide by the data protection authorities of the Confederation and the Cantons on the application of data protection laws to the digital processing of personal data in connection with elections and voting in Switzerland', p. 12.p. 3; see chapter III.D.4.

588 The Guide by the FDPIC in section '7.2. overriding private and public interest' provides little information on the exercise of balancing interests when political personal data are involved. See FDPIC, 'Guide by the data protection authorities of the Confederation and the Cantons on the application of data protection laws to the digital processing of personal data in connection with elections and voting in Switzerland'.

589 See chapter III.D.

previous academic research has been that the regulatory instrument of voting secrecy has a temporal effect before as well as during and after the ballots.<sup>590</sup> Accordingly, when balancing interests, the extent to which this effect holds on the horizontal level should be taken into consideration. Additionally, the data protection laws depend on compliance in reality as well as on the willingness of the individual to enforce the rights, which in practice compromises the actual protection. Concerning political personal data, stricter protection should be sought. On a more actionable level, I argue that any processing of political personal data on a large scale should be required to be registered with a cantonal data protection commissioner and go through the respective consultation. In practice, questions relating to the implementation of data protection and thus the relevant balancing of interests are dealt with either by the organisation's internal data protection officer or by a consulting lawyer. The legal practice in Switzerland follows a risk-based approach.<sup>591</sup> To meet the democratic collective interests, additional guidelines for balancing interests in practice are needed as there is a lack of awareness about the potential compromise of democratic interests.

Moreover, in creating transparency for the enforcement of other rights, there is a procedural role of the right to informational self-determination. The process of balancing interests is part of the challenge, whereas transparency problems precede it. As the right to informational self-determination is rooted within personal freedoms, it does not focus on creating transparency with regard to collective interests influenced by personal data management. The dynamic infrastructure of the digital domain, coupled with the inherent unpredictability and speed of change in the digital information market, is an additional regulatory challenge. Consequently, it should be assessed where additional transparency instruments are required. For instance, the purchase of anonymised political personal data might create a power asymmetry in favour of one person or market player.

## 2.2. The Role of the Political Rights and Democratic Principles in Governing Online Information Spheres

Within online information spaces, there is the pending challenge to find suitable regulations in which various constitutional interests are weighed against each other. A further discussion point in this context is the possible subsidization of

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590 See Ralph Doleschal and David Rumer, 'Anspruch auf Wahrung des Stimmgeheimnisses im bundesgerichtlichen Verfahren' in Andrea Good and Bettina Platipodis (eds.) *Direkte Demokratie, Herausforderungen zwischen Politik und Recht* (Stämpfli 2013) 87; see chapter III.D.

591 See David Rosenthal, 'Das neue Datenschutzgesetz' [2020] Jusletter, November 16, 2020.

traditional newspapers, and the possible use of technical means in this context. Additionally, it is questionable how the use of artificial intelligence and bots spreading information shall be governed. Furthermore, it should be determined how exactly the scope of the political rights and the discourse interest are taken into account in this context. Swiss legal theory differentiates between the individual as a private person and consumer and their role as a political citizen, which becomes particularly evident in the obligation to vote.<sup>592</sup> In Switzerland, the discourse serves to create awareness of the individual's active role as a political citizen. The sphere of communication is seen as an institution that encourages deliberative exchange, while the discourse creates an active political citizenry. Individual citizens' critical, reflective, and responsible consciousness is also shaped by discourse-incentivising infrastructures. A consideration of discourse ethics reveals that, because the right to vote protects the actual preconditions of free and genuine expression of will, it turns to the asymmetries of the real discourse situation. These are internal and external constraints that could prevent the voter from exercising their discursive rights.<sup>593</sup> Accordingly, based on the assumptions about the possibilities of horizontal restrictions of the area of political rights that is protected by constitutional rights, TSCHANNEN concluded that, as far as the press is concerned, it is advisable to attach a limited horizontal effect to the right to vote.<sup>594</sup> In my opinion, this the horizontal effect should be translated to the digital domain.

Notably, within a newly created information domain, the discourse interest could be incentivised since the regulation of the existing digital gatekeepers is much more difficult. Specific consideration could be given to the options of banning algorithmically created content, instruments that render paid visibility of politically relevant information transparent, and even counter-balancing one-sided filtered political information within online platforms.

The assumption of the multi-dimensional nature of constitutional rights can be supported in the light of the preceding analysis. The constitution is embedded as an instrument in the democratic principles, with political rights serving to guarantee the democratic principles. The analysis of the political rights in chapter III revealed how democratic principles have been enshrined within the law: serving primarily to legitimise state action, political rights are an instrument of control. Legitimacy of the state requires the autonomy of the

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592 See chapter III.D.1.

593 Pierre Tschannen, *Stimmrecht und politische Verständigung* (Helbing Lichtenhahn 1995) 393.

594 Ibid 25.

individual and the autonomy of discourse.<sup>595</sup> Accordingly, I regard the institutional side of political rights as an obligation to create the conditions for autonomous discourse. Thus, in my view, a constitutional guarantee of the discourse and the regulatory consequences do not require an extended understanding of the constitutional rights.

### **2.3. Emerging Technologies and the Evolution of the Right to Informational Self-Determination**

In the course of the above analysis, I have reached conclusions regarding the right to informational self-determination in particular, which are set forth below. The right to informational self-determination is a rather new constitutional right that has only emerged as a result of new technologies and has a cross-sectional character. The scope of this right needs to be further developed in the context of evolving risks. In recent years, the new technical possibilities of analysing personal data have yielded a multitude of new economic opportunities as addressed in chapter II. Society and legal scholars have reacted with demands to strengthen subjective data protection rights. At the same time, there exists uncertainty about the doctrine of informational self-determination, as well as how data protection should be further adapted to emerging technologies.

In chapter IV, I provided a short review of the right to informational self-determination, with a particular focus on its democratic value. My analysis of the right to informational self-determination revealed that its doctrinal classification and further development have been primarily focused on the protection of the autonomous development of one's personality. The legal theory on the right to informational self-determination is rooted within the personal freedoms and the right to privacy. The revision of the Federal Act on Data Protection focused on strengthening the individual's rights. Nevertheless, one of the main novelties of the digital domain is that the use of personal data has become a decisive factor in information distribution. This effect unfolds for information independently of its content. As personal data are a decisive factor in the algorithmic distribution of information, this suggests that the exercise of informational self-determination as part of the information distribution process is a technical process that is of democratic relevance. As I discussed in chapter II, the consumption of information has a significant impact on the creation of information. Within this process, economic interests and individual freedom rights interact in a dynamic process which, in turn, affects the collective information distribution processes and even the creation of information (see

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595 See chapter III.B.

chapter III.E for further discussion). The information distribution process is relevant from the perspectives of both communicative constitutional rights and political rights. The legal theory outlined suggests that politically relevant information is protected within the public domain in an enhanced manner. Furthermore, there is also a legal claim to equal access to diverse information of political relevance by virtue of political rights.<sup>596</sup> In this situation, there is a conflict between the interests that underlie the exercise of the right to informational self-determination and the collective interests in accessing a functioning information sphere with diverse information. The regulations for the protection of personality development and the right to a private life have for most part been developed in isolation from the context of political life.<sup>597</sup> Consequently, I have argued that the right to informational self-determination should be decoupled from the right to privacy and right to personal integrity in the dogmatic sense. This proposal is underpinned by the following two considerations. Firstly, political personal data as protected by data protection law are connected to the concept of democracy and autonomy and, therefore, to a different constitutional content than the right to privacy and personal integrity. Secondly, there is a procedural role of the right to informational self-determination connected to the rule of law and to human dignity in a democracy that needs to be acknowledged in the further development of this constitutional right. Certain violations of constitutional rights can only become visible when data protection laws create the necessary transparency without a compromise in the practical application. To put it differently, certain constitutional rights are enforceable only if data protection law is implemented according to the present risk. This functional role needs to be reflected in the further regulatory development.

As outlined in the previous analysis, there is ambiguity on what the subject of protection of the right to informational self-determination is. Due to the rapidly developing technologies and their influence on constitutional interests, it seems necessary to define the doctrinal background more precisely. In the preceding analysis, I have proposed to define the subject of protection of the right to informational self-determination as ‘an impermissible vulnerability resulting from the processing of personal data that has constitutional significance’.<sup>598</sup>

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596 See Urs Saxer ‘Von den Medien zu den Plattformen, Regulierung öffentlicher Kommunikation im Zeichen der digitalen Revolution’ in Christian von Coelln, Karl-Nikolaus Pfeifer and Karl-Eberhard Hain (eds.), *Schriften zum Medienrecht und Kommunikationsrecht* (Moor Siebeck Tübingen 2023) 69 et seqa.

597 See Pierre Tschannen, ‘Art. 34 BV’ in Bernhard Waldmann, Eva M Belser and Astrid Epiney (eds.), *Basler Kommentar, Bundesverfassung* (Helbing Lichtenhahn 2015) N 12.

598 See chapter IV.C.5.

This proposal connects to a discussion on data protection rights in Germany and also aligns with the conclusions drawn in chapter IV.<sup>599</sup> Given the importance of informational self-determination for the enforcement of other constitutional rights as well as the collective interests protected therein, it does not seem appropriate to limit its scope to protection from misuse arising from the processing of personal data. However, to assume that the constitutional protective scope grants the individual complete control and autonomy over their personal data does not appear feasible in practical terms. It should be taken into account that a balancing of interests takes place in the practical implementation against constitutionally justified interests of others.<sup>600</sup>

Another dogmatic conclusion from the present analysis concerns different functions of the right to informational self-determination and different aspects of the individual that might be engaged by the processing of personal data. I have identified the following aspects of the data subject that are protected by means of the right to informational self-determination: a dignity aspect, an identity aspect, the autonomy of political will-formation and, lastly, a transparency aspect.<sup>601</sup> In my view, within the exercise of balancing interests, the criteria for the balancing exercises should be defined whilst considering which aspect of the right to informational self-determination is engaged.

On a more practical level, I have argued that a functional perspective on the right to informational self-determination should be of guidance to further define its protective content. In regulating new technological developments such as artificial intelligence, the transparency function of the right to informational self-determination is of particular significance. If the core of another constitutional right is affected, transparency should be established by means of the right to informational self-determination without any compromise with competing constitutional interests.

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599 See Maximilian von Grafenstein, 'Refining the Concept of the Right to Data Protection in Article 8 ECFR – Part II' [2021] 2 EDPL 190.

600 See chapter IV.C.5.

601 See chapter IV.C.



## VII. Research Findings: Evolving Legal Theory in the Digital Space and Regulatory Inputs

At a juncture in time within Switzerland, the translation of the scope of constitutional political rights into the digital sphere has become a complex issue due to the dynamics of the digital space. The ongoing debates surrounding online media, governance of platforms, the use of artificial intelligence, and the further evolution of data protection rights highlight the need to situate the risks posed by digitalization within a systemic constitutional context. Therefore, there is a need to examine the impact of constitutional political rights from a theoretical perspective. The Federal Council has initiated a discussion on regulating online communication platforms, and there is also an ongoing debate regarding the regulation of artificial intelligence.<sup>602</sup> The thesis at hand has addressed these critical issues and aimed at providing insights and conclusions that can inform and contribute to the ongoing discussions on the challenges in governing the digital landscape. The thesis has focused on the potential extension of the scope of political rights into the digital sphere in particular.

The preliminary examination in this research revealed the need for a systematic analysis to address the potential risks to democratic interests brought about by digitalization. This analysis recognises that certain fundamental assumptions underlying constitutional rights may no longer hold with the rapidly evolving digital landscape.<sup>603</sup> Furthermore, it becomes apparent that safeguarding constitutional interests solely based on individual subjective rights will prove inadequate. Instead, there is an imperative to discuss a digital governance to address the risks outlined and to develop criteria that effectively balance interests within the intricate digital sphere, given the frequent collisions of multiple constitutional rights.<sup>604</sup> Additionally, it is crucial to consider the interconnectedness of various constitutional interests. For example, the

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602 See Staatssekretariat für Bildung, Forschung und Innovation, 'Herausfordern der künstlichen Intelligenz'.

603 See chapter II.

604 See chapter VI.

regulation of personal data by means of data protection law has implications for the scope of political rights, given that personalised and data-analyzed information now is an effective means of influencing political opinions at an individual level.<sup>605</sup>

The initial approach of this study has been to compare the changes in the digital world with the assumptions on which the constitution has been established. Some of these changes compromise democratic principles and are not addressed within the scope of the constitutional rights. For this reason, the chapter on democratic theory precedes the analysis of constitutional rights in this work. Subsequently, I have established the connection between the constitutional protection of political rights and democratic theory.<sup>606</sup> This initial work then forms the basis for the discussion of how this content of constitutional rights might impact the further development of data protection and regulation in the online information sphere or the regulation of the media in general. Recognising that regulations must be tailored to allow for case-by-case assessments, I also explored the doctrinal principles for balancing interests at the horizontal level to assess their transferability to the digital sphere.<sup>607</sup>

Several changes due to digitalisation have been addressed within this analysis that could potentially compromise the content of constitutional rights and protected democratic principles. The traditional newspaper sector can no longer depend solely on advertisements to sustain its business. The online information sphere is no longer characterised by the degree of autonomy and transparency on possible power asymmetries that previously existed. As a result, interventions in the market through state funding are being discussed.<sup>608</sup> Today's traditional newspapers no longer exist separately from the digital domain, which blurs the boundaries between the digital domain and the one created by traditional newspapers. Within the current digital information domain, there is a lack of resources to perform the main journalistic work of researching according to journalistic standards and creating reliability in terms of objectiveness and trust. Within the digital domain, a large part of prevailing business models capitalises on data, on the possibilities to influence and nudge individuals, and on providing visibility to third parties. These new business models have significantly shifted the ways political opinions are formed in comparison to the analogue world.<sup>609</sup>

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605 See chapter III.E., IV.C.3.

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606 See chapter III.D.

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607 See chapter V.

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608 See chapter V.C.

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609 See chapter II.

The present regulations rely on people's sound and critical judgment and assumes the existence of external press pluralism within a functioning information market. Citizens' critical mindset as well as external press pluralism are understood as having a function of counter-balancing against one-sided information, misinformation, and polarisation.<sup>610</sup> Within the realm of the new gatekeepers, it becomes more difficult to assess the objectivity of information as well as to identify possible underlying economic or political incentives. Digital gatekeepers function differently from traditional journalistic gatekeepers, and there is a lack of transparency on how information distribution is governed. In the context of information creation, transparency regarding the utilization of automated content generation is notably deficient. Accordingly, the reader, listener, or viewer in the digital domain faces the challenge of differentiating between facts, opinions, exaggerations, and misinformation.<sup>611</sup> Furthermore, personalisation of information distribution and the possibility of filter bubbles move the social reality further away from an ideal discourse situation. Consequently, scholars highlight the need for a regulatory response in particular to the risks of algorithmic information distribution, the use of automated information creation, the use of artificial intelligence in journalistic work, and political micro-targeting.<sup>612</sup>

Given the incorporation of political rights within the democratic framework, along with the unique characteristics of Switzerland, it is both reasonable and essential to include democratic principles within the legal analysis. The objective of political rights is to safeguard the unhindered political will-formation process and to serve as a guarantee to uphold the democratic principles within the legal framework amidst emerging societal risks and technological shifts. One assumption of democratic theory is that individuals are capable of assessing the objectivity of information that is provided to them on their own. In other words, there is the assumption that citizens are able to respond with a reflective mind to persuasive and influencing techniques, to detect exaggerations, and to distinguish between opinions and facts. Furthermore, within democratic theory, it is assumed that deliberative discussions occur when certain conditions of a well-functioning information sphere are met. Additionally, the autonomy and independence of the information sphere from government interventions, social influences, and economic power asymmetries are crucial for fostering deliberation.<sup>613</sup> However, from the perspective of deliberative

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610 See chapter III.D.4.

611 See chapter II.

612 See chapter II.C.

613 See chapter III.D.

democratic theory, several of the recent changes are problematic. Assessing the objectivity of information has become challenging, and understanding the economic motivations behind certain information online has also become difficult. In the digital realm, power dynamics have shifted in favour of digital gatekeepers whose business models are not contingent upon adhering to journalistic standards. The use of data analytics on politically relevant data, including both personal and non-personal data, further enhances power asymmetries while often lacking transparency. I have highlighted how the existing regulations do not adequately address and reveal these power imbalances.<sup>614</sup> Based on democratic principles, I have evaluated the potential extent of the significance of political rights for the regulation of digital media and/or digital gatekeepers, as well as their influence on data protection laws. Both points of reference call for establishing the context with deliberation theory and a consideration of discourse ethics. Discourse ethics responds to the challenge of combining collective sovereignty and individual autonomy within a democratic system that evolves and innovates according to its established rules. I suggest that the following democratic principles should be taken into account within the discussions on upcoming regulations: a) the principle of reducing power asymmetries in the process of forming political opinions in different information spheres; b) orientation towards the ideal situation that an individual can distinguish between facts, opinions, and advertisements among information that is provided; c) the principle of granting equal access to a variety of information of political relevance; d) the assumption of a critical, independent, and questioning consciousness of each citizen that should be protected against intrusive, unconscious influence.

Continuing the analysis on a more concrete level, I delved into the emerging phenomenon of political microtargeting. This trend intersects with multiple constitutional interests. The impact of microtargeting extends to crucial democratic concerns such as autonomous opinion formation, personalised information consumption, the constitutional interests of political parties, and the protected economic interests of digital players. Consequently, an adequate balancing of these conflicting interests is required. Furthermore, the right to informational self-determination faces doctrinal legal ambiguities. Political personal data are classified as sensitive personal data and are therefore subject to stricter requirements under the FADP. In this context, the scope of constitutional political rights overlaps with the scope of the right to informational self-determination.<sup>615</sup> Due to this interconnection, I suggest that in the further

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614 See chapter III.E and IV.C.5.

615 See chapter IV.C.3.

development and interpretation of regulating political personal data, the parameters developed within the constitutional scope of political rights should be taken into consideration. In this consideration, the protection of voting secrecy would be a focal point.<sup>616</sup> From a practical standpoint, I propose that the processing of large datasets containing political personal data as well as the anonymization of large datasets containing political personal data should be subject to mandatory registration with the Cantonal Data Protection and Information Commissioner on all occasions. It should not be possible to circumvent this requirement by designating an internal data protection officer, especially given the current lack of comprehensive guidelines for assessing risks associated with political personal data and emerging technologies like artificial intelligence. As such, relying solely on an internal data protection officer may not adequately address the unique challenges and considerations associated with safeguarding political rights by means of data protection rights. Therefore, it is essential to establish guidelines and regulatory frameworks that explicitly account for the protection of political rights as well as the conflicting interests. Such guidelines should take into account the complexity and potential implications of emerging technologies, such as the use of social bots and artificial intelligence, to ensure a comprehensive and balanced approach to the regulation of political personal data.

In addition to stricter regulations regarding the processing of political personal data, I propose a reconsideration of the protective scope of the right to informational self-determination. The existing disagreement among academics regarding the precise content of constitutional protection further contributes to uncertainties when balancing interests in concrete cases, such as in the execution of data protection impact assessments. I suggest defining the protective scope of the right to informational self-determination as ‘an impermissible vulnerability resulting from the processing of personal data that has constitutional significance’.<sup>617</sup> Whether the resulting vulnerability is constitutionally significant in a specific case should be established based on case law, evolving criteria, and taking into account the protective scope of other relevant constitutional interests. In light of this interpretation of the constitutional right, the balancing of conflicting interests should be conducted with its function and relationship to other relevant constitutional interests in mind. I have attempted to highlight different functions of the right to informational self-determination in chapter IV.C. There is a dignity aspect that the right to informational self-determination protects as well as the interest in establishing and

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616 See chapter III.D.5.

617 See chapter IV.C.5.

(re)creating one's own identity. At the same time, the right to informational self-determination protects the unhindered political will-formation process and serves a functional role in ensuring transparency that is required for the enforcement of other constitutional interests. Furthermore, in my perspective, the right to informational self-determination should no longer be perceived solely as a right derived from the right to privacy or the right to protection of one's personality.<sup>618</sup> Instead, it should be recognised that through the processing of personal data, the protective scope of political rights or other constitutional interests, such as human dignity, may also be compromised. One of the functions of the right to informational self-determination is to create transparency. When balancing conflicting interests, this role of the right to informational self-determination should be given due consideration.

The thesis at hand has further explored the impact of the constitutional political rights on the regulation of online gatekeepers and information.<sup>619</sup> A diverse information market is crucial for the exercise of political rights in Switzerland, and the legislator has employed various legal instruments to protect the sphere of the press and the sphere of radio and television. The distinction between politically relevant information and commercial content has been a key factor in regulatory decisions. However, within the digital sphere, distinguishing between purely commercially motivated advertising, politically relevant information, and opinions becomes challenging. Therefore, it is necessary to develop new forms of governance to address the present regulatory challenges. The prevailing opinions on the translation of the doctrine on communicative freedoms suggest that the differential treatment of information in the present regulation (political information, commercial information or advertising, and the expression of personal opinions) should be translated into the digital sphere. From the lens of such translation, I would argue that the legislator may therefore rely on the political rights (art. 34 BV) as a legal basis for regulating politically relevant information within the online media sphere. For this reason, I propose that the regulatory response to the risks inherent to the new information spheres created by new gatekeepers should be grounded in the above-mentioned democratic principles. In my view, it is necessary to label political advertisements as well as to create transparency on the use of social bots, automated journalistic content creation, and the use of artificial intelligence in the context of politically relevant information.

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618 See chapter IV.C.5.

619 See chapter VI.

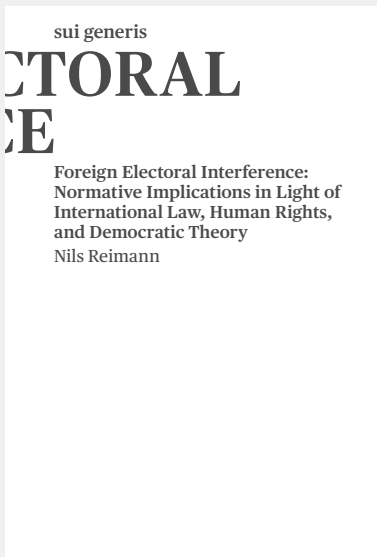
In conclusion, this dissertation has delved into the intricate complexities of the digital sphere and its impact on constitutional interests. Through an analysis of the evolving landscape of online media, the challenges posed by new gatekeepers, and the importance of effective data protection, it becomes evident that additional regulatory measures are necessary to preserve democratic values and safeguard individual rights against the emerging technologies and the challenges in the digital information spaces. By drawing upon democratic theory, principles of deliberative democracy, and the unique characteristics of Swiss democracy, this study has highlighted the need for proactive measures that address power asymmetries, promote transparency, and uphold the autonomy of the information sphere. Moving forward, policymakers and legal scholars should strive to preserve the tenets of democratic principles whilst harnessing the potential of digital technologies.

### *About the Author*

Natalie Michèle Pompe has completed her PhD at the University of Zurich. She works as a General Counsel in a Software Company focused on artificial intelligence and automation. She independently consults software companies and start-ups in compliance, strategy and data protection. Her PhD research is situated on the intersection of evolving legal theory, the affordance of constitutional rights in the digital era and innovate technologies. She has also experience in lecturing and has co-founded a start-up in the wellness sector.

037 – Nils Reimann: **Foreign Electoral Interference:  
Normative Implications in Light of International Law,  
Human Rights, and Democratic Theory**

Foreign interference in elections may have attracted increased public attention since 2016, but it is a practice virtually as old as modern electoral democracy itself. This book offers the most comprehensive account of its normative implications yet. It discusses relevant standards of international law, human rights, and democratic theory, thereby casting a net wide enough to address the fundamental value of human dignity as well as the conditions of real political autonomy. Ultimately, the book identifies potential deficits of legality, accountability, and legitimacy ensuing from certain types of foreign electoral interference, and it provides ideas on what can and should be done in response.



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061 – Pauline Meyer: **La cybersécurité des infrastructures critiques et la gestion de cyberincidents en droit suisse**

Un besoin de cybersécurité existe aujourd’hui indéniablement en Suisse et en particulier pour les infrastructures critiques, soit essentielles à la population, à la société ou à l’économie nationale. La réglementation fait partie des leviers servant à améliorer leur cybersécurité.

La présente étude poursuit deux objectifs principaux. Premièrement, elle expose une analyse du cadre légal existant à ce jour pour la cybersécurité des infrastructures critiques en droit suisse, et de l’activité des prestataires de gestion de cyberincidents. Deuxièmement, cette étude formule des propositions législatives visant à inciter les infrastructures critiques à améliorer leur cybersécurité, à encadrer la pratique de gestion de cyberincidents et à renforcer le rôle de l’État dans ce domaine majeur pour la société.



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## 021 – Roger Plattner: **Digitales Verwaltungshandeln – Rechtliche Aspekte der Digitalisierung in der öffentlichen Verwaltung**

In einer Zeit, in der die meisten Aufgaben des Alltagslebens online erledigt werden können, werden auch an die öffentliche Verwaltung steigende Ansprüche bezüglich Erreichbarkeit, Verfügbarkeit und Vereinfachung ihrer Dienstleistungen gestellt. Daher wurden in den letzten Jahren unter dem Begriff des «E-Government» zahlreiche Verwaltungsdienstleistungen digitalisiert. Neben allen positiven Aspekten ist diese Digitalisierung auch mit Herausforderungen sowie Gefahren für die Rechtstellung Privater verbunden.

Die vorliegende Monographie soll einen Beitrag zur Beantwortung der Frage leisten, wie die mit der Digitalisierung einhergehenden Veränderungen im Bereich des Verwaltungshandelns rechtlich zu beurteilen sind. Dabei werden einerseits Technologien und Phänomene, welche im Handeln der öffentlichen Verwaltung bereits zum Einsatz gelangen, auf ihre Vereinbarkeit mit dem bestehenden Rechtsrahmen beleuchtet. Andererseits werden sich abzeichnende, künftigen Entwicklungen aufgezeigt und mit kritischem Blick auf mögliche rechtliche Probleme untersucht.



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# CONSTITUTIONAL RIGHTS IN THE DIGITAL CO

The research discusses regulatory deficits at the intersection of constitutional law and its practical affordance in the digital era. This dissertation is based on the legal policy objective of evaluating future regulations in terms of their suitability for the realisation of political rights in the changed digital environment. The dissertation suggests specific evolutions of legal theory to respond to the technological era and ends with a few specific regulatory proposals.

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