

CONSTITUTIONAL DEMOCRACY, PLATFORM POWERS AND DIGITAL POPULISM

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ABSTRACT

The current massive spread of populist narratives online raises questions for constitutional democracies. Through the internet, populist voices have become a relevant part of the public debate and of the political arena. This issue is even harder to address due to the role of social media in governing online content. Within this framework, we underline how the regulation of content moderation can play a critical role in mitigating the strategies of populist movements without impairing political speech. Such an approach may contribute to making digital populist strategies more exposed to democratic control. The first part of this article examines the governance of the online spaces where populist movement spread their narratives. The second part focuses on the characteristics of digital populism. The third part deals with the potential constitutional paths to address digital populism. The fourth part analyses how the substantive and procedural safeguards in the process of content moderation can help to mitigate the spread of populist content and increase democratic control.

KEYWORDS: *constitutional democracy, platform governance, digital populism, content moderation, disinformation*

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INTRODUCTION

“The internet is a new free marketplace of ideas.” This could be the metaphor used by those who, within scholarly and public debate, take the view that the issue of online speech need not be addressed by public authorities (and constitutional law). The main idea behind this thesis is that whereas in the world of atoms, as Justice Holmes wrote in 1919, the “best test of truth is the power of the thought to get itself accepted in the competition of the market,”³ this is even more true in the world of bits, as the internet is amplifying the free exchange of and competition between ideas and opinions. In other words, public authorities should not have any role in dealing with the ever-growing dimension of online speech, including falsehood and populism on the internet, because individuals (optimistically) already have the skills to select and distinguish the best information.

However, in the last years, the massive spread of populist narratives has raised questions for constitutional democracies (Daly and Jones 2020). New (digital) populist strategies manipulating information for political purposes have populated digital spaces (Barberis 2020). By exploiting the opportunities of online platforms, populist voices have become a relevant part of the public debate online and in politics (Engesser et al. 2016). The success of these movements is the result of the exploitation of the technological factor, which characterizes (digital) populism (Bartlett et al. 2011) in its multiple definitions of a political communication style, a political strategy framed in certain types of organization, and an ideology (Rovira Kaltwasser et al. 2017).

The cases of the Brexit referendum and of the US elections of 2016 have provided examples of how populist movements have relied on digital technologies and, primarily, online platforms as instruments to spread their narratives (Flew and Iosifidis 2020). Extreme voices at the margins contribute to driving today’s political debate. The case of Hungary and Poland (Sadurski 2019) and even the electoral successes of Alternative für Deutschland (AfD) in Germany or the Five Star Movement in Italy provide examples to understand how populist narratives are widespread no longer as an answer to the economic crisis but as anti-establishment movements fighting against globalized phenomena such as migration and proposing a constitutional narrative unbuilding democratic values and the principle of the rule of law (Delledonne et al. 2020). The pandemic has constituted an opportunity for populist movements to challenge the élite and spread false news. US president Donald Trump referred to the coronavirus as a “hoax” (Egan 2020), while Brazilian

3. Dissenting opinion of Justice Holmes in *Abrams v. United States*, 250 U.S. 616 (1919).

president Bolsonaro defined the virus a “fantasy” and preventive measures “hysterical” (Paraguassu 2020; Phillips 2020).

Even if populism does not represent a novel issue for constitutional democracies, the technological dimension causes democratic systems to lose the control they traditionally had over the spread of political speech (Gerbaudo 2014; Bimber 1998). For instance, the massive amount of online content shared does not allow for an effective fact-checking to operate and leaves users to deal with large amount of unprofessional information flowing on the internet. What is scarce in the digital environment is the attention of users, which is not only affected by the quantity of information but also by the opaque moderation of online content by online platforms.

These actors are the governors of the digital spaces where most of the information flows (Klonick 2018). The decision of Twitter to silence former President Trump in the aftermath of the violent conflict at Capitol Hill (Fung 2021), the Facebook ban of Australian publishers and users from sharing or viewing Australian as well as international news content (Morrison 2021), or even the decision of YouTube to block anti-vaccine content spreading misinformation (Heavey 2021), are just some examples of how platforms have consolidated their role as gatekeepers over information globally. These cases are not only business decisions that reflect platforms’ economic freedoms. They are examples of the exercise of functions replicating those of public authorities, thus showing how powers have been relocated among different actors in the algorithmic society, “which features large, multinational social media platforms that sit between traditional nation states and ordinary individuals, and the use of algorithms and artificial intelligence agents to govern populations” (Balkin 2018a). This framework pushes towards a new phase of digital constitutionalism (De Gregorio 2021; Pollicino 2021).

Given the lack of regulation, online platforms, as private actors, are not required to comply with constitutional safeguards when moderating online speech. Since constitutions were traditionally meant to limit public (and more precisely governmental) powers (i.e., to protect individuals against any abuse by the state), the shift of power from public to private hands leads to wondering about and revisiting some well-established assumptions. In this case, the threats for constitutional democracies are linked to the possibility that private actors develop a set of private standards that clash with public values (Suzor 2018). Precisely when their economic freedoms turn into forms of power, the risk is that private actors prioritise their interests while affecting fundamental rights and democratic values. The constitutional challenges of the algorithmic society require to deal not only with the troubling legal uncertainty relating to digital technologies but also with

the limits to private determinations, driven by automated decision-making systems. This is particularly evident in the aforementioned cases, which show how information flows online and how the characteristics of the public sphere have developed to be increasingly personalised rather than pluralistic.

Within this framework, we argue that the consolidation of online platforms as gatekeepers of online content makes it harder for constitutional democracies to address the spread of disinformation and populist narratives. Particularly, we underline how regulating content moderation can play a critical role in mitigating some of the strategies put in place by populist movements, especially when they concern disinformation. Even if this approach does not aim to solve the issue of populism, it contributes to making the digital populist narratives more exposed to democratic controls. Particularly, the first part of this article examines the governance of the online spaces where populist movements spread their narratives. The second part focuses on the characteristics of digital populism. The third part deals with the potential constitutional paths to address digital populism in the age of platform power. The fourth part analyses how the substantive and procedural safeguards in the process of content moderation can help mitigate the spread of populist content and increase democratic control.

I. PRIVATE POWERS AND ONLINE CONTENT IN THE ALGORITHMIC SOCIETY

The rise and consolidation of digital technologies have played a crucial role in empowering the private sector in the last twenty years. Beyond public powers, the freedom to conduct business has now gained a new dimension—namely, that of private power—and this, it goes without saying, brings significant challenges to the role and tools of constitutional law. Competition law and policy, in fact, would no longer be sufficient to capture the functioning of these actors. The liberal approach taken by constitutional democracies in relation to digital technologies and online platforms has contributed to the transformation of economic freedoms into something that resembles the exercise of powers as vested in public authorities (De Gregorio 2019).

The global pandemic has highlighted the role of online platforms. For instance, Amazon provided deliveries during the lockdown phase (Klebnikov 2020), while Google and Apple offered their technologies for contact-tracing apps (Barber 2020). These actors played a critical role in providing services that other businesses or even the state had failed to promptly deliver. The pandemic crisis has led these actors to become increasingly involved in our daily lives and part of our social structure. In

other words, their primary role during the pandemic has resulted in these actors being thought of as public utilities. Generally speaking, it is worth observing that the solidarity expressed during the pandemic has also been mediated by the role of online platforms at the heart of individuals' lives and relationships.

One may actually wonder about the connection between algorithms and power. Private actors other than the traditional public authorities are now vested with some forms of power, and that is no longer of a merely economic nature. The apparently strange couple “power and algorithms” does actually make sense and triggers new challenges in the specific context of constitutional democracies. A broad range of decision-making activities are increasingly delegated to algorithms that can advise and, in some cases, take decisions based on the data they process, so that “how we perceive and understand our environments and interact with them and each other is increasingly mediated by algorithms” (Mittelstadt et al. 2016). In other words, algorithms are not necessarily driven by the pursuit of public interests but are instead sensitive to business needs as a result of the large development of these systems in the private sector. These concerns are even more serious in light of the learning capabilities of algorithms, which—by introducing a degree of autonomy and thus unpredictability—are likely to undermine “accountability” and the human understanding of the decision-making process. For instance, the opacity of algorithms is seen by scholars as a possible cause for discrimination or differentiation between individuals when it comes to activities such as profiling and scoring (Citron and Pasquale 2014).

This situation particularly affects the public sphere. The way in which we express opinions and ideas online has changed in the last twenty years. The internet has contributed to shaping the public sphere. It would be a mistake to consider the new channels of communication just as threats. The digital environment has indeed been a crucial vehicle to foster democratic values like freedom of expression (Benkler 2006). This, however, does not imply that threats have not appeared on the horizon. On the contrary, the implementation of automated decisions-making systems is concerning when one focuses on the protection of the right to freedom of expression online. Even before the rise and spread of artificial intelligence technologies in the last years, European courts, especially the European Court of Human Rights, have underlined the threats the digital environment has raised for the protection of freedom of expression (Pollicino 2019).

It would be enough to focus on social media like Facebook or YouTube to understand how freedom of expression and artificial intelligence are intertwined in the algorithmic society (Balkin 2018a). Indeed, to organize and moderate billions of contents each day, platforms also rely on artificial intelligence to decide whether

to remove content or flag some expressions to human moderators (Gillespie 2018a). The result of this environment is troubling for constitutional principles, primarily the rule of law, from different perspectives. First, artificial intelligence systems contribute to the interpretation of the legal protection of fundamental rights by de facto setting a private standard of protection in the digital environment. Second, there is also an issue of predictability and legal certainty, since private determinations blur the lines between public and private standards. This leads us to the third point: the lack of transparency and accountability in the decisions concerning freedom of expression online (De Gregorio 2020). The implementation of machine-learning technologies does not allow the scrutiny of decisions over expressions that are still private but involve the public at large.

In the lack of a horizontal translation of constitutional values, online platforms, as private actors, will continue to exercise their discretion in assessing and removing speech according to their business purposes. During the pandemic, once Facebook and Google sent their moderators home, the effect of these measures extended to the process of content moderation, resulting in the suspension of various accounts and the removal of some content even though there was no specific reason for these removals (Douek 2021). This situation not only has affected users' right to freedom of expression but also has led to discriminatory results and the spread of disinformation.

This situation is the result of the logic of moderation. Online platforms are critical channels for sharing online content and exchanging ideas. However, the interests guiding these actors are not just focused on facilitating the spread of opinions and ideas across the globe to foster freedom of expression. Particularly in the case of large social media such as Facebook or YouTube, the activity of content moderation is performed to attract advertising revenues by ensuring a healthy online community, to protect the corporate image, and to show commitments with ethical values.

Within this business framework, users' data are the central product of online platforms under a logic of accumulation (Zuboff 2015). Platforms thus aim to create a digital environment where users feel free to share information and data that can feed commercial networks and channels and, especially, attract profits coming from advertising revenues (Gillespie 2018b). Facebook, for instance, aims to maximise the amount of time users spend in their digital spaces to collect data and information (Alter 2017). Even if this could seem paradoxical, this logic also leads to developing addictive technologies, to capturing users' attention with inflammatory content, and to fostering a low degree of privacy (Bell and Owen 2017), thus undermining the objective to ensure a peaceful framework to share content.

The spread of false content and populist narratives on social media does not escape this logic. Online platforms host and moderate false content and populist speech, which become a part of the process of content moderation and, therefore, the mechanism of profit maximisation. Within these spaces, populist movements have found new opportunities to exploit digital technologies for their political purposes. Particularly, the logic of moderation has amplified some of the traditional challenges raised by these narratives, leading online platforms to provide an even broader and targeted digital public square.

II. THE DIGITAL DREAM FOR POPULISM

Online platforms have provided critical spaces to share ideas and opinions with billions of people without the filters of traditional media. However, at the same time, this opportunity for democracy has also proven to be a political boomerang. If examples like the Arab Spring can show the power of digital channels in fostering movements from the bottom, there is also an opposite trend by which the spread of disinformation and the consolidation of populist narratives online lead to the dissemination of anti-egalitarian and sovereign promises as well as to the questioning of the slowness of (representative) democracy.

Populism has captured global attention, thus raising serious concerns across the globe (Mudde and Rovira Kaltwasser 2017). In particular, one of the primary challenges is for constitutional democracies where populism has proposed a democratic degradation (Urbinati 2019). Populist groups build their moral narrative around the people (the good citizens) and the “Elite” (the corrupted) (Muel-ler 2016). These movements can be considered as anti-élite groups whose aim is to question the political establishment or the wealthy economic élites enriched by a season of neoliberalism and globalization. Against these centrifugal challenges, populism promises to represent citizens’ interests by promising to foster national sovereignty and identity.

In the past, populism has already been defined just a “perennial possibility” in democratic countries (Canovan 1999). In democratic societies, populism is a call for popular rather than consolidated institutions and organizations representing the ideas and values of the society (Canovan 1981). To achieve this result, populist groups and leaders are interested in appearing close to people by rejecting bureaucracy, expertise, and representation while offering fast and simple solutions. This narrative consists of proposing a reduction of complexity and requiring institutions to give back the power to the people. They offer to restore the betrayed will of the

people by putting them back at the centre of political decision-making, no matter if this results in a clash with constitutional norms and principles. As also observed, “populists call for making popular sovereignty a reality, or better, the pinnacle of a new constitutional order” (Blokker 2019a). Nonetheless, anti-élitism is not the only populist pillar. Populist movements are also anti-pluralist: they support only “the people” as opposed to all other political parties, which are considered as part of the corrupt élite. The people need to be protected against the continuous global pressures and influences (e.g., migration) undermining their national identity. Within this framework, protecting “the people” means safeguarding shared values, traditions, and destinies. It is here that the notion of people transcends its meaning and acquires a metaphysical interpretation.

Populism is opposed to the democratic and liberal basis of the rule of law, thus underlining a constitutional tension. Populist movements do not accept the distinction between ordinary and constitutional politics (Walker 2019). This separation characterizes democratic societies where ordinary politics is promoted as an instrument for the solution of social conflicts, while constitutional politics provides the normative boundaries of these conflicts. This system is perceived as a limit to the exercise of popular sovereignty, so constitutional rules and the rule of law are rejected. In fact, the basic rules of the game should be defined by the people to avoid any marginalization. This consideration can be applicable to different constitutional norms protecting, for example, minorities or institutions like constitutional courts and, in general, the judiciary.

The technological factor has amplified this situation and diminished the distance between left- and right-wing populism. Rather, it can be considered one of the primary reasons why populist narratives have increased their reach while challenging the principles of constitutional democracies. The European political situation seemingly reveals these tensions and a trend towards polarization (Neudert and Marchal 2019). Online platforms, in particular, are common instruments in current political processes. The consumption of news is increasingly shifting online, even if traditional media outlets still govern the scene. Users access social media not only to manage their relationships but also to be informed and to exchange ideas (Eurostat 2018). Therefore, online platforms have become the natural space to host political communication. Political parties and leaders set their online presence, but unlike traditional media outlets, they can rely on the services of social media platforms to target certain users according to some characteristics. Besides, they can also directly interact with people by using the same content and format without organizing a meeting or events, while collecting and analyzing their comments and reactions. These examples also underline why social media

have become a critical tool for politicians not only during electoral periods but especially in the everyday political debate.

Within this framework, populist narratives seem to fit perfectly within the attention economy (Wu 2016). Populist movements rely on simple sentences that reduce complexity by using black or white expressions or vague references to the “élite” or to “others” (Canovan 1999), such as in the case of Donald Trump (Oliver and Rahn 2016). Moreover, these narratives aim to share emotions as an expression of the “populist mood” (Canovan 1999, 6), based on sentiments of hate, xenophobia, or negativity. These views are shared outside the moderation of traditional media outlets, thus creating more engagement and putting politicians increasingly closer to the citizens.

Within this system, political strategies have changed. Populist movements have tried to follow mainstream trends and controversial rhetoric to capture users’ attention and lock users in their information bubble, leading to the issue of network homophily wherein users tend to interact more with similar points of view rather than with dissenting ideas (Sunstein 2017). Populists use social media as direct communication channels to overcome traditional filters or gatekeepers (Schroeder 2018). Besides, traditional media outlets fall for this trap and increase their reach by giving spaces in their larger platforms even through unfavourable coverage (Phillips 2018). Social media allow politicians to reach different targets of population and to talk directly with people. Populist movements can reach and influence public opinion by relying on social media services and micro-targeting techniques to spread their narratives. Indeed, the debate around polarization and digital technologies is strongly linked to the increasing use of data and the role of artificial intelligence systems in creating echo chambers or filter bubbles frustrating the political debate (Pariser 2011; Sunstein 2017). Therefore, the digital environment seems to be a perfect space for populisms to advance their mission.

This situation could be considered the realization of one of the populist dreams: limiting trust in professional media and having a direct relationship with people making decisions. Populist movements use social media as an alternative tool to challenge traditional media by dismantling dissent and making the possibility to disagree difficult. This framework is also connected with the spread of disinformation. Social media has proven to be one of the primary fields where political parties support their extremist theses, which often overcome the threshold of truthfulness (Bayer et al. 2019). In other words, the liberal architecture of the internet allows populism to flourish and better support, in an environment that is closer to people, its narrative about supranational powers hiding in bureaucracy, media owned by the wealthy and political establishment, and the fallacies inherent to representative democracy.

However, it is worth underlining that when using digital technologies to spread their narratives, populist groups and leaders are exercising constitutional rights and liberties. Therefore, they are relying on constitutional safeguards. Still, populist movements exploit this framework for their purposes, shielding themselves behind democratic safeguards to share opinions that inevitably undermine the same values that allow them to perform their activities. In other words, they exploit constitutional values to run their unconstitutional projects (Blokker 2019b).

Besides, this situation also extends to other constitutional norms and safeguards. When they use social media, populist movements also exercise other pluralist values such as freedom of assembly and association, which allows everyone to participate in the social and political life, including those minorities that populism aims to fight as a threat to the people's unity. In this sense, populism can be considered as a parasite of constitutional democracies (Fournier 2019).

The digital environment has been the perfect place for the spread of populist narratives. The influence of the digital environment not only goes even beyond national populism but also extends to the field of international politics. The Cambridge Analytica scandal is a clear example of how even states can interfere in foreign presidential elections by exploiting social media services to polarize and influence communities across the globe (Pollicino and Pitruzzella 2020). Therefore, once we agree on the relevance of the technological factor, we should wonder how to address digital populism that threatens the rule of law and should determine to what extent this phenomenon can transform democratic values. As already observed, populism seems to be one of the prices democracies should pay to tolerate pluralism. Nonetheless, this does not mean that the price should be high.

The case of digital populism provides a paradigmatic example of the complexity in the protection of constitutional principles in the algorithmic society. These challenges also lead us to wonder about the constitutional strategy to deal with digital populism in the age of platform powers.

III. ADDRESSING DIGITAL POPULISM

Addressing digital populism leads to different constitutional strategies but, primarily, raises questions about the boundaries of freedom of expression, and especially political speech, in the digital environment. The decision to intervene to filter out political speech requires questioning whether and to what extent it is acceptable for liberal democracies to enforce limitations on freedom of expression. This is a multifaceted question, since different constitutional systems adopt different paradigms of protection even when they share a common liberal matrix, such as in

the case of Europe and the United States. We could outline a dichotomy, with respect to the circulation of ideas and opinions, that presents the option of a militant democracy—one that is committed to the strenuous defence of a value system actually at risk of being jeopardized by the exercise of protected constitutional rights—and the model of a tolerant democracy, where the idea of an ethical state, or in any event of greater control over the exercise of freedom by individuals, seems to disappear (Loewenstein 1937). In other words, it is a matter of understanding the limits of freedom of speech to protect legitimate interests or safeguard other constitutional rights.

The relevance of the right to freedom of expression was already underlined in the seventeenth century by John Milton (Milton 1644), and in the nineteenth century by John Stuart Mill (Mill 1859), who supported a liberal view and believed that falsehood could contribute as well to reaching the truth, especially by avoiding the risk of a dogmatization of knowledge. These liberal ideas protecting individuals against the interferences of public actors are still at the core of the right to freedom of expression as underlined in the twentieth century by Justice Holmes in his dissenting opinion in *Abrams v. United States* of 1919.⁴ Justice Holmes argued that although men try to support their positions by criticizing opposing ideas, they must not be persuaded that their opinions are certain. Only the free exchange of ideas can confirm the accuracy of each position creating a “free marketplace of ideas.”⁵

Whereas the need to protect freedom of expression is a goal for many constitutional democracies, this fundamental right could firmly conflict with many other interests in other contexts, especially when one focuses on authoritarian and illiberal democracies. These systems may consider censoring dissent as an opportunity to enhance their authority rather than as a threat to the right to freedom of expression. Since these regimes are characterised by the predominance of a central authority or leader (Ginsburg and Simpser 2013), they aim to suppress or control the degree of pluralism to avoid that spark of dissent that triggers ideas undermining the stability of the central power. In this case, disinformation is not a threat but an opportunity for the central authority. By using political parties’ dissemination of false content as an excuse to protect legitimate interests (e.g., national security), these regimes aim to foster their legal narrative to dismantle undesirable (and lawful) speech (Clark et al. 2017). For instance, the example of internet shutdowns or less intrusive forms of censorship has shown how governments implement these

4. *Abrams v. United States*, 250 U.S. 616 (1919).

5. This expression was coined for the first time by Justice Douglas in *United States v. Rumely*, 345 U.S. 41 (1953) (Ho and Schauer 2015; Volokh 2011; Goldman and Cox 1996; Coase 1974).

practices without providing explanations or relying on a general legal basis (De Gregorio and Stremmler 2020). Technology thus becomes not only a tool for liberation (Diamond and Plattner 2012) but also a tool for surveillance and propaganda (Morozov 2012; Tufekci 2014).

On the other side of the spectrum, protecting freedom of expression is vital for liberal democracies. The respect of fundamental rights and freedoms, especially freedom of expression, is at the core of the entire democratic system.⁶ Without protecting equality, freedom of expression, and assembly, it would not be possible to enjoy a democratic society. This consideration underlines why fundamental rights and democracy are substantially intertwined. Because of this substantive relationship, fundamental rights cannot easily be exploited to pursue political ends (Marks 2003).

Constitutional democracies tolerate the political exchange of views, and even falsehood, as a precondition of pluralism—or, to use a neo-liberal metaphor, of the free marketplace of ideas—while promoting the exchange of political ideas. Although the spread of disinformation can produce serious consequences in the offline world, disinformation has been considered an opportunity for promoting the exchange of ideas. Likewise, the spread of populist narratives online is an expression of political speech, even though it can lead to a serious impact on the public discourse and on the stability of constitutional democracies. Therefore, the question is where to draw the line when a political speech clashes with other constitutional interests deserving protection such as dignity.

Still, the way in which constitutional democracies answer this question could differ, particularly when one looks at the constitutional models. For instance, across the Atlantic, this general trust in a vertical and negative paradigm of free speech is not entirely shared (Pollicino and Bassini 2014; Zeno-Zencovich 2008). Unlike the United States, where a strict scrutiny test applies to the limitations of the right to freedom of expression (Volokh 1996), the protection of this fundamental right in Europe is subject to an express balancing with other fundamental rights and may be subjected to (conflicting) legitimate interests.⁷ It is not by chance that the Charter of Fundamental Rights of the European Union provides a clause for the abuse of rights as a means to avoid that granting absolute protection to one right

6. Contracting parties to the European Convention on Human Rights (ECHR) are under a positive obligation to ensure the effective enjoyment of freedom of expression. Among others, ECHR, *Özgür Gündem v. Turkey*, Application no. 23144/93, March 16, 2000, para. 43; *Dink v. Turkey*, Applications nos. 2668/07, 6102/08, 30079/08, 7072/09, and 7124/09, September 14, 2010, para. 137.

7. Charter of Fundamental Rights of the European Union (2012) OJ C326/12 (“Charter”), Art. 52; ECHR (1950), Art. 10(2).

leads to the destruction of other fundamental rights, undermining de facto their constitutional relevance.⁸

If these considerations would be enough to explain the constraints for constitutional democracies when regulating online speech, the role of online platforms in disseminating populist narratives makes the entire picture even more intricate. The digital environment amplifies the challenges raised by digital populism not only for the architectural characteristics of the internet, intended as a channel that allows people to communicate on a global scale with fewer barriers to entering the market of ideas, but also for the role of online platforms. As a result, limiting digital populism is a cross-border issue that requires public actors to rely on private intermediaries to enforce their policies in the digital environment. As observed by Balkin, in the information society, freedom of expression is like a triangle (Balkin 2018b). The regulation of speech no longer involves just the state and the speaker; it includes multiple players outside the state's control, such as social media companies. Unlike traditional media outlets, online platforms usually perform content moderation activities by implementing automated systems governing the organization of information and deciding in a heartbeat whether to maintain or delete the vast amount of online content globally.

The lack of remedies to address disinformation or the spread of populist narratives online is also the result of the constitutional limits in regulating online platforms. Constitutional democracies do not always agree about the need to regulate digital private powers governing the flow of online information. In the United States, the protection recognized to the activities of online platforms is broad, since the constitutional grounds to perform their business are based on the right to freedom of speech as recognized by the First Amendment. In particular, in order to understand when a violation of the right to freedom of speech occurs, the US Supreme Court applies a strict scrutiny test according to which any such law should be narrowly tailored to serve a compelling state interest, as demonstrated in the cases *Reno v. ACLU*, at the end of the last century,⁹ and *Packingham v. North Carolina*.¹⁰ Still, the Communication Decency Act immunizes online intermediaries, including modern online platforms, from liability for the moderation of users' content, thus showing how the US policy is still anchored to a digital liberal approach that considers the First Amendment as the primary reference of the algorithmic society.

8. Charter, Art. 54; ECHR, Art. 17.

9. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

10. *Packingham v. North Carolina*, 582 U.S. ____ (2017).

Even from a European constitutional standpoint, the primary limitation can be found in the freedom to conduct business as recognized by the Charter of Fundamental Rights of the European Union together with the European fundamental freedoms, especially the freedom to provide services as set out in Article 16 of the Charter and Articles 56–62 of the TFEU. This freedom constitutes a crucial barrier to disproportionate regulatory attempts involving platforms’ activities. Each attempt to regulate online platforms should comply with the test established by the Charter. Therefore, in order to restrict the freedoms of platforms, it is necessary that limitations comply with the principles of legality, legitimacy, and proportionality. Moreover, regulatory attempts are blocked not only by economic freedoms but also by the impact that regulation could have on other constitutional rights such as freedom of expression, privacy, and data protection of users. Despite the differences between the two models across the Atlantic, online platforms enjoy a “constitutional safe area” whose boundaries can be restricted only by a disproportionate prominence over other fundamental rights.

In these years, courts across the Atlantic have addressed questions about the removal of political speech or the block of accounts of political figures. In the United States, courts have primarily barred any attempt to make platforms responsible for the discretionary removal of content. In particular, the case of the removal and block of the former president of the United States,¹¹ or even the case of PragerU about the dissemination of conservative ideas, can be considered a paradigmatic example of the constitutional protection enjoyed by online platforms. In contrast, in Europe, courts have answered this question by extending constitutional values horizontally. Most notably, in Germany and in Italy there have been cases in which courts have recognized that the discretionary removal of content by online platforms cannot be justified just by a contractual relationship but should take into account the protection of fundamental rights.¹²

This approach broadly results from the different sensitivity of the two sides of the Atlantic to the exercise of private powers. Still, the broad extension of the horizontal effect doctrine could affect legal certainty, and therefore the focus moves to the remedies to address digital populism in the age of platform powers. Particularly, this situation leads to wondering whether regulating content moderation could contribute to mitigating platform discretion and reducing the possibility for digital populism to conduct unconstitutional projects within these digital spaces.

11. *Knight First Amendment Institute at Columbia University v. Trump*, 302 F.Supp.3d 541 (2018).

12. *Tribunal of Rome, CasaPound v. Facebook*, Order of April 29, 2020; Dresden Higher Regional Court, *Ein Prozent v. Facebook Ireland Ltd.*, Decision of June 16, 2020.

IV. REGULATING DIGITAL POWERS AND DISINFORMATION?

Within the framework of the algorithmic society, the success of digital populism is primarily the result of the mix between the consolidation of online platforms providing digital spaces driven by the need to maximise profits and the liberal approach characterizing the approach constitutional democracies have adopted to protect freedom of expression. Therefore, addressing digital populism requires constitutional democracies to deal with the boundaries of freedom of expression and the power of online platforms in governing the digital spaces where information flows online.

The European Union has been at the forefront of platform regulation in the last years. While the United States seems to trust digital liberalism, looking at the other side of the Atlantic, the European Union has slowly complemented its economic imprinting with a constitutional democratic strategy (De Gregorio 2021). The Digital Services Act proposal is a paradigmatic example of the shift of paradigm in the Union towards more accountability of online platforms to protect European democratic values.¹³ Particularly, there are at least two relevant strategies that affect digital populism. First, the Union has primarily focused on addressing false content by providing guidelines and self-regulatory solutions. Second, the Union has focused on increasing the degree of transparency and accountability in content moderation, also requiring very large online platforms to conduct systemic risk assessments.¹⁴

Even before the launch of the Digital Services Act proposal, the Code of Practice on Disinformation had introduced a self-regulatory approach, pushing social media to voluntarily increase transparency and set other proactive measures to address the spread of false content.¹⁵ Major platforms voluntarily committed to implementing a set of standards to tackle disinformation practices on their platforms. This approach had already shown the intention to fight disinformation without regulating speech as much as the dynamics affecting its circulation. The Democracy Action Plan then consolidated this approach, recognizing the role of the Digital Services Act in the fight against disinformation. The new legal framework will encourage the Commission to overhaul the Code of Practice on Disinformation into a co-regulatory framework. In this case, according to the Digital

13. Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM/2020/825 final (“DSA”).

14. *Ibid.*, Art. 26.

15. *Ibid.*, Art. 37.

Services Act, codes of conduct will play an important role to tackle the amplification of false news through bots and fake accounts and may be considered as an appropriate risk-mitigating measure by very large online platforms, even though the Code of Practice has already raised questions, as underlined by the Sounding Board on the Multistakeholder Forum on Disinformation (2018).

Nonetheless, codes of conduct are only a small part of the jigsaw. Another important purpose of the Digital Services Act will be to increase transparency in the field of targeted advertising. The Digital Services Act, indeed, recognizes that advertising systems used by very large online platforms pose particular risks, for instance, relating to the spread of disinformation that could have an impact on public health, public security, civil discourse, political participation, and equality. Therefore, the Digital Services Act introduces the obligation for very large online platforms to provide public access to repositories of advertisements.¹⁶ This new measure will allow more scrutiny and increase the accountability of online platforms. This measure will also provide more information about the target of this advertising, allowing researchers, media, and civil society organizations to scrutinize populist strategies hiding behind the opacity of online platforms. Also, the proposal for a regulation on the transparency and targeting of political advertising is part of the efforts to address these challenges in the digital age.¹⁷

Likewise, another important part of fighting disinformation relates to the role of trusted flaggers. The Digital Services Act requires online platforms to take the necessary technical and organizational measures to ensure that notices submitted by trusted flaggers are processed and decided on with priority and without delay.¹⁸ This system opens the door to fact-checkers and other civil society organizations, allowing them to be more involved in the process of content moderation and the reporting of online disinformation.

The Digital Services Act also deals with extraordinary circumstances affecting public security and public health. In these cases, the Commission has the power to rely on crisis protocols to coordinate a rapid, collective, and cross-border response, especially when online platforms are misused for the rapid spread of illegal content or disinformation or where the need arises for rapid dissemination of reliable

16. DSA, Art. 30.

17. Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising (COM/2021/731 final).

18. DSA, Art. 19.

information.¹⁹ In these cases, very large online platforms are required to adopt these protocols, though these are to be applied only temporarily and should not lead platforms to a general monitoring obligation of online content.

Besides, even EU member states have followed different paths in addressing disinformation, since, as already stressed, such a phenomenon has not yet been subjected to a clear framework at a European level. The approach is very fragmented, as some states have adopted soft-law solutions to address disinformation while discussing new bills on online harm (e.g., the United Kingdom), while others have opted for a hard regulation of this phenomenon (e.g., Germany). However, even when agreeing on this last choice, member states have intervened to regulate disinformation following different logics.

The lack of coherence and cohesion between these measures is evident when focusing just on the cases of Germany and France. In June 2017 the German Bundestag passed the German Network Enforcement Act (NetzDG),²⁰ which has been fully operational since January 2018,²¹ against the backdrop of the intention to counter hate speech and fake news, increasingly surfacing in public discourse in the preceding years. It is worth noting, first of all, that the act does not provide a definition of “fake news” or “hate speech,” these being the two pillars of the act, interwoven in its final draft (Wischmeyer 2020). Second, it does not introduce new legal categories but simply provides for the application of existing provisions of the German Criminal Code to the platform sphere (Tworek and Leerssen 2019, 2).

The scope of application covers providers of telecommunication services and internet platforms operating for profit and designed to allow their users to share any type of content or to make it accessible to the public (i.e., social networks). Platforms offering journalistic or editorial content, for which the responsibility lies with the service provider itself, are excluded, as well as platforms intended for individual communication or distribution of specific content. A social network with more than two million registered users in Germany, receiving more than a hundred reports of illegal content in a calendar year, is placed under an obligation to draw up a six-monthly report on the management of reports of illegal content on its platforms. Besides, the main obligation focuses on the establishment of a procedure to handle complaints regarding illegal content.

19. *Ibid.*, Art. 37. See also Recital 71.

20. *Netzdurchsetzungsgesetz*, Law of 30 June 2017, *Federal Law Gazette* I, 3352ff. (“NetzDG”).

21. Be noted, the law entered into force on 1 October 2017; however, pursuant to Art. 1(6), the reporting duty provided at para. 2 became applicable from the first semester of 2018.

Likewise, France followed the path of hard regulation, though in a completely different way, since it focused precisely on disinformation during electoral periods. Finally approved in November 2018,²² both the framework and ordinary law were promulgated after passing a preliminary constitutionality review.²³ The ordinary law is essentially divided into parts: (1) setting provisions imposing transparency duties on platforms;²⁴ (2) specifying the powers of the French public audiovisual regulatory authority (*Conseil supérieur de l'audiovisuel*);²⁵ (3) imposing duties of cooperation on platforms;²⁶ (4) promoting media literacy in the educational framework.²⁷ A crucial element of the law deals with the electoral period, designated as the three-months period prior to an election, with the view of protecting fairness of elections and honesty of the votes expressed.

The law establishes, for the electoral period, a transparency obligation on platforms, which must report sponsored content and publish the source and the amount of payments received. The law also provides for a proceeding (*action judiciaire en référé*) to end the dissemination of false information on online public communication services.²⁸ In this sense, the contested falsehood must be obvious, be disseminated massively and artificially, and lead to the disturbance of public peace or the honesty of an election. According to the emergency procedure, judicial authorities have the power to order the deletion of content within forty-eight hours from their reporting, thus requiring a judge's rapid decision on the truthfulness of the contested information and proof of the author's intent to manipulate public opinion.

The European framework underlines how there have been serious efforts to fight the opacity of content moderation and the spread of disinformation. The Digital Services Act will contribute to harmonising this picture, but it is still just a first step towards the mitigation of platform power over content and the unveiling of the strategies of populist movements.

22. Loi organique no. 2018-1201 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information; Loi no. 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information.

23. Décision no. 2018-773 DC du 20 décembre 2018; Décision no. 2018-774 DC du 20 décembre 2018.

24. Title I of Loi no. 2018-1202. Translations from French are by the author.

25. *Ibid.*, Title II.

26. *Ibid.*, Title III.

27. *Ibid.*, Title IV.

28. *Ibid.*, Art. 1(2).

CONCLUSION

In the algorithmic society, constitutional democracies are under pressure from multiple sides. The spread of populist narratives online constitutes a paradigmatic example of the complexity of dealing with narratives playing with constitutional instruments to perform their unconstitutional purposes. The success of populist movements comes primarily from the evolution of online platforms that provide spaces for disintermediated and direct contact, so it is difficult to find populist movements that are not intimately digital.

The consolidation of digital populism is intertwined with the power of online platforms to govern content. Behind the scenes of content moderation, populists can profit directly from reaching citizens while exploiting the First Amendment dogma characterising US online platforms. The mix between liberalism and technology is the perfect mix for digital populism, which even in times of pandemic has shown how political speech can produce serious harms for society.

Populist narratives are still an expression of political speech, and it is a question for constitutional democracy about where to draw the line for protecting populist expressions. Generally, constitutional democracies are tolerant spaces for this type of speech even when it inflames protests or contributes to spreading disinformation. Instead, in illiberal and authoritarian regimes, the spread of this content is also a way to consolidate the power of the central authority by censoring dissent.

Nevertheless, addressing populism involves not only dealing with questions about political speech but also dealing with the role and responsibilities of online platforms. The introduction of transparency and accountability safeguards in the process of content moderation will contribute to mitigating platform discretion when prioritising content while also requiring the disclosure of information about advertising. Regulating the process of content moderation can provide a clear framework positively affecting online speech, thus ensuring that the logic of content moderation does not lead to the spread of disinformation and populist narratives.

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