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Fundamental Rights Protection on the Internet - Horizontal Effects in the Information Age

I. Introduction

Digitalisation and the internet are changing private and public communication fundamentally, and with it our lives and societies. The internet is not just a specific field for the dissemination of opinions, but changes our communication in their entirety. It places the fundamental rights, not least the freedom of expression, in a completely new environment. The exchange of information is now possible between almost every person in the world, without delay. At the same time, it is embedded in a network infrastructure that is provided by private, internationally active corporations - from the deployment of the technology to the organisation of the communication processes to the provision of a wide range of services, not least the provision of communication platforms.

This poses major challenges for the law. One is that the concept of constitutionalism has no answer to this: The idea that rules and limits can be imposed on private activities on the basis of the constitution and general elections is of fading cogency. Nationally limited, legal systems can do less and less to counter the international world of the Internet and the power of important private actors.

I cannot take up this problem as such. It cannot be addressed by mere legal analysis but refers to policies of international cooperation and thereby to political power and assertiveness. My topic, however, will be the role of human rights (or we may also say: fundamental rights). After all, human rights constitute a legal layer that reaches beyond the particularity of a single legal system. They thus create at least a common vanishing point to resolve the problems of our world not only by political and economic power but also by the idea of law.

As for my methodical approach: I will largely refer to German constitutional case law. However, in doing so I will not discuss its details and internal conclusiveness, but am seeking for a transnational perspective. I want to expose some general structures and assumptions in order to contribute to a common understanding of the problems we are confronted with. The aim is thus to give some impulses for a possible understanding of human rights in wrestling with the challenges of our digital and international world. This is not guided by the assumption, that human rights must produce the same results all over the world. On the contrary, a meaningful

fundamental rights interpretation provides much flexibility in balancing the different guarantees. But they offer a starting point for making the idea of law a standard in a transnational perspective.

II. Power of private corporations in the age of information

Indeed, this raises right away the question: Can we still suppose, that fundamental rights are relevant in our days? Do they contain a reservoir of justice that can serve as the basis of a legal order in the age of information? Are they meaningful for the problems of the internet?

Much depends here on an appropriate understanding of fundamental rights. As a result of digitalization and internationalization, legal relations are determined to a large extent by private actors operating transnationally. This applies first and foremost to the internet itself. The rules of the net are determined by private corporations. They provide the infrastructure, they design the services and they shape our world with their know-how and their interests. We have to make use of our freedom in the face of private power and economic strength. This is particularly visible for freedom of expression. Platform operators and privately defined rules on the Internet decide which opinions are disseminated and how. But similarly, this applies to practically all other guarantees granted by fundamental rights - be it personal rights, economic freedoms or telecommunications secrecy. This is not merely a new edition of the old problem of media power: Since the Internet is reshaping the entire reality of the real world as well, it is fundamentally changing the basis of freedom and the conditions of equality.

Whether fundamental and human rights offer an answer here - and thus retain relevance - is determined by an appropriate understanding of fundamental rights: We need to acknowledge horizontal effects. I will develop this in two steps: first in a general perspective and then exemplified for some basic legal relations on the Internet.

III. Broad understanding of human rights

As to the general perspective: Protection of fundamental rights in the Internet age requires a broad understanding of fundamental rights. Fundamental rights must be understood as principles that are intended to shape the whole political order. They are legal ideas that place the individual at the centre of the legal order and aim at his or her free self-development. In consequence they must also be accorded legal effect between private actors. They have horizontal effects.

1. Broad understanding of human rights in history

This is entirely in line with their historical content. Since the beginning, human rights have been demanded and understood as comprehensive legal ideas for the entire legal system. The French Revolution proclaimed human rights in its preamble as the "aim of every political institution"; sacred and imprescriptible, they were to be withdrawn from private law. “Being ever-present to all the members of the social body”, they were to “unceasingly remind them of their rights and duties". Their realization then lay first and foremost in the creation of the great codes, especially the *Code Civil*. Only such an understanding also does justice to their roots in natural law. Human rights focus on the individual and his or her right to develop as a free person - not on a technically limited relationship between citizen and state. The Virginia Bill of Rights was already written in this spirit, and this also underlies the international human rights covenants created later. The proclamation of human rights is likely to have been linked with the hope and commitment to material principles of justice practically everywhere.

If human rights are also to have an impact in the information age, such a broad understanding, including horizontal effects, is all the more indispensable. The more private actors gain the power to shaping public policies and unilaterally impose their will to others, the more important it is to protect fundamental rights also in private legal relationships. What use is data protection vis-à-vis the state if Google can collect and disseminate unlimited data about me?

In contrast, limiting fundamental rights to a negative safeguard vis-à-vis the state or reducing their guaranties by tenets like the *state action doctrine* is an inappropriate reduction of their meaning. It is likely to be motivated by the concern that the judiciary would otherwise encroach too far on the other powers of the state, and, indeed, this concern may pose a problem. But this problem can and must be solved by a more precise adjustment of judicial control, not by limiting the content of fundamental rights protection to the relationship between citizen and state (- which, incidentally, can and will hardly be upheld).

2. Judicial control as part of human rights protection

Nevertheless, at least a certain judicial control of human rights is an important component of human rights protection, especially for the relationship between private individuals. The independence of the judiciary and its view on human rights in concrete encounter with the inequalities of private actors in everyday life makes it possible to identify problems quickly and to develop conceivable compensatory mechanisms. The courts can do so in different ways, depending on their procedural rules and their profile – whether by creating such mechanisms themselves within the framework of the law, whether by rejecting unfair or disproportionate

norms or whether by requiring lawmakers to regulate a problem in a differentiated way. Particularly in a world in which state and economic interests are often closely intertwined, the relatively depoliticized perspective of the courts can advance human rights-based responses. In a network of courts it may even build bridges across state borders. Ultimately, of course, the enforcement of human rights is a task shared by all state powers, not only the judiciary.

In Europe, case law has long taken account the necessary horizontal effects of human rights. In the case law of both the European Court of Human Rights and the Court of Justice, human rights have been repeatedly applied in private law relations. A pioneer in this respect is the case law of my Court, the German Federal Constitutional Court. In many landmark decisions since 1958 it has extended the fundamental rights guarantees to legal relationships between citizens as a general rule. In addition, there are decisions that derive even institutional requirements from fundamental rights. They oblige the legislature to counteract the consolidation of imbalances between private actors and to foster public interests by means of institutional arrangements and specific forms of regulation. The role to be assigned to the courts in this regard can be answered in different ways, depending on the legal traditions. It should depend not least on the extent to which it is possible to establish a politically shielded but not detached judiciary. In any way, it seems indispensable to me that judicially enforced fundamental rights must play an important role, especially in limiting private power in the information society.

3. Different modes of protection vis-à-vis the state and vis-à-vis private actors

Indeed however, fundamental rights operate differently between private individuals than they do vis-à-vis the state. Vis-à-vis public authorities fundamental rights protection has rather clear structures. It follows the principle of minimization and is relatively strict, embedded in the asymmetrical relationship that marks the rule of law: The citizen is free, the state is bound, bound as a trustee for the sake of the citizen’s welfare. While the citizen's freedom is an end in itself, state action is limited to fulfilling a function – the function of realizing public interests. Thus, interferences to fundamental rights by public authorities must be precisely defined, legitimised by law and held as reserved as possible. They have to be justified and minimalized: Only such interferences are constitutional which are suitable and as unintrusive as possible (and remain sufficiently tempered). The burden of justification lies with the state.

Citizens in contrast face each other on an equal level with the same rights. Their legal relationship is of a symmetrical order: in principle, no free person is accountable to another, and there is no axiomatic need to justify private action in respect to others. The law is not aiming

to minimize the interferences of freedom but to secure a balance that imposes inherent limits on either side. The idea of asymmetric freedom thus cannot provide an adequate benchmark. The aim of fundamental rights protection is to preserve freedom and fundamental rights on both sides equally. Consequently, human rights protection cannot be guided by the principle of minimization between private actors.

All the more, asymmetric power is an important criterion in the protection of human rights between private actors, too. In this scenario, the aim is to correct imbalances in power in order to enable everyone to enjoy their fundamental rights. Consequently, our court has found, that fundamental rights may also impose requirements onto private actors which are just as strict, in some cases possibly even stricter than when facing public authority. This does not mean, that the asymmetrical relation between freedom and public authority should be projected onto private relations. On the contrary, all private actors remain bearers of freedom. But the resolution or at least mitigation of factual imbalances between private actors to allow equal participation in freedom and to secure symmetrical protection of fundamental rights is an important part of human rights protection.

The horizontal effects of human rights are thus less clear and strict. Since different spheres of freedom collide, the different rights must be weighed against each other and depend more on subjective valuation here than vis-à-vis the state. They are particularly open to concretization, whereby - depending on the constitution - all state powers have a role to play.

4. Fundamental rights as a duty of all branches of the state

At the same time, a broad understanding of human rights presupposes that all state powers are responsible for safeguarding, concretizing and realizing fundamental rights. The protection of human rights is not limited to an omission of interference, but requires the establishment and shaping the conditions of meaningful rights in real life; it is a positive obligation. The legislator is responsible for this in the first instance, and must take account of fundamental rights also through regulation and shaping the private-law relations. The same then applies to the executive and to the courts, which apply the laws and thus fill them with life. The shaping and application of law are always bound by fundamental rights and can receive impetus and direction from them. This does not prevent very different arrangements of checks and balances between the state powers, in particular, in respect to the nature and scope of constitutional control by courts.

IV. Horizontal effect in the internet

I come to my second part: Let us now have a closer look at legal relationships on the Internet. Of course, this is possible only by way of example. I will focus on fundamental rights protection in respect to the relations between the provider (such as hosts providing platforms for social networks), the user who makes statements on that platform (let's call them the speaker) and the person who is concerned by those statements (let's call them the affected person).

1. Issues in a triangle

Regarding the internet, we must think of human rights protection in terms of multipolar legal relationships. The basic one is the triangle *provider / speaker / affected person*. Human rights are widely embedded herein. This applies first and foremost to freedom of opinion: What opinions can be published is decided here. But it also applies to the protection of personal rights: What information about a person may be disseminated is result of this. At the same time, the freedom of Internet providers and the associated opportunities and risks for the general public are in question. All of this is only a narrow exemplary focus - in reality, many other fundamental rights may be affected and far more actors are involved.

Problems arising from this triangular relationship are of fundamental scope and have long since reached the courts. For example: Are search engines subject to restrictions when indexing webpages? Our court as well as the ECJ had to deal with this question – and decided to recognize fundamental rights on each side of the triangle (- it finally granted protection to the affected person). Another example: We had a case where Facebook shut down an account of an extremist political party. It shut it down amidst the European election campaign, thereby depriving this party of its main electoral advertising opportunities. Was it free to do so? (we ordered in a preliminary decision to reopen this account). I will just mention some further problems the civil courts had to deal with: Are social networks free to exclude inappropriate statements, may be algorithm based? Are discussion forums free to bar extreme comments? May they even be obliged to do so? In the same way there are many disputes about the legality of statements in rating portals. Finally, we all know the shutdown of the Twitter account for the US President. Is Twitter free to decide at will about shutting or opening his services?

In practice, these questions are brought before civil courts and solved primarily by rules of civil law. However, in a German perspective questions of fundamental rights protection are always lurking in the background. Even more: all these cases can and have to be construed also in a fundamental rights-perspective. Of course, I do not think, that the German concept with its complicated details have to be applied all over the world. But perhaps it may serve as

an impulse to think of human rights as a transnational basis of legal relations, especially on the internet.

Before having a closer look at this we have to remember: We are dealing here with the protection of fundamental rights between private individuals. This means that every actor here has individual freedom and thus fundamental rights on their side. The legal relations are not based on a presumption of freedom for one side or the other, but fundamental rights here require a balance guaranteeing freedom and protection for each side, taking into account the actual circumstances of real life. An important aspect of this lies in outweighing imbalances of power. At the same time, this means that fundamental right will be subject to substantial restrictions.

2. The fundamental rights involved

A first question arising is, which fundamental rights are conflicting in that triangle? This is easy for the speaker: He can invoke freedom of expression. For the person concerned there is also a quite clear legal basis: he or she can invoke their right of personality. For both sides other fundamental rights may be affected as well, but in essence there is a recognized fundamental right basis here.

In contrast, this is a dispute of more general importance for service providers. What fundamental rights are they entitled to? Of course, they have their economic fundamental rights, such as freedom of business or property. But can they also invoke freedom of expression?

If platforms are operated as "tendency platforms", which are designed to propagate certain ideas, there is no doubt about this. However, this is less obvious, if a platform intends to provide a neutral forum for the exchange of opinions by third parties. The problem probably need many distinctions and is too complex to go into in depth here. Just to give glance at the debate: The German Federal Court *of Justice* (the highest court in civil affairs) understands freedom of expression rather broadly and assigns the protection of freedom of expression also to rating portals and social networks. In contrast, according to the ECJ and the Federal Constitutional Court, *search engines* cannot rely on freedom of expression. Indeed, I think there are good reasons to be rather restrictive. At any rate, it is doubtful to ennoble a sheer business interest by the guarantee of freedom of expression, just because it objectively influences public opinion-making. But this leads into a deep debate about the nature of freedom of expression.

At any case, the providers can invoke their economic freedoms. It is true, the ECJ did not give those rights much weight. It denied them almost any enforceability against other fundamental rights and thus deprived them of their substance. However this valuation is not mandatory and not the only way to handle this conflict. Our court, for example, weighed in the freedom of

expression of the speaker on the side of the providers. At the end of the day the freedom of the providers must be an important factor in the balancing process (as well as public interest concerns of the legislature are, cf. below).

3. Freedom of the speaker in respect to the service provider

So, let us now have a look at the respective relations. A first basic question is: To what extent do host providers have to respect the users' freedom of expression? The German Federal Court of Justice had to adjudicate on a very fundamental question in this regard: The issue was how far Facebook is bound by the freedom of expression (and the principle of equal treatment) vis-à-vis its users. As a social network, Facebook provides an open platform for the exchange of opinions, without intending to disseminate specific views of its own. It thereby has considerable market power. The question therefore arose whether Facebook is subsequently bound by the freedom of expression of its users in a state-like manner, that means if it may ban statements only if they are formally illegal. Facebook, as a private company, claimed the freedom to impose stricter requirements through corporate guidelines. Hence, are social networks permitted to ban posts that do not reach the high thresholds of punishable incitement of masses if Facebook considers them unnecessarily polemical or aggressive?

The Court affirmed this in principle – but only to a quite limited extent. It did state, indeed, that the fundamental rights of the users, especially freedom of expression, have to be considered by the providers. Therefore, their terms of use must not provide for an arbitrary exclusion of undesirable political opinions. The court requires an explicitly stated and foreseeable reason – which, importantly, is safeguarded also by procedural law (see below). After all, it recognises a legitimate interest of the operators, based in their fundamental rights, to restrict the freedom of expression on their platforms. But such policies are limited. They may be guided by legitimate business interests as well as in the interest of other users, but in a transparent way and respecting the idea of open debate.

I cannot discuss the question exhaustively here. There are at least good reasons for this view that gives not little leeway to the providers. However, we have to be careful. If this view prevails for all host-providers, including market-dominant companies, this can have far-reaching significance for freedom of expression. The spectrum of statements may be considerably limited and the relationship between, for example, personality rights and freedom of expression can be significantly altered to the detriment of the latter. The standards defined by internationally acting companies are likely to incorporate the moral concepts and limits of free speech of different countries which is likely to limit the range of possible expressions. If things go badly the

spectrum of positions exchanged on the internet can thus be reduced over time to a moral mediocrity of virtuousness and common sense. It is true, no such development can be identified at present. To the contrary, one may hope that in this way something can be done to counteract the evident current brutalisation of political debate, which at present is rather promoted by the service providers. But the courts will have to take care that free speech in its full width will still be possible.

4. Fundamental rights protection of affected persons and freedom of the service providers

Let us now turn to another conflict in the triangle. It raises the reverse question: To what extent *must* a host delete statements off the internet in order to protect the rights of third parties?

a) The provider's esponsibility towards respected persons

Easily, insofar as providers adopt the opinions of third parties, endorse and disseminate them, there is no doubt that they are liable. They become speakers and their responsibility then is based on the general principles. This means that the opposing fundamental rights of the speaker and the affected person are balanced according to, what we call, the "law of expression" with its many distinctions in case law. This ultimately determines which content may be disseminated.

Liability is less evident, however, if service providers offer just platforms for third-party statements without endorsing them or if they act otherwise as intermediaries. Indeed, this question, too, has to be considered from a fundamental rights perspective. On the one hand the affected persons need protection that only the provider can grant effectively; on the other hand it would be a heavy encroachment in the freedom of the providers if they were fully responsible for all statements on their platforms. It would result in costly obligations of control and research, which in some circumstances that may even jeopardize the business model itself. Here again, the conflicting fundamental rights must be balanced against each other.

The creation of such a balance is primarily the responsibility of the legislature, because it is open to many different solutions. The current law exempts host providers from joint liability for the content posted on their platforms (section 230 TelecomAct US, Art 12, 15 E-Commerce Directive). However, affected persons can report any violation of personality rights to the host, who is then subject to monitoring and possibly removing such statements. In my view, this legal status appears to have a fundamental rights core - at least regarding the protection of those affected. But the balance might also be shaped otherwise.

In the end, the requirements of fundamental rights protection have to be based on a sufficiently detailed analysis of the specific constellation. Accordingly, the balance established by the legislator must be specified by the regular courts. When applying and interpreting the law, the courts have to be guided by fundamental rights. The legislature can never foresee all different conflicts. At the same time the legislature has a wide scope for rulemaking can bring in manifold public interest guided considerations. For example, if shaped in balanced way, it can also impose active monitoring obligations upon providers – as is the case in copyright law in the EU – or create obligations to enforce criminal laws – as is the case in Germany in the Network Enforcement Act. The European Digital Services Act, too, aims at a responsibility of the providers in order to balance the rights of freedom of expression and possible opposing fundamental rights. Operators thus can largely be held responsible for general law enforcement on the internet and also be burdened with costs. Indeed, this only corresponds to their social importance in the information age.

b) The provider's responsibility towards the speaker

Until now, we have looked at the fundamental rights of the providers and affected persons. However, we must not forget the fundamental rights of the speakers, whose statements may be deleted. It is above all their freedom expression which is at stake.

If a provider is obliged to block a statement in respect of its content – be it by law, by an agency or by a court decision –, this is ultimately a sanction against the expressing party. Even if a provider is doing so on his own accord, in the result he limits free speech of the speaker. Providers deciding upon inclusion and exclusion within the framework of general communication decide on the fundamental rights of users in their interaction. If we rightly understand fundamental rights as legal principles that also influence relationship between private actors, we have to put this in the balance. Once again, we see, freedom of expression on the internet is embedded in a multipolar relationship, here: a triangle. The first laws and court decisions in Germany did not understand that yet. But after some hints of the Constitutional Court the legislator as well as the civil courts include these rights in the balancing process.

c) Procedural safeguards

Finally we have to look at an important consequence: The multipolar nature of fundamental rights must also be reflected in the design of procedures and legal protection. Service providers have to make their decisions in an informed, transparent manner, which is fair in respect to both sides. According to the case law of our Constitutional Court, also procedural requirements can be derived from fundamental rights, even for civil law. In this respect, above all a fair hearing

may be imperative. The Federal Court of Justice (the "*Bundesgerichtshof*") has specified this in more detail for social networks: It says: When a network operator removes a statement from a platform, it must "inform the person concerned immediately, provide the reason for doing so and offer an opportunity for them to offer a statement, leading to the possibility of again making the removed statement available".[1] Here, too, the requirements are to be designed in a balance of interests. So, to enable the network operator to act fast, he may remove a statement immediately if necessary; it may catch up the relevant proceedings only afterwards. However, it must then promptly act and involve the affected parties. This opens up the possibility for the affected persons to seek legal protection by the courts (e,g, of their personality rights), including provisional decisions.

On the European level we also find a procedural approach to balance the fundamental rights of the users and providers. As a first attempt it is widely limited by a procedural design: Individuals can address host providers notifying them items they consider illegal. The host must take a decision and immediately inform that person offering a reasoned answer, at the same time providing information on legal protection in respect to that decision. If the provider decides to remove specific items or disable access, it shall inform the speaker. It has to do so the latest at the time of the removal or disabling of access and provide a clear and specific statement of reasons for that decision. Larger hostproviders have to provide access to an effective internal complaint-handling system. After this, further dispute settlement must be guaranteed.

I will not go in further detail. There is not just one answer to solve these complex multipolar conflicts. But to get a transnational grip on them we can discuss them under the perspective of fundamental rights. This does not avoid necessary political choices and public interest considerations by the different legislators and difficult weighing of interests by the respective executive and courts. But it may help to understand the different rights at stake and to leave nobody behind.

V. Final Remarks

This brings me to my end. My topic was human rights as a reference of transnational discussion and a legal basis for conflicts in the Internet age. I hereby limited my focus to the recognition of horizontal effects of these rights, taking as an example the triangle of provider, speaker and affected person. This is, of course, only a very limited sample of the fundamental

[1] BGH III ZR 179/20, para. 85 [29.07.2021].

rights issues raised by the internet. Most of the major problems of the Internet are not even touched by this analysis, such as: manipulation of information, communicative bubbles, steering by selective information, opacity of algorithms, fake-news, security, the power of foreign states ... and much more. Regulation will gradually be necessary here. Fundamental rights may likewise be able to provide impetus. German fundamental rights doctrine has not only developed horizontal effects and procedural rights, but also derived organizational and institutional requirements from freedom of expression – for example for the press, broadcasting, or science in faculties. This case-law as such is far from be helpful for the problems of the internet. But perhaps we can think further in this direction and dare innovations? ... But of course, that would be a new topic.