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Report

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Report on the Academic Round Table, 30 April 2024, New York City: Freedom of Online Communication Across Transatlantic Borders

The Alexander von Humboldt Institute for Internet and Society (HIIG), the Leibniz Institute for Media Research | Hans Bredow Institute (HBI), the Columbia Global Freedom of Expression and the UNESCO Chair on Freedom of Communication and Information co-hosted an academic workshop in New York City on 30 April 2024. European and US experts examined the current state of freedom of expression on digital platforms on both sides of the Atlantic. The round table took place as part of the Year of Science 2024 in Germany. To celebrate the 75th anniversary of the German Basic Law (*'Grundgesetz'*), this Year of Science has 'Freedom' as its central theme. This provided an excellent opportunity to examine the various understandings of freedom as it relates to communication rights and free speech between the US and Europe. The full extent of mutual learning opportunities remains untapped, and the practical implications are vast.

I. Introduction

Several major communication platforms originate from the US, carrying a significant influence shaped by their interpretation of the First Amendment of the US Constitution in defining their values and communication guidelines. They are thus 'exporting' the understanding of freedom to other parts of the world. The expansive EU regulation – along with its extraterritorial impact – commonly referred to as the 'Brussels Effect' results in a comparable dissemination of freedom-oriented principles from Europe.

Given the ongoing constitutionalization of communication orders on platforms, driven by the implementation of the Digital Services Act in the EU and pending US Supreme Court decisions on the right of platform operators to moderate content, this was an excellent moment to contrast current understandings of freedom, to explore learning potentials, and to intensify transatlantic cooperation in this field – particularly since similar questions arise for the regulation of AI systems. Against this background, the goal was to facilitate an exchange on relevant transatlantic topics in light of the latest scientific insights.

The workshop was attended by some renowned researchers, namely Anupam Chander (Georgetown University) Catherine J. Ross (George Washington University), Claudia E. Haupt (Northeastern University), Chinmayi Arun (Yale University), Ellen P. Goodman (Rutgers University), Hannah Bloch-Wehba (Texas A&M University), Hawley Johnson (Columbia University), Joan Barata (The Future of Free Speech), Nikolas Guggenberger (University of Houston), Robert C. Post (Yale University), Wolfgang Schulz (Hamburg University). The responsibility for this summary lies solely with the organizers of the event.

II. Analytical part

After a brief round of introductions, Wolfgang Schulz emphasized the relevance of the event in times of hybridization of rule structures on social media platforms. Indeed, an overlap, interdependence, and inseparability of private and public communication rules on social media platforms can be observed. Anecdotally, he described how the CEO of a global platform company approached him to find out how human rights could be incorporated into private communication rules of their platform. This formed the starting point for the overarching question of the event: How can we bridge the gap between legal requirements and the actual practices of platform operators?

In order to investigate this, the normative structures of platform governance were to be examined in four different thematic blocks from a comparative law perspective in order to identify research. Each was preceded by a short introduction by one of the researchers present.

1. Discussion 1: Comparative overview of the legal framework in the USA and the EU

Ellen P. Goodman gave an introduction to the current legal situation in the USA. To put this into context, she identified three issues that the Supreme Court is dealing with. The first concerns cases in which state officials

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block followers, the second concerns social media laws in the US states of Texas and Florida and the third refers to the influencing of platform operators by state actors, so-called 'Jawboning'. She predicted that issues relating to the protection of minors and transparency requirements in the USA would also become particularly relevant in the future; these aspects are still under-examined, but are often already the subject of state legislation.

The ensuing discussion highlighted how politicized the legal debate is in the USA. Republicans tend to want more content on social media to remain online, while Democrats are in favour of the idea that harmful content should be deleted. While the former regularly see platform operators as common carriers, the latter view them as being responsible for the public discourse space, which is why content moderation is necessary. Both sides see Sec. 230 of the Communications Decency Act, the core rule for exempting intermediaries from liability, as the cause of the problem. In this tense relationship – especially regarding the Texas and Florida laws – the courts have so far not seriously weighed up the triangle of interests (state-platform operator-user).

Several panelists agreed that the solution here could primarily be interoperability between different services. The extent to which the dichotomy between technical mediation by platform operators on the one hand and the understanding of platform operators as publishers on the other could be maintained was also questioned. A nuanced debate on the functions of these actors is necessary. This debate in the US often does not result in conclusive outcomes in court because the cases are frequently dismissed at an early stage of the proceedings. Finally, the debate in US scholarship on the legal classification of platform operators according to their functions was seen as a parallel to European platform regulation, which follows a risk-based approach.

The latter aspect gave Nik Guggenberger the opportunity to describe the legal situation in the EU. He began by discussing the origins of the Digital Services Act, which lie in particular in the German Network Enforcement Act to curb illegal content. He introduced the panel of academics to the main provisions of this new EU legislation, without omitting the first proceedings initiated by the EU Commission. Nik Guggenberger's overarching analysis is that European courts are operationalizing constitutional standards in the originally very abstract and vague general terms and conditions of platform operators.

From the user's perspective, this would give rise to rights; from the platform operator's perspective, it would define the extent to which they are allowed to go beyond 'illegality' in their content moderation. Moreover, all of this would be subject to the condition of whether national or EU protection of fundamental rights is applicable. The provisions of the Digital Markets Act (e.g. prohibition of self-preferencing, interoperability, antitrust enforcement), the General Data Protection Regulation (e.g. provisions on automated decision-making) and the Artificial Intelligence Act (e.g. the risk-based approach) are also relevant for content moderation. Yet it remains to be seen whether these laws are compliant with higher-ranking law. The speaker doubted that the Digital Services Act could be overturned, and regretted that the German Network Enforcement Act had never been reviewed for its constitutionality.

In the discussion on the coherence of the various legal acts, it became clear that a legal definition of the notion of 'platform' was introduced for the first time with the more recent EU laws, although the Digital Services Act (functioning of the service) and the Digital Markets Act (power of a service) differed in their areas of application. It became clear that European legislation was written with a mental model of certain services in mind and without sufficient consideration of the hybridity of services, e.g. in the case of Generative Artificial Intelligence. The partial lack of coherence in the regulations can lead to legal uncertainty, for example on the question of which requirements consent for data processing must meet in the case of personalized advertising. It was also noted that deficits in the delimitation of the areas of application could also lead to confusion regarding competences, e.g. the question of whether a data protection authority or an antitrust authority is responsible. In addition, other relevant EU legal acts were mentioned which further complicated the application of the law due to overlaps, namely the Terrorist Content Regulation (which was, however, largely ignored in legal practice), the Political Advertising Regulation and the European Media Freedom Act. The latter in particular sparked a debate on the protection of media content on social media. The main problem was the extent to which media could be classified in order to assign them to a special protection regime – especially as the special protection would then be handed over to platform operators. The problem of classification could be seen as a further indication that the creation of overly rigid categories in the legal text is generally unsuitable for the regulation of digital media.

2. Discussion 2: Of 'horizontal effects' and 'state action doctrine'

The second part dealt specifically with the constructions that exist in Europe and the USA to draw platform operators into the scope of application of fundamental rights obligations. Wolfgang Schulz kicked things off by presenting the relevant decisions of the German Federal Court of Justice in the '*Facebook*' case, where the court essentially concluded that procedural guarantees must be observed when weighing up the fundamental rights of the platform company and the users on the other when moderating content. Based on these statements the panel discussed how corresponding (albeit often less elaborate) case law on the horizontal effect of fundamental rights on platforms also exists in other EU Member States. It was also emphasized that – particularly with regard to international human rights – the focus has so far been very much on user rights, which is especially evident in the UNESCO Guidelines on Platform Regulation.

Claudia E. Haupt took this discussion as an opportunity to comprehensively present the legal situation regarding the horizontal effect of constitutional guarantees in the USA, especially in comparison to the European understanding of the effects of fundamental rights. After a systematic review of the case law of the German Federal Constitutional Court – which in recent

cases has increasingly come to the conclusion that private actors are bound by fundamental rights – she put forward the thesis that Donald Trump's deplatforming by Twitter after the storming of the Capitol on 6 January 2021 could also be accompanied by a legal paradigm shift in the USA. In particular, she raised the question of whether the Supreme Court's state action doctrine should not be softened, as otherwise any hate speech regulation could be blocked. The decisions in the above-mentioned cases on social media laws in Texas and Florida could now open the way to establishing elements of a 'militant democracy' to defend the Constitution. This refers to the exclusion of behaviour that undermines the democratic system – in other words limiting fundamental rights for the sake of democracy. For example, speech rights could be limited if they are anti-democratic. However, the premise for this is the horizontalization of constitutional values.

After the round table discussed the origins of legal concepts of militant democracy against the background of Claudia E. Haupt's presentation, the question arose as to what extent an analogy from this vertical concept to the horizontal situation in platform regulation was justified. It was argued that links should be drawn between constitutional law and antitrust law in some cases in the USA. In this context, the Digital Markets Act was once again highlighted in a comparative legal context as being like a fine ex ante granular version of the US essential facilities doctrine. Nevertheless, it was noted that while market power and power of opinion could be related, they are not the same anchor points of regulation. Rather, the opinion of a significant number of users could be influenced by a service without it necessarily having a corresponding market share. In European media law, a distinction is therefore drawn between the number of viewers and advertising revenue, which is a concept that can be applied to platform regulation. It would also make sense to attempt to establish a new dimension of diversity laws based on the power of opinion within certain ecosystems.

3. Discussion 3: What are the odds of hybrid legal thinking?

Right at the beginning of the third thematic block, Robert C. Post made it clear that, in contrast to the EU, it would be alien to US legal thinking to consider private and public communication rules on social media platforms as hybrid regulatory structures. Instead, it is likely that in light of the traditional First Amendment doctrine in favour of platform operators, a clear separation of constitutional guarantees and obligations would take place. He illustrated this with examples from his own experience. He reported on a legal examination that he gave to his students at Yale Law School. An overwhelming majority of his students saw the mere regulatory requirement for a platform company to establish a policy of some kind as a violation of the constitution. Robert C. Post noted it is deeply embedded in US legal thinking that even the mildest form of regulation would face constitutional challenges. The primary question to be addressed is therefore what kind of regulation does not affect social media content itself.

The subsequent discussion opened with the question of whether content-neutral transparency requirements of the Digital Services Act could be compliant with US law against this background. In this respect, it was assumed that the way in which social media companies are classified is very important. In contrast to the press, which is a publisher with an opinion, social media companies could be ascribed a different form of opinion expression. In this respect, the proposal was made to establish the 'expressive product' as a category in US law in order to focus on the quality of a service's infrastructure. This gave rise to a comparison with German constitutional law, where a distinction is made according to the social functions of a service – in the case of social media companies, however, this classification according to function is difficult given the hybrid nature of the offering. Regulators on both sides of the Atlantic would nevertheless do well to leave room for these functional differences, even though the fact that online speech can have such different effects depending on its reach would always remain a difficult hurdle.

Joan Barata then introduced hybrid thinking in European platform governance. Article 14 para. 4 of the Digital Services Act in particular makes this clear, as it requires a three-step proportionality test. Nevertheless, it could prove particularly difficult to identify legitimate purposes in horizontal situations. There is also the problem that it is unclear how platform operators could operationalize this test. There would be a risk that bodies with special expertise (e.g. youth protection) could have a bias in favour of the protected interests falling within their area of responsibility, particularly in the case of the Digital Services Act's out-of-court dispute settlement bodies. It is also noteworthy that platform operators are held responsible for risks that lie outside the platform ecosystem according to the concept of risk management under Arts. 34 and 35 of the Digital Services Act. The fact that the EU uses platform operators to minimize such social risks could already be understood as state action. In the same context, Joan Barata highlighted the problematic fact that the publication of risk assessments under the Digital Services Act takes place without the involvement of civil society, meaning that this could also represent a shift of power in favour of platform operators. He therefore argued that even though the Digital Services Act is typically understood as a procedural set of rules, it certainly also has a substantive component. In this context, the problematic role of the EU Commission, which as a political body is responsible for enforcing the Digital Services Act, was also particularly highlighted.

4. Discussion 4: TikTok and constitutionalizing of the internet

Anupam Chander began by explaining how the liability immunity provisions of Sec. 230 of the Communications Decency Act and Title 2 of the Digital Millennium Copyright Act enabled the business model of social media companies in the USA. Both regulations are ultimately an expression of the First Amendment, which originally cleared the way for US internet companies. Nowadays, however, in addition to this entrepreneurial freedom, a social risk is seen, even in the USA, particularly in the

example of TikTok. Since 2020 at the latest, there have been concerns that TikTok serves as a proxy for the Chinese government to conduct propaganda on the one hand and surveillance on the other. For this reason, the TikTok law was finally passed in April 2024, essentially ordering the platform to be banned unless it was sold before the inauguration of the next president. Anupam Chander predicts that both TikTok and its users or user organizations will sue against the law. The underlying problem is the tension between national security and the First Amendment, making the TikTok Act a classic case of constitutionalization.

During the discussion, it became clear that other large platform companies in the USA, such as Meta and Google, would have an economic interest in banning TikTok. In comparison to the situation in the EU, it was mentioned that Commission President Ursula von der Leyen had said that TikTok could also be banned in the EU. In fact, there are already examples of such bans, for instance in Pakistan, Nepal and India. Moreover, in the case of the USA, it is not entirely correct to speak of a ban, as the law provides for exemptions to allow the platform to continue operating. However, the law could serve as a global roadmap to provide for corresponding bans in other countries. Against this backdrop, a comparison was also made with the ban on Russia Today in the EU, which was viewed critically from a fundamental rights perspective. Finally, it was also made clear that such bans are not uncommon in the Global South, for example the Twitter ban in Nigeria.

III. Conclusion

Overall, the panelists agreed that the round table was filled with rich discussions that were so illuminating that platform regulation issues would now appear in an even more complex light in a transatlantic comparison. Many agreed that due diligence could be seen as a viable way to advance speech regulation in both the EU and the US. As a result of the debate, the problem of the extent to which the central concept of 'risk' could be operationalized in European platform regulation was also highlighted. In terms of enforcement, this term could create a danger in the EU of placing too much trust in regulators – especially against the backdrop of some rather vague formulations of human rights standards with strong self-regulatory elements. Conversely, it became clear how strong the USA's 'First Amendment fetish' is, which makes regulatory projects more difficult. Nevertheless, it was argued that procedural requirements for platform operators are not completely ruled out, even with such strong First Amendment protection in the USA. As an overarching point, many agreed that efficient regulation requires a move away from certain mental models regarding specific companies in order to focus more on the respective functions of social media platforms.