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New Public Spheres and How to Incorporate Them into Information Law

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New Public Spheres and How to Incorporate them into Information Law

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Introduction

Publicity has changed in a way that can almost be called structural through some forms of online communication. Especially social media have created new types of public spheres. This leads to structural problems in processing it from a legal point of view. I am going to describe these problems in this paper and on this basis I will outline possible regulatory measures which have either already been taken or are works in progress.

New formations of public spheres

When talking about "the public", it is important to clarify whether this is meant as a normative term or an empirical and factual one. From a normative point of view, the public can be defined according to Juergen Habermas as the embodiment of all those communication conditions which allow for a discursive formation of public opinion and will of an audience of citizens (The Structural Transformation of the Public Sphere, 1992; one has to note that the German word "Öffentlichkeit" has no connotation referring to a locality like "sphere", however it is regarded as the best fitting translation in most cases). The concept of Habermas' is one of the most enduring to deal with society and democracy; thus it is not regarded as outdated in the "post-media" "networked information" societies (cf. McGannon 2009).

When the German Federal Constitutional Court for example states in established case-law that individual as well as public opinion needs to be formed freely, it takes recourse to the normative term (for broadcasting starting with Bundesverfassungsgericht, BVerfGE 12, 205). It is referring to the preconditions – given in structures such as the broadcasting system – which are indispensable for forming an opinion or will "freely".

There is a difference between this and an empirical and factual understanding of the term. The most prominent concept – at least in the German speaking world – is certainly the one by Niklas Luhmann (The reality of the mass media, 2000), i.e. – as it is often the case - he was the one who expressed it most distinctively. According to this concept something can be called public if following communications take it as a known fact. This definition implies publicity to be relative. The question is who can be assumed to know about something. This can range from a couple (even in a marriage there is a difference between what can be assumed as known and what not) to the entire world with many steps in between. The relativity aspect also refers to the duration, meaning that people forget since information has a certain half-life in the public sphere.

An empirical and factual perspective leads to seeing different types of public spheres. They mainly differ with regard to how they were created. The two main types are the public sphere in media and the public sphere in spontaneous encounters.

Media publicity plays a very specific role. On the one hand it guarantees that information can be generally assumed to be public knowledge. (Epping/Hillgruber, Art. 5 marginal no. 26) In differentiated societies this is the only institution to do that. You can expect that what you read in the newspaper is something other people you come in touch with will also know about, but no more than that. The public sphere in media is characterized by providing selective information on the basis of journalistic and editorial criteria. Journalists are the agents of their principal, the citizens. They select what is socially relevant and thus create a public agenda. To date, media have had a "monopoly" so to speak on a society's self-reflection.

This is, however, the point where things have started to change. There have been complaints for example that mass media communication tends to lose its function.

When people look for information, they apparently have shifted towards other types of communication that are not based on any journalistic or editorial work. (Digital Life Study) Cases in point are political blogs receiving a lot of attention and thus potentially having a lot of influence. (Blogstudy by the University of Leipzig) Even in traditional mass media an accelerated fragmentation can already be observed leading to the generation of only partially public spheres. Their contents can no longer be assumed to be public knowledge to the entire society. This trend is going to be further accelerated on the technical platform of the Internet. Currently it is expressed in the form of target-specific formats created for radio broadcasts and a further specialisation of special interest magazines.

New types of public spheres have been created additionally. However, they have not been clearly described yet by communication and media research. To name just some:

- There is for example something I would call "search engine publicity". It is initially a passive publicity, meaning that in contrast to mass media publicity there is no explicit social mechanism by which information is made public knowledge at a specific point in time and then "destroyed" again when the next day's newspaper is issued. However, social practices seem to be emerging to make something become public knowledge in certain contexts. It has for example become customary to "google" job applicants (Forst in NZA 2010, 427(427)). Information that can be found among the high-ranking results of a search when you enter a name can be regarded as public knowledge in a situation like this. Some people who have neglected to take this into consideration found their application ignored. The selection process for this information marks an interesting difference to mass media communication. It no longer follows journalistic and editorial criteria but specific algorithms instead. (Ott in MMR 2008, 222

(225)) The basic considerations these algorithms are based on are at times surprisingly similar in their structure to the considerations of a journalist when deciding on what is relevant information. There is for example the criterion of prominence (search engines also function on the principle of analysing how many others have referred to the web site in question, i.e., how prominent it is). Other criteria such as how topical a content is also play an important role for its rank in the list of search engine results.

- Additionally, the "private public spheres" as Jan Schmidt (2010; see also Boyd 2007) calls them are another interesting new development. The term is of course a deliberate contradictio in adjecto. It is meant to describe communities generated by so-called "friends", people connect with via social networks such as Facebook, within which information is exchanged. Information posted there can be considered public knowledge among the members of the community. Some people are trying to find a way to differentiate between what is public and what is private for themselves by creating multiple Facebook profiles and thus showing different aspects of themselves. Their selection process is entirely based on private motives. Having said that, it must be assumed that they are doing so while thinking of their audience, i.e., the community: I will only post what I think the community might find interesting as well (Baumgartlinger/Hirsch 2010). The ensuing networking effects are highly interesting and are still subjects of scientific research. Such research also includes analyses in line with chaos theory while assuming that networks show certain patterns and reveal specific points in interlinked communities which need to be stimulated so that a topic or a piece of information will be spread to a wider public.

- This takes me to the last type of public sphere I would like to present. I would like to call it "flash publicity". It results from the networking effect of private public spheres and makes a piece of information reach immediate publicity. It becomes public knowledge with a widespread impact comparable to public knowledge generated by mass media. This happened for example when the former German President, Horst Koehler, stepped down. Blogs referred to statements he made on the deployment of German Bundeswehr troops in Afghanistan which had initially been neglected by the media. There was an exploding awareness in the blogosphere. The issue became highly controversial later on and was picked up and reported at large scale by traditional mass media. (FAZ 03.06.2010)

Structural problems with legal aspects

There are various effects of the above mentioned changes that challenge traditional concepts of information law.

Pulverisation of the public sphere

I have so far described effects that could result in a pulverisation of the public sphere when summarized (Weinfurtner 2010). Such effects include the fragmentation of public spheres, functions shifting from active to passive public spheres and finally a privatisation of the public sphere. From a regulatory perspective this could lead to problems when factual changes lead to a breakdown of the normative understanding of publicity underlying Article 5 para 1 of the German Basic Law. As mentioned before, this piece of legislation refers to individual and public opinion and how it is formed.

As a background one has to note the special structure of the German freedom of communications clause. While the right to express one's opinion and informing oneself is first of all seen as a "classical" civil right, the German Constitutional Court (Bundesverfassungsgericht, leading case BVerfGE 57, 295 (320)) interprets the freedom of mass media communication, especially by means of broadcasting, according to a different underlying concept. According to the court's point of view the freedom of media is not merely a subjective right, but also an objective guarantee, which states the obligation for the lawmaker to ensure that the media system works. The lawmaker has the duty to ensure that a free and open process of forming public and individual opinion is given. This includes further objectives like guaranteeing variety and diversity, and the fair chance of participating in public communication. The functional approach described before links the constitutional law discourse to factual changes in public communications.

In a democracy self-imposed legislation is based on finding a consensus concerning what is important for a society and – theoretically at least – focusing political competition on finding solutions for the problems according to their priority thus established. This process will not lead anywhere if there is no agreement on what is commonly considered important. In this context preserving the public sphere might become part of the guarantees stipulated in Article 5 para 1 of the German Basic Law. This aspect, however, cannot be analysed in the frame of this paper. It is not a trivial insight by any means. In the past this provision aimed to prevent individual players from having a dominant influence on public opinion and thus distorting the results of such a communication process.

Another response by the legislator could be a reframing of the "Institut Freie Presse" which was established by the Federal Constitutional Court in its 20th volume (pages 162 and 175). This figure, which was often misunderstood and ultimately not used often by the Federal Constitutional Court in its recent

judicature, might have to be considered the guarantor of preconditions for providing institutionalised journalistic and editorial services. Assuming that the public sphere generated by mass media will continue to play a role for generating public knowledge also in future "digital" societies, maintaining such services will become a prime objective of regulatory provisions. If there is not sufficient demand for these services and they cannot be refinanced at the free market, it will become necessary and a constitutional requirement for the state to finance them. (Kurp Medienforum NRW 2011) This economic scenario is not unlikely as information goods are imperfect products and thus a full competition cannot work. The state's funding mechanism, however, has to make sure that it does not compromise the principle of independent media.

The discussion on the functions of the public broadcasting system and its continuation into the digital world needs to be assessed against the same background.

Asymmetrical balancing

Some of the changes mentioned above have an effect on the protection of privacy in laws at sub-constitutional as well as constitutional level. New formations of public spheres might for example lead to double incongruencies between intended publicity and the one that has been reached in the end. Relatively good examples for this can be found in quotes by teachers appearing on Internet portals such as Spickmich (a – once – popular German platform for schoolchildren). These platforms have provoked some legal disputes, in Germany (Federal Court Ruling BGH VI ZR 196/08 cf. the critical commentary by Ladeur RdJB 2008, pp. 16 seq.) as well as in other countries (cf. Tabor 50 B.C. L. Rev. 561 (2009) – in the US it has mainly been framed as 1st amendment vs. school discipline affair). The focus

has so far been the (alleged) defamation of teachers. However, there is another aspect which has been neglected connected with the different spheres involved.

A teacher can assume that what she says in class remains public in her classroom, i.e., does not leave the room in which the words are spoken. This expectation, however, can be disappointed if a student posts some of her words on an Internet portal and makes them available to a wider public – the size of which depends on the forms of access to this platform. The student herself might also be mistaken about which public she is finally reaching. She might assume that the quotes will remain public within the group of students of the same class or school but the portal may be designed in such a way that all students having registered to the website anywhere in the country have access to its contents.

Internet archives are another case in point. As outlined above there might be situations in which information might be retrieved regularly about certain people via search engines. An archive that is generally accessible on the Internet and might only intend to provide information for people interested in contemporary history might happen to make their information search-engine-public. This information could for example contain previous criminal offenses committed by a certain person. Some courts already had to deal with cases like that (BGH NJW 2010, 757).

For legal cases like those the balancing of the interests involved is paramount. Independent of the changes created by a fragmentation of the public sphere, the Federal Constitutional Court has already pointed out that for creating a "practical concordance" between the general right to privacy of a person defined in Article 2 para 1 in combination with Article 1 para 1 of the German Basic Law on one side and the fundamental communication rights in accordance with Article 5 para 1 of the German Basic Law on the other, both sides need to take into consideration the specific aspects of their type of communication. Civil courts have to take this into

account when deciding internet related cases. Up to now they mainly had to deal with facts that involved traditional media and therefore the public sphere created by them (e.g. Federal Court Ruling BGH VI ZR 89/02). This calls for a reflection of the above mentioned changes.

This entails an analysis of which public sphere has ultimately been reached concerning the question what information interests have been satisfied and to what extent the right to privacy has been adversely affected. For archives accessible to search engines this might mean that the additional publicity reached is not especially relevant for their purpose whereas personal rights to privacy are affected much more heavily if the archive remains open to search engines. (Petersdorff-Campen ZUM 2008, 102 pp.)

Malfunctions

The functional shifts in generating publicity mentioned above and emerging private public spheres can lead to malfunctions or even failure in the field of the right to information. Let me give you a few examples:

- Media concentration law or in other words legal provisions aiming to prevent a dominant influence on public opinion as defined in the Interstate Broadcasting Treaty (Rundfunkstaatsvertrag, RStV) sections 26 et seq focus heavily on traditional mass media of a television type. They include other powerful players into their system only if they convey a TV-like power. The question arises whether this sufficiently takes into account the potential concentration of power in public communication (Neuberger/Lobigs 2010). To put it differently: would it not make better sense to simultaneously consider the influence of aggregators and search engines? In terms of media law there is apparently no problem should

Google and the Springer publishing house of tabloids in Germany were to merge – just to give you the example of an unlikely scenario.

- Many standards and regulations such as copyrights legislation explicitly refer to the public sphere or rather its counterpart, the private sphere. In the case of private public spheres the question can be for example whether they make something "publicly" accessible as defined in section 19a of the German Copyright Law (Urheberrechtsgesetz, UrhG) or whether cases like these have automatically to do with "private" copies in accordance with section 52 UrhG.

Let me briefly raise a few more points such as the differentiation principle in section 58 RStV which currently focuses on journalistic and editorial contents. The question here would be whether there still is confidence worth protecting in the differentiation of communication products according to the contexts of their origin. The scope of the media privilege in the Federal Data Protection Act (Bundesdatenschutzrecht, BDSG) section 41 is based on a clear distinguishability of journalistic and editorial communication types. The somewhat hidden norm of transparency requirements in section 55 RStV carries a fundamental potential for conflict as it touches upon the possibilities of anonymous communication on the Internet. A lot depends on the interpretation of the term "personal or family purposes" which means that it will be important to make a distinction between the public sphere and the private sphere for this norm to apply (Spindler/Schuster § 55 RStV marginal no. 10).

Conceivable responses

Legislation obviously already reacts to the problems outlined above, but it only does so per case and not on the basis of a systematic analysis. A case in point is a

new approximation that has "sneaked" into German media law as being highly relevant. This is the term "journalistic and editorial". The media legislator has used it in multiple cases; some of them have been mentioned already. I would like to add that it is also used as a negative feature in defining broadcasting in section 2 para. 2 number 4 RStV. If a service is not journalistic and editorial, then it cannot be considered a broadcasting service. One has to note that under German regulation there is a specific framework for broadcasting while other types of electronic media does falls within the regulation of so-called telemedia with a by far lighter regulatory regime. Therefore the distinction between journalistic and editorial services and others is highly relevant at this point. (Rumyantsev ZUM 2008, 33 pp.)

Specific rights and obligations are applied to telemedia providing journalistic and editorial work (sections 54 para. 2, 55 para. 2, 56 RStV). The media privilege (sections 57 RStV, 41 BDSG) I have mentioned just now also refers to this feature. The term has achieved a new function through the fact that the public broadcasting system is limited in its commissioned function in accordance with section 11d RStV to exactly that, telemedia that are journalistic and editorial. The irony is that this term was introduced into the debate concerning the function of the public broadcasting system by arguing that it had already been well established in German law. It is true that the legislator has already used it before, but it is not true if you take it to mean that it is a clearly defined term. There cannot even be certainty that the term means the same type of service in all the instances in which it has been used in media law. If the hypothesis applies that it is indeed a highly significant new approximation, there is still need for research.

In a first step the term's meaning can be differentiated according to its components: "journalistic" implies certain rules of action, namely those defining the role of media services as agents of the citizen as its principal, as outlined

above. This aspect alludes to the criteria with which to select what the society has in common, i.e., what is socially important. A second aspect can be found in the "editorial" part. It refers to the media as institutions, i.e., not to an individual or incidental occurrence of fulfilling a function (Jarren 2008). No comparable terms are yet available for other ways to generate publicity and their differentiation.

This term illustrates clearly that the legislator will often be faced with the decision whether to refer to the traditional mass media as defined above as a special group and protect them against any changes in defiance of the facts or not. The other option would be to try and react to new developments by allocating rights and obligations to communication services depending on fulfilling certain functions on a case-by-case basis. The middle path would consist of introducing further sub-differentiations with the aim to find a logical structure for the diverse offers that there are on the technical platform of the Internet.

In my view another response will and must become necessary: the guarantees for the right to privacy in particular must be revised. I have already pointed out that the Federal Constitutional Court requires that perspectives from both sides need to be evaluated and the constitution binds both sides to consider them. Such considerations can, however, only be implemented if the contents of the guarantees are apparent; in this respect especially the general right to privacy needs to be examined.

This is not the case at all for the right to self-representation which is relevant for publicity. In some literature on the German constitutional law you can read that the right to self-representation allows individuals to publicly represent themselves, but conversely it is also understood as an instrument to correct images of others. (Maunz/Dürig – Di Fabio, Art.2, marginal no. 166ff.) These interpretations have a common starting point, i.e., the protection of autonomy, but they arrive at completely different guarantees. The former is relatively

uncontroversial, but it is hardly infringed in media or online publications if at all, as it refers to how others see one's own personality. This is, however, protected by the latter definition for cases that can never happen. The "right to self-representation" can only refer to limiting the influence of third parties, such as the state or private entities in the present case of protection obligations, with regard to how a person is perceived by others if this influence has an impact on this person's freedom of personal development. The field of re-socialisation of former criminals is a good example in which legal methods have already been prepared. It seems to make sense to ask where certain types of publicity might infringe upon the freedom of personal development. I have already outlined the example of search engine publicity and people applying for jobs. Similar conditions may apply for other components of the right to privacy. In this context it will become necessary to get back to the question in what way this guarantee is different from the right to informational self-determination in case of Internet publicity.

Regulatory control will finally have to put more emphasis on considering aspects of regulation via software architecture or codes, and social norms. Internet governance will aptly be understood as a structure in which state legislation comes into play but interacts with software architecture, contractual design of codes, and it also interacts with social norms. State control will have to incorporate all the other three components more intensely than before. This is already happening in the draft amendment for the EU Directive on Data Protection when it refers to technical data protection. Systemic data protection and the protection of self-representation on platforms such as social media platforms can be guaranteed by technically secured rules of forgetting – always remembering the sentence that the memory's main function lies in forgetting. If some copying option for private pictures in social media would simply not be technically feasible, there would be only limited risk potential for infringing upon

a person's right to self-representation. This risk potential, however, does exist if pictures from a private public sphere are transferred to a different one or even gain wider publicity without the person in question being able to have any influence. Another aspect of control via "code" can consist of watermarks in content to protect copyright law or by legally protecting platform competition through norms and regulations for the portability of data from one platform to others.

Our knowledge about social norms on the Internet is profoundly under-developed. We know that "offline" compliance with legislation is primarily given by the fact that citizens adhere to informal social norms that are congruent to formal regulatory standards. This is why there is in many cases no need for controls or sanctions. In this context it is highly relevant to know the social norms in communities (formerly referred to as netiquette), in order to make sure that legislation is efficient and effective. Additionally, the potential of explicit social norms such as codes of conduct should not be neglected. These are only some thoughts on how legislation can process the changes in public spheres.

Research Questions

1. ***How do new sources of information and their use affect the public agenda?***

As mentioned above, there seems to be a structural transformation of public spheres which to some extent can be described as fragmentation. However, empirically-founded knowledge about that transformation is patchy to say the least. If you frame the public sphere by analyzing the agenda of relevant issues we have in common (one but not the only approach), there are some studies especially by Schönbach that dwell into the changes caused by online sources.

Effects can to be demonstrated if you differentiate between different social groups: "In sum, then, printed newspapers serve an important function for the public agenda: they widen the horizon of those whose range of interests is rather small." (Schönbach/de Waal/Lauf European Journal of Communication, 20 (2005), 245-258 [250]). The other way round the exposure to online sources alone would narrow the public agenda. However, it remains to be shown that it is really the fact of the papers being printed that create that effect. At the same time we need to ask what kind of "common awareness" really is essential for democratic self-governance to work in the knowledge society. This calls for the combination of empirical research and normative, legal deliberations.

2. *What legal concepts are at hand to cope with conceivable structural transformation of public spheres?*

It has been mentioned that German constitutional law is not restricted to protecting the individual freedom of speech but requires lawmaker to guarantee the functioning of public communication. One traditional consequence is that the law maker has to effectively combat media concentration. However, if the real danger is fragmentation of the public sphere, the lawmaker might even be constitutionally required to find concepts to hinder that. Public service broadcasting can be seen as a means to achieve that. However, some thought should be given to developing complementary instruments.

3. *What approximations are adequate as starting points for legal regulation of internet services?*

The structural changes in public communications have left the lawmaker without the traditional starting point of regulation (for the German standing see HBI 2010). The lawmaker, however, needs some definitions as a starting point for creating concepts to solve regulatory problems. Since practically all legal systems

are facing this problem – even if the regulation as such varies – comparative research might be fruitful.

4. *What do we know about social norms and their interaction with formal legal norms as regards behavior in the Internet?*

As mentioned above, the governance structure does not only consist of formal law but also of social norms, software architecture and contracts. The interaction of these elements is dealt with in another paper, however, what can be mentioned here is that there is a lack of empirical evidence as regards the social norms. Due to economic relevance there are some studies as regards illegal copying (van Eijk/Poort/Rutten COMMUNICATIONS & STRATEGIES, 2010, p. 35.). In other years research has to enter uncharted territories.

5. *How can knowledge on the structure of public spheres created by internet services be made available for the legal system to guarantee adequate conflict solving?*

There is an overarching problem connected with all aforementioned questions and that is how to incorporate the knowledge about the constantly changing structure of public spheres created by Internet services in the legal systems? This refers to the lawmaker, the government, regulators and the courts. Not understanding the structure might lead to regulatory goals not being achieved or dysfunctional over-regulation. Some evidence has been presented that especially the courts when balancing the different legally protected interests involved in a case need to know about the effects of different forms of public spheres. With the traditional mass media it was - basically - plain sailing, however, the picture has apparently changed.

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