ALEXANDER VON HUMBOLDT
INSTITUT FÜR INTERNET
UND GESELLSCHAFT

DRAFT PAPER prepared for the 1st Berlin Symposium
in Internet and Society
October 25 – 27, 2011

TITEL

Refocusing on the Constitution – Approaching Internet Legislation and Regulation through the Eyes of the Constitution. A Research Sketch

Conference Draft, 14 October, 2011

AUTHOR **Steffen Hindelang**
steffen.hindelang@fu-berlin.de

Paper prepared for the 1st Berlin Symposium on Internet and Society, Oct. 25-27, 2011

Refocusing on the Constitution – Approaching Internet Legislation and Regulation through the Eyes of the Constitution. A Research Sketch

by

Steffen Hindelang[*]

steffen.hindelang@fu-berlin.de; Fachbereich Rechtwissenschaft, Freie Universität Berlin, Boltzmannstraße 3, D-14195 Berlin

[*] Prof. Dr., LL.M., Free University Berlin; Senior Fellow at WHI Berlin, Humboldt-University Berlin. The author wishes to thank Prof. Dr. Dr. h. c. Ingolf Pernice, Dr. Osvaldo Saldias and Rüdiger Schwarz, M. A. for long hours of fruitful discussion, Prof. Dr. Dirk Heckmann for helpful comments on this sketch, Ref. jur. Laura Jentzsch and stud. jur. Sebastian Schreiber for research support, and Ref. jur. Katharina Berner for everything. Suggested citation: Hindelang, Steffen, Refocusing on the Constitution – Approaching Internet Legislation and Regulation through the Eyes of the Constitution. A Research Sketch (October 7, 2011). Available at SSRN: http://ssrn.com/abstract=1940405.

Abstract: If it is true that territorial coercive governmental force remains the hallmark of governance in the internet age then it should be the territorial constitution that directs but also restrains this force. While already considerable thought has been devoted to the issue of how the reading of certain fundamental rights and constitutional principles and the understanding of their underlying values contained in territorial constitutions might have changed due to the emergence of the internet *technology* and possible resulting changes in *social behavior*, this study chooses a different, in respect of the internet so far not sufficiently explored avenue. At the heart of this study lies the question of what internet-related *legislation and regulation* do to constitutions. More precisely, this study wants to look at whether, where and how fundamental rights and constitutional principles (**"**constitutional issue areas**"**) have been limited or bolstered by internet-related legislation and regulation ("internet-related norms").

A constitution does not only form governmental legislation and regulation, but governmental legislation and regulation also significantly shape the understanding of principles and beliefs underlying the constitutional issue areas and, in the end, will also alter the reading of the constitutional issue areas itself. This having said it becomes reasonably clear that it is only by identifying such internet-related norms which are able to shape our reading of constitutional issue areas that a society is put in the position to thoroughly *discuss* underlying principles and beliefs *before* legislation or regulation *tacitly* transform, first, our understanding of principles and beliefs and, later on, the reading of the constitutional issue areas. However, this study does not (yet) want to trace how, for example, the incremental expansion of data retention legislation is altering our understanding of the normative constitutional concept of the right to privacy. The primary purpose of this study is a somewhat more modest one: it wants to *enable* holding this debate by better understanding where, to which extent and in which way internet-related legislation and regulation restrict or bolster constitutional issue areas. This "enabling to debate"

shall, though, not be confined to the boundaries of a specific jurisdiction but this debate shall ideally extend across different legal systems allowing for cross-reference and cross-fertilization. In order to achieve this end this study resorts to a *comparative approach*, categorizing internet-related norms from various jurisdictions into selected constitutional issue areas.

Content

I. Introduction

"There is this naïve idea that the internet changes everything. It does not change everything. It does not change the laws in France."[1] This sentence originates from the French lawyer successfully attacking *Yahoo* of California's US auction site offering Nazi memorabilia to internet users situated in France in *Le Tribunal de Grand Instance de Paris*. It does not only say something about French patriotism but tells a lot about the influence of local legislation and regulation on a seemingly global technology.

Obviously, technological changes brought about by the internet – just like those by the telegraph, the telephone, radio and TV – alter the way how human beings live and interact.[2] Although these changes also require governments to develop new strategies to regulate human affairs, this does not mean, however, that the internet renders territorial boundaries and national jurisdictions irrelevant.[3] Quite to the contrary; scholars like *Goldsmith* and *Wu*[4] have demonstrated that the internet has *not* fundamentally[5] challenged the way *"how nations and their people govern themselves"*[6]. Territorial jurisdictions remain *"far more important than anybody expected"*.[7] Coercive governmental force remains the ultimate means and centerpiece in governing local

[1] *L. Guernsey*, Welcome to the Web. Passport, Please?, New York Times (15.3.2001).
[2] Basically, communication costs were lowered dramatically.
[3] Of such view that internet were to kill geography, distance, and language is, e.g. *T. L. Friedman*, The Lexus and the olive tree (hereafter: Lexus) (2000); *T. L. Friedman*, The world is flat : a brief history of the twenty-first century (hereafter: The world is flat) (2007).
[4] *J. L. Goldsmith and T. Wu*, Who controls the Internet? Illusions of a borderless world (hereafter: Controls), at 176 et seqq (2006).
[5] It is by no means disputed that self-regulation, market forces, or the technological design have also influenced human governance in the internet age. However, all these forms of governance have not relativized governance by territorial governments in a way that it was to rank *pari passu* with the other forms.
[6] *Goldsmith and Wu*, Controls at 180.
[7] Ibid.; in German literature see for example *P. Mankowski*, Die Düsseldorfer Sperrungsverfügung - alles andere als rheinischer Karneval (hereafter: Sperrungsverfügung) Multimedia und Recht 227-228 (2002); *J. Dietlein*, Illegales Glücksspiel und staatliche Gefahrenabwehr - Herausforderungen an die staatliche Gefahrenabwehr im Informationszeitalter (hereafter: Illegales Glücksspiel) Gewerbearchiv 89-94 (2005) ; others, such as *Ellickson*, hold the view that globalization – driven by the catalyst "internet" – would significantly reduce the role of governments compared to other forms of human organization and non-state actors. See *R. C. Ellickson*, Order without law : how neighbors settle disputes (hereafter: Order without law) (1991).

people, businesses and their equipment; and governmental legislation and regulation remains a mayor instrument in exercising this force.[8]

If this is true and territorial coercive governmental force remains the hallmark of governance in the internet age then it should be territorial constitutions that direct but also restrain this force. While already considerable thought has been devoted to the issue of how the reading of certain fundamental rights and constitutional principles and the understanding of their underlying values contained in territorial constitutions will, has or might have changed due to the emergence of internet *technology* and possible resulting changes in *social behavior*[9], this study chooses a different, in respect of the internet so far not sufficiently explored avenue. At the heart of this study lies the question of what internet-related *legislation and regulation* do to constitutions. More precisely, we want to look at whether, where and how fundamental rights and constitutional principles (hereafter **"constitutional issue areas"**) have been limited or bolstered by internet-related legislation and regulation (hereafter "**internet-related norms**").

Comprehensively mapping and drawing a picture of limiting or affirmative effects of internet-related norms on constitutional issue areas refocuses from "soft" to "hard" facts, i.e. turns the spotlight away from perceived technologically triggered changes in social behavior and assumed principles which guide this behavior to perceptions and values condensed in internet-related norms. A constitution does not only form governmental legislation and regulation, but governmental legislation and regulation also significantly shape the understanding of principles and beliefs underlying constitutional issue areas and, in the end, will also alter the reading of constitutional

[8] Interestingly, *Lessig* predicted in 2006 that *"cyberspace will be the most regulable space humans have ever known"*. See *L. Lessig*, Code : version 2.0 (hereafter: Code : version 2.0), at 32 (2006).

[9] For references see below V.2.. Another question is the one of whether the internet has an inherent constitution which is also not discussed here. For references see below 5.

issue areas itself.[10] This having said it becomes reasonably clear that it is only by identifying such internet-related norms which are able to shape our reading of constitutional issue areas that a society is put in the position to thoroughly *discuss* underlying principles and beliefs *before* legislation or regulation *tacitly* transform, first, our understanding of principles and beliefs and, later on, the reading of constitutional issue areas. However, this study does not (yet) want to trace how, for example, the incremental expansion of data retention legislation is altering our understanding of the normative constitutional concept of the right to privacy. The primary purpose of this study is a somewhat more modest one: it wants to *enable* holding this debate by better understanding where, to which extent and in which way internet-related legislation and regulation restrict or bolster constitutional issue areas. This "enabling to debate" shall, though, not be confined to the boundaries of a specific jurisdiction but this debate shall ideally extend across different legal systems allowing for cross-reference and cross-fertilization. In order to achieve this end this study resorts to a *comparative approach*, categorizing internet-related norms from various jurisdictions into respective constitutional issue areas. The scope of each constitutional issue area is very broadly defined and detached from an understanding predominating in any specific jurisdiction. By assessing whether, where, what kind, to what extent, and why decentralized internet-related legislation and regulation originating from different jurisdictions display common denominators and/or fractions in terms of limiting or bolstering effects on constitutional issue areas this study can serve as a starting point for international coordination efforts with a view to prevent an "internet controversy" turning quickly into larger disputes between jurisdictions as witnessed in the past for example in respect of online gambling, domain name governance, or privacy laws.[11]

[10] Seminal on the discussion of this interaction *P. Häberle*, Die Wesensgehaltgarantie des Artikel 19 Abs. 2 Grundgesetz - Zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt (hereafter: Wesensgehaltgarantie), at 126 et seqq (1983).
[11] See on this *Goldsmith and Wu*, Controls at 168-177.

II. The Design and Questions to be investigated

The *basic* procedural design of this study can be divided into three steps: first, a typology of constitutional issue areas is identified, defined, and refined. The term internet-related norm is demarcated. Secondly, internet-related norms within jurisdictions are pinpointed. Thirdly, internet-related norms are categorized into one or more constitutional issue area.

The study consists of three consecutive implementing stages: Stage 1 focuses – in a case study type approach – on Germany. In the course of this stage the basic procedural design is substantiated. In stage 2 the study is going to be extended *horizontally*, i.e. the review will be extended geographically by adding additional case studies on other jurisdictions, as well as *vertically* by expanding the types of internet-related legal norms which are to be categorized. At stage 3 results from this study as well as those from its co-projects undertaken within the research cluster "Internet and Constitutional Law" of the *Institute of Internet and Society Berlin* are conflated.

Taking into account the cross-jurisdictional nature and scope of the study the successful completion heavily relies on a collaborative effort.

1. Constitutional Issue Areas

Constitutional issue areas shall consist of *fundamental rights*, such as the freedom of expression, right to property, or right of publicity as well as of *constitutional principles*, such as the principle of democratic state ("*Demokratieprinzip*"), principle of constitutional state – rule of law ("*Rechtsstaat*"), or principle of social state ("*Sozialstaatsprinzip*").

In order to keep normative judgments to a minimum the study attributes very broad meanings to the reviewed "constitutional issue areas" detached from any specific jurisdiction. By not subscribing to a particular view to be found in a specific jurisdiction, or even applying a very narrow perception of a constitutional issue area,

it is ensured that limiting or bolstering effects of certain internet-related norms operating "at the edges" or outside the scope of a fundamental freedom or constitutional principle within a certain jurisdiction are nonetheless covered by this study. Furthermore, by operating with "hybrid" definitions of constitutional issue areas this study connects to its co-projects in a way further explained below.[12]

At stage 1 of the study only working definitions in respect of the chosen constitutional issue areas are used to categorize internet-related norms. This allows for refinements at a later stage when it comes to reviewing other jurisdictions in case the working definitions should prove to be inadequate.[13]

The following selected constitutional issue areas are envisaged to be used in this study:

- Freedom of expression
- Right to property
- Right of publicity / general right of personality
- Freedom of assembly
- Freedom of information
- Freedom of faith and conscience
- Freedom to choose an occupation
- Freedom of communication
- Inviolability of the Home
- Right to petition
- Principle of democratic state
- Principle of constitutional state
- Principle of social state

[12] See below II.1.c. and 0.

[13] When a working definition of a constitutional issue area is changed this would of course require reassessing internet-related norms in jurisdictions already reviewed.

The above-mentioned constitutional issue areas form an imperfect list of essential elements of a constitution.[14] An initial probe conducted in respect of the German legal order suggested that especially the right of publicity, freedom of information, freedom to choose an occupation, and the right to property are of particular interest in an internet context. These constitutional issue areas were the most relevant ones in terms of quantity of internet-related norms assigned to them.[15] In respect of the other chosen constitutional issue areas it will be interesting to see whether they are of a (higher) relevance within other jurisdictions.

An extension of constitutional issue areas is possible at a later stage as internet-related norms, not possible to be categorized into a certain constitutional issue area, are recorded within a special ("reserve") group named "not relating to any specific constitutional issue area".

The definitions themselves of a constitutional issue area are to be developed taking recourse to the teachings of comparative constitutional law.[16]

[14] A certain element of arbitrariness in selecting constitutional issue areas shall not be denied. It is essentially driven by the fact of limited resources as well as the aim of not operating with a too fragmented set of constitutional issue areas.

[15] Note also the study conducted by *Berner* which identifies the right of publicity, freedom of speech, the freedom of communication, and the right to property as high on the German Constitutional Court's agenda. Cf. *K. Berner*, Constitutions going online - Internet-related dynamics in constitional law? -, presented at Exploring the digital future - First Berlin symposium on internet and society, Berlin (25.-28.10.2011).

[16] On comparative constitutional law e.g. *A. Weber*, Europäische Verfassungsvergleichung (hereafter: Europäische Verfassungsvergleichung) (2010); *A. W. Heringa and P. Kiiver*, Constitutions compared - An introduction to comparative constitutional law (hereafter: Constitutions compared) (2009); *K.-P. Sommermann*, Funktionen und Methoden der Grundrechtsvergleichung, in D. Merten and H.-J. Papier (eds.), Handbuch der Grundrechte in Deutschland und Europa (hereafter: Grundrechtsvergleichung), Vol. 1, 631-678 (2004); *P. Alston* (ed.), Promoting human rights through Bills of Rights (1999); *P. Alston*, A framework for the comparative analysis of bills of rights, in P. Alston (ed.), Promoting human rights through Bills of Rights (hereafter: Comparative analysis), 1-14 (1999); *M. Darrow and P. Alston*, Bills of rights in comparative perspective, in P. Alston (ed.), Promoting human rights through Bills of Rights (hereafter: Comparative perspective), 465-524 (1999); *R. R. Ludwikowski*, Constitutionalization of human rights in post-Soviet states and Latin America - a comparative analysis (hereafter: Constitutionalization), 33 Georgia Journal of International & Comparative Law 1-113 (2004); *C. Saunders*, Constitutional protection of rights in common law systems, in N. Alivizatos (ed.), Essays in honour of Georgios I. Kassimatis (hereafter: Constitutional protection), 701-715 (2004).

2. Internet-related Norms

Identifying internet-related (legal) norms presupposes, first, clarifying the meaning of the term "norm" for the purpose of this study. This term will relate to rules which are:

- written or customary (unwritten)
- general ("*abstrakt-generell*")
- adopted by a legislature in accordance with a specific constitutional procedure ("*Gesetze im formellen Sinne*"), or by the administration acting upon empowerment by the legislature (by-laws; "*Gesetze im nur-materiellen Sinne*"), or by the administration in order to direct the exercise of administrative discretion ("*ermessenslenkende (Verwaltungs-)Richtlinien*")

A norm is "internet-related" for the purpose of this study if it regulates or influences access to the internet[17], the infrastructure of the internet, and data processing and exchange within the internet. The scope of application of an internet-related norm does not have to be exclusively limited to internet-related phenomena. For example, libeling provisions – applicable within an offline as well as online environment – will also be categorized.

Within a given jurisdiction such internet-related norms are categorized for which the competent authority within that jurisdiction issued a formal order to apply that norm ("*formeller Rechtsanwendungsbefehl*"), i.e., for example, the adoption of a law by parliament and its subsequent promulgation. This study however also aims at categorizing legal norms which unfold a "de facto binding force", i.e. norms originating from one jurisdiction and unfolding so-called extraterritorial effects in another one. Such extraterritorial effects of national legislation could for example be

[17] Working definition: the internet is a world-wide net which consists out of a multitude of computer networks through which data is exchanged and which forms the basis for internet services. See Internet, Gabler Wirtschaftslexikon - Online (Gabler Verlag, 2011), vol; Internet, Wikipedia (2011), vol.

studied in respect of *Microsoft's dot-NET Passport*. The US corporation Microsoft was forced to adopt EU data protection standards globally despite the fact that its serves are to be found in the USA. *Goldsmith* and *Wu* observed in this respect that "*where a large and important market imposes a restrictive rule and where geographic discrimination is practically infeasible – the restrictive rule will in many cases be the dominant rule worldwide.*"[18]

3. Implementing Stages of the Study

As mentioned in the introduction to this section, the study is divided up into three implementing stages which will be laid out as follows.

a. Implementing Stage 1 – Substantiating Basic Procedural Design – Case Study on Germany

At stage 1 the basic procedural design of this study is substantiated, in particular the constitutional issue areas are defined. The German legal order will serve as first test case. At this stage, internet-related norms from other jurisdictions having extraterritorial effects in Germany are excluded.[19]

Tying in with this study's central question of whether, where and how constitutional issue areas have been limited or bolstered by internet-related norms, at this stage the following sub-questions – also by taking recourse to pertinent jurisprudence and scholarly writing in respect of the interpretation of the internet-related norms – shall, inter alia, be answered:

With a view of understanding *where* a government has placed a legislative and regulatory emphasis this study starts off by seeking to explore which constitutional

[18] *Goldsmith and Wu*, Controls

[19] The extraterritorial effect of norms is not to be confused with the effect flowing from norms originating from EU sources. The latter are binding law in Germany and all other Member States of the EU.

issue areas are more and which areas are less frequently affected by internet-related norm setting and tries to put forward an explanation for this.

This study furthermore wants to explain which regulatory approach is chosen to shape a certain constitutional issue area and aims at identifying possible patterns and fractions. In doings so, it looks, first, at *actors* which can be international, supranational, federal state, regional, or municipal legislators or administrations. An initial probe conducted in respect of Germany – although not yet allowing for any conclusive appraisals –in terms of mere numbers suggests that, for example, in respect of the freedom to choose an occupation it is the federal level which enacts the majority of restrictive internet related-norms. While the number of regional ("*Länder-"*) competences in that area cannot be neglected, the noticeable choice by the *Länder* of so-called inter-state agreements ("*Staatsverträge*"), i.e. treaties concluded among them, as a type of regulation demonstrates that there is an intention to prevent fragmentation of legislation and regulation.

Second, the *type* – i.e. statutes, by-laws (ordinances), administrative regulation guiding discretion, customary law, or hybrid means – of internet-related norm is considered. The initial probe in respect of the freedom to choose an occupation implies that statutes (and inter-state agreements) are the chosen means in Germany to shape the constitutional issue area; by-laws[20] are only occasionally used. One possible, admittedly rather straight forward and still very limited explanation could be that the preference for statutes is the result of a specific occurrence of the parliamentary prerogative ("*Parlamentsvorbehalt*") in German constitutional law.

[20] Notable examples are the Ordinance concerning the Technical and Organisational Implementation of Measures for the Interception of Telecommunications ("*Telekommunikations-Überwachungsverordnung (TKÜV)*") and the Digital Signature Ordinance (*"Verordnung zur elektronischen Signatur (SigV)"*).

Third, the *intensity* of intervention by an internet-related norm will be addressed. Internet-related norms can come as a prohibition/duty to act, a prohibition/duty to act with caveat of permission in the individual case, a freedom with caveat of prohibition in the individual case, a freedom, or as a freedom plus affirmative measures. In the area of the freedom to choose an occupation the initial probe in respect of Germany displayed, for example, a stronger tendency towards prohibitions and prohibitions with caveat of permission in the individual case. Internet-related norms which can be described as containing a "freedom plus affirmative measures" could (so far) not be identified. This could, for example – albeit on a provisional and very limited basis – be explained by the fact that many professional activities in relation to the internet are protected by the fundamental right of choosing an occupation contained in the German constitution. Legislation is enacted to prescribe the boundaries of this freedom; a legal norm stating that a certain activity is on principle free to undertake would be repetitive.

Furthermore, internet-related norms will be also examined by this study

- in respect of their *point of intervention*, i.e. whether norms envisage precautionary or repressive measures,
- in respect of the *degree of detail*, i.e. to which degree it operates with open-worded legal terms (*"offener Rechtsbegriff"*) and in how much detail it defines the legal consequence and means of action to cause the legal consequence, and
- in respect of in *degree of directness of regulation*, which relates to the question of whether the obliged party is also the envisaged ultimate addressee whose conduct shall be influenced by the norm or whether the obliged party is an intermediary and the addressee is someone else.

An initial probe into German internet-related norms in respect of the freedom to choose an occupation showed that taking up the private business of nationwide radio and television broadcasting requires an ex ante *permission*[21] while the business relating to electronic information and communication services, such as the launch of a commercial website or an email-service does on principle *not* require any permission or registration.[22] If you want to run a public telecommunications network on a commercial basis you have to *notify* to the competent authority.[23] Why does the regulatory approach in respect of access to a certain business activity vary? After having analyzed the regulatory approach chosen in respect of each *individual* internet-related norm, the study will compare internet-related norms which relate to the same situation, e.g. to the taking up or to the conduct of a business, to each other in respect of the chosen regulatory approach. The study will hence pose the question of whether, and if answered in the affirmative, in which way and why do different internet-related norms referring to like situations, correlate or differ in terms of their regulatory approaches and, hence, in respect of their restricting or bolstering effect on a constitutional issue area.

The study will, furthermore, explore the degree of convergence and/or divergence in terms of balancing different constitutional issue areas in situations referring to comparable "constitutional situations", i.e. norms relating to the regulation of different real word phenomena but touching upon the same constitutionally protected interests. Finding answers to the two questions just mentioned might allow for identifying commonalities and fractions within a regulatory body growing organically under one overarching constitutional issue area.

At stage 1, the study will result, first, in a country report which describes, in the way outlined above, whether, where and how constitutional issue areas have been limited

[21] Cf. §§ 20 et seq. Inter-State Broadcasting Treaty (*"Rundfunkstaatsvertrag"*)
[22] Cf. § 4 German Tele Media Services Act (*"Telemediengesetz (TMG)"*)
[23] Cf. § 6 Telecommunications Act (*"Telekommunikationsgesetz (TKG)"*)

or bolstered by internet-related norms. The findings will be made publicly available through a wiki[24] inviting others to comment, edit and add. In order to verify (or falsify) the findings, internet-related norms identified and categorized in the course of conducting the case study will also be recorded and made available to the public through the wiki.

b. Implementing Stage 2 – Horizontal and Vertical Extension

At stage 2 other country reports relating to Latin America (possibly starting with Chile), Africa (possibly starting with Kenya), Asia (possibly starting with Japan), North America (possibly starting with the USA), Europe (possibly starting with the UK and Russia), and Oceania (possibly starting with Australia) will be conducted in a way described above in relation to Germany. At this stage, internet-related norms from one jurisdiction having extraterritorial effects in another will be included in the review.

Drawing on the country reports on the above-mentioned jurisdictions, within the implementing stage 2 the emphasis of the study will be placed on the comparative perspective. The question of whether, where, what kind, and to what extent decentralized internet-related legislation and regulation originating from different jurisdictions display common denominators and/or also fractions in terms of limiting or bolstering effects on constitutional issue areas shall be answered.

In order to answer the question mentioned above this study will, first, make visible differences and communalities in terms of legislative and regulatory activity – i.e. which constitutional issue areas are more and which areas are less frequently affected by internet-related norm setting – across different jurisdictions. It is, furthermore, asked whether one can identify divergences or convergences of regulatory approaches (see on the typology above) within a constitutional issue area across different jurisdictions. By the way of a simple (hypothetically) example, one

[24] See 0 - Annex.

possible finding could be that the freedom of expression is restricted – across all jurisdictions – by provisions found in penal codes criminalizing libel.

If this study is able to identify certain regulatory patterns emerging in respect of a certain constitutional issue area, then it will attempt to detect the driving forces behind these patterns: are they mere coincidence, are they owed to the circumstances or to objective needs of the regulated real-world phenomena, or are they driven by informal or formal regional[25] or international coordination?[26]

At stage 2 the study will result in additional country reports drafted in the style of the report on Germany. The case studies are drafted in a collaborative effort by experts on the respective jurisdictions. The findings will also be made publicly available through a wiki inviting others to comment, edit and add. Internet-related norms of the jurisdictions under review will also be recorded and made available to the public through the wiki.[27] The results gained can additionally be visualized, for example, by using political maps and a color code indicating scales of restriction in respect of the constitutional issue areas.

The comparative part of the study will be compiled by a group of experts from different jurisdictions, each group assigned to a constitutional issue area.

c. Implementing Stage 3 – The 360° Perspective – Conflation with Co-Projects of the Institute's Research Cluster "Internet and Constitutional Law"

Implementing stage 3 is not an indispensable part of this study, as it reaches its own full scale already at stage 2. However, it will unfold its full potential when, in the *long*

[25] In particular EU legislation.

[26] At this point there is already a link to the co-project "Patterns of Legalization in the Internet". See below 0 and 0.

[27] A considerable challenge is posed by the language issue. The country reports are drafted in English. National legislation and regulation is translated into English to the greatest extent possible. Occasionally, official translations are already in existence.

run, its findings are merged with those of its co-projects "*Patterns of Legalization in the Internet*"[28] and "*Internet-related Dynamics in Constitutional Law*"[29]. While the project "*Internet-related Dynamics in Constitutional Law*" tries to detect and explain in a comparative perspective patterns of reaction of constitutions and, in particular, of their constitutional courts' jurisprudence towards internet-related real world phenomena[30], the project "Patterns of Legalization in the Internet" looks at norms not (yet) legal but nonetheless governing human affairs in respect of the internet. If accompanied by a fourth project which should deal with technical standards, all projects together would cover legal, social as well as technical internet-related norms originating from state and non-state actors. In a nutshell, the conflated projects would cover "360 degrees" of internet-related norms and practices affecting constitutions. Eventually, all projects will contribute to answering the question encompassing and overarching all of them: Which constitutional issue areas will be affected by which norms, made by which legislative or juridification processes, driven by which actors?

III. Purpose of this Study

1. Changing Perspective 1: Away from Discussing How to Regulate Real-word Phenomena to a Discourse on Constitutional Values

This study aims at further strengthening a constitutional focus on the internet governance debate. That means that this study does *not* want to talk about how to regulate access to the internet, net neutrality, cybercrime or cloud computing according to real or alleged practical constrains. Rather we intend to elaborate on

[28] *O. Saldias*, Patterns of Legalization in the internet, presented at Exploring the digital future - First Berlin symposium on internet and society, Berlin (25.-28.10.2011).
[29] *Berner*, Internet-related dynamics.
[30] To a certain extent this co-project also forms a helpful background for defining the "hybrid" constitutional issue areas. It might provide some initial – though not conclusive – insight in which constitutional issue area(s) a certain internet-related norm is to be grouped in.

how certain fundamental rights and constitutional principles – i.e. the constitutional issue areas – are shaped in an internet-related context through legislation and regulation in the areas just exemplarily mentioned.

By the word "shaping" this study does not mean, though, that it wants to trace how, for example, data retention legislation is altering our perception or understanding of the normative constitutional concept of the right of publicity.[31] This study, figuratively speaking, aims at tracing the limiting and bolstering effects of internet-related legislation and regulation – i.e. internet-related norms – on constitutional issue areas such as the right of publicity.

As previously mentioned, in order to keeping the authors' normative judgments to a minimum this study attributes very broad meanings to the reviewed "constitutional issue areas" detached from any specific jurisdiction or society. Categorizing internet-related legislation and regulation of a certain jurisdiction into constitutional issue areas and thereby picturing the limits to and strengtheners of each constitutional issue area will result in an elaborated illustration how the scope of a constitutional issue area is understood by governments.

Ultimately, by illustrating the limits on and the "facilities" of a constitutional issue area flowing form internet-related norms this study *creates* part of the *tools* necessary *to evaluate* whether the organically grown internet-related legislative and regulatory body in a given jurisdiction still conforms to fundamental normative perceptions and beliefs in respect of fundamental freedoms and constitutional principles in a given society. Putting it somewhat more provocative: this study (also) aims at enabling to judge whether these freedoms some might have dreamed of gaining through the spread of the internet technology have already been lost or not.[32]

[31] For a sharp-minded depiction see *A. Roßnagel, et al.*, Digitalisierung der Grundrechte? : Zur Verfassungsverträglichkeit der Informations- und Kommunikationstechnik (hereafter: Digitalisierung der Grundrechte?), at 254 (1990).

[32] Ibid.

2. Changing Perspective 2: Away from Individual Fears to Common Constitutional Values

Not each and every post in an internet blog or on a website is necessarily enlightening, very poetic or a serious contribution to a political or scientific debate. In fact we can find lots of chitchat, gossip or simply wired stuff. To be clear, you can also spot all sorts of disturbing and clearly discriminating, libeling, racist or anti-Semitic statements on the net. However, is this enough to call for government surveying each and every internet-conversation without specific cause? Recently, the German Police Union, an association of German police officers, demanded the introduction of a so-called "warn file" collecting the identity of internet users which leave "conspicuous content" in blogs or chats. According to the Police Union such measure is the *only* feasible way to deal with obnoxious – though not penalized – thoughts on the web. But who decides over the catch phrases which bring an internet user – although not committing any offence under German law – on "warn file" leading to an identity verification and registration as "*potential* offender". Who has access to this "warn file"? Do we label millions as "potential offender" only in order to catch a few real ones?[33]

Only a few days after one homicidal maniac killed almost a hundred people in Norway, public security spokesman of the ruling German Christian Social Democrats, *Hans-Peter Uhl,* demanded an all-embracing legislation allowing the government to store personal internet user connection data. He argued in all seriousness that cruelties such as those committed in Norway are truly born on the net.[34] Is it reasonable to put all internet users in Germany under general suspicion only because a single offender commits a crime in Norway, independent of the fact of how abhorrent this crime was?

---

[33] *O. Reißmann*, Die Denkfehler der Scharfmacher Spiegel Online (2011), available at: <http://www.spiegel.de/netzwelt/netzpolitik/0,1518,776872,00.html>, last visited: 16.09.2011.
[34] Ibid.

Focusing on fears might render it (too) easy to compromise on constitutional values. By approaching internet-regulation through the eyes of constitutional issue areas this study wants to bring the discussion back to a more objective level by affording to focus on how to bolster constitutional values in the internet age instead of how to fight real, created, or merely dreamed internet-related threats.

3. Changing Perspective 3: Away from Partial Blindness to a more Comprehensive Benchmarking

Evgeny Morozov observed in his recent book "*The Net Delusion*" a disturbing paradox. While Western politicians tend to denounce censorship in China, at home the same politicians champion the introduction of far-reaching data retention legislation and internet blockage. For the home crowd internet is pictured as favoring data scamming and child pornography. The same internet, however, allegedly promotes democracy, pluralism and tolerance in North African countries, in North Korea and in Iran.[35]

This study wants to look below the fog of political rhetoric by producing part of the means to critically evaluate in a comparative perspective where our governments truly stand. It will be illuminative to observe whether the emergence of the internet – deemed by some scholars to be inherently liberating[36] – triggered legislation and regulation which made it even easier to appreciate in an even more comprehensive fashion fundamental freedoms and to build an even more democratic or more pluralistic society. By appreciating the hard facts, i.e. internet-related legislation and regulation, this study wishes to draw a realistic picture of limits on or "facilities" of selected constitutional issue areas as they stand today

By categorizing internet-related legislation and regulation from various jurisdictions into the same set of constitutional issue areas we are placed in the position to

[35] *E. Morozov*, The Net Delusion: How Not to Liberate The World (hereafter: Net Delusion) (2011).
[36] *Friedman*, Lexus ; *Friedman*, The world is flat.

compare the approaches of the different jurisdictions towards a respective constitutional issue area. This in turn enables us to understand whether there are elements of a "common or fragmented constitution", i.e. approaches towards certain aspects of a constitutional issue area which are shared by or disputed among the jurisdictions under review. As many internet controversies have proven to quickly turn into disputes between states[37] – just consider the already mentioned disputes over domain name governance, online gambling or privacy law – identifying and displaying communalities, but equally important, also fractions can serve as starting point for international coordination efforts in order to evade or defuse tensions as early as possible with a view of taking advantage of the chances inherent in the internet for the exercise of fundamental rights and constitutional principles.

IV. Areas excluded from this Study / Interconnections to other Co-Projects Studies within the Institute's Research Cluster "Internet and Constitution"

Above it was stated that territorial governments remain very important for the question of how people govern themselves in the internet age. This does however not mean that non-state actors and forms of "self-governance" can be neglected. Norm-setting by non-state actors and the role that "self-governance" has on constitutional issue areas is essentially dealt with by the co-project "Patterns of Legalization in the Internet".

Also the technical design which might have an impact on constitutional issue areas[38] is beyond the scope – and capacity – of this study and is possibly be dealt with by another co-project within the Institute's research cluster "Internet and Constitution".

This study also does not deal with the reactions of constitutions to the internet technology, which might take the forms of formal amendments to the constitutional

[37] *Goldsmith and Wu*, Controls at 165.
[38] Cf., e.g. *Lessig*, Code : version 2.0.

text or of adaptation of the interpretation of the constitution by the competent court to new circumstances. Questions relating to these dynamics are to be answered by the co-project "*Internet-related Dynamics in Constitutional Law*".

V. Available Sources and References

The exploration of the relationship between the internet und constitution(s) is by no means a new area of legal research. In fact, considerable scholarly effort has already been made towards elaborating constitutional issues in the context of the discussion of the application of legislation and regulation to certain internet-related real-world phenomena, i.e., e.g., Google Street View or cloud computing. Substantial thought has also been devoted to the issue of how the reading of fundamental rights and constitutional principles and the understanding of their underlying values – usually in relation to a specific jurisdiction and society – might have changed due to the emergence of the internet technology and possible resulting changes in social behavior. Also discussed were the impact of self-regulation and the impact of technical standards on constitutions as well as questions regarding the "inherent" constitution of the internet as an own legal space.

All these valuable sources are informing this study or constitute its background. A necessarily imperfect selection out of the existing vast corpus of literature is briefly introduced and grouped in broad-bushed categories below. To best of our knowledge, there is no comprehensive study available in German or English language which looks thoroughly in a comparative perspective at the question of this study which is whether, where and how fundamental rights and constitutional principles have been limited or bolstered by internet-related legislation and regulation.

1. A Selection of Literature dealing with Legislation / Regulation of Specific Internet-related Real-world phenomena, such as Access to the Internet or Searching on the Internet; Occasionally with a Discussion of Constitutional Implications39

- *"Access denied"*[40] and *"Access controlled"*[41] are comprehensive studies on *internet filtering* dealing with virtually any jurisdictions around the world. This study will benefit from the research done as it helps identifying national legislation and regulation. *Palfrey,* in comparison, offers in his paper a concise depiction of the first two phases of internet filtering described as "access denied" and "access restricted" and asserts the wake of a new phase of "access contested".[42]
- The interdisciplinary study edited by *Becker* and *Stalder* addresses in two chapters the implications of *deep search engines* on constitutional issues and the question of how to effectively regulate such search engines.[43]
- Google street view has steered heavy debates on *privacy* and has been addressed by various authors.[44]
- *Gartska* is reviewing German data retention legislation in respect of the internet against the background of the constitutional court rulings in this

[39] *K. Becker and F. Stalder* (eds.), Deep Search - Politik des Suchens jenseits von Google (2010).
[40] *R. Deibert, et al.* (eds.), Access denied : the practice and policy of global Internet filtering (2008).
[41] *R. Deibert, et al.* (eds.), Access controlled : the shaping of power, rights, and rule in cyberspace (2010).
[42] *J. G. Palfrey, Jr.*, Four Phases of Internet Regulation (hereafter: Four Phases of Internet Regulation), 77 Social Research (2010).
[43] *C. Lobet-Maris*, Vom Vertrauen zur Spurenauswertung - Eine neue Sicht der Technikfolgenabschätzung, in K. Becker and F. Stalder (eds.), Deep Search - Politik des Suchens jenseits von Google (hereafter: Technikfolgenabschätzung), 85-97 (2010); *J. van Hoboken*, Suchmaschinen-Gesetzgebung und die Frage der Ausdrucksfreiheit, in K. Becker and F. Stalder (eds.), Deep Search - Politik des Suchens jenseits von Google (hereafter: Suchmaschinen-Gesetzgebung), 98-111 (2010).
[44] E.g. *B. Golomb, et al.*, Gemeinden vs. Google Street View (hereafter: Gemeinden vs. Google Street View) Bayerische Verwaltungsblätter 39-43 (2011); *C. Hoffmann*, Die Verletzung der Vertraulichkeit informationstechnischer Systeme durch Google Street View (hereafter: Google Street View) Computer und Recht 514-518 (2010); *C. Lindner*, Persönlichkeitsrecht und Geo-Dienste im Internet – z. B. Google Street View/Google Earth (hereafter: Geo-Dienste), 2010 Zeitschrift für Urheber- und Medienrecht 292-301 (2010); *J.-A. Weber*, Google „Street View" und ähnliche Geo-Datendienste im Internet aus zivilrechtlicher Sicht (hereafter: Geo-Datendienste), 2011 Neue Juristische Online Zeitschrift 673-676 (2011).

area.[45] *Bamberger* and *Mulligan* chose a similar approach in respect of U.S. privacy law.[46]

- *Medosch* touches upon the legal aspects of virtual political demonstration on the internet.[47]
- *Leube* in her study examines the possibility, permissibility and necessity of governmental legislation and regulation of the internet in respect of Germany.[48] Her work provides a valuable insight in regulatory approaches taken or to be taken in respect of the internet.
- *Géczy-Sparwasser*[49] has drawn up a genesis of internet-related legislative activity in the USA, the EU and in Germany. The widely descriptive study dating back to 2003 is partly technically outdated and constitutional considerations do not play any significant role.
- *Grewlich* in its shortish study of 2001 on "constitutionalisation" of "cyberspace" points towards the different layers of legislation on EU (esp. sectoral and competition law) and the international level.
- *Kreutzer* provides a short history of intellectual property legislation in respect of the internet.[50] *Bull* ventures on legislation and regulation designed to

[45] *H. Garstka*, Informationelle Selbstbestimmung und Datenschutz - Das Recht auf Privatsphäre, in C. Schulzki-Haddouti (ed.), Bürgerrechte im Netz (hereafter: Privatsphäre), 48-70 (2003).
[46] *K. A. Bamberger and D. K. Mulligan*, Privacy on the Books and on the Ground (hereafter: Privacy), 63 Stanford Law Review (2011).
[47] *A. Medosch*, Demonstrieren in der virtuellen Republik - Politischer Aktivismus im Internet gegen staatliche Institutionen und privatwirtschaftliche Unternehmen, in C. Schulzki-Haddouti (ed.), Bürgerrechte im Netz (hereafter: Demonstrieren), 261-306 (2003).
[48] *S. C. Leube*, Die Rolle des Staates im Internet : eine Untersuchung der Möglichkeit, Zulässigkeit und Notwendigkeit staatlicher Regulierung (hereafter: Die Rolle des Staates im Internet) (2004).
[49] *V. Géczy-Sparwasser*, Die Gesetzgebungsgeschichte des Internet - Die Reaktion des Gesetzgebers auf das Internet unter Berücksichtigung der Entwicklung in den USA und unter Einbeziehung gemeinschaftsrechtlicher Vorgaben (hereafter: Die Gesetzgebungsgeschichte des Internet) (2003).; see also *B. G. Kern*, Das Internet zwischen Regulierung und Selbstregulierung, available at: <http://d-nb.info/1001356748/34>, last visited: 07.05.2011. who extended his review also to self-regulation.
[50] *T. Kreutzer*, Das Spannungsverhältnis zwischen Wissen und Eigentum im neuen Urheberecht, in J. Hofmann (ed.), Wissen und Eigentum : Geschichte, Recht und Ökonomie stoffloser Güter (hereafter: Urheberecht), 109-140 (2006).

protect against possible internet-specific or internet-related infringements of the right to property.[51]

- Legislation and regulation applicable to clouds are, inter alia, discussed by *Hon, Kuan, Millard, and Walden*.[52]
- *Schulz* in its research fragment for the Inaugural Conference of the Berlin Institute for Internet and Society 2011 ponders on perceived changes to the public sphere and their consequences for the right to privacy in German constitutional law and necessary regulatory responses.[53]

2. A Selection of Literature focusing on the Questions of What Actors Legislate or Regulate in Respect of Internet-related Phenomena by Which Means

- *Tambini, Leonardi* and *Marsden* in 2008 have put forward a study which addresses the question of whether the internet can regulate itself. By looking at self-regulation in practice it offers an overview of key resources as well as a review of key challenges for self-regulation. It moreover illuminates the ambivalent relationship between self-regulation and the fundamental freedom of expression. While self-regulation might avoid restrictive state-regulation, self-regulation is unlikely to positively enable and bolster freedom of expression.[54]

---

[51] *H. P. Bull*, Persönlichkeitsschutz im Internet: Reformeifer mit neuen Ansätzen (hereafter: Persönlichkeitsschutz im Internet: Reformeifer mit neuen Ansätzen) Neue Zeitschrift für Verwaltungsrecht 257-263 (2011).; for the UK see *M. Klang and A. Murray* (eds.), Human rights in the digital age (2005).

[52] *W. K. Hon, et al.*, The Problem of 'Personal Data' in Cloud Computing - What Information is Regulated? The Cloud of Unknowing, Part 1 (hereafter: The Problem of 'Personal Data' in Cloud Computing - What Information is Regulated? The Cloud of Unknowing, Part 1) SSRN eLibrary (2011); *W. K. Hon, et al.*, Who is Responsible for 'Personal Data' in Cloud Computing? The Cloud of Unknowing, Part 2 (hereafter: Who is Responsible for 'Personal Data' in Cloud Computing? The Cloud of Unknowing, Part 2) Queen Mary School of Law Legal Studies Research Paper No. 77/2011 (2011).

[53] *W. Schulz*, New public spheres and how to incorporate them into fragment law, presented at Exploring the digital future - First Berlin symposium on internet and society, Berlin (25.-28.10.2011).

[54] *D. Tambini, et al.*, Codifying cyberspace : communications self-regulation in the age of Internet convergence (hereafter: Codifying cyberspace), at 299 (2008).; see also *I. Brown*, Internet Self-Regulation and Fundamental Rights (hereafter: Internet Self-Regulation and Fundamental Rights) Index on Censorship, Vol. 1, March 2010

- *Murray* in his study *"The regulation of cyberspace : control in the online environment"* explains the different types of control mechanisms, such as design & market controls, self-regulation, and legal rules, used to govern cyberspace.[55] The same author has put forward a text book entitled *"Information technology law : the law and society"* which might prove to be helpful for the purposes of this study as it systematically examines how the law and legal process of the UK interacts with the fast-moving process of digitization.[56]
- *Schulz, et al.,* in a collaborative research sketch, aim at examining and mapping the governance structure in the realm of social media by choosing three legally and socially protected interests[57] which – in the view of the authors of the research sketch – encapsulate, to a great extent, the overall breadth of issues of information law is facing. The study depicted in this paper as well as the one of *Schulz, et al.* will mutually benefit from each other as they both look at legal norms. In the case of *Schulz, et al.* law will form one of four factors of governance which are used as analytical framework.[58]

(2010).; note also *F. C. Mayer*, Europe and the Internet - The Old World and the New Medium WHI Papers (2000), available at: <http://www.whi-berlin.eu/documents/whi-paper0200.pdf>, last. calling for a public international law approach; more recently *F. C. Mayer*, Europäisches Internetverwaltungsrecht, in J. P. Terhechte (ed.), Verwaltungsrecht in der Europäischen Union (hereafter: Europäisches Internetverwaltungsrecht), 931-958 (2011 forthcoming).

[55] *A. Murray*, The regulation of cyberspace : control in the online environment (hereafter: Regulation of cyberspace) (2007).; note also *R. Herzog*, Doppelgesichter der internationalen Internetregulierung - Zur Bedeutung transnationaler Akteure bei der Gestaltung der neuen Internet-Ordnung (hereafter: Internetregulierung), 17 Analysen-Daten-Dokumentation 58-90 (2000).

[56] *A. Murray*, Information technology law : the law and society (hereafter: Information technology law) (2010).

[57] (1) Privacy and transparency, (2) ownership of content, and (3) the protection of minors.

[58] *W. Schulz, et al.*, Mapping the frontiers of Governance in Social Media, presented at Exploring the digital future - First Berlin symposium on internet and society, Berlin (25.-28.10.2011).

3. A Selection of Literature Specifically discussing the Application of Fundamental Rights or Constitutional Principles to Internet-related Real-world Phenomena

- The paper of *Bizer* explains in a rather shortish fashion which fundamental freedoms in the German constitutional order are applicable to the "internet".[59] It provides a useful overview and background reading for this study.
- *Karavas'* monograph discusses the currently prevailing German constitutional law doctrine on horizontal effects of fundamental freedoms in private law in the context of the internet. He argues that this doctrine is insufficient to protect the holders of fundamental rights against discrimination of certain data in transfer by means of interferences with the internet structure. He argues in favor of a duty, addressed to internet intermediaries, to treat all data on the net equally.[60]
- *Weigl's*[61] study of 2011 discusses the constitutional issues surrounding Web 2.0 applications such as opinion and evaluation forums. The issues are basically pictured as a conflict between the freedom of expression and the right to privacy in the German *Grundgesetz* and the European Convention on Human Rights. The author furthermore addresses in detail the legislative framework dealing with the operation of such applications in Germany. In particular the latter elaboration can prove helpful for identifying internet-related legislation and regulation.

[59] *J. Bizer*, Grundrechte im Netz, in C. Schulzki-Haddouti (ed.), Bürgerrechte im Netz (hereafter: Grundrechte im Netz), 21-29 (2003).
[60] *V. Karavas*, Digitale Grundrechte : Elemente einer Verfassung des Informationsflusses im Internet (hereafter: Digitale Grundrechte) (2007).
[61] *M. Weigl*, Meinungsfreiheit contra Persönlichkeitsschutz am Beispiel von Web 2.0-Applikationen (hereafter: Web 2.0-Applikationen) (2011).; see also *A.-B. Kaiser*, Bewertungsportale im Internet - Die Spickmich-Entscheidung des BGH (hereafter: Bewertungsportale) Neue Zeitschrift für Verwaltungsrecht 1474-1477 (2009).; note the older study of *M. Gets*, Meinungsäußerungs- und Informationsfreiheit im Internet aus der Sicht des Völkerrechts (hereafter: Meinungsäußerungs- und Informationsfreiheit), at esp. 46-52 (2002). on restrictive legislation.

- *Degenhart* discusses the applicability of the freedom of public broadcasting as defined by the German constitution and the jurisprudence of the German constitutional court to internet communication.[62]
- *Kläner* addresses the phenomenon *Wikileaks* from the perspective of the freedom of press as defined by the German constitution.[63]
- The study of *Bronsema* focuses on the protection of *Digital Press* in a European and German constitutional context.[64]
- *Nettesheim's* treatise elaborates on the constitutional protection of privacy.[65]

4. A Selection of Literature addressing the Questions of How the Internet Has Challenged or Changed our Perception of our (Conventional) Constitutional Legal Order66 and of How the Internet Weakens or Strengthens the Exercise of Fundamental Rights and Constitutional Principles

- The monograph of *Roßnagel, Wedde, Hammer* and *Pordesch*[67] represents an early account (1990) of the changes brought about by the "information technology" in respect of the real live conditions and the resulting pressure on the German constitutional legal order and on the German legal system as a whole to adapt. Their study results in legislative and regulatory proposals on how to respond

[62] *C. Degenhart*, Verfassungsfragen der Internet-Kommunikation - Wie die Rundfunkfreiheit in die Online-Welt hineinstrahlt (hereafter: Internet-Kommunikation) Computer und Recht 231-237 (2011).
[63] *T. Kläner*, Wikileaks: Das Web 2.0 als Vehikel der Pressefreiheit (hereafter: Wikileaks) Neue Juristische Wochenschrift, NJW-aktuell Nr. 34 14-16 (2010).
[64] *F. Bronsema*, Medienspezifischer Grundrechtsschutz der elektronischen Presse : Darstellung des Grundrechtsschutzes in der Europäischen Union und Entwicklung eines Lösungsansatzes für den Grundrechtsschutz aus Art. 5 Abs. 1 GG (hereafter: Elektronischen Presse) (2008).
[65] *M. Nettesheim*, Grundrechtsschutz der Privatheit, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (hereafter: Grundrechtsschutz der Privatheit), 7-49 (2010).
[66] *Y. Benkler*, The wealth of networks : how social production transforms markets and freedom (hereafter: The wealth of networks) (2006); *Y. Benkler*, Information, Structures, and the Constitution of American Society, in J. M. Balkin and R. B. Siegel (eds.), The constitution in 2020 (hereafter: Information, Structures, and the Constitution of American Society), 187-195 (2009).
[67] *Roßnagel, et al.*, Digitalisierung der Grundrechte?

to the challenges posed by the information technology. Hence, the focus is on future instead present legislation; the latter being at this study's center of attention. Although their elaborations on fundamental freedoms and constitutional principles appears to be helpful for defining the constitutional issue areas, overall the study is outdated technically as well as in terms of constitutional development.

- *Lessig's* book "*Code 2.0*"[68], an important background reading, focuses on the instruction sets, i.e. programs, applications, etc. – i.e. in the words of the author "*the West Coast Code*"– that form the architecture of the internet. This code emerges from the decisions made by a small group of technocrats. It does not presuppose the awareness or the consent of its subjects in order to be effective. Over time this code unfolds comparable coercive influences like those exercised by governments, market power and oppressive social mores. Unlike, however, for example in respect of laws, there is neither a formalized public process of adopting codes nor is there a formal, institutional review and interpretation of the kind exercised by a judicial system. That leads him to assert that "*technology is plastic. It can be remade to do things differently… We should expect—and demand—that it can be made to reflect any set of values that we think important. The burden should be on the technologists to show us why that demand can't be met.*"[69] Lessig's idea is significant for this study as it points to the power inherent in legislation and regulation to reshape technical standards and, therefore, provides another argument for not neglecting the impact of internet-related legislation and regulation on constitutional issue areas.
- *Benkler* in his political economy study argues that today's availability of the basic material requirements of information production for literally a billion of

[68] *Lessig*, Code : version 2.0.
[69] Ibid., 32.; see also *G. Hübner*, Wie wirken Standards und Normen im Recht? (hereafter: Standards) DuD 56 (2011).

people loosely connected via the net has given them a *"new practical freedom of action"*[70] in terms of information and communication. According to *Benkler* this perspective *"offers a genuine reorganization of the public sphere"*[71] by turning away from classic commercial mass media, relying on market based proprietary models, towards an increased role for nonproprietary, decentralized information production. To some extent informative for the study's purpose are *Benkler's* observations that despite an increased role of social production, legislation favors proprietary business models, in particular by strengthening exclusive intellectual property rights. While *Benkler* believes that the struggle between this social information production model and "old-fashioned" proprietary business models has yet to been decided, *Wu* in his recent book *"The Master Switch"* argues that also the information production on the internet could soon be "monopolized" by the broadband and content companies following the "classic proprietary business model".[72]

- *Ladeur's* paper focuses on the challenge the internet poses to the right to property.[73]
- *Murray* in his paper *"examines the rules and institutional structures through which the peculiar tensions between proprietary rights and the right of free expression in cyberspace are mediated"*.[74]

[70] *Benkler*, The wealth of networks, at 462.
[71] Ibid., 465.
[72] *T. Wu*, The master switch : the rise and fall of information empires (hereafter: The master switch) (2010).; see on a discussion of media concentration on the internet: *E.-J. Mestmäcker*, Medienkonzentration im Internet, in J. Becker and M. Gebrande (eds.), Der Rundfunkstaatsvertrag als föderales Instrument der Regulierung und Gestaltung des Rundfunks - Symposion für Wolf-Dieter Ring zum 60. Geburtstag (hereafter: Medienkonzentration), 25 - 41 (2004); *B. Kubala*, Medienkonzentration im Internet (hereafter: Medienkonzentration im Internet) (2004).; note also Trute's observations in respect of free access to "the cables", already made in 1998: *H.-H. Trute*, Öffentlich-rechtliche Rahmenbedingungen einer Informationsordnung, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (hereafter: Informationsordnung), 218, at 227 et seqq (1998).
[73] *K.-H. Ladeur*, Die Dynamik des Internet als Herausforderung der Stabilität des Rechts : "virtuelles Eigentum", Copyright, Lauterkeitsrecht und Grundrechtsbindung im Internet als Exempel, Innovation und rechtliche Regulierung (hereafter: Dynamik des Internet), 339-361 (2002).
[74] *A. Murray*, Regulation and Rights in Networked Space (hereafter: Regulation and Rights in Networked Space), 30 Journal of Law and Society 187-216, at 187 (2003).

- *Schulzki-Haddouti* and *Redelfs* explain how the internet can fertilize the freedom of information which itself contributes to more transparency and a functioning of democracy[75]
- The book edited by *Gibbons* deals with the changes of our perception of the political and constitutional principle and theory of free speech brought about by the internet and asks the question of how these changes affect the law and regulation of content in new media that are based on digital technology.[76]

5. A Selection of Literature devoted to the Question of Whether the Internet has its own "Constitution" and, if Answered in the Affirmative, How this "Constitution" Should Look like.

- Since the emergence of the internet there has been a debate on values and governance within the net. *Levy* attempted in its book *"Hackers"* to synthesis values and instructions on how to act on the internet, resulting in a "hacker ethic".[77] Another notable attempt to formulate a "constitution of the internet" is the German initiated "*Online Magna Charta*" of 1997[78] which aimed at translating classic fundamental rights into such of ordering the internet. Several others followed, for example the NGO-initiated *"People's Communication Charter"* or the "*Citizen's Charter*"[79] drawn up by the Council of European Professional Informatics Societies. The latter also contained

[75] *C. Schulzki-Haddouti and M. Redelfs*, Informationsfreiheit als demokratisches Prinzip - Mehr Tranzparenz durch mehr Information, in C. Schulzki-Haddouti (ed.), Bürgerrechte im Netz (hereafter: Informationsfreiheit), 178-189 (2003).
[76] *T. Gibbons*, Free speech in the new media (hereafter: Free speech) (2009).
[77] *S. Levy*, Hackers - Heroes of the computer revolution (hereafter: Hackers - Heroes of the computer revolution) (2001).
[78] *F. Rötzer*, Die "Online Magna Charta" (hereafter: Die "Online Magna Charta") Heise Online (1997).http://www.heise.de/tp/artikel/1/1098/1.html
[79] *Gesellschaft für Informatik e. V.*, Mensch steht im Mittelpunkt der «Citizen's Charter», 13.5.2011, available at: <http://www.gi.de/presse/pressemitteilungen-thematisch/pressemitteilung-vom-10061999.html>, last visited: 16.9.2011.

recommendations to the governments how to protect "constitution of the internet" by means of state legislation and regulation.

- The study *"Who controls the Internet?"* of *Goldsmith* and *Wu* is important for this work as it shows that (territorial) governmental legislation and regulation has remained a very important if not decisive factor in human governance in the internet age.[80] If this is true "classic" constitutions of nation states (but also constitutions of supranational organizations like the EU) remain equally decisive in guiding and directing this legislative and regulatory activity.

The literature review illustrates that a comprehensive study, undertaken in a comparative perspective, on the effects or internet-related legislation and regulation on constitutional issue areas is still missing. Considering the continued importance of national jurisdictions in human governance in the internet age, this research gap comes at some surprise. With a view to close this gap this study's research results shall enable to judge whether the organically grown internet-related legislative and regulatory body still conforms to fundamental normative perceptions and beliefs in respect of fundamental freedoms and constitutional principles.

[80] *Goldsmith and Wu*, Controls at 180.

VI. Significance of this Study

1. Academia

The study, closing a research gap on the question of "what internet-related *legislation and regulation* do to constitutions", might be interesting for both s*cholars of legal and political sciences* involved in researching the general topic of constitution and internet.

2. Practitioners

This study's country reports may well be informative for *policy advisers* and *legislators/regulators* in terms of better understanding constitutional issues overarching different subject areas of internet-related legislation/regulation. This "top-down approach" might help identifying commonalities and fractions within the regulatory body usually growing bottom-up. Ultimately, it might help producing better legislation/regulation. Furthermore, the country reports can also be seen as a display of openness and regulatory constrains for internet-related business activities and might therefore be useful for *companies* planning to conduct business activities within a certain jurisdiction. Detecting regulatory patterns across a variety of jurisdictions might help *policy makers* and *legislators/regulators* to identify alternative regulatory approaches which, while leading to the same wished result, are less restrictive or more enabling in respect of a certain constitutional issue area.

The identification of potential regulatory spill-over effects of national legislation and regulation (so-called extraterritorial effects) could help *defusing* early potential *conflicts* between states or international organizations originating from the fact that one is governed by a norm in the creation of which one has not taken part. A discussion could – due to the framing of this study – to a limited extent – be refocused from the "sovereignty issue" more towards a debate on constitutional

issue areas and their underlying principles and beliefs which might even be shared by the state parties involved in that discussion.

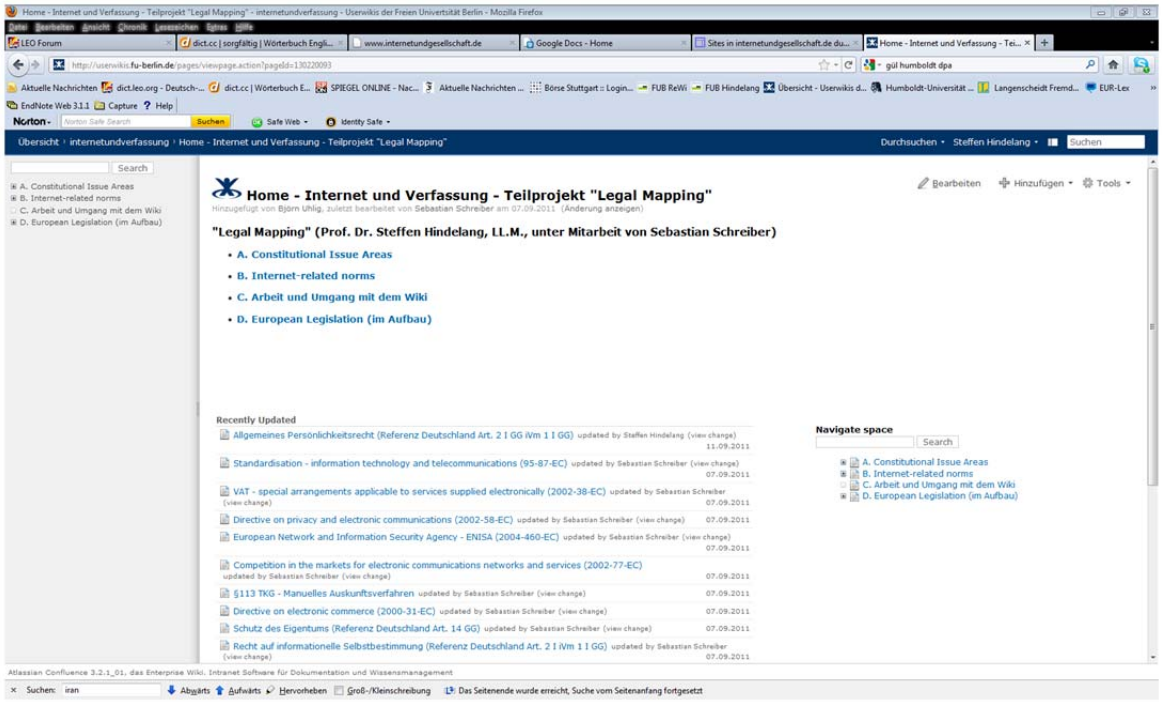
VII. Research Questions

Within the context of the overarching issue of what internet-related legislation and regulation do to constitutions, the following questions are submitted for further consideration:

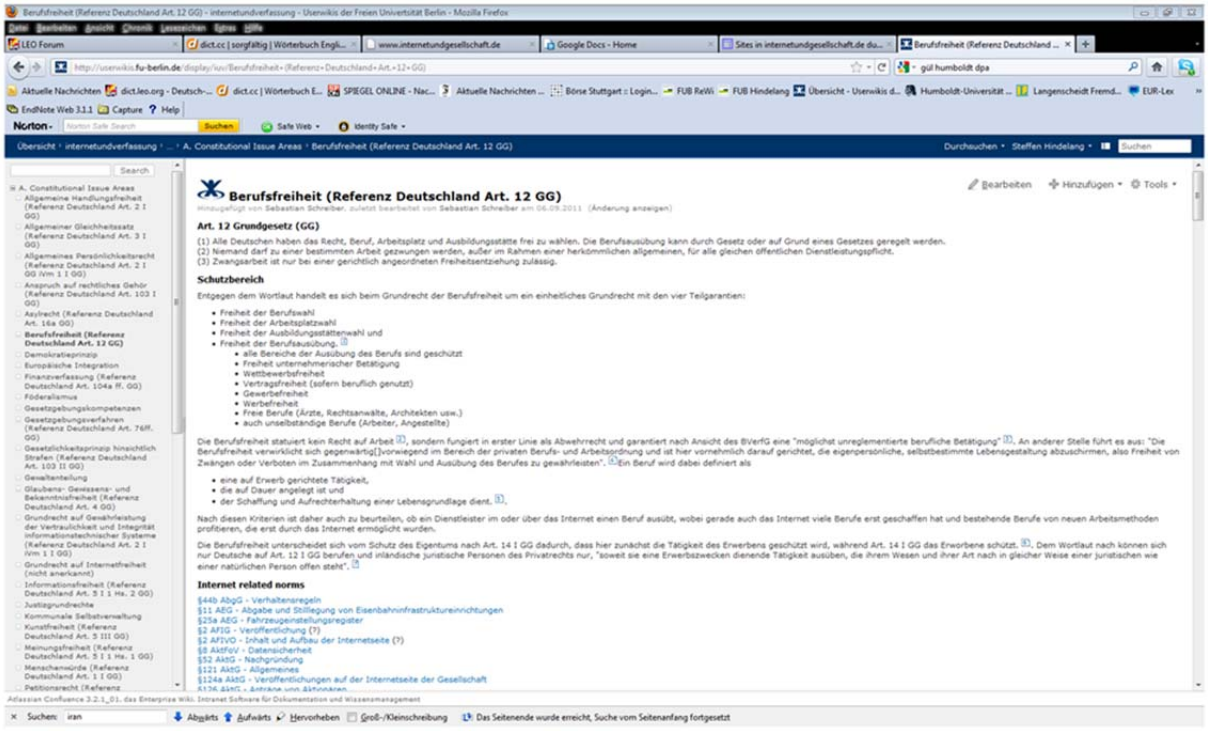
- Which constitutional issue areas are more and which areas are less frequently affected by internet-related norm setting?
- Which regulatory approach is chosen to shape a certain constitutional issue area? Can patterns and/or fractions be identified?
- Do, and if answered in the affirmative, in which way and why do different internet-related norms referring to like situations, correlate or differ in terms of their regulatory approaches and, hence, in respect of their restricting or bolstering effect on a constitutional issue area?
- Which degree of convergence and/or divergence in terms of balancing different constitutional issue areas in situations referring to comparable "constitutional situations", i.e. norms relating to the regulation of different real word phenomena but touching upon the same constitutionally protected interests, can be identified?
- Do, and if answered in the affirmative, where, what kind, to what extent, and why do decentralized internet-related legislation and regulation originating from different jurisdictions display common denominators and/or also fractions in terms of limiting or bolstering effects on constitutional issue areas? In particular, is it possible to identify divergence or convergence of regulatory approaches within a constitutional issue area across different jurisdictions and what are the driving forces behind possible patterns?

VIII. Annex – Screenshots Wiki ("Probe Phase")

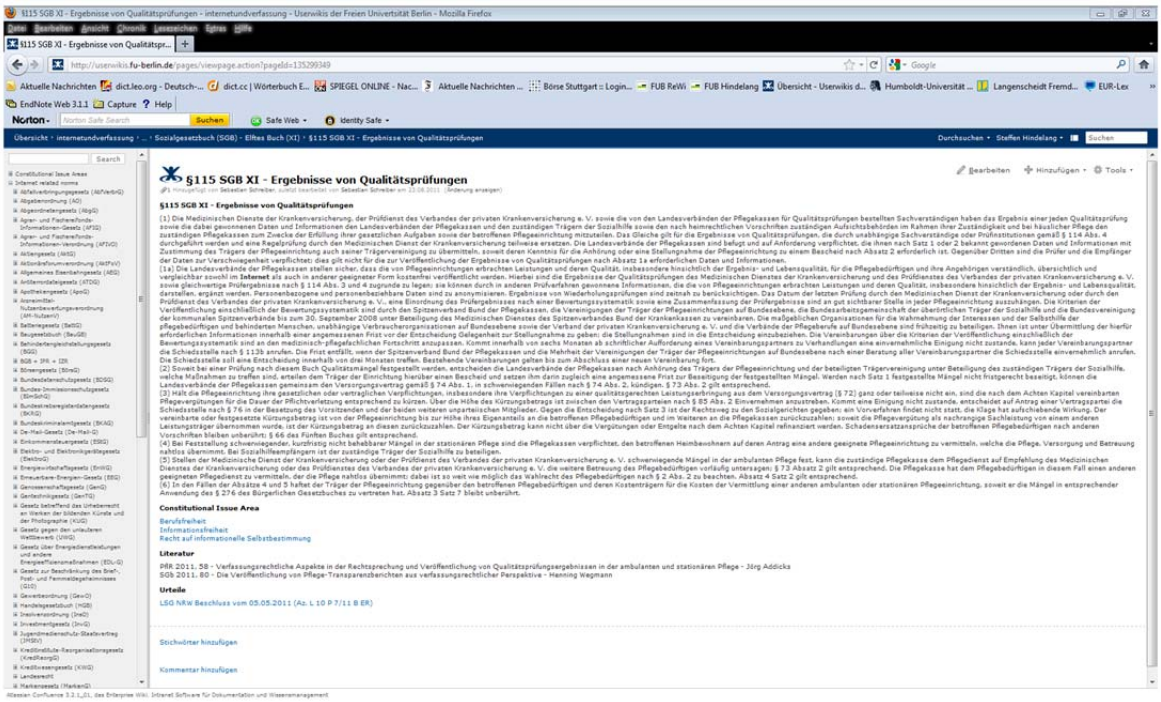
1. Start Page



2. Example Constitutional Issue Area



3. Example Internet-related Norm


§115 SGB XI - Ergebnisse von Qualitätsprüfungen - internetundverfassung - Userwikis der Freien Universität Berlin - Mozilla Firefox
§115 SGB XI - Ergebnisse von Qualitätsprüfungen
§115 SGB XI - Ergebnisse von Qualitätsprüfungen
Constitutional Issue Area
Berufsfreiheit
Informationsfreiheit
Recht auf informationelle Selbstbestimmung
Literatur
Urteile
LSG NRW Beschluss vom 05.05.2011 (Az. L 10 P 7/11 B ER)
Stichwörter hinzufügen
Kommentar hinzufügen

IX. Annex - References

Alston, Philip, A framework for the comparative analysis of bills of rights, in Philip Alston ed., Promoting human rights through Bills of Rights (Oxford, et al.: Oxford Univ. Press, 1999), 1-14.

--- ed., Promoting human rights through Bills of Rights (Oxford, et al.:Oxford Univ. Press, 1999).

Bamberger, Kenneth A., and Deirdre K. Mulligan, Privacy on the Books and on the Ground, 63 Stanford Law Review (2011).

Becker, Konrad, and Felix Stalder eds., Deep Search - Politik des Suchens jenseits von Google (Bonn:bpb Bundeszentrale für Politische Bildung, 2010).

Benkler, Yochai, The wealth of networks : how social production transforms markets and freedom (New Haven, Conn. ; London: Yale University Press, 2006).

---, Information, Structures, and the Constitution of American Society, in Jack M. Balkin and Reva B. Siegel eds., The constitution in 2020 (Oxford: Oxford University Press, 2009), 187-195.

Berner, Katharina, Constitutions going online - Internet-related dynamics in constitional law? - (Berlin, 2011).

Bizer, Johann, Grundrechte im Netz, in Christiane Schulzki-Haddouti ed., Bürgerrechte im Netz (Bonn: Bundeszentrale für politische Bildung, 2003), 21-29.

Bronsema, Frauke, Medienspezifischer Grundrechtsschutz der elektronischen Presse : Darstellung des Grundrechtsschutzes in der Europäischen Union und Entwicklung eines Lösungsansatzes für den Grundrechtsschutz aus Art. 5 Abs. 1 GG (Berlin: Lit, 2008).

Brown, Ian, Internet Self-Regulation and Fundamental Rights, Index on Censorship, Vol. 1, March 2010 (2010).

Bull, Hans Peter, Persönlichkeitsschutz im Internet: Reformeifer mit neuen Ansätzen, Neue Zeitschrift für Verwaltungsrecht (2011), 257-263.

Darrow, Mac, and Philip Alston, Bills of rights in comparative perspective, in Philip Alston ed., Promoting human rights through Bills of Rights (Oxford, et al.: Oxford Univ. Press, 1999), 465-524.

Degenhart, Christoph, Verfassungsfragen der Internet-Kommunikation - Wie die Rundfunkfreiheit in die Online-Welt hineinstrahlt, Computer und Recht (2011), 231-237.

Deibert, Ronald, John G. Palfrey, Rafal Rohozinski, and Jonathan Zittrain eds., Access denied : the practice and policy of global Internet filtering (Cambridge, Mass.; London:MIT, 2008).

--- eds., Access controlled : the shaping of power, rights, and rule in cyberspace (Cambridge, Mass.:MIT Press, 2010).

Dietlein, Johannes, Illegales Glücksspiel und staatliche Gefahrenabwehr - Herausforderungen an die staatliche Gefahrenabwehr im Informationszeitalter, Gewerbearchiv (2005), 89-94.

Ellickson, Robert C., Order without law : how neighbors settle disputes (Cambridge, Mass.: Harvard University Press, 1991).

Friedman, Thomas L., The Lexus and the olive tree, Rev. ed. (New York: Farrar, Straus, Giroux, 2000).

---, The world is flat : a brief history of the twenty-first century, 1st further updated and expanded hardcover. ed. (New York: Farrar, Straus and Giroux, 2007).

Garstka, Hansjürgen, Informationelle Selbstbestimmung und Datenschutz - Das Recht auf Privatsphäre, in Christiane Schulzki-Haddouti ed., Bürgerrechte im Netz (Bonn: Bundeszentrale für politische Bildung, 2003), 48-70.

Géczy-Sparwasser, Vanessa, Die Gesetzgebungsgeschichte des Internet - Die Reaktion des Gesetzgebers auf das Internet unter Berücksichtigung der Entwicklung in den USA und unter Einbeziehung gemeinschaftsrechtlicher Vorgaben, Beiträge zum Informationsrecht (Berlin: Duncker & Humblot, 2003).

Gesellschaft für Informatik e. V., Mensch steht im Mittelpunkt der «Citizen's Charter», 13.5.2011 2001, available at: <http://www.gi.de/presse/pressemitteilungen-thematisch/pressemitteilung-vom-10061999.html>, last visited: 16.9.2011.
Gets, Marina, Meinungsäußerungs- und Informationsfreiheit im Internet aus der Sicht des Völkerrechts (Berlin: Berlin-Verl. Spitz, 2002).
Gibbons, Thomas, Free speech in the new media, Library of essays in media law (Farnham, Surrey, England ; Burlington, VT: Ashgate, 2009).
Goldsmith, Jack L., and Tim Wu, Who controls the Internet? Illusions of a borderless world (Oxford, et al.: Oxford Univ. Press, 2006).
Golomb, Beate, Robert Mehrgardt, and Hubertus Weber, Gemeinden vs. Google Street View, Bayerische Verwaltungsblätter (2011), 39-43.
Guernsey, Lisa, Welcome to the Web. Passport, Please?, New York Times, 15.3.2001.
Häberle, Peter, Die Wesensgehaltgarantie des Artikel 19 Abs. 2 Grundgesetz - Zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt, Freiburger rechts- und staatswissenschaftliche Abhandlungen, 3. ed. (Heidelberg: Mueller Juristischer Verl., 1983).
Heringa, Aalt W., and Philipp Kiiver, Constitutions compared - An introduction to comparative constitutional law, Ius commune Europaeum, 2. ed. (Antwerp, et al.: Intersentia, 2009).
Herzog, Roman, Doppelgesichter der internationalen Internetregulierung - Zur Bedeutung transnationaler Akteure bei der Gestaltung der neuen Internet-Ordnung, 17 Analysen-Daten-Dokumentation (2000), 58-90.
Hoffmann, Christian, Die Verletzung der Vertraulichkeit informationstechnischer Systeme durch Google Street View, Computer und Recht (2010), 514-518.
Hon, W. Kuan, Christopher Millard, and Ian Walden, The Problem of 'Personal Data' in Cloud Computing - What Information is Regulated? The Cloud of Unknowing, Part 1, SSRN eLibrary (2011).
---, Who is Responsible for 'Personal Data' in Cloud Computing? The Cloud of Unknowing, Part 2, Queen Mary School of Law Legal Studies Research Paper No. 77/2011 (2011).
Hübner, Gerold, Wie wirken Standards und Normen im Recht?, DuD (2011), 56.
Kaiser, Anna-Bettina, Bewertungsportale im Internet - Die Spickmich-Entscheidung des BGH, Neue Zeitschrift für Verwaltungsrecht (2009), 1474-1477.
Karavas, Vagias, Digitale Grundrechte : Elemente einer Verfassung des Informationsflusses im Internet, Internationale Studien zur Privatrechtstheorie ; 8 (Baden-Baden: Nomos, 2007).
Kern, Bernhard Georg, Das Internet zwischen Regulierung und Selbstregulierung (2009)), available at: <http://d-nb.info/1001356748/34>, last visited: 07.05.2011.
Kläner, Tobias, Wikileaks: Das Web 2.0 als Vehikel der Pressefreiheit, Neue Juristische Wochenschrift, NJW-aktuell Nr. 34 (2010), 14-16.
Klang, Mathias, and Andrew Murray eds., Human rights in the digital age (London:GlassHouse, 2005).
Kreutzer, Tim, Das Spannungsverhältnis zwischen Wissen und Eigentum im neuen Urheberecht, in Jeanette Hofmann ed., Wissen und Eigentum : Geschichte, Recht und Ökonomie stoffloser Güter (Bonn: Bundeszentrale für Politische Bildung, 2006), 109-140.
Kubala, Birge, Medienkonzentration im Internet, Schriftenreihe Information und Recht (München: Beck, 2004).
Ladeur, Karl-Heinz, Die Dynamik des Internet als Herausforderung der Stabilität des Rechts : "virtuelles Eigentum", Copyright, Lauterkeitsrecht und Grundrechtsbindung im Internet als Exempel, Innovation und rechtliche Regulierung (2002), 339 - 361.
Lessig, Lawrence, Code : version 2.0, 2. ed. (New York: BasicBooks ; [London : Perseus Running, distributor], 2006).
Leube, Sabine C., Die Rolle des Staates im Internet : eine Untersuchung der Möglichkeit, Zulässigkeit und Notwendigkeit staatlicher Regulierung, Rechtswissenschaften (München: Utz, 2004).

Levy, Steven, Hackers - Heroes of the computer revolution, Updated afterword. ed. (New York, N.Y.: Penguin Books, 2001).
Lindner, Christian, Persönlichkeitsrecht und Geo-Dienste im Internet – z. B. Google Street View/Google Earth, 2010 Zeitschrift für Urheber- und Medienrecht (2010), 292-301.
Lobet-Maris, Claire, Vom Vertrauen zur Spurenauswertung - Eine neue Sicht der Technikfolgenabschätzung, in Konrad Becker and Felix Stalder eds., Deep Search - Politik des Suchens jenseits von Google (Bonn: bpb Bundeszentrale für Politische Bildung, 2010), 85-97.
Ludwikowski, Rett R., Constitutionalization of human rights in post-Soviet states and Latin America - a comparative analysis, 33 Georgia Journal of International & Comparative Law (2004), 1-113.
Mankowski, Peter, Die Düsseldorfer Sperrungsverfügung - alles andere als rheinischer Karneval, Multimedia und Recht (2002), 227-228.
Mayer, Franz C., Europe and the Internet - The Old World and the New Medium WHI Papers (2000), available at: <http://www.whi-berlin.eu/documents/whi-paper0200.pdf>, last.
---, Europäisches Internetverwaltungsrecht, in Jörg P. Terhechte ed., Verwaltungsrecht in der Europäischen Union (2011 forthcoming), 931-958.
Medosch, Armin, Demonstrieren in der virtuellen Republik - Politischer Aktivismus im Internet gegen staatliche Institutionen und privatwirtschaftliche Unternehmen, in Christiane Schulzki-Haddouti ed., Bürgerrechte im Netz (Bonn: Bundeszentrale für politische Bildung, 2003), 261-306.
Mestmäcker, Ernst-Joachim, Medienkonzentration im Internet, in Jürgen Becker and Martin Gebrande eds., Der Rundfunkstaatsvertrag als föderales Instrument der Regulierung und Gestaltung des Rundfunks - Symposion für Wolf-Dieter Ring zum 60. Geburtstag (Baden-Baden: Nomos Verl.-gesellschaft, 2004), 25-41.
Morozov, Evgeny, The Net Delusion: How Not to Liberate The World (Penguin UK, 2011).
Murray, Andrew, Regulation and Rights in Networked Space, 30 Journal of Law and Society (2003), 187-216.
---, The regulation of cyberspace : control in the online environment (Abingdon: GlassHouse, 2007).
---, Information technology law : the law and society (Oxford: Oxford University Press, 2010).
Nettesheim, Martin, Grundrechtsschutz der Privatheit, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (2010), 7-49.
Palfrey, John G., Jr., Four Phases of Internet Regulation, 77 Social Research (2010).
Reißmann, Ole, Die Denkfehler der Scharfmacher Spiegel Online (2011), available at: <http://www.spiegel.de/netzwelt/netzpolitik/0,1518,776872,00.html>, last visited: 16.09.2011.
Roßnagel, Alexander, Peter Wedde, Volker Hammer, and Ulrich Prodesch, Digitalisierung der Grundrechte? : Zur Verfassungsverträglichkeit der Informations- und Kommunikationstechnik (Opladen: Westdt. Verl., 1990).
Rötzer, Florian, Die "Online Magna Charta", Heise Online (1997).
Saldias, Osvaldo, Patterns of Legalization in the internet (Berlin, 2011).
Saunders, Cheryl, Constitutional protection of rights in common law systems, in Nikolaos Alivizatos ed., Essays in honour of Georgios I. Kassimatis (Berlin, et al.: BWV Berliner Wissenschafts-Verl., et al., 2004), 701-715.
Schulz, Wolfgang, New public spheres and how to incorporate them into fragment law (Berlin, 2011).
Schulz, Wolfgang, Jan-Hinrik Schmidt, Karl-Heinz Ladeur, Niva Elkin-Koren, Tal Zarsky, and Gustavo S. Mesch, Mapping the frontiers of Governance in Social Media (Berlin, 2011).
Schulzki-Haddouti, Christiane, and Manfred Redelfs, Informationsfreiheit als demokratisches Prinzip - Mehr Tranzparenz durch mehr Information, in Christiane Schulzki-Haddouti ed., Bürgerrechte im Netz (Bonn: Bundeszentrale für politische Bildung, 2003), 178-189.
Sommermann, Karl-Peter, Funktionen und Methoden der Grundrechtsvergleichung, in Detlef Merten and Hans-Jürgen Papier eds., Handbuch der Grundrechte in Deutschland und Europa, vol. 1 (Heidelberg C. F. Müller, 2004), 631-678.

Tambini, Damian, Danilo Leonardi, and Christopher T. Marsden, Codifying cyberspace : communications self-regulation in the age of Internet convergence (London: Routledge, 2008).

Trute, Hans-Heinrich, Öffentlich-rechtliche Rahmenbedingungen einer Informationsordnung, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (1998), 218.

van Hoboken, Joris, Suchmaschinen-Gesetzgebung und die Frage der Ausdrucksfreiheit, in Konrad Becker and Felix Stalder eds., Deep Search - Politik des Suchens jenseits von Google (Bonn: bpb Bundeszentrale für Politische Bildung, 2010), 98-111.

Weber, Albrecht, Europäische Verfassungsvergleichung (München: Beck, 2010).

Weber, Jörg-Andreas, Google „Street View" und ähnliche Geo-Datendienste im Internet aus zivilrechtlicher Sicht, 2011 Neue Juristische Online Zeitschrift (2011), 673-676.

Weigl, Michaela, Meinungsfreiheit contra Persönlichkeitsschutz am Beispiel von Web 2.0-Applikationen, Schriften zum Medienrecht (Hamburg: Kova, 2011).

Wu, Tim, The master switch : the rise and fall of information empires, 1st. ed. (New York: Alfred A. Knopf, 2010).