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Legal Questions of Excluding Participants from Internet Discussion Groups: On the Guaranteeing of Freedom of Communication through 'Network- Adapted' Private Law

By Karl-Heinz Ladeur[*]

A. New 'Hybrid' Forms of Communication and what Private Law can do

The development of media law in recent years is – following a brief stage of calm in the course of establishing the 'dual broadcasting system'[1] – being affected by new dynamism sparked particularly by the rise of the Internet. The increasing multiplicity of forms and possibilities of communication, in particular of 'hybrid' coupling of elements of individual and mass communication (e.g. individual exchange of pieces of music by a generally accessible procedure such as Napster and Gnutella, Internet discussion groups among people who do not know each other, Video-on-Demand etc.) has brought broadcasting regulation within a 'positive order' oriented towards 'pluralism' under pressure.[2] New hybrid services can no longer be sharply distinguished from broadcasting, nor simply classified with traditional individual communication. The content too may be disseminated in various contexts: for instance, the same film may be disseminated as a full programme, a side programme or part of a media service. Can the difference in context then justify, say, differentiation of legal requirements relating to advertising?

This development, which cannot be traced in detail here, is increasingly leading to a breakdown of the specifically behaviour-oriented public-law regulation of broadcasting,[3] while at the same time private law[4], in particular anti-trust law and the law against unfair competition, is gaining importance: § 46a of the Treaty of the

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[1] See further BVerfGE (Reports of the Federal Constitutional Court) 57, 295, 320 ss.; 73, 118, 153.

[2] On the consequences for broadcasting in the narrower sense, see HOFFMANN-RIEM ET AL., KONVERGENZ UND REGULIERUNG (2000); JARREN/DONGES, MEDIENREGULIERUNG DURCH DIE GESELLSCHAFT (2000).

[3] See further BVerfGE 57, 295, 320 ss.; 73, 118, 153.

[4] On media private law, see further PASCHKE, MEDIENRECHT (2ND ED., 2001), p. 213.

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Länder on Broadcasting (RStV) allows far-reaching flexibilization of advertising law for local and regional programmes; the new provisions on cable laying in § 53 RStV[5] reduce public-law ties on the provision of cable capacity to the supply needs of public broadcasters, while in other respects the network provider has a largely free hand. At the second stage of cable provision using digital programmes the net provider is bound only by the pluralism requirement, which can however be practised according to one's own understanding, without being in principle restricted by instructions from the Länder media institutions; at the third stage it becomes entirely free. Competition law and private autonomy with public-law ties (taking account of 'pluralism' as well as freedom of judgement in detail) replace the statute-based decisional practice of Länder media institutions. Internet communication, in so far as it to be classified with media or telecommunication services, has from the outset been highly unregulated.

Various new conflict situations are however showing that the development cannot run in a linear fashion in the sense of breaking down public regulation and the insertion of private law into the positions vacated,[6] but that private law itself is facing a challenge that requires new adjustment efforts. This is in turn connected with the hybrid nature of many new information services and forms of communication, for the legal treatment of which private law too scarcely offers ready-made solutions. Traditional public regulation may in turn offer too little flexibility[7], but in relation to the constitutional ties of the whole legal system the position has to remain that the communications constitution contained in Article 5(1) and further developed by the German Constitutional Court's case law[8] also contains directives for the formation of institutions of an information order organized under private law[9]. This follows simply from the third-party effect of the fundamental rights in Article 5, which because of the 'service function' of institutional press and broadcasting freedom is much more strongly supported

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[5] See further W. SCHULZ & KÜHLERS, KONZEPTE DER ZUGANGSREGULIERUNG FÜR DIGITALES FERNSEHEN (2000).

[6] See further Osthaus, *Die Renaissance des Privatrecht im Cyberspace*, ARCHIV FÜR PRESSERECHT (AFP) (2001), 13.

[7] See in general DETERMANN, KOMMUNIKATIONSFREIHEIT IM INTERNET (1999).

[8] See further BVerfGE 57, 295, 320; 73, 118, 153.

[9] See in general Schoch & Trute, *Öffentlich-rechtliche Rahmenbedingungen einer Informationsordnung*, VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (VVDStRL) 57 (1998), 158; 216; See also Hoffmann-Riem, in ÖFFENTLICHES RECHT UND PRIVATRECHT ALS WECHSELSEITIGE AUFFANGORDNUNGEN (Hoffmann-Riem & Schmidt-Aßmann eds., 1996), 261, 263.

dogmatically than is the case for other fundamental rights. This 'service function'[10] follows particularly because the communications constitution must in a liberal system oriented to openness for the future take on a special role for the maintenance and production of knowledge that is the basis for the efficiency of all social subsystems. This functional conception of freedom of communication, which cannot accept the reduction of freedom to 'arbitrariness',[11] cannot be met by public regulation alone.

If the latter proves too rigid, private law as an alternative has to be looked at to see whether and how far it can in turn make adjustment efforts that enable the development of a flexible information order, open to innovation. This expectation can in the light of the Constitution be formulated realistically only because private law itself has developed increasingly more approaches that go beyond the classical conceptions of private autonomy oriented solely toward the individual[12]. Again, private law has opened up to 'multi-polar organizational legal relationships' going beyond the individual exchange contract, but staying this side of company law[13]. The question is how far it can also offer dogmatic figures suitable for developing a flexible private-law-based information and communication order and capable of adding requirements arising from the constitutional order of the Basic Law, in particular the guaranteeing of the pluralism and openness of opinion formation. Such functional ties are not a priori compatible with 'undistorted private law'[14] or the 'analytical requirements of formally just application of law', as they are understood by a large proportion of private-law scholars[15].

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[10] See further BVerfGE 57, 295, 319; 74, 297, 323; 87, 181.

[11] See further HAIN, RUNDFUNKFREIHEIT UND RUNDFUNKORDNUNG (1993) 138; Degenhart, in: BONNER KOMMENTAR, Art.5, margin note 643; See also Starck, in: VON MANGOLDT/KLEIN/IDEM, GRUNDGESETZ, Vol. 1, Art. 5, Abs. 1, 2, margin note 70.

[12] See further ZUMBANSEN, ORDNUNGSMUSTER IM MODERNEN WOHLFAHRTSSTAAT (2000) p 261; Teubner, *Ein Fall von struktureller Korruption? Die Familienbürgschaft in der Kollision unverträglicher Handlungsoptionen*, KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (KritV) 2000, 385, 400; there one also finds a discussion of traditional civil-law conceptions, citing NÖRR, DIE LEIDEN DES PRIVATRECHTS (1994).

[13] See, *supra*, note 12, ZUMBANSEN 269.

[14] See, *supra*, note 12, Nörr, 225.

[15] See OECHSLER, GERECHTIGKEIT IM MODERNEN AUSTAUSCHVERTRAG (1997), 141.

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Yet private law has in individual areas brought about a 'reorientation of dogmatics to the treatment of social functions and role expectations in complex situations',[16] which is able also to confer outlines on the third-party effect, at least of the basic right in Article 5, in private law. It is only on this precondition that the constitutional construction of the third-party effect of fundamental rights can conversely be capable of acting like a foreign body within private law and producing rejection effects. This impression is indeed aroused by the Federal Constitutional Court's case law on third-party effect, particularly of the basic rights in Articles 2(1) and 12 Basic Law, which goes well beyond Article 5 Basic Law. This development is also the subject of a controversial debate in private law.

On view taken here, however, differentiations are appropriate. In particular, the distinction is to be drawn between possible requirements of justice put upon law of contract 'from outside', without being able to take into account the effects of private law, consisting particularly in the binding of uncertainty and the enabling of innovations, and the functional requirements arising notably from the objective legal dimension of the communication freedoms, in their turn at least partly oriented towards openness to innovation. The harmonization of communication freedoms with private law[17] might prove fruitful to the extent that - from the Hayek viewpoint - the latter is ultimately oriented towards guaranteeing competition as a 'discovery procedure'.[18] There follow concrete possibilities of linking up the Constitution and private law, able not only not to overstrain its performance capacity, but indeed to strengthen it. Here a distinction must in particular be drawn between communication freedoms and economic fundamental rights: the former are much more dependent than the latter on legal institutional guarantees of the conditions of their exercise, because of transferred effects on public-opinion formation. The influence exercised by fundamental rights on the private law[19] has to be defined by both sub-areas of the law in a mutual interlinking of perspectives. An approach to this will be developed below on the example of a decision by the

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[16] See, *supra*, note 12, ZUMBANSEN, 269; with reference to the internet see also Karavas & Teubner, *http://www.CompanyNameSucks.com: The Horizontal Effect of Fundamental Rights on 'Private Parties' within Autonomous Internet Law*, 4 GERMAN LAW JOURNAL (2003).; KARAVAS, DIGITALE GRUNDRECHTE (2007), p. 50-72; for the American discussion on problems of "Drittwirkung" see further Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to 'Private' Regulation*, 71 UNIVERSITY OF COLORADO LAW REVIEW 2000, 1263

[17] On the Federal Constitutional Court's case law on private law in general, see Oeter, *"Drittwirkung" der Grundrechte und die Autonomie des Privatrechts*, 119 ARCHIV DES ÖFFENTLICHEN RECHTS (AöR) 529 (1994); Ladeur, *Das Bundesverfassungsgericht als "Bürgergericht"?*, RECHTSTHEORIE 67 (2000)

[18] See further F.A. V. HAYEK, NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS (1978), 179

[19] See further HESSE, VERFASSUNGSRECHT UND PRIVATRECHT (1988), 30.

Bonn District Court on legal questions of participation in Internet discussion groups. This decision throws a spotlight on a new type of conflict within the hybrid communications made possible by the Internet.

B. The Decision by the Bonn District Court on Exclusion from Participation in Discussion Groups

The decision[20] is based on the following underlying circumstances: a service provider offering Internet services also makes available so called chat software that enables participants to communicate with third parties in such a way that the chatters' contributions become accessible to all on the computer screen immediately they are input. There was, however, no contract underlying utilization, at any rate by the defendant. The latter had joined the chat forum from the suppliers' home page by entering a pseudonym and a password, and been recorded for participation. The user often had recourse to the service and 'fierce verbal disputes' arose, in which other users also took part. At that point, the provider denied the defendant further use of the service. The latter did not however accept this, and continued to take part in the chat forum, dodging the technical barriers. The provider accordingly applied for a temporary order against the defendant barring participation in the chat service. The Court rejected the application, on the basis of the assumption that the provider could in principle be allowed an entitlement to the barring under § 1004 BGB, since a sort of 'virtual house right' applied to the chat room that ought to be assessed in accordance with dogma on real property. Accordingly the provider - being as it were a 'virtual owner' - could "in principle act as he wished with his property, and exclude others from operating with it." In accordance with the construction of § 1004 BGB, however, rights of third parties might lie against this. The provider could be seen as giving the user 'permission to enter' from which there followed - again following the principles developed for the utilization of real buildings[21] - a ' binding of the owner', which ruled out withdrawal of the permission without objective justification. The Court here referred to the case law on the opening of a business for general transactions with the public, where withdrawal was allowed in individual cases only if there were disruption of the course of business or similar conduct. This binding followed from the 'ban on contradictory conduct' derived form the general obligation to abide by the rules of "boni mores" (§ 242 BGB). Withdrawal of the utilization permission was arbitrary in the case in point, and thus unlawful, since the defendant had used the chat room 'in the context of ordinary chatter behaviour'. The provider had

[20] MULTIMEDIA UND RECHT (MMR) 2000, 109.

[21] See Christensen, *Taschenkontrolle im Supermarkt und Hausverbot*, JURISTISCHE SCHULUNG (JuS) 873 (1996).

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however pointed out that 'various regular chatters had felt badly treated by the defendant against the order'. The Court, however, found the submissions 'too global' in this connection. Nor did anything different follow from the 'eavesdropped' verbal dispute between the defendant and a third party, since the defendant's assertion that there had been conflicts among other 'chatters' too was not at dispute. 'It cannot be seen why specifically the defendant's involvement' should constitute conduct no longer covered by the general permission for utilization. Accordingly, even the provider's indication that he wished to 'establish a certain standard of communication as a minimum level...' was not sufficient to justify exclusion either.

Before the Cologne Higher District Court,[22] a settlement was reached where this court took the lower court's view in its decision as to costs, at any rate to the extent of accepting 'virtual house rights' for the provider. The Higher District Court pointed to the possibility of laying down 'bindingly formulated conditions of use' for chatters; here, however, there had not been the expected degree of precision. In that case the provider could also bar insults. Whether this had been the case could no longer be established.

C. 'Virtual Trespass' in the Chat Room – A Viable Construction of the Law?

I. The Bonn District Court's Dogmatic Approach

In the upshot, the Bonn District Court's order seems entirely plausible, even though individual features of the underlying facts cannot fully be followed by the reader. The approach to justification shows first that the civil law by no means has problem-free dogmatic figures available that can be used to resolve the issues. The analogy with trespass of private property ('virtual trespass') is an entirely usable auxiliary construction if the special features of the chat room and of discussion groups are taken into account: these are in particular that the software provided can be used only for communication among third parties. Apart from utilization by the chatters, the service has no function. This becomes still clearer if the facts are shifted a little: the provider might also have an interest in deleting particular statements without refusing their utterer access in other respects; this is the case in particular if he is liable, notably under §§ 5 ss.TDG/MDStV (§§ 6ss TDG/MDStV as

[22] See Oberlandesgericht (OLG - Higher Regional Court) Köln, Multimedia & Recht (MMR) 52 (2001).

of 1/4/2003 – restricted by §§ 7 ss. Telemediengesetz 2007) , for content produced by others and resulting nuisances.[23]
In the Unites States too, the legal figure of virtual property has been developed for similar cases: for instance, disruption to offers by a virtual auctioneer ('eBay') by electronic links to competing offers was treated as trespass, because the 'intrusion' on the auctioneer's computer program and the 'storage' of data had the same meaning as trespass on real property.[24] The analogy drawn by the Bonn District Court seems - supported by a glance at the law in the US - sensible because the chat room is a separate institution independent of the content of the various contributions, and at the provider's disposal: he can open and close software for the service, he has the possibility of deleting contributions, barring members from access, etc. The software itself is also subject to the provider's voluntary disposal. This justifies treating the chat room as similar to property, and also in part applying the provisions for real property to it, by analogy. This is all the more so since a chat forum can be used even independently of a contractual agreement once access is open. It is only insofar as the provider is also the user's service provider that a contractual relationship is also present. It would be going too far to derive a contractual relationship out of mere acquiescence in utilization by third parties. In both cases, however, the provider can limit utilization permission through either general terms of business or other provisions.

The problem thus shifts to the level of § 1004(2) BGB, that is, the question of the obligation of tolerance on the service provider as 'owner'. The opening of access to the chat room is to be regarded as consent; this was here given in the first place. The question is how far this acceptance can be withdrawn. The Bonn District Court evidently wishes to make exercise of the 'powers in principle due to the owner' dependent on compliance with the ban on contradictory conduct. It thus differentiates between conditions laid down on admission itself and checks made

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[23] The MDStV (*Mediendienstestaatsvertrag*) was a treaty among the Länder which regulated the content related problems of electronic communications, whereas the TDG (*Teledienstegesetz*) was a federal law which regulates commercial electronic communication; on liability in general see, SIEBER, VERANTWORTLICHKEIT IM INTERNET (1999); FREYTAG, HAFTUNG IM NETZ (1999); see also Spindler, in RECHT DER MULTIMEDIADIENSTE (Roßnagel, ed.), § 5 TDG margin note 91, who evidently regards the problem of clashes between freedom of speech and liability as secondary – the TDG has been replaced by the new *Telemediengesetz* in 2007, whereas the content related regulations of the *Mediendienstestaatsvertrag* has been integrated into the Treaty of the Länder on Broadcasting (§§ 54ss. RfStV of 2007).

[24] See Bunker, *Trespassing Speakers and Commodified Speech*, JOURNALISM AND MASS COMMUNICATION QUARTERLY 713, 716 (2000); Bick, *Trespass Theory Poses a Threat to Internet*, NEW YORK LAW JOURNAL 7 (2000).

with the aim of excluding 'undesirables' and other reasons that only arise later.[25] The distinction does not however become entirely clear.

II. 'Good faith' in networks

The Court takes the view that arbitrary withdrawal of consent [26] infringes the prohibition on contradictory conduct once admission has been given. Here the question arises whether this legal figure, developed on the basis of good faith, really fits the private exercise of 'virtual house rights'. This is all the more so since in the case in point the provider by no means obviously acted arbitrarily. Evidently the user had pursed 'conflictual verbal disputes' with other participants. Additionally, the provider appealed to infringements of 'Chatiquette', a sort of 'Internet usage' the rules of which may have been formed through self-organized communication among participants in the narrower sense, or else the practice of Internet utilization in general. To that extent, the District Court finds that it cannot be seen that 'conditions can be found in it that bindingly regulate utilization of the service'. This is unconvincing, since the point is not whether duties arise for the provider, but conversely the question whether the provider's right of revocation, which as such exists, might be restricted. Evidently the Court distinguishes here between 'binding terms' that might from the outset restrict utilization by restricting the consent - here it would seem to be explicit rules that are in mind - and standards of "usual 'chatter conduct'" that may subsequently have arisen from the communicative practice of chatting itself. This distinction of restriction on utilization permission from the outset, which in the District Court's view must be formulated 'bindingly' in rules, and subsequent restriction oriented towards unwritten rules and usages of communicative practice is, in its approach, quite appropriate to the conditions of Internet utilization. In its further justification, however, the Court does not seem entirely able to uphold the distinction, since it asks whether conduct "outside of 'ordinary chatter conduct'' would still be covered by the 'generalized utilization

[25] See also Landgericht (LG – Regional Court) Potsdam, on the State's Liability for Utterances in Chat Groups, MMR 1999, 739, published also in COMPUTER UND RECHT (CR) 2000, 13, with a case note by Schmitz.

[26] On consent generally see Bassenge, in PALANDT-HEINRICHS, BGB (67th Ed. 2008), § 1004 margin note 32; Bundesgerichtshof (BGH – Federal Court of Justice), published in: WERTPAPIER-MITTEILUNGEN (WM) 1971, 179.

permission'. Particularly if the legal admissibility of revocation is measured against the prohibition of contradictory conduct,[27] it cannot really be seen why its preconditions are here being affirmed.

Infringement of the prohibition of contradictory conduct presupposes a breach of trust:[28] evidently the defendant had in fact vigorously attacked another user. Taking into account the fact that we have to do here with a service to be assessed as free of charge in private law, which is also of no existential importance to those involved, it is not easy to see breach of trust in the mere fact that the provider wanted to exclude only one of the 'fighting cocks' from the chat, but not the others. This may be against equality, but in private law, binding by the equality principle would require more detailed justification. Assessing the conduct involved as a breach of trust, however, presupposes detailed justification relating to the case. One has also to ask whether and how far the Court was at all able to assess that the user's conduct did not lie "outwith 'ordinary chatter conduct'". Its rules and behaviour patterns are themselves diffuse and can in view of the fragmentation of chat rooms and discussion groups scarcely be formulated generally, and in particular they are necessarily hard for non-participants to see, since the totality of the discussion processes is not known. The Court could at any rate hardly establish this without fully knowing the course of the communication processes. Here again problems of allocation of the burden of proof arise - evidently the Court also in effect did not know the total content of the chat forum, or the communication patterns that had arisen. Whether mere consideration of an 'extract' can be taken as an adequate basis for assessment seems dubious. If it was breach of the prohibition of contradictory conduct that was at stake, here there would at any rate have been the possibility of seeing prima facie proof of the requisite facts in the provider's favour in the fact that here a manifestly aggressive style by the defendant could plausibly be asserted. The proof that others too may possibly have communicated in similar fashion is not without further ado suitable for removing this impression, since the provider had appealed to the fact that 'various regular chatters felt unworthily treated' by the defendant. It is also evident from the fact that he had probably not been participating in the chat group for long: the order is dated 16 November 1999, and the defendant had begun the communication 'at latest by September 1999'. The assumption would accordingly suggest itself that the provider wanted to exclude the later-coming participant so as to secure pacification. Even if he did not submit this explicitly, his submission ought nonetheless to have

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[27] See Heinrichs, in PALANDT-HEINRICHS, BGB (67th Ed. 2008), § 242, margin note 55.

[28] See Heinrichs, *supra*, note 27, arguing that, while no fault is required, the conduct must be relatively unambiguous as the basis for the formation of expectations by others.

been interpreted in this way, and this conduct could not have been able to establish the accusation of breach of trust.

D. Private Autonomy and Self-Commitment without Contract

I. The Establishment of Terms of Use by Providers and the Self-Establishment of Forms of Communication in Discussion Practice

If there is nonetheless something to say for the finding of the Bonn District Court, this is because the figure of the prohibition of contradictory conduct is not the legal institution appropriate to the problem. To be sure, another legal institution in the civil law arsenal is not necessarily available either. In practice, however, it seems entirely plausible that participation in such Internet discussion groups needs a certain establishment of access conditions and a decision upon exclusion of participants and deletion of content. The provider has an atypical role: he is neither an organizer of the communication process (as with broadcasting and the press) nor a provider of mere technical services utilization of which is at the disposal of the users alone, as with, say, a telecommunications firm. In other respects, in this self-organized communication process a need also arises to draw up definite rules and set up an arbitration role, especially since legal protection against the provider (whether of participants in the chat room themselves or of outsiders) is difficult in practice; this is particularly connected with the use of pseudonyms and the possibility of even further-reaching anonymization. Accordingly, the organizer must also be liable to a considerable extent for third-party content under § 5 TDG/MDStV (§ 6 as of 1/4/2003 – now restricted by §§ 7 ss. Telemediengesetz of 2007), even under general civil law[29].

This liability has been fully to the fore in the interest of the debate in recent years. The case being reported here, however, shows clearly that the provider's associated control function has its obverse, namely in the problem of defining its limits vis-à-vis participants, especially where legal admissibility cannot easily be assessed. In such a case providers might tend to prefer suppressing an opinion in case of doubt to running the risk of liability.

Recourse to private autonomy - as the Bonn District Court properly saw - cannot help here by itself: while it may be admissible to open a communication group entirely as the organizer sees fit, as long a there is no monopoly position, even from the private-law viewpoint it seems problematic if the conditions on this discussion

[29] See in general SIEBER, *supra* note 23.

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on the Internet are not made open. Since the discussion process involved is an open one, the question affects not only the direct participants but also all others for whom it is important to know who else is taking part in the discussion and who may have been excluded and why. This may be of great importance for the conditions of communication.

This too shows that the point is not just a legal relationship between provider and individual participant, but that the network of link-ups has legal significance. Much the same applies to chat rules, which can be laid down formally in advance only to a limited extent. This must primarily arise spontaneously among participants themselves- this is just what the groups offer, and they must if necessary be put up with by 'outsiders'. Here a sort of self-organized social standard is emerging that cannot be denied legal significance. This was properly recognized in the Bonn District Court's approach.

II. The Need to Develop 'Private Ordering'

Here, then, there is a need for new legal institutions to handle Internet communication; the reserved institution of the prohibition of contradictory conduct, suitable only to protect trust in particular situations determined by subjective components, offers too few starting points for this. From the viewpoint of recent private-law theory, the need arising is more to 'respond directly through private law to spontaneous non-production by the social sector concerned, by shaping the law'.[30] The example shows that legal dogmatics based narrowly on the private autonomy of *individuals* can no longer do justice to this: here the opening up of the possibility of a self-organized communications process must be taken into account, with rules that within limits can also be brought against the service provider. If he does not want to accept that, he may lay down the access conditions for and content control of communication in rules a priori, providing a special procedure for interpreting and adjusting them in the individual case. In contract law too, processes of linkage between contracts leading to the formation of horizontal and

[30] On this see Teubner, *Nach der Privatisierung?, Diskurskonflikte im Privatrecht*, ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE (ZRSoz) 8 (1998), at 31; Teubner, *Vertragswelten: Das Recht in der Fragmentierung von private governance regimes*, RECHTSHISTORISCHES JOURNAL 234 (1998); Teubner, *Im blinden Fleck der Systeme: Die Hybridisierung des Vertrages*, SOZIALE SYSTEME 313 (1997); Teubner, *Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie*, ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES UND VÖLKERRECHT (ZaöVR) 1 (2003) [english version in Joerges/Sand/Teubner eds., TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, 3 (2004)); see also Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003).

vertical dependencies in the form of 'networks' ('net contracts') are developing,[31] which create legally relevant connection constraints. This might be compared with the institution of the flexible legal consideration given to the 'bases of a transaction', associating the individual contract with particular expectations regarding the goal pursued in common. By contrast, networks create linkage between expectations participants partly have in common, but they are partly also the outcome of horizontal functional linkage among contracts, because the primary transaction is regularly followed by a multiplicity of 'secondary transactions' (e.g. with franchising).

Another variant phenomenon in the growing construction of contractual ties over and above individual exchange relationships but not as far as company-law collective formations is the model being discussed in the US of 'relational contracts',[32] supposed similarly to enable lasting so-operation between the parties (e.g. with quality guarantee agreements between a manufacturer and their supplier). In this situation private law sets up conditions of a possible 'private ordering',[33] a sort of social self-steering, which does not reduce solely to exchange processes or the forming of companies. Similar phenomena are internal company law or private standards, which can generate not fixed legal binding but expectations which must anyway be responded to if they are not to be denied.[34] This may in particular change the standard of negligence, which must always remained tuned to de facto expectations of the legal transaction.

The issues here are to be assessed similarly: de facto the Bonn District Court is arguing above and beyond the institution of the prohibition of contradictory conduct. It is operating in particular with rules of proof at the provider's expense: they are de facto having the duty imposed to make communication rules explicit in advance, and otherwise accept and comply with their subsequent confrontation by self-organization in the context of 'ordinary chatter behaviour'. Recourse to the prohibition of contradictory conduct is more of a code for the combination of ex

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[31] See further ROHE, NETZVERTRÄGE (1997); Teubner, *Die vielköpfige Hydra: Netzwerke als kollektive Akteure höherer Ordnung*, in: ORGANISATION UND NETZWERK 535 (Kenis/Schneider eds., 1996).

[32] See Deakin& Michie, *The Theory and Practice of Contracting*, in CONTRACT, COOPERATION AND COMPETITION, 1, (Deakin & Michie eds., 1997); see further Vékás, *Contract in a rapidly changing International Environment*, 152 JITE 40 (1996).

[33] See ZUMBANSEN, *supra* note 12, at 283; see also Zumbansen, *Die engen Wände der Internetwelt – Autonomie und Kontrolle jenseits staatlicher Steuerung und gesellschaftlicher Eigenorganisation*, in INNOVATIONSOFFENE REGULIERUNG DES INTERNET – NEUES RECHT FÜR KOMMUNIKATIONSNETZWERKE, 273 (Ladeur ed., 2003).

[34] See further KÖNDGEN, SELBSTBINDUNG OHNE VERTRAG (1981).

ante rule-oriented and ex post, self-organized by participants themselves, binding on the provider, fully in line with the intrinsic logic of private law if this is related not to protecting the 'arbitrariness' of individual conduct,[35] but to the search for productive social rules of self-coordination and self-organization.[36] This does not mean that the provider is made into a functionary of social ordering: the setting of rules and conditions gives him an influence over use of his service that can to a large extent be exercised in private autonomy, but is under the constraint to self-commitment – something not identical to binding by a substantively pre-given function. The Bonn District Court decision provides rules of proof in order to provoke the organizer to consistent self-commitment, since otherwise there is only the possibility of ad-hoc decisions, which is however restricted in the individual case by the difficulty of information. This is both productive for the development of Internet communication and compatible with the rationality of private law. The advantage of this sort of solution is that it can be adjusted to the presently existing uncertainty as to the prospects of Internet communication.

E. The Co-Operation between Private Law and Constitutional Law in forming 'network-adapted' Rules

I. Internet Freedom and Communication Freedom

From a constitutional viewpoint, the Internet's openness to the future raises the question whether a specific Internet freedom is needed alongside the individual and institutional freedoms already rooted in article 5(1).[37] This question will be left open here. However, alongside freedom of speech - in an expansive interpretation of this fundamental right - information freedom is to be regarded as affected too: here too Internet communication raises classification problems because of the requirement of general accessibility of the information source (is this the case with chat rooms?), but such hybrid, semi-private, semi-public forms of communication are ultimately also to be classified in the sphere of information freedom protected by Article 5(1), first sentence, Basic Law.

Not only does the situation to be assessed here show that Internet communication can by no means be construed exclusively as exercise of individual freedom of speech, without institutional underpinnings. Problems arise also with search

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[35] See, ZUMBANSEN, *supra*, note 12, 266.

[36] See Teubner, *Neo-spontanes Recht und duale Sozialverfassungen in der Weltgesellschaft?*, in FESTSCHRIFT SIMITIS, 437 (2000).

[37] See Grothe, *Kommunikative Selbstbestimmung im Internet und Grundrechtsordnung*, KRITV 27 (1999).

engines and portals, through which access to information on the Internet is mediated. [38] Their searching and structuring function will become further differentiated in future, thus more selectively controlling access to information. This will (or may) be in users' interests, but the rules and functional patterns according to which information is selected and arranged must be openly disclosed,[39] so that users can adjust to whether, for instance, priority places on the pages displayed are allocated on payment, or whether the search is structured by relevance viewpoints. This variant might, for instance, be oriented by preferences of particular institutions (for instance, with legal concepts, to searches by lawyers, courts etc.). This may be very efficient, but the user also has to be informed in order to be able to compare his own preferences with it. The same might also apply to advertising rules; in data protection law too, a duty to enable self-protection through technical systems is being discussed. This at any rate shows that new duties of observation and organization on the State may arise at the "meta-level" of fixing methods and laying down procedural rules, within an order otherwise dominated by private law.[40] This too is a variant of the much discussed regulation of self-regulation. For instance, chat room themes might be laid down in advance either by the provider or spontaneously by the participants, and then constitute the framework for further contributions. Thus, participants in a religious debate could not be expected to put up with every form of criticism. Additionally, the right to invoke a 'cyber court' to settle disputes as to the rules of discussion might be granted. The organizer would have to commit himself to make decisions so far taken regarding the definition of the limits of communication accessible. In other respects, fleshing this out could be left up to a process of thrashing it out among the participants.

The third-party effect of fundamental rights could be mobilized to specify what private law can do to structure Internet communications. In particular, the development of procedural rules might serve to meet a newly conceived protective obligation for the guaranteeing of freedom of communication.[41] Here, however, a special variant of this co-operation comes in: constitutional law might serve to underpin the idea of the self-commitment of the decision to open a communication service derived above from private-law developments themselves. The nature and

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[38] Regarding competition problems with portals, see Hoeren, *Suchmaschinen, Navigationssysteme und das Wettbewerbsrecht*, MMR 1999, 649.

[39] On the importance of procedural rules for upholding the transparency of markets in general, see Ebke, *Accounting, Auditing and Global Capital Market*, FESTSCHRIFT BUXBAUM, 113 (2000).

[40] On this see Ladeur, *"Die objektiv-rechtliche Dimension der Rundfunkfreiheit" unter Bedingungen von Multimedia*, FESTSCHRIFT EKKEHARD STEIN, 67 (2002).

[41] See BVerfGE 53, 30, 60; JARASS/PIEROTH, GRUNDGESETZ (9th ed. 2007), Vorb., 10, 30, 33.

degree of the dependence of freedom of speech on the various private-law institutions (property, renting, 'virtual house rights' etc.) or the weight of institutions protected in private law (rights of personality etc.) would have to be taken into account here[42].

II. The Functional Similarity between Public-Law 'Relevance Theory' and Private-Law Concepts of 'Self-Commitment' for Defining the Conditions for Exercising Fundamental Freedoms

Here one may also find a functional equivalent to the 'relevance theory',[43] developed for the reservation as to statute in public law, in private law: particularly in relation to the unclear conditions for exercising the fundamental right to freedom of speech, there is a need inter alia for statutory demarcations and harmonizations of conflicting positions,[44] for instance in schools law between school supervision, parental rights and the pupil's personality rights. While in private law no unitary definitions are required in this respect, since the conditions for exercising freedom of speech on the Internet are not determined by a single market-dominating provider, nonetheless the self-commitment by the provider - differentiated according to the dispute area – is requisite in order for participants to know where and how they can express their opinions. As long as a contract exists between provider and user, one might here think of a link between judicial control of private contracts and Article 5 Basic Law, along the lines that the general clause barring inappropriate discrimination against a contractual partner of someone making use of general terms of business might also cause transparency in rules to be expected.[45] These requirements in private law functionally correspond with the approach in the 'relevance theory' developed for the reservation as to statute, initially similarly

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[42] On the debate on taking freedom of speech into account and private law, see Bethge, in SACHS, GRUNDGESETZ (3rd ed. 2002), Art. 5, margin note 30; see also Hoffmann-Riem, in ALTERNATIV-KOMMENTAR ZUM GRUNDGESETZ, (3rd ed. 2001), Art. 5, margin notes 45, 139; BVerfGE 7, 198, 214; 42, 163,168. On the entitlement to 'participation in information' against a sports club (exclusion of a reporter), see further OLG Köln, AfP 2001, 218.

[43] See BVerfGE 61,260,275; 49, 89,126; JARASS/PIEROTH, GRUNDGESETZ (9thed., 2007), Art. 20, margin note 46

[44] See BVerf GE 47, 46, 79.

[45] See PALANDT-HEINRICHS, BGB, (67th ed., 2008), § 305, margin note 8ss..

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intended to create transparency in conditions for exercising fundamental rights. This is an idea that can also be brought to bear in private law.

In particular for determining the limits to freedom of expression within an ongoing discussion process, the Bonn District Court's judgment could be read to the effect that there is a presumption against the provider's freedom of disposal where no precise proof of the disruption to the Internet debates is presented. This seems entirely sensible. On the other hand, in view of the problems of time dependency of any sensible conflict solution that have to be coped with in the area of telecommunications and broadcasting regulation, one might consider providing for alleviation of the burden of proof on the provider where a formalized procedure (which could very well involve the provider's own staff) and continuing justificatory practice for deciding conflicts are institutionalized. The Telecommunications Act, for instance, provides in the case of inter-connection of networks (§ 37), as does the State Treaty on broadcasting in the case of disputes on digital programme content on cable networks (§ 53 RStV), for special dispute settlement by the competent regulatory body, even if the decision itself remains a private one. This is connected with the fact that even the prospect of a prolonged court dispute would, because of the time dependency of the decision to be taken, give the respective 'gate-keeper', here the provider who decides on access, a disproportionately strong position, since decisions in the main case will often come too late. Much the same applies here too: given the multiplicity of possible decisions to be taken on the one hand and the rather slight weight of user interests at stake in the individual case on the other, procedural underpinning of the provider's right of decision seems sensible, or even necessary.

F. Summary

The Bonn District Court Decision had to cope with a new problem in harmonizing private rights in Internet utilization. It became clear that the 'hybrid', boundary-crossing nature of many forms of use does not make recourse to the dogma of private law easy. Additionally, the capacity of private law to set up and monitor private standards and rules (over and above the individual case) and develop new forms of self-commitment over and above contract, particularly in multi-polar networked relationships, needs to be strengthened. But this also seems possible. The Bonn District Court has developed practically useful criteria here, but the dogmatic structuring of a 'network-adapted' private law remains a desideratum. Additionally, a productive understanding of the third-party effect of fundamental

rights in private law may help; in particular, the third-party effect of Article 5 (1) Basic Law has its own important contribution to make.[46]

[46] For an approach to a "transnational expansion" of "drittwirkung" of constitutional liberties, see Ladeur & Viellechner, *Die Transnationale Expansion staatlicher Grundrechte*, 46 ARCHIV DES VÖLKERRECHTS (2008), 42.

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