20. Private ordering of media organisations and platform operators

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CONCEPTS AND RELATIONSHIP TO FORMAL LAW

Concept and Genesis

'Private ordering' is a term that is often mentioned but used inconsistently. As an opposite term to 'public ordering', it describes the rule setting of societal subsystems and organisations in their own matters and is thus in the context of an increasingly differentiated and international society. The understandings of the term diverge in terms of the activities covered, the intentions and goals of the activities and the level of tolerance of governance interference (Birnhack, 2004, p. 2; Radin & Wagner, 1998; Schwarcz, 2002, pp. 324–329). In order to speak of private ordering, the organisations and companies involved must have a significant degree of autonomy to set their own rules; however, since in the highly differentiated legal systems of the twenty-first century no private ordering starts on a blank sheet of paper, the concept should not depend on whether the private rule-making as such is prescribed by law or is subject to minimum requirements. Furthermore, as far as media and platforms are concerned, the concept should not be overly restricted in terms of the topics and intentions covered in order to remain open to development. As socially highly relevant entities in the production and maintenance of public discourse, they are all characterised by a tension between entrepreneurial self-interest and a possibly conflicting public interest that needs to be balanced. This commonality justifies the joint attention given here.

Organisations that are not set up as private, autonomous entities at the will of a person or company exercising their civil liberties, but are part of the sovereign or state sphere (public authorities, public broadcasters), also tend to give themselves orders. As far as we deal with them here, we will speak of self-ordering instead of private ordering.

The social phenomenon of private ordering itself is not new. Since the Middle Ages, there have been examples of privately established and applied legal systems with varying degrees of state involvement (Hadfield, 2001, pp. 41–43). In the press sector, first editorial statutes were developed at the beginning of the twentieth century (historically on the development of editorial statutes in press and broadcasting companies: Holtz-Bacha, 1998, pp. 73–74). In the 1970s, these were taken up by broadcasting companies (Hoffmann-Riem, 1972, pp. 21–23). For such classic media companies, the elaboration and publication of corresponding standards serve the (external) presentation of journalistic independence and the self-commitment to qualitative standards.

Completely new forms of private ordering then emerged in the early internet. In the 1990s, users developed their own conventions of politeness for their forums and mailing lists (netiquette; Scheuermann & Taylor, 1997, pp. 269–273). In some cases, they remained an informal social practice; in other instances they were codified. After the triumph of commer-

cial platforms, which initially saw themselves only as infrastructure operators, early forms of social media emerged. Their operators developed community standards as a new form of private ordering; probably for the first time to an audience of millions in the form of AOL's rules of expression at the turn of the millennium (Lessig, 2006, pp. 88–94). In the meantime, with commercial content moderation, a whole branch of industry with hundreds of thousands of employees under sometimes precarious working conditions has been geared to enforcing the desired modes of communication and behaviour for the platforms (see Roberts, 2016, pp. 147–161). Content moderation has become a central product feature and a considerable cost factor in the business model of platforms.

Related Concepts

In our definition of private ordering as the rule setting of companies and organisations in their own affairs, the concept overlaps with the concepts of self-regulation and co-regulation (regulated self-regulation) as well as with the concept of governance. All of them are not defined in a consensual way, but vary in meaning according to research disciplines and schools of thought.

While regulation often serves as an umbrella term for the modes of governmental task fulfilment and intentional influencing of economic and social processes, self-regulation and co-regulation are opposed to such state regulation. While the state is completely restrained with legal requirements in the case of self-regulation, co-regulation is fitted into a legal framework or takes place on a legal basis. But these are highly simplified descriptions that encompass innumerable design options and degrees of state integration. In reality, they hardly ever occur in their pure form: 'there is no such thing in the real world as self-regulation' (Ogus, 1995, pp. 99–100; Prosser, 2008, p. 99).

In relation to this, the concept of governance can be understood as the opposite of the classic hierarchical-imperative concept of government: it then describes the complex network of actors and social as well as legal arrangements that influence the processing of public concerns (Bröchler & Lauth, 2014, p. 4; Gorwa, 2019, p. 856; Schuppert, 2011, p. 278). Others understand governance even more broadly as an umbrella term that includes both government in the sense of state regulation and alternatives (e.g. Mayntz, 2007, p. 6, for media, Freedman, 2008, p. 14; Puppis, 2010, p. 138).

Both regulation and governance are conceptually more focused on influencing behaviour and considering the consequences of certain interventions than private ordering. Both focus not only on the act of setting norms, but choose a broader perspective. While private ordering focuses on norm-setting by private actors, from a regulatory and governance perspective this is only one element among many. Nevertheless, private ordering is a concept that can be described as an aspect of media or communication governance and can therefore be processed by these research approaches.

Relationship to Statutory and Constitutional Law

According to the principles of the rule of law in a liberal legal system, private actors cannot set rules that bind strangers without their consent. Such sovereign powers cannot be assigned to private actors by means of a public legal act (Rennert, 2009, pp. 982–984). The self-imposed

rules of the media and platforms therefore do not have the character of law. The normative basis of those rules are often acts of private autonomy in the shape of contracts.

In principle, every person can freely conclude or not conclude contracts with (almost) any mutual obligations and any (number of) partner(s) without being so obliged (positive and negative freedom of contract). Such autonomous social orders stabilise themselves through the protective impact of constitutional law. Although self-constitution is not delegated legislation but an expression of individual freedom, it is supported by fundamental legal institutions such as property, private autonomy, freedom of society and freedom of contract (Teubner, 2012, pp. 36–41). Within the framework of the legal requirements, the state leaves the free choice of goals and means to private organisations. Statutory and constitutional law forms the basis and the limits of private ordering. To the extent that there are industry-wide standards, the organisation's own rules will also be careful not to openly contradict them. The relationship here, however, is a more informal one.

Contract law and extra-legal 'soft law' (code of conduct, letter of intent, guidelines, professional ethical standards, editorial statutes, community standards) function as design tools. Both of these, with their longstanding pools of usage experience, provide accessible knowledge that can be utilised for the purposes of private ordering and specified in the sense of the media and platform companies.

Private ordering is conceivable both in the form of publicly accessible regulations and internal rules (Weber, 2002, p. 26). Especially if the order contains substantive standards, they serve to describe and confirm organisation-specific values – not in a descriptive, but in a normative sense. In the media sector, the self-imposed legal regime will in many cases (also) be directed outwards, so that it will have an internal and external function (Stapf, 2005, pp. 24–25; Stapf, 2010, p. 181). The public is thus put in a position to act as an instrument of control and, in the case of scandals, can put a finger on the discrepancies between self-representation and practices (*Relotius* scandal; see Lüneborg & Medeiros, 2021, pp. 1720–1738). Outside of the legal sphere (conceivable are consequences under labour law in the case of violations),[1] the public may sanction rule violations through loss of market share and lower profitability (Seufert & Gundlach, 2017, p. 134).

Irrespective of their own legal quality, the self-imposed standards can have a retroactive effect on the legal system as an aid to orientation in the interpretation and concretisation of indeterminate legal concepts by the courts (Weber, 2002, p. 28).

However, such effects will regularly be greater with sector-wide standards than with the orders of individual companies and organisations dealt with here. A recent example of the former is provided by Section 19 (1) 'Medienstaatsvertrag' (Interstate Treaty on Media, MStV, in Germany). This regulation stipulates that journalistic and editorial content within the field of telemedia must comply with recognised 'journalistic principles'. What can be understood by the term is differentiated in more detail for the area of 'analogue' press reporting in the voluntary 'Press Code' (Deutscher Presserat, 2017) of the self-regulated German Press Council, which is not binding law, but rather privately set guidelines. The explanatory memorandum to the amended MStV refers to this 'Press Code'. It states that the principles set out in the 'Press Code' are to be applied to the question of what is understood by the term 'journalistic principles' within the MStV (Bayerischer Landtag, 2020, p. 90). A corresponding law does not yet exist for communication platforms, but there, too, hybrid orders are evolving through the legal reception of self-imposed standards (see below for more details).

LEGITIMACY AND DIS-/ADVANTAGES

Sociological and Normative Legitimacy

The normative effect of private rules depends to a large extent on their authority, persuasiveness and deterrent effects, for example through the publication of violations (Weber, 2002, p. 28). They live from their *sociological legitimacy* in the sense of 'factual belief in the correctness and value of a certain set of rules' (Luhmann, 2009, p. 239, translated by us). Those affected tend to accept them more easily than externally imposed norms.

Another question, on the other hand, is the *normative legitimacy* of private ordering, that is the acceptability of the self-imposed norms (Habermas, 1976, pp. 39–58). If private rule-making takes place without being set in a legal frame, the rules set are not democratically legitimised in the narrower sense (Ogus, 1995, p. 98; Page, 1986, p. 163; Schwarcz, 2002, pp. 334–337), but must be measured against other sources of legitimacy: for example, collective self-determination (input legitimacy), consensus or at any rate the participation of those affected (procedural legitimacy), commitment to fundamental rights values or the common good (substantive legitimacy or output legitimacy) (Scharpf, 1970, pp. 21–28). Autonomy and procedural considerations, however, turn out to be deficient if those affected could not participate in the decision-making processes, for example because they only work for the media company afterwards or use the online platform (external effects; see Kettemann, 2020). The substitute mechanism of individually self-determined consent to the private order when concluding the contract of employment or platform use can only be legitimised if it takes place voluntarily and on an informed basis (meaningful consent; *volenti non fit iniuria*; see Cleff, 2007, pp. 262–269; Varnhagen et al., 2005, pp. 37–48).

Some of the advantages and disadvantages of private ordering described below have regularly been developed on the basis of industry-wide standards, but can be related in the list chosen here to the orders of individual companies or organisations.

Advantages and Opportunities

Private ordering offers certain advantages over state regulation models:

- Tendency towards higher acceptance by those affected than with imposed norms.
- Superior knowledge and expertise and practical relevance increase the chance of adequate, efficient regulations (Baldwin et al., 2011, pp. 139, 141–142; Schulz & Held, 2001, pp. 11, 36; Schwarcz, 2002, pp. 321–324, 334).
- Greater flexibility in rule-making and adjustment compared to legislative procedures (although this flexibility decreases considerably if the rules are secured by individual contracts with workers or users; Hoffmann-Riem, 1972, pp. 63–65).
- A potentially innovation-inhibiting effect of external regulation is avoided.
- Private regulations can serve as a test and role model for later legal regulations (Campbell, 1999, p. 756).
- Internationally active companies can adopt regulations that transcend territories and legislative competences (Campbell, 1999, pp. 715–717; Schwarcz, 2002, pp. 327–329; Seufert & Gundlach, 2017, p. 130; Weber, 2002, p. 27).

- Since self-regulation is often sought in order to avoid legal obligations (coerced self-regulation), it relieves the burden on the state (Ogus, 1995, p. 98; Stapf, 2010, p. 169).

Disadvantages and Risks

In addition to the described advantages, however, possible disadvantages and risks of private ordering must also be taken into account:

- While state regulation concretises constitutional public interest objectives and must itself be designed in accordance with the constitution, privately set standards can conflict with such interests and be designed in a way that is detrimental to the public interest (Campbell, 1999, pp. 717–719; Hoffmann-Riem, 2001, pp. 14–15; Jarren & Donges, 2000, p. 59; Lunt & Livingstone, 2012, pp. 35–41, 182–184; Prosser, 2008, p. 103).
- The legality paradigm can come into conflict with an efficiency or economic paradigm (Ogus, 1995, pp. 98–99; Stapf, 2005, p. 17).
- Since the self-imposed rules can be amended or supplemented comparatively easily, legal certainty is reduced (Weber, 2002, p. 28).
- In the case of published standards, there is a danger that they will be used to cultivate a purely symbolic image, while in fact the desire for 'business as usual' persists (Seufert & Gundlach, 2017, p. 134).
- In the case of non-published standards, there is no external confidence-building in society (Lunt & Livingstone, 2012, p. 25).
- The weaker enforceability is often criticised (Campbell, 1999, p. 718; Stapf, 2005, p. 31; Stapf, 2010, p. 180), but depends on the quality of a specific contractural agreement or the inclusion of the provisions in the employment contract (Ogus, 2004, pp. 258–260). Principles of trust, the employer's duty of loyalty or the principles of equal treatment can also serve as converters (Hoffmann-Riem, 1972, p. 56). In any case, the chance of enforcement increases considerably if it is possible to appeal to the civil courts.
- Judicial functions within the company tend to have fewer independence guarantees and less expertise than state courts.
- Insofar as such regulations appeal to the individual ethics of individual journalists, they shift responsibility away from media companies as the actual powerful actors (Fürst & Schönhagen, 2018, pp. 277–279).

PRIVATE ORDERING BY PRIVATE MEDIA

Both private broadcasting and press companies often give themselves statutes, standards or guidelines for their reporting.

The SPIEGEL Statute from 1949 is famous in this respect,[2] which was replaced by the SPIEGEL Standards in 2011. But also the weekly newspaper *Die Zeit* has a Code of Ethics (Niggemeier, 2015). *The Los Angeles Times* have Ethics Guidelines, *The Guardian* has 'Editorial Guidelines' and a 'News & Media Editorial Code, 2011', *The New York Times* published a handbook on ethical journalism, a handbook of 'Values and Practices for the News and Opinion Departments'.

The rules and regulations of traditional media companies contractually bind the employees, not the recipients affected by the misconduct, who are usually not contractually involved and thus cannot assert any contractual claims (Weber, 2002, p. 27).

Even if such self-imposed rules of media companies are limited to repeating the standards already laid down by the national press or media councils in the form of voluntary self-regulation, their contractual quality gives them special validity: violations of the agreed standards thus constitute breaches of contract that can be sanctioned under labour law – up to and including extraordinary dismissal.

In addition to such guidelines and journalistic principles, editorial statutes often regulate, as a collective regulation, a company-specific distribution of competences between specially created collective bodies of the editors ('editorial meeting', 'editorial council') and the company management (Branahl & Hoffmann-Riem, 1975, pp. 127–128; Rüthers, 2002, p. 360). Editorial statutes can serve to avoid or resolve conflicts resulting from the fact that journalists see themselves as part of a bureaucratic, hierarchical organisation whose requirements can collide with their self-image (Hoffmann-Riem, 1972, p. 30).

If the editorial statute has become part of the employment relationship of the members of the editorial staff by contractual reference, a solution can only be found in the employment contract (reservation of revocation, amendment agreement, notice of termination; for Germany see Bundesarbeitsgericht (BAG; Federal Labour Court), judgement of 19 June 2001 – 1 AZR 463/00, NZA 2002, 397).

SELF-ORDERING BY PUBLIC BROADCASTING AGENCIES

Public service broadcasters are legally designated institutions that escape the otherwise clear distinction between state and society. They occupy a peculiar chimerical position with regard to fundamental rights, because they are simultaneously entitled by them, but also bound by them (for Germany see Bundesverfassungsgericht (BVerfG; Federal Constitutional Court), Decision of the 2nd Chamber of the First Senate of 15 December 2003 – 1 BvR 2378/03 – para. 6). From a legal perspective that differentiates between state and society, their self-imposed rules cannot therefore be properly described as 'private' ordering (see Michelman, 2012, pp. 299–302). In substance, however, it is a matter of 'self-ordering', whereby comparable phenomena can be observed. The starting point of any rule-making is the given programme mandate: public service broadcasting as a high-quality, journalistic standard and balanced contribution to the individual and public opinion-forming process, which should promote a self-description of society and identity formation of individuals. In Germany, their right to self-governance derives from their constitutional protection under the Freedom of Broadcasting (Art. 5 Sec. 1 (2) Grundgesetz). Parallel to that, all over Europe, broadcasters, as institutions established under public law that do not exercise sovereign powers and have spheres of autonomy vis-à-vis the state, can invoke the freedom of expression of Art. 10 ECHR. It seems reasonable to deduce from this a certain amount of freedom in setting concrete rules with relevance to programme design.

In this respect, the organisation and content of public broadcasting is prescribed in much greater detail by law than is the case with private media companies.

Nevertheless, their professional orientation is also supported organisationally by editor representatives, committees and statutes (Eifert, 2002, pp. 38–39). Accordingly, there are also

codes here that concern professional cooperation (such as the BBC Code of Conduct; https://www.bbc.com/aboutthebbc/reports/policies/codeofconduct) or concretise journalistic standards (such as the SRF Publizistische Leitlinien (SRF, 2021)).

SELF-ORDERING OF INFORMATION ACTIVITIES BY PUBLIC AUTHORITIES

The increasing participation of state actors in public discourse goes hand in hand with different authorities and ministries setting their own communication rules. Here, too, the term 'private' ordering does not fit, but it is 'self-ordering': The authorities assigned to the sphere of the state are subject to a stronger legal obligation. Their public communication is not an exercise of fundamental rights freedom, but the legally required performance of duties (Mast, 2020).

Codes and guidelines set by the respective state authorities themselves serve to concretise the rationalisation requirements arising from the dictates of the rule of law and democracy as well as the fundamental rights of the objects of expression and recipients. They contain communicative models, content-related and stylistic guidelines, internal authority responsibilities and guidelines for dealing with complaints or requests for correction. At the European level, the European Commission has already published several communication strategies, some of which differ significantly (Mast, 2021, p. 445). In Germany, for example, many ministries have adopted social media guidelines, and in the German *Land* Baden-Württemberg there is even a general police media code (Medienkodex der Polizei Baden-Württemberg; Mast, 2022).

The classification into executive forms of action can vary; depending on the state agency, administrative regulations, statutes or simply 'soft law' are conceivable (cf. Mast, 2022).

Due to the legal binding nature of all state agencies and the primacy of the constitution and the law, these self-regulation programmes must themselves be in accordance with higher-ranking law, and the link back to legislative law is significantly stronger than in the private media sector. Such a binding of the administration to the constitution and parliamentary laws can be found, albeit with different dogmatic derivations, in all Western European states and the USA (Burnham & Reed, 2021, p. 347; Herz, 2005; cf. Triantafyllou, 1996).

PRIVATE ORDERING BY COMMUNICATION PLATFORMS

Internal Mottos and Binding Terms

From the very beginning, communication platforms like social networks have given themselves 'community guidelines' to which corporate action should be aligned. As part of corporate brand management, fundamental corporate purposes and visions are described (Esch, 2019, pp. 77–80). Facebook, for example, has had the motto 'connect and share with people in your life' since its introduction in 2004 and then changed it to 'to give people the power to build community and bring the world closer together' (Robards & Lincoln, 2017). YouTube sees its mission 'to give everyone a voice and show them the world' (YouTube, 2023). Twitter says it serves the public conversation and therefore reaches for healthy conversations, security and privacy, as well as civic integrity (Twitter, 2023).

Concrete rules of communication and behaviour, on the other hand, were still rare at the turn of the millennium. For example, in the early years, Facebook's content moderators operated according to the not very meaningful principle: 'If something makes you feel bad in your gut, take it down' (Marantz, 2020).

Today, on the other hand, the self-imposed principles and rules of the platform operators are even arranged in different hierarchical levels and have reached a high level of complexity. The mottos described above stand as general and relatively stable corporate philosophies in a logical hierarchical relationship above more concrete corporate rules in the form of Community Standards and Terms of Service. Facebook has even added an intermediate level of 'values'. These values serve as the basis of the Community Standards. The company wants to give priority to the promise 'to give people voice' and additionally commit to authenticity, safety, privacy and dignity 'in writing and enforcing' the Community Standards (Meta, 2019).

The rule-making processes have already reached a high degree of complexity on large platforms. They involve stakeholder consultations and follow their own set of procedural rules (Kettemann & Schulz, 2020).

The Community Standards then differ considerably from the codes and statutes of classic media, because here it is also a matter of regulating (millions of) users: they themselves are contractually bound to Community Guidelines via ToS when using social media. These in turn have a direct influence on their possibilities of expression and activity, their personal and legal protection (Belli & Venturini, 2016). For example, Instagram users automatically grant the platform a licence to use shared content; this means that Instagram is entitled to 'host, use, distribute, modify, perform, copy, publicly perform or display, translate and create derivative works from' the content. In addition, there are numerous regulations on how and which content may be displayed on the platform. As for rules in general, these are sometimes clear and accessible but sometimes very vague, for example there is a prohibition on generating misleading content.

This broad and deep impact lends particular relevance to the question of legitimacy generally addressed above. Since consent to the sometimes extremely extensive rules and regulations of platform operators is hardly ever given on an actually informed basis (cf. Hermstrüwer, 2016) and was therefore recently described as 'the biggest lie in the internet' (Obar & Oeldorf-Hirsch, 2020), participation and voting solutions are discussed (Schramm, 2022). However, whether and how such votes can actually be implemented in practice to give legitimacy is an open question. In 2009, for example, Facebook actually let its users vote on the 'Terms of Use', with only 668,872 people participating – less than 1% of the registered users at the time (Suzor, 2018).

Quasi-Executive and Quasi-Judicative Platform Functions

A particularly interesting aspect of communication platforms that a narrow concept of private ordering limited to rulemaking tends to overlook is the platform power of enforcement and dispute resolution. With their algorithm-controlled infrastructure and their staff assigned to content moderation, the online platforms have enforcement mechanisms at their disposal that enable the control and sanctioning of user behaviour according to the rules they set themselves, even without state assistance. Additionally, disputes that arise between platform users about whether posted content was legitimately removed or not are (usually) dealt with by platforms themselves. Often, users who are disappointed by a (refrained) moderation decision have few

other options of legal protection open to them besides appealing to state courts. On the one hand, some online platforms such as Facebook have set up a reporting and remedy procedure for themselves by autonomous decision. In the case of Facebook, users can even appeal against moderation decisions to the so-called Oversight Board of the parent company Meta, if it is a case on the Facebook or Instagram platform. According to its own charter, the board sees itself as a protector of freedom of expression 'by making principled, independent decisions about important pieces of content and by issuing policy advisory opinions on Meta's content policies' (Oversight Board, 2023). Both the Oversight Board and the guidelines on which it is based were developed not on an external legal basis but solely by the digital services provider, Meta, itself.

On the other hand, laws requiring the installation of such procedures are increasing, especially in Europe. As a first, according to an amendment to the German Network Enforcement Act (§ 3c Netzwerkdurchsetzungsgesetz, NetzDG) authorities could certify private institutions as arbitration bodies for the out-of-court settlement of disputes between persons affected by moderation decisions.

The EU's Digital Services Act (DSA), which replaces the German NetzDG, goes one step further and contains a multi-layered complaints and redress concept for moderation decisions based on the self-imposed community standards of online platforms: Firstly, the online platforms themselves have to set up such a reporting procedure (Art. 16 DSA). This represents the 'first instance' of a complex legal process. The decision made there can in turn be challenged and corrected in a complaint management system (Art. 20 DSA) as the 'second instance'. Finally, as an alternative or subsequently, an extrajudicial dispute resolution body independent of the platform operators can be called upon as a 'third instance' (Art. 21 DSA). In addition, complaints against all platform moderation decisions can be taken to the Digital Services Coordinator as the regulatory authority (Art. 53 DSA). All this is in complement to the state court system, which is not replaced but supplemented by the DSA rules.

Online Platforms as Holders of Fundamental Rights or/and as Bound by Fundamental Rights?

The freedoms that remain for online platforms in this private rule-making depend on the structure of the private law system and its classification under fundamental rights. Due to their function as a public forum and their sometimes monopoly-like position, a state-like connection to fundamental rights is sometimes considered (see Heldt, 2020, pp. 997–999; Klonick, 2018, p. 1658; Langvardt, 2018, p. 1386; Pasquale, 2016, p. 512). For the Charter of Fundamental Rights (CFR), which is becoming increasingly important in the field of platform regulation in Europe, the European Court of Justice (ECJ) has not yet ruled on whether the mere intermediary service or the moderation decision of the platforms is protected by the freedom of expression and media of Art. 11 CFR. The same is true for Germany, where a final clarification by the Bundesverfassungsgericht (BVerfG; Federal Constitutional Court) is still pending. However, there the Bundesgerichtshof (BGH; Federal Court of Justice) ruled in a significant decision in 2021 that private platform operators, due to their own ownership of fundamental rights, may prescribe communication standards that go beyond the legal requirements of civil and criminal law (judgement of 29 July 2021 – III ZR 179/20 no. 78). The creation and application of private norms is even protected as 'speech' by the German Constitution, according to the Bundesgerichtshof (BGH; Federal Court of Justice, judgement of 29 July 2021 – III ZR

179/20 no. 74). Such a legal classification of online platforms enables them to take action on their own responsibility against 'legal but harmful' content, which would be prohibited from direct access by state actors (Mast, 2023; similar considerations on advertising bans in relation to the First Amendment Act were raised by Campbell, 1999, p. 717).

There are also recognisable tendencies towards judicialisation via equal treatment requirements (Art. 3 sentence 1 Grundgesetz) for large platforms, which would further push back private autonomy in favour of rationalisation requirements (see Heldt, 2020, pp. 1020–1021). From this fundamental right, the Bundesgerichtshof (BGH; Federal Court of Justice) derived for Facebook that the communication platform may not arbitrarily exclude persons and must also fulfil procedural requirements before exclusion. This includes the prior hearing of affected persons and, at their request, also a statement of reasons for the decision, in order to enable the affected persons to assert their rights. Authors interpret such demands directed at platform operators as analogies to administrative procedural requirements for public authorities (Krönke, 2022, p. 18; Kulick, 2020, p. 208; Michl, 2018, p. 915; Wiater, 2020, pp. 384–387).

In line with this, the legal approach to the community standards of the platforms, which are understood as general Terms and Conditions (T&C) in Germany and the European Union, is also changing. Originally, T&C law was developed to compensate for the power imbalance in the bilateral relationship between large companies and their individual customers in the drafting of their contracts (disturbed contractual parity). In today's platform law, on the other hand, statutory T&C requirements increasingly focus on the private order in their general effect and legitimacy. It takes into account third-party interests and seeks to impregnate the self-imposed standards with constitutional values. On the German level, this is done through an extensive interpretation of the traditional T&C law by the Bundesgerichtshof (BGH; Federal Court of Justice); on the European level, the legislator chooses similar approaches with Art. 14 para. 4 DSA and Art. 5 para. 1 regulation on preventing the dissemination of terrorist content online (TCO regulation; Mast, 2023; Mast & Ollig, 2023; Wielsch, 2019, therefore argues that T&C law is functionally similar to constitutional law in this constellation as a second level of norms enabling and limiting private lawmaking). Both laws respect the platforms' practice of setting their own rules for content moderation, but at the same time they set quality standards for them (or at least their enforcement) in terms of fundamental rights and the rule of law. What can be said on a platform thus depends on both public and private rules. These are not unconnected, but there are increasingly intentional or unintentional interdependencies. Hybrid orders becomes a category in its own right (called 'hybrid speech governance' by Schulz & Ollig, 2023).

CONCLUSION

Deeply rooted in the last century, private ordering has emerged as an increasingly favoured method of governing media organisations and platform operators in the digital era. This approach grants these business entities the authority to establish their own set of terms of service, thereby allowing them to tailor their policies to suit their unique requirements and circumstances. They can set up their own private orders and implement them themselves. But with this freedom also come challenges. Media organisations and platforms are privately run and yet also serve public interests. Their private orders are not per se legitimate and meaningful in terms of content, but must be measured against procedural, organisational and content-related

standards that one considers appropriate in relation to the communicative infrastructure of our society (cf. regarding platforms Cammaerts & Mansell, 2020; van Dijck, 2020).

Although private orders that merely mimic existing statutory media laws tend to yield limited tangible effects, the significance of private ordering as a foundation for content moderation on online platforms cannot be overstated. It is imperative to strike a balance between permitting private ordering and establishing a framework that upholds fundamental values and principles. By providing clear guidelines, ensuring transparency in decision-making processes and instituting mechanisms for public scrutiny, it is possible to uphold fundamental values and principles within the realm of private media governance.

NOTES

1. See the case of Moritz Gathmann, who was accused of violating the ZEIT code of ethics and was subsequently dismissed (Niggemeier, 2014).
2. In 1949, the editorial board decided on the Spiegel statute: 'All news, information, facts processed and recorded in Der Spiegel must be absolutely correct. Every news item and every fact (...) is to be scrupulously checked'. The Spiegel Archive, which later became known beyond Germany and, with more than 80 employees, is considered the world's largest documentation and research department of a news magazine, was to serve the realisation of this claim (Silverman, 2010).

REFERENCES

Baldwin, R., Cave, M., & Lodge, M. (2011). *Understanding regulation* (2nd ed.). Oxford University Press. https://doi.org/10.1093/acprof:osobl/9780199576081.001.0001

Bayerischer Landtag. (2020). *Drucksache 18/7640*. Retrieved 15 March 2023 from https://www.bayern.landtag.de/www/ElanTextAblage_WP18/Drucksachen/Basisdrucksachen/0000005000/0000005098.pdf

Belli, L., & Venturini, J. (2016). Private ordering and the rise of terms of service as cyber-regulation. *Internet Policy Review*, *5*(4), 1–17. https://doi.org/10.14763/2016.4.441

Birnhack, M. (2004). *Principle of private ordering* (Working Group Paper). Haifa Center of Law & Technology.

Branahl, U., & Hoffmann-Riem, W. (1975). *Redaktionsstatute in der Bewährung*. Nomos.

Bröchler, S., & Lauth, H.-J. (2014). Die Lokalisierung von Schneisen im Dickicht – Konzeptionelle Grundlegungen und empirische Befunde informaler Governance. *ZVglPolW (Suppl)*, *8*, 1–33. http://dx.doi.org/10.1007/s12286-014-0186-9

Bundesarbeitsgericht (BAG; Federal Labour Court), judgement of 19 June 2001 – 1 AZR 463/00. NZA 7 (2002), 397–400.

Bundesgerichtshof (BGH; Federal Court of Justice), judgement of 29 July 2021 – III ZR 179/20 no. 74.

Bundesgerichtshof (BGH; Federal Court of Justice), judgement of 29 July 2021 – III ZR 179/20 no. 78.

Bundesverfassungsgericht (BVerfG; Federal Constitutional Court), decision of the 2nd Chamber of the First Senate of 15 December 2003 – 1 BvR 2378/03 – para. 6.

Burnham, W., & Reed, S. (2021). *Introduction to the law and legal system of the United States* (7th ed.). Westend Academic Publishing.

Cammaerts, B., & Mansell, R. (2020). Digital platform policy and regulation: Toward a radical democratic turn. *International Journal of Communication*, 14 (2020), 135–154.

Campbell, A. J. (1999). Self-regulation and the media. *Federal Communications Law Journal*, *51*(3), 711–772. https://www.repository.law.indiana.edu/fclj/vol51/iss3/11

Charter of Fundamental Rights (CFR), OJEU 2012 C326/391.

Cleff, E. B. (2007). Implementing the legal criteria of meaningful consent in the concept of mobile advertising. *Computer Law & Security Review*, *23*, 262. https://doi.org/10.1016/j.clsr.2007.03.005

Deutscher Presserat. (2017). *German press code*. Retrieved 15 March 2023 from https://www.presserat.de/pressekodex.html?file=files/presserat/dokumente/pressekodex/Pressekodex2017english.pdf

Eifert, M. (2002). *Konkretisierung des Programmauftrags des öffentlich-rechtlichen Rundfunks*. Nomos.

Esch, F.-R. (2019). Zusammenhänge zwischen der Identität der Corporate Brand, der Unternehmensphilosophie und dem Geschäftsmodell berücksichtigen. In F.-R. Esch, T. Tomczak, J. Kernstock, T. Langner, & J. Redler (Eds.), *Corporate brand management* (pp. 73–88). Springer Fachmedien Wiesbaden. https://doi.org/10.1007/978-3-658-24900-7_4

European Convention on Human Rights (ECHR), BGBl. III no. 210/1958.

Freedman, D. (2008). *The politics of media policy*. Polity Press.

Fürst, S., & Schönhagen, P. (2018). Lückenhafte Selbstregulierung der Schweizer Medien – Medienethische Herausforderungen im Zuge der Ökonomisierung. *Studies in Communication and Media*, *7*(3), 271–337. https://doi.org/10.5771/2192-4007-2018-3-271

Gorwa, R. (2019). What is platform governance? *Information, Communication & Society (iCS)*, *22*(6), 854–871. https://www.tandfonline.com/doi/full/10.1080/1369118X.2019.1573914

Grundgesetz (GG; Basic Law of the Federal Republic of Germany), BGBl. I 2478.

Habermas, J. (1976). Legitimationsprobleme im modernen Staat. In P. Graf von Kielmansegg (Ed.), *Legitimationsprobleme politischer Systeme: Tagung der Deutschen Vereinigung für Politische Wissenschaft in Duisburg, Herbst 1975 (PVS Sonderheft Vol. 7)* (pp. 39–61). Springer.

Hadfield, G. K. (2001). Privatizing commercial law. *Regulation*, *24*, 40–45.

Heldt, A. (2020). Merging the social and the public: How social media platforms could be a new public forum. *Mitchell Hamline Law Review*, *46*, 997–1042.

Hermstrüwer, Y. (2016). *Informationelle Selbstgefährdung*. Mohr Siebeck.

Herz, B. (2005). Der Vorbehalt des Gesetzes im Europarecht. *Berliner Online-Beiträge zum Europarecht*, *1*, 1–17. https://www.jura.fu-berlin.de/forschung/europarecht/bob/berliner_online_beitraege/Paper27-Herz/Paper27---Der-Vorbehalt-des-Gesetzes-im-Europarecht.pdf

Hoffmann-Riem, W. (1972). *Redaktionsstatute im Rundfunk*. Nomos.

Hoffmann-Riem, W. (2001). Steuerung medienvermittelter Kommunikation. In H. Rossen-Stadtfeld & J. Wieland (Eds.), *Steuerung medienvermittelter Kommunikation* (pp. 11–23). Nomos.

Holtz-Bacha, C. (1998). Redaktionsstatuten – eine Bilanz nach 30 Jahren. In W. Duchkowitsch, F. Hausjell, W. Hömberg, A. Kutsch, & I. Neverla (Eds.), *Journalismus als Kultur* (pp. 73–81). Westdeutscher Verlag.

Jarren, O., & Donges, P. (2000). *Medienregulierung durch die Gesellschaft?* Westdeutscher Verlag.

Kettemann, M. C. (2020). *The normative order of the Internet*. Oxford University Press.

Kettemann, M. C., & Schulz, W. (2020). *Setting rules for 2.7 billion: A (first) look into Facebook's norm-making system* (Working Paper Series). Hans-Bredow-Institut. https://doi.org/10.21241/ssoar.71724

Klonick, K. (2018). The new governors: The people, rules, and processes governing online speech. *Harvard Law Review*, *131*(6), 1598–1670.

Krönke, C. (2022). Privatverfahrensrecht in digitalen Grundrechtsnetzwerken. *Zeitschrift für Urheber- und Medienrecht (ZUM)*, 1, 13–19.

Kulick, A. (2020). *Horizontalwirkung im Vergleich*. Mohr Siebeck.

Langvardt, K. (2018). Regulating online content moderation. *Georgetown Law Journal*, *106*, 1353–1388.

Lessig, L. (2006). *Code version 2.0.* Cambridge (MA).

Luhmann, N. (2009). *Legitimation durch Verfahren* (11th ed.). Suhrkamp (1st ed. 1983).

Lüneborg, M., & Medeiros, D. (2021). Journalism as an affective institution. Emotional labor and the discourse on fraud at Der Spiegel. *Journalism Studies*, *22*(12), 1720–1738. http://dx.doi.org/10.1080/1461670X.2021.1873820

Lunt, P., & Livingstone, S. (2012). *Media regulation*. SAGE Publications.

Marantz, A. (2020, 12 October). Why Facebook can't fix itself. *The New Yorker*. https://newyorker.com/magazine/2020/10/19/why-facebook-can-fix-itself

Mast, T. (2020). *Staatsinformationsqualität*. Duncker & Humblot. https://doi.org/10.3790/978-3-428-55876-6

Mast, T. (2021). Gute Öffentlichkeitsarbeit und die Europäische Union. *ZaöRV/HJIL*, *81*(2), 443–478. https://doi.org/10.17104/0044-2348-2021-2-443
Mast, T. (2022). Der 'Pressekodex' der Polizei Baden-Württemberg. *Verwaltungsblätter für Baden-Württemberg (VBlBW)*, *43*(1), 6–15.
Mast, T. (2023). AGB-Recht als Regulierungsrecht. *Juristenzeitung (JZ)*, *78*(7), 287–296. https://doi.org/10.1628/jz-2023-0096
Mast, T., & Ollig, C. (2023). The Lazy Legislature: Incorporating and Horizontalising the Charter of Fundamental Rights through Secondary Union Law. *European Constitutional Law Review (EuConst)*, *19*(3), 462–486. https://doi.org/10.1017/S1574019623000238
Mayntz, R. (2007). The architecture of multi-level governance of economic sectors. MPIfG Discussion Paper 07/13. http://edoc.vifapol.de/opus/volltexte/2008/370
Meta (2019). Updating the values that inform our community standards. https://about.fb.com/news/2019/09/updating-the-values-that-inform-our-community-standards.
Michelman, F. I. (2012). Constitutions and the public/private divide. In M. Rosenfeld & A. Sajó (Eds.), *The Oxford handbook of comparative constitutional law* (pp. 298–318). Oxford University Press.
Michl, F. (2018). Situativ staatsgleiche Grundrechtsbindung privater Akteure. *Juristenzeitung (JZ)*, *73*(19), 910–918.
Netzwerkdurchsetzungsgesetz (NetzDG; German Network Enforcement Act), BGBl. I 1182.
Niggemeier, S. (2014, 11 March). Kurzer Prozess: 'Zeit Online' und der geschasste 150-Euro-Reporter. *Stefan Niggemeier*. http://www.stefan-niggemeier.de/blog/17427/kurzer-prozess-zeit-online-und-der-geschasste-150-euro-reporter
Niggemeier, S. (2015, 3. June). Kodexfusion bei der 'Zeit': Gemeinsame ethische Richtlinien für Print und Online. *Stefan Niggemeier*. http://www.stefan-niggemeier.de/blog/21250/kodexfusion-bei-der-zeit-gemeinsame-ethische-richtlinien-fuer-print-und-online
Obar, J. A., & Oeldorf-Hirsch, A. (2020). The biggest lie on the Internet: Ignoring the privacy policies and terms of service policies of social networking services. *Information, Communication & Society*, *23*(1), 128–147. https://doi.org/10.1080/1369118X.2018.1486870
Ogus, A. (1995). Rethinking self-regulation. *Oxford Journal of Legal Studies*, *15*(1), 97–108. https://doi.org/10.1093/ojls/15.1.97
Ogus, A. (2004). *Regulation*. Bloomsbury Academic.
Oversight Board. (2023, September). *Oversight Board Charter*. Retrieved 6 December 2023 from https://transparency.fb.com/sr/oversight-board-charter-2023
Page, A. C. (1986). Self-regulation: The constitutional dimension. *The Modern Law Review*, *49*(2), 141–167.
Pasquale, F. A. (2016). Platform neutrality: Enhancing freedom of expression in spheres of private power. *Theoretical Inquiries in Law*, *17*, 487–513.
Prosser, T. (2008). Self-regulation, co-regulation and the Audio-Visual Media Services Directive. *Journal of Consumer Policy*, *31*, 99–113. https://doi.org/10.1007/s10603-007-9055-0
Puppis, M. (2010). Media governance: A new concept for the analysis of media policy and regulation. *Communication, Culture & Critique*, *3*(2), 134–149. https://doi.org/10.1111/j.1753-9137.2010.01063.x
Radin, M. J., & Wagner, R. P. (1998). The myth of private ordering: Rediscovering legal realism in cyberspace. *Chicago-Kent Law Review*, *73*, 1295.
Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act, DSA).
Rennert, K. (2009). Beleihung zur Rechtsetzung? *Juristenzeitung (JZ)*, *64*(20), 976–984.
Robards, B., & Lincoln, S. (2017). *Left behind, left unsaid: Absences on young people's Facebook timelines*. AoIR Selected Papers of Internet Research.
Roberts, S. T. (2016). Commercial content moderation: Digital laborers' dirty work. In S. U. Noble & B. M. Tynes (Eds.), *The intersectional Internet: Race, sex, class and culture online* (pp. 147–157). Peter Lang Publishing.
Rüthers, B. (2002). Zulässigkeit und Ablösbarkeit von Redaktionsstatuten. *Recht der Arbeit (RdA)*, *55*(6), 360–363.
Scharpf, F. (1970). *Demokratietheorie zwischen Utopie und Anpassung*. Konstanzer Universitätsverlag.

Scheuermann, L., & Taylor, G. (1997). Netiquette. *Internet Research*, *7*(4), 269–273.
Schramm (2022, 23 January). Where is Olive? Or: Lessons from democratic theory for legitimate platform governance. *The Digital Constitutionalist.* https://digi-con.org/where-is-olive-or-lessons-from-democratic-theory-for-legitimate-platform-governance
Schulz, W., & Held, T. (2001). Regulierte Selbstregulierung als Form modernen Regierens. Hans-Bredow-Institut.
Schulz, W., & Ollig, O. (2023). Hybrid Speech Governance: New Approaches to govern Social Media Platforms under the European Digital Services Act? *jipitec 14*(4), 560–579. https://www.jipitec.eu/jipitec/article/view/22
Schuppert, G. F. (2011). Governance-Forschung: Versuch einer Zwischenbilanz. *Die Verwaltung (DV)*, *44*(2), 273–289.
Schwarcz, S. L. (2002). Private ordering. *Northwestern University Law Review*, *97*, 319–350.
Seufert, W., & Gundlach, H. (2017). *Medienregulierung in Deutschland* (2nd ed.). Nomos.
Silverman, C. (2010, 9 April). Inside the world's largest fact checking operation. *Columbia Journalism Review*. https://archives.cjr.org/behind_the_news/inside_the_worlds_largest_fact.php
SRF (2021). *Publizistische Leitlinien*. https://publizistische-leitlinien.srf.ch
Stapf, I. (2005). Medienselbstkontrolle – Eine Einführung. In A. Baum, W. R. Langenbucher, H. Pöttker, & C. Schicha (Eds.), *Handbuch Medienselbstkontrolle* (pp. 17–36). VS Verlag für Sozialwissenschaften.
Stapf, I. (2010). Selbstkontrolle. In C. Schicha & C. Brosda (Eds.), *Handbuch Medienethik* (pp. 164–185). VS Verlag für Sozialwissenschaften.
Suzor, N. (2018). Digital constitutionalism: Using the rule of law to evaluate the legitimacy of governance by platforms. *Social Media + Society*, *4*(3), 1–11. https://doi.org/10.1177/2056305118787812
Teubner, G. (2012). *Verfassungsfragmente*. Suhrkamp.
Triantafyllou, D. N. (1996). *Vom Vertrags- zum Gesetzesvorbehalt*. Nomos.
Twitter (2023). *About*. https://about.twitter.com/en
van Dijck, J. (2020). Governing digital societies: Private platforms, public values. *Computer Law & Security Review*, *36*, 105377. https://doi.org/10.1016/j.clsr.2019.105377
Varnhagen, C. K., Gushta, M., Daniels, J., Peters, T. C., Parmar, N., Law, D., Hirsch, R., Takach, B. S., & Johnson, T. (2005). How informed is online informed consent? *Ethics & Behavior*, *15*(1), 37–48. https://doi.org/10.1207/s15327019eb1501_3
Weber, R. H. (2002). Stärken und Schwächen der Selbstregulierung im Medienbereich. *Medienwissenschaft Schweiz*, *1*, 25–30.
Wiater, P. (2020). Verwaltungsverfahren durch Private? Ein neuer Blick auf grundrechtsdogmatische Folgen des Stadionverbots-Beschlusses des Bundesverfassungsgerichts. *Juristenzeitung (JZ)*, *75*(8), 379–388. https://doi.org/10.1628/jz-2020-0120
Wielsch, D. (2019). Private law regulation of digital intermediaries. *European Review of Private Law*, *27*, 197–220. https://doi.org/10.54648/erpl2019013
YouTube (2023). *About YouTube*. https://about.youtube.