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Abstract: The digital agora – utopia or legal reality?

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As social media platforms take up more and more space in our daily life, enabling not only individual and mass communication, but also offering payment and other services, there is still a need for a common understanding of their subsumption under old-school speech regulation (Balkin, 2013) with regards to the communicative space they create. While in social science a new digital sphere was proclaimed (Castells, 2008) and social media platforms can be categorized as “personal publics” (Schmidt, 2013, 30), there is no such denomination in law that is agreed upon. Public space can be summarized as a free room between the state and society (Eder, 2003), a space for freedom. But where and by whom is this guaranteed in the digital world?

The term ‘public forum’, used for privileged speech protection under the First Amendment of the U.S. Bill of Rights, is very similar to the German term ‘öffentliches Forum’ as a space dedicated to the exchange of information and opinions. In its FRAPORT ruling, the BVerfG defined this notion as follows: “It is characterized by the fact that a multitude of different activities and concerns can be pursued in it, creating a versatile and open network of communication.” (BVerfGE 126, 226, 253). In its ensuing decision the court made it clear that privately-owned but publicly-accessible rooms cannot evade a human rights protection of speech and social actions (BVerfG, 18.7.15 - 1 BvQ 25/15). The BVerfG partly bases its definition on the U.S. Supreme Court decision ISKCON v. Lee. And yet, the Supreme Court ruled that a privately-owned airport terminal is not such a public forum (ISKCON v. Lee, 505 U.S. 672). These rulings show that not only the interpretation of free speech differs between western democratic states (Tushnet, 1999), but also that of the forum (Post, 1995, 199 f.). Hence, the notion of public space in the digital sphere is a central one, which constantly evolves as platforms become broader in their services and needs to be examined more closely when looking at the influence of platforms on social processes. Are constitutional concepts for the analogue publics transferable into the digital space? Will company-owned social media platforms host the public space from a legal perspective? And, accordingly, create a form of digital agora?

The goal of this paper is to firstly provide a comparative overview of the ‘agora’ in German and U.S. constitutional scholarship and secondly to assess which are the consequences in the digital sphere, i.e. for platforms that globally connect users. It will look at whether the public forum serves the same function in both systems and if so, how it needs to be taken in account by platforms. The fundamental question being, to which extent can platforms host public spaces and still enforce their own community guidelines on the basis of their contractual relationship with users. This would serve the purpose of possibly revising our current societal expectations towards platforms on a global scale, when in fact their legal position in the communication infrastructure differs across national contexts.

Keywords: comparative constitutional law, freedom of speech, public forum, digital sphere

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