

7

**COURT-MADE COMMUNICATION POLICIES :
THE WEST GERMAN EXPERIENCE**

Wolfgang Hoffmann-Reim *

In hardly any other industrialized State are there so many courts and judges as in the Federal Republic of Germany: there is one judge for every 4,000 residents.¹ There are a variety of branches in the justice system, and for each court proceeding, there are usually three instances. In addition, in constitutional disputes, the Federal Constitutional Court (Bundesverfassungsgericht) may also be appealed to. The possibility for judicial review determines the way in which private and public actors behave. Politicians as well pay regard to this. There have been cases where they have let the courts do the work in order to avoid having to take responsibility for politically unpopular, yet necessary decisions. As a result, the court — in particular, the Federal Constitutional Court — are accustomed to serving as last-minute aids when, for example, politics is incapable of resolving conflicts of legal policy.

Communications policy of the postwar period has above all been heavily influenced by the Federal Constitutional Court. The basic right of freedom of communication and media (Art. 5 of the Basic Law) was the starting point, and it created a framework for formulating detailed requirements for the structure of the media system and the conduct of journalists and media companies.

This statement on the role of the Constitutional Court applies without reservation to broadcasting, although it is only conditionally valid for the press. It was never disputed that the press was able to be organized according to the principles of private economy and that its work was not to be subject to State influence. Laws dealing with the press — the sixteen federal states are empowered to enact these — are formulated tersely and contain only relatively marginal obligations, such as those regarding the masthead, duty of care and right of reply. These are accompanied by special norms on seizure and refusal to give evidence. In addition to the few laws directed specifically at the press, there are also laws of general validity that the press must respect. For instance, the press may become liable to prosecution in the area of political offenses or in the event of defamation. Also conceivable are claims for compensation, in particular, when

* Professor Dr. Wolfgang Hoffmann-Reim is Director of Hans-Bredow Institut, Universität Hamburg, Germany.

the right of personality has been violated.² A variety of courts have developed substantial case law here, which nevertheless leaves the press with sufficient room to propagate its information. Above all, in determining the reach of these general laws, the basic right of freedom of the press must be taken into consideration and can lead to a restrained application of law vis-a-vis the press.³ Accordingly, it has for example been recognized that protection against defamation does not extend as far in political disputes as with regard to private affairs.⁴ In summary, it may be stated that the courts have accepted the fact that the press is subject to private economic principles and have provided it with wide latitude in its conduct, similar to that recognized in the U.S. The commitments that have been placed upon the press have in principle also been accepted by the public.

Considerably farther-reaching commitments are to be found in the area of broadcasting. This sector was created in the postwar period on the model of the British BBC as a public-service institution obligated to provide programming that is independent and pluralistic. Since this did not correspond to the German broadcasting tradition, special guarantees for independence and pluralism had to be developed. The legislature — these are the parliaments of the individual states — have sought to set down such guarantees in law. In the process, two types of norms were provided for.⁵ On the one hand, there are commitments with respect to conduct. Public broadcasters are obligated to observe the duties of care and truth in their reporting and to be balanced and fair, they are prohibited from giving one-sided preference to individual interests. Institutionally speaking, broadcasters have been created as independent corporations whose revenues are mainly secured from broadcasting fees. Broadcast advertising has long been permitted, though subject to restrictions as to time and content, but broadcasters may not pursue profit-making interests. Furthermore, the internal organization of broadcasters is regulated in such a way that representatives of relevant societal interests — e.g., churches, sports associations, trade unions and employer groups, but also political parties — are able to exercise influence on budgeting, personnel and certain programming decisions. This is based on the idea that the various pluralistic interest groups balance each other out — and, if need be, block attempts to gain unilateral control of programming — such that balanced programming satisfying all interests is ensured.

This is a nice theory. It was adhered to by the legislature, and the courts — led by the Federal Constitutional Court — have developed further this concept, treating its parameters as constitutionally mandated. In the process, the Federal Constitutional Court has engendered a remarkable concept for the interpretation of Article 5 of the Basic Law: Freedom of opinion and the media is not merely a subjective right, that is, the individual's claim to ward off State interference, but also an objective guarantee of law ensuring the ability of the media system to function. In the interest of citizen's free formation of opinion, the State — acting through the legislature — must create positive assurances for this ability to function. What is required are commitments with regard to conduct and structural guarantees of pluralism. By way of these assurances, the Court seeks to take account of the State, the Court has referred not just to scarcity of frequencies and to broadcasting's special status occasioned by the great financial expense. Also of importance is broadcasting's power to influence citizens.⁶ Competition between broadcasters cannot alone ensure that a significant number of social groups and intellectual movements truly have their say. This could give rise to the risk of concentration of power over opinion and misuse of such power for the purposes of one-sided influence on public opinion. Therefore, broadcasting — in contrast to the press — must not be

left to the free play of the powers of the market.⁷

Two elements are united: Broadcasting itself is conceived as the trustee of society, and the State is to ensure with positive precautions that it actually exercises this trustee role. However, the State may not intervene in the contents of communication, although it must create the structural guarantees of independence and plurality.

With its concept, the Court is closely aligned with European, in particular, British public-service broadcasting, as well as with earlier U.S. case law.⁸ Nevertheless, such a concept does not fit with the philosophy of deregulation and privatization and of trust in the economic market, as has increasingly gained sway in the U.S. and Great Britain and is on the move worldwide. This trend has now reached the Federal Republic as well. Broadcasting is today no longer a national affair; it is not possible to maintain national or regional public-service broadcasting at a time characterized by large, international media markets, commercialization of the broadcasting system and widely deployable communications technology and software. In particular, representatives of economic and political interests — in the Federal Republic, these were initially large publishing companies, but they have now been joined by other multimedia concerns, especially internationally active ones — are insisting that public-service broadcasting either be dismantled or forced into a niche. Such forces have found support with the EC Commission⁹ and with politicians who favour deregulation or at least wish to ensure that their state or the Federal Republic of Germany as a whole can also profit from the expanding media market.

The public-service bulwark erected by the Federal Constitutional Court was thus no longer able to be maintained in the 1980s. The Court had to bow to united political and economic pressure in order to avoid running the risk of becoming the sectarian of media policy. However, it took pains to maintain as much of public-service broadcasting as possible. For this reason, it has clung to its concept of freedom of broadcasting. It has rejected the deregulation philosophy, repeatedly emphasizing that market opportunities are an issue of economic freedom and not freedom of opinion.¹⁰ The State continues to be obligated to be the guarantor of the media order, while it may allow private broadcasting alongside internally diverse, independent public broadcasting. Moreover, the commitments on private broadcasting may be less stringent than those for public broadcasters. The Court sees in private broadcasting the economically unstoppable drive toward mass appeal and the disregard for minority interests.¹¹ However, it believes that it is able to accept this as long as public broadcasting remains functional and basic provision is ensured: The entire spectrum of the population must be offered programming that provides comprehensive information to the full extent of the classic broadcasting mandate.¹²

The wording of Article 5 of the Basic Law¹³ says nothing about basic provision and, of course, nothing at all about the relationship between private and public broadcasting. The Court has, however, "interpreted" this norm, that is, given it a specific meaning much like a legislature would. The underlying idea is quite simple: The Court has attempted to salvage as much as at all possible from the "classic" broadcasting mandate. Its hopes here do not rest with private broadcasting but rather with public broadcasting. For this reason, it has sought to stabilize the latter, that is, to keep it functional in the competitive struggle as well. The magic formula that has been developed for this runs as follows: From the standpoint of constitutional law, public broadcasting has a "guarantee of existence and development."¹⁴ It must remain capable of providing comprehensive programming, and it must have access to new technological opportuni-

ties. To this end, it must also be equipped with adequate financial underpinnings. At the time the Court reached these decisions, the federal states concluded the Interstate Treaty on Broadcasting¹⁵ and thereby established the coexistence of public and private broadcasting (dual broadcasting system). The Treaty guarantees the status quo for public broadcasting, and for private broadcasting, there are new fields of activity. The latter is subject to slackened public-service obligations and relatively weak rules limiting cross and multiple ownership. Private radio broadcasters, have been licensed all across the Federal Republic. Furthermore, there are currently four nationally operating private television broadcasters, of which two — SAT 1 and RTL Plus — have good chances of survival. Pay - TV is only in its beginnings.

Now that the Federal Constitutional Court has laid the groundwork for the dual broadcasting system and private broadcasting is on the rise, the legal conflicts have also changed. The courts continue to be resorted to. Especially important is the battle surrounding whether public broadcasting is subject to the same competition rules in the dual broadcasting system as private broadcasting.¹⁶ The basic idea behind public broadcasting is, of course, that it does not operate on a profit-making basis and that it does not determine its conduct according to factors governing the economic market. Although it competes with other public and private broadcasters with regard to its communication activities, it is not in economic competition with them. The refusal to accept economic competition as regulator is, however, rejected by arch-liberal theoreticians and practitioners — and by the EC Commission. They believe that economic competition is by far the best assurance for programming competition and thus for diversity. They assert that the broadcasting order is best ensured when economic competition is functioning.¹⁷

Although such authors do not receive support from the Federal Constitutional Court, they do so from those courts dealing with the Act on Unfair Competition and the Act against Restraints of Competition¹⁸ and from the Federal Monopolies Office, which keeps watch on the functioning of the economic market.¹⁹ Aid also comes from the EC Commission, which is seeking to apply EC competition law to public broadcasting as well.²⁰ It is usually respected that the offerings in public broadcasting programming are themselves not market offerings aimed at economic exchange. But with respect to advertising, the purchase and sale of broadcasting rights and the awarding of contracts for programming production, public broadcasters are subject to the same rules as other market participants. The broadcasters counter this with the argument that they need special rights in order to fulfil their obligation to provide comprehensive programming.²¹ The courts that have thus far had to deal with such controversies have not held for the latter.²² Until now, there has been no ruling by the Federal Constitutional Court on this issue.

This new front along which legal battles are being waged makes clear that the topics have changed: Earlier, the main issue was political communication and the reach of the basic right to freedom of opinion and communication in a democracy, followed by guaranteeing the public-service idea; now, the thrust is ensuring processes of economic exchange. Broadcasting has increasingly moved away from its specific, cultural mandate and is on the path to becoming treated as only an economic good and subject to market processes. With the exception of the Federal Constitutional Court, the courts have had a strong hand in reinforcing this trend. To be sure, many legal commitments enacted in line with broadcasting's older tradition of cultural policy continue to apply on paper. However, there are only limited possibilities for ensuring their practical relevance

broadcasting is forced to fight for survival — and not merely for viewer ratings but also for broadcasting rights for attractive programmes, in selling its own productions, etc. It can be observed in many countries of the world that the conduct of broadcasters is predominantly economically oriented and that the power of law in opposition to this is waning.²³ Even public broadcasting seems unable to avoid this process. Although it may not seek to make a profit, it views itself as having been thrown into economic competition and aligns itself accordingly. Only recently was West Germany's public Channel Two (Zweites Deutsches Fernsehen; ZDF) found by the Federal High Court in one case of having impermissibly associated advertising with programming.²⁴ In addition, in the programming of public broadcasters, one can observe substantial efforts to adapt to private commercial broadcasting — even when it is still clearly distinguishable from its competitors and the public-service orientation still predominates.²⁵

This situation has also remained unchanged with the reunification of Germany. The former State Broadcasting Authority, which was responsible for the territory of the earlier GDR, will be definitively shut down on 31 December 1991. All of the eastern states have already created new broadcasting norms and in so doing adopted the system of dual broadcasting set up in the West. New public broadcasting authorities have likewise been established, with measures having been taken for the licensing and supervision of private broadcasters. Here, however, the legal limits for private broadcasting have often been formulated much more weakly than those in the western states.²⁶

One upshot might be the following: The media have not been spared the encroachment of law into all areas of life. Although relatively few laws specifically tailored to the press have been enacted, it is subject to general laws interpreted in light of the significance of freedom of the press — that is, if need be, restrictively. General laws apply in similar fashion to broadcasting, but this sector is subject to considerably more rules. Attempts to anchor it to the public-service concept are still to be found in the laws. But in the age of the expanding private economy, these norms have only very limited chances for implementation. Attention is shifting to precautions under competition law. The EC's Television Directive²⁷ and the activities of the EC Commission²⁸ have bolstered this trend.

From the broadcaster's standpoint, the legal precautions are ambivalent. In some respects, they fight them as burdensome ballast and in so doing invoke lofty ideals of freedom. In others, however, they are well aware that the norms also act as a protective shield for broadcasters once they are established. They have learned to live with these norms, realizing that the legal restrictions also make it difficult for new competitors to receive licenses and prevail in the market. For the public broadcaster, the norms regarding the guarantee of existence and development likewise set up a protective shield, which they need in order to survive in the battle with purely commercially oriented competitors but which at the same time threatens to interfere with their ability to innovate and reform.

The legislature and the courts nevertheless proclaim that these norms aid in attaining the desired objectives, for instance, that the broadcasters' trustee orientation helps to ensure the citizens' freedom of opinion or that well-functioning competition is a basis if informational diversity. Whether these objectives will be fully attained or are attainable whatsoever has to be doubted. It may, however, be presumed that these values would be even more strongly endangered if the norms did not exist.

The courts have intervened massively in the development of the German media, and to some observers, there may seem to be powerful actors. Although they are able

determine infractions of the law and thereby draw borders, they cannot guarantee that the borders will also be respected. Moreover, they are unable or only limitedly able to have a positive effect on the structure of the media order so as to secure its ability to function. The Federal Constitutional Court had sought to do so in an heroic battle, but it ultimately had to capitulate to external framework conditions. Other courts have, depending on their status, pursued more modest goals from the outset, but they as well have usually joined the general trend, strengthening it in the process. Even when the law and the courts in the Federal Republic have intervened more strongly in media development than in other sectors, it is unmistakable that they have adhered to the international, particularly the European trend. The courts have played a role in influencing the face of communication policy. But in no way have they shaped this policy itself.

Notes

1. As of 1 January 1987, there were 17,380 judges in the FRG: *Deutsche Richterzeitung* (German Judges Journal) 1987, p. 321. At the same time, there were 61 million residents. The number of judges in the eastern section of (reunified) Germany is lower than in the West, although it will be gradually increased in the coming years.
2. A good summary of the relevant norms and case law is provided by Wenzel, Karl Egbert, *Das Recht der Wort- und Bildberichterstattung* (The Law of Written and Televised Reportage) (3d ed. 1986).
3. The landmark ruling here is the decision of 15 January 1958 by the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* (Collected Decisions of the Federal Constitutional Court; B VerfGE), vol. 7, pp. 198 ff.
4. Cf., e.g., Federal Constitutional Court, Order of 13 May 1980, B VerfGE, vol. 54, pp. 129 ff., 138 (applicable to broadcasting but also fitting for the press).
5. For the different types of norms, cf. Hoffmann-Riem, Wolfgang, *Erosionen des Rundfunkrechts* (Erosions in the Law of Broadcasting), 1990, pp. 17 ff.
6. For the justification behind broadcasting regulation, cf. the decision by the Federal Constitutional Court of 28 February 1961, B VerfGE, vol. 12, pp. 205 ff., 261; of 27 July 1971, B VerfGE, vol. 31, pp. 314 ff., 326; of 16 June 1981, B VerfGE, vol. 57, pp. 295 ff., 322; of 4 November 1986, B VerfGE, vol. 73, pp. 118 ff., 121 ff., 154; of 24 March 1987, B VerfGE, vol. 74, pp. 292 ff.; of 5 February 1991, B VerfGE, vol. 83, pp. 238 ff., 295 ff.
7. B VerfGE, vol. 21, pp. 314, 325; B VerfGE, vol. 57, pp. 295, 323.
8. I.e., the decision of the Supreme Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). See generally the articles in Blumler, Jay (ed.), *Television and the Public Interest* (1992).
9. Cf. *Television without Frontiers. Green Paper on the Establishment of a Common Market for Broadcasting, Especially for Satellite and Cable*, 14 June 1984, Eur. Comm. Doc. Com. (84)300 final. See also infra note 20.
10. See, e.g., Federal Constitutional Court, Order of 24 March 1987, B VerfGE, vol. 74, pp. 297 ff., 335.
11. See, e.g., B VerfGE, vol. 73, pp. 118, 157 f.
12. B VerfGE, vol. 74, pp. 297, 325. See also B VerfGE, vol. 73, pp. 118, 157 f.
13. Art. 5(1): "Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally acces-

- sible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship."
14. B VerfGE, vol. 73, pp. 118, 157 ff.; B VerfGE, vol. 74, pp. 297, 325, f. Cf. also, e.g., 103 of the Gesetz über den Westdeutschen Rundfunk Köln (Act on the Western German Public Broadcasting Authority in Cologne) of 11 January 1988.
 15. Staatsvertrag zur Neuordnung des Rundfunkwesens (Rundfunk-Staatsvertrag) of 1 and 3 April 1987. This Treaty was revised in 1991 and incorporated in the Interstate Treaty on Broadcasting in Unified Germany (Staatsvertrag über den Rundfunk im vereinten Deutschland) of 31 August 1991.
 16. Cf. Federal Constitutional Court, Decision of 5 February 1991, B VerfGE, vol. 83, pp. 298 ff.
 17. Cf. Hoppmann, E., Meinungswettbewerb als Entdeckungsverfahren (Competition of Opinion as Process of Discovery), in Mestmacker, Ernst-Joachim (ed.), Offene Rundfunkordnung (Open Broadcasting Order), 1988, pp. 163 ff.; Mestmacker, Ernst-Joachim, Referat (see supra note 9), in Verhandlungen des 56. Deutschen Juristentages (Meetings of the 56th German Lawyers Conference), vol. II, 1986. For criticism of this position, see Hoffmann-Riem, Wolfgang, Rundfunkrecht neben Wirtschaftsrecht (Broadcasting Law and the Law of Economics), 1991; Rahn, Monika, Programmauftrag und Kartellrecht (Programming Mandate and Monopolies Law), 1990.
 18. See, in particular, Kammergericht, Archiv für Presserecht (Archive for the Law of the Press) 1989, pp. 466 ff.; Federal High Court (Bundesgerichtshof), Decision of 14 March 1990, Zeitschrift für Urheber- und Medienrecht 1990, pp. 519-527.
 19. See, e.g., Bundeskartellamt, in: Wirtschaft und Wettbewerb/E 2273 ff.
 20. See the Decision of the Commission of 15 September 1989, O.J. Eur. Comm. (No. L 284) 286 purchase of films by German television stations; cf. also Decision of the Commission of 21 December 1988, O. J. Eur. Comm. (No. L 78) 43 Magill TV Guide/ETP BBC and RTE.
 21. See, e.g., the opinion of the ARD and the ZDF (West Germany's two public television broadcasters) on the Order of the Federal Monopolies Office of 27 August 1989 regarding the "Interstate Global Television Treaty" (Fernseh-Globalvertrag), Media Perspektiven (Media Perspectives) Dokumentation III, 1987, p. 199).
 22. See generally Federal High Court, supra note 18.
Cf. Hoffmann-Riem, Wolfgang, Kommerzielles Fernsehen. Rundfunkfreiheit zu ökonomischer Nutzung und staatlicher Regelungsverantwortung: Das Beispiel USA (Commercial Television. Freedom of Broadcasting vis-a-vis Economic Use and State Regulatory Responsibility: The Example of the USA), 1981; id., Rundfunkaufsicht (Broadcasting Supervision), vol. II: Rundfunkaufsicht im Ausland: Großbritannien, USA und Frankreich (Broadcasting Supervision Abroad: Great Britain, USA and France), 1989.
 23. Federal High Court, Decision of 22 February 1990, Zeitschrift für Urheber- und Medienrecht 1990, pp. 291-298.
 24. For a comparison of programming, see Kruger, Udo Michael, Qualitätsschere in Angebot (Quality Differences in Supply), Media Perspektiven 1987, pp. 549 ff.; Konvergenz im dualen Fernsehsystem? Programmanalyse 1989 (Convergence in the Dual Television System? 1989 Analysis of Programming), Media Perspektiven 1989, pp. 776 ff; id., Zur Konvergenz öffentlich-rechtlicher und privater Fernsehprogramme (On the Convergence of Public and Private Television Pro-

- gramming), *Rundfunk und Fernsehen* 1991 (vol. 39), pp. 83-96.
26. For the development of the media and media law in the territory of the former GDR, see Bullinger, Martin, *Die Entwicklung der Medien und des Medienrechts in den neuen Bundesländern* (The Development of the Media and Media Law in Germany's New States), *Archiv für Presserecht* 1991, pp. 465-472; Hoffmann-Riem, Wolfgang, *Die Entwicklung der Medien und des Medienrechts im Gebiet der ehemaligen DDR* (The Development of the Media and Media Law in the Territory of the Former GDR), *Archiv für Presserecht* 1991, pp. 472-481. For a review of the discussions prompted by the establishment of public broadcasting, see Hoffmann-Riem, Wolfgang, *Rundfunkneuordnung in Ostdeutschland* (Broadcasting Reform in Eastern Germany), 1991.
 27. Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities, 3 October 1989, O. J. Eur. Comm. (No. L 298) 23 ff. (1989).
 28. See *supra* note 20.