Federal Constitutional Court Affirms Ban of TV-Coverage of Court Proceedings

By Peer Zumbansen
Suggested Citation: Peer Zumbansen, *Federal Constitutional Court Affirms Ban of TV-Coverage of Court Proceedings*, 2 German Law Journal (2001), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=49

[1] Court Hearings are public sources of information and it is within the discretion of the legislature to design the rules governing the public's access to these sources of information. This is the essence of the *Bundesverfassungericht's* (Federal Constitutional Court [FCC]) ruling of January 24, 2001, with which it decided two constitutional complaints that had been brought by the television broadcasting company "n-tv".

[2] With the first complaint, the complainant sought relief from: (1) an order of the Berlin Landgericht (Regional Court) that prohibited the complainant's live TV coverage of Court proceedings; and (2) that court's alleged unconstitutional interpretation and application (in implementing such a prohibition) of the relevant norm of the *Gerichtsverfassungsgesetz* (Federal Statute Governing Organization of and Conduct Before Courts [GVG]). The second complaint was directed against a judgment of the Bundesverwaltungsgericht (Federal Administrative Court [FAC]), which issued its own order prohibiting the complainant from broadcasting its proceedings. The FCC rejected both complaints with a 5 to 3 vote, with Justices *Kühling, Hohmann-Dennhardt* and *Hoffmann-Riem* entering a rare dissent to the majority opinion.

[3] With respect to the first complaint, the complainant attempted, in 1995, to broadcast proceedings before the criminal court involving several members of the former East German *Politbüro* (ruling government body). The defendants had been charged with counts of wrongful death in relation to deaths that occurred at the East/West German border before the collapse of the East German communist regime. The presidung judge of the Berlin Regional Court ruled against the complainant's request to broadcast the hearings, basing the denial of the request on the GVG. On the complainant's appeal, the criminal judge affirmed his order generally prohibiting courtroom broadcasts, but he granted an exception for broadcasts during the brief period when the case was being called to session and the parties were being introduced. The complainant brought a rushed constitutional complaint seeking to temporarily restrain the enforcement of this oder to the FCC, which the FCC rejected on January 11, 1996 [published in *Neue Juristische Wochenschrift* - NJW, 1996, p. 581].

[4] The second complaint involved the complainant's request, in 1999, to broadcast proceedings before the Federal Administrative Court involving the highly contested issue of hanging the crucifix in classrooms. The FCC denied the complainant's rushed constitutional complaint seeking to temporarily restrain the enforcement of the FAC's denial of its request.

[5] The complaints before the FCC alleged that the orders prohibiting television broadcasts of the two cases violated the complainant's right to freely broadcast as laid down in Art. 5.1(2) of the *Grundgesetz* (German Basic Law [GG]). In its complaint, the complainant focused on what it claimed to be the reality and conditions concerning the media's changed relation to society. The complainant argued that, since passage of the GVG and its prohibition of TV-broadcasting of court proceedings, the habitual viewing of television and its use as primary source of information has substantially altered people's relationship to this medium. The complainant argued that the "public" mentioned and presupposed in the respective Section 169 of the GVG could only be understood as meaning a modern "media public". It was the complainant's position that in today's culture only the publication of events by television media would be apt to guarantee the basic values of Section 169. The complainant argued that the broadcasting of court proceedings simultaneously permits public control of court proceedngs while allowing for a better understanding of the law by the average citizen. The complainant also argued that media coverage of court proceedings would also enhance public acceptance of court decisions. According to the complainant, courtroom broadcasts would allow for a democratic "public review" of a court's reasoning, requiring judges to reflect upon the compatibility of their judgments with societal norms.

[6] To the degree that the Court did not embrace the complainant's view, the decision must be read as an important milestone in the jurisprudence governing our media saturated society. The standards applicable to the activities of our (much celebrated and oft debated) "information society" are not easy to identify and articulate, especially as the omni-presence of the media inevitably blurs the boundaries between issues of public relevance and those only of interest to a small minority. The "making of events" by the media has steadily come to accompany the occurance of real events. It is becoming the case that issues only qualify as issues if they receive the necessary media attention.

[7] The FCC, which itself allows TV-coverage during the calling of a case, had to assimilate a flood of professional opinion on the matter, as it received *amicus* briefs from: the Federal Ministry of Justice, the spokespersons of the Federal Courts, the center-right *Deutscher Richterbund* (German Association of Judges), the left-leaning *Neuer Richterbund* (Judges-association) as well as a group representing a majority of the members of the German Lawyers'

Association's committee on constitutional law. All argued that the complaint should be unsuccessful.

[8] These amicus parties focused, in their argument, on a comparison of: (1) the function of a criminal proceeding, primarily consisting in the trial of an individual or a group in order to establish their criminal responsibility; as against (2) the function of the media, mainly responsible for informing the public. The FCC accepted that, when deciding on the complaints, it would have to have to offer a solution to this juxtposition of two equally important values.

[9] The Court's opinion is centered around the demarcation between the openness of a public source of information with the accompanying liberal rights requiring access to that source, on the one hand, and the rule that such rights to access do not necessarily open all sources for broadcasting (Offenheit einer Informationsquelle v. Öffnung einer Informationsquelle). The Court held that, in contrast to other public sources of information, court proceedings cannot be considered as fully open sources. The Court reasoned that the prohibition on cameras in courtrooms would constitute a violation of the constitutionally protected rights to free information and free press only if it concluded that court proceedings were fully "open" public sources of information. The court concluded that this was not the case and denied the complainant's charge that the prohibition constituted a violation of the Constitiution's free press rights.

[10] The FCC held that every person or entity enjoys, in accordance with those rights conferred upon him/her or it by the rules of property and procedure, the discretion to decide whether and how to open a source of information to the public. As to the rules governing court proceedings and court organization (the GVG), the FCC declared a legislative use of discretion as legitimate as long as the media's access itself was guaranteed. Because the GVG, in section 169 Sentence 2, only excludes TV-coverage of court proceedings from the permissible methods of media coverage, this limmitation itself does not constitute an infringment of a constitutionally protected right. The FCC makes clear that the media's right to access only reaches as far as the legislature sketched the boundaries of that access, within the discretion afforded the legislature.

[11] The Court undertook a considerably short exploration of the qualities of the modern media, as well as its impact on public deliberation. Far from condemning the important role of television, the Court, did however express doubts as to the authenticity of TV-pictures. The Court implicitly acknowledged the principle of a constructed media "reality" and pondered the editorial and manipulative selcetion and exposure of actors and events. The opinion moves on with admirable elegance, touching upon a great number of issues related to the omni-presence of media coverage and the imagery of a blurred public sphere which no longer possesses a clear demarcation public and private.

[12] The Court finally bases its denial of the complaints on: (1) the privacy interests of plaintiffs and, in a criminal case, defendants; and (2) the integrity of court proceedings. The court especially expressed concern about the danger that inadequate or manipulative representations of singular events in court proceedings could constitute great harm to the persons involved. The Court emphasized the importance of providing a fair trial, a societal obligation that would likely be harmed when courtroom participants become self-conscious of the presence of cameras. The Court concluded that these dangers also exist in less "spectacular" moments of a trial, leading the Court to dismiss the complainant's request that a compromise allowing limited TV-coverage of certain parts of the proceedings is appropriate.

[13] The dissenting opinion by Justices Kühling, Hohmann-Dennhardt and Hoffmann-Riem supported the Senate's decision but took issue with the majority's conclusion that television coverage of court proceedings can never be justified.

[14] A powerful argument for this avenue is gained by pointing to the historical context in which the *publicization* of courtroom proceedings by allowing guests and observers, including private parties and the press, originated. The dissent argues that while it was adequate in order to overcome the before existent arcanic justice system of trials behind close doors and under the constant veil of seclusion to install the courtroom public, this aspect has - in the course of time - become but one of the reigning aspects concerning the publicity of the trial. The principles of the rule of law have in such strong manners been infused into the law governing procedure and organization of the courts, that now there are a whole number of other safeguards securing the integrity of both proceedings and privacy interests. The FCC further rightly illuminates the fact that the twofoldedness of curiosity interests of the observer and the attempt to allow for a certain public control did in fact always coexist at any phase of opening of court proceedings to an outside gaze. The old legislature did try to bring together both considerations and could do so without the need to differenciate between a courtroom and a media pubilc. The media, as we know it today, didn't exist to a greater extent than that provided by press coverage. Therefore, the dissent can implicitly rebut the majority's argument that the important value conflict arises primarily from the tension between privacy and publicity interests concerning the courtroom proceedings. While the majority need to draw upon the observation wherafter the extension by which media have started to reach out to more and more aspects of life, justifies the holding up of clear demarcation lines, the dissent goes the opposite way.

[15] It argues that the media have not only become omnispresent in their coverage of just about anything but that thereby has occurred a fundamental transformation of what is referred to as the public sphere. The *mediatization* of reality, that is the almost exclusive representation of reality, events, and opinions through the medium of TV-, Radio (or Internet) -coverage, has become so dominant in our ways of gaining knowledge, making experiences or participating in public discourses, that the majority's differenciation between courtroom and media public loses a lot of its convincing force. For the dissent, the rule-of-law based conception of the court proceedings' publicity must consequently be understood in the light of a media public. The dissent goes on to argue for a freedom of the media that leads to a burden of justification on the side of the state if it choses not to open sources of information to the media public. With regard to the legislature's fundamentally acknowledged prerogative in weighing the participating interests, the dissent suggests nevertheless that there is reason to believe that the legislature might be held to consider ist balancing process especially in light of such radical structural changes like those brought about by Information Society. While the dissent goes along with the description of the conflicting values at stake when debating boundaries for media coverage in a courtroom, the dissent finds that the majority's reasoning in its totality fails to acknowledge important differences as to the various phases of the court proceedings. In extensively drawing upon voices in acadmic writing as well as a view across into foreign legal systems, the dissenting Justices find the totality of the media ban not altogether persuasive. Instead, research shows that while substantial skepticism subsists vis-à-vis criminal court proceedings, that is seen differently with regard to civil or publc court proceedings. The dissent mentions a number of situations in media-related legistative history where a closer and more critical look at the foundations on which the law would then be based would have revealed an alternative view point.

[16] It can aptly be said that the FCC's decision and the dissenting vote reaches beyond the confines of a purely legal interpretation of the facts. The boundaries to a more open analysis of societal realities appear to be fragile and while the majority reacts by relying on the orginal intent present in the historical law-maker, the dissent welcomes this border opening and trusts in the critical study of a "law in context" and the indeed numerous layers of society's complexities.

For more information:
Decision of the Federal Constitutional Court
[Bundesverfassungsgericht] of January 24,
2001 - 1 BvR 2623/95 and 1 BvR 622/99 (not yet published).

English language version of the Basic Law on-line: www.uni-wuerzburg.de/law