

M. Stock, *Medienfreiheit in der EU-Grundrechtscharta: Art. 10 EMRK ergänzen und modernisieren!*. Studien zum deutschen und europäischen Medienrecht Band 5. Frankfurt am Main: Peter Lang, 2000. 129 pages. SFR 32. ISBN 3-631-36842-9.

This book was published in May 2000, when the preparation of the Charter of Fundamental Rights of the European Union was in full swing. Translated into English the title reads: 'Media freedom in the EU-Charter of fundamental rights: supplementing and modernizing Article 10 ECHR!'. Martin Stock (1933), former professor in constitutional and administrative law at the University of Bielefeld in Germany, wanted to call forth a debate on the draft Charter. His book, an extended pamphlet, focuses on the freedom of expression and its application to audiovisual media. Since then the Charter of fundamental rights got its final shape and was solemnly proclaimed in Nice. That does not mean, however, that the book has lost its value. It offers an intriguing analysis of two conflicting philosophies regarding the freedom of broadcasting. On the one hand there is the *laissez faire* doctrine. Radical advocates of this philosophy argue: the best Broadcasting Act is no Broadcasting Act. According to them, the market must decide which programmes are best. Governments should not try to influence the invisible hand of free market forces. Obviously, this point of view is more popular with private entrepreneurs than with public service broadcasters.

Stock is no free market fan. His central thesis is that broadcasting has a mission to fulfil in society. In order to enhance a proper functioning of the broadcasting system as a whole, legislators must secure certain standards. There should be plurality of opinion, truthful reporting and a broad range of content (information as well as education, culture and entertainment). A lack of regulation would violate the fundamental right of viewers and listeners to be properly informed. In particular, the public should be able to form an opinion on matters of general interest. Advocates of this approach usually sympathize with public service broadcasting and have reservations about broadcasting on a strictly commercial basis. In Germany, the case law of the *Bundesverfassungsgericht* (BVerfG) shows that broadcasting freedom under the German Constitution imposes several positive obligations on the legislator. Stock welcomes this case law and fears that European law, either through the European Court of Justice or the European Court on Human Rights, could form a threat for this state of affairs.

The book is divided into four chapters. The first describes the historical context and the possible future of the Charter of Fundamental Rights. In just a few pages, the author draws attention to a very important question. Should the Charter be the first step towards a genuine European constitution? If the answer is negative, the 'Convention' preparing the Charter could confine itself to summarizing the case law of the ECJ. Little more would be needed than an adaptation of international treaties on human rights. If the answer is yes, however, a more ambitious schedule is necessary. Then, the Charter should pave the way for a democratic European Union. The Charter must take into account the support that fundamental rights can give to the integrity and democratic character of Europe. Stock prefers the latter option.

The next three chapters deal with the freedom of the media. Chapter 2 describes how Article 10 ECHR was interpreted by the European Commission in the 1980s,

especially in the Green Paper ‘Television without frontiers’ (1984). At that time the Commission focused heavily on freedom of expression as a subjective right against government intervention. Rather polemically, Stock argues that this approach was wrong. If only interpreted as a ‘negative’ right, freedom of expression threatens to slide into a privilege for powerful media concerns. The right of the public to be properly informed as well as democracy would suffer. It is amusing to read how both sides in the discussion claim the word ‘modernising’ for their own view. The German lawyer Engel for example, whose publications are discussed by Stock as a specimen of the opposite party, had characterised the Green Paper as a refreshing development. In his view, the case law of the BVerfG was old fashioned and should be revised in the light of European law. Stock, on the other hand, considers the Green Paper as old-fashioned. He thinks that Article 10 ECHR must be modernised by adding elements borrowed from the case law of the BVerfG.

The third and longest chapter discusses the ‘objective’ freedom, which emphasizes the useful role media can play in a democracy. Obviously, this approach is favoured by Stock. He refers to several European policy papers, some of which are printed in the annex of the book. Central theme in these documents is the importance of public service broadcasting. According to Stock, the European Commission has turned back from the wrong track it followed in the 1980s. Next, the author compares the relevant constitutional traditions in Germany, Austria, Switzerland and – briefly – some other European countries. Referring to these traditions, the final chapter proposes a new provision in the Charter on freedom of expression. In addition to a subjective right for everyone, the proposal contains detailed instructions for media legislation. A lengthy text, reflecting many elements of the BVerfG-case law. The author thinks it is better to specify every detail, otherwise you have to rely on future decisions of the ECJ. Indeed, nobody can predict whether or not the Court is willing to follow in the footsteps of the BVerfG.

It is quite possible that this book did have an influence on the Convention, which was presided by the former president of the BVerfG Herzog. In May 2000, the draft Article on freedom of expression was mainly a shortened version of Article 10 ECHR. On the internet site <http://db.consilium.eu.int/>, one can read that a summary of the book was distributed on 5 June 2000 as document Charte 4342/00. More or less at the same time, on 4 June 2000, the Presidium of the Convention proposed adding a second paragraph to its original draft: ‘(..) The freedom of the press and of information shall be guaranteed with due respect for transparency and pluralism’ (Charte 4333/00). Later on, the draft Article was amended again, re-numbered and supplied with a new heading. In the final Charter, proclaimed in Nice, the Article in question reads as follows:

#### *Article 11*

##### *Freedom of expression and information*

- 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*
- 2. The freedom and pluralism of the media shall be respected.*

The unofficial memorandum of explanation (Charte 4473/00) of 11 October 2000 states:

‘(..) Pursuant to Article 52(3) of the Charter, the meaning and scope of this right are the same as those guaranteed by the ECHR. The limitations which may be imposed on it may therefore not exceed those provided for in Article 10(2) of the Convention, without prejudice to any restrictions which Community competition law may impose on Member States’ right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR. Paragraph 2 of this Article spells out the consequences of paragraph 1 regarding freedom of the media. It is based in particular on Court of Justice case law regarding television, particularly in case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others* [1991] ECR I-40070, and on the Protocol on the system of public broadcasting in the Member States annexed to the EC Treaty, and on Council Directive 89/552/EC (particularly its seventeenth recital).’

I wonder how Stock feels about this result. On the one hand, the importance of media pluralism has been acknowledged in the final text. Furthermore, Article 22 of the Charter reminds that the EU shall respect cultural, religious and linguistic diversity. One could argue that this implies an obligation to protect and foster public service media aiming at the same goals. On the other hand, it is clear that Article 11(2) of the Charter only ‘spells out’ the principles stated in the first paragraph. In other words: governmental abstinence is the rule, governmental interference is the exception. As for broadcasting regulation Stock had pleaded quite the opposite. Moreover, nothing has been adopted of his detailed proposals on programme standards. Not a word on duties to transmit ‘complete and truthful information’ or to contribute to ‘education and entertainment’. Not a word on a duty to ‘promote the European integration’.

Speaking for myself, I think the final Charter is a good compromise. I completely agree with Stock that public service broadcasting is a valuable European tradition. However, I do not support his view that it was ‘unfortunate’ to take Article 10 ECHR as a starting-point. History has shown that some governments trying to achieve beautiful ideals ended up in dictatorship. Quite rightly the ECHR demands that any restriction, even those with the best intentions, on fundamental freedoms must be ‘necessary’ in a democratic society. A provision in the Charter saying that broadcasting must contribute to European integration, would have been a serious liability. Who can guarantee that a future European government will not use such a provision for promoting their own policy? Or use it as an alibi to silence their political opponents? To avoid misunderstandings: Stock does not have any sympathy for broadcasting as a mouth-piece for the government. On the contrary, he stresses the importance of editorial independence. The question is, however, how to protect this editorial independence most effectively.

The ‘convention’ acted wisely to insert a provision on freedom and pluralism of the media only. Specifications for broadcasting were not necessary. In the digital age it becomes increasingly difficult to distinguish radio and television from other electronic messages. Stock might regret that the final Charter says nothing on the functions that broadcasting can perform in a democratic society. However, I refer to an observation of Stock himself in his first chapter: *‘Es käme auf juristisch operationalisierbare*

*Aussagen in knapper Form an, im Unterschied zu blumigen und langatmigen, mit vielen Erwägungsgründen etc. beladenen Texten*. (‘What matters is that we get legally binding provisions in concise terms, in contrast to ornate and long-winded declarations, overloaded with many recitals etc.’). Particularly when political differences are great, a Constitution must confine itself to principles that are common ground for a large majority. The EU Charter of fundamental rights offers enough latitude to allow public service broadcasting to flourish. Fortunately!

Wouter Hins  
Amsterdam