Federalism and Mass Media Policy in
Germany

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Institutional change is a question which attracts the interest of many political scientists, but it is also one over which many disagreements exist. The prevailing perspectives in comparative politics tend to highlight the continuity of institutions and they focus on the role institutions play in preserving themselves over time by providing choices and constraints to political actors (Koelble 1995; North 1990; Pontusson 1995; Steinmo, Thelen and Longstreth 1992; Weaver and Rockman 1993). Most theories of institutional change, on the other hand, tend to use agency-based rational action models to account for changes (Knill and Lenschouw 2001; Colomer 2001; Sil 2000). This article employs a social structure based model to explain change instead. The change under examination, however, is not in the form of legal/institutional reconstruction of the rules of the game, but one where the institutional constraints are bypassed through the workings of the system. In other words, the focus is on how the de jure constitution and de facto practice diverge from one another. This will be done through a particular focus on federalism in Germany. In this context, the aim is to explain why the federal institutions of West Germany proved to be malleable rather than sticky. The explanation is a macro-social one building on the theory of congruence between society and institutions.¹

The institutions designed for the Federal Republic of Germany in 1949 were organized according to a political logic that ran against the grain of its unitary ethno-linguistic structure. In the following 50 years, the political system moved towards a closer match with the underlying social structure as political actors mobilized in all-German terms rather than following the federal demarcations. This was largely attained through the workings of the system; in particular, through devising nationwide public policies even in areas where the substate level enjoyed exclusive constitutional competence. Canadian, Belgian and Swiss experiences suggest that diversity in public policies tend to follow the federal demarcations in multination federations, especially between the ethno-linguistically diverse constituent groups.² In the German case, however, unable to change the Constitution, political actors decided to work above the federal demarcations bequeathed by the Allies.

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At the end of the Second World War, Western Allies saw political decentralization as a safeguard against an expansionist strong Germany and as a way to denazify and reeducate the German people by preventing centralization and bringing politics closer to the citizen. They, therefore, encouraged the West German provinces (Länder) under their occupation to adopt such a federal system. In the long run, however, the unitary characteristics of the German society led to demands for uniform nationwide policies in the Federal Republic. In response to public pressures, policy areas within the exclusive jurisdiction of the Länder were first harmonized and then standardized, eventually leading to ‘national’ policies. Article 79(iii) of the Constitution, the Basic Law (Grundgesetz), states that the federal character of the German state cannot be changed by constitutional amendments. As a consequence, centralizing tendencies have manifested themselves through the workings of the system rather than a large-scale state reform. In particular, collective action of the German Länder together with Länder–Federal government (Bund) cooperation has paved the way for nation-wide public policies. Gradually, a federal system based on exclusive competences was replaced by an interlocking system of federalism (Scharpf, Reissert and Schnabel 1976). The trend towards centralization has led some observers to suggest the label of a ‘unitary federal state’ (Hesse 1962). Another observer has described Germany as ‘a decentralized state and centralized society’ (Katzenstein 1987: 15); or put differently, Germany did not have a ‘federal society’ to provide the federal institutions with an underlying social base for continuity (Livingston 1952: 84). Contrary to the expectations of institutionalist perspectives, the decentralized federal structure failed to socialize political actors into the system set up by the Basic Law; instead the federal system gradually changed in response to the unitary social structure.

In a number of groundbreaking decisions (BVerfGE 1952a: 131), the Federal Constitutional Court lent legal support to the centralizing tendencies and introduced the principle of federal friendly behaviour (bundesfreundliches Verhalten) (BVerfGE 1952b: 315). In subsequent decisions, the Court continued to develop the principles of federal comity (Bundestreue) and federal friendly behaviour, although having to concede that these were unwritten extra-constitutional principles (BVerfGE 1956: 140; BVerfGE 1957: 361). Gradually the effect was to produce principles which would constrain autonomous substate activity:

In the federal state, the federal government and the Länder have the common duty to establish and safeguard the basic legal order in all levels and sections of the overall state (Gesamtstaat). To the extent that the federal government cannot provide for this directly but rather is
dependent on the direct participation of a Land, every Land is responsible for this cooperation. This follows from the unwritten principle of the duty of federal friendly relations (BverfGE, 1959: 138).

The Constitutional Court’s efforts to modify the federal structure led other federal courts to develop unusual legal interpretations in order to follow Constitutional Court rulings. For example, faced with the creation of a nation-wide public broadcasting corporation by the Länder, the Federal Administrative Court had to invent a legal grounding for the nationalization of broadcasting, which is a policy area under exclusive Länder jurisdiction:

There is no rule in the Basic Law which states that a Land can exert its state authority only in its own territory, and by extension, [there is no rule which states] that only the federal government has competence for the whole of federal territory (BverwGE, 1966: 306–7).

It is interesting to note that neither Federal nor Länder governments opposed such Court activism. In fact, in many areas of public policy, pressures towards all-German solutions were shared across the political spectrum. The following empirical examination of the changes in the field of mass media policy demonstrates that all political actors approached the issue of mass media as a nation-wide concept and not an exclusive Länder competence. Länder governments – including the parties in power and the Länder bureaucracy, opposition parties, interest groups and professional associations – have all been active in translating societal homogeneity into federal change. This process of congruence does not necessarily mean that the political actors involved always agreed with the particular contents of a national media policy. But regardless of their differences over the contents of the policies, they decided to tackle the issues at the national level.

Media policy is a part of the cultural sovereignty (Kulturhoheit) of the Länder as set up by Article 30 of the Basic Law. Media policy was seen as an important tool by the Allies to reform and reshape Germany. Following the end of the war, the Western Allies installed a decentralized system of the press in their zones of occupation. Against the background of the Nazi propaganda machine, the dispersion of the media was seen as a way to guarantee the freedom of the press. Allied plans for media decentralization went against the wishes of the post-war German politicians, but German leaders were in no position to resist the occupation authorities. During the meetings of the Parliamentary Council discussing the new constitution for West Germany in 1949, the representative of the Land Württemberg-Baden, Dr. Theodor Heuss, who was later to become the first President of the Federal Republic, was very explicit about what was wanted and what was possible under Allied supervision:
I would rather not consider these affairs of broadcasting installations and public corporations here, because that would anticipate legislation which is currently a mixture of issues and one which we obviously want to place in the hands of the Bund. We do not want three or four different kinds of radio law. This is surely no reason for the American military government to reject everything, but they are hoping – as is clear here - to push matters of state concern as much as possible into the background (from the 32. meeting of the Grundsatzauschuss of the Parlementarische Rat, 11 December 1949, in Lüders 1953: 40).

PRINT MEDIA

German newspapers with nation-wide circulation remain subject to the press licensing laws of the Land in which they are published, but these Land-based laws follow the national standards which were established along the way. The legally decentralized structure of 1949 has not produced a Land-based press culture with accompanying substate diversity. Despite its Land-based legal grounding, the German press is a nation-wide phenomenon. This was facilitated by the harmonization of Länder press laws and frequent Bund initiatives aiming at standardization. There are many local newspapers with limited circulation, of course, but in broad terms the German press has managed to bypass the legal decentralization designed by the Allies and has come to be the representative of national public opinion.

The origins of German press legislation predate the Basic Law. The Allies had installed a system of press licensing in their zones of occupation. The press licensing system ended in 1949 as the Länder acquired responsibility for the regulation of mass media. Each Land passed its own press law, but joint commissions were also established to harmonize Länder policies. During this early time period, there were three important pressure groups which sought some sort of federal press law but differed with regard to the contents of it. The old publishers (Altverleger) represented the traditional German publishing houses which were initially denied licences by the Allies due to their collusion with the Nazis.

The Allies wanted to prevent the reappearance of the influential press magnates who had dominated public opinion during the Weimar Republic and Nazi rule. Decentralization of the press was believed to be an important building block in a pluralist democracy. In response to Allied recalcitrance, the old publishers formed the national Association for Press Questions (Arbeitsgemeinschaft für Pressefragen) which published the Manifesto for Press Freedom (Manifest der Pressefreiheit) in the autumn of 1948. Here the old publishers demanded the removal of press licensing and asked for a
uniform federal law to regulate the press (Schütz 1999: 43). The new publishers licensed by the Allies sought to keep the old out, but they also lobbied for a federal press law. On 22 February 1950 the Association of Newspaper Publishers (Verein Deutscher Zeitungsverleger) and the Association of German Journal Publishers (Verband Deutscher Zeitschriftenverleger) tabled a draft federal press law to this end. As the old publishers gradually reacquired their licences, the interests of the new and old publishers converged and they came together on 15 July 1954 to form the Federal Union of German Newspaper Publishers (Bundesverband Deutscher Zeitungsverleger). This Newspaper Publishers Union sought a federal system which would give them considerable autonomy. The journalists, on the other hand, also had their organization, the German Journalists Association (Deutscher Journalisten Verband) which lobbied for federal laws, but in contrast, they favoured strict public control over the press. Eventually the Journalists Association published its Draft Federal Press Law (Entwurf für ein Bundespressegesetz) on 10 April 1954 along these lines. The Allied system seemed to work for the benefit of publishers who were given de facto monopolies in each Land, yet the drive towards a nation-wide German system was shared by all actors involved.

In the meantime, Federal and Länder governments continuously tried reaching an agreement on a common national press law. As early as 1950 the Standing Conference of Cultural Ministers of West German Länder (Ständige Konferenz der Kultusminister) proposed a federal press law. This draft law of 15 July 1950 aimed to bring legal uniformity to the existing Land-based press laws. Segments of this draft law were incorporated into a proposal by the Christian Democratic Union (CDU) and the Bavarian Christian Social Union (CSU). In 1952 the Christian Union Parties proposed a federal law bringing legal standardization to the existing press laws of the Länder. This draft law titled Referentenentwurf des Gesetzes über das Pressewesen (Bundespressegesetz) was introduced on 12 March 1952. In addition to the legal unification of press laws, the proposal included the establishment of public Press Committees (Presseausschüsse) at the national level with considerable regulatory powers. For partisan reasons the draft bill was not accepted at the Bundestag, but this failure was by no means the end of the nationalization process as there would be many other federal proposals for press regulation.

Meanwhile, the Federal and Länder governments actively encouraged the creation of nation-wide press associations. Accordingly, the German Press Council (Deutscher Presserat) was created in 1952 as an institution for the regulation of the press. The Press Council had no legal enforcement authority and depended on the cooperation of the newspapers, publishers and journalists, but its nation-wide mandate carried a lot of weight. The
statements of the German Press Council reflect the consensus shared by publishers and journalists concerning the need for uniform national press laws: 'The fact that in the Federal Republic of Germany today the press law is not uniform is considered increasingly to be an unsatisfactory situation' (Deutscher Presserat 1960: 17). The Press Council was also active in putting together a draft law for the unification of Land press legislation.

The need for a national standard in press laws was shared across the political spectrum. In 1960 the Standing Conference of Länder Interior Ministers established a joint Länder Commission to produce a draft Land press law which was to be the model for all the Länder. The outcome was the 1963 draft press law (Modell-Entwurf 1963). This model law allowed for the establishment and maintenance of a harmonized legal system for the press in the Federal Republic of Germany. As Sandford has put it: 'On the whole...the press laws of the ten Länder and West Berlin are very similar, and in some cases virtually identical, and this elevenfold duplication rarely causes any serious problems' (Sandford, 1976: 53). The standardization process along the 1963 draft press law was smoothly carried out. Even the strong Länder with enough resources to take independent action embraced the emergence of a German media policy. In a volume written by members of the Baden-Württemberg Ministry of Justice, the authors proudly announce Baden-Württemberg’s rapid adoption of this model draft law: 'Baden-Württemberg is thereby the first federal Land which has passed the draft model of the Land press law based on the Interior Ministers Conference of 10 January 1963' (Rebmann, Ott and Storz 1964: 5). Baden-Württemberg’s bureaucrats seem to have welcomed with enthusiasm such a centralizing measure bringing uniformity. The significance of this bill is described by the authors in the following terms: 'With the Land press law, Baden-Württemberg could therefore also provide an essential contribution to the legal uniformity in the federal territory' (Rebmann, Ott and Storz: 25).

Standardization was still not enough as the Federal government continued the efforts to bring the press under full Bund competence. In 1967 the Christian Democrats and Social Democrats agreed to set up a commission to come up with recommendations for a national regulation of the press, but the reports of the so-called Günther Commission did not lead to any major reform. The Social Democrat (SPD)/Free Democrat (FDP) coalition government in office from 1962 to 1982 under Chancellors Brandt and Schmidt also tried but failed to introduce a framework legislation for the regulation of press (Presserechtrahmengesetz). At the end of the day, the harmonization of Länder press laws obviated a need for a national press law since the legal system governing the press was already unified in practice.
According to Article 30 of the Basic Law, broadcasting falls under exclusive Land jurisdiction. The Länder thus have the right of legal supervision (Rechtsaufsicht) in the field of broadcasting. That is to say, the Länder legislate and oversee media law. Länder governments, however, have worked towards a nation-wide media policy by standardizing their broadcasting regulations. They have delegated broadcasting policy to nation-wide entities created either through the collective action of the Länder or the Bund. It should be noted, however, that the process of centralization has not been without controversy. The question of private broadcasting in the mid-1980s brought in an important stumbling block to the process. The public–private ownership dimension introduced a strong left–right axis thereby rendering a clear national consensus on the reform and governance of the media problematic. But even with the left–right axis, centralizing tendencies remained prevalent as both sides chose the federal level as the battleground.

The Early Days of Bund–Länder Cooperation

Attempts to overcome the decentralized media structure imposed by the Allies got underway immediately after the ratification of the Basic Law. However, the federal structure set up by Article 79 of the Basic Law is not subject to amendment and Article 30 gives the Länder exclusive competence over media. Changes had to operate around these constitutional clauses. There were many disagreements concerning various aspects of a potential nation-wide policy, but these disagreements were submerged within a collective effort to bypass the institutional barrier to national broadcasting.

The first example of collective Länder activism is the Preliminary Draft for a Federal Broadcasting Law (Vorläufiger Entwurf zu einem Bundesrundfunkgesetz) introduced by the Broadcasting Subcommittee of the Standing Conference of Ministers of Culture of the Länder (Der Unterausschuß Rundfunk der Ständigten Kultusministerkonferenz der Länder) on 15 July 1950. On December 7 of the same year a second draft was adopted by the Federal government which proposed the creation of a Broadcasting Advisory Board (Rundfunkbeirat). The draft law also called for changes in the regional demarcations between Länder broadcasting corporations. The proposed system would be administered by this advisory board composed of six representatives from the Länder broadcasting agencies and three representatives each from the Bundestag and the Bundesrat.

The early days of the Federal Republic were bustling with several initiatives from various political actors discussing the possibilities for change. On 9 May 1951, there was the first major debate in the Bundestag concerning the broadcasting policy. The now defunct Deutsche Partei (DP)
initiated the debate calling for a federal broadcasting policy. The Federal government ensured the Bundestag that it was making the unification of German broadcasting its first priority (Schütz 1999: 61). The process started by this debate eventually lead to the Federal government’s attempt to set up a national broadcasting corporation which will be discussed in detail later. Meanwhile the Länder continued their efforts to unify German broadcasting.

On 19 May 1953 the Länder governments signed an agreement establishing a Standing Commission for Broadcasting Questions (Ständige Kommission für Rundfunkfragen) in Bonn. This body was designed to coordinate Länder relations with the Federal government concerning broadcasting policy and relieve the Länder Kultusminister Konferenz of this task. The following step was to bring in the Federal government. The process for a comprehensive broadcasting treaty started on 13 January 1955 when a Bund–Länder Commission published the Draft General Broadcasting Treaty (Referentenentwurf für einen Allgemeinrundfunkvertrag) it had been working on and the draft was subsequently sent to the Federal and Land governments for discussion. The Draft Treaty aimed to establish a harmonized nation-wide broadcasting system for the Federal Republic of Germany. But the discussions ended without result and the draft was finally discarded in 1959. In the meantime, collaboration among Länder broadcasting corporations successfully resulted in a nation-wide entity.

ARD (Association of Public Broadcasting Corporations)

Following the ratification of the Basic Law, the Länder acquired control over the non-profit public broadcasting corporations established by the Western Allies. The Länder governments did not run the broadcasts themselves; rather the broadcasters were public corporations subject to the legal supervision of the Länder governments. In cases where a number of Länder shared a broadcasting corporation, inter-state treaties were signed. In 1950, the six Länder-based broadcasting corporations came together in the form of the Association of Public Broadcasting Corporations in West Germany (Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten in der Bundesrepublik Deutschland), referred to as ARD. The ARD statute signed on 9 June 1950 did not give ARD its own individual legal personality, but the association was to act as the base for future standardization. As stated in Article 2 of its statute, the aim of ARD is: ‘To look after the collective interests of the public broadcasting corporations in carrying out their sovereign rights in the field of broadcasting’ (Satzung der ARD, 9/10.6.1950, in Herrmann, 1977: 300).

Following its creation, ARD undertook an activist policy right away. On 29 September 1950 ARD Directors adopted a draft federal broadcasting law, which proposed the establishment of a broadcasting advisory board at
the federal level composed of representatives of Länder broadcasting corporations, the Bundestag and the Bundesrat. The draft law was almost identical to that proposed earlier by the Broadcasting Subcommittee of the Standing Conference of Ministers of Culture of the Länder (Der Unterausschuß Rundfunk der Ständigen Kultusministerkonferenz der Länder). On 12 June 1953 an agreement was signed which dealt with the production of common television broadcasting. The broadcasts started on 1 November 1954. In the meantime, Nordwestdeutscher Rundfunk, which was originally the public broadcasting corporation of the British zone of occupation, was divided into Westdeutscher Rundfunk and Norddeutscher Rundfunk, and the repatriated Saarland established its public broadcasting corporation. In 1956 these three new broadcasting corporations, together with Sender Freies Berlin, became ARD members. As a result, ARD included all 11 broadcasting corporations of the Länder (Bayerischer Rundfunk, Hessische Rundfunk, Norddeutscher Rundfunk, Radio Bremen, Saarländischer Rundfunk, Sender Freies Berlin, Süddeutscher Rundfunk, Südwestfunk, Westdeutscher Rundfunk). The two Federal broadcasting corporations (Deutsche Welle, Deutschlandfunk) and RIAS Berlin (the broadcasting corporation of the American Zone in Berlin) were also to participate in an advisory capacity.

The following decades witnessed closer cooperation between Länder broadcasting corporations as well as measures to rationalize ARD in terms of programming, production and technical issues. According to Günther Hermann, integration was justified by the public benefits which would ensue from ARD’s ability to carry out tasks more efficiently than individual Land-based broadcasting corporations:

Also for the broadcasting sphere united behaviour is obviously useful so that no further justification is needed when, for example, the joint behaviour of all broadcasting corporations in and through ARD (especially central institutions) is more efficient than the different separate activities of the individual broadcasting corporations (Herrmann 1994: 384).

Land broadcasting corporations also installed a system of financial equalization (Finanzausgleich) between themselves which aimed to channel resources from the rich broadcasting corporations to the poorer. An informal system of financial equalization had been in effect since the 8 April 1954 meeting of ARD Directors. In 1959, Länder broadcasting corporations signed a financial equalization treaty which institutionalized the pooling of resources. The scheme of financial equalization is interpreted by Albrecht Hesse in the following terms:
The differences in efficiency of the broadcasting corporations which resulted from the size differences of individual Länder were to be equalized in the course of boundary changes of the federal territory. However, the failure to make these changes made the search for other forms of equalization and cooperation between the Länder broadcasting corporations necessary (Hesse, 190: 149).

Since it was dependent on the financial performance of individual corporations, the system required constant revision. An additional administrative agreement was signed between the Länder broadcasting corporations on 11 August 1973. This formal financial integration between the Länder broadcasting corporations and the ARD consequently led to the establishment of a national centre for the collection of broadcasting fees (Gebühreneinzugzentrale, GEZ) in 1973. Underpinned by a common budget and administration, ARD has since become a truly national institution of German broadcasting.

Deutsche Welle, Deutschlandfunk, Deutschland Fernsehens GmbH

While the Länder were successfully pooling their resources within the context of ARD and setting up a nation-wide broadcasting entity, the Federal government was also taking initiatives in the field of broadcasting. On 14 August 1952 the Interior Ministry of the CDU/CSU government of Adenauer published a Federal Draft Law for Broadcasting (Referentwurf eines Bundesrundfunkgesetz). The law aimed to rationalize German broadcasting by reducing the number of Länder broadcasting corporations to six. There would be one northern corporation covering Lower-Saxony, Schleswig-Holstein, Bremen, and Hamburg; the north-western one would correspond to North Rhine-Westphalia; the western broadcasting corporation would cover the Rhineland Palatinate and Hesse; the south-western one would correspond to Baden-Württemberg and the southern one to Bavaria. But this section of the draft law faced strong objections from the Länder and was dropped in the subsequent version. The new version, titled Draft Law for Carrying Out Common Tasks in the Field of Broadcasting (Entwurf eines Gesetzes zur Wahrnehmung gemeinsamer Aufgaben auf dem Gebiet des Rundfunks), was published a year later on 20 February 1953. It was argued that the Länder-based broadcasting system was creating unnecessary diversity and there was a great deal of discrepancy due to this unbalanced institutional structure. The negative consequences of the Länder-based broadcasting system could be seen not only in terms of the quality of broadcasts, the proposal claimed, but there were financial disparities between the Länder broadcasting corporations which created many difficulties, many essential services were unnecessarily duplicated,
the ‘voice of Germany’ at the international level was weakened, and the multiplicity of government involvement was bringing in undue partisan politics to what should be a national policy.

The draft law was introduced in the Bundestag on 18 March 1953. It aimed to establish two national broadcasting corporations, Deutscher Rundfunk and Deutsche Welle. But facing strong opposition from the SPD and the Länder, the plan was dropped. In the following years attempts to come up with a comprehensive broadcasting treaty between the Bund and the Länder also proved to be unsuccessful. But based on the same proposal, the CDU/CSU government made a second attempt in 1957 to establish a national broadcasting corporation and presented a draft law to set up a second television channel (Deutschland Fernsehen GmbH) on 30 September 1959. As a part of the same bill, two national broadcasting corporations, Deutsche Welle and Deutschlandfunk, were created on 5 December 1960. These two stations were created to represent the interests of the nation. They were more internationally oriented, and they directed their broadcasts at East Germany in particular. Deutsche Welle’s mandate was for ‘broadcast transmission over the short wave for abroad’ (Rundfunksendungen über Kurzwelle für das Ausland), and Deutschlandfunk’s was for ‘broadcast transmission for Germany and European countries’ (Rundfunksendungen für Deutschland und das europäische-Ausland). Their creation, however, did not cause a controversy similar to that created by the second television channel.

In response to the establishment of a second television channel, the Länder Minister-Presidents Conference convened to prepare a collective response. The Länder challenged the constitutionality of the Federal government’s proposal before the Constitutional Court. In response, the Court delivered one of the most important rulings in the field of mass media. In its ruling delivered on 28 February 1961 the Court upheld the Länder competence in broadcasting: ‘It is the Länder, and not the Bund, which have competence in the field of the organization and programming of broadcasting’ (BverfGE, 1962: 205). The Court also affirmed broadcasting as a ‘cultural’ phenomenon within Land competence (BverfGE, 1962: 229). It is interesting to note that the ruling of the Court also included a section which criticized the Federal government for not cooperating with the Länder. The issue here seems to be the independent action of the Federal government not the level of governance. The Court ruled that the Federal government offended the principle of federal friendly behavior (Sandford 1976: 105). As a consequence, Deutschland Fernsehen GmbH was abolished, but Deutschlandfunk and Deutsche Welle remained, due to their international mandates.

This time period was characterized by intense national debates on the question of federalism in broadcasting and the need for a nationwide
broadcasting policy. Many interpreted the decentralized structure in the media as an impediment to a national cultural policy. Writing in 1960, Furchner epitomizes the sentiment felt at the time concerning the multiplicity of broadcasting corporations:

Many difficulties, which have resulted in the German broadcasting system from the fact that nation-wide tasks have not always been solved in accordance with their importance, can certainly be traced back to this organizational chaos (Furchner, 1960: 29).

In an article in the *Deutsche Tagespost*, titled “Federalism and the Reorganization of Broadcasting”, after acknowledging the constitutional impossibility of amending the federal foundations of the West German state as set up in Article 79(iii), Friedrich von der Heydte called for efforts to seek common solutions to the questions of broadcasting:

It is one of the largest mistakes of the federal structure of our Basic Law that it only recognizes a separation of competences and a division of tasks between the Bund and the Länder, but it does not acknowledge the common tasks that have to be carried out jointly by the Bund and the Länder….Above all these common tasks are found in the field of cultural policy. Nowhere is the mistake in the federal structure of the Basic Law of which I just spoke, clearer than here (von der Heydte, 1960: 50).

In order to solve this problem, Heydte suggested a rather odd interpretation of federalism:

Federalism can also mean the renunciation of competences for the sake of the common good. It can mean the transfer of sovereign rights – supposed and real sovereign rights – to the Foedus, to the Bund. (von der Heydte 1960: 52).

The two new broadcasting corporations which survived this storm, i.e. Deutsche Welle and Deutschlandfunk, were purely national bodies with no Länder representation. The composition of the broadcasting boards of these new corporations was similar to many nation-wide institutions. They included members from the two Federal Houses of Parliament, the Federal government, and representatives of Catholic and Protestant Churches. In the meantime, the Länder were continuing their collective action to establish a second national corporation for domestic broadcasting.

**ZDF (Second TV Channel)**

Following the Constitutional Court decision on 28 February 1961 which upheld the rights of the Länder against the Bund in the field of broadcasting,
the Länder pooled their resources again. Two weeks later on 17 March 1961
the Länder Minister-Presidents came together to establish a committee to
draw up a treaty for another nation-wide public broadcasting corporation.
Following the suggestions of this committee, ARD and the Länder wasted no
time and immediately established the public broadcasting corporation of the
second national television channel ZDF (Zweites Deutsches Fernsehen) on 6
June 1961. Two years later, on 1 April 1963, ZDF started its television
broadcasts to Germany. Art. 2 of the ZDF treaty clearly outlines the nation-
wide aims: ‘In its broadcasts, the corporation is obliged to convey to its
viewers in all of Germany an objective overview of world events, and
especially, an extensive picture of the German reality’ (in Fuhr 1972: 17).
The creation of ZDF was the outcome of a competition between the Länder
and the Federal government, but the administrative composition of this
corporation includes the federal level as well. The Administrative Board of
the ZDF is composed of nine members, three of which are appointed by the
Länder Minister-Presidents’ Council and one by the Federal government.
The remaining five are members of the Television Board of the ZDF selected
by the board itself. An important point here is that these five members can
only be members of a government or a legislature. The Television Board
includes one representative from each Land, three from the Federal
government, and 12 members from the Bundesrat in accordance with the
proportional strength of the political parties. Consequently, the
Administrative Board’s composition is bound to tilt towards the federal level.
The remaining members of the ZDF Television Board are representatives of
churches, unions, professional associations and community groups.
Although the Länder competed with the Federal government in setting up a
national broadcasting corporation, once established they brought in the
Federal government to this new entity. In due course, the Federal
Constitutional Court upheld the right of the Länder to form a common
broadcasting corporation through an inter-state treaty. In line with the
Constitutional Court’s decisions, in 1966 the Federal Administrative Court
ruled on the legality of a national authority set up by the Länder. A reading
of the decision shows that the Court not only accepted the legality, but also
the necessity of establishing such a nation-wide corporation.

In addition it should be noted that in spite of Article 30 there were
new, unanticipated state tasks which could not be ignored and which
could only be regulated in common or by a central authority for the
entire country, even though the Bund has no legal authority, and – at
least in the short term – could not be made responsible. This calls for
an interpretation and implementation of the Basic Law which would
enable the Länder to agree to uniform regulations as well as to
establish central authorities for the fulfillment of such tasks (BVerwGE 1966: 308).

This view was supported by scholars of media law who lent support to the centralization process by arguing that since ZDF did not monopolize all broadcasting in Germany and since the Länder broadcasting corporations would continue regional programming, the establishment of national broadcasting was not a violation of the Basic Law:

It should be cautiously noted that a joint Länder institution would appear to be inadmissible if it carries out original functions of the Länder in total or to a great extent. One joint broadcasting network established by the Länder for all publicly organized broadcasts, e.g. due to economic and political considerations, would be such a violation of the federal structure of the Federal Republic of Germany [italics in original] (Herrmann, 1994: 233).

It is worth reiterating the point that the Länder were a driving force in search of nation-wide solutions. A member of the Research Commission on Broadcasting Policy in the South West (i.e. Baden-Württemberg) explicitly came out in support of a broader nation-wide broadcasting policy in his 1969 report:

That the Länder in general have the authority for coordinating and harmonizing their tasks is certainly no longer a question which should be seriously discussed...The federal state principle does provide the Länder with the possibility of handling differently their constitutionally assigned sphere of tasks. But this right of divergence in the implementation of their given competences does not correspond to a duty of the Länder to engage in acts of disunity. (Stern 1969: 33)

Emergence of the Dual Public–Private System

Despite deep divisions between SPD and Christian Union parties, emergence of private broadcasting was a part of the nationalization process in the field of media. The interesting point concerning this conflict between the left and the right is that the choice of venue was once again the national level. In response to the private broadcasts which started in 1984, SPD members at the Bundestag brought the issue of broadcasting deregulation in the Land of Lower Saxony before the Federal Constitutional Court. The CDU government of Lower Saxony had allowed satellite-based private broadcasts by the company RTL. SPD politicians claimed that satellite broadcasting was a national issue which should not be decided by Land governments. Furthermore, SPD complained that deregulation ran the risk
of bringing media concentration, and consequently, a diminished diversity of opinion (Meinungsvielfalt). While SPD was seeking legal means to annul private broadcasting, business was lobbying for a federal policy regulating private satellite broadcasts. The Private Broadcast and Telecommunication Union (Verband Privater Rundfunk und Telekommunikation, VPRT) had acquired the support of the federal CDU/CSU/FDP coalition government for a common national regulatory framework. Meanwhile, the Länder Minister-Presidents Conference met in 1984 with the aim of reaching a common position on the issue. But they were unable to reach a compromise. The federal CDU/CSU/FDP coalition government seized the opportunity and forced the Länder governments into accepting a common policy on satellite broadcasting. The subsequent ruling of the Federal Constitutional Court was an endorsement of the dual system.

In its decision on Lower Saxony Media Law delivered on 4 November 1986, the Constitutional Court ruled that a dual system through public and private broadcasting was possible under the Basic Law. By citing the new cable and satellite technologies and the changing nature of broadcasting, the Court opened up the legal path for private broadcasting. In its past decisions, the Court had stressed the scarcity of frequencies and thus the need to maintain public service monopoly of broadcasting. At first glance, the Court’s decision seemed to be influenced by the new technologies and the availability of frequencies. But interestingly, the Court also suggested a recourse to the ‘principle of federal friendly behaviour’ for reaching a coherent nation-wide policy. As a part of its decision, the Federal Constitutional Court called for common action in the field of broadcasting and asked the Länder to harmonize their regulations. The Court ruled that satellite broadcasting was a national policy area, and therefore, individual Land regulation had to be replaced by a new inter-Land treaty.

It is clear that every political actor involved, from SPD to the Federal Constitutional Court, agreed on the nation-wide character of broadcasting policy but differed on the contents of such a policy. The Court’s decision subsequently opened up the possibility for an inter-state treaty (Staatsvertrag zur Neuordnung des Rundfunkwesens) brokered by the Federal government in April 1987. The new system effectively standardizes the media policies of the German Länder. In order to license and regulate private broadcasters, the Länder began to establish Land-based institutions for media regulation (Landesmedienanstalten) separate from the existing public broadcasting corporations. The establishment of these regulatory agencies was carried out with a high degree of standardization and federal involvement. Länder regulatory agencies for private broadcasting also formed a nation-wide association (Arbeitgemeinschaft der Landes-medienanstalten in der Bundesrepublik Deutschland) to harmonize their regulations.
German Unification

Two years before the unexpected turn of events opened up the path for unification, the West German Länder reached a comprehensive agreement on broadcasting. On 3 April 1987, Länder Minister-Presidents signed the State Treaty on the Reorganization of Broadcasting Systems (Staatsvertrag über die Neuordnung des Rundfunkwesens) which institutionalized the dual private–public broadcasting system. This treaty became the norm for united Germany. German unification brought the federal system to East Germany and introduced the constitutional clause of Länder cultural sovereignty. Article 26 of the Unification Treaty of 31 August 1990, called for the establishment of new public broadcasting corporations in the five new East German Länder. The new Länder were also asked to establish the necessary private broadcasting regulations based on the dual West German system.

Following unification, the 1987 State Treaty was expanded to include the new Länder. Despite Article 30 of the Basic Law on Länder cultural sovereignty, the East German Länder were asked to conform to the standard West German media policy. Accordingly, a new treaty titled the United Germany Broadcasting Treaty (Staatsvertrag über den Rundfunk im vereinten Deutschland) was signed on 31 August 1991 to establish a common framework of broadcasting for the united Federal Republic. The contradiction in granting cultural sovereignty to the new Länder and imposing a uniform media policy at the same time did not appear to violate the Constitution. This was followed by the 1997 inter-state treaty. Article 1 of this treaty states that ‘The purpose of the inter-state treaty is to bring uniform framework conditions in the following regulated electronic information and communication services in all of the Länder’ (Staatsvertrag über Mediendienste, 1997: 18). But the readiness to ignore the constitutional division of responsibilities in media policy is perhaps best exemplified by the following selection from the minutes attached to the 1997 inter-state treaty on media:

The Federal Government and the Länder have come to an understanding on July 1 1996 to create in the framework of their constitutional jurisdictions, a uniform legal framework in the form of a Federal Law and an inter-Land State Treaty. It was agreed that the necessary regulations should not be allowed to fail to materialize due to different interpretations of constitutional authority [italics added] (Staatsvertrag über Mediendienste, 1997: 25).
A GERMANY-WIDE MEDIA POLICY VS. LÄNDER CULTURAL SOVEREIGNTY

Despite partisan differences concerning the contents of public policies, attempts to reach an all-German media policy is a recurring theme in the Federal Republic of Germany. Due to the federal character of the Basic Law there will never be a truly unified media policy; however, through the collective action of the Länder and Bund-Länder cooperation, a standardized system for regulating and running the German media has emerged. This is a remarkable development considering that the Basic Law gave the Länder exclusive jurisdiction over media. The preceding sections dealing with the changes in mass media policy demonstrate the prevailing centralist pressures shared across the political spectrum. In particular, there appears to be an overall consensus which associates diversity with inefficiency. When deemed necessary, a constitutional clause which is believed to create unnecessary and inefficient diversity can be conveniently ignored. The widespread desire to surpass cultural federalism is described by Sandford in the following terms:

Politicians and the press are increasingly prone to point out that the present organization of broadcasting, with its lavish ninefold multiplication of resources, is a luxury that is hard to justify. The bulk of the material put out by the various radio and television services is not of local or regional nature, and could be produced much less expensively at a national level without detriment to the possibility of producing more and better programmes that are genuinely regional in character (Sandford, 1976: 130).

As the analysis of the last 50 years of media policy in the Federal Republic of Germany demonstrates, the institutional structure set up by the Allies failed to reproduce itself over time. Provincial jurisdiction did not lead to provincial politics. In fact, in response to the unitarist pressures of the societal life, the federal system itself changed within the parameters allowed by the non-amendable provisions of the Basic Law. Most interestingly, it was the Länder governments and Länder-based public broadcasting corporations which were the main agents in the nationalization of German media. These centralist initiatives originating from the substate level would certainly puzzle observers familiar with multination federations, especially when the centralist initiatives come not from the weak and small but from the big and strong Länder. In a report published in 1971, the Minister-President Heinz Kühn of Germany’s most populous and arguably strongest Land, North Rhine-Westphalia, calls for a ‘rationalization’ of the federal system (Kühn, 1971: 14). He argues that a five-Länder model is better, and he believes that such rationalization should
also be applied to public broadcasting corporations because of the cost-cutting possibilities and the needs for economic centralization:

It is surely not at all certain that we can cope with the future tasks with the federal system of institutions we have today. This holds true for the Länder as regards their constitutional tasks they have to carry out for their citizens in cultural, economic, social, administrative and other areas. And it is valid for the broadcasting corporations and their special function of providing communication services to their populations by broadcasting (Kühn, 1971: 8).

These ideas seem to be widely accepted across the political spectrum. In fact, a nation-wide approach to mass media appears to be the imperative of common sense to many German decision-makers and academics:

[The cooperation between the Länder is daily matter of course in the Federal Republic of Germany is taken for granted=CHECK TRANSLATION??]. And furthermore, cooperative federalism is a command of the Constitution – and of common sense! [sic] (Herrmann 1994: 155).

As a result of the combination of social pressures towards uniformity and constitutional caps to centralization, collective Länder public policy has almost become a substitute to a unitary state. Focus on public policies helps bring social and institutional perspectives closer, and in due course attaining a fuller comprehension of the political patterns at play. The two ideal models of federal state and unitary state are useful benchmarks to evaluate the political institutions, but a deeper understanding of the workings of the system can be attained by looking at the policies. The preceding analysis shows that in federations with non-federal societies, the workings of the system might be more unified than what the de jure federal structure suggests.

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NOTES

1. The term congruence is closely associated with Harry Eckstein. The first appearance of the notion of congruence is in his work on Norway. Here Eckstein reflected on the relationship
between authority patterns of the society (i.e. in families, schools, and economic organizations) and the authority patterns of the government. He believed that a congruence between authority patterns ensures stability (Eckstein 1966:186–92, 232–41). Eckstein continued exploring the notion of congruence throughout his career but never turned it into a general theory of congruence between social structure and political institutions. There are, however, useful theoretical insights that could be put to use in the study of nationalism, federalism and institutional change (Eckstein 1973; Eckstein and Gurr, 1975).

2. Canadian political scientists tend to make a distinction between ‘multination’ and ‘territorial’ federal systems (Kymlicka 1998, Chp.10; Resnick 1994: 71).

3. Details concerning the public broadcasting corporation in question, the ZDF, is provided later in the article.

4. There is a rich literature in English dealing with German media policy (for example, see Sandford, 1976; Humphreys, 1990; Hoffman-Riem, 1996; Porter and Hasselbach, 1991). Deutsche Welle continues to exist as an internationally oriented broadcasting corporation for the Federal government, Deutschlandfunk, on the other hand, ceased to exist with the broadcasting reorganization law of 20 December 1993 (Gesetz über die Neuordnung der Rundfunkanstalten des Bundesrechts und des RIAS Berlin, Rundfunkneuordnungsgesetz).

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