European Court of Human Rights: Three Recent Judgments on the Freedom of Expression and Information

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1. Hertel vs. Switzerland, 25 August 1998: the freedom of expression also extends to the criticising of certain economic goods, in casu microwave ovens.

In 1992 in an article in the quarterly Journal Franz Weber referred a research paper of Mr. Hertel on the effects on human beings of the consumption of food prepared in microwave ovens. According to the journal the research findings of Mr. Hertel scientifically proved the (carcinogenic) danger of microwave ovens. In an editorial by Mr. Weber it was argued that microwave ovens should be banned. Some extracts of the research paper were also published. The Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances started up proceedings against the editor of the journal and against Mr. Hertel under application of the Federal Unfair Competition Act (Section 3). While the application against the editor of the Journal was dismissed, in the case against Mr. Hertel the Berne Commercial Court allowed the application because the defendant had used unnecessarily wounding statements. Mr. Hertel was prohibited by the Court from stating that food prepared in microwave ovens was a danger to health and from using in publications and public speeches on microwave ovens the image of death. The imposed injunction was later confirmed by the Federal Court. Mr. Hertel applied to the European Commission for Human Rights, complaining especially of a violation of Article 10 of the European Convention of Human Rights. Just like the Commission in its report of 9 April 1997, the European Court comes to the conclusion that Mr. Hertel's freedom of expression was violated by this ban imposed on him by the Swiss Courts. Although the interference in the applicant's freedom of expression was prescribed by law and had a legitimate aim ("the protection of the rights of others"), the Court is of the opinion that the impugned measure was not necessary in a democratic society. The Court notes that there is a disparity between the measure and the behaviour it was intended to rectify. According to the Court "the effect of the injunction was partly to censor the applicant's work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied". And the Court emphasised : "It matters little that this opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas" (par. 50). By six votes to

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three the Court reached the conclusion that Article 10 of the European Convention was violated.

2. Lehideux and Isorni vs. France, 23 September 1998: a conviction because of an advertisement presenting in a positive light certain acts of Marshal Pétain is considered a violation of the right of freedom of expression.

On 13 July 1984 the newspaper Le Monde published a one-page advertisement bearing the title "People of France, you have short memories". The text presented Philippe Pétain, first as a soldier and later as French head of State under the Vichy Government, in a positive light. After a complaint by the National Association of Former Members of the Resistance a criminal procedure was started against Mr. Lehideux as the president of the Association for the Defence of the Memory of Marshal Pétain and against Mr. Isorni as the author of the text. The advertisement finally was estimated a public defence of the crimes of collaboration with the enemy, under application of section 23-24 of the Freedom of the Press Act of 29 July 1881 (Paris Court of Appeal 26 January 1990). The civil parties were awarded damages of one franc and publication of excerpts from the judgment in Le Monde was ordered. The Court of Cassation in its judgment of 16 November 1993 was of the opinion that this conviction did not infringe the right to freedom of expression protected by Article 10 of the European Convention.

The European Court in Strasbourg, sitting in Grand Chamber (21 judges), has now reached a different conclusion. Although the interference in the applicants' right to freedom of expression was prescribed by law and pursued the protection of the reputation or rights of others and the prevention of disorder or crime, the criminal conviction of Lehideux and Isorni was not estimated as "necessary in a democratic society". Although the Court recognises that the litigious advertisement presented Pétain in an entirely favourable light and did not mention any of the offences for which he was sentenced to death by the High Court of Justice in 1945, the Court also underlines that the text explicitly contains a disapproval of "Nazi atrocities and persecutions" and of "German omnipotence and barbarism". Although the Court estimates the omissions in the advertisement of any reference to the responsibility of Pétain for the persecution and deportation to the death camps of tens of thousands of Jews "morally reprehensible", it evaluates the advertisement as a whole in the light of a number of circumstances of the case. Referring to the different decisions and judgments during the domestic proceedings, to the fact that the events in issue occurred more than forty years ago and to the circumstance that the publication in issue corresponds directly to the object of the associations which produced it without any other proceedings have ever been brought against them for pursuing their object, the Court reaches the conclusion that the impugned interference in the applicants' rights violates Article 10. The Court also refers to the seriousness of a criminal conviction for publicly defending the crimes of collaboration, having regard to the

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existence of other means of intervention and rebuttal, particularly through civil remedies. Taking all this into consideration, the Court reaches the conclusion that the criminal conviction of the applicants was disproportionate and as such unnecessary in a democratic society. Therefore, the conviction of Lehideux and Isorni has been a breach of Article 10 (fifteen votes to six). Having reached this conclusion, the Court does not consider it appropriate to rule on the application of Article 17of the Convention (prohibition of abuse of rights).

3. Steel and others vs. United Kingdom, 23 September 1998: the arrest and detention of protesters for breach of the peace and the freedom of expression.

The judgment of the European Court in the case Steel and others concerns 3 different cases with an analogue issue: the interference by the British authorities against protest and demonstrations by ecological or peace movement activists. In all 3 cases the applicants were arrested and kept in custody some time for reason of "breach of peace". The first applicant, Ms. Steel, took part in a protest against a grouse shoot. She walked in front of a hunter's shotgun, preventing him from firing. The second applicant, Ms. Lush, took part in a protest against the building of an extension to a motorway. Three other applicants had taken part in a protest against the sale of military helicopters : their protest took the form of the distribution of leaflets and holding up banners in front of a conference centre. The Court recognises that although the protest by the first and second applicant took the form of physically impeding the activities of which the applicants disapproved, this behaviour could be considered as the expression of an opinion within the meaning of Article 10. With regard to both cases the Court is of the opinion however that the detention and the imprisonment was to be considered as "necessary in democratic society" for the interest in maintaining public order, the rule of law and the authority of the judiciary. With regard to the detention of the protesters against the military helicopters, the Court is of the opinion that this interference was not "prescribed by law", since the peaceful distribution of leaflets could not be considered as a breach of the peace. The Court does not find any indication that the applicants significantly obstructed or attempted to obstruct the conference taking place or that they took any other action likely to provoke others to violence. Additionally, the Court considered the interference in the applicants' right of freedom of expression as disproportionate to the aims of preventing disorder or protecting the rights of others. Unanimously the Court reached the conclusion that in this case there has been a violation of Article 10, just as there was a violation of Article 5, par. 1 of the Convention (right to liberty and security).

Hertel vs. Switzerland, 25 August 1998

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Lehideux and Isorni vs. France, 23 September 1998

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