European Court of Human Rights: Case of VGT Verein gegen Tierfabriken v. Switzerland

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In its judgment of 28 June 2001, the European Court of Human Rights has developed a remarkable approach with regard to the right of access to broadcast "non-commercial" television commercials. Although the judgment of the Court is essentialy declaratory, it can be interpreted as affording arguments for a "right to an antenna", ie a right of access to a particular media controlled by a third person.

The case originates in an application against Switzerland because of the refusal in 1994 by the AG für das Werbefernsehen (Commercial Television Company, now Publisuisse) to broadcast a commercial concerning animal welfare at the request of the Verein gegen Tierfabriken (Association against industrial animal production - VGT). The television commercial was to be considered as a response to the advertisements of the meat industry, and ended with the words "eat less meat, for the sake of your health, the animals and the environment". The Commercial Television Company refused to broadcast the commercial, however, because it considered it to be a message with a clear political character, and Swiss broadcasting law prohibits political advertisements on radio and television. The applicant's administrative law appeal was dismissed by the Bundesgericht (Federal Court) on 20 August 1997, relying inter alia on the legitimate aim of the prohibition of political advertising stated in Section 18 Paragraph 5 of the Federal Radio and Television Act.

The European Court of Human Rights in its judgment of 28 June 2001 agreed that a ban on political advertisements on television as such can be considered to have a legitimate aim, in order to prevent financially-strong groups from obtaining a competitive advantage in politics and to spare the political process from undue commercial influence. Such a ban can also help to provide for a certain equality of opportunity between political movements in society, and to support the press which remained free to publish political advertisements. The Court also agreed that the commercial could be regarded as "political" within the meaning of Section 18 Paragraph 5 of the Swiss Federal Radio and Television Act. Indeed, rather than inciting the public to purchase a particular product, it reflected some controversial opinions on an actual debate in society.

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On the decisive question of whether the refusal to broadcast the commercial was necessary in a democratic society, the Court took into account several factors. First of all, the Court observed that powerful financial groups obtain competitive advantages through commercial advertising and might therefore exercise pressure on, and eventually curtail, the freedom of the radio and television stations broadcasting the commercials. The Court underlined that such situations undermine the fundamental role of freedom of expression in a democratic society. Here, however, the applicant association, did not constitute a powerful financial group. Rather than seeking to abuse a competitive advantage, the association was intending to participate by means of its proposed commercial in an ongoing general debate on animal protection. Secondly: although a prohibition on political advertising can be compatible with the requirements of Article 10 of the Convention, the Court was of the opinion that Section 18 Paragraph 5 of the Swiss Federal Radio and Television Act was in casu not applied in accordance with Article 10 of the European Convention. According to the Strasbourg Court, the Swiss authorities had not demonstrated in a "relevant and sufficient" manner why the grounds generally advanced in support of the prohibition on political advertising also served to justify the interference in the particular circumstances of the case. Furthermore, the Court underlined that the domestic authorities did not adduce the disturbing nature of any particular sequence, or of any particular words of the commercial as a ground for refusing to broadcast it. Finally, it was also taken into consideration that the Commercial Television Company was the sole entity responsible for the broadcasting of commercials during programmes programmes broadcast nationally, which meant that there were few other possibilities to reach the entire Swiss public with the proposed advertisement.

In light of all these elements, the Court held unanimously that the refusal to broadcast VGT's commercial could not be considered as necessary in a democratic society and that consequently there had been a violation of Article 10 of the European Convention.

This judgment will become final in the circumstances set out in Article 44 of the Convention. Within 3 months any party in the case may request a rehearing by the Grand Chamber of the Court.

Judgment by the European Court of Human Rights (Second Section), Case of VGT Verein gegen Tierfabriken v. Switzerland, Application no. 24699/94 of 28 June 2001

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