

[MT] Recent Case Law on Political Advertising

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*Kevin Aquilina
Faculty of Laws, University of Malta*

On 3 November 2006, the Maltese Constitutional Court delivered a judgment finding the Malta Broadcasting Authority to be in breach of freedom of expression. On 17 August 2000, Smash Television faxed the Broadcasting Authority a transcript of a political spot that the General Workers Union had submitted to Smash TV for broadcasting. The Authority informed Smash Television that this spot was in breach of the Broadcasting Act which prohibits political advertising unless such a spot is broadcast within a scheme of political broadcasts organised by the Broadcasting Authority. The message of the spot was as follows: "What justice is this? There are those who are comfortable and those who have to carry all the burdens. There are those who are filthy rich and those who have to struggle to maintain a decent standard of living [...]. It is very easy to turn to the wage-earner and to pensioners to collect as many taxes as possible [...]. Why should we turn the clock back? Is this just? You can also give your contribution".

On 3 June 2005, the Civil Court decided that the advert was of a political nature but it did not appear reasonable to the Court that a person wanting to air a political advert on television should request the Broadcasting Authority to organise a scheme of political broadcasts as the Authority could always refuse to organise such a scheme. Although it acknowledged that the Authority is obliged to ensure that balance is maintained where matters of political or industrial controversy are concerned, such a balance could not however be ensured by prohibiting the broadcast of a political advert. The Court opined that one has the right to express oneself and if there is any balance to be maintained, this should be achieved by means of adequate regulations through which a balance is ensured even if the first advert is a paid advert. These regulations should then also establish how this advert could be counter-balanced.

The Court held the Union had the freedom to express its opinions even if these opinions were of a political nature and even by way of paid adverts. It also had the right to impart information as to its opinion without being hindered by a public authority. The Broadcasting Authority had acted unreasonably when it applied the law and regulations in question by prohibiting such an advert; such a decision not being required in a democratic society. Therefore the Authority was not justified to prohibit the broadcast of this political spot.

The Civil Court quoted the judgment of the ECHR of 28 June 2001 in the case of VGT Verein Gagen Tierfabriken v. Switzerland. In its decision, the ECHR held that the prohibition to broadcast an advert by an association amounted to interference by a public authority in the exercise of the fundamental freedom guaranteed by Article 10 of the European Convention of Human Rights and that a prohibition of political advertising was permissible only “to protect public opinion from the pressures of powerful financial groups and from undue commercial influence; to provide for a certain equality of opportunity between the different forces of society; to ensure the independence of broadcasters in editorial matters from powerful sponsors and to support the press”. In the Civil Court’s opinion, the facts of the case pending before it did not fall within any one of these cases mentioned by the European Court of Human Rights.

In the judgment of 3 November 2006, the Constitutional Court held that the *a priori* and total prohibition to broadcast a political advert solely based on the Broadcasting Authority’s decision clashed with the principle of proportionality which was required by the legitimate aim to be achieved and the means used to achieve it. To achieve impartiality, there was no need for political advertising to be subject to the approval of the Broadcasting Authority.

There was no pressing social need for prohibiting a political advert. Nor did it result in any complaint from a political party, union or other constituted body wishing to offer a rebuttal. The Authority’s prohibition, even if through the application of a clear provision of ordinary law as the court of first instance correctly held, was not reasonably justifiable in a democratic society, bearing in mind the importance which freedom of expression, especially in matters of political controversy, has in a democratic country. The Constitutional Court thus rejected the Broadcasting Authority’s appeal.

Constitutional Court, judgment of 3 November 2006

