[AT] ORF's Broadcasting Freedom in Conflict with Journalistic Freedom

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In a judgment of 14 March 2013, the Verfassungsgerichtshof (Constitutional Court - VfGH) decided that Österreichischer Rundfunk (ORF), by virtue of the broadcasting freedom guaranteed under the Constitution, can give specific instructions to its journalists on how they should prepare their reports.

The decision followed a circular email sent by the deputy editor of ORF's Lower Austrian regional studio in July 2011, instructing its journalistic staff not to describe the man responsible for the attacks in Norway as a "Christian fundamentalist". In a decision of 28 March 2012, the Bundeskommunikationssenat (Federal Communications Senate - BKS) stated that the instruction infringed the freedom of journalistic expression, protected under Article 32(1)(1) of the ORF-Gesetz (ORF Act - ORF-G). Instructions from superiors should be primarily aimed at improving the effectiveness of reporting. The more they concerned content or editorial matters, the more they interfered with the freedom mentioned in Article 32(1)(1) ORF-G.

ORF appealed to the VfGH against the BKS's decision and argued that its broadcasting freedom was a specific example of the right to freedom of expression enshrined in Article 10(1) of the European Convention on Human Rights (ECHR) and Article 1(2) of the Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks (Federal Constitutional Act concerning the Safeguarding of the Independence of Broadcasting - BVG-Rundfunk).

The court ruled that Article 32(1) ORF-G was a restriction prescribed by law, as required under Article 10(2) ECHR. However, it thought that the BKS's understanding of the freedom of journalistic expression was unconstitutional. A right to the unrestricted distribution of programmes with particular content could not be based on either Article 32(1) ORF-G or Article 1(2) BVG-Rundfunk. Rather, in non-constitutional law, Article 33(1)(1) ORF-G and ORF's editorial status that was based on this provision, and in constitutional law, the aforementioned Article 1(2) BVG-Rundfunk provided for a fundamental right to issue instructions relating to content and editorial matters.

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Such exertions of influence were therefore admissible as long as they were necessary to meet the obligations to be objective and unbiased, and to protect plurality of opinion. ORF could therefore decide whether particular reports should be broadcast at all. It was therefore logical that it should be able to influence programme content.

Article 32(1) ORF-G could therefore be breached if an unreasonable restriction was imposed, e.g., if an instruction was designed to suppress particular facts. This was not the case here, since the deputy editor had only banned the term "Christian fundamentalist" because, when the instruction was issued, the views of the man responsible were still not definitely known. The instruction had been designed to ensure objective reporting and therefore to serve ORF's public remit, rather than to suppress a fact.

The VfGH therefore decided that the BKS's decision that the instruction was unlawful violated ORF's broadcasting freedom.

Erkenntnis des Verfassungsgerichtshofs vom 14. März 2013 (Az. B 518/12-7)

http://images.derstandard.at/2013/04/04/ORFE-Mail.pdf

Judgment of the Constitutional Court of 14 March 2013 (case no. B 518/12-7)

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