

[DE] Complaints about Shock Advertising Ban Upheld

IRIS 2001-2:1/29

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In a judgment of 8 November 2000, the first chamber of the Bundesverfassungsgericht (Federal Constitutional Court) overturned rulings by the Bundesgerichtshof (Federal Supreme Court - BGH), which had prohibited the appellant, a press firm, from printing three advertisements for the Benetton company.

The BGH had deemed the advertisements, which contained images of child labour, a duck covered in oil and an HIV carrier, to be immoral on the grounds that the portrayal of serious human and animal suffering was likely to arouse feelings of sympathy which were being exploited without good reason for advertising purposes.

However, the Constitutional Court ruled that banning the advertisements contravened the freedom of the press.

The Court began by arguing that even the publication of an outside, commercial advertisement was protected by the freedom of the press. This basic right was not, however, guaranteed without restriction. However, contrary to the BGH's opinion, banning these images could not be justified on the basis of Article 1 of the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG), which in a general sense prohibits competitive activities such as press advertising if they offend common decency, because restricting the freedom of the press was only possible on the grounds of important public interests or the rights of third parties.

Confronting the reader with unpleasant or pitiable images was acceptable because the need to protect citizens from such social phenomena as shown by these pictures was not so great that the State should restrict basic freedoms, even if many people disapproved of the advertisement.

Also, the lack of relationship between the pictures and the products being advertised did not give rise to a nuisance that affected the rights of others, since many modern advertising techniques did not establish such a relationship and were seen as positive rather than arousing feelings of pity. Even though the Benetton advertisements did not criticise the terrible situations depicted, they could not simply be condemned because they were protected by the freedom of the press enshrined in Article 5 of the Grundgesetz (Basic Law).

The Court disagreed with the BGH's view that the portrayal of AIDS sufferers was a breach of human rights, since it was not necessarily to be interpreted as excluding these people from human society, but rather as an accusatory reference to the danger that AIDS sufferers might be or were already excluded. On this basis, the picture certainly did not constitute a breach of human dignity.

Urteil des Bundesverfassungsgerichtes vom 12. Dezember 2000, Az.: 1 BvR 1762/95 und 1 BvR 1787/95

Ruling of the Bundesverfassungsgericht (Federal Constitutional Court), 12 December 2000, case nos. 1 BvR 1762/95 and 1 BvR 1787/95

