[DE] Constitutional Court Overturns Shock Advertising Ruling Again

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The highest German courts still cannot agree on the meaning and scope of human dignity as a restriction on freedom of expression. In a decision of 11 March 2003, the Bundesverfassungsgericht (Federal Constitutional CourtBVerfG) quashed a ruling made on 6 December 2001 by the Bundesgerichtshof (Federal Supreme Court - BGH) in a dispute relating to competition law (see IRIS 2002-2: 14) and referred the case back to the BGH for a review. In the same case, on 12 December 2000 the BVerfG had overturned and referred back the BGH's first ruling of 6 July 1995 (see IRIS 2001-2: 13). The BGH had subsequently issued a further decision, which has now been quashed.

The dispute concerns an advertisement for the Benetton company, depicting part of a naked human bottom on which the words "H.I.V. Positive" were stamped. Below the image, on the right hand side, were the words "UNITED COLORS OF BENETTON". Both courts agree that this advertisement could (also) be interpreted as a criticism of society, while at the same time serving a selfish commercial purpose. However, they draw different conclusions to the question of whether the dignity of AIDS sufferers is breached by the image. While the BGH believes it infringes human dignity, which is protected by Article 1.1 of the Grundgesetz (Basic Law - GG), the BVerfG disagrees.

The BGH's view was essentially based on the argument that this "shock advertising" exploited the affliction of HIV sufferers and their stigmatisation by society for economic advantage. AIDS sufferers and their fate were portrayed as objects that could be used to generate profit through advertising. Attention-grabbing advertisements that exploited people's suffering for commercial advantage were incompatible with Article 1.1 of the GG. An appeal for solidarity with people in need was cynical and breached their right to respect and human solidarity if it was linked to a commercial strategy designed to increase business turnover in a completely unrelated field.

The BVerfG has now decided that the BGH's ruling breaches a fundamental right of the plaintiff, a press firm, enshrined in Art. 5.1.2 of the Basic Law (freedom of the press). Under the freedom of the press, the company was entitled to rely on the freedom of expression guaranteed in Art. 5.1.1 of the Basic Law. The freedom of the press covered third-party opinions contained in advertisements. In its assessment of the advertisement with regard to competition law, the BGH had

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misjudged the meaning and scope of human dignity as a restriction on freedom of expression. In fact, human dignity set an absolute limit on freedom of expression. If an opinion expressed in an advertisement infringed human dignity, it was inadmissible regardless of any breach of competition law. However, since fundamental rights were, on the whole, practical expressions of the principle of human dignity, a specific reason would always need to be given for any decision that the exercise of a fundamental right was in breach of human dignity, which was sacrosanct. Using this yardstick, the attention-grabbing nature of the advertisement did not, on its own, mean that it breached human dignity. The advertisement itself merely drew attention to the suffering of the people concerned and left it to members of the public to draw their own interpretation. The fact that the advertiser also sought to profit from the public attention created by the image did not justify the harsh accusation that it had breached human dignity.

Federal Constitutional Court, 11 March 2003, case no.: 1 BvR 426/02

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