H e a d n o t e s

to the Judgement of the First Senate of 12 December 2000

- 1 BvR 1762/95 -

- 1 BvR 1787/95 -

1. **A magazine publisher's right to freedom of the press can be violated if the publisher is prohibited from publishing advertisements with regard to which the advertiser enjoys the protection of the freedom of expression.**
2. **Constitutional judgement on image-building advertising that raised themes critical of society (Benetton advertisements).**

FEDERAL CONSTITUTIONAL COURT

- 1 BVR 1762/95 -
- 1 BVR 1787/95 -

Pronounced
12 December 2000
Kehrwecker
Amtsinspektor
Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

of Gruner + Jahr AG & Co. KG,
represented by its unlimited partner Druck- und Verlagshaus Gruner + Jahr AG,
the unlimited partner being represented by the chairman of the management board,
Gerd Schulte-Hillen, Am Baumwall 11, Hamburg,

- authorised representative: Professor Dr. Gunnar Folke Schuppert,
Unter den Linden 6, Berlin -

against a) the judgement of the Bundesgerichtshof (Federal Court of Justice) of 6 July 1995 - I ZR 180/94 -

- 1 BVR 1762/95 -,

b) the judgement of the Federal Court of Justice of 6 July 1995 - I ZR 110/93 -

- 1 BVR 1787/95 –

the First Senate of the Federal Constitutional Court, with the participation of Judges

Papier (Vice-President),
Kühling,
Jaeger,
Hömig,
Steiner, and
Hohmann-Dennhardt

issued the following

Judgement

on account of the oral argument of 8 November 2000:

The judgements of the Federal Court of Justice of 6 July 1995 - I ZR 180/94 and I ZR 110/93 - violate the complainant's fundamental right under Article 5.1 sent. 2, first part, of the Basic Law. They are reversed.

The matters are remanded to the Federal Court of Justice.

The Federal Republic of Germany shall reimburse the complainant the necessary expenses.

Extract from grounds:

A.

1 In its constitutional complaint the complainant, a publishing company, challenges two judgements of the Federal Court of Justice that prohibited the complainant's publication of advertisements of Benetton on grounds of their unconscionability (§ 1 of the *Gesetz gegen den unlauteren Wettbewerb,* UWG, German Unfair Competition Act; hereinafter referred to as UWG).

I.

2 The illustrated magazine "Stern", which is published by the complainant, published three advertisements of Benetton, a company which sells clothing world-wide. One of the advertisements showed an oil-covered duck floating on an oil slick. Another advertisement depicted children of different ages at hard labour in a Third World setting. The third advertisement consisted of the photograph of naked human buttocks with the words "H.I.V. POSITIVE" stamped on them. In a corner of each of the photographs, there was the note "United Colors of Benetton" in a green square. The first two advertisements mentioned above are at issue in the constitutional complaint 1 BvR 1787/95; the constitutional complaint 1 BvR 1762/95 concerns the third advertisement.

3 The *Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.* (Central Institute for Combating Unfair Competition, a registered association), requested the complainant to refrain from publishing these advertisements. When the complainant refused to do so, the Central Institute for Combating Unfair Competition brought the cases before the courts. The *Landgericht* (Regional Court) ruled in favour of the plaintiff. The complainant's appeals before the Federal Court of Justice, after bypassing the *Oberlandesgericht* (Higher Regional Court), were unsuccessful. . . .

II.

4 The Federal Court of Justice gave the following grounds for the challenged decisions:

5 1. On account of their advertising effect, which makes the company better known, the first two advertisements (oil-covered duck, child labour) constitute an act of competition under § 1 of the UWG. The grounds for the reproach of unconscionability are, in essence, that, by combining the depiction of misery with a reference to its own

name, the company that placed the advertisements provokes feelings of pity and helplessness among a considerable number of consumers. The Federal Court of Justice concluded that by doing so, the company presents itself as equally concerned about the content of the photographs and thus succeeds in establishing that consumers addressed in this way identify, in their attitude, with the name, and, at the same time, with the economic activities of the company. The Federal Court of Justice took the position that whoever, by depicting great suffering of humans and animals in business transactions, exploits feelings of pity for competitive purposes without any acceptable basis for doing so, transgresses the bounds of public policy as regards competition even if the advertising activities concerned are not connected with specific products. . . .

According to the Federal Court of Justice, those who engage in business activities are allowed to publicly give their views on events that are important for society in order to make themselves better known or to increase their reputation in the interest of their business. Under competition law, such behaviour is, in principle, not objectionable. However, the assessment of such activities from the point of view of competition law leads to a different result if the public statement does not make a significant contribution to the discussion on the respective issue but only intends to create among the consumers a feeling of identification with the company that places the advertisement, which serves to increase the company's reputation and thus, is ultimately exploited for commercial reasons. The Federal Court of Justice held that this is the case in the matter at issue. The Federal Court of Justice concluded that Benetton's advertising campaign limits itself to denouncing the misery of the world while using this misery to establish the consumers' identification with the name of the company by playing, *inter alia*, upon their feelings of pity and helplessness. 6

The Federal Court of Justice concluded that by publishing the advertisements, the complainant itself had performed an act of competition. . . . It is true that, within the scope of the freedom of the press, the company that published the advertisements is only liable for acts of advertising that are grossly and recognisably anti-competitive. Such acts are not at issue here. The Federal Court of Justice asserted, however, that the order to refrain from publication is well-founded on account of the fact that an *Erstbegehungsgefahr* exists (*i.e.* the risk that the defendant will perform an impermissible act in a blameworthy way for the first time). 7

. . .

2. In its judgement on the third advertisement (H.I.V. POSITIVE), the Federal Court of Justice reaffirmed the above-mentioned principles concerning the interpretation of § 1 of the UWG and added that in the present case an advertisement depicting AIDS patients as "branded" and excluded not only exploits feelings of pity but also grossly violates the principles that concern the safeguarding of human dignity. The Court concluded that such an advertisement transgresses the bounds of what can be classified as merely tasteless. Tasteless advertising, as such, cannot be criticised by the courts. . . . The Federal Court of Justice found that the field of competition law must 8

also counteract desensitisation concerning discrimination against persons who are afflicted by suffering and the emergence of a mentality of "branding" people. This especially applies to younger people who look at this advertisement, as they do not necessarily draw a comparison to past manifestations of the exclusion of persons from society. . . .

9 The Federal Court of Justice concluded that, as the scope of the infringement of competition law had been easily recognisable, the fact that the Regional Court had derived a liability of the complainant from the complainant's non-observance of the obligation to refrain from the publication of the advertisement was not objectionable.

III.

10 By way of its constitutional complaints, the complainant asserts that the judgements in the proceedings on appeal constituted a violation of Articles 5.1(1) and 5.1(2) of the Basic Law.

11 1. In the proceedings 1 BvR 1787/95 (oil-covered duck and child labour), the complainant argued that the challenged judgement . . . is based on a fundamentally erroneous view of the meaning of Article 5 of the Basic Law because the judgement, on account of the commercial purpose of the statement, does not grant the protection provided by this fundamental right to a statement that: (1) has an obviously political and social content; and (2) is highly topical as concerns the public interest. The complainant further argued that the challenged judgement is based on a fundamentally erroneous view of the meaning of Article 5 of the Basic Law because it does not allow a balancing of the protection of this fundamental right with competing legal interests. . . .

12 The complainant argued that the Federal Court of Justice

. . . regards . . . the increase in sales as the sole purpose of the advertisement because, in the Court's opinion, the advertisements do not make any substantial contribution to the debate on the deplorable situations that they depict. Actually, the advertisements contain, in the complainant's opinion, statements on topical political and social problems. Images of this type can be directly understood, and stimulate discussion, even without an additional context or a verbal expression of their content. . . . Even if it is taken into account that advertising has changed in the contemporary media and leisure society, an advertisement cannot from the outset be denied the characterisation as a contribution to the formation of the public opinion on the grounds that its purpose is advertising. . . .

13 In the opinion of the complainant, the conclusions of the Federal Court of Justice establish neither a reference to a protected interest that is related to competition nor to a jeopardising of the conditions that are necessary for competition to function. . . . The complainant argued that emotional advertising as such is by no means anti-competitive. Modern advertising . . . frequently forgoes the connection to a specific product and intends to achieve an identification between a lifestyle and the company

name or brand name.

. . . Benetton has made this approach the core element of its advertising campaign. Unlike other advertising campaigns, however, this campaign does not aim at achieving an escape from reality by establishing a reference to the beauty of the world, dreams of equality, hopes for peace or to physical closeness. Unlike this type of emotional advertising, which has not been criticised by the courts as yet, the Benetton advertisements denounce the situation of the real world and provoke reflection or protest. The complainant argued that, by permitting emotional advertising that shows an intact world, while at the same time banning advertisements that show the real world, the Federal Court of Justice also violates the principle of equality before the law.

Finally, the complainant claimed that by assuming that an *Erstbegehungsgefahr* exists, the Federal Court of justice also violated the freedom of the press. . . . 14

2. In the proceedings 1 BvR 1762/95 (H.I.V. POSITIVE), the complainant additionally argued that the photograph draws the attention to a political and social problem that exists in the real world, namely to the situation of HIV-infected persons. The advertising purpose, which can be inferred from the fact that the name of the company is shown, comes second to the impressive image. 15

In the opinion of the complainant, the Federal Court of Justice also violated the complainant's rights under Article 5.1 of the Basic Law by assuming a violation of human dignity and by basing its ruling, that the complainant is liable as an organ of the press, on this assumption. . . . The Federal Court of Justice did not prove that the advertisement, in a degrading way, converts the persons concerned into mere objects or into instruments with which commercial interests are pursued. The Federal Court of Justice did not allege that the depiction in itself - *i.e.,* irrespective of the name of the company - violates human dignity. The mere reference to the company that placed the advertisement cannot substantiate the allegation of such a violation. The combination of the striking image with the purpose of advertising does not increase the social stigmatisation of AIDS patients. . . . The complainant argued, to the contrary, that an image of this type can be utilised to draw public attention to the situation of persons who are infected with the HIV virus. 16

. . .

IV.

Opinions regarding the constitutional complaints have been given . . . by: (1) the plaintiff in the original proceedings; (2) the *Bundeskartellamt* (Federal Cartel Office); (3) the *Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht e.V.* (German Association for the Protection of Industrial Property and Intellectual Property, a registered association); (4) the *Deutsche Industrie- und Handelstag* (Federation of German Chambers of Industry and Commerce); (5) the *Zentralverband der Deutschen Werbewirtschaft ZAW e.V.* (Central Association of the German Advertising Industry, ZAW, a registered association); and (6) the *Arbeitsgemeinschaft der* 17

Verbraucherverbände e.V. (Working Group of Consumer Associations, a registered association). . . .

B. 18

19 The constitutional complaints are well-founded. Both judgements of the Federal Court of Justice that are challenged by the complainant violate the complainant's freedom of the press guaranteed by Article 5.1 sent. 2, first part, of the Basic Law.

I.

20 1. The scope of protection of the freedom of the press comprises the entire content of an organ of the press, *inter alia* advertisements (cf. BVerfGE [Decisions of the Federal Constitutional Court] 21, p. 271 [at pp. 278-279]; BVerfGE 64, p. 108 [at p. 114]). To the extent that statements of third parties' opinions that enjoy the protection of Article 5.1(1) of the Basic Law are published in an organ of the press, the freedom of the press includes the protection of these statements; an organ of the press must not be prohibited from publishing a statement of a third party's opinion if the original holder of the opinion is to be permitted to express and propagate it. . . .

21 The protection provided by Article 5.1(1) of the Basic Law, which, in this context, is embedded in the protection of the freedom of the press, also extends to the expression of opinions for commercial purposes and to nothing other than business advertising that expresses a value judgement and contributes to the formation of opinions (cf. BVerfGE 71, p. 162 [at p. 175]). To the extent that the statement of an opinion - a view, a value judgement or a specific perspective - is expressed in an image, such an image also falls under the scope of Article 5.1(1) (cf. BVerfGE 30, p. 336 [at p. 352]; BVerfGE 71, P. 162 [at p. 175]).

22 All three advertising photographs at issue comply with these prerequisites. They illustrate general injustices (environmental pollution, child labour, exclusion of HIV-infected persons) and thus contain at the same time a (negative) value judgement on socially and politically relevant questions. The images at issue are expressive, and their content contributes to the formation of opinions. The challenged judgements also part from this assumption when they hold that the advertisements denounce the misery of the world. The expression of opinions that pursue this intention and draw the attention of citizens to general injustices particularly enjoy the protection of Article 5.1(1) of the Basic Law (cf. BVerfGE 28, p. 191 [at p. 202]).

23 The fact that Benetton deals with the above-mentioned subjects in the framework of nothing other than image-building advertising, that it refrains from any comment and only makes itself known by the company logo makes no difference. It is true that this approach can lead to the impression that the company that placed the advertisement is not interested in making a contribution to the formation of opinions but only in drawing attention to the company itself. Such an interpretation, which questions a subjective relationship of the person making a statement to the content of the statement, is not the only possible interpretation; it is not even a particularly obvious one. In public

perception, the messages that emanate from the advertisements are, in fact, assigned to Benetton and are regarded as the company's own opinion, and the courts have not expressed any doubts in this respect. The photographer Oliviero Toscani, who designed the advertisements, is also of the opinion that Benetton uses them as "vehicle" to divulge "an anti-racist and cosmopolitan attitude that is free of taboos" (Oliviero Toscani, *Die Werbung ist ein lächelndes Aas*, 3rd ed., 2000, p. 44).

2. The ban on publishing Benetton's controversial advertisements again in the illustrated weekly "Stern", which was confirmed in the challenged judgements, restricts the complainant's freedom of the press. . . . 24

3. This ban is not constitutionally justified. 25

a) § 1 of the UWG, on which the Federal Court of Justice relies when justifying its ban on the publication of the advertisements at issue, is a general law under the terms of Article 5.2 of the Basic Law (cf. BVerfGE 62, p. 230 [at p. 245]; BVerfGE 85, p. 248 [at p. 263]). It serves to protect competitors in the market, consumers and other actors in the market, and to protect the general public . . . . These aims are in accord with the *Wertordnung,* (*i.e.*, the spirit), of the Basic Law (cf. BVerfGE 32, p. 311 [at p. 316]). 26

b) To the extent that the complainant alleges that § 1 of the UWG is not specific enough or, from the outset, not accessible to interpretation in cases of the type at issue, this allegation cannot be supported. . . . 27

c) . . . The fact that the risk of an *Erstbegehungsgefahr* is inferred from the behaviour of the publishing company during the proceedings does not violate the freedom of the press. . . . 28

d) The complainant, however, successfully asserted that the Federal Court of Justice, in its assessment of the advertisements under competition law, misjudged the meaning and the scope of the freedom of expression. 29

aa) . . . The challenged judgements are based on § 1 of the UWG, *i.e.,* on a civil-law provision. The interpretation of civil law and its application to the specific case is the competence of the civil-law courts. The Federal Constitutional Court can only interfere if mistakes become apparent that are caused by a fundamentally erroneous view of the meaning of a fundamental right, in particular of the extent of its scope of protection; and if the meaning of the mistake, as far as substance is concerned, is also of some relevance for the legal questions at issue in this case (cf. BVerfGE 18, P. 85 [at pp. 92-93]; established case law). This is true here. 30

bb) Certainly, the Federal Court of Justice has recognised correctly that the advertisements are statements of opinions whose subjects are economic, political, social and cultural problems and that they therefore enjoy the protection of Article 5.1(1) of the Basic Law to a particularly high degree. In their interpretation of § 1 of the UWG and, as regards the third advertisement (H.I.V. POSITIVE), in the application of this 31

provision, the challenged judgements, however, do not do justice to the meaning and the scope of this fundamental right.

32 Restrictions of the freedom of the press, which is a right that is an essential element of the free and democratic order of a state (cf. BVerfGE 20, p. 56 [at p. 97]; established case law), require, in principle, that such a restriction is justified either by sufficient reasons of public interest or by rights and interests of third parties that are worthy of protection. This particularly applies to critical opinions regarding social and political questions. The challenged judgements, however, do not provide any indications in this respect, nor are such indications otherwise apparent.

33 aaa) According to the conclusion of the Federal Court of Justice, § 1 of the UWG prohibits an advertising behaviour that, by depicting great suffering of humans and animals, provokes pity and, without any acceptable basis for doing so, exploits this feeling for competitive purposes, as the advertiser presents itself as equally concerned about the deplorable situations that are shown and thus achieves an identification of the consumers with the advertiser's name and business activities.

34 This judgement, with which the Federal Court of Justice, by interpreting § 1 of the UWG, establishes the unconscionability of the advertisements, is quite acceptable as a social convention and is, as such, probably accepted by large parts of the population. The reason for this is the wish to live in a society whose response to suffering is not the insensitive pursuit of profit but empathy and remedial measures, *i.e.,* a response that primarily refers to the suffering itself. It cannot, however, be discerned right away whether such a convention also protects sufficiently important public or private interests.

35 bbb) The Federal Court of Justice itself probably does not assume that the advertisements significantly annoy the public, as the plaintiff in the original proceedings alleges. The Federal Court of Justice does not regard violations of good taste or a shocking design of advertisements as unconscionable as defined by § 1 UWG. This is not constitutionally objectionable. An annoying effect that is strong enough to justify regulations that restrict fundamental rights cannot be inferred from the mere fact that the media confront the public with unpleasant realities, or realities that provoke pity, outside their editorial sections. This also applies if it is assumed, as the German Association for the Protection of Industrial Property and Intellectual Property assumes, that a general increase of this type of advertising will occur due to imitation. To assure that the citizens' minds are not burdened by the misery of the world is not an interest for which the state is allowed to restrict fundamental rights. The assessment may be different if the pictures shown are disgusting, terrifying or liable to corrupt the young.

36 To the extent that the plaintiff in the original proceedings classifies the advertisements as intrusive and annoying because their suggestive power appeals to consumers' feelings that have no connection with the products or the business activities of the company that placed the advertisement, this line of argument cannot be supported. Today's advertising is largely characterised by the aim of attracting attention

and gaining a positive response by using emotional motifs. Commercial advertising with images whose suggestive power arouses libidinous wishes, evokes the urge for freedom and independence or promises the splendour of societal prominence is ubiquitous. It may be true, as the plaintiff in the original proceedings alleges, that consumers are "inure" *vis-à-vis* such motifs. Such a habituation, however, does not justify the attribution of annoying effects to advertisements that appeal to the feeling of pity, which has not been put to such use as excessively so far.

ccc) The interests of the company's competitors or the principle of competition of performance are also not affected. . . . Image-building advertising that is independent of the advertised product has become an established practice without recognisably affecting the principle of competition of performance. Competitors that regard a comparable type of advertisement as suitable for promoting their business can make use of it just like Benetton does. 37

ddd) The protection of the depicted persons is, if at all, only at issue in the "child labour" advertisement. It is, however, not discernible that the depicted children's rights are affected. . . . The depicted children cannot be discerned as individuals. Apart from this, the way in which they are shown provokes pity but is neither derogatory nor in any other way negative. The advertising context as such is not sufficient to allege a violation of human claims for respect. 38

eee) The public interest is not concerned here. It is obvious that the protection of the environment, which has been raised to the rank of an aim of the state by Article 20a of the Basic Law, is not impaired by the advertisement that concerns this subject (oil-covered duck). It cannot be found, at least as regards the advertisements at issue, that commercial advertising that denounces inhuman conditions (child labour, branding of HIV-infected persons), could promote tendencies towards brutalisation and towards the dulling of sensitivity in our society and could be detrimental to a culture of humanity when dealing with suffering. 39

cc) Altogether, standing alone, the principle that compassion for great suffering must not be aroused and exploited for advertising purposes, which has been described by the Federal Court of Justice as a component of *boni mores* in the commercial field, does not justify the order to refrain from publication in the light of the fundamental right under Article 5.1(1) of the Basic Law. As has been shown, the public interest or interests of private individuals that are worthy of protection are not affected. 40

On the other hand, the ban constitutes a serious impairment of the freedom of expression. The advertisements draw the attention to socially and politically relevant issues and are also suitable for gaining public attention for these issues. The special protection that Article 5.1(1) of the Basic Law provides particularly for this form of expression is not diminished by the fact that they, in the opinion of the Federal Court of Justice, do not make any substantial contribution to the debate on the deplorable situations that they depict. The (mere) denouncement of an injustice can also be an im- 41

portant contribution to the free exchange of ideas. Whether a statement presents new aspects or whether it refrains from suggesting a solution, does not, in principle, influence the protection of the fundamental right under Article 5.1(1) of the Basic Law. This protection exists independently of: (1) whether an opinion is rational or emotional, well-founded or without substance, and (2) whether others regard it as useful or harmful, valuable or worthless (cf. BVerfGE 30, p. 336 [at p. 347]; 93, p. 266 [at p. 289] with further references).

The denouncing effect of the advertisements, which are critical of society, is not called into question by the advertising context. The fact that social problems are addressed in advertisements is certainly unusual, and it may indeed appear strange due to the connection that is established with the object of business of Benetton. This, however, does not call the seriousness of the message into question, even for someone who looks at the images in an objective way. If this were different, the images could not provoke pity in such an person. 42

dd) All this leads to the conclusion that the Federal Court of Justice, by establishing a *Lauterkeitsregel* (standard of sincerity) upon which it based its decision, has interpreted § 1 of the UWG in a way that does not stand up to review in the light of the freedom of expression. For this reason alone, the above-mentioned provision, in the interpretation of the Federal Court of Justice, is not a suitable basis for an encroachment upon the complainant's free-press rights. Therefore, the judgement concerning 1 BvR 1787/95 (oil-covered duck, child labour), which only relied on the interpretation of § 1 of the UWG in accordance with the above-mentioned standard is to be reversed. The matter is to be remanded to the Federal Court of Justice. 43

ee) The challenged judgement in the matter 1 BvR 1762/95 does not only rely on the interpretation of § 1 of the UWG that has already been discussed. The Federal Court of Justice regarded the advertisement at issue in these proceedings (H.I.V. POSITIVE) as anti-competitive also because it grossly violates the principles of safeguarding human dignity by presenting AIDS patients as "branded" and thus excluded from human society. 44

aaa) These conclusions can basically be affirmed. If § 1 of the UWG is interpreted in such a way that pictorial advertising that violates the human dignity of the persons depicted is contrary to public policy, this interpretation is constitutionally unobjectionable. It takes a protected interest into consideration that justifies restrictions of the freedom of expression, even in the particularly sensitive area of social and political criticism. Article 1.1 of the Basic Law obliges the state to protect all human beings from attacks on human dignity, like humiliation, branding, persecution, ostracism, etc. (cf. BVerfGE 1, p. 97 [at p. 104]). Advertisements that, in a manner that violates human dignity, exclude individuals or groups of persons from human society or that disparage, deride or ridicule them in any other way, can, in principle be banned under competition law even if they enjoy the protection of the fundamental rights regarding communication provided by Article 5 of the Basic Law or any other protection provid- 45

ed by fundamental rights.

bbb) The application of these principles to the advertisement in question (H.I.V. POSITIVE), however, does not stand up to review under the standard of Article 5.1(1) of the Basic Law. In principle, the interpretation of opinions that are protected by Article 5.1(1) of the Basic Law is only subject to review by the Federal Constitutional Court to the extent that the Federal Constitutional Court is to safeguard compliance with the constitutional requirements. It is not the task of the Federal Constitutional Court to take a final decision about the meaning of a statement at issue or to substitute an interpretation that had been made in compliance with the constitutional requirements with an interpretation that it regards as more appropriate. One of the constitutional requirements, however, is that the statement be interpreted in its context and that it is not assigned a meaning that it cannot objectively have. In the case of ambiguous statements, the courts must, in awareness of the ambiguity, deal with the different possibilities of interpretation and must give plausible reasons for the solution that they have found (cf. BVerfGE 94, p. 1 [at pp. 10-11]). 46

The Federal Court of Justice interprets the "H.I.V. POSITIVE" advertisement in such a way that it represents AIDS patients as "branded" and thus excluded from human society. Elsewhere, it says that the advertisement stigmatises AIDS patients in their suffering and excludes them from society. . . . According to this position, this advertisement must, at least by HIV-infected persons, be regarded as grossly offensive and as a violation of their human dignity, but other persons that see this advertisement cannot avoid this effect either. 47

This advertisement, however, cannot be interpreted unambiguously in this sense. Without giving any comment, it shows a person who appears to be stamped "H.I.V. POSITIVE". It is not obvious that this manner of presentation confirms, emphasises or even belittles the scandalous perspective (which, however, is not far removed from reality) that HIV-infected persons are discriminated against and excluded from society. The interpretation saying that the advertisement is supposed to draw, with an accusing tendency, attention to a situation that is worthy of criticism, *i.e.,* the exclusion of HIV-infected persons, is at least as likely. As the complainant correctly remarks, this photograph could also advertise a congress on AIDS. 48

The imagery that is employed here is certainly sensational and, in a conventional sense, improper. Of the depicted person, one sees nothing but the upper half of his or her naked buttocks, on which, in black capital letters, the abbreviation "H.I.V.", and diagonally below it, the word "POSITIVE" appear as if they had been stamped there. This alone, however, does neither suggest cynicism nor an affirmative tendency. The presentation is, corresponding to the medium, *i.e.,* an advertisement, meant to catch the viewer's attention. 49

An interpretation of the advertisement that sees it as a critical appeal is not called into question by the advertising context. The fact that a company in the clothing industry employs serious socio-political issues for its image-building advertising is unusual 50

and constitutes a marked contrast to the public image that its competitors in the industry usually promote of themselves. This may foster doubts concerning the seriousness of the critical intention and may be perceived as offensive under the terms of the *Lauterkeitsregel* (obligation of sincerity) that has been formulated by the Federal Court of Justice. The impression, however, that the advertisement, for its part, stigmatises or excludes HIV-infected persons, is also not created by the advertising context. Its critical tendency and its stirring effect remain obvious. This would possibly be different if the advertisement advertised a specific product; the connection with specific commodities or goods could result in a ridiculing or belittling effect. The note "United Colors of Benetton" alone, however, does not produce such an effect. In comparison, the interpretation that the Federal Court of Justice gives the advertisement, according to which it violates the human dignity of AIDS patients, appears considerably less obvious, in any case, it is not the only possible interpretation. This is also shown in the statement of the photographer Oliviero Toscani about this advertisement: "With this poster, I wanted to show that Benetton is still willing to intervene, as we stand up against the exclusion of AIDS patients with the same force as against racism." (*loc. cit*., p. 78).

51 ff) This means that the judgement challenged by way of the constitutional complaint 1 BvR 1762/95 (H.I.V. POSITIVE) does not comply with the requirements that are to be placed upon the interpretation of opinions in the interest of the protection of the freedom of expression. The Federal Court of Justice misjudged the obvious possibility that the advertisement was supposed to direct the public attention, with a critical intention, to the actually existing discrimination against AIDS patients and their exclusion from society. If the advertisement is interpreted in this manner, there is no violation of the human dignity of AIDS patients. When dealing anew with the matter, the Federal Constitutional Court will have to examine the alternative interpretation that has been indicated.

II.

52 As the challenged judgements are to be reversed on account of a violation of Article 5.1 sent. 2, first part, of the Basic Law, the infringement of the general principle of equality before the law, which has been raised by the complainant as well, and the possible violation of Article 5.3 of the Basic Law do not have to be addressed.

Papier	Kühling	Jaeger
Hömig	Steiner	Hohmann-Dennhardt

Bundesverfassungsgericht, Urteil des Ersten Senats vom 12. Dezember 2000 - 1 BvR 1762/95

Zitiervorschlag BVerfG, Urteil des Ersten Senats vom 12. Dezember 2000 - 1 BvR 1762/95 - Rn. (1 - 52), http://www.bverfg.de/e/rs20001212_1bvr176295en.html

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