

## More Disagreement Over Human Dignity: Federal Constitutional Court's Most Recent Benetton Advertising Decision

By Craig Smith\*

Article 1 is the Basic Law's crown. The concept of human dignity is this crown's jewel: an interest so precious that the state must affirmatively protect and foster its inviolability. This uniquely important status is evident from human dignity's prominence in the constitution, the early Federal Republic's pressing need to repudiate the Third Reich, the many judicial and scholarly exegeses of Article 1, and human dignity's unique claim to absolute protection. The success of the German legal construct of human dignity also is apparent from its influence on the European Union's Charter of Fundamental Rights. That document likewise begins with a provision nearly identical to the Basic Law's Article 1.<sup>1</sup>

Human dignity is also one of the most elusive concepts in German constitutional law. It is the "foundation of all fundamental rights," which in turn collectively are *Konkretisierungen* (concretizations or concrete forms) of the Basic Law's "principle of human dignity."<sup>2</sup> Elusive concepts offer judges great power because they are sufficiently malleable to mean many different things to well-meaning interpreters. The malleability of the Basic Law's human dignity concept has been prominently displayed in recent years. Disagreements over its substantive content have bounced back and forth in Karlsruhe between two of Germany's most important courts in the *Benetton Advertising Cases*. Twice the *Bundesgerichtshof* (BGH – Federal Court of Justice) has discerned a violation of human dignity in a Benetton print advertise-

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\* Assistant Professor of Law and Director of Legal Writing, Vanderbilt University Law School. B.A. William & Mary 1985; J.D. Michigan 1991; LL.M. Potsdam University, Germany 1995. Member of the Board of Editors of GERMAN LAW JOURNAL.

<sup>1</sup> Charter of Fundamental Rights of the European Union, Ofcl. J. E.C. 2000/C 364/01.

<sup>2</sup> BVerfG 1 BvR 426/02 of 11 March 2003, Slip Opinion ¶ 26 (available at [http://www.bverfg.de/entscheidungen/rs20030311\\_1bvr042602.html](http://www.bverfg.de/entscheidungen/rs20030311_1bvr042602.html)).

ment.<sup>3</sup> The ad displayed, above the clothing company's name in small letters, naked human buttocks stamped with the phrase "H.I.V. POSITIVE." Twice now, however, the *Bundesverfassungsgericht* (BVerfG – Federal Constitutional Court) has overruled its Karlsruhe neighbor.<sup>4</sup> It did so most recently on March 11, 2003, holding that Article 1 of the Basic Law does not justify banning the press from distributing an advertiser's depiction of suffering even though the purpose of that depiction is to generate commercial profits.

The Federal Court of Justice first upheld prohibition of the Benetton ad and of others like it in 1995. The Court concluded that publication of the ad violated the *gute Sitten* (good morals or customs) requirement imposed by the *Gesetz gegen den Unlauteren Wettbewerb* (UWG – Unfair Competition Act). By depicting persons infected with the AIDS virus as stamped, stigmatized, and excluded from society, the Court explained, the ad unlawfully engendered pity among consumers and exploited this feeling for competitive commercial purposes.<sup>5</sup> The ad also would have to be viewed at least by AIDS sufferers as injurious to human dignity.<sup>6</sup>

The Federal Constitutional Court's December 2000 opinion reversed this holding. The Court remanded the case to the Federal Court of Justice with instructions to reinterpret the ad using proper conceptions of human dignity and of the freedoms of expression and the press protected by the Basic Law's Article 5.<sup>7</sup> The judges were in particular told to view the ad as subject to varying interpretations. They also were told not to construe Article 5 of the Basic Law as permitting prohibition of an ad simply because the ad exploits "empathy with grave suffering" for commercial purposes.<sup>8</sup> Freedom of the press does not shield ads that violate human dignity from liability under the Unfair Competition Act, the Court explained.<sup>9</sup> The

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<sup>3</sup> BGH I ZR 180/94 (6 July 1995); BGHZ 149, 247 (I ZR 284/00, 6 December 2001), Slip Opinion available at <http://www.bundesgerichtshof.de/>. See German Law Journal, Volume 2, Number 1 (15 January 2001).

<sup>4</sup> The first decision (BVerfGE 102, 347) came on 12 December 2000. See German Law Journal, Volume 2, Number 1 (15 January 2001). The second is BVerfG 1 BvR 426/02 of 11 March 2003.

<sup>5</sup> See BVerfGE 102, 347, Slip Opinion at ¶¶ 5, 10, 68 (summarizing BGH I ZR 180/94 of 6 July 1995); BVerfG 1 BvR 426/02 of 11 March 2003, Slip Opinion at ¶ 3 (same).

<sup>6</sup> BVerfGE 102, 347, Slip Opinion at ¶¶ 10, 68 (summarizing BGH I ZR 180/94 of 6 July 1995).

<sup>7</sup> *Id.* at ¶ 72.

<sup>8</sup> *Id.* at ¶ 61.

<sup>9</sup> *Id.* at ¶ 66.

Federal Court of Justice, however, had improperly overlooked possible interpretations of the ad, and under these interpretations the ad would not violate human dignity.<sup>10</sup> Consequently, banning the ads violated freedom of the press.<sup>11</sup>

On reconsideration of the case, the Federal Court of Justice again found a violation of the Unfair Competition Act.<sup>12</sup> The Constitutional Court's decision of December 2000 did not, the Federal Court of Justice reasoned, require judges to rely on factual evidence regarding how the public actually viewed the ad. To the contrary, the judges could rely on their general life experience in determining the meaning and impact of the ad.<sup>13</sup> This time, however, the judges concluded that the ad was a provocation that communicated no particular message.<sup>14</sup> The ad instead aimed to gain viewers' attention and then left them to interpret and evaluate the ad freely.<sup>15</sup> The ad perhaps called for solidarity with suffering human beings, but only cynically; profit was the real motive.<sup>16</sup> A vast majority of AIDS sufferers would feel that the ad minimized or demeaned their human dignity, and this violated their right to enjoy respect and compassionate solidarity.<sup>17</sup> Hence the ad *misused* a depiction of suffering: The ad violated human dignity by using such a depiction simply for the advertiser's commercial purposes of provoking viewers to gain attention and increase profits.<sup>18</sup> In addition, publishing the ad constituted unfair competition because the ad could harass the public, engendering fear of AIDS and unacceptably confronting persons affected by AIDS with their own suffering in the form of advertising.<sup>19</sup> With this revised reasoning, the Federal Court of Justice reinstated the

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> BGHZ 149, 247 (6 December 2001).

<sup>13</sup> *Id.*, Slip Opinion at 26-27.

<sup>14</sup> BVerfG 1 BvR 426/02 of 11 March 2003, Slip Opinion at ¶¶ 5-7 (summarizing BGHZ 149, 247).

<sup>15</sup> *Id.*

<sup>16</sup> BGHZ 149, 247 (6 December 2001), Slip Opinion at 26-27.

<sup>17</sup> *Id.* at 14.

<sup>18</sup> *Id.* at 24-25.

<sup>19</sup> *Id.* at 27-28. See BVerfG 1 BvR 426/02 of 11 March 2003, Slip Opinion at ¶ 28 (summarizing BGHZ 149, 247).

legal conclusion that the Federal Constitutional Court had rejected in December 2000: publishing the ad violated the Unfair Competition Act's *gute Sitten* requirement.

Responding in March 2003, the Federal Constitutional Court first repeated the assertion, from its December 2000 opinion, that the ad fell within the scope or protective realm (*Schutzbereich*) of press freedom under the Basic Law's Art. 5(1).<sup>20</sup> The ad cannot, the Court wrote, be reduced to the mere intention to gain attention for the advertiser.<sup>21</sup> The ad instead makes a social problem visible. Therefore, the ad has opinion-forming content.<sup>22</sup>

The Federal Constitutional Court then acknowledged that it lacks power to correct an interpretive error by the Federal Court of Justice unless that error has substantive weight in the case and rests on a fundamentally incorrect view of a basic right.<sup>23</sup> This rule imposes a high threshold the Federal Constitutional Court must cross before it can reverse a decision of the Court of Justice. Nonetheless, the Federal Constitutional Court concluded that the Federal Court of Justice had again committed such a grave error, thereby unjustifiably restricting freedom of the press.<sup>24</sup>

This time the error lay not, however, in improperly interpreting the ad's meaning. To the contrary, the Federal Court of Justice had, as instructed by the Federal Constitutional Court in its December 2000 decision, correctly found that the ad did not suggest that the advertiser approved of stigmatizing AIDS sufferers. To the contrary, the ad could be understood positively as social criticism.<sup>25</sup> Moreover, the Federal Court of Justice had correctly distinguished this expressive *content* of the ad from the advertiser's expressive *purpose* – namely, increasing profits by gaining the public's attention.<sup>26</sup> This purpose forms part of the expression's context; hence it

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<sup>20</sup> BVerfG 1 BvR 426/02 of 11 March 2003, Slip Opinion at 16. Art. 5(1) GG states in part: "Everyone has the right to freely express and disseminate his opinion in speech, writing, and pictures .... Freedom of the press ... [is] guaranteed."

<sup>21</sup> BVerfG 1 BvR 426/02 of 11 March 2003, Slip Opinion at ¶ 16.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at ¶ 18 (citing BVerfGE 18, 85 (92-93)).

<sup>24</sup> *Id.* at ¶ 17.

<sup>25</sup> *Id.* at ¶ 22. See BGHZ 149, 247 (6 December 2001), Slip Opinion at 8-9.

<sup>26</sup> *Id.* at ¶¶ 23-24.

could indeed affect the ad's meaning.<sup>27</sup> The purpose could not, however, exclude or contradict the potential social-criticism meaning.<sup>28</sup> One cannot conclude, the Federal Constitutional Court wrote, that the advertiser intended *only* to gain attention and to profit.<sup>29</sup> Rather, this purpose and the critical meaning coexist "side by side" and without contradiction.<sup>30</sup> Consequently, the Federal Court of Justice had correctly assumed that viewers could regard the ad as expressing a critical opinion.<sup>31</sup>

The Federal Court of Justice seriously erred, however, by using the ad's purpose to establish a violation of human dignity. This use revealed a misinterpretation of the scope of the limitation on freedom of expression created by Article 1's human-dignity protection.<sup>32</sup> The advertisement employs the misery of AIDS sufferers for commercial purposes, the Federal Constitutional Court conceded.<sup>33</sup> Noncommercial depictions of suffering may be morally preferable, the Court added, but they are not constitutionally required.<sup>34</sup> An ad's *content* can justify prohibition of the ad as violative of human dignity under Unfair Competition Act.<sup>35</sup> But an ad's commercial *purpose* cannot.<sup>36</sup> The Federal Court of Justice, the Federal Constitutional Court concluded, improperly ruled that a profit motive can, by itself, rob an ad's message of the constitutionally mandated respect for human beings that the message otherwise possesses, thereby transforming a protected expression into an infringement of the constitution.<sup>37</sup>

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<sup>27</sup> *Id.* at ¶ 24.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at ¶¶ 21, 27.

<sup>34</sup> *Id.* at ¶ 27.

<sup>35</sup> *Id.* at ¶ 26.

<sup>36</sup> *Id.* at ¶ 27.

<sup>37</sup> *Id.*

The Federal Constitutional Court also rejected the Federal Court of Justice's additional reasoning. Protecting the public from *Belästigung* (harassment) likewise does not justify prohibiting an ad whose content addresses suffering without violating human dignity.<sup>38</sup>

The opinion of the Federal Constitutional Court thus intriguingly seems to assert that the Basic Law makes the purpose of an advertiser's expression both relevant and irrelevant. Attention to the use and timing of this consideration may offer the best hope of unraveling this apparent paradox: Purpose is initially relevant as context but later irrelevant as a separate consideration. Initially, as the state examines the expression's meaning, the advertiser's purpose may be relevant because it is context for the expression, and context can affect the expression's meaning.<sup>39</sup> The meaning must then be determinative, by itself, of whether the expression is compatible with Article 1's protection of human dignity. Thereafter, however – that is, once the meaning has been evaluated – the expression's purpose lacks further relevance. It then cannot, by itself, change the constitutional analysis. Under this interpretation, the Federal Court of Justice's error lay in regarding the advertiser's profit motive as decisive even *after* the Court had judicially evaluated the Benetton ad's meaning.<sup>40</sup> The Court failed to distinguish between expressive purpose as initially relevant context and subsequently irrelevant *dross*.

How useful such a distinction regarding advertisers' purposes will prove to be in future cases is an open and interesting question. Could an advertiser's purpose decisively influence the meaning and constitutionality of that advertiser's expression? Could the state for example use the Unfair Competition Act to prohibit, as violative of human dignity, an advertisement that, though difficult to interpret, seems designed to help the advertiser not just profit commercially but also at the same time exploit and foment racial hatred? This Benetton opinion provides little help in answering such a question, but the question unfortunately seems not to lie beyond the realm of possibility.

Finally, the key to the Federal Constitutional Court's decision may lie in the opinion's final paragraph. Here the Court explicitly names "reality" as a compelling reason for judicial restraint in the case: Forbidding commercial advertisements

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<sup>38</sup> *Id.* at ¶ 28.

<sup>39</sup> *Id.* at ¶ 24 ( "Because the advertising purpose forms part of the social-criticism message's context, this purpose can influence the message's meaning." ).

<sup>40</sup> *Id.* at ¶ 25.

from addressing suffering would leave no place for a substantial portion of today's advertising, which is ubiquitous and powerfully influential over people's views, values, and opinions.<sup>41</sup> The Court did not add that use of commercial law to forbid widespread and powerful messages might soon overwhelm judges with the task of closely policing advertising. But little imagination is needed to reach that conclusion. The Court instead simply reminded its readers that expression merits special protection whenever it addresses society's problems.

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<sup>41</sup> *Id.* at ¶ 29.