COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF BARTHOLD v. GERMANY

(Application no. 8734/79)

JUDGMENT

STRASBOURG

25 March 1985

In the Barthold case*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. Thór VILHJÁLMSSON,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. L.-E. PETTITI,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. GERSING,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 October 1984 and 25 February 1985,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 12 October 1983, within the period of three months laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. The case originated in an application (no. 8734/79) against the Federal Republic of Germany lodged with the Commission on 13 July 1979 under Article 25 (art. 25) by a national of that State, Dr. Sigurd Barthold, a veterinary surgeon.

2. The Commission's request refers to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Federal Republic of Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The purpose of the request was to obtain a decision as to whether the facts of the case disclose a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention.

3. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Dr. Barthold stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

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* The case is numbered 10/1983/66/101. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

4. The Chamber of seven judges to be constituted included, as ex officio members, Mr. R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b)). On 27 October 1983, the President of the Court drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. Thór Vilhjálmsson, Mrs. D. Bindschedler-Robert, Mr. E. Garcia de Enterria, Mr. L.-E. Pettiti and Mr. J. Gersing (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43), Rule 21-4). Mr. C. Russo, substitute judge, subsequently replaced Mr. E. Garcia de Enterria, who was prevented from taking part in the consideration of the case (Rule 22 para. 1 and Rule 24 para. 1).

5. Having assumed the office of President of the Chamber (Rule 21 para. 5), Mr. Wiarda consulted, through the Deputy Registrar, the Agent of the German Government ("the Government"), the Commission's Delegate and the lawyer for the applicant regarding the need for a written procedure (Rule 37 para. 1). On 8 December, he directed that the Agent and the applicant's lawyer should each have until 1 March 1984 to file a memorial and that the Delegate should be entitled to reply in writing within two months from the date of the transmission to him by the Registrar of whichever of the aforesaid memorials should last be filed.

The President twice extended the time-limit accorded to the Agent: on 21 February until 30 March, and then on 5 April until 11 May.

On 21 February, the President granted the applicant's lawyer leave to use the German language (Rule 27 para. 3).

6. The memorial of the applicant was received at the registry on 21 February, and that of the Government on 11 May.

Acceding to a request by the Government, the President decided on 14 May that a document submitted by the Agent on 11 May should be neither published nor made available to the public.

On 18 May, the Agent communicated several other documents to the Registrar.

On 11 July, the Secretary to the Commission informed the Registrar that the Delegate would present his observations at the hearings.

7. On 12 July, the President set 23 October as the date for the opening of the oral proceedings, having first consulted the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant through the Deputy Registrar (Rule 38). On 2 October, he gave leave for those appearing on behalf of the Government to use the German language at the hearings (Rule 27 para. 2).

8. On various dates between 24 July and 18 October, the Commission, the applicant and the Government, as the case may be, lodged a number of documents and submissions with the registry, either at the request of the President or of their own motion.

9. The hearings took place in public on 23 October 1984 at the Human Rights Building in Strasbourg. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mrs. I. MAIER, Ministerialdirigentin
at the Federal Ministry of Justice, *Agent*,
Mrs. E. STEUP, Ministerialrätin
at the Federal Ministry of Justice,
Mr. H. VIEHMANN, Ministerialrat
at the Federal Ministry of Justice, *Advisers*;

- for the Commission

Mr. F. ERMACORA, *Delegate*;

- for the applicant

Mr. E. Eyl, RECHTSANWALT, *Counsel*.

The Court heard addresses by Mrs. Maier for the Government, by Mr. Ermacora for the Commission and by Mr. Eyl for the applicant, as well as their replies to its questions. During the course of the hearings, the Agent of the Government submitted several documents to the Court.

AS TO THE FACTS

10. Dr. Barthold, who was born in 1926, is a veterinary surgeon practising in Hamburg-Fuhlsbüttel. In 1978 and until March 1980, his practice operated as a "veterinary clinic", of which there were eight in Hamburg at the time. He closed down this clinic on 5 March 1980 but subsequently re-opened it on 1 January 1983.

11. By virtue of the Hamburg Veterinary Surgeons' Council Act of 26 June 1964 (Tierärztekammergesetz - "the 1964 Act"), the applicant is a member of the Hamburg Veterinary Surgeons' Council, whose task, among other things, is to ensure that its members comply with their professional obligations (section 1 and section 3 sub-section no. 2 of the 1964 Act). These obligations are laid down principally in the Rules of Professional Conduct of Hamburg Veterinary Surgeons (Berufsordnung der Hamburger Tierärzteschaft - "the Rules of Professional Conduct"), which were promulgated on 16 January 1970 by the Council in pursuance of section 8 sub-section 1 no. 1 of the 1964 Act and approved on 10 February 1970 by the Government (Senat) of the Land of Hamburg (section 8 sub-section 3).

12. As the director and proprietor of a clinic, Dr. Barthold provided a round-the-clock emergency service (Rule 19 of the Rules of Professional Conduct and Regulation 2 of the Regulations of 27 August 1975 on the Establishment of Veterinary Clinics - Richtlinien zur Einrichtung von

tierärztlichen Kliniken; see also paragraph 29 below). This was not necessarily the case as far as other veterinary surgeons were concerned (praktische Tierärzte - see paragraph 28 below).

From 1974 onwards, the applicant - who was one of the authors of the above-mentioned Regulations and who had insisted on the provision of a round-the-clock service by clinics - advocated within the Council that a regular night service involving the participation, by rota, of all veterinary surgeons should be organised. However, the majority of his colleagues voted on two occasions, on 19 December 1974 and 7 December 1979, against such a proposal (see also paragraph 28 below).

I. THE CIRCUMSTANCES OF THE CASE

A. The article published on 24 August 1978 in the "Hamburger Abendblatt"

13. On 24 August 1978, there appeared in the daily newspaper Hamburger Abendblatt an article signed by Mrs. B, a journalist, and entitled "Tierärzte ab 20 Uhr schwer erreichbar - Warum ‘Shalen’ die Nacht doch noch überlebte" ("Veterinary surgeons hard to reach after 8 p.m. - why "Shalen" managed to survive the night after all").

The article, 146 lines and 4 columns long, comprised an introductory paragraph and in brackets, in bolder type, the three following sub-heads: "Auf eine spätere Zeit vertröstet" ("Put off until later"), "Unfreundliche Absage" ("Unfriendly refusal") and "Zur Not hilft die Polizei" ("Police to the rescue").

The introductory paragraph, in bold type, read as follows:

> "When the owner of a domestic pet needs help at night for his beloved animal, he may often become desperate: not one veterinary surgeon can be contacted. This state of affairs ought now to improve. There are plans to bring in a new Act on veterinary surgeons, along the lines of the Hamburg legislation governing doctors. According to Dr. Jürgen Arndt, veterinary surgeon and Chairman of the Hamburg Land Association which is part of the Federal Association of Veterinary Surgeons (Bundesverband praktischer Tierärzte e.V.), ‘it will also regulate the emergency night service’. At present, it is true, a few clinics voluntarily provide an emergency service from time to time, and [other] veterinary surgeons also help, but this is not on a regular basis and does not give pet-owners security. They only do it voluntarily."

The journalist writing the article began by recounting the efforts made by the owners of the cat "Shalen" to find a veterinary surgeon prepared to help them one evening between 7.30 and 10.00 p.m. After telephoning in vain to two veterinary practices and to the emergency service, apparently they at last struck lucky: "Dr. Barthold, director of the Fuhlsbüttel veterinary clinic,

intervened". The journalist then quoted the applicant as saying: "It was high time; ... [the cat] would not have survived the night."

According to the author, Mrs. B, the particular case disclosed a problem, namely the inadequacy of the emergency service, at least on weekdays between 8 p.m. and 8 a.m. There followed a passage which read:

> "'I think that in a big city such as Hamburg there ought to be a regular service for attending to animals', Dr. Sigurd Barthold emphasised.
>
> Hamburg's animal lovers" - added the journalist, summarising her interview with Dr. Barthold - "would then no longer have to get sore fingers trying to ring up veterinary surgeons, looking for one who is prepared to help. In that case it would not only be the clinics which would voluntarily be on emergency duty round the clock; each of the 53 practising veterinary surgeons would be on night duty once a month if arrangements were made for two of them to be on duty each night.
>
> The fact that there is a demand for an emergency service at night-time is illustrated by Dr. Barthold by reference to the number of calls received by his practice between 8 p.m. and 8 a.m.: 'Our telephone rings between two and twelve times each night. Of course these are not all emergency cases. Sometimes advice over the telephone is all that is needed.'"

The author concluded the article by presenting under the third sub-head comments of Dr. Jürgen Arndt, "Vice-Chairman of the Hamburg Veterinary Surgeons' Council and himself director of a clinic in Harburg". Believing that an emergency service organised on a rota basis "would not release clinics from dispensing their voluntary service but would lessen the strain on them", Dr. Arndt said that he was actively trying to promote such a service. He added that the appropriate Hamburg authorities envisaged drafting the Act on veterinary surgeons during the fourth quarter of the year. Until it came into force, owners of animals would have to call one veterinary surgeon after another - or else the police, who would normally be prepared to help them.

The article was illustrated by two photographs. The larger, centrally placed, showed a cat and had the caption: "Um das Leben der kleinen 'Shalen' wurde gekämpft - erfolgreich" ("They fought for the life of little 'Shalen' - and won"). The second one was an identity photograph which appeared alongside the title and introductory paragraph of the article; it was a photograph of the applicant, though its caption erroneously gave the name of Dr. Arndt.

Below the photograph of the cat and outside the space occupied by the article, there was a short text under the heading "Hamburg - Stadt der Tiere" ("Hamburg - city of animals"), giving the number of domestic pets, veterinary surgeons and veterinary clinics in Hamburg and the telephone number of the emergency service available at weekends and on public holidays.

14. On 25 August 1978, the Hamburger Abendblatt once again published the applicant's photograph under the heading "Unter dem Foto

ein falscher Name" ("Wrong name under photo"), together with the following explanation: "An error crept into our report yesterday on the emergency veterinary service. Unfortunately, the wrong name appeared under the photograph. The person in question is in fact Dr. Sigurd Barthold, director of the Fulhsbüttel veterinary clinic."

B. The unfair competition proceedings

15. A number of Dr. Barthold's fellow practitioners, who regarded the article in question as publicity conflicting with the Rules of Professional Conduct, referred the matter to the association "PRO HONORE - Verein für Treu und Glauben im Geschäftsleben e.V." ("Pro Honore Association for fairness and trustworthiness in business" - "Pro Honore"). This association was founded in 1925 by the businessmen of Hamburg and exists in order to "ensure honesty and good faith in all spheres of business life" and "in particular to combat unfair competition, fraud in connection with moneylending and corruption" (article 2 of the Charter of 26 September 1979).

Between 1978 and 30 September 1980, Pro Honore was operating simultaneously as a branch organisation of the Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V. Frankfurt-am-Main (the Frankfurt-am-Main Central Agency for Combatting Unfair Competition - "the Central Agency"). The latter has been active for decades in curbing unfair competition, and counts among its members all the chambers of industry, trade and crafts and some 400 other associations, including the Federal Association of Veterinary Surgeons. The Hamburg Veterinary Surgeons' Council and the Deutsche Tierärzteschaft e.V, which is the umbrella organisation of the councils and private associations of veterinary surgeons, are not members of the Agency.

Under section 13 of the Unfair Competition Act of 7 June 1909 (Gesetz gegen den unlauteren Wettbewerb - "the 1909 Act"), Pro Honore and the Central Agency are empowered to bring against anyone engaged in business proceedings to restrain that person from breaking certain rules set forth in the Act.

16. On 4 September 1978, Pro Honore wrote to the applicant to say that it had been informed by certain veterinary surgeons that he had "instigated or tolerated, in the Hamburger Abendblatt of 24 August 1978, publicity on [his] own behalf". The letter went on to quote extracts from the article in question. The applicant was said to have thereby infringed section 1 of the 1909 Act in conjunction with Rule 7 of the Rules of Professional Conduct.

Section 1 of the 1909 Act stipulates that: "Any person who in the course of business commits, for purposes of competition, acts contrary to honest practices (gute Sitten) may be enjoined from further engaging in those acts (Unterlassung) and held liable in damages."

Rule 7 of the Rules of Professional Conduct deals with advertising and publicity (Werbung und Anpreisung) and reads as follows:

> "It is contrary to the ethics of the profession (standeswidrig):
>
> (a) to advertise publicly one's veterinary practice,
>
> (b) to instigate or tolerate publicity or public acknowledgements on television, radio or in the press or other publications,
>
> (c) to disclose case histories or methods of operation or of treatment elsewhere than in specialised journals (Fachzeitschriften),
>
> (d) to co-operate with non-veterinarians for the purpose of publicising one's own practice."

Pro Honore asserted its right to bring proceedings against the applicant for unfair competition (section 13 sub-section 1 of the 1909 Act) and called on him, for the purposes of a friendly settlement of the matter, to sign an enclosed declaration. Under the terms of this declaration, he would undertake not to make publicity on his own behalf by instigating or tolerating press articles such as that which had appeared in the Hamburger Abendblatt, to pay the Central Agency 1000 DM for each infringement and to pay Pro Honore 120 DM by way of costs incurred in asserting its right (Rechtsverfolgung).

17. A lawyer replied two days later on behalf of the applicant. The request made to Dr. Barthold was, he wrote, very close to blackmail. It was presumptuous (Zumutung) to speak of unlawful publicity. The reproaches directed against his client, who had not instigated the article complained of, had done considerable damage to his personal and professional reputation.

The applicant's lawyer asked Pro Honore to confirm in writing that it would be dropping its claim against his client, withdrawing its accusations and expressing regret. He also asked for reimbursement of his costs and announced that he would sue Pro Honore if it failed to meet his demands within three days.

1. The interim injunction (einstweilige Verfügung)

18. The Central Agency then applied to the Hamburg Regional Court (Landgericht) for an interim injunction (Articles 936 and 944 of the Code of Civil Procedure).

An interim injunction was issued on 15 September 1978 by the presiding judge of the 15th Civil Chamber. This decision forbade the applicant

> "to report in the press (except in professional journals), giving his full name, a photograph of himself and an indication of his occupation as director of the Fuhlsbüttel veterinary clinic, that at least on working days between 8 p.m. and 8 a.m., animal lovers in Hamburg would get sore fingers from trying to telephone veterinary surgeons ready to help them, in conjunction with (in Verbindung mit)

(a) the statement that only veterinary clinics were on voluntary emergency duty round the clock, and/or

(b) the statement that in his practice the telephone rang between two and twelve times between 8 p.m. and 8 a.m., though not all these calls were emergency cases and advice over the telephone would sometimes be sufficient, and/or

(c) the description of a case in which the owner of an animal had tried in vain one ordinary weekday between 7.30 p.m. and 10 p.m. to find a veterinary surgeon to treat his cat, until finally he was lucky enough to contact Dr. Barthold, who acted when it was more than 'high time',

and/or to contribute to such reports by giving journalists information".

For each and every breach of the injunction, he was liable to a maximum fine (Ordnungsgeld) of 500,000 DM or non-criminal imprisonment (Ordnungshaft) of up to six months, the precise penalty to be fixed by the court.

19. The applicant lodged an objection (Widerspruch) against this injunction (Articles 936 and 924 of the Code of Civil Procedure). The competent Chamber of the Regional Court upheld the injunction, however, on 15 November 1978. He thereupon entered an appeal which was dismissed on 22 March 1979 by the 3rd Chamber (Senat) of the Hanseatic Court of Appeal (Hanseatisches Oberlandesgericht). Finally, on 2 July 1979, the Federal Constitutional Court (Bundesverfassungsgericht), sitting as a bench of three judges, decided not to entertain the constitutional application he had brought against the latter judgment and the interim injunction of 15 September 1978, on the ground that the application did not offer sufficient prospects of success.

2. The proceedings in the main action

20. Before completion of the proceedings relating to the interim injunction, Dr. Barthold had asked the Regional Court to set a time-limit within which the Central Agency should commence the action as to the main issue (Articles 936 and 926 of the Code of Civil Procedure); whereupon the Agency instituted the necessary proceedings on 22 December 1978. Its statement of claim was couched in the same terms as the prohibitory injunction issued by the Regional Court on 15 September 1978 (see paragraph 18 above).

21. On 20 July 1979, the 16th Commercial Chamber of the Regional Court found in favour of the defendant.

The Regional Court rejected certain objections raised by him as to the Agency's right of action. Nor did it accept his argument that the plaintiff, in complaining of an infringement of section 1 of the 1909 Act, could not rely upon Rule 7, paragraph (a), of the Rules of Professional Conduct.

On the other hand, the Regional Court was satisfied that the evidence adduced did not support the charge of infringing the rules governing competition (Wettbewerbsverstoss). It had not been established that the applicant had influenced to an appreciable extent or tolerated the publication complained of. In fact, there were important indications pointing in the opposite direction. The author of the article had declared that Dr. Barthold's name had been mentioned without his knowledge. It could be inferred from her testimony that the applicant had not asked for his identity to be divulged and must have expected not to find mention of it in the newspaper. He might thus have believed - as indeed he asserted - that the Hamburger Abendblatt would do no more than discuss the deplorable situation brought about by the absence of a night service. In addition, it was quite possible that the article in question, instigated by the journalist, was not based solely on the interview with Dr. Barthold and that the newspaper or the journalist had included the name of Dr. Barthold and of his clinic so as to emphasise the difference between the latter - praiseworthy - clinic and other less helpful veterinary surgeons. The question whether the applicant had taken care, or at least endeavoured, to prevent his name and clinic being given prominence over his fellow practitioners had been impossible to elucidate - and this should not operate to Dr. Barthold's detriment - as the journalist had refused to give any further evidence, on the justified ground that she was not obliged to disclose her sources.

22. On 24 January 1980, the Hanseatic Court of Appeal, after declaring admissible the appeal brought by the Central Agency, upheld the Agency's grounds of appeal, which reiterated the terms of the injunction granted on 15 September 1978 (see paragraphs 18 and 20 above).

The Court of Appeal held in the first place that the applicant had infringed Rule 7, paragraph (a), of the Rules of Professional Conduct, a legally valid (formell rechtmässig) provision that was in conformity with the Basic Law as well as other superior rules of law. That Rule did not unreasonably limit Dr. Barthold's right to freedom of expression as guaranteed by Article 5 of the Basic Law, for there was nothing to prevent him from freely stating his opinion and in particular from criticising deplorable situations, even if this had the inevitable effect of producing publicity favourable to himself. The Agency was not seeking to restrain Dr. Barthold from making public pronouncements about veterinary assistance. Its application was concerned solely with a given form of conduct comprising - "cumulatively!" - several aspects: the giving of Dr. Barthold's full name, the reproduction of his photograph, the mention of his being director of the Fuhlsbüttel veterinary clinic and the statement that, at least between 8 p.m. and 8 a.m. on working days, animal lovers in Hamburg would get sore fingers trying to telephone a veterinary surgeon willing to help them, plus one of the three assertions set out in the Agency's grounds

of appeal (and, previously, in the interim injunction of 15 September 1978 - see paragraph 18 above).

Objectively, the article complained of entailed publicity for Dr. Barthold: compared to other veterinary surgeons, it presented him as an exemplary practitioner, thereby being particularly likely to incite the owners of sick animals to turn to his clinic. Such publicity exceeded the bounds of objective comment on matters of justified concern for the applicant. If in the future he were to supply the press with information necessary for the writing of an article, he should, in order to avoid any infringement of Rule 7, paragraph (a), of the Rules of Professional Conduct, ensure beforehand that the text to be published did not involve any unlawful publicity or advertising, by reserving a right of correction or by agreeing on the form of the article with the journalist.

In the view of the Hanseatic Court of Appeal, the respondent had at the same time contravened section 1 of the 1909 Act. His intention of enhancing his own competitivity to the detriment of his competitors was to be presumed in the case of this type of publication, and that presumption was not rebutted in the circumstances. It mattered little (unerheblich) that he may additionally or even primarily have been pursuing other objectives, as there was an act done for the purposes of commercial competition as long as the intent to stimulate such competition had not been entirely overriden by other motives ("nicht völlig hinter sonstigen Beweggründen verschwindet").

As for the risk of repetition, also presumed in this matter, there were no grounds for concluding that this was non-existent. Contrary to what the Regional Court had found, the applicant had knowingly and substantially contributed to the publication which highlighted his person and his clinic. It was true that the press had itself taken up the case of "Shalen" and had invited Dr. Barthold to comment only after being informed of the incident by the animal’s owner. However, the applicant had, by his interview, greatly influenced the content of the article and, what was more, had authorised a photograph to be taken of himself. He had thereby provided the opportunity for producing the article in question, with its character of publicity.

He could not have been unaware of this risk and the Rules of Professional Conduct required him to ensure that the text to be published did not involve illegal publicity favourable to himself, by reserving a right of correction or by agreeing on the form of publication with the journalist. He could also have made an arrangement with Mrs. B to remain anonymous, although he was in no way obliged to express his views without disclosing his identity.

In fact, the respondent had acknowledged in his written pleadings of 13 December 1978 and 12 January 1979 that he had authorised the inclusion of his name and photograph. Although he retracted those statements on 29 March and 6 April 1979, he had not shown that he had insisted on publication without inclusion of such details. The testimony of the journalist

was not conclusive on this point. It was not necessary to take evidence from Dr. Arndt, because Dr. Barthold had unquestionably allowed photographs to be taken. That being so, he ought not to have contented himself with obtaining a verbal promise - as he claimed to have done - that he would not himself appear in one of the photographs. Whilst he claimed to have told the journalist that the Rules of Professional Conduct prohibited advertising and publicity, he was wrong to have passed on to her the responsibility of writing an article which complied with those Rules.

The danger of repetition persisted notwithstanding the time that had elapsed. The "Shalen" affair was no longer topical, but the press was likely to come back to the issues it had raised, by making reference to this incident along with others, after another interview with Dr. Barthold.

The Court of Appeal decided finally not to give leave to appeal on points of law against its judgment: the latter did not depart from the established case-law of the Federal Court of Justice (Bundesgerichtshof), and the case did not raise questions of principle.

23. Dr. Barthold challenged the judgment of 24 January 1980 before the Federal Constitutional Court. He repeated various arguments on which he had based his constitutional application in the interim proceedings (see paragraph 19 above), namely non-observance of equality before the law, of freedom of expression and of freedom to practise a profession, as safeguarded by Articles 3, 5 and 12 of the Basic Law, and incompatibility of the obligation to belong to the Veterinary Surgeons' Council with freedom of association, as guaranteed by Article 9 of the Basic Law. In addition, he alleged violation of his right to be heard, in particular by a legally competent court (gesetzlicher Richter). On this latter point, he claimed that it was not within the province of the civil courts to apply the Rules of Professional Conduct.

The Constitutional Court, sitting as a bench of three judges, dismissed the constitutional application on 6 October 1980, on the ground that it lacked sufficient prospects of success.

II. THE RELEVANT LEGISLATION

A. The law governing the veterinary profession

24. In the Federal Republic of Germany, veterinary medicine is governed partly by federal law and partly by the law of the Länder. The principal rules relevant to the present case are to be found in the Federal Veterinary Practitioners Act (Bundes-Tierärzteordnung, in the version of 22 August 1977 - "the Federal Act"), the Hamburg Act of 26 June 1964 on the Veterinary Surgeons' Council ("the 1964 Act" - see paragraph 11 above), the Hamburg Act on Disciplinary Tribunals for the Medical Professions

(Gesetz über die Berufsgerichtsbarkeit der Heilberufe, in the version of 20 June 1972 - "the 1972 Act"), the Rules of Professional Conduct of 16 January 1970 (see paragraph 11 above) and the Regulations on the establishment of veterinary clinics (see paragraphs 12 above and 29 below).

25. The profession of veterinary surgeon is not an industrial, commercial or craft occupation (Gewerbe) but, by its nature, a liberal profession (section 1(2) of the Federal Act). According to sub-section 1 of section 1 of the Federal Act,

> "It shall be the task of the veterinary surgeon to prevent, alleviate and cure suffering and disease in animals, to contribute to the maintenance and development of productive livestock, to protect man from the dangers and harm arising from animal disease and from foodstuffs and products of animal origin, and to endeavour to improve the quality of foodstuffs of animal origin".

In order to be able to practise on a permanent basis, an authorisation (Approbation) issued by the appropriate Land authorities is required; such authorisation is granted if the person concerned satisfies the conditions laid down by law (sections 2 to 4 of the Federal Act).

26. The veterinary surgeons practising in Hamburg constitute the Hamburg Veterinary Surgeons' Council, which is a public-law association (sections 1 and 2 of the 1964 Act). Its functions include defending the professional interests of the veterinary surgeons, ensuring that the latter meet their professional obligations and assisting the public health services (öffentlicher Gesundheitsdienst) in the performance of their duties (section 3 of the 1964 Act).

The Council's organs are the governing board (Vorstand) and the general assembly; the latter adopts the Charter and the Rules of Professional Conduct, which are submitted to the Government of the Land for approval (sections 5 and 8 of the 1964 Act).

The Council is under the supervision of the State, which supervision extends to observance of the laws and the Charter (section 18 of the 1964 Act).

27. The Rules of Professional Conduct of the Hamburg Council require each veterinary surgeon to practise in such a way that the profession inspires respect and confidence; the making of pejorative statements about the person, knowledge or skills of another veterinary surgeon is not allowed (Rule 1 (1) and (2)).

The Rules contain a number of provisions forbidding veterinary surgeons from advertising their own practices. Under Rule 5, veterinary surgeons may only intervene if asked to do so; offering or providing their services without being requested is at variance with the rules of the profession. Rule 7 deals more specifically with publicity and lays down conditions to be observed (see paragraph 16 above). In addition there are Rules 8 and 9, which concern advertisements in the press and name-plates respectively.

28. Each veterinary surgeon is required to intervene in the event of an emergency (Rule 1 (3)); he must (soll) participate in providing a service at weekends and on holidays and hold himself in readiness to replace any other colleague (Rule 14).

The question of a night service for veterinary surgeons, a matter not dealt with in the law or the Rules of Professional Conduct, has been the subject of debate within the profession (see paragraph 12 above). The Council opted on 11 December 1978 for a voluntary solution whereby veterinary surgeons indicate on a list the times when they may be contacted and the Council communicates to the public, by means of an automatic reply service, the names of those veterinary surgeons who are available even outside normal consultation hours.

According to the Government, it was apparently quite a long time before a relatively sizeable number of veterinary surgeons agreed to participate in this scheme. In 1979, the Council was said to have felt the need to launch an appeal for volunteers for the weekend and emergency service.

Yet again, in 1981, the director of a veterinary clinic publicly criticised the working of the emergency service in Hamburg and stated that he had been unsuccessfully campaigning for two years for a duty rota for all veterinary surgeons (see Die Zeit of 11 December 1981).

However, according to the applicant, there has existed since 1982 a system along the lines he had proposed. The Government did not contest this assertion.

29. An establishment for the treatment of sick animals may be called a "veterinary clinic" if it has the requisite premises and equipment and if the Council has given its approval (Rule 19). The detailed rules are set out in Regulations promulgated by the Council (see paragraph 12 above), the most recent version of which dates from December 1982. The 1982 Regulations lay down that henceforth clinics must provide a round-the-clock service for emergencies unless the Council has made other arrangements guaranteeing adequate assistance.

B. The law on unfair competition

30. The 1909 Act applies to any person seeking to derive income from a regular economic activity; it thus covers industrial, commercial and craft activities, services and the liberal professions. It is designed to protect competitors and consumers, and applies independently of the texts, if any, governing the conduct of members of the liberal profession in matters of publicity and advertising.

31. The courts with jurisdiction to deal with infringements of the 1909 Act - principally the civil courts (section 13 of the Act) - are not bound by any findings made by such professional tribunals as may have considered the same facts in the light of the professional rules governing publicity.

However, it has been consistently held by the Federal Court of Justice that breach of these professional rules will, in the normal course of things, also entail infringement of section 1 of the 1909 Act (see paragraph 16 above). The court having to decide the case on the basis of the 1909 Act must nonetheless inquire in each case whether the requirements of section 1 are satisfied.

32. By virtue of section 13, an action for contravention of, for example, section 1 may be brought by any competitor, by trade and professional associations (gewerbliche und Berufsverbände) and, since 1965, by consumer associations.

PROCEEDINGS BEFORE THE COMMISSION

33. In his application of 13 July 1979 to the Commission (no. 8734/79), Dr. Barthold complained of the injunctions against him issued by the German courts. He regarded these injunctions as "indirect sanctions" which had wrongfully interfered with his freedom of expression and freedom of thought as secured by Articles 10 and 9 (art. 10, art. 9) of the Convention, and had violated Articles 6 and 7 (art. 6, art. 7). He further maintained that compulsory membership of the Veterinary Surgeons' Council contravened Article 11 (art. 11).

34. On 12 March 1981, the Commission declared the application inadmissible as regards the complaints under Articles 6 and 7 (art. 6, art. 7) (manifestly ill-founded) and Article 11 (art. 11) (incompatibility ratione materiae with the provisions of the Convention). On 13 October 1981, after observing that Dr. Barthold seemed no longer to be pursuing his complaint of interference with his freedom of thought, it admitted the remainder of the application.

In its report of 13 July 1983 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of Article 10 (art. 10). The full text of the Commission's opinion is reproduced as an annex to the present judgment.

FINAL SUBMISSIONS PRESENTED TO THE COURT

35. At the hearings on 23 October 1984, the Government confirmed the final submissions set out in their memorial and requested the Court "to find that there was no violation of the rights of the applicant".

The Delegate of the Commission invited the Court "to follow the opinion of the Commission".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

36. Article 10 (art. 10) of the Convention provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

37. The applicant complained of the prohibitory injunctions issued against him by the German courts following publication of an article in the Hamburger Abendblatt on 24 August 1978. In his submission, these injunctions, namely the interim injunction whose terms were then reiterated in the injunction of the Hanseatic Court of Appeal in the main proceedings, prevented him from making known his views on the need for an emergency veterinary service and thereby violated his freedom of expression.

Dr. Barthold further contended before the Commission that the rule of professional conduct obliging veterinary surgeons to abstain from advertising was in itself contrary to Article 10 (art. 10). The injunctions complained of were, however, grounded not on Rule 7, paragraph (a), of the Rules of Professional Conduct but on section 1 of the 1909 Act taken in conjunction with Rule 7, paragraph (a). Moreover, the applicant did not repeat this contention before the Court. Like the Commission, the Court will therefore limit its examination to the application of the two relevant provisions in the particular circumstances of the case before it.

38. The Government's main submission was as follows. The subject-matter of the injunctions complained of was not Dr. Barthold's critical comments regarding the organisation of a night service for veterinary surgeons in Hamburg, but was exclusively the praise of his own practice and clinic and the disparaging remarks about his professional colleagues. These statements, which in part gave incorrect information, went beyond the objective expression of opinion and amounted to commercial advertising. Article 10 (art. 10), however, did not cover commercial advertising, this being a matter relating to the right freely to exercise a trade or profession, a right not protected by the Convention.

In the alternative, the Government argued that the contested measure was justified under paragraph 2 of Article 10 (art. 10-2).

39. The Commission found a violation. In its opinion, the circumstances of the case did not involve commercial advertising in the sense in which that term is generally understood and, in any event, commercial advertising did not fall outside the scope and intendment of Article 10 (art. 10) (see the decision of 5 May 1979 on the admissibility of application no. 7805/77, X and Church of Scientology v. Sweden).

A. Applicability of Article 10 (art. 10)

40. According to the Delegate, the Government are estopped from re-opening the issue of the applicability of Article 10 (art. 10) since before the Commission they had conceded that the case could be examined under this Article (art. 10).

The Government considered themselves entitled to raise the point as they had always maintained that certain features of the interview in issue did not relate to the exchange of ideas, which lies at the heart of freedom of expression, but fell within the field of economic activity.

41. The Court is unable to agree with the Delegate. For the purposes of the procedure before the Court, the applicability of one of the substantive clauses of the Convention constitutes, by its very nature, an issue going to the merits of the case, to be examined independently of the previous attitude of the respondent State (see, mutatis mutandis, the judgment of 9 February 1967 in the "Belgian Linguistic" case, Series A no. 5, pp. 18-19, and the Airey judgment of 9 October 1979, Series A no. 32, p. 10, para. 18).

42. Article 10 para. 1 (art. 10-1) specifies that freedom of expression "shall include freedom to hold opinions and to ... impart information and ideas". The restrictions imposed in the present case relate to the inclusion, in any statement of Dr. Barthold's views as to the need for a night veterinary service in Hamburg, of certain factual data and assertions regarding, in particular, his person and the running of his clinic (see paragraph 18 above). All these various components overlap to make up a whole, the gist of which is the expression of "opinions" and the imparting of "information" on a topic of general interest. It is not possible to dissociate from this whole those elements which go more to manner of presentation than to substance and which, so the German courts held, have a publicity-like effect. This is especially so since the publication prompting the restriction was an article written by a journalist and not a commercial advertisement.

The Court accordingly finds that Article 10 (art. 10) is applicable, without needing to inquire in the present case whether or not advertising as such comes within the scope of the guarantee under this provision.

B. Compliance with Article 10 (art. 10)

43. There has clearly been an "interference by public authority" with the exercise of the applicant's freedom of expression, namely the interference resulting from the judgment delivered at final instance in the main proceedings by the Hanseatic Court of Appeal on 24 January 1980 at the close of the action brought by the Central Agency (see paragraph 22 above). This interference will not be compatible with Article 10 (art. 10) unless it satisfies the conditions laid down in paragraph 2 (art. 10-2), a clause calling for a narrow interpretation (see the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 41, para. 65). Thus, the interference must be "prescribed by law", have an aim or aims that is or are legitimate under Article 10 para. 2 (art. 10-2) and be "necessary in a democratic society" for the aforesaid aim or aims (ibid., p. 29, para. 45).

1. Is the interference "prescribed by law"?

44. In the submission of Dr. Barthold, the injunctions in question were neither grounded on a "law" nor "prescribed". Both the Government and the Commission disagreed with this contention.

45. According to the Court's case-law on this point, the interference must have some basis in domestic law, which itself must be adequately accessible and be formulated with sufficient precision to enable the individual to regulate his conduct, if need be with appropriate advice (see the above-mentioned Sunday Times judgment, p. 30, para. 47, and p. 31, para. 49; see also, mutatis mutandis, the Silver and Others judgment of 25 March 1983, Series A no. 61, pp. 32-34, paras. 85-88, and the Malone judgment of 2 August 1984, Series A no. 82, pp. 31-33, paras. 66-68).

46. The legal basis of the interference under consideration was provided by section 1 of the 1909 Act, section 8 (1) of the 1964 Act and Rule 7, paragraph (a), of the Rules of Professional Conduct, as applied by the Hanseatic Court of Appeal (see paragraph 22 above). Unlike the first two of these provisions, the third emanated from the Veterinary Surgeons' Council (see paragraphs 11 and 26 above) and not directly from parliament. It is nonetheless to be regarded as a "law" within the meaning of Article 10 para. 2 (art. 10-2) of the Convention. The competence of the Veterinary Surgeons' Council in the sphere of professional conduct derives from the independent rule-making power that the veterinary profession - in company with other liberal professions - traditionally enjoys, by parliamentary delegation, in the Federal Republic of Germany (see notably the judgment of 9 May 1972 by the Federal Constitutional Court, Entscheidungen des Bundesverfassungsgerichts, vol. 33, pp. 125-171). Furthermore, it is a competence exercised by the Council under the control of the State, which in particular satisfies itself as to observance of national legislation, and the Council is obliged to submit its rules of professional conduct to the Land Government for approval (sections 8 (3) and 18 of the 1964 Act - see paragraphs 11 and 26 above).

47. The "accessibility" of the relevant texts has not been the subject of any dispute. On the other hand, the applicant argued that the injunctions complained of were not "foreseeable", either subjectively or objectively. In his submission, the relevant legislation did not fix the limits of freedom of expression with sufficient clarity to indicate in advance to each member of the veterinary profession the dividing line between what was permitted and what was not; in particular, section 1 of the 1909 Act was couched in extremely vague terms.

Section 1 of the 1909 Act does indeed employ somewhat imprecise wording, notably the expression "honest practices". It thereby confers a broad discretion on the courts. The Court has, however, already had the occasion to recognise the impossibility of attaining absolute precision in the framing of laws (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 31, para. 49; the above-mentioned Silver and Others judgment, Series A no. 61, p. 33, para. 88). Such considerations are especially cogent in the sphere of conduct governed by the 1909 Act, namely competition, this being a subject where the relevant factors are in constant evolution in line with developments in the market and in means of communication. Finally, the Hanseatic Court of Appeal based its judgment of 24 January 1980 on a combined application of section 1 of the 1909 Act and paragraph (a) of Rule 7 of the Rules of Professional Conduct, which is a clearer and more detailed provision.

48. Before the Commission, Dr. Barthold also pleaded non-compliance with the domestic law. His arguments ran as follows. The civil courts had no jurisdiction to apply the Rules of Professional Conduct; failure to observe the requirements of those Rules could not automatically entail violation of the 1909 Act, a text which, moreover, was inapplicable to the liberal professions; the ordinary courts had interpreted Rule 7, paragraph (a), differently from the professional tribunals; finally, the Central Agency lacked locus standi to sue him.

Whilst it is true that no interference can be considered as "prescribed by law", for the purposes of Article 10 para. 2 (art. 10-2) of the Convention, unless the decision occasioning it complied with the relevant domestic legislation, the logic of the system of safeguard established by the Convention sets limits upon the scope of the power of review exercisable by the Court in this respect. It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection (see, mutatis mutandis, the Winterwerp judgment of 24 October 1979, Series A no. 33, p. 20, para. 46; the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, pp. 19-20, para. 43). The evidence adduced in the present case does not disclose any clear non-observance either of the 1909 Act or of the Rules of Professional Conduct. The applicant’s arguments - to which, moreover, he did not revert

before the Court - do no more than evince his disagreement with the Hamburg courts.

49. To sum up, the injunctions complained of are "prescribed by law".

2. Does the interference have an aim that is legitimate under Article 10 para. 2 (art. 10-2)?

50. The Government argued that the interference in issue served to protect human "health" as well as the "rights" of the applicant's fellow veterinary surgeons and of clients of veterinary surgeons, that is to say, "others"; and that the interference was also aimed at the protection of "morals".

Dr. Barthold considered, on the contrary, that the interference was likely to perpetuate a situation which constituted a potential risk to public health. The Commission, for its part, found there to be a legitimate object in the protection of the rights of clients of veterinary surgeons.

51. The Court notes that, according to the reasons given in the judgment of 24 January 1980, the final injunction in the present case was issued in order to prevent the applicant from acquiring a commercial advantage over professional colleagues prepared to conduct themselves in compliance with the rule of professional conduct that requires veterinary surgeons to refrain from advertising (see paragraph 22 above). The Hanseatic Court of Appeal grounded its decision on the protection of the "rights of others" and there is no cause for believing that it was pursuing other objectives alien to the Convention. The judgment of 24 January 1980 thus had an aim that was in itself legitimate - that is to say, subject to the "necessity" of the measure in issue - for the purposes of Article 10 para. 2 (art. 10-2) of the Convention. There is no need to inquire whether that judgment is capable of being justified under Article 10 para. 2 (art. 10-2) on other grounds as well.

3. Is the interference "necessary in a democratic society"?

52. The Government considered the restriction imposed to be one that was "necessary in a democratic society". Their arguments may be summarised as follows. The statements that the applicant was restrained by the judgment of 24 January 1980 from repeating denigrated his fellow veterinary surgeons and were in part erroneous; by reason of the form they took and the type of publication in which they appeared, these statements went beyond objective criticism and amounted to advertising incompatible with the Rules of Professional Conduct. Although Dr. Barthold was not himself the author of the article in the Hamburger Abendblatt, the Hanseatic Court of Appeal was not mistaken to hold him responsible.

In addition, the prohibition complained of was consistent with the principle of proportionality. Being circumscribed within narrow limits, it did not bar Dr. Barthold from expressing an opinion on the issue of a night

veterinary service in Hamburg. The Commission had exaggerated the interest of the people of Hamburg for a statutory scheme for such a service. Nor did the penalties that the applicant risked incurring if he were to repeat the prohibited statements fall foul of the principle of proportionality, since they amounted to no more than an "abstract threat" that the domestic courts would have to implement in the event of wrongful conduct in the light of the particular circumstances obtaining at that time.

Finally, in the submission of the Government, in the field of the repression of unfair competition the Contracting States enjoyed a wide margin of appreciation and the legal traditions of the Contracting States had to be respected by the Convention institutions. In this connection, provisions comparable to those of the relevant German legislation were to be found in other member States of the Council of Europe, in international instruments and in the law of the European Communities.

53. The applicant contested the "necessity" of the interference, adducing the following arguments. His declarations did not have any advertisement-like effect. The prohibition on his publicly disseminating his opinion together with an indication of his name and professional activities struck at the very essence of his freedom of expression, as did the precautions that the Hanseatic Court of Appeal directed him to observe in his contacts with the press. Moreover, in a democratic society, it was not necessary to prohibit veterinary surgeons from advertising, at least not in as comprehensive a manner as in his case.

In addition, the injunction imposed on him was capable of harming the legitimate interests of animal owners, especially as the Veterinary Surgeons' Council had not made available to animal owners the information they would need regarding the night service. The effect of the judgment of 24 January 1980 was to prevent journalists from checking or exploring with a qualified person information they had received and from revealing the source of any such information, thereby adversely affecting the credibility of any statements published. The judgment was thus liable, directly or indirectly, to render the task of the press more difficult and to reduce the range of information supplied to readers, a result contrary to one of the objectives of a "democratic society". Although the applicant remains free to express his views in professional journals, that would not be sufficient to enable the 200,000 households of animal owners in Hamburg to be informed.

54. In the opinion of the Commission, the article in the Hamburger Abendblatt dealt with a topic of general interest. There was no indication that Dr. Barthold had intended to exploit the article for advertising purposes. The disclosure of his identity and of various facts relating to his practice constituted an essential element of the exercise of his freedom of expression. The Commission further considered that the precautions which the domestic courts required him to take could not be regarded as necessary

in a democratic society. In sum, the principle of proportionality had not been respected in the circumstances.

55. It has been pointed out in the Court's case-law that, whilst the adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2) of the Convention, is not synonymous with "indispensable", neither does it have the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable"; rather, it implies a "pressing social need". The Contracting States enjoy a power of appreciation in this respect, but that power of appreciation goes hand in hand with a European supervision which is more or less extensive depending upon the circumstances; it is for the Court to make the final determination as to whether the interference in issue corresponds to such a need, whether it is "proportionate to the legitimate aim pursued" and whether the reasons given by the national authorities to justify it are "relevant and sufficient" (see, inter alia, the above-mentioned Sunday Times judgment, Series A no. 30, pp. 35-37, para. 59, and p. 38, para. 62).

56. In order to assess the necessity for restraining Dr. Barthold from repeating those of his declarations which were adjudged to be incompatible with the 1909 Act and with the Rules of Professional Conduct, the prohibited declarations must be placed in their proper context and examined in the light of the particular circumstances of the case.

The gist of the article in the Hamburger Abendblatt concerned the absence in Hamburg of a night service operated by the entirety of veterinary surgeons. The article explained the general problem to readers by illustrating it with the case of the cat "Shalen" and then by quoting interviews given by the applicant and by Dr. Arndt, who at that time was Vice-Chairman of the local Veterinary Surgeons' Council. In addition, the newspaper indicated to readers the telephone number of the emergency service where they could obtain the name and address of practitioners available at the weekend. The article was thus pursuing a specific object, that is to say, informing the public about the situation obtaining in Hamburg, at a time when, according to the two practitioners interviewed, the enactment of new legislation on veterinary surgeons was under consideration.

57. It has not been disputed that the problem discussed in the article was a genuine one. As recently as 1981, a professional colleague of Dr. Barthold criticised in Die Zeit the lack of a compulsory night duty for veterinary surgeons in Hamburg (see paragraph 28 above). In any event, the applicant felt strongly that such a service should be organised; he had always campaigned to this effect within the Veterinary Surgeons' Council.

The Government maintained that on one point at least Dr. Barthold was making a false assertion. According to the Government, clinics provided a round-the-clock emergency service because they were obliged to do so and not of their own volition; as proof of this, the Government pointed to

Regulation 2 of the Regulations on the Establishment of Veterinary Clinics (see paragraph 12 above). The Court restricts itself to noting that the correctness or incorrectness of the applicant's declarations - which, in fact, would seem to have been corroborated on this point by Dr. Arndt, himself the director of a clinic - had no influence on the judgment of 24 January 1980, which did not go into the matter.

58. The Court must come to its decision on the basis of all these various factors.

As the Court has already had the occasion to point out, freedom of expression holds a prominent place in a democratic society. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every man and woman (see, in particular, the Handyside judgment of 7 December 1976, Series A no. 24, p. 23, para. 49). The necessity for restricting that freedom for one of the purposes listed in Article 10 para. 2 (art. 10-2) must be convincingly established.

When considered from this viewpoint, the interference complained of went further than the requirements of the legitimate aim pursued.

It is true, as was stated in the judgment of the Hanseatic Court of Appeal, that the applicant retained the right to express his opinion on the problem of a night service for veterinary surgeons in Hamburg and even, in so doing, to divulge his name, have a photograph of himself published and disclose that he was the director of the Fuhlsbüttel veterinary clinic. He was, however, directed not to supplement his opinion, when accompanied by such indications, with certain factual examples drawn from his own experience and illustrating the difficulties encountered by animal owners in obtaining the assistance of a veterinary surgeon during the night.

It may well be that these illustrations had the effect of giving publicity to Dr. Barthold's own clinic, thereby providing a source of complaint for his fellow veterinary surgeons, but in the particular circumstances this effect proved to be altogether secondary having regard to the principal content of the article and to the nature of the issue being put to the public at large. The injunction issued on 24 January 1980 does not achieve a fair balance between the two interests at stake. According to the Hanseatic Court of Appeal, there remains an intent to act for the purposes of commercial competition, within the meaning of section 1 of the 1909 Act, as long as that intent has not been entirely overriden by other motives ("nicht völlig hinter sonstigen Beweggründen verschwindet" - see paragraph 22 above). A criterion as strict as this in approaching the matter of advertising and publicity in the liberal professions is not consonant with freedom of expression. Its application risks discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community if ever there is the slightest likelihood of their utterances being treated as entailing, to some degree, an advertising effect. By the

same token, application of a criterion such as this is liable to hamper the press in the performance of its task of purveyor of information and public watchdog.

59. In conclusion, the injunctions complained of are not proportionate to the legitimate aim pursued and, accordingly, are not "necessary in a democratic society" "for the protection of the rights of others", with the result that they give rise to a violation of Article 10 of the Convention (art. 10).

II. ALLEGED VIOLATION OF ARTICLE 11 (art. 11)

60. In his memorial of 21 February 1984, Dr. Barthold had additionally alleged a breach of Article 11 (art. 11), which reads:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article (art. 11) shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

His objection was directed not against the restrictions imposed by the domestic courts on his freedom of expression, but against the legal obligation to be a member of the Veterinary Surgeons' Council. He considered this obligation to be inconsistent with freedom of association.

61. The applicant did not explicitly revert to the question at the hearings on 23 October 1984. In any event, the complaint under this head does not cover the same ground as the claim already examined by the Court; it does not merely amount to a supplementary legal submission or argument adduced in support of that claim. Having been declared inadmissible by the Commission on 12 March 1981 as being incompatible ratione materiae with the provisions of the Convention (Article 27 para. 2) (art. 27-2), this complaint falls outside the ambit of the case referred to the Court (see, amongst other authorities, mutatis mutandis, the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 18, para. 38).

III. APPLICATION OF ARTICLE 50 (art. 50)

62. In his memorial of 21 February 1984, Dr. Barthold made several comments as to the application of Article 50 (art. 50) in the present case, but at the hearings on 23 October 1984 his lawyer asked the Court to reserve the question.

The Government replied that they did not propose to make any statement on the subject in the absence of specific claims put forward by the Commission.

63. The question is therefore not yet ready for decision. Accordingly, it is necessary to reserve the matter and to fix the further procedure, taking due account of the possibility of an agreement between the respondent State and the applicant (Rule 53 paras. 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT

1. Holds by five votes to two that there is breach of Article 10 (art. 10);

2. Holds unanimously that it has no jurisdiction to entertain the applicant's complaint under Article 11 (art. 11);

3. Holds unanimously that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) invites the applicant to submit, within the forthcoming two months, his written comments on the said question and, in particular, to notify the Court of any agreement reached between himself and the Government;

(c) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 25 March 1985.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

The separate opinions of the following judges are annexed to the present judgment in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court:

- dissenting opinion of Mr. Thór Vilhjálmsson and Mrs. Bindschedler-Robert;

- concurring opinion of Mr. Pettiti.

G.W.
M.-A.E.

DISSENTING OPINION OF JUDGES THÓR VILHJÁLMSSON AND BINDSCHEDLER-ROBERT

Although the facts of this case border on the trivial, they nevertheless require the Court to make an assessment, by no means easy, as to whether a given interference with the exercise of the right to freedom of expression was "necessary in a democratic society". We have voted against the finding of a violation as, with respect, we disagree with the majority of the Chamber on this assessment. The majority has set out its opinion on the relevant point in paragraph 58 of the judgment. Our view may be stated as follows.

The newspaper item which gave rise to this case and the court actions that followed are described in the judgment. As is evident from paragraph 18, the interim injunction issued on 15 September 1978 was very specific. The applicant was restrained from making certain public statements, but the injunction did not preclude him from making statements on other points concerning, or from contributing to public debate on, the veterinary services available in his city. It is equally evident from paragraph 22 of the judgment that the resultant interference was confirmed by the Hanseatic Court of Appeal on 24 January 1980 in a fully-reasoned ruling in which the relevant issues under German law were considered in detail. To this should be added that the decisions of the German courts were grounded on rules on professional conduct and unfair competition. Although restrictions on advertising and publicity by members of the liberal professions are well known in the States Parties to the Convention, the combined application of rules from these two categories is not the general practice.

The foregoing brief indications regarding the particular facts of the present case have to be kept in mind when determining whether the interference with the applicant’s freedom of expression was "necessary in a democratic society" for the purposes of paragraph 2 of Article 10 (art. 10-2) of the Convention. The Court has already, in previous judgments, expounded the principles governing how this problem should be approached (see notably the Handyside judgment of 7 December 1976, Series A no. 24, pp. 22-24, paras. 48-50, and the Sunday Times judgment of 26 April 1979, Series A no. 30, pp. 35-38, paras. 58-62). We take the liberty of referring also to the dissenting opinion expressed in the latter case by nine judges, a group to which we belonged (paras. 7-9).

According to the well-established case-law of our Court, it is for the national authorities to make the initial assessment of the necessity. In this respect, the Contracting States enjoy a margin of appreciation. The assessment has to be made in good faith, with due care and in a reasonable manner. There is no doubt, in our view, that this was so in the applicant’s case. As to the supervisory role of our Court, the main question for determination is whether the decisions of the German courts were

proportionate to the legitimate aim pursued. The fact that the article in question was not solely devoted to generating publicity or even that its author had not had publicity in view as an objective does not alter this conclusion. The German courts were certainly not acting unreasonably in taking into consideration those aspects of the article which produced a publicity-like effect. Having due regard to the limited scope of the restrictions, we consider that the principle of proportionality was not transgressed. Accordingly, we cannot find a breach of Article 10 (art. 10) in the present case.

CONCURRING OPINION OF JUDGE PETTITI

(Translation)

I have voted with the majority of my colleagues that there has been a breach of Article 10 (art. 10) of the European Convention, and I share their analysis notably as concerns the reasoning (at paragraphs 55 and following of the judgment) holding that the interference complained of went further than the requirements of the legitimate aim pursued and that the criterion applied by the Hanseatic Court of Appeal was not consonant with freedom of expression.

I nonetheless believe that the decision of our Court could have been more explicit with regard to freedom of expression in as much as the approach to the question of commercial advertising was also evoked by the applicant.

The Commission, rightly in my view, drew attention to the advertisement-like effect of the interview which was the cause of complaint against Dr. Barthold.

Doubtless paragraph 39 of the Court's judgment cannot be taken in isolation, and in particular in isolation from paragraphs 42, 43, 51, 55 and following.

The issue of commercial advertising was raised only incidentally in the Barthold case, and the Commission and the Court will be called on to rule more directly and comprehensively on the subject.

As of now, however, one cannot ignore the considerable evolution that has occurred, in Europe as well as in North America, within the professional bodies representing the liberal professions in opening themselves up to certain forms of collective advertising about their activities and even to certain forms of individual advertising, in particular so as to indicate practitioners' specialities.

Standards of professional conduct are thereby undergoing development and, for members of the liberal professions, it is not possible to divorce assessment of professional conduct from the degree of liberty afforded in relation to advertising, which is what happened in Dr. Barthold's case.

Freedom of expression in its true dimension is the right to receive and to impart information and ideas. Commercial speech is directly connected with that freedom.

The great issues of freedom of information, of a free market in broadcasting, of the use of communication satellites cannot be resolved without taking account of the phenomenon of advertising; for a total prohibition of advertising would amount to a prohibition of private broadcasting, by depriving the latter of its financial backing.

Regulation in this sphere is of course legitimate - an uncontrolled broadcasting system is inconceivable -, but in order to maintain the free flow of information any restriction imposed should answer a "pressing

social need" and not mere expediency. Even if it were to be conceded that the State's power to regulate is capable of being more extensive in relation to commercial advertising, in my view it nevertheless remains the case that "commercial speech" is included within the sphere of freedom of expression. Such was the import of a decision by the Commission (Church of Scientology v. Sweden, Decisions and Reports, vol. 16, pp. 72-74); such is the case-law of the Supreme Court of the United States under the First Amendment (Virginia Pharmacy Board, Bates - Bar of Arizona, Central Hudson, etc.), albeit that commercial communications are afforded a different degree of protection to that granted in respect of the press.

In the Barthold case, the submission of the applicant was, in part, that the rule of professional conduct obliging veterinary surgeons to refrain from advertising and publicity was in itself inconsistent with Article 10 (art. 10) (see paragraph 37 of the judgment).

The Court has above all concentrated on examining the principal complaints and, in this context, on analysing whether the interference had a basis in domestic law and was necessary in a democratic society.

The Court has concluded on the facts of the case that there was indeed a breach of Article 10 (art. 10).

The Court could perhaps have pushed its reasoning a little further, even though it may not have been indispensable to do so, and thereby have given a fuller statement of its approach in regard to the links between interference and freedom of expression, between communication of ideas and information, and commercial speech.

To the extent that both these aspects can be considered to be so intimately connected as to be incapable of being dissociated, the Barthold judgment makes a further contribution to the movement that is reflected in legal writings towards freedom of expression, its content and its projection in the world of broadcasting and communications.