A Chamber of the Federal Constitutional Court Endorses Private Dentists' Information Service and Directory Within the Framework of the Right to Occupational Freedom

By Holger Hestermeyer
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[1] The *Bundesverfassungsgericht* (Federal Constitutional Court) has repeatedly had to deal with regulation of the medical professions. (1) The frequency of decisions in this area result from the clash between two fundamental values: One is the constitutionally recognized "occupational freedom" (Art. 12 I GG), the other is the health of the population, which justifies the numerous regulations for the medical professions. (2) A recent decision of the Second (Three-Judge) Chamber of the First Senate of the Federal Constitutional Court (BVerfG 1 BvR 881/00 – decided on October 18, 2001) is a further instance of this conflict.

I. Factual Background

[2] The complainant was a dentist admitted to practice in the southern state of Baden-Württemberg. He worked as an assistant dentist between May, 1994, and May, 1995, but a severe traffic accident left him unfit to practice. In 1997, he founded the *Initiative optimale Zahnheilkunde* (Initiative for Optimal Dentistry), a non-profit organization fostering high-quality dental care, especially by informing patients about alternative treatments, insurance coverage for dental care and other questions related to dentistry. The organization set up a directory of dentists based on data provided by the dentists themselves. The data included the dentists' statements about their own qualifications and activities. The organization charged 7.5 DM (app. US $ 3.5) for an entry in the directory. The complainant claimed that the inquiries placed with the directory provided the requested information accompanied by a disclaimer stating that the data on the qualification of a dentist was based on the dentist's own perception. The complainant was charged with improper professional behavior under the *Berufsordnung* (professional charter) for dentists, specifically with violating the following provisions: (a) § 1 II 2 b) BO, which obliges a dentist to act according to the trust placed in the profession; (b) § 11 I BO, according to which a dentist has to show collegial behavior towards other professionals, and which bans improper means of competition; and (c) § 16 I 1 BO, which bans advertising. (3)

[3] The local dentists' chamber itself keeps a "patient-information-list," identifying the dentists with their fields of interest. The dentists' association informs interested patients from this data-base, including a notice that the data was provided from the dentists themselves.

II. Procedural History

[4] The case was first brought to the *Bezirksberufsgericht für Zahnärzte* (Local Professional Court for Dentists), a specialized professional court. The dentist was sentenced on September 21, 1999, to a fine of 3.000 DM. His appeal to the *Landesberufsgericht* (State Professional Court) upheld the sentence, but reduced the fine to 1.500 DM. The Court held that the complainant's database violated the trust in the medical profession in two ways: First, the database included only some of the local dentists, and secondly, it included data provided by the dentists themselves without any effort to certify or validate the information. The Court concluded that this sort of directory would be highly likely to contain confusing and false data. The Court affirmed the lower court's finding of a violation of § 11 I BO, holding that, with his database, the complainant improperly intrudes upon the competition among his colleagues, specifically with the misleading data. The Court especially stressed the fact that inclusion in the database was not free of charge.

III. Decision of the Court
[5] The Second (Three-Judge) Chamber (4) of the First Senate of the Federal Constitutional Court decided that the terms of § 93 c I of the *Bundesverfassungsgerichtsgesetz* (Federal Constitutional Court Act), which sets the standard for granting a constitutional complaint by a Three-Judge Chamber, had been met.

[6] On the one hand, the Chamber found that the Complaint does not pose questions of constitutional importance; the Court had already decided all the fundamental aspects of the constitutional provision concerning occupational freedom (Art. 12 I GG), *i.e.* the reach of the freedom and questions on medical advertising.

[7] On the other hand, the Chamber concluded that accepting the complaint was necessary to protect the rights of the complainant stemming from Art. 12 I GG. Like the lower courts, the Chamber regarded the activity of the complainant as part of his profession as a dentist. Art. 12 I GG protects any activity meant to be conducted for some length of time and which creates or supports one's welfare. If an activity is not contributing to one's welfare (as in the present case)

it is nonetheless protected if it is an aspect of an otherwise protected profession. Here, creating the database is part of the complainant's practice of the dental profession.

[8] The Chamber further concluded that the provisions of the professional charter can be and have to be interpreted in a way that is consistent with the constitution. Such an interpretation allows the factual, neutral provision of information about dentists, also via the Internet. The general interest of the public requires the freedom that permits dentists to describe their services to their colleagues and the state dentistry chamber, so that both patients and colleagues (for referring other patients) can learn about specialties and interests of dentist.

[9] The Chamber then stated that the professional courts, in the complainant's case, failed to apply such an interpretation. Instead they applied the charter in a way that does not respect the constitutional rights of the complainant. The Chamber did not see community interests that would justify a ban on creating a dentist directory for dentists. The health of the population, a recognized community interest, is not at stake if the information given by the dentists is factual and not confusing. Stating both officially recognized qualifications and fields of activity, special methods of treatments and equipment is in the interest of the client as long as the wording makes clear whether the qualification is an official one or just a field of interest. The Chamber concluded that the dentists' chamber, which opposed the complainant in the matter, recognizes this itself: it maintains a database very similar to the complainant's. The dentists' chamber database also includes interests of the dentists and is also based on data provided by the dentists without any certification or effort to validate the information. The Chamber criticized the professional courts for failing to explain why the database of the complainant endangers the common good while the information service of the dentists' chamber does not.

[10] The Chamber also concluded that the charge of 7.50 DM for entry into the directory does not violate the duty to collegial behavior within the profession because it only covers the costs of the non-profit organization.

[11] Finally, the Chamber held that the behavior of the complainant does not constitute forbidden advertising because it does not advertise the services of the complainant. The chamber further held that the information about the other dentists provided by the complainant's information service is not advertising, but is instead neutral and legitimate information.

[12] For these reasons the court annulled the decisions of the lower courts and remanded the matter back with the order to correctly weigh Art. 12 I GG.

V. Comment

A. Constitutional Background

[13] The Chamber's decision undertakes the interpretation and application of Art. 12 I of the German Constitution. The article provides that:

"All Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law."

[14] The leading case on the interpretation of the provision is the Pharmacy Case, a 1958 case in which a provision in the Bavarian Apothecary Act was struck down as unconstitutional. The act provided that an admitted apothecary could only be allowed to open a pharmacy if the new pharmacy was commercially viable and causes no economic harm to nearby competitors. The Constitutional Court held that, although the wording of Article 12 of the Basic Law seemed to protect a number of rights (choice of occupation, profession, place of work, place of training, practice of an occupation), in fact, it only protected the free choice and exercise of the occupation, from education to retirement. (6) The Court held that occupation has to be understood in the largest possible sense, as a legal activity with a certain duration serving the creation or support of one's welfare, *i.e.* not just a hobby. (7) The protection covers all aspects of such an activity. (8)

[15] Article 12 also provides that the parliament may "regulate" the practice of an occupation by or pursuant to law. This means that activities infringing upon the freedom secured by Article 12 can be justified if they are based on a law. As stated in the Pharmacy Case, and in spite of the wording of the Article, such a justification is possible for all areas of the freedom, be it choice of occupation or practice of the occupation. (9) But not just any legal basis will do; it has to comply with a test called the *Stufentheorie* (Gradation Theory), basically demanding that the harmful effects of the law on the freedom granted by Art. 12 I GG have to be proportionate to the value of the goal the parliament hoped to achieve. In the Pharmacy Case, the Court adjudged the harmful effect as immense. The parliament had made the choice of the person wishing to exercise an occupation dependent upon an objektive Berufswahlregelung (a criterion the person herself is unable to control), namely the commercial viability of the pharmacy. The Court demanded

important overriding community interests to justify this harmful effect. (11) The Court saw such an overriding interest in the public health, but could not see how the Bavarian law was necessary for this interest.

B. Medical Advertising

[16] The Chamber's Dentists' Information Service decision follows a host of decisions on medical advertising, (12) the latest dating from July 23, 2001. (13) In that decision a dentist had added "implantation medicine" as a field of interest on his door-sign and stationary. After being convicted in two instances by the professional courts he made his case to the Constitutional Court, which then had to decide on the same provisions at issue in the present Dentists' Service case. The Court ruled that, even though the charter said that advertising was not allowed, a constitutional interpretation of this provision resulted in a ban only on advertisement contrary to the profession, *e.g.* providing information that could be confused with legally recognized qualifications. If there is no risk of such an error, and if the data provided by the dentist is correct (he or she really does specialize), identifying fields of specialization and interest on stationary cannot be banned. (14)

[17] The cases show a rapidly developing trend in the Court's jurisprudence towards more leniency in allowing medical advertising, (15) allowing dentists to publish more information about their services. This trend must be seen as positive, as long as publishing the information gives the patients access to helpful information badly needed about the tangled and complex world of medicine. A fine balance has to be struck, however, because what informs one patient, may confuse the other. The Constitutional Court seems to be assuming ever better informed patients, when making its decision about what the public is capable of sorting out for themselves. So far, the author applauds the trust the Court has shown us.

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(1) To mention only some examples: The ground-breaking pharmacy case (BVerfGE 7, 377) or a whole history of decisions concerning advertisements of medical professionals, *e.g.* BVerfGE 71, 183; BVerfGE 85, 248.
(2) *Volksgesundheit* (peoples' health), which the Constitutional Court calls an important community interest in the pharmacy case (BVerfGE 7, 377 (414 ff.)).
(3) The *Berufsordnung*, as a charter, is based on § 31 I 1 of the Baden-Württemberg *Gesetz über die öffentliche Berufsvertretung, die Berufspflichten, die Weiterbildung und die Berufsgerichtsbarkeit der Ärzte, Zahnärzte, Tierärzte, Apotheker und Dentisten*. (law on the public representation, professional obligations, continuing education and professional courts of doctors, dentists, veterinaries, apothecaries and dentists). The ban on advertising has been interpreted to forbid only improper ("*berufswidrig*") advertising, *see* BVerfG NJW 2001, 2788 (2789).
(4) The Constitutional Court consists of two Senates with 8 judges. Each Senate has been divided into several Chambers, each with 3 judges, that are charged, *e.g.* with reviewing constitutional complaints and can dismiss them or grant them if the legal questions have already been decided before and the legal situation is obvious (*See*, Schleich, DAS BUNDESVERFASSUNGSGERICHT 258 note 38 (4th ed. 1997).
(5) BVerfGE 7, 377, *See* Donald Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY, 285 (1989).
(6) BVerfGE 7, 377; Pieroth/Schlink, GRUNDRECHTE. STAATSRECHT II, note 808 (17th ed., 2001).
(7) *See e.g.*, Tettinger, Article 12, in GRUNDGESETZ, note 29 et sequ (Sachs ed., 1996).
(8) BVerfGE 97, 228 (253) (Short report – Kurzberichterstattung).
(9) BVerfGE 7, 377, *see* Kommers, supra note 4.
(10) The gradation theory is just a somewhat modified application of the principle of proportionality that the Court generally demands for justifications of infringements upon constitutional rights.
(11) *See*, BVerfGE 7, 377.
(12) *See, supra,* note 1.
(13) BVerfG, NJW 2001, 2788.
(14) BVerfG, NJW 2001, 2788 (2789).
(15) Earlier cases, such as BVerfGE 85, 248 (holding that collaboration of a doctor in press reports about his professional activity cannot be banned *per se* if he does not hold the right of examining the report before publication) confirm this trend.