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

COURT (CHAMBER)

CASE OF MÜLLER AND OTHERS v. SWITZERLAND

(Application no. 10737/84)

JUDGMENT

STRASBOURG

24 May 1988

In the case of Müller and Others*,

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. R. RYSSDAL, *President*,
Mr. J. CREMONA,
Mrs. D. BINDSCHEDLER-ROBERT,
Sir Vincent EVANS,
Mr. R. BERNHARDT,
Mr. A. SPIELMANN,
Mr. J. DE MEYER,

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

Having deliberated in private on 27 January and 27 and 28 April 1988,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Swiss Confederation ("the Government") on 12 December 1986 and 25 February 1987 respectively, within the three-month period laid down in Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 10737/84) against Switzerland lodged with the Commission under Article 25 (art. 25) by nine Swiss citizens - Mr. Josef Felix Müller, Mr. Charles Descloux, Mr. Michel Gremaud, Mr. Paul Jacquat, Mr. Jean Pythoud, Mrs. Geneviève Renevey, Mr. Michel Ritter, Mr. Jacques Sidler and Mr. Walter Tschopp - and a Canadian national, Mr. Christophe von Imhoff, on 22 July 1983.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). Both sought a

* Note by the Registrar: The case is numbered 25/1986/123/174. 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.

decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings pending before the Court and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mrs. D. Bindschedler-Robert, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 3 February 1987, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr. J. Cremona, Mr. J. Pinheiro Farinha, Sir Vincent Evans, Mr. R. Bernhardt and Mr. A. Spielmann (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Subsequently, Mr. Pinheiro Farinha, who was unable to attend, was replaced by Mr. J. De Meyer, substitute judge (Rules 22 § 1 and 24 § 1).

4. Mr. Ryssdal, who had assumed the office of President of the Chamber (Rule 21 § 5), consulted - through the Deputy Registrar - the Agent of the Government, the Delegate of the Commission and the lawyer for the applicants on the need for a written procedure (Rule 37 § 1). In accordance with the orders made in consequence, the registry received:

(a) the applicants' memorial, written in German by leave of the President (Rule 27 § 3), on 1 June 1987;

(b) the Government's memorial, on 30 July.

In a letter of 12 October, the Secretary to the Commission informed the Registrar that the Delegate would make his submissions at the hearing.

5. Having consulted - through the Deputy Registrar - the Agent of the Government, the Delegate of the Commission and the lawyer for the applicants, the President directed on 23 October 1987 that the oral proceedings should commence on 25 January 1988 (Rule 38).

6. On 30 November, the Court decided to inspect the impugned paintings by Josef Felix Müller, as the Government had suggested (Rule 40 § 1). They were duly shown, in camera, in the presence of those appearing before the Court, on 25 January 1988, before the hearing began.

In the meantime, on 2 and 4 December 1987, the Registrar had received a number of documents which the President had instructed him to obtain from the Commission. Between 11 January and 8 April 1988, the Government and the applicants furnished several other documents.

7. The hearing was held in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr. O. JACOT-GUILLARMOD, Head

of the Department of International Affairs, Federal Department of Justice, *Agent*,
Mr. P. ZAPPELLI, Cantonal Judge, Canton of Fribourg,
Mr. B. MÜNGER, Federal Department of Justice, *Counsel*;
- for the Commission
Mr. H. VANDENBERGHE, *Delegate*;
- for the applicants
Mr. P. RECHSTEINER, avocat, *Counsel*.

The Court heard addresses by Mr. Jacot-Guillarmod for the Government, by Mr. Vandenberghe for the Commission and by Mr. Rechsteiner for the applicants, as well as their replies to its questions.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The first applicant, Josef Felix Müller, a painter born in 1955, lives in St. Gall. The other nine applicants are:

(a) Charles Descloux, art critic, born in 1939 and living in Fribourg;

(b) Michel Gremaud, art teacher, born in 1944 and living at Guin, Garmiswil;

(c) Christophe von Imhoff, picture restorer, born in 1939 and living at Belfaux;

(d) Paul Jacquat, bank clerk, born in 1940 and living at Belfaux;

(e) Jean Pythoud, architect, born in 1925 and living in Fribourg;

(f) Geneviève Renevey, community worker, born in 1946 and living at Villars-sur-Glâne;

(g) Michel Ritter, artist, born in 1949 and living at Montagny-la-Ville;

(h) Jacques Sidler, photographer, born in 1946 and living at Vuisternens-en-Ogoz;

(i) Walter Tschopp, assistant lecturer, born in 1950 and living in Fribourg.

9. Josef Felix Müller has exhibited on his own and with other artists on many occasions, particularly since 1981, both in private galleries and in museums, in Switzerland and elsewhere.

With the assistance of the Federal Office of Culture, he took part in the Sydney Biennial in Australia in 1984, as Switzerland's representative. He has been awarded several prizes and has sold works to museums such as the Kunsthalle in Zürich.

10. In 1981, the nine last-mentioned applicants mounted an exhibition of contemporary art in Fribourg at the former Grand Seminary, a building due to be demolished. The exhibition, entitled "Fri-Art 81", was held as part of the celebrations of the 500th anniversary of the Canton of Fribourg's entry into the Swiss Confederation. The organisers invited several artists to take part, each of whom was allowed to invite another artist of his own choosing. The artists were meant to make free use of the space allocated to them. Their works, which they created on the spot from early August 1981 onwards, were to have been removed when the exhibition ended on 18 October 1981.

11. In the space of three nights Josef Felix Müller, who had been invited by one of the other artists, produced three large paintings (measuring 3.11m x 2.24m, 2.97m x 1.98m and 3.74m x 2.20m) entitled "Drei Nächte, drei Bilder" ("Three Nights, Three Pictures"). They were on show when the exhibition began on 21 August 1981. The exhibition had been advertised in the press and on posters and was open to all, without any charge being made for admission. The catalogue, specially printed for the preview, contained a photographic reproduction of the paintings.

12. On 4 September 1981, the day of the official opening, the principal public prosecutor of the Canton of Fribourg reported to the investigating judge that the paintings in question appeared to come within the provisions of Article 204 of the Criminal Code, which prohibited obscene publications and required that they be destroyed (see paragraph 20 below). The prosecutor thought that one of the three pictures also infringed freedom of religious belief and worship within the meaning of Article 261 of the Criminal Code.

According to the Government, the prosecutor had acted on an information laid by a man whose daughter, a minor, had reacted violently to the paintings on show; some days earlier another visitor to the exhibition had apparently thrown down one of the paintings, trampled on it and crumpled it.

13. Accompanied by his clerk and some police officers, the investigating judge went to the exhibition on 4 September and had the disputed pictures removed and seized; ten days later, he issued an attachment order. On 30 September 1981, the Indictment Chamber dismissed an appeal against that decision.

After questioning the ten applicants on 10, 15 and 17 September and 6 November 1981, the investigating judge committed them for trial to the Sarine District Criminal Court.

14. On 24 February 1982, the court sentenced each of them to a fine of 300 Swiss francs (SF) for publishing obscene material (Article 204 § 1 of the Criminal Code) - the convictions to be deleted from the criminal records after one year - but acquitted them on the charge of infringing freedom of religious belief and worship (Article 261). It also ordered that the

confiscated paintings should be deposited in the Art and History Museum of the Canton of Fribourg for safekeeping. At the hearing on 24 February, it had heard evidence from Mr. Jean-Christophe Ammann, the curator of the Kunsthalle in Basle, as to Josef Felix Müller's artistic qualities.

In its judgment, the court pointed out first of all that "the law [did] not define obscenity for the purposes of Article 204 CC [Criminal Code] and the concept [had] to be clarified by means of interpretation, having regard to the intent and purpose of the enactment as well as to its place in the legislation and in the overall legal system". After referring to the Federal Court's case-law on the subject, it said among other things:

> "In the instant case, although Mr. Müller's three works are not sexually arousing to a person of ordinary sensitivity, they are undoubtedly repugnant at the very least. The overall impression is of persons giving free rein to licentiousness and even perversion. The subjects - sodomy, fellatio, bestiality, the erect penis - are obviously morally offensive to the vast majority of the population. Although allowance has to be made for changes in the moral climate, even for the worse, what we have here would revolutionise it. Comment on the confiscated works is superfluous; their vulgarity is plain to see and needs no elaborating upon.
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> ...
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> Nor can a person of ordinary sensitivity be expected to go behind what is actually depicted and make a second assessment of the picture independently of what he can actually see. To do that he would have to be accompanied to exhibitions by a procession of sexologists, psychologists, art theorists or ethnologists in order to have explained to him that what he saw was in reality what he wrongly thought he saw.
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> Lastly, the comparisons with the works of Michelangelo and J. Bosch are specious. Apart from the fact that they contain no depictions of the kind in Müller's paintings, no valid comparison can be made with history-of-art or cultural collections in which sexuality has a place ..., but without lapsing into crudity. Even with an artistic aim, crude sexuality is not worthy of protection ... . Nor are comparisons with civilisations foreign to western civilisation valid."

On the question whether to order the destruction of the pictures under paragraph 3 of Article 204 (see paragraph 20 below), the court said:

> "Not without misgivings, the court will not order the destruction of the three works.
>
> The artistic merit of the three works exhibited in Fribourg is admittedly less obvious than is supposed by the witness Ammann, who nevertheless said that the paintings Müller exhibited in Basle were more 'demanding'. The court would not disagree. Müller is undoubtedly an artist of some accomplishment, particularly in the matter of composition and in the use of colour, even though the works seized in Fribourg appear rather scamped.
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> Nonetheless, the court, deferring to the art critic's opinion while not sharing it, and concurring with the relevant findings of the Federal Court in the Rey judgment (ATF 89 IV 136 et seq.), takes the view that in order to withhold the three paintings from the general public - to 'destroy' them - it is sufficient to place them in a museum, whose curator will be required to make them available only to a few serious specialists

capable of taking an exclusively artistic or cultural interest in them as opposed to a prurient interest. The Art and History Museum of the Canton of Fribourg meets the requirements for preventing any further breach of Article 204 of the Criminal Code. The three confiscated paintings will be deposited there."

15. All the applicants appealed on points of law on 24 February 1982; in particular, they challenged the trial court's interpretation as regards the obscenity of the relevant paintings. For example, it was argued by Josef Felix Müller (in pleadings of 16 March 1982) that something which was obscene sought directly to arouse sexual passion, and that this had to be its purpose, with the essential aim of pandering to man's lowest instincts or else for pecuniary gain. This, it was alleged, was never the case "where artistic or scientific endeavour [was] the primary consideration".

16. The Fribourg Cantonal Court, sitting as a court of cassation, dismissed the appeals on 26 April 1982.

Referring to the Federal Court's case-law, it acknowledged that "in the recent past, and still today, the public's general views on morality and social mores, which vary at different times and in different places, have changed in a way which enables things to be seen more objectively and naturally". The trial court had to take account of this change, but that did not mean that it had to show complete permissiveness, which would leave no scope for the application of Article 204 of the Criminal Code.

As for works of art, they did not in themselves have any privileged status. At most they might escape destruction despite their obscenity. Their creators nonetheless fell within the thrust of Article 204, "since that statutory provision as a whole [was] designed to protect public morals, even in the sphere of the fine arts". That being so, the court could dispense with deciding the question whether the pictures complained of were the outcome of "artistic ideas, though even then, intention [was] one thing and realisation of it another".

Like the trial court, the appellate court found that Josef Felix Müller's paintings aroused "repugnance and disgust":

"These are not works which, in treating a particular subject or scene, allude to sexual activity more or less discreetly. They place it in the foreground, depicting it not in the embrace of man and woman but in vulgar images of sodomy, fellatio between males, bestiality, erect penises and masturbation. Sexual activity is the main, not to say sole, ingredient of all three paintings, and neither the appellants' explanations nor the witness Mr. Ammann's learned-seeming but wholly unpersuasive remarks can alter that fact. To go into detail, however distasteful it may be, one of the paintings contains no fewer than eight erect members. All the persons depicted are entirely naked and one of them is engaging simultaneously in various sexual practices with two other males and an animal. He is kneeling down and not only sodomising the animal but holding its erect penis in another animal's mouth. At the same time he is having the lower part of his back - his buttocks, even - fondled by another male, whose erect penis a third male is holding towards the first male's mouth. The animal being sodomised has its tongue extended towards the buttocks of a fourth male, whose penis is likewise erect. Even the animals' tongues (especially in the smallest painting)

are more suggestive, in shape and aspect, of erect male organs than of tongues. Sexual activity is crudely and vulgarly portrayed for its own sake and not as a consequence of any idea informing the work. Lastly, it should be pointed out that the paintings are large ..., with the result that their crudeness and vulgarity are all the more offensive.

The court is likewise unconvinced by the appellants' contention that the paintings are symbolical. What counts is their face value, their effect on the observer, not some abstraction utterly unconnected with the visible image or which glosses over it. Furthermore, the important thing is not the artist's meaning or purported meaning but the objective effect of the image on the observer ... .

Not much of the argument in the appeal was directed to the issues of intention or of awareness of obscenity, nor indeed could it have been. In particular, an author is aware of a publication's obscenity when he knows it deals with sexual matters and that any written or pictorial allusion to such matters is likely, in the light of generally accepted views, grossly to offend the average reader's or observer's natural sense of decency and propriety. That was plainly so here, as the evidence at the trial confirmed. ... Indeed, several of the defendants admitted that the paintings had shocked them. It should be noted that even someone insensible to obscenity is capable of realising that it may disturb others. As the trial court pointed out, the defendants at the very least acted recklessly.

Lastly, it is immaterial that similar works have allegedly been exhibited elsewhere; the three paintings in issue do not on that account cease to be obscene, as the trial court rightly held them to be ..."

17. On 18 June 1982, the applicants lodged an application for a declaration of nullity (Nichtigkeitsbeschwerde) with the Federal Court. They sought to have the judgment of 26 April set aside and the case remitted with a view to their acquittal and the return of the confiscated paintings or, in the alternative, merely the return of the paintings.

In their submission, the Fribourg Cantonal Court had wrongly interpreted Article 204 of the Criminal Code; in particular, it had taken no account of the scope of the freedom of artistic expression, guaranteed inter alia in Article 10 (art. 10) of the Convention. Mr. Ammann, one of the most distinguished experts on modern art, had confirmed that these were works of note. Similar pictures by Josef Felix Müller, moreover, had been exhibited in Basle in February 1982 and it had not occurred to anyone to regard them as being obscene.

As to the "publication" of obscene items, which was prohibited under Article 204 of the Criminal Code, this was a relative concept. It should be possible to show in an exhibition pictures which, if they were displayed in the market-place, would fall foul of Article 204; people interested in the arts ought to have an opportunity to acquaint themselves with all the trends in contemporary art. Visitors to an exhibition of contemporary art like "Fri-Art 81" should expect to be faced with modern works that might be incomprehensible. If they did not like the paintings in issue, they were free to look away from them and pass them by; there was no need for the protection of the criminal law. It was not for the court to undertake indirect

censorship of the arts. On a strict construction of Article 204 - that is, one which, having regard to the fundamental right to freedom of artistic expression, left it to art-lovers to decide for themselves what they wanted to see -, the applicants should be acquitted.

Confiscation of the disputed paintings, they submitted, could only be ordered if they represented a danger to public order such that returning them could not be justified - and that was a matter the court of cassation had not considered. Since the pictures had been openly on display for ten days without giving rise to any protests, it was difficult to see how such a danger was made out. Josef Felix Müller would certainly not show his paintings in Fribourg in the near future. On the other hand, they could be shown without any difficulty elsewhere, as was proved by his exhibition in Basle in February 1982. It was consequently out of all proportion to deprive him of them.

18. The Criminal Cassation Division of the Federal Court dismissed the appeal on 26 January 1983 for the following reasons:

> "The decided cases show that for the purposes of Article 204 of the Criminal Code, any item is obscene which offends, in a manner that is difficult to accept, the sense of sexual propriety; the effect of the obscenity may be to arouse a normal person sexually or to disgust or repel him. ... The test of obscenity to be applied by the court is whether the overall impression of the item or work causes moral offence to a person of ordinary sensitivity ...
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> The paintings in issue show an orgy of unnatural sexual practices (sodomy, bestiality, petting), which is crudely depicted in large format; they are liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity. The artistic licence relied on by the appellant cannot in any way alter that conclusion in the instant case.
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> The content and scope of constitutional freedoms are determined on the basis of the federal law currently in force. This applies inter alia to freedom of the press, freedom of opinion and artistic freedom; under Article 113 [of the Federal Constitution], the Federal Court is bound by federal enactments ... In the field of artistic creation [it] has held that works of art per se do not enjoy any special status ... A work of art is not obscene, however, if the artist contrives to present subjects of a sexual nature in an artistic form such that their offensiveness is toned down and ceases to predominate ... In reaching its decision, the criminal court does not have to view the work through an art critic's spectacles (which would often ill become it) but must decide whether the work is liable to offend the unsuspecting visitor.
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> Expert opinion as to the artistic merit of the work in issue is therefore irrelevant at this stage, though it might be relevant to the decision as to what action to take in order to prevent fresh offences (destruction or seizure of the item; Art. 204 § 3 CC ...).

The Cantonal Court duly scrutinised the paintings for a predominantly aesthetic element. Having regard in particular to the number of sexual features in each of the three (one of them, for instance, contains eight erect members), it decided that the emphasis was on sexuality in its offensive forms and that this was the predominant, not to say sole, ingredient of the

items in dispute. The Cassation Division of the Federal Court agrees. The overall impression created by Müller's paintings is such as to be morally offensive to a person of normal sensitivity. The Cantonal Court's finding that they were obscene was accordingly not in breach of federal law.

The appellants maintained that the publication element of the offences was lacking. They are wrong.

The obscene paintings were on display in an exhibition open to the public which had been advertised on posters and in the press. There was no condition of admission to 'Fri-Art 81', such as an age-limit. The paintings in dispute were thus made accessible to an indeterminate number of people, which is the criterion of publicity for the purposes of Article 204 CC ..."

Finally, the Criminal Cassation Division of the Federal Court declared the alternative application for return of the paintings to be inadmissible as it had not first been made before the cantonal courts.

19. On 20 January 1988, the Sarine District Criminal Court granted an application made by Josef Felix Müller on 29 June 1987 and ordered the return of the paintings.

On the basis that it had been requested in effect to reconsider the confiscation order it had made in 1982, the court held that it had to decide whether the order could stand "almost eight years later". Hence, the reasons for its decision were as follows:

> "In Swiss law, confiscation is a preventive measure in rem. This is already clear from the legislative text, which classifies Article 58 under the heading 'other measures' - the heading in the margin for Articles 57-62 CC - and not under the subsidiary penalties prescribed in Articles 51-56 CC ...
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> The confiscation of items or assets may admittedly constitute a serious interference with property rights. It must be proportionate and a more lenient order may thus be justified where it achieves the desired aim. Confiscation remains however the rule. It should be departed from only where a more lenient order achieves the desired aim ... In this case, when the confiscation order was made in 1982, the statutory provision (Article 204 § 3 CC) would normally have required the destruction of the paintings. Giving a reasoned decision, the court preferred a more lenient measure which achieved the aim of security, whilst complying with the principle of proportionality ... . The measure itself should remain in force only as long as the statutory requirements are satisfied ... .
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> It is true that the Code makes no provision for an order under Article 58 to be subsequently discharged or varied. The legislature probably did not address itself to this question at the time, whereas provision was made whereby other measures, which were admittedly much more serious because they restricted personal liberty, could be re-examined by a court of its own motion (Articles 42-44 CC). It does not follow that discharge or variation is completely illegal. The Federal Court has, moreover, held that a measure should not remain in force where the circumstances justifying it cease to obtain ... .
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> Accordingly, the view must be taken that an order confiscating a work of art may subsequently be discharged or varied, either because the confiscated item is no longer

dangerous and a measure is no longer required, or because the necessary degree of security may be achieved by another more lenient measure (judgment of the Basle-Urban Court of Appeal of 19 August 1980, in the Fahrner case).

Judgments concerning freedom of expression and its scope often refer to Article 10 §§ 1 and 2 (art. 10-1, art. 10-2) [of the Convention].

In this area, the decisions of the Convention authorities have a direct influence on the Swiss legal system, by way of strengthening individual liberties and judicial safeguards ...

In this case, where the applicant has availed himself of the possibility of applying for the return of his paintings, the court must consider whether the grounds on which it made the confiscation order in the first place, which restricted J.F. Müller's freedom of expression, are still valid.

While the restriction was necessary in a democratic society in 1982 and was justified by the need to safeguard and protect morality and the rights of others, the court considers, admittedly with some hesitation, that the order may now be discharged. It should be noted that the confiscation measure was not absolute but merely of indeterminate duration, which left room to apply for a reconsideration.

It appears to the court that the preventive measure has now fulfilled its function, namely to ensure that such paintings are not exhibited in public again without any precautions. Those convicted have themselves admitted that the paintings could shock people. Once the order has achieved its aim, there is no reason why it should continue in force.

Accordingly, the artist is entitled to have his works returned to him.

It is not necessary to attach any obligations to this decision. If J.F. Müller decided to exhibit the three paintings again elsewhere, he knows that he would be running the risk of further action by the courts under Article 204 of the Criminal Code.

Finally, it appears that by exhibiting three provocative paintings in a former seminary in 1982, J.F. Müller deliberately intended to draw attention to himself and the organisers. Since then he has become known for more 'demanding' works, to use the terms of the art critic who gave evidence in 1982. Having achieved a certain repute, he may find it unnecessary to shock by resorting to vulgarity. In any event, there is no reason to believe that he will use the three paintings in future to offend other people's moral sensibilities.

..."

Josef Felix Müller recovered his paintings in March 1988.

II. RELEVANT DOMESTIC LAW

20. Article 204 of the Swiss Criminal Code provides:

"1. Anyone who makes or has in his possession any writings, pictures, films or other items which are obscene with a view to trading in them, distributing them or

displaying them in public, or who, for the above purposes, imports, transports or exports such items or puts them into circulation in any way, or who openly or secretly deals in them or publicly distributes or displays them or by way of trade supplies them for hire, or who announces or makes known in any way, with a view to facilitating such prohibited circulation or trade, that anyone is engaged in any of the aforesaid punishable activities, or who announces or makes known how or through whom such items may be directly or indirectly procured, shall be imprisoned or fined.

2. Anyone supplying or displaying such items to a person under the age of 18 shall be imprisoned or fined.

3. The court shall order the destruction of the items."

The Federal Court has consistently held that any works or items which offend, in a manner that is difficult to accept, the sense of sexual propriety, are obscene; the effect may be to arouse a normal person sexually or to disgust or repel him (Judgments of the Swiss Federal Court (ATF), vol. 83 (1957), part VI, pp. 19-25; vol. 86 (1960), part IV, pp. 19-25; vol. 87 (1961), part IV, pp. 73-85); making such items available to an indeterminate number of people amounts to "publication" of them.

21. The Federal Court held in 1963 that, for the purposes of paragraph 3 of Article 204, if an obscene object was of undoubted cultural interest, it was sufficient to withhold it from the general public in order to "destroy" it.

In its judgment of 10 May 1963 in the case of Rey v. Attorney-General of Valais (ATF vol. 89 (1963), part IV, pp. 133-140), it held inter alia "that, in making destruction mandatory, the legislature had in contemplation only the commonest case, publication of entirely pornographic items". As "destruction is a measure as opposed to a punishment", "it must not go beyond what is necessary to achieve the desired aim", that is to say "the protection of public morality". The court went on to state:

"In other words, 'destruction', as prescribed by Article 204 § 3 of the Criminal Code, must protect public morality but go no further than that requirement warrants.

In the commonest case, that of pornographic publications devoid of artistic, literary or scientific merit, the destruction will be physical and irreversible, not just because of the lack of any cultural value, but also because, in general, this is the only adequate way of ultimately protecting the public from the danger of the confiscated items ... .

It is quite a different matter when one is dealing, as in the present case, with an irreplaceable or virtually irreplaceable work of art. There is then a clash of two opposing interests, both of them important in terms of the civilisation to which Switzerland belongs: the moral and the cultural interest. In such a case, the legislature and the courts must find a way of reconciling the two. This court has thus held, in applying Article 204, that it must always be borne in mind that artistic creativity is itself subject to certain constraints of public morality, but that there must nonetheless be artistic freedom ... .

It is, accordingly, a matter for the courts to consider in each case in view of all the circumstances, whether physical destruction is essential or whether a more lenient

measure suffices. The mandatory requirement of Article 204 § 3 will, therefore, be complied with where the courts order that an obscene item devoid of any cultural value is to be physically destroyed, and, in respect of an item of undoubted cultural interest, where effective steps are taken to withhold it from the general public and to make it available only to a limited number of serious specialists ... .

If such precautions are taken, Article 204 of the Criminal Code will not be applicable to items which are inherently obscene but of genuine cultural interest. A distinction must also be drawn between such items and pure pornography. The cultural interest of an item admittedly does not prevent it from being obscene. But it does require the courts to determine with particular care what steps must be taken to prevent general access to the item, while making it available to a well-defined number of serious connoisseurs; this will comply with the requirements of Article 204 § 3 of the Criminal Code, which, as has been shown, makes destruction mandatory but only as a measure whose effects must be in proportion to the intended aim ... ."

This particular case concerned seven ivory reliefs and thirty prints of antique Japanese art; the court held that the requirement to "destroy" them was met by placing them in a museum.

22. Previous to the Sarine District Criminal Court's decision of 20 January 1988 (see paragraph 19 above), the Basle-Urban Court of Appeal had already discharged a confiscation order made pursuant to the Criminal Code. In a judgment of 29 August 1980, to which the District Court referred, the Court of Appeal granted an application to restore to the heirs of the painter Kurt Fahrner a painting confiscated in 1960, after he had been convicted of an infringement of freedom of religious belief and worship (Article 261 of the Criminal Code).

The Court of Appeal held inter alia that as confiscation "always interferes with the property rights of the person concerned, a degree of restraint is called for and, in accordance with the principle of proportionality, such a measure must go no further than is essential to maintain security". The court added (translation from the German):

"This principle applies, in particular, where (on account of its distinctiveness) the item subject to confiscation is hard or impossible to replace. Therefore the principle applies more strictly to a work of art (e.g. a painting) than to a weapon used to commit an offence ... . Finally, having regard to its preventive character, the measure should remain in force only for as long as the legal requirements are satisfied ... ."

Accordingly, the view had to be taken that "an order confiscating a work of art may subsequently be discharged or varied, either because the confiscated item is no longer dangerous and the measure no longer required, or because the necessary degree of security may be achieved by another more lenient measure".

In that particular case, the reasoning of the Court of Appeal was as follows:

"To apply present-day criteria, both parties agree with the court that the public's ideas of obscenity, immorality, indecency, blasphemy, etc. have changed considerably in the last twenty years and have become distinctly more liberal. Although the confiscated painting is undoubtedly liable to offend a great many people's religious

sensibilities even today, there is no reason to fear that, by exhibiting it in a private or suitable public place, one would be endangering religious harmony, public safety, morals or public order within the meaning of Article 58 of the Criminal Code ...

Whether there is a danger thus depends primarily on where the item to be confiscated is liable to end up ... . In this case, the exhibition of the painting in a museum would at present clearly be unobjectionable in the context of Article 58 of the Criminal Code. However, even if the picture were to be returned unconditionally, the likelihood of misuse must be regarded as minimal because Fahrner, who deliberately set out, by means of a provocative exhibition, to draw attention to himself as a painter and to his ideas and works, has since died. There is no reason to believe that the applicants have any intention of using the picture to offend other people's religious sensibilities. At any rate, the picture would not lend itself to such a purpose (Article 261 of the Criminal Code) sufficiently to permit the 1960 confiscation order to stand ... . Any danger of that kind arising from the picture is no longer serious enough to justify action under Article 58 of the Criminal Code. Nor is there any reason to hand this picture over to a scientific collection, i.e. a museum, in order to protect the public and morality. The confiscation order should be discharged and the picture unconditionally returned to the applicants, whose main application is thus granted."

PROCEEDINGS BEFORE THE COMMISSION

23. The applicants applied to the Commission on 22 July 1983 (application no. 10737/84). Relying on Article 10 (art. 10) of the Convention, they complained of their criminal conviction and sentence to a fine (hereinafter referred to as the "conviction") and of the confiscation of the pictures in dispute.

24. The Commission declared the application admissible on 6 December 1985.

In its report of 8 October 1986 (made under Article 31) (art. 31), it took the view that there had been a breach of Article 10 (art. 10) in respect of the confiscation of the paintings (by eleven votes to three) but not in respect of the conviction (unanimously). The text of the Commission's opinion and the separate opinion contained in the report is reproduced as an annex to this judgment.

FINAL SUBMISSIONS TO THE COURT

25. At the hearing on 25 January 1988, the Government reiterated the final submissions in their memorial, asking the Court to

"hold that there has been no violation of Article 10 (art. 10) of the Convention in this case, either in relation to the applicants' conviction and sentence to a fine or as regards the confiscation of the first applicant's paintings".

AS TO THE LAW

26. The applicants complained that their conviction and the confiscation of the paintings in issue violated Article 10 (art. 10) of the Convention, which 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."

The Government rejected this contention. The Commission too rejected it with regard to the first of the measures complained of but accepted it with regard to the second.

27. The applicants indisputably exercised their right to freedom of expression - the first applicant by painting and then exhibiting the works in question, and the nine others by giving him the opportunity to show them in public at the "Fri-Art 81" exhibition they had mounted.

Admittedly, Article 10 (art. 10) does not specify that freedom of artistic expression, in issue here, comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression. As those appearing before the Court all acknowledged, it includes freedom of artistic expression - notably within freedom to receive and impart information and ideas - which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Confirmation, if any were needed, that this interpretation is correct, is provided by the second sentence of paragraph 1 of Article 10 (art. 10-1), which refers to "broadcasting, television or cinema enterprises", media whose activities extend to the field of art. Confirmation that the concept of freedom of expression is such as to include artistic expression is also to be found in Article 19 § 2 of the International Covenant on Civil and Political Rights, which specifically includes within the right of freedom of expression information and ideas "in the form of art".

28. The applicants clearly suffered "interference by public authority" with the exercise of their freedom of expression - firstly, by reason of their conviction by the Sarine District Criminal Court on 24 February 1982, which was confirmed by the Fribourg Cantonal Court on 26 April 1982 and then by the Federal Court on 26 January 1983 (see paragraphs 14, 16 and 18

above), and secondly on account of the confiscation of the paintings, which was ordered at the same time but subsequently lifted (see paragraph 19 above).

Such measures, which constitute "penalties" or "restrictions", are not contrary to the Convention solely by virtue of the fact that they interfere with freedom of expression, as the exercise of this right may be curtailed under the conditions provided for in paragraph 2 (art. 10-2). Consequently, the two measures complained of did not infringe Article 10 (art. 10) if they were "prescribed by law", had one or more of the legitimate aims under paragraph 2 of that Article (art. 10-2) and were "necessary in a democratic society" for achieving the aim or aims concerned.

Like the Commission, the Court will look in turn at the applicants' conviction and at the confiscation of the pictures from this point of view.

I. THE APPLICANTS' CONVICTION

1. "Prescribed by law"

29. In the applicants' view, the terms of Article 204 § 1 of the Swiss Criminal Code, in particular the word "obscene", were too vague to enable the individual to regulate his conduct and consequently neither the artist nor the organisers of the exhibition could foresee that they would be committing an offence. This view was not shared by the Government and the Commission.

According to the Court's case-law, "foreseeability" is one of the requirements inherent in the phrase "prescribed by law" in Article 10 § 2 (art. 10-2) of the Convention. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see the Olsson judgment of 24 March 1988, Series A no. 130, p. 30, § 61 (a)). The Court has, however, already emphasised the impossibility of attaining absolute precision in the framing of laws, particularly in fields in which the situation changes according to the prevailing views of society (see the Barthold judgment of 25 March 1985, Series A no. 90, p. 22, § 47). The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague (see, for example, the Olsson judgment previously cited, ibid.). Criminal-law provisions on obscenity fall within this category.

In the present instance, it is also relevant to note that there were a number of consistent decisions by the Federal Court on the "publication" of "obscene" items (see paragraph 20 above). These decisions, which were accessible because they had been published and which were followed by the

lower courts, supplemented the letter of Article 204 § 1 of the Criminal Code. The applicants' conviction was therefore "prescribed by law" within the meaning of Article 10 § 2 (art. 10-2) of the Convention.

2. The legitimacy of the aim pursued

30. The Government contended that the aim of the interference complained of was to protect morals and the rights of others. On the latter point, they relied above all on the reaction of a man and his daughter who visited the "Fri-Art 81" exhibition (see paragraph 12 above).

The Court accepts that Article 204 of the Swiss Criminal Code is designed to protect public morals, and there is no reason to suppose that in applying it in the instant case the Swiss courts had any other objectives that would have been incompatible with the Convention. Moreover, as the Commission pointed out, there is a natural link between protection of morals and protection of the rights of others.

The applicants' conviction consequently had a legitimate aim under Article 10 § 2 (art. 10-2).

3. "Necessary in a democratic society"

31. The submissions of those appearing before the Court focused on the question whether the disputed interference was "necessary in a democratic society" for achieving the aforementioned aim.

In the applicants' view, freedom of artistic expression was of such fundamental importance that banning a work or convicting the artist of an offence struck at the very essence of the right guaranteed in Article 10 (art. 10) and had damaging consequences for a democratic society. No doubt the impugned paintings reflected a conception of sexuality that was at odds with the currently prevailing social morality, but, the applicants argued, their symbolical meaning had to be considered, since these were works of art. Freedom of artistic expression would become devoid of substance if paintings like those of Josef Felix Müller could not be shown to people interested in the arts as part of an exhibition of experimental contemporary art.

In the Government's submission, on the other hand, the interference was necessary, having regard in particular to the subject-matter of the paintings and to the particular circumstances in which they were exhibited.

For similar reasons and irrespective of any assessment of artistic or symbolical merit, the Commission considered that the Swiss courts could reasonably hold that the paintings were obscene and were entitled to find the applicants guilty of an offence under Article 204 of the Criminal Code.

32. The Court has consistently held that in Article 10 § 2 (art. 10-2) the adjective "necessary" implies the existence of a "pressing social need" (see, as the most recent authority, the Lingens judgment of 8 July 1986, Series A

no. 103, p. 25, § 39). The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but this goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (ibid.). The Court is therefore empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10) (ibid.).

In exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned court decisions in isolation; it must look at them in the light of the case as a whole, including the paintings in question and the context in which they were exhibited. The Court must determine whether the interference at issue was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the Swiss courts to justify it are "relevant and sufficient" (see the same judgment, p. 26, § 40).

33. In this connection, the Court must reiterate that freedom of expression, as secured in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and for the self-fulfilment of the individual. Subject to paragraph 2 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see the Handyside judgment of 7 December 1976, Series A no. 24, p. 23, § 49). Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression.

34. Artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10 (art. 10-2). Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, "duties and responsibilities"; their scope will depend on his situation and the means he uses (see, mutatis mutandis, the Handyside judgment previously cited, p. 23, § 49). In considering whether the penalty was "necessary in a democratic society", the Court cannot overlook this aspect of the matter.

35. The applicants' conviction on the basis of Article 204 of the Swiss Criminal Code was intended to protect morals. Today, as at the time of the Handyside judgment (previously cited, p. 22, § 48), it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their

countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.

36. In the instant case, it must be emphasised that - as the Swiss courts found both at the cantonal level at first instance and on appeal and at the federal level - the paintings in question depict in a crude manner sexual relations, particularly between men and animals (see paragraphs 14, 16 and 18 above). They were painted on the spot - in accordance with the aims of the exhibition, which was meant to be spontaneous - and the general public had free access to them, as the organisers had not imposed any admission charge or any age-limit. Indeed, the paintings were displayed in an exhibition which was unrestrictedly open to - and sought to attract - the public at large.

The Court recognises, as did the Swiss courts, that conceptions of sexual morality have changed in recent years. Nevertheless, having inspected the original paintings, the Court does not find unreasonable the view taken by the Swiss courts that those paintings, with their emphasis on sexuality in some of its crudest forms, were "liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity" (see paragraph 18 above). In the circumstances, having regard to the margin of appreciation left to them under Article 10 § 2 (art. 10-2), the Swiss courts were entitled to consider it "necessary" for the protection of morals to impose a fine on the applicants for publishing obscene material.

The applicants claimed that the exhibition of the pictures had not given rise to any public outcry and indeed that the press on the whole was on their side. It may also be true that Josef Felix Müller has been able to exhibit works in a similar vein in other parts of Switzerland and abroad, both before and after the "Fri-Art 81" exhibition (see paragraph 9 above). It does not, however, follow that the applicants' conviction in Fribourg did not, in all the circumstances of the case, respond to a genuine social need, as was affirmed in substance by all three of the Swiss courts which dealt with the case.

37. In conclusion, the disputed measure did not infringe Article 10 (art. 10) of the Convention.

II. THE CONFISCATION OF THE PAINTINGS

1. "Prescribed by law"

38. In the applicants' submission, the confiscation of the paintings was not "prescribed by law" for it was contrary to the clear and unambiguous terms of Article 204 § 3 of the Swiss Criminal Code, which lays down that items held to be obscene must be destroyed.

The Government and the Commission rightly referred to the development of Swiss case-law with regard to this provision, beginning with the Federal Court's judgment of 10 May 1963 in the Rey case; since then, where an obscene item is of cultural interest and difficult or impossible to replace, such as a painting, it has been sufficient, in order to satisfy the requirements of Article 204 § 3 of the Criminal Code, to take whatever measures the court considers essential to withhold it from the general public (see paragraph 21 above). In 1982, confiscation was the measure envisaged under the relevant case-law and was as a rule employed for this purpose. Accessible to the public and followed by the lower courts, this case-law has alleviated the harshness of Article 204 § 3. The impugned measure was consequently "prescribed by law" within the meaning of Article 10 § 2 (art. 10-2) of the Convention.

2. The legitimacy of the aim pursued

39. The confiscation of the paintings - the persons appearing before the Court were in agreement on this point - was designed to protect public morals by preventing any repetition of the offence with which the applicants were charged. It accordingly had a legitimate aim under Article 10 § 2 (art. 10-2).

3. "Necessary in a democratic society"

40. Here again, those appearing before the Court concentrated their submissions on the "necessity" of the interference.

The applicants considered the confiscation to be disproportionate in relation to the aim pursued. In their view, the relevant courts could have chosen a less Draconian measure or, in the interests of protecting human rights, could have decided to take no action at all. They claimed that by confiscating the paintings the Fribourg authorities in reality imposed their view of morals on the country as a whole and that this was unacceptable, contradictory and contrary to the Convention, having regard to the well-known diversity of opinions on the subject.

The Government rejected these contentions. In declining to take the drastic measure of destroying the paintings, the Swiss courts took the minimum action necessary. The discharge of the confiscation order on 20 January 1988, which the first applicant could have applied for earlier, clearly showed that the confiscation had not offended the proportionality principle; indeed, it represented an application of it.

The Commission considered the confiscation of the paintings to be disproportionate to the legitimate aim pursued. In its view, the judicial authorities had no power to weigh the conflicting interests involved and order measures less severe than confiscation for an indefinite period.

41. It is clear that notwithstanding the apparently rigid terms of paragraph 3 of Article 204 of the Criminal Code, the case-law of the Federal Court allowed a court which had found certain items to be obscene to order their confiscation as an alternative to destruction. In the present case, it is the former measure which has to be considered under Article 10 § 2 (art. 10-2) of the Convention.

42. A principle of law which is common to the Contracting States allows confiscation of "items whose use has been lawfully adjudged illicit and dangerous to the general interest" (see, mutatis mutandis, the Handyside judgment previously cited, Series A no. 24, p. 30, § 63). In the instant case, the purpose was to protect the public from any repetition of the offence.

43. The applicants' conviction responded to a genuine social need under Article 10 § 2 (art. 10-2) of the Convention (see paragraph 36 above). The same reasons which justified that measure also apply in the view of the Court to the confiscation order made at the same time.

Undoubtedly, as the applicants and the Commission rightly emphasised, a special problem arises where, as in the instant case, the item confiscated is an original painting: on account of the measure taken, the artist can no longer make use of his work in whatever way he might wish. Thus Josef Felix Müller lost, in particular, the opportunity of showing his paintings in places where the demands made by the protection of morals are considered to be less strict than in Fribourg.

It must be pointed out, however, that under case-law going back to the Fahrner case in 1980 and which was subsequently applied in the instant case (see paragraphs 19 and 22 above), it is open to the owner of a confiscated work to apply to the relevant cantonal court to have the confiscation order discharged or varied if the item in question no longer presents any danger or if some other, more lenient, measure would suffice to protect the interests of public morals. In its decision of 20 January 1988, the Sarine District Criminal Court stated that the original confiscation "was not absolute but merely of indeterminate duration, which left room to apply for a reconsideration" (see paragraph 19 above). It granted Mr. Müller's application because "the preventive measure [had] fulfilled its function, namely to ensure that such paintings [were] not exhibited in public again without any precautions" (ibid.).

Admittedly, the first applicant was deprived of his works for nearly eight years, but there was nothing to prevent him from applying earlier to have them returned; the relevant case-law of the Basle Court of Appeal was public and accessible, and, what is more, the Agent of the Government himself drew his attention to it during the Commission's hearing on 6 December 1985; there is no evidence before the Court to show that such an application would have failed.

That being so, and having regard to their margin of appreciation, the Swiss courts were entitled to hold that confiscation of the paintings in issue was "necessary" for the protection of morals.

44. In conclusion, the disputed measure did not infringe Article 10 (art. 10) of the Convention.

FOR THESE REASONS, THE COURT

1. Holds by six votes to one that the applicants' conviction did not infringe Article 10 (art. 10) of the Convention;

2. Holds by five votes to two that the confiscation of the paintings did not infringe Article 10 (art. 10) of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 May 1988.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 52 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Mr. Spielmann;

(b) partly concurring and partly dissenting opinion of Mr. De Meyer.

R.R.
M.-A.E.

DISSENTING OPINION OF JUDGE SPIELMANN

(Translation)

1. In his separate opinion, Mr. H. Danelius of the Commission stated inter alia as follows:

> "In my view, the Commission should have asked whether, taken together, the two measures" [fine and confiscation] "constituted a violation of his right to freedom of expression as protected by Article 10 (art. 10) of the Convention, and my reply would have been that they did."

2. I can only agree with this approach to the question, just as I endorse Mr. Danelius completely when he states:

> "I believe Mr. Müller's fine and the fines imposed on the other applicants for exhibiting the three paintings at Fribourg are a more complex matter since the question arises whether there is any real need, in modern society, to punish such expression of artistic creativity, even though some may find them offensive or even disgusting."

3. However, I do not agree with the following conclusion reached by Mr. Danelius:

> "In the end, though, I voted with the rest of the Commission on this matter, wishing to conform to European Court case-law, particularly Handyside. There the Court pointed out that 'it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals' and that the requirements of morals vary 'from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject'. The Court added that 'by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements'."

4. In purely logical terms I find it very difficult to regard the fines imposed as coming within the requirements of Article 10 (art. 10) of the Convention and, on the other hand, to agree with the Commission that the confiscation of the paintings did not comply with the requirements of that Article (art. 10).

5. I believe the two matters are indistinguishable. Either there has been a violation of the Convention both in respect of the fines and the confiscation, or there has been no violation at all.

6. My view is that there has been a violation of Article 10 (art. 10) of the Convention. I will explain this view without drawing any distinction between the fines imposed and the confiscation ordered.

7. A. Prescribed by law

I agree entirely with the finding of the majority of the Court that the convictions and confiscation order were prescribed by law.

8. B. Legitimate nature of the aim

I have no reason to doubt that these decisions had a legitimate aim under Article 10 § 2 (art. 10-2) of the Convention.

9. C. "Necessary in a democratic society"

The majority of the Court recognises "that conceptions of sexual morality have changed in recent years. Nevertheless, having inspected the original paintings, the Court does not find unreasonable the view taken by the Swiss courts that those paintings, with their emphasis on sexuality in some of its crudest forms, were 'liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity'." Furthermore, this was "an exhibition which was unrestrictedly open to - and sought to attract - the public at large." In the circumstances, having regard to the margin of appreciation left to them under Article 10 § 2 (art. 10-2), [the Swiss courts] were entitled to consider it 'necessary' for the protection of morals to impose a fine on the applicants for publishing obscene material."

As regards the confiscation of the disputed paintings, the majority of the Court also considers that "having regard to the margin of appreciation, the Swiss courts were entitled to hold that confiscation of the paintings in issue was 'necessary' for the protection of morals".

10. I cannot agree with this opinion for the following reasons.

(a) Relativity of the notion of "obscenity"

There are numerous examples in the press, literature and painting which should teach us to be more prudent in this field. Freedom of expression is the rule and interferences by the State, properly justified, must remain the exception.

For example, in 1857, Flaubert was prosecuted for his last novel "Madame Bovary".

In the same year, on 20 August 1857 to be precise, Charles Baudelaire and his publishers were summoned before the same Regional Criminal Court of the Seine. The subject-matter of the proceedings: "Les Fleurs du Mal".

In the context of this case, it is not inappropriate to recall this trial (see appendix).

In my opinion, the Contracting States should take greater account of the notion of the relativity of values in the field of the expression of ideas.

If, of necessity, we may regard State authorities as being in principle in a better position than the international court to give an opinion on the exact content of the requirements of Article 10 (art. 10) of the Convention, it remains unacceptable in a Europe composed of States that the State in question should leave such an assessment to a canton or a municipal authority.

If this were to be the case, it would clearly be impossible for an international court to find any violation of Article 10 (art. 10) as the second paragraph of that Article would always apply (art. 10-2).

(b) "Margin of appreciation" of national authorities

It is not necessary to repeat the Court's case-law in this regard.

I believe however that there are limits to this concept.

Otherwise, many of the guarantees laid down in the Convention might be in danger of remaining a dead letter, at least in practice.

Moreover, can it not be argued that all exaggeration is liable in the short or medium term to lose its significance?

As will be stated below, I do not believe that the notion of "the margin of appreciation" justified the decisions taken by the Swiss authorities as these measures were in no respect necessary in a democratic society.

(c) The criterion of "necessity"

In concluding that the decisions taken were in no respect necessary in a democratic society, I would rely on the following two arguments:

1. Although convicting the applicants in criminal proceedings, the Swiss authorities did not order the destruction of the disputed paintings, despite a formal provision in their criminal code.

2. Although they ordered the confiscation of the disputed paintings, the authorities agreed in 1988 to restore these items.

In other words, can it seriously be argued that what was "necessary" in 1987 is no longer so in 1988, or, what is certainly no longer "necessary" in 1988, was necessary in 1982?

I do not understand this reasoning.

11. In these circumstances, I conclude that there was a violation of Article 10 (art. 10) of the Convention both as regards the fines imposed and the confiscated - albeit returned - pictures.

APPENDIX

The "Baudelaire" case : "Les Fleurs du Mal"

On 20 August 1857, the 6th Criminal Chamber of the Seine Regional Court delivered the following judgment:

> "The Regional Court,
>
> Whereas Baudelaire, Poulet-Malassis and de Broisse have offended against public morality, imposes a fine of 300 Francs on Baudelaire and 100 Francs each on Poulet-Malassis and de Broisse;
>
> Orders the destruction of documents nos. 20, 30, 39, 80, 81 and 87 in the book of documents ..."

This conviction followed the formal address by the public prosecutor's representative, who cited inter alia the following verses in support of the prosecution case :

> "Je sucerai, pour noyer ma rancoeur, Le népenthès et la bonne ciguë Aux bouts charmants de cette gorge aiguë Qui n'a jamais emprisonné de coeur ..."

and also:

"Moi, j'ai la lèvre humide et je sais la science De perdre au fond d'un lit l'antique conscience. Je sèche tous les pleurs sur mes seins triomphants Et fais rire les vieux du rire des enfants. Je remplace, pour qui me voit nue et sans voiles, La lune, le soleil, le ciel et les étoiles !"

After these quotations, the public prosecutor's representative stated as follows:

"Gentlemen, ..., I say to you: take a stand by your judgment in this case against these growing, unmistakable tendencies, against this unhealthy fever which seeks to paint everything, to write everything and to say everything, as though the crime of offending public morality had been abolished and that morality no longer existed.

Paganism had its shameful manifestations which may be found in the ruins of the destroyed cities of Pompeii and Herculanum. However, in the temple and in public places, its statues have a chaste nudity. Its artists follow the cult of plastic beauty; they make harmonious shapes out of the human body and do not depict it as being debased or throbbing in the stranglehold of debauchery; they respected community life.

In our society immersed in Christianity, show at least the same respect."

Baudelaire's defence lawyer, Maître Gustave Chaix d'Est-Ange, stated as follows:

"...

After the title "Les Fleurs du Mal" comes the epigraph: all the author's thinking is there, the entire spirit of the book; it is in a way a second title, more explicit than the first, explaining, commenting and elaborating upon it:

'On dit qu'il faut couler les exécrables choses Dans le puits de l'oubli et au sépulchre encloses, Et que par les escrits le mal résuscité Infectera les moeurs de la postérité; Mais le vice n'a point pour mère la science, Et la vertu n'est pas mère de l'ignorance.'"

(Th. Agrippa d'Aubigné, les Tragiques, livre II)

Maître Gustave Chaix d'Est-Ange went on to state:

"The intimate thoughts of the author are even more clearly expressed in the first poem which he dedicates to the reader as a warning:

'La sottise, l'erreur, le péché, la lésine, Occupent nos esprits et travaillent nos corps. Et nous alimentons nos aimables remords, Comme les mendiants nourrissent leur vermine.

Nos péchés sont têtus, nos repentirs sont lâches; Nous nous faisons payer grassement nos aveux; Et nous rentrons gaîment dans le chemin bourbeux, Croyant par de vils pleurs laver toutes nos taches.

C'est le Diable qui tient les fils qui nous remuent! Aux objets répugnants nous trouvons des appas. Chaque jour vers l'Enfer nous descendons d'un pas, Sans horreur, à travers des ténèbres qui puent.'"

Baudelaire's lawyer added:

> "Gentlemen, change this into prose, delete the rhyme and the caesura, grasp the substance of this powerful and vivid language and the underlying intentions; and tell me if we have ever heard this language being delivered from the Christian pulpit, from the lips of some fiery preacher; tell me if the same thoughts would not be found, perhaps sometimes even the same expressions, in the homilies of some strict and unsophisticated father of the Church".

On 31 May 1949, at the request of the Société des gens de lettres, the Paris Court of Cassation in a decision on the merits, quashed the above-mentioned judgment of the Seine Regional Court on the following grounds:

> "Whereas the prohibited poems do not contain any obscene or even rude term and do not exceed the licence which the artist is permitted ...
>
> Whereas accordingly, the crime of offending public morality is not established ...
>
> ...
>
> Quashes the judgment of 20 August 1857, restores the good name of Baudelaire, Poulet-Malassis and de Broisse ..."

When Baudelaire's good name was thus restored, he had already been dead more than 80 years.

In legal terms, this was quite simply a miscarriage of justice.

(Source: "Le procès des Fleurs du Mal" - 'Le journal des procès' no. 85, 1986 - Bruxelles, Ed. Justice et Société)

SEPARATE OPINION, PARTLY CONCURRING AND PARTLY DISSENTING, OF JUDGE DE MEYER

(Translation)

I.

Art, or what claims to be art, certainly falls within the sphere of freedom of expression.

There is no need at all to try to see it was a vehicle for communicating information or ideas[1]: it may be that but it is doubtful whether it is necessarily so.

Whilst the right to freedom of expression "shall include" or "includes" the freedom to "seek", to "receive" and to "impart" "information" and "ideas"[2], it may also include other things. The external manifestation of the human personality may take very different forms which cannot all be made to fit into the categories mentioned above.

II.

It is only with some hesitation that I have come to the view that the courts of the defendant State did not infringe the applicants' right to freedom of expression by imposing on them the fines at issue in this case.

That I was finally able to form this view owed much to the fact that the paintings in question were exhibited in rather special circumstances[3]. This factor made it possible for the Swiss courts properly to determine, without going beyond the limits of their discretionary power, that to impose these fines was "necessary in a democratic society".

It might have been otherwise if these paintings had been exhibited in other circumstances.

III.

The particular nature of the circumstances of their exhibition in Fribourg in 1981 leads me, moreover, to believe that it has not been shown that in this case it was necessary to confiscate the paintings.

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[1] See paragraph 27 of the judgment.

[2] See Article 10 (art. 10) of the European Convention on Human Rights, Article 19 of the International Covenant on Civil and Political Rights and Article 19 of the Universal Declaration of Human Rights.

[3] See the first sub-paragraph of paragraph 36 of the judgment.

Rather it seems to me that such confiscation went beyond what could be considered necessary and that the fines were sufficient on their own.