***Vereinigung Bildender Künstler v. Austria* (ECtHR) | Columbia Global Freedom of Expression**

**Case Analysis #4**

***Meta-Data*:**

* **Case Number**: No. 68354/01
* **Corresponding Law Reference**: ECtHR, Vereinigung Bildender Künstler v. Austria, App. No. 68354/01 (2007)
* **Date of decision**: April 25, 2007
* **Featured case**: N/A
* **Region**: Europe and Central Asia
* **Country**: Austria
* **Type of expression**: Non-verbal Expression (Painting)
* **Judicial Body**: European Court of Human Rights (ECtHR)
* **Type of law**: International/Regional Human Rights Law
* **Main Themes**: Artistic Expression, Defamation/Reputation, Political Expression
* **Outcome**: ECtHR, Article 10 violation
* **Status**: Closed
* **Tags**: Satire, Art, Public figures

***Analysis:***

* **Summary and Outcome**:

The European Court of Human Rights (ECtHR – First Section) held, by four votes to three, that the applicant’s right under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “Convention”) had been violated. The claim before the ECtHR had arisen out of the grant of an injunction by the Austrian domestic courts prohibiting Vereinigung Bildender Künstler Wiener Secession (the “applicant”) from exhibiting a painting entitled ‘Apocalypse’ created by the Austrian painter Otto Mühl. The painting portrayed 34 public figures naked and involved in various sexual activities. Meischberger, member of the National Assembly and former general secretary of the FPO, filed for the injunction before the Austrian domestic court of first instance on the claim that his depiction in the painting debased him and his public standing. The ECtHR, in its decision, established at the outset the legally permissible nature of the interference with the applicant’s freedom of expression as well as the legitimate aim of protecting the rights of others pursed by the interference. On an assessment of the necessity of the interference, the Court found the injunction granted to be disproportionate to the legitimate aim pursued, and concluded that the applicant’s right under Article 10 of the Convention had been violated. The Court reasoned that the painting was satirical, and reflective not of reality but rather of a counter-attack against the FPO whose members had been critical of Mühl’s work. The Court also noted that Meischberger was a relatively less significant public figure among those depicted, and that post a vandalization incident of June 12, 1998, his depiction was further diminished, if not entirely eclipsed. Lastly, the Court drew attention to the adverse implications of an injunction unlimited in time and space, as granted against the applicant in the present case.

* **Facts**:

Vereinigung Bildender Künstler Wiener Secession (the “applicant”) is an association of artists. As part of the celebrations of their 100th anniversary, the applicant organized an exhibition at an independent gallery ‘The Secession’ between April 03 and June 21, 1998. The theme of the exhibition was ‘The Century of Artistic Freedom’. Among the works of art on display was a [painting](https://www.ippt.eu/files/2007/IPPT20070125_ECHR_Vereinigung_Bildender_Kunstler_v_Austria.pdf) titled ‘Apocalypse’, the creator of which was the Austrian painter Otto Mühl. The painting depicted 34 public figures – such as Mother Teresa, Jörg Haider (Former head of the Austrian Freedom Party), Hermann Groer (the Austrian cardinal) – nude and involved in sexual activities. While the bodies of the figures had been painted by Mühl, the faces were photographs blown-up from newspapers with the eyes of some of the figures covered by black bars. One of the figures depicted in the painting was Meischberger, who was a member of the National Assembly at the time the painting was exhibited, a post he held until 1999, and who had served as a former general secretary of the FPO until 1995. In the painting, Meischberger was holding Haider’s penis, was being touched by two other FPO politicians, and was ejaculating on Mother Teresa. On June 11, 1998, an Austrian newspaper *Täglich Alles* expressed its anger at the portrayal of “*group sexual situations with Bishop Groer and Mother Teresa*” [para 10]. The exhibition was open to the public, and on June 12, 1998 the painting was vandalized with red paint by a visitor to the exhibition, resulting in the part depicting Meischberger being obscured. This event was covered by several Austrian newspapers, accompanied by photographs of the painting.

On June 22, 1998, Meischberger instituted proceedings against the applicant pursuant to Section 78 of the Copyright Act (*Urheberrechtsgesetz*), seeking the relief of an injunction to prohibit the exhibition and publication of the painting. He also sought compensation of 20,000 Austrian shillings (“ATS”). Meischberger contended that the painting made a statement about his “*allegedly loose sexual life*” [para 13] and debased his political activities. He argued that neither the black bars nor the red paint marring the painting as a result of the incident on June 12, 1998 prevented him from being recognized, and that the incident had only further publicized the painting. The grant of an injunction, he argued, would also prevent the recurrence of such debasement at other exhibitions the painting was slated to be showcased at. Meischberger’s action was dismissed by the Vienna Commercial Court on August 6, 1999. The Court reasoned that the painting was akin to a comic strip and was obviously not representative of reality. It could, therefore, not be considered to have detrimentally impacted Meischberger or have revealed information about his private life. The Court further reasoned that while a painting which depicted its subject in a sexual or intimate position could have a degrading effect regardless of its representation of reality, to determine whether the freedom of expression of the creator should be curtailed, a balancing of interests had to be undertaken. The Court found that in the balance between the applicant’s right to freedom of artistic expression and Meischberger’s personal interests, the former outweighed the latter due to the exhibition’s celebration of the “*artistic spectrum* [of the applicant] *over the last hundred years*” [para 14], a spectrum inclusive of the works of Mühl. It was also noted that the painting itself was to be understood to be a “*counter-attack*” [para 15] as it depicted several other figures who had criticized Mühl’s work, and that the depiction of Meischberger was only a small part of the painting which was not striking and that he was unrecognizable as a result of the incident of June 12, 1998. The Court further noted that the intention of the applicant was to close down the exhibition instead of showcasing it at other locations as planned.

The Vienna Court of Appeal granted an appeal filed by Meischberger on points of law as well as fact on February 24, 2000. The Court issued an injunction in favour of Meischberger, and also ordered the applicant to pay him legal costs and 20,000 ATS with 4% interest (w.e.f July 8, 1998) as compensation. The Court also permitted Meischberger to publish extracts of the judgment in two Austrian newspapers. The Court reasoned that it would have to conclude that the limits of artistic freedom had been exceeded in cases where it was unclear whether the painting was aimed at being satirical or exaggerated. Applying this measure, the Court concluded that the painting by Mühl was not covered by the scope of Article 10 as it was “*not intended to be a parable or even an exaggerated criticism conveying a basic message*” [para 16]. The Court observed that Meischberger’s depiction was only partially marred by the red paint, as a result of which he was still recognizable, and that this depiction debased his public image and standing. The Court went on to add that its exhibition could not also be justified under Article 17a of the Basic Law (*Staatsgrundsgesetz*) protecting artistic freedom, and that in the absence of an injunction there would be a risk of recurrence. An appeal subsequently filed by the applicant before the Supreme Court was rejected on July 18, 2000 on the grounds that the claim did not pertain to a legal question of considerable interest. The Court observed that the Court of Appeal had not negated that the painting was covered by Article 17a of the Basic Law, but rather considered Meischberger’s personal interests to outweigh the applicant’s artistic freedom due to the degrading nature of the depiction. The Court added that there was no requirement for intervention and rectification as the Court of Appeal had not taken a stance contradictory to the documents in the court file with regards to the question about the recognizability of Meischberger.

On March 12, 2001, the applicant lodged an application before the ECtHR against the Republic of Austria (the “defendant”), alleging that the decision of the Austrian domestic courts to forbid exhibition of the painting had resulted in a breach of their right to freedom of expression under Article 10 of the Convention.

* **Decision Overview**:

On April 25, 2007 the Court held, by four votes to three, that the applicant’s right to freedom of expression under Article 10 of the Convention had been violated.

*Parties’ Submissions*

The applicant submitted that while the interference with the applicant’s right to freedom of expression was prescribed by the law, it had neither been necessary nor proportionate. In pursuance of this contention, the applicant submitted that while the Austrian domestic courts had decided that Meischberger’s personal interests were to prevail and be protected pursuant to Section 78 of the Copyright Act, no claim to any such personal interest worth protecting could be established. The applicant substantiated this submission by arguing that the painting was not a factual representation of Meischberger’s actual conduct, nor did it state or suggest so. Rather, the painting was an allegorical representation of Mühl’s personal history, reflective of the artist’s “*conception of the interrelation between power and sexuality*” [para 24]. It was argued that the FPO party had been critical of Mühl’s work, and given that Meischberger had been a key figure in the history of the FPO, had been depicted alongside other three other members of the FPO as an allegory for the political party. It was further argued Meischberger was interested in discrediting the artist’s work rather than protecting his personal interests as he had only initiated legal proceedings after the partial damage to the painting and its publicization. The applicant submitted that the painting was protected under Article 10 of the Convention as “*the public exhibition of a painting contributed to a debate between the artist, the exhibitor and the public*” [para 24], and that the interference by the domestic courts by way of the injunction was “*equivalent to the deletion of the painting from the collective memory*” [para 25].

Conversely, the defendant, in its submissions, argued that the injunction did not interfere with the applicant’s rights under Article 10 of the Convention as the provision did not protect artistic freedom as such, but only conferred certain protections on artists intending to contribute to a public discussion through their work. The defendant argued that the depiction of public figures in “*group sexual situations*” [para 22] in Mühl’s painting could hardly be considered to be making such a contribution. The defendant also presented an *arguendo* in its submission. It argued that even if the applicant’s rights could be considered to have been interfered with, the interference was lawful and in pursuance of the legitimate aim of protecting the reputation and rights of others as well as their morals. The defendant furthermore argued that the interference was proportional, and that Meischberger’s personal interests outweighed the applicant’s interests in exhibiting the painting, as the exhibition had drawn media attention primarily due to the painting. It was argued that the interest of the media had only intensified after the incident of June 12, 1998, and the debasing nature of the representation of Meischberger was subsequently made known to the general public and not only the visitors of the exhibition due to reportage about it in almost all the Austrian newspapers and television. The defendant supplemented this submission by arguing that it was irrelevant to consider whether Meischberger was a subject of public interest at the time when these events occurred as the painting could not be considered to form part of a public discussion of general interest, nor could it be seen as relating to Meischberger in his capacity as a public figure. The defendant added that the injunction curtailed only the applicant from exhibiting the painting, and not the artist or his manager.

*General Principles*

The Court noted that States are obligated not to encroach unduly on the freedom of expression as democratic societies are founded upon certain principles of which the freedom of expression is an essential one as it fosters the society’s progress and yields self-fulfilments for individuals. It observed the production and distribution of works of art as forms of expression are contributory to essential exchanges in democratic societies, and that the right to freedom of expression extends to “ideas” and “information” which “*offend, shock, or disturb the State or any section of the population*” as “*such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society*”” [para 26]. While reiterating the essentiality of the right as secured by paragraph 1 of Article 10 of the Convention, the Court made sure to convey the fettered nature of the right pursuant to paragraph 2 of Article 10. The Court noted that creators and artists could consequently be restrained as per paragraph 2 of Article 10 as the right was enjoyed and exercised in accordance with “certain duties and responsibilities”, the specific scope of which were defined by the circumstances and the means used by them (*[Müller and Others v. Switzerland](https://hudoc.echr.coe.int/eng" \l "{\"fulltext\":[\"Müller%20and%20Others%20v.%20Switzerland\"],\"documentcollectionid2\":[\"GRANDCHAMBER\",\"CHAMBER\"],\"itemid\":[\"001-57487\"]})* [[1998] 10737/84](https://hudoc.echr.coe.int/eng" \l "{\"fulltext\":[\"Müller%20and%20Others%20v.%20Switzerland\"],\"documentcollectionid2\":[\"GRANDCHAMBER\",\"CHAMBER\"],\"itemid\":[\"001-57487\"]})).

*The Court’s findings*

The Court noted that the grant of the injunction by the Austrian domestic courts which resulted in the prohibition of the exhibition of the painting ‘Apocalypse’ by Mühl interfered with the applicant’s right to freedom of expression. The Court found that it was undisputed that the interference with the applicant’s right was prescribed by law under Section 78 of the Copyright Act. The Court also accepted that the interference had pursued the legitimate aim of protecting the rights of others, as the domestic courts had injuncted the applicant from exhibiting the painting due to its debasement of Meischberger’s public standing, basing their decisions on Section 78 of the Copyright Act. The Court observed that the provision offered a remedy against the publication of an individual’s picture where the publication was violative of the legitimate interests of the individual concerned. Though the defendant had also submitted that the interference pursued the legitimate aim of protecting public morals, the Court rejected this argument as it did not find mention in either the stature or the terms of the domestic courts’ decisions.

Having established that the interference was legally permissible and pursued a legitimate aim, the Court engaged in an assessment of the necessity of the interference. Firstly, the Court observed that while Mühl’s depiction of a naked Meischberger, involved in sexual activities, was a “*somewhat outrageous*” [para 32] one, it was obvious to the Court that the painting was not reflective or suggestive of reality. The Court noted that neither had the defendant negated so in their submissions nor had the domestic courts deviated from this understanding. Emphasis was placed on the painting’s use of only photos of the heads of the figures with eyes hidden behind black bars and the exaggerated and unrealistic representation of the bodies. The portrayal of the figures in the ‘Apocalypse’ was determined to be a “*caricature of the persons concerned using satirical elements*” [para 33]. The Court stipulated that any interference with an artist’s right to freedom of expression must be carefully examined as “*satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate*” [para 33].

Secondly, by relying on [*Lingens v. Austria* [1986] 9815/82](https://hudoc.echr.coe.int/fre#{"fulltext":["Lingens%20v.%20Austria"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-57523"]}), the Court noted that given that the depiction of Meischberger pertained to his public standing as a politician of the FPO and not to his private life, Meischberger had to be more tolerant of criticism [para 34]. Echoing the domestic court of first instance, the Court observed that the painting could rather be understood to be a counter-attack against the FPO as its members had been scathingly critical of Mühl’s work. Furthermore, per the Court, Meischberger was one of lesser-known and scantly remembered figures depicted in the painting vis-à-vis some of the other 33 figures who were more well-known to the Austrian public [para 35]. The Court also observed that post the vandalization incident of June 12, 1998, Meischberger’s depiction was “*certainly diminished, if not totally eclipsed*” [para 36] by the portrayals of these other more prominent figures. Thirdly, the Court highlighted that the injunction granted in favour of Meischberger was not limited in time or space. The implication of such an injunction was that the applicant could not exhibit the ‘Apolcalypse’ at any place or time in the future irrespective of whether Meischberger was still known to the public [para 37].

The Court, having balanced the satirical nature of Mühl’s expression and the implications of the injunction on the applicant with Meischberger’s personal interests, found that the injunction granted by the Austrian domestic courts was disproportionate to the legitimate aim pursued and therefore not necessary in a democratic society. Accordingly, a violation of the applicant’s rights pursuant to Article 10 of the Convention was pronounced.

*Dissenting Opinion of Judge Loucaides*

Judge Loucaides, in his Dissenting Opinion, distinguished himself from the majority by opining that the applicant’s right to freedom of expression pursuant to Article 10 of the Convention had not been violated. He opined that the meaning, nature, and effect of the images in a painting must not be assessed by the metric of what the artist intended to convey, but rather must be assessed on the basis of effects of the images on the viewers/audience. He noted that, in his view, not every image was artistic merely because it was produced by an artist, and that images could not be classed as being satirical if the criticism about a specific issue or figure could not be drawn from them. He goes on to state that to him, the painting is neither satirical nor artistic as it depicts unrelated figures in “*repulsive sexual poses*” and fails to convey any message while having the effect of degrading the figures portrayed. He urges the Court and the readers of the judgment to nuance the understanding of ‘art’ – much like insults are excluded from free speech, ‘art’ must exclude expressions which insult or adversely impact the reputation or dignity of others, especially when they fail to convey a meaningful message. Judge Loucaides, much like the Austrian domestic courts, finds the painting to be undermining of Meischberger’s reputation and dignity without a legitimate justification for the expression, and opines that liability for insulting others cannot be avoided merely because a work is presented as art by an artist. He concludes that the domestic authorities were entitled to consider the interference as necessary in a democratic society in order to protect the reputation or rights of others.

*Joint Dissenting Opinion of Judges Spielmann and Jebens*

Judges Spielmann and Jebens, in their Joint Dissenting Opinion, noted that they had voted against finding a violation of Article 10 of the Convention as they disagreed with the majority on the disproportionality of the interference to the aim pursued. According to them, artistic freedom could not be unlimited when the ‘protection of the reputation and rights of others’ was at issue. The painting ‘Apocalypse’, according to them, thus did not deserve unfettered protection under Article 10 of the Convention as it “*excessively*” [para 7 of the Joint Dissenting Opinion] interfered with the rights of others. The excessiveness of the interference was attributed to the “*attack*” by the painting on the “*dignity of others*” [para 8 of the Joint Dissenting Opinion] in contravention to the “*concrete concept of “fundamental personal dignity of others” which was central to the debate in the present* case” [para 9 of the Joint Dissenting Opinion] as well as the value pervading the Convention. By referencing an [order](https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=634) of the German Federal Constitutional Court, Judges Spielmann and Jebens stated that in a conflict between human dignity and artistic freedom, the former must prevail, regardless of whether the individual in question is a public figure or not. The Opinion concludes that the view of the majority is therefore disagreeable to them as it fails to recognize the subordinate nature of other considerations to human dignity. Judges Spielmann and Jebens also opined that the inclusion of Meischberger’s photograph without his consent in the painting was in itself a problematic issue. They noted that the right to own one’s image, in their view, was covered by Article 8 of the Convention due to the control over such an image being a key component of personal development as protected by the provision. In their view, this matter was all the more serious in the present case as Meischberger’s photograph had been used without his consent in a depiction “*of situations which were particularly shocking in their conception*” [para 14 of the Joint Dissenting Opinion].

Though Judges Spielmann and Jebens departed from the view of the majority on the necessity of the interference in a democratic society, they observed that the Court’s case law “*consistently reiterates, and rightly so, that freedom of expression “is applicable not only to ... ‘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 sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society*’” [para 6]. They also opined that in their view the margin of appreciation enjoyed by States should be practically non-existent or extremely limited in relation to interference affecting artistic freedom. Pertinently, while referencing the order of the German Federal Constitutional Court, they also drew attention to the Court’s acceptance of cartoons as a form of art, and the inappropriateness of an authority exercising “*quality control*” and assessing ““*superior” and “inferior” or “good” and “bad” art*” [para 10].

***Direction:***

* **Outcome**: Expands Expression
* **Information**:

The Court, while commenting on the pivotal role of the freedom of expression in the foundation and progress of a democratic society, pertinently notes that the right is one which extends to offensive ideas and information. Given that art is a form of expression, it emphasizes that the creation, performance, distribution, and exhibition of works of art are contributory to essential exchanges of “*cultural, political, and social information and ideas of all kinds*” ([*Cultural Rights in the Case-Law of the ECtHR*](https://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf)) in democratic societies, implying therefore that it is not for the State to determine the type of art which should be protected ([*Polymenopoulou*](https://academic.oup.com/hrlr/article/16/3/511/2452827)). Applying these general principles to the case at hand, the Court expands expression by concluding that the interference by the defendant in the applicant’s right to freedom of expression was disproportionate and therefore not necessary in a democratic society as the painting was satirical and “obviously” not reflective or suggestive of reality. Rather, it was aimed at being a counter-attack against the FPO whose members had been scathingly critical of Mühl’s work, and much like other satirical works, was a form of artistic expression and social commentary which provoked through exaggeration and distortion of reality [para 33]. The Court supplemented this reasoning by reiterating that given that the painting targeted Meischberger’s standing as a public official and not details of his personal life, the depiction being *prima facie* ‘obscene’ did not alter the requirement for wider tolerance for criticism from public officials ([Fathaigh and Voorhoof](https://strasbourgobservers.com/2019/01/23/activists-conviction-for-hooliganism-over-obscene-protest-violated-article-10-echr/)). In the present case, while ascertaining that the interference was not necessary in a democratic society for the foregoing reasons, the majority showcased that in their view the expression was marked by clear indicators of satirical intention, and that the potentially offensive message being decipherable by a small audience and the context of the expression had served as mitigating circumstances ([Godioli](https://olh.openlibhums.org/articles/10.16995/olh.571/)). The Court was however finely divided on these issues in the case at hand, indicating the lack of a “*consistent approach*” to or “*shared vocabulary*” on the assessment of specific facts and interpretation of artistic expressions, particularly satirical or humorous ones, as well as the need for them ([Godioli](https://olh.openlibhums.org/articles/10.16995/olh.571/); [Brown](https://www.lawgazette.co.uk/law/media-law/4357.article))

***Perspective***:

* **Outcome**: International and/or Regional Perspective
* **Related International and/or regional laws**:

[ECHR, art. 10](https://www.echr.coe.int/Documents/Convention_ENG.pdf);

[ECtHR, Lingens v. Austria, App. No. 9815/82 (1986)](https://hudoc.echr.coe.int/fre#{"fulltext":["Lingens%20v.%20Austria"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-57523"]});

[ECtHR, Müller and Others v. Switzerland, App. No. 10737/84 (1988)](https://hudoc.echr.coe.int/eng#{"fulltext":["Müller%20and%20Others%20v.%20Switzerland"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-57487"]}).

* **National law or jurisprudence**:

Austria, Copyright Act s. 78;

[Austria, Basic Law art. 17a](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=84888&p_classification=01).

* **Other national law or jurisprudence**:

[BVerfGE 75, 369 1 BvR 313/85 Strauß caricature-decision (Translation)](https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=634).

***Significance***:

* **Binding or persuasive precedent within jurisdiction**; **Decision establishes influential or persuasive precedent outside jurisdiction**; **Explanation**:

Standard I: The decision establishes a binding or persuasive precedent within its jurisdiction.

Information: Judgments of the European Court of Human Rights are binding upon parties to the decision.

Standard II: Decision (including concurring or dissenting opinions) establishes influential or persuasive precedent outside its jurisdiction.

Information: The decisions of the European Court of Human Rights have precedential value on the interpretation of the right to freedom of expression for other States Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

* **Related Cases**: Self-generated
* **Date updated**: Tuesday, December 01, 2020

***Docs***:

* **Official Case Documents**:

Judgment (ECtHR) (in English) [Attached]

Press Release issued by the Registrar of the ECtHR dated 25.01.2007 (in English) [Attached]

Information Note on the Court’s Case-Law No. 76 (in English) [Attached]

* **Amicus briefs and other legal authorities**:

Case Guide of the ECtHR on Article 10 (Freedom of Expression) (in English) [Attached]

Cultural Rights in the Case-Law of the ECtHR (in English) [Attached]

* **Reports, Analysis, and News Articles**:

[Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights – Eleni Polymenopoulou](https://academic.oup.com/hrlr/article/16/3/511/2452827) [Attached]

[Cartoon Controversies at the European Court of Human Rights: Towards Forensic Humor Studies – Alberto Godioli](https://olh.openlibhums.org/articles/10.16995/olh.571/) [Attached]

[Activist’s conviction for hooliganism over ‘obscene’ protest violated Article 10 ECHR – Ronan Ó Fathaigh and Dirk Voorhoof](https://strasbourgobservers.com/2019/01/23/activists-conviction-for-hooliganism-over-obscene-protest-violated-article-10-echr/)

[The Right not to be Offended – Amber Melville-Brown](https://www.lawgazette.co.uk/law/media-law/4357.article)