# EGMR 10737/84 vom 24. Mai 1988

Hudoc Ch, 1988-05-24, FR

Quelle: https://mcp.opencaselaw.ch/entscheid/hudoc_ch_10737_84

FR: CourEDH 10737/84 du 24 mai 1988

IT: CorteEDU 10737/84 del 24 maggio 1988

## Regeste

No violation of Art. 10; No violation: 10

## Erwägungen

### E. 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

### E. 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

### E. 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.

### E. 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".

**E. 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"

**E. 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

**E. 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"

**E. 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.

**E. 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).

**E. 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.

**E. 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.

**E. 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.

**E. 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.

**E. 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"

**E. 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

**E. 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"

**E. 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.

**E. 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.

**E. 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.

**E. 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.

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

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