

*(TRANSLATION)*

**THE FACTS**

The facts of the case as submitted by the applicants may be summarised as follows :

The first applicant, Josef Félix Müller, artist, born in 1955, is a Swiss national living at St. Gallen.

The second applicant, Charles Descloux, art critic, born in 1939, is a Swiss national living at Fribourg.

The third applicant, Michel Grenaud, art teacher, born in 1944, is a Swiss national living at Garmiswil.

The fourth applicant, Christophe von Imhoff, picture restorer, born in 1939, is a Canadian national living at Belfaux.

The fifth applicant, Paul Jacquat, bank clerk, born in 1940, is likewise of Swiss nationality and lives at Belfaux.

The sixth applicant, Jean Pythoud, architect, born in 1925, is also of Swiss nationality and lives at Fribourg.

The seventh applicant, Geneviève Renevey, a community worker, born in 1946, is of Swiss nationality and lives at Villars-sur-Glâne.

The eighth applicant, Michel Ritter, artist, born in 1949, is a Swiss national and lives at Montagny-la-Ville.

The ninth applicant, Jacques Sidler, photographer, born in 1946, is a Swiss national living at Vuisternens-en-Ogoz.

The tenth applicant, Walter Tschopp, assistant lecturer, born in 1950, is of Swiss nationality and lives at Fribourg.

All are represented before the Commission by Mr. Paul Rechtsteiner, a member of the St. Gallen Bar.

In 1981, in connection with the 500th-anniversary celebrations of the canton of Fribourg's membership of the Swiss federation, an exhibition, "Fri-Art 81", was organised by the second to tenth applicants. The organisers invited several artists to take part, each of whom was allowed to invite another artist of his own choice.

The artists made their exhibits on the spot at the start of August 1981.

In three nights Mr. Müller, one of the artists invited by a fellow artist, painted three large works entitled "Three Nights, Three Paintings", which, with other work, went on show on 21 August 1981, the first day of the exhibition, which had been advertised by poster and in the press and for which a catalogue, containing *inter alia* a photograph of Mr. Müller's three paintings, had been printed.

On 4 September 1981, the date of the official opening, the examining judge, at the Public Prosecutor's instance had the three paintings seized for obscenity.

On 24 February 1982, under Article 204 of the Criminal Code<sup>1</sup>, the Sarine District Court fined the nine organisers and Mr. Müller 300 FS each for obscene publication, the convictions to be deleted from the criminal record after one year.

It gave them the benefit of the doubt on the charge of causing religious offence (Criminal Code, Article 261).

On the requirement of Article 204 para. 3 of the Criminal Code that the courts order the destruction of obscene items, the District Court, referring to the Federal Court judgment in the Rey case (ATF 89 IV 136 *et seq.*), held that to keep the three paintings from the general public — to "destroy" them — it was sufficient to place them in a museum whose curator would be required to make them available only to the few serious specialists capable of taking an artistic and cultural as opposed to prurient interest in them.

The three paintings were confiscated and handed over to the Fribourg Cantonal Art and History Museum.

All ten applicants appealed on points of law, arguing that as the law did not define obscenity for purposes of Article 204 of the Swiss Criminal Code the meaning of the word needed clarificatory interpretation and that the court of first instance had been quite wrong to find the paintings obscene. They contended that obscenity was impossible in work that was first and foremost artistic or scientific.

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1. Article 204 -

1. Anyone who makes or possesses writings, pictures, film 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 publicly distributes or displays them or by way of trade supplies them for hire, or who announces or makes known how or through whom such items may be procured directly or indirectly, shall be imprisoned or fined.
2. Anyone supplying or displaying such items to a person under the age of eighteen shall be imprisoned or fined.
3. The court shall order the destruction of such items.

In a judgment of 26 April 1982 the Fribourg Cantonal Court, sitting as a court of criminal cassation, dismissed the appeals. In particular it held:

“The court agrees with the trial court that the three paintings seized arouse revulsion. These are not works which, in treating a particular subject or scene, allude to sexual activity. They place it in the foreground, not the embrace of man and woman but vulgar depictions of sodomy, fellatio between males, bestiality, the erect penis and masturbation. Sexual activity is the main, not to say sole ingredient of all three paintings, and neither the appellants’ explanations nor Mr. Ammann’s learned-seeming but unpersuasive evidence alter that fact. To go into detail, however distasteful, one of the paintings contains no fewer than eight erect members. All those depicted are entirely naked and one of them is engaging simultaneously in various sexual activities with two other males and an animal. He is kneeling down, sodomising the animal while holding its erect penis in another animal’s mouth. At the same time he is having his lower back — 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 the erect male organ. Sexual activity is 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 (3.11 m by 2.24 m; 2.97 m by 1.98 m and 3.7 m by 2.20 m), with the result that the vulgarity is all the more shocking.

The court is unconvinced by the appellants’ allegation that the paintings are allegorical. What counts is the face value, the effect on the observer, not some abstraction utterly removed from the picture or which glosses over it. The important thing is not the artist’s meaning or purported meaning but the objective effect on the observer.

The appeal does not particularly go into the question of intention or of awareness of the obscenity, nor in truth could it have. In particular, the author is aware of a publication’s obscenity when he knows it deals with sexual matters and that, by common consent any written or pictorial allusion to such matters risks grossly offending the average reader’s or observer’s natural sense of decency and propriety. This was plainly so here, as the evidence at the trial confirmed since several of the defendants admitted the paintings had shocked them. It should be noted that even someone insensitive to obscenity is capable of realising that obscenity may be disturbing to others. As the trial court pointed out, the defendants at the very least acted recklessly.

Lastly, it is immaterial whether similar works have been exhibited elsewhere and makes no difference to the obscenity the trial court correctly recognised.”

Appealing on points of law from the judgment of 26 April 1982 the applicants sought to have it set aside, themselves acquitted and the paintings returned to them, and alternatively merely to have the paintings returned.

In a judgment of 26 January 1983 the Cassation Division of the Federal Court dismissed the appeals. It held:

“The case-law position is that, for purposes of Article 204 of the Criminal Code, any item is obscene which unacceptably offends the sense of sexual propriety; the effect of the obscenity may be to sexually arouse a normal person or to disgust or repel him. The test of obscenity is whether the overall effect of the item or work is to cause moral offence to a person of normal sensitivity.

The paintings show an orgy of unnatural sexual activity (sodomy, bestiality, petting, which is vulgarly depicted in large format; they are liable grossly to offend the average sense of sexual propriety. The appellant’s reliance on artistic licence can in no way alter that conclusion.

The nature and scope of constitutional freedoms, such as freedom of the press, freedom of opinion and artistic freedom, are determined by current federal law, by which, under Article 113 of the Federal Constitution, the Federal Court is bound. On artistic creativity the Federal Court has rules that works of art *per se* have no special status, but that a work of art is not obscene if the artist contrives to present sexual subject matter aesthetically so that the offensiveness is toned down and ceases to predominate. In making up its mind the criminal court need not view the work through art critic’s spectacles, which would often ill become it anyway. What it must do is decide whether the work is liable to offend the unsuspecting observer.

Expert opinion as to the work’s artistic merit is therefore irrelevant at this stage, though it might be relevant to the decision what action to take to avert a repeat offence (destruction or confiscation of the item; Criminal Code, Article 204 para. 3).

The Cantonal Court duly scrutinised the paintings for a predominantly aesthetic element. Given in particular the number of sexual practices in each of the three (one of them, for instance, contains eight erect members), it decided the emphasis was on offensive forms of sexual activity, which were the predominant, not to say sole ingredient of the paintings. The Cassation Division of the Federal Court agrees. In overall effect Müller’s paintings are liable to be morally offensive to anyone of normal sensitivity. The Cantonal Court’s finding that the paintings were obscene was accordingly not in breach of federal law.

The appellants maintain that the publication element of the offence was absent. They are mistaken.

The obscene paintings were in an exhibition which was open to the public and which had been advertised by poster and through the press. There was no

condition of entry to 'Fri-art 81' such as an age limit. The paintings were thus available to an indeterminate number of people, the criterion of publicity for purposes of Article 204 of the Criminal Code."

Lastly the Federal Court dismissed the alternative application for recovery of the paintings as inadmissible, no such application having been made to the cantonal authorities.

## COMPLAINTS

The applicants allege that their conviction for obscene publication and the confiscation of the paintings were an interference with their right to freedom of expression as protected by Article 10 of the Convention. They say the interference cannot be justified, under Article 10 para. 2, as necessary to protect morals in a democratic society.

They first point out that the paintings, which are in dark oppressive colours, contain very roughly sketched figures and are in no way intended as pornographic depiction of sexual relations but rather as allegories of the relationship between man and animal, Eros and Thanatos, civilisation and primitive instinct.

They maintain that in matters of artistic freedom there is no defining obscenity, as the Swiss courts have done, by reference to the moral views of a person of normal sensitivity, particularly as "the person of normal sensitivity" is a legal fiction.

They submit that to assess the obscenity or otherwise of any work of art by reference to the feelings of the "average" person is unduly to restrict freedom of artistic creativity, which, rather than merely reflect the prevailing morality, must go beyond it and, indeed, challenge it.

They argue that taking the "person of normal sensitivity" as the criterion amounts to the courts making their own moral standards the test of obscenity.

They further argue that the Federal Court interpretation, whereby the penalties prescribed in Article 204 of the Criminal Code do not apply to works of art which portray sexual subject matter aesthetically so that the offensiveness ceases to predominate, likewise amounts to an infringement of the artist's creative freedom in that it virtually makes the State the judge of artistic merit.

They lastly point out that Mr. Müller has many times exhibited work similar to that confiscated for obscenity, *inter alia* at Zurich, Basel, Graz, Friedrichshafen, Lucerne and Winterthur and art galleries in Rotterdam, Paris, Cologne and The Hague.

In 1984 he took part as Switzerland's official representative, with the Federal Cultural Committee's official support, in the 5th Sydney Biennale in Australia.

## THE LAW

The applicants contend that their conviction for obscene publication and the confiscation of the paintings were an unjustified interference with their right to freedom of expression as protected by Article 10 para. 1 of the Convention.

### a. Exhaustion of domestic remedies

The Commission notes that in a letter of 4 December 1984 the Government acknowledged that, having appealed on points of law to the Federal Court, the applicants had properly exhausted the domestic remedies available to them.

At the hearing on 6 December 1985, however, the Government maintained that with specific regard to the confiscation of the paintings they had not properly exhausted the domestic remedies since the Federal Court judgment of 26 January 1983 determining their appeal had declared inadmissible on account of failure to exhaust the cantonal remedies their alternative application to have the confiscation order lifted.

In view of the Government's objection on exhaustion of the domestic remedies, the Commission must decide whether Article 26 was complied with.

It should be noted that the applicants appealed to the Federal Court to have the judgment of 26 April 1982 set aside, themselves acquitted and the three paintings returned to them, and alternatively merely to have the paintings returned to them.

The Commission accordingly takes the view that appeal on points of law was an effective remedy capable of repairing the situation complained of: if the applicants' appeals on points of law had succeeded, the Federal Court would also have set aside the confiscation order.

It is not sufficiently clear from the Government's argument on what legal basis the applicants could have entered separate appeals solely to have the confiscated paintings returned.

The Government's objection that the requirement to exhaust the domestic remedies was not met therefore cannot be upheld.

The Commission accordingly holds that the requirements of Article 26 of the Convention were complied with.

### b. The alleged violation of Article 10 of the Convention

The Commission considers it should first examine whether the applicants, in painting and exhibiting the works, could claim to come under Article 10 para. 1 of the Convention, which provides that everyone has the right to freedom of expression.

The Commission recalls its case-law that artistic expression is covered by Article 10 of the Convention (see, for example, No. 9870/82, Dec. 13.10.83, D.R. 34 p. 208).

The Commission is in no doubt that in painting and exhibiting the three works the applicants exercised their right to freedom of expression, a right which the Convention recognises whatever the form of expression used.

It is not disputed that the penalties were an interference with the applicants' right to freedom of expression.

According to the applicants, however, their punishments, namely the fines and the confiscation of the paintings for obscene publication, were unnecessary in a democratic society, *inter alia* to protect health and morals.

The Government, on the other hand, allege that the penalties were necessary in a democratic society and proportionate to the aim pursued, which was to protect morals and protect the rights of others.

In the light of a preliminary examination of the parties' submissions, its own case-law and the case-law of the European Court of Human Rights (in particular Eur. Court H.R., Handyside judgment of 7 December 1976, Series A no. 24), the Commission considers the applicants' complaints sufficiently complex and important to require an examination of the merits and that the application therefore cannot be declared manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, and without prejudging the merits, the Commission

**DECLARES THE APPLICATION ADMISSIBLE.**