



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

FIRST SECTION

**CASE OF VEREINIGUNG BILDENDER KÜNSTLER v. AUSTRIA**

*(Application no. 68354/01)*

JUDGMENT

STRASBOURG

25 January 2007

**FINAL**

*25/04/2007*

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Vereinigung Bildender Künstler v. Austria,**

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs F. TULKENS,

Mrs E. STEINER,

Mr K. HAJIYEV,

Mr D. SPIELMANN,

Mr S.E. JEBENS, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 19 October 2006,

Delivers the following judgment, which was adopted on that date:

## PROCEDURE

1. The case originated in an application (no. 68354/01) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an association, Vereinigung Bildender Künstler (“the applicant association”), on 12 March 2001.

2. The applicant association was represented by Schönherr OEG, a law firm practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant association alleged that the Austrian courts' decisions forbidding it to continue exhibiting a painting by Otto Mühl had violated its right to freedom of expression under Article 10 of the Convention.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 30 June 2005 the Court declared the application admissible.

6. Neither the applicant association nor the Government filed further written observations (Rule 59 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

7. Vereinigung Bildender Künstler Wiener Secession is an association of artists with its seat in the Secession building in Vienna. The Secession, an independent gallery, is devoted entirely to exhibitions of contemporary art. One of the basic objectives of the association is to present current developments in Austrian and international art, and to cultivate an openness to experimentation.

8. Between 3 April and 21 June 1998 the applicant association held an exhibition on its premises. The exhibition, entitled “The century of artistic freedom” (“*Das Jahrhundert künstlerischer Freiheit*”), was intended as part of the celebrations of the association's 100th anniversary. Among the works to be shown was a painting entitled “Apocalypse”, which had been produced for the occasion by the Austrian painter Otto Mühl. The painting, measuring 450 cm by 360 cm, showed a collage of various public figures, such as Mother Teresa, the Austrian cardinal Hermann Groer and the former head of the Austrian Freedom Party (FPÖ) Mr Jörg Haider, in sexual positions. While the naked bodies of these figures were painted, the heads and faces were depicted using blown-up photos taken from newspapers. The eyes of some of the persons portrayed were hidden under black bars. Among these persons was Mr Meischberger, a former general secretary of the FPÖ until 1995, who at the time of the events was a member of the National Assembly (*Nationalratsabgeordneter*), a mandate he held until April 1999. Mr Meischberger was shown gripping the ejaculating penis of Mr Haider while at the same time being touched by two other FPÖ politicians and ejaculating on Mother Teresa.

9. The exhibition, for which admission was charged, was open to the public.

10. On 11 June 1998, while the exhibition was in progress, the Austrian newspaper *Täglich Alles* bristled at the above painting's portrayal of “group sexual situations with Bishop Groer and Mother Teresa”.

11. On 12 June 1998 the painting was damaged by a visitor, who covered with red paint the part which showed, among others, Mr Meischberger. As a consequence of this incident the entire painted body of Mr Meischberger and part of his face were covered with red paint.

12. Several Austrian newspapers reported on this event and also published pictures of the painting.

13. On 22 June 1998 Mr Meischberger brought proceedings under section 78 of the Copyright Act (*Urheberrechtsgesetz*) against the applicant association, seeking an injunction prohibiting it from exhibiting and publishing the painting. He further requested compensation in the amount of

20,000 Austrian schillings (ATS – 1,453.46 euros (EUR)). He argued that the painting, showing him in sexual positions with several persons, debased him and his political activities and made statements as to his allegedly loose sexual life (*lotterhaftes Intimleben*). The black eye-bars did not prevent him from being recognised, because he was shown together with two other FPÖ politicians. He remained recognisable even after the incident of 12 June 1998, which had further increased the publicity given to the painting. Furthermore, there was a danger of recurrence as after the present exhibition the painting was due to be shown at another exhibition in Prague.

14. On 6 August 1999 the Vienna Commercial Court (*Handelsgericht*) dismissed Mr Meischberger's action. It noted that it had initially been intended to show the exhibition in Prague, Bucharest and Luxembourg as well; now the intention was to close down the exhibition. The court further found that it could be ruled out that the painting had adversely affected the claimant or divulged information about his private life, as the painting, which resembled a comic strip ("*comixartig*"), obviously did not represent reality. However, a painting showing the claimant in such an intimate position could, regardless of its relation to reality, still have a degrading and personally debasing effect. In the present case, however, the right of the applicant association to freedom of artistic expression outweighed Mr Meischberger's personal interests. When balancing the latter's interests against the interests of the applicant association, the court had regard in particular to the fact that the exhibition was dedicated to the association's artistic spectrum over the last hundred years, which included the work of the Austrian painter Otto Mühl. It further noted that the painting showed numerous other persons, among them friends and benefactors of the painter, and also representatives of the FPÖ party, which had always strongly criticised Mr Mühl's work.

15. The painting in question could therefore be seen as a kind of counter-attack (*Gegenschlag*). In any event, Mr Meischberger's picture constituted only a rather small part of the painting and was therefore not striking. The court further added that there appeared to be no danger of recurrence (*Wiederholungsgefahr*) as the painting had been partly covered by red paint and Mr Meischberger was therefore no longer recognisable on it.

16. On 24 February 2000 the Vienna Court of Appeal (*Oberlandesgericht*), after having held an oral hearing, granted an appeal on points of law and fact by Mr Meischberger, issued an injunction against the applicant association prohibiting it from continuing to display the painting at exhibitions, and ordered it to pay the costs incurred by Mr Meischberger in the proceedings and ATS 20,000 (EUR 1,453.46), plus 4% interest with effect from 8 July 1998, in compensation. It further allowed Mr Meischberger to publish extracts of its judgment in two Austrian newspapers. It noted that Mr Meischberger's picture was only partly covered

by red paint, so that part of his face, the shape of his head and his hairstyle were still recognisable. The limits of artistic freedom were exceeded when the image of a person was substantially deformed by wholly imaginary elements without it being evident that the picture aimed at satire or any other form of exaggeration. The painting in the present case was not intended to be a parable or even an exaggerated criticism conveying a basic message, such as, for example, the statement that Mr Meischberger had disregarded sexual decency and morals. It therefore did not fall within the scope of Article 10 of the Convention, but in fact constituted a debasement of Mr Meischberger's public standing (*Entwürdigung öffentlichen Ansehens*). The applicant association could not justify the exhibition of the painting under the artistic freedom protected by Article 17a of the Basic Law (*Staatsgrundgesetz*). There was, furthermore, nothing to indicate that the applicant association would abstain from exhibiting the painting in the future, so that there was a danger of recurrence.

17. On 18 July 2000 the Supreme Court (*Oberster Gerichtshof*) rejected an appeal by the applicant association as it did not concern a legal question of considerable interest. It noted that the Court of Appeal had not questioned the fact that the painting fell within the scope of protection provided by Article 17a of the Basic Law but, weighing the guarantee of artistic freedom enshrined in that provision against Mr Meischberger's personal rights as protected by section 78 of the Copyright Act, had considered that the latter prevailed over the former because a picture of Mr Meischberger had been used in a degrading and insulting manner. As to the question whether Mr Meischberger could still be recognised despite the painting being covered with red paint, the Court of Appeal had not contradicted the documents contained in the court file and there was therefore no need for a rectification. It ordered the applicant association to pay the costs of the proceedings.

18. That decision was served on the applicant association's counsel on 13 September 2000.

## II. RELEVANT DOMESTIC LAW

19. Section 78 of the Copyright Act, in so far as relevant, reads as follows:

“(1) Images of persons shall neither be exhibited publicly, nor in any way made accessible to the public, where injury would be caused to the legitimate interests of the portrayed persons or, in the event that they have died without having authorised or ordered publication, those of a close relative.”

20. Artistic freedom is guaranteed by Article 17a of the Basic Law (*Staatsgrundgesetz*), which provides:

“There shall be freedom of artistic creation and of the publication and teaching of art.”

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

21. The applicant association complained under Article 10 of the Convention that the Austrian courts' decision forbidding it to exhibit any further the painting at issue had violated its right to freedom of expression.

Article 10, as far as relevant, reads as follows:

“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. ....

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.”

#### A. The parties' submissions

22. The Government argued that the Austrian courts' injunction did not constitute an interference with the applicant association's rights within the meaning of Article 10 of the Convention. They submitted in that regard that Article 10 did not protect artistic freedom as such but only provided protection to artists who intended to contribute through their work to a public discussion of political or cultural matters. The present reproduction of public figures in “group sexual situations” could, however, hardly be regarded as a statement of opinion contributing to a cultural or political debate.

23. In the alternative, the Government argued that the interference at issue had been lawful and had served the legitimate aim of protecting morals and the reputation and rights of others. As regards the proportionality of the interference, they argued that since its inauguration, the exhibition at which the painting had been shown had been at the centre of media attention, precisely because of the painting itself. The interest of the media had become even more intense after the painting had been partly damaged, so that after the event in question the part of the painting affected and the fact that it showed Mr Meischberger was known not only to visitors of the exhibition but to the general public. The painting had been displayed in nearly all Austrian newspapers and on television. Accordingly, at least from that date on, Mr Meischberger's personal interests had prevailed over the interests of the applicant association in exhibiting the painting. It was

also irrelevant whether Mr Meischberger was a subject of public interest at the time of the events as the painting could by no means be regarded as part of a public discussion of general interest or as relating to Mr Meischberger in his public capacity. Nor could Mr Meischberger be expected to comment in public on the painting since the activities depicted in it could certainly offend the sense of sexual propriety of persons of ordinary sensitivity. The Government lastly pointed out that at the time of the interference the exhibition at issue had already been closed down and that throughout the duration of the exhibition the painting had actually been on display. The applicant association had not intended to exhibit the painting abroad. Furthermore, the prohibition on exhibiting the painting any further concerned only the applicant association as the exhibitor and not the owner of the painting, namely the artist and his manager. Having regard to all these elements, the Government argued that the interference at issue was proportionate within the meaning of paragraph 2 of Article 10 of the Convention.

24. The applicant association argued that the public exhibition of a painting contributed to a debate between the artist, the exhibitor and the public and was therefore protected under Article 10 of the Convention. It accepted that the impugned interference was prescribed by law, but maintained that the interference had been neither necessary nor proportionate. It submitted that the Government's submissions as regards the protection of morals were irrelevant as in the present case the domestic courts had based their decisions merely on Mr Meischberger's prevailing personal interests as protected under section 78 of the Copyright Act. Mr Meischberger could not, however, claim any personal interest worth protecting as the painting obviously did not state or suggest that the way in which he was portrayed corresponded to his actual behaviour. The painting presented the artist's personal history in an allegorical way and depicted, among several other well-known persons, the painter himself and some of his friends and benefactors. All these persons were depicted engaging in sexual acts, reflecting the painter's conception of the interrelation between power and sexuality. Mr Meischberger had been one of the figures who had characterised the history of the FPÖ party in the past few years, and he had been portrayed with the other three members as an allegory of that party, which had always strongly criticised the painter's work. Furthermore, Mr Meischberger and, in any event, the actions he considered libellous were not recognisable after the painting had been partly damaged. In the applicant association's view, the fact that he had instituted proceedings only after the painting had been partly damaged demonstrated that rather than protecting his personal interests he was aiming to discredit the painter's work.

25. The applicant association lastly pointed out that the Austrian courts' decisions that the painting violated Mr Meischberger's rights as protected under section 78 of the Copyright Act, and the injunction prohibiting any



further exhibition of the painting, concerned not only the applicant association but also the painter himself and any other third person wishing to exhibit the painting and were equivalent to the deletion of the painting from the collective memory. As an example they referred to the 2004 exhibition concerning the work of Otto Mühl at the Vienna Museum for Applied Arts (*Museum für Angewandte Kunst*), where the painting had not been shown.

## **B. The Court's assessment**

26. The Court reiterates that freedom of expression, as secured in paragraph 1 of Article 10, 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, 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”. 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. 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. 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 *Müller and Others v. Switzerland*, judgment of 24 May 1988, Series A no. 133, p. 22, §§ 33-34, with further references).

27. In the present case, the Austrian courts forbade the applicant association to exhibit any further the painting “Apocalypse” by Otto Mühl. Such decisions interfered with the applicant association's right to freedom of expression (see, *mutatis mutandis*, *Müller and Others*, cited above, p. 19, § 27).

28. The Court further finds, and this was not disputed before it, that the interference was “prescribed by law,” the impugned courts' decisions having been based on section 78 of the Copyright Act.

29. As to the question of the legitimate aim pursued, the Court observes that section 78 of the Austrian Copyright Act provides a remedy against publication of a person's picture where this would violate the legitimate interests of the person concerned or, in the event that he or she has died, those of close relatives. Referring to that legislation, the domestic courts prohibited the applicant association from exhibiting the painting at issue any further as they found that it constituted a debasement of Mr Meischberger's

public standing. The Court therefore accepts that the impugned measure pursued the legitimate aim of “protection of the rights of others”.

30. The Government further contended that the aim of the interference complained of was to protect public morals.

31. The Court notes, however, that neither the wording of the above legislation, nor the terms in which the relevant court decisions were phrased, refer to the latter aim. Therefore, the Court cannot accept that the Austrian authorities, when prohibiting the exhibition of the painting at issue, pursued any other objective than the protection of Mr Meischberger's individual rights. Accordingly, the Government's argument that the interference also pursued the legitimate aim of protecting public morals fails.

32. As regards the necessity of the interference, the Court notes at the outset that the painting, in its original state, depicted Mr Meischberger in a somewhat outrageous manner, namely naked and involved in sexual activities. Mr Meischberger, a former general secretary of the Austrian Freedom Party and a member of parliament at the time of the events, was portrayed in interaction with three other prominent members of his party, amongst them Mr Jörg Haider, who at that time was the party's leader and has in the meantime founded another party.

33. However, it must be emphasised that the painting used only photos of the heads of the persons concerned, their eyes being hidden under black bars and their bodies being painted in an unrealistic and exaggerated manner. It was common ground in the understanding of the domestic courts at all levels that the painting obviously did not aim to reflect or even to suggest reality; the Government, in their submissions, have not alleged otherwise. The Court finds that such portrayal amounted to a caricature of the persons concerned using satirical elements. It notes that 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. Accordingly, any interference with an artist's right to such expression must be examined with particular care.

34. In the present case, the Court considers that the painting could hardly be understood to address details of Mr Meischberger's private life, but rather related to Mr Meischberger's public standing as a politician from the FPÖ. The Court notes that in this capacity Mr Meischberger has to display a wider tolerance in respect of criticism (see *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 42). The Court does not find unreasonable the view taken by the court of first instance that the scene in which Mr Meischberger was portrayed could be understood to constitute some sort of counter-attack against the Austrian Freedom Party, whose members had strongly criticised the painter's work.

35. Furthermore, the Court would stress that besides Mr Meischberger, the painting showed a series of 33 persons, some of whom were very well

known to the Austrian public, who were all presented in the way described above. Besides Jörg Haider and the painter himself, Mother Teresa and the Austrian cardinal Hermann Groer were pictured next to Mr Meischberger. The painting further showed the Austrian bishop Kurt Krenn, the Austrian author Peter Turrini and the director of the Vienna Burgtheater, Claus Peymann. Mr Meischberger, who at the time of the events was an ordinary member of parliament, was certainly one of the less well known amongst all the people appearing on the painting and nowadays, having retired from politics, is hardly remembered by the public at all.

36. The Court also observes that, even before Mr Meischberger instituted proceedings, the part of the painting showing him had been damaged so that notably the offensive painting of his body was completely covered by red paint. The Court considers that, at the very latest from this incident onwards, Mr Meischberger's portrayal – even assuming that he was still recognisable, a question that elicited contradictory answers from the different Austrian courts – was certainly diminished, if not totally eclipsed, by the portrayal of all the other, mostly more prominent, persons who were still completely visible on the painting.

37. The Court lastly notes that the Austrian courts' injunction was not limited either in time or in space. It therefore left the applicant association, which directs one of the best-known Austrian galleries specialising in contemporary art, with no possibility of exhibiting the painting irrespective of whether Mr Meischberger was known, or was still known, at the place and time of a potential exhibition in the future.

38. In sum, having balanced Mr Meischberger's personal interests and taking account of the artistic and satirical nature of his portrayal, as well as the impact of the measure at issue on the applicant association, the Court finds that the Austrian courts' injunction was disproportionate to the aim it pursued and therefore not necessary in a democratic society within the meaning of Article 10 § 2 of the Convention.

39. Accordingly, there has been a violation of Article 10 of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

40. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

### A. Damage

41. In respect of pecuniary damage, the applicant association claimed ATS 21,778 for the compensation and ATS 144,499.20 for the costs it had been ordered to pay Mr Meischberger in the domestic proceedings. Both sums were inclusive of VAT. It further claimed ATS 24,570, including VAT, in respect of the costs of the publication of extracts of the judgment. It finally claimed reimbursement of a lump sum of EUR 2,200 for supplementary administrative expenses during the domestic proceedings.

42. In respect of non-pecuniary damage, the applicant association sought EUR 70,000.

43. The Government claimed that, in the absence of a detailed breakdown, the lump sum claimed for supplementary administrative expenses was incomprehensible and that there was thus no causal link between this sum and the violation found. The claim for non-pecuniary damage was excessive and, in any event, the finding of a violation would offer sufficient redress.

44. As regards pecuniary damage, the Court finds that there is a direct link between the applicant association's claims concerning the costs it was ordered to pay to Mr Meischberger in the domestic proceedings, the costs of publication of the judgment and the violation of Article 10 found in the instant case. The Court therefore awards the full amount claimed under this head, namely EUR 12,286.74, inclusive of VAT. However, the applicant association's complaint, and, therefore, the proceedings before the Court, concerned only the injunction forbidding it to continue exhibiting the painting. Accordingly, the Court cannot find any causal link between the applicant association's claim in respect of the compensation it was ordered to pay and the violation found. The Court will deal with the claim for reimbursement of supplementary administrative costs incurred during the domestic proceedings under the head of costs and expenses. As regards the claim for non-pecuniary damage, the Court finds that in the circumstances of the present case the finding of a violation constitutes in itself sufficient just satisfaction.

## **B. Costs and expenses**

45. The applicant association claimed reimbursement of its costs in the domestic proceedings in the amount of EUR 12,950.16 and EUR 8,984.04 in respect of the proceedings before the Court. Both amounts included VAT and were calculated on the basis of statutory domestic rates.

46. The Government argued that these claims were excessive and pointed out that the Court was not bound by domestic scales and practices. Furthermore, the subject of the proceedings before the Court was to a considerable degree identical with that of the proceedings before the national authorities and less preparation had therefore been required.

47. The Court considers in respect of the domestic proceedings that the court costs for the applicant association's legal representation were actually incurred. Accordingly, it awards the full amount of EUR 12,950.16, including VAT, for the applicant association's domestic costs and expenses. As to the lump sum claimed for supplementary administrative costs (see paragraph 44 above), the Court notes that the applicant association did not submit supporting documents as required by Rule 60 of the Rules of Court. It therefore dismisses the claim as being unsubstantiated.

48. With regard to the applicant association's costs in the Convention proceedings, the Court reiterates that it does not consider itself bound by domestic scales and practices, although it may derive some assistance from them (see, among many other authorities, *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316, p. 83, § 77, and *Baskaya and Okçuoglu v. Turkey*, nos. 23536/94 and 24408/94, § 98, ECHR 1999-IV). Deciding on an equitable basis and having regard to similar cases, the Court awards the applicant association EUR 3,000, including VAT, under this head. It therefore awards a total of EUR 15,950.16 under the head of costs and expenses.

## **C. Default interest**

49. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## **FOR THESE REASONS, THE COURT**

1. *Holds* by four votes to three that there has been a violation of Article 10 of the Convention;

2. *Holds* by four votes to three that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant association;
3. *Holds* by four votes to three
  - (a) that the respondent State is to pay the applicant association, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
    - (i) EUR 12,286.74 (twelve thousand two hundred and eighty-six euros and seventy-four cents), inclusive of VAT, in respect of pecuniary damage;
    - (ii) EUR 15,950.16 (fifteen thousand nine hundred and fifty euros and sixteen cents), inclusive of VAT, in respect of costs and expenses;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* by four votes to three the remainder of the applicant association's claim for just satisfaction.

Done in English, and notified in writing on 25 January 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN  
Registrar

Christos ROZAKIS  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:

- (a) Dissenting opinion of Mr Loucaides;
- (b) Joint dissenting opinion of Mr Spielmann and Mr Jebens.

C.L.R.  
S.N.

## DISSENTING OPINION OF JUDGE LOUCAIDES

I disagree with the opinion of the majority that there has been a violation of Article 10 of the Convention in this case.

The majority found that the images portrayed in the “painting” in question were “artistic and satirical in nature”. This assessment had a decisive effect on the judgment. The majority saw the “painting” as a form of criticism by the artist of Mr Meischberger, a politician and one of the persons depicted in it. It was he who brought the proceedings which led to the impugned measure.

The nature, meaning and effect of any image or images in a painting cannot be judged on the basis of what the painter purported to convey. What counts is the effect of the visible image on the observer. Furthermore, the fact that an image has been produced by an artist does not always make the end result “artistic”. Likewise, an image will not become “satirical” if the observer does not comprehend or detect any message in the form of a meaningful attack or criticism relating to a particular problem or a person's conduct.

In my view, the picture in question cannot, by any stretch of the imagination, be called satirical or artistic. It showed a number of unrelated personalities (some political, some religious) in a vulgar and grotesque presentation and context of senseless, disgusting images of erect and ejaculating penises and of naked figures adopting repulsive sexual poses, some even involving violence, with coloured and disproportionately large genitals or breasts. The figures included religious personalities such as the Austrian Cardinal Hermann Groer and Mother Teresa, the latter portrayed with protruding bare breasts praying between two men - one of whom was the Cardinal - with erect penises ejaculating on her! Mr Meischberger was shown gripping the ejaculating penis of Mr Haider while at the same time being touched by two other FPÖ politicians and ejaculating on Mother Teresa!

The reader will of course need to look at the “painting” in question in order to be able to form a view of its nature and effect. It is my firm belief that the images depicted in this product of what is, to say the least, a strange imagination, convey no message; the “painting” is just a senseless, disgusting combination of lewd images whose only effect is to debase, insult and ridicule each and every person portrayed. Personally, I was unable to find any criticism or satire in this “painting”. Why were Mother Teresa and Cardinal Hermann Groer ridiculed? Why were the personalities depicted naked with erect and ejaculating penises? To find that situation comparable with satire or artistic expression is beyond my comprehension. And when we speak about art I do not think that we can include each and every act of artistic expression regardless of its nature and effect. In the same way that we exclude insults from freedom of speech, so we must

exclude from the legitimate expression of artists insulting pictures that undermine the reputation or dignity of others, especially if they are devoid of any meaningful message and contain nothing more than senseless, repugnant and disgusting images, as in the present case.

As was rightly observed in the judgment (paragraph 26) “...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. 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...”

Nobody can rely on the fact that he is an artist or that a work is a painting in order to escape liability for insulting others. Like the domestic courts, I find that the “painting” in question undermined the reputation and dignity of Mr Meischberger in a manner for which there can be no legitimate justification and therefore the national authorities were entitled to consider that the impugned measure was necessary in a democratic society for the protection of the reputation or rights of others.

It might be useful to add that the large-sized painting in question was exhibited in an art gallery open to the general public so that even children could find themselves viewing it. It in fact provoked some public indignation and even a violent reaction when a visitor intentionally damaged parts of it. I acknowledge that, as a result of the damage, Mr Meischberger's body was no longer visible. However, I can adhere to the view taken by the Austrian courts that the undamaged portrayal of a part of Mr Meischberger's head made identification still possible.



## JOINT DISSENTING OPINION OF JUDGES SPIELMANN AND JEBENS

*(Translation)*

We voted against finding a violation of Article 10 of the Convention. We are anxious to clarify the reasons for our vote in the following lines.

1. The Court accepted that the prohibition on exhibiting the painting “Apocalypse” was prescribed by law and pursued the legitimate aim of the “protection of the rights of others”. However, the majority of the judges found that the interference was disproportionate to the aim pursued and therefore not necessary in a democratic society within the meaning of Article 10 § 2 of the Convention. Accordingly, the majority found a breach of Article 10 of the Convention.

2. We do not subscribe to this approach.

3. It should be recalled that the painting was a montage combining painted elements and photographs of people, the overall effect being an unrealistic and exaggerated depiction of public figures in sexually explicit positions. The painting was not intended to portray reality. On the contrary, it is permissible to consider that it sought to convey a message by means of caricature and satire, which, according to the Court, 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” (see paragraph 33 of the judgment).

4. To justify its finding of a violation of Article 10, the Court relied on Mr Meischberger's standing as a politician and the fact that the message conveyed could be construed as a sort of counter-attack against the Austrian Freedom Party, whose members had previously criticised the artist's work (paragraph 34). The Court added that 33 people were depicted on the same painting and that Mr Meischberger was certainly one of the less well known of them (paragraph 35), that the painting had subsequently been damaged, having been covered in red paint (paragraph 36), and that the injunction in issue had not been limited in time or in space (paragraph 37). Having weighed up Mr Meischberger's personal interests and taken account of the artistic and satirical nature of his portrayal and the impact of the injunction on the applicant association, the Court concluded that the injunction was disproportionate (paragraph 38).

5. We do not agree with this conclusion. Our reason is that where the “protection of the rights of others” is at stake, artistic freedom cannot be unlimited.

6. Admittedly, 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'.<sup>1</sup> We also take the view that the State's margin of appreciation should be particularly limited, or indeed practically non-existent, where its interference affects artistic freedom.<sup>2</sup>

7. However, in the present case the painting in question, even if it is an expression of what is known nowadays as “committed” art (*art engagé*),<sup>3</sup>

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1. *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49.

2. This solution has (unfortunately) not been adopted to date by the Court. See *Müller and Others v. Switzerland*, judgment of 24 May 1988, Series A no. 133, concerning the applicants' conviction and sentence to a fine (“conviction”) for publishing obscene material following an exhibition of pictures, and the confiscation of the pictures; *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, concerning the seizure and forfeiture of a film deemed to be blasphemous; and *Wingrove v. the United Kingdom*, judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V, concerning the refusal of a certificate for distribution of a video deemed to be blasphemous. We might note in passing that in *Müller and Others v. Switzerland* the Court found that there had been no violation of Article 10, a solution which we do not find persuasive, seeing that the paintings in issue in that case did not infringe the rights of others but were simply deemed to be obscene. As to the applicant's conviction, the Court added, however, that “[m]oreover, as the Commission pointed out, there is a natural link between protection of morals and protection of the rights of others” (pp. 20-21, § 30). Concerning the confiscation of the paintings, the Court referred to the “protect[ion of] public morals by preventing any repetition of the offence with which the applicants were charged” (pp. 23-24, § 39).

3. See the German Federal Constitutional Court's decision of 3 June 1987 (BVerfGE 75, 369; *EuGRZ*, 1988, 270), discussed below:

“Die umstrittenen Karikaturen sind das geformte Ergebnis einer freien schöpferischen Gestaltung, in welcher der Beschwerdeführer seine Eindrücke, Erfahrungen und Erlebnisse zu unmittelbarer Anschauung bringt. Sie genügen damit den Anforderungen, die das Bundesverfassungsgericht als wesentlich für eine künstlerische Betätigung ansieht (BVerfGE 67, 213 [226] = *EuGRZ* 1984, 474 [477] unter Berufung auf BVerfGE 30, 173 [189]). Daß mit ihnen gleichzeitig eine bestimmte Meinung zum Ausdruck gebracht wird, nimmt ihnen nicht die Eigenschaft als Kunstwerk. Kunst und Meinungsäußerung schließen sich nicht aus; eine Meinung kann – wie es bei der sogenannten engagierten Kunst üblich ist – durchaus in der Form künstlerischer Betätigung kundgegeben werden (Scholz, a.a.O., Rdnr. 13). Maßgebliches Grundrecht bleibt in diesem Fall Art. 5 Abs. 3 Satz 1 GG, weil es sich um die spezielle Norm handelt (BVerfGE 30, 173 [200]).”

It should be noted that in German Constitutional Law, freedom of the arts (*Kunstfreiheit*) is specifically protected by Article 5 (3) of the Basic Law. “The exercise of this freedom is not limited, as is freedom of expression, by the provisions of general laws or the right to reputation, but it must be considered in conjunction with other constitutional rights, notably the right to the free development of personality and human dignity.” E. Barendt, *Freedom of Speech*, 2nd ed., Oxford, Oxford University Press, 2005, p. 229, citing the order of the German Constitutional Court of 17 July 1984 in the “street-theatre” case, [BVerfGE 67, 213; *EuGRZ*, 1984, 474] in which the court held that a moving street theatre, in which Franz-Josef Strauss, then a candidate for the Chancellorship, was portrayed in the same float as prominent Nazis, should be protected under freedom of the arts in the absence of evidence that there was a very serious injury to personality rights.

does not deserve the unlimited protection of Article 10 of the Convention, precisely because it interferes excessively with the rights of others. In other words: “There are ... limits to excess: one cannot be excessively excessive.”<sup>4</sup>

8. The excessive nature of the portrayal results precisely from its attack on the “dignity of others”, which in our view is covered by the protection of the “rights of others”. On this point, we subscribe to the dissenting opinion of our colleague Judge Loucaides. We would emphasise that the concept of dignity prevails throughout the European Convention on Human Rights, even if it is not expressly mentioned in the text of the Convention.<sup>5</sup> However, the Court has made it clear in its case-law that “[t]he very essence of the Convention is respect for human dignity and human freedom.”<sup>6</sup> And as a learned author has put it: “The foundation of human rights cannot be anything other than the 'equal dignity' of all human beings. Dignity and universality are therefore indissociable.”<sup>7</sup>

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4. P. Martens, *Théories du droit et pensée juridique contemporaine*, Brussels, Larcier, 2003, p. 151: “Il y a (...) des limites à l'excès : on ne peut pas être excessivement excessif.”

5. The Preamble to the Convention refers to the Universal Declaration of Human Rights (10 December 1948), which contains references to dignity in the first recital of its Preamble and in Articles 1, 22 and 23. The concept is also referred to in the Charter of the United Nations (1945) (Preamble) and the United Nations Covenants (1966) (Preambles to both Covenants; Article 10 of the International Covenant on Civil and Political Rights; Article 13 of the International Covenant on Economic, Social and Cultural Rights). This list of international instruments is not exhaustive. Several national constitutions contain an explicit reference to the concept of dignity. For example, Article 1 (1) of the German Basic Law provides: “Human dignity is inviolable. All public authorities have a duty to respect and protect it.” (“Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.”) Lastly, mention may also be made of the Charter of Fundamental Rights of the European Union, Article 1 of which provides: “Human dignity is inviolable. It must be respected and protected.” For a commentary on this provision in the light of international case-law, see the commentary on the European Union Charter by the EU Network of Independent Experts on Fundamental Rights (CFR-CDF), June 2006, and L. Burgorgue-Larsen, A. Levade and F. Picod, *Traité établissant une Constitution pour l'Europe. Commentaire article par article. Partie II : La Charte des droits fondamentaux de l'Union*, Brussels, Bruylant, 2005, Vol. 2, pp. 36 et seq.

The European Court of Justice has mentioned human dignity several times. See the commentary on the European Union Charter by the EU Network of Independent Experts on Fundamental Rights (CFR-CDF), June 2006, *op. cit.*, pp. 24 et seq., and in particular the judgment of 14 October 2004, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundestadt Bonn*, [2004] ECR I-9609, § 34: “the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law.” The ECJ referred to the opinion of Advocate-General, Mrs. Christine Stix-Hackl of 18 March 2004 (§§ 82-91).

6. *Pretty v. the United Kingdom*, no. 2346/02, § 65, ECHR 2002-III, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI. See also *Valašinas v. Lithuania*, no. 44558/98, § 102, ECHR 2001-VIII.

7. E. Decaux, “Dignité et universalité”, in S. Marcus Helmons (ed.), *Dignité humaine et hiérarchie des valeurs. Les limites irréductibles*, Brussels, Academia-Bruylant, Bruylant, 1999, p. 164 : “Le fondement des droits de l'homme ne peut être que « l'égalité dignité » de

9. In our opinion, it was not the abstract or indeterminate concept of human dignity – a concept which can in itself be dangerous since it may be used as justification for hastily placing unacceptable limitations on fundamental rights<sup>8</sup> – but the concrete concept of “fundamental personal dignity of others”<sup>9</sup> which was central to the debate in the present case, seeing that a photograph of Mr Meischberger was used in a pictorial montage which he felt to be profoundly humiliating and degrading.

10. It should be noted in this connection that in an order of 3 June 1987,<sup>10</sup> in a case about cartoons, the German Federal Constitutional Court relied on the concept of human dignity as expressly enshrined in the Basic Law (Article 1 (1)),<sup>11</sup> in dismissing a complaint by a publisher. The cartoon portrayed a well-known politician as a pig copulating with another pig dressed in judicial robes. The court did not accept the publisher's argument relating to artistic freedom as protected by Article 5 (3) of the Basic Law.<sup>12</sup>

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tous les hommes. Dès lors, dignité et universalité sont indissociables.”

8. See D. Feldman, “Human Dignity as a legal value. Part I”, *Public Law*, 1999, pp. 682-702, at p. 697: “The notion of dignity can easily become a screen behind which paternalism or moralism are elevated above freedom in legal decision-making.” As another author has pointed out, “[I]a notion de dignité, indéfinie, est à l’évidence manipulable à l’extrême. Grande peut-être alors la tentation d’un ordre moral évoquée par G. Lebreton (*Chr. D.* [1996, J., 177]). La confusion établie entre moralité publique et dignité s’y prête particulièrement à l’heure où le politiquement correct traverse l’Atlantique”, J.-P. Théron, “Dignité et libertés. Propos sur une jurisprudence contestable”, in *Pouvoir et liberté. Etudes offertes à Jacques Mourgeon*, Brussels, Bruylant, 1998, p. 305, concerning two decisions of 27 October 1995 by the French *Conseil d’Etat*, sitting as a full court, *Commune de Morsang-sur-Orge* and *Ville d’Aix-en-Provence*, *AJDA*, 1995, 942, *RFDA*, 1995, 1204, submissions by Mr Frydman, and *Rev. trim. dr. h.*, 1996, 657, submissions by Mr Frydman, note by Nathalie Deffains. See also P. Martens, “Encore la dignité humaine: Réflexions d’un juge sur la promotion par les juges d’une norme suspecte”, in *Les droits de l’homme au seuil du troisième millénaire. Mélanges en hommage à Pierre Lambert*, Brussels, Bruylant, 2000, pp. 561 et seq. On the role played by morals in the debate on dignity, see J. Fierens, “La dignité humaine comme concept juridique”, *Journal des Tribunaux*, 2002, pp. 577 et seq., in particular p. 581. See also, from the perspective of the “paradigm of humanity”, B. Edelman, “La dignité de la personne humaine, un concept nouveau”, *D.*, 1997, chron. p. 185, and reprinted in the book by the same author *La personne en danger*, Paris, PUF, 1999, pp. 505 et seq.

9. On the distinction between protection of the dignity of others and protection of one’s own fundamental dignity, see B. Maurer, *Le principe de respect de la dignité humaine et la Convention européenne des droits de l’homme*, Paris, La documentation française, 1999, in particular pp. 450 et seq. and pp. 464 et seq.

10. BVerfGE 75, 369; *EuGRZ*, 1988, 270. See also the article by G. Nolte, “Falwell vs. Strauß: Die rechtlichen Grenzen politischer Satire in den USA und der Bundesrepublik”, *EuGRZ*, 1988, pp. 253-59.

11. See footnote 5 above.

12. Article 5 (3) of the German Basic Law provides: “Art and science, research and teaching are free. ...”

As already noted (see footnote 3 above), freedom of the arts (*Kunstfreiheit*) is specifically protected by Article 5 (3) of the Basic Law and the exercise of this freedom is not limited as freedom of expression is. It must be considered in conjunction with other constitutional

It is important to note that the court accepted that the cartoons could be described as a work of art; it was not appropriate to perform a quality control (*Niveauekontrolle*) and thus to differentiate between “superior” and “inferior” or “good” and “bad” art.<sup>13</sup> However, it dismissed the complaint, finding that the cartoons were intended to deprive the politician concerned of his dignity by portraying him as engaging in bestial sexual conduct. Where there was a conflict with human dignity, artistic freedom (*Kunstfreiheit*) must always be subordinate to personality rights.<sup>14</sup>

11. One commentator, Eric Barendt, rightly approved this decision, stating:

“Political satire should not be protected when it amounts only to insulting speech directed against an individual. If, say, a magazine feature attributes words to a celebrity, or uses a computerized image to portray her naked, it should make no difference that the feature was intended as a parody of an interview she had given. It should be regarded as a verbal assault on the individual's right to dignity, rather than a contribution to political or artistic debate protected under the free speech (or freedom of the arts) clauses of the Constitution.”<sup>15</sup>

12. In a word, a person's human dignity must be respected, regardless of whether the person is a well-known figure or not.

13. Returning to the case before us, we therefore consider that the reasons that led the Court to find a violation (see paragraph 4 above) are not relevant. Such considerations must be subordinate to respect for human dignity.

14. We would also like to add that the very fact that Mr Meischberger's photograph was included as part of the painting without his consent is in itself problematic in terms of the Convention. The right to one's own image is in our view covered by Article 8 of the Convention, which protects the right to private life.<sup>16</sup> Article 8 protects the right to an identity<sup>17</sup> and the

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rights, such as the right to human dignity. See E. Barendt, *Freedom of Speech*, 2nd ed., Oxford, Oxford University Press, 2005, p. 229.

13. “Die Grundanforderungen künstlicher Tätigkeit festzulegen, ist daher durch Art. 5 Abs. 3 Satz 1 GG nicht verboten sondern verfassungsrechtlich gefordert. Erlaubt und notwendig ist allerdings nur die Unterscheidung zwischen Kunst und Nichtkunst; eine Niveauekontrolle, also eine Differenzierung zwischen ‘höherer’ und ‘niederer’, ‘guter’ und ‘schlechter’ (und deshalb nicht oder weniger schutzwürdiger) Kunst, liefe demgegenüber auf eine verfassungsrechtlich unstatthafte Inhaltskontrolle hinaus (Scholz in: Maunz/Dürig, GG, Art. 5 Abs. 3 Rdnr. 39).”

14. E. Barendt, *Freedom of Speech*, 2nd ed., Oxford, Oxford University Press, 2005, p. 230.

15. *Op. cit.*, p. 230. The author adds in a footnote the following: “For an Italian case on the point, see the decision of the Corte di Cassazione, Penal Section, of 20 Oct. 1998, reported in (1999) *Il Diritto dell'Informazione e dell'Informatica* 369, rejecting appeal of author of a newspaper article which included a cartoon implying that a woman senator fellated Berlusconi. Satire is not protected if does not respect personality rights.”

16. See *Von Hannover v. Germany*, no. 59320/00, § 50, ECHR 2004-VI, and *Sciaccia v. Italy*, no. 50774/99, § 28, ECHR 2005-I.

right to personal development, particularly in relation to the notion of personal autonomy, an important principle underlying the interpretation of the guarantees of that provision.<sup>18</sup> Since control of one's own image is one of the essential components of personal development, Article 8 may therefore be applicable simply on the ground that the person has not had the prior opportunity to challenge the reproduction of his or her image. In the present case, the question of a violation of the right to one's own image is all the more serious in that the photograph of Mr Meischberger was used, or rather misused, as part of a depiction of situations which were particularly shocking in their conception and have, moreover, been eloquently described by our colleague Judge Loucaides in his dissenting opinion.

15. Lastly, we voted against the second point of the operative provisions in which the Court held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained. The wording of point 2 of the operative provisions of the judgment should have left us indifferent. But since we voted against finding a violation of Article 10 of the Convention, we also decided to vote against that point of the operative provisions.

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17. See *Wisse v. France*, no. 71611/01, § 24, 20 December 2005.

18. See *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III.