

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 13470/87

OTTO-PREMIINGER-INSTITUT

against

AUSTRIA

REPORT OF THE COMMISSION

(adopted on 14 January 1993)

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## I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

### A. The application

2. The applicant, Otto-Preminger-Institut Verein für audiovisuelle Mediengestaltung (OPI), is a private association established in Innsbruck, acting through its executive committee (Vorstand) who instructed Mr. Frank Höpfel, a university professor and criminal defence counsel in Innsbruck, to represent it before the Commission.

3. The application is directed against Austria whose Government are represented by their Agent, Ambassador Helmut Türk, Deputy Secretary General and Legal Counsel of the Federal Ministry of Foreign Affairs.

4. The application concerns the prohibition to show the film "Das Liebeskonzil" in the applicant association's cinema in Innsbruck on the

ground that its showing would constitute the criminal offence of blasphemy. The film was seized and subsequently confiscated in "objective media proceedings". The applicant association complains that these measures violated its right of freedom of expression as guaranteed by Article 10 of the Convention.

B. The proceedings

5. The application was introduced on 6 October 1987 and registered on 2 December 1987.

6. On 5 March 1990 the Commission decided to bring the application to the notice of the respondent Government and to invite them to submit before 11 May 1990 observations in writing on the admissibility and merits of the application as well as a copy of the confiscated film.

7. At the Government's request, the time-limit was extended to 11 June 1990. The Government submitted observations on 25 May 1990 and the applicant association replied thereto on 5 July 1990. On 12 October 1990 the Government submitted the confiscated copy of the film to the Commission.

8. On 7 January 1991 the Commission decided to appoint a delegation of five German speaking members (MM. Trechsel, Ermacora, Jörundsson, Weitzel and Danelius) to attend a screening of the film. The screening took place on 15 January 1991.

9. The delegation deliberated on 16 January 1991 and reported to the full Commission on 17 January 1991. The Commission's deliberations continued on 12 April 1991.

10. On the same day the Commission declared the application admissible and fixed a further screening of the film before the full Commission in the presence of the parties.

11. At the screening on 5 July 1991 the following members of the Commission were present: MM. C.A. Nørgaard (President), J.A. Frowein, S. Trechsel, F. Ermacora, G. Jörundsson, A.S. Gözübüyük, A. Weitzel, H.G. Schermers, H. Danelius, Mrs. G.H. Thune, Mr. C.L. Rozakis, Mrs. J. Liddy, MM. L. Loucaides, J.-C. Geus, M.P. Pellonpää and B. Marxer. The parties were represented as follows: the Government by Mr. Wolf Okresek of the Federal Chancellery and Mr. Florian Haug of the Federal Ministry for Foreign Affairs; the applicant association by Mr. Frank Höpfel, Mr. Dietmar Zingl, manager of the applicant association's cinema and Mr. Friedrich Schmidt, cashier of the applicant association.

12. Further information was submitted by the applicant association on 5 November and communicated to the respondent Government on 23 November 1992.

13. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

14. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C. A. NØRGAARD, President

J. A. FROWEIN  
S. TRECHSEL  
F. ERMACORA  
G. JÖRUNDSSON  
A. S. GÖZÜBÜYÜK  
A. WEITZEL  
H. G. SCHERMERS  
H. DANELIUS  
Mrs. G. H. THUNE  
J. LIDDY  
MM. L. LOUCAIDES  
J.-C. GEUS  
M. P. PELLONPÄÄ

15. The text of this Report was adopted on 14 January 1993 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

16. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- i) to establish the facts, and
- ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

17. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

18. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

## II. ESTABLISHMENT OF THE FACTS

### A. The particular circumstances of the case

19. The applicant is a private association in Innsbruck with the aim to give information and enable communication on audio-visual media, as well as to encourage creativity and entertainment in this field. The applicant association also runs a cinema which was licensed by a decision of the Provincial Government of the Tyrol on 26 January 1984. In this cinema the association intended to show the film "Das Liebeskonzil" (Council in Heaven) to the general public on 13 May 1985 at 22.00h.

20. This film by Werner Schroeter is based on a theatre play by Oskar Panizza of 1894 which after its first performance gave rise to criminal proceedings against the author before the Regional Court of Munich in 1895. After those proceedings, the play had not been shown on stage until 1973 when it was produced in Hamburg. Since then, performances have taken place in several countries, including Germany, Italy and Austria. The film shows this play, as put on the stage in the Teatro Belli in Rome in 1981 (a performance which provoked a theatre scandal), as a story within the story of the criminal proceedings against the author. The play concerns a Council in Heaven, convoked by God the Father after having learnt of the lascivious life of the people of Naples in order to invent a punishment which would strike mankind without interfering with their need for salvation. After deliberations with, inter alia, the Virgin Mary and Jesus Christ the Devil is also consulted and it is finally decided on the latter's proposal that the Devil and Salome procreate a daughter who is sent to Earth to spread syphilis first in the Court of the Pope and the

monasteries and finally among the ordinary people.

21. The film had earlier been shown in Vienna in February 1984. According to the Government the institution of criminal proceedings had been considered by the Vienna public prosecutor's office at that time. However, these proceedings had eventually not been pursued as the film had been taken off the programme of the Vienna cinema concerned and it appeared that the copy projected was no longer in Austria and therefore could not be seized. According to the report of the Vienna public prosecutor's office the contents of the film manifestly fell within the scope of the criminal offence of disparaging religious precepts (Herabwürdigung religiöser Lehren) within the meaning of Section 188 of the Austrian Penal Code (Strafgesetzbuch).

22. The projection of the film in Innsbruck was announced in the show-window and foyer of the applicant association's cinema and in the periodical distributed to members of the association and other interested persons.

23. The announcement was phrased in the following terms:

(German)

"Oskar Panizzas satirische Himmelstragödie wurde von Schroeter in einer Aufführung des römischen Teatro Belli verfilmt und in eine Rahmenhandlung gestellt, die den 1895 wegen Gotteslästerung geführten Prozeß gegen den Dichter und seine Verurteilung rekonstruiert. Panizza geht von der Annahme aus, die Syphilis sei die Strafe Gottes für die Unzucht und Sündenhaftigkeit der Menschen zur Zeit der Renaissance gewesen, speziell am Hofe des Borgia-Papstes Alexander VI. In Schroeters Film gleichen die Vertreter Gottes auf Erden, versehen mit den Insignien weltlicher Macht, aufs Haar den himmlischen Protagonisten.

Karikaturistisch werden bildliche Trivialvorstellungen und Auswüchse des christlichen Glaubens auf Korn genommen und die Beziehung von Glaubensinhalten und weltlichen Unterdrückungsmechanismen untersucht."

(Translation)

"Oskar Panizza's satirical tragedy set in Heaven was filmed by Schroeter from a performance of the Teatro Belli in Rome and placed in a frame story which reconstructs the trial of the writer for blasphemy in 1895 and his conviction. Panizza starts from the assumption that syphilis was God's punishment for the lasciviousness and sinfulness of mankind at the time of the Renaissance, especially at the court of the Borgia Pope Alexander VI. In Schroeter's film, God's representatives on Earth carrying the insignia of worldly power resemble to a hair the heavenly protagonists.

In a caricatural mode trivial imagery and absurdities of the Christian creed are targeted and the relationship between religious beliefs and worldly mechanisms of oppression is investigated."

24. A regional newspaper also announced the title of the film and the date and place of its projection without giving details as to its contents.

25. On 10 May 1985 i.e. before the date of the intended projection, the public prosecutor at the request of the Innsbruck diocese of the Roman Catholic Church instituted criminal proceedings against the applicant association's manager, being the responsible person under the

Media Act (Mediengesetz), on the suspicion of the attempted criminal offence of disparaging religious precepts under Section 188 of the Penal Code.

26. On 12 May 1985, after the film had been shown in a private session in the presence of a duty judge (Journalrichter), the prosecution requested its seizure under Section 36 of the Media Act. This was granted by the Regional Court (Landesgericht) of Innsbruck the same day, and the film therefore could not be shown to the general public. As the applicant association's manager had returned the film to the distributor, a firm in Vienna, the film was actually seized at the latter's premises on 11 June 1985.

27. The appeal of the applicant association's manager against the Regional Court's seizure order was rejected by the Innsbruck Court of Appeal (Oberlandesgericht) on 30 July 1985. It held that the seizure was justified since the contents of the film were likely objectively to constitute the criminal offence of disparaging religious precepts in such a manner that the fundamental right of artistic freedom had to give way. In this context the subjective side of the offence, i.e. the intent of the applicant association's manager, was not essential, the seizure being a preventive measure which could be taken on the basis of the objective facts if there was a well-founded suspicion of a criminal offence. In the Court of Appeal's opinion the massive insult to religious feelings outweighed the arguments based on artistic freedom, the public's general interest in information and the financial interests of the persons who wished to show the film.

28. On 24 October 1985 the criminal proceedings against the applicant association's manager were discontinued and the further proceedings were conducted as "objective proceedings" for the forfeiture (Einziehung) of the film under Section 33 of the Media Act. In these proceedings, the distribution firm informed the court that the copy to be shown in Innsbruck was the only copy existing in Austria and that they waived their right to the return of this copy and agreed to its destruction.

29. On 10 October 1986 a trial took place before a single judge of the Innsbruck Regional Court. At the trial, the film was shown again in closed session. Its contents were described in detail in the trial record (cf. Appendix III). The distribution firm was not represented and the applicant association's manager, who had been summoned as an interested party (Haftungsbeteiligter), explained that he had sent the film back to the distribution firm following the seizure order since he did not wish to have anything to do with the matter.

30. The court granted the forfeiture on the following grounds:

(German)

"Durch die für den 13. Mai 1985 vorgesehene öffentliche Aufführung des Tonfilmes 'Das Liebeskonzil', worin in Bild und Sprache Gott Vater als seniler, impotenter Trottel, Christus als Kretin und die Gottesmutter Maria als lüsterne Dame mit ebensolcher Ausdrucksweise dargestellt und die Eucharistie verspottet wird, wurde der Tatbestand des Vergehens der Herabwürdigung religiöser Lehren nach § 188 StGB verwirklicht."

(Translation)

"The intended public projection, on 13 May 1985, of the film 'Council in Heaven', which, both in image and text, depicts God the Father as a senile, impotent idiot, Christ as a cretin and Mary the Mother of God as a wanton lady with a corresponding manner of expression, and which also ridicules the Eucharistic

ceremony, came within the definition of the criminal offence of disparaging religious precepts under Section 188 of the Criminal Code."

31. In the reasons it was pointed out that God the Father, Christ and Mary were the central persons of veneration in the Catholic Church and that also the Eucharistic ceremony was protected by Section 188. Not every injury of religious convictions was punishable under this provision, but only one that disturbed the religious peace by arousing public irritation. In the present case the disparagement of God the Father, Christ, Mary and the Eucharistic ceremony was reinforced by the general character of the film as an attack on Christian religion. It was done in a scope and manner likely to disturb the feelings of average people, in particular the majority of believing Christians. This was not counterbalanced by the fact that a small minority of persons might be able to interpret the film in a positive way, having regard to the logical context of the disparaging remarks which could be seen as criticism of historic facts and of religious practices.

32. The freedom of art under Article 17a of the Basic Law on the General Rights of Citizens (Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger) could not be invoked as this freedom was limited by other fundamental rights such as the right to religious freedom and by the necessity of a social order based on tolerance and respect for legally protected values. While Section 188 of the Penal Code did not in itself restrict the freedom of art, there was in the present case such an intensive interference with religious feelings by the provocative anti-Christian attitude of the film that it outweighed the freedom of art.

33. The applicant association's manager appealed against the judgment, submitting a declaration signed by some 350 persons who protested that they had been prevented from having free access to a work of art, and claiming that Section 188 of the Penal Code had not been interpreted in line with the requirements of freedom of art under Article 17a of the Basic Law.

34. However, on 25 March 1987 the Innsbruck Court of Appeal declared the appeal inadmissible, finding that the applicant association's manager had no standing as he was not the owner of the copyright of the film which belonged to the distribution firm.

35. In May 1987 the Federal Minister for Education, Arts and Sport, Mrs. Hawlicek, in a private letter approached the Attorney General (Generalprokuratur) suggesting the filing of a plea of nullity for safeguarding the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes) with the Supreme Court (Oberster Gerichtshof).

36. The Attorney General made investigations concerning the steps taken by the Vienna public prosecutor's office in 1984 (see para. 21 above) and the manner in which the showing of the film had been announced in Innsbruck (see paras. 22-24 above). Finally, the Attorney General ruled on 26 July 1988 that there was no reason to file a plea of nullity for safeguarding the law. Detailed reasons were given for this ruling which included, in particular, references to the legal doctrine in Austria and the Supreme Court's decision in the Achternbusch case which concerned the seizure of another film (11 Os 165,166/85-9, Medien und Recht 1986, No. 2 p. 15). In this decision the Austrian Supreme Court had ruled that the right of freedom of art, as guaranteed by Article 17a of the Basic Law, can be limited if other fundamental rights and freedoms are infringed, in this specific case the freedom of belief and conscience (Article 14 of the Basic Law).

37. More recently, theatre performances of Panizza's play took place

on two occasions in Austria: in November 1991 in Vienna, and in October 1992 in Innsbruck. The Vienna production did not give rise to any action by the prosecution authorities. The performance in Innsbruck was the subject of several complaints (Strafanzeigen) by private persons. After preliminary investigations the Innsbruck public prosecution authorities found no reason to institute criminal proceedings and decided to discontinue the proceedings under Section 90 of the Austrian Code of Criminal Procedure (Zurücklegung der Strafanzeige).

B. Relevant domestic law

1. Substantive provisions

38. Section 188 of the Penal Code (Strafgesetzbuch) makes it a criminal offence to disparage religious precepts. It reads as follows:

(German)

"Wer öffentlich eine Person oder eine Sache, die den Gegenstand der Verehrung einer im Inland bestehenden Kirche oder Religionsgesellschaft bildet, oder eine Glaubenslehre, einen gesetzlich zulässigen Brauch oder eine gesetzlich zulässige Einrichtung einer solchen Kirche oder Religionsgesellschaft unter Umständen herabwürdigt oder verspottet, unter denen sein Verhalten geeignet ist, berechtigtes Ärgernis zu erregen, ist mit Freiheitsstrafe bis zu sechs Monaten oder mit Geldstrafe bis zu 360 Tagessätzen zu bestrafen."

(Translation)

"Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who or an object which is being venerated by a church or religious community established within the country, or a dogma, a legally authorised custom or a legally authorised institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates."

39. According to the case-law of the Austrian courts the application of this provision may be subject to certain restrictions resulting from fundamental rights such as the freedom of art stipulated in Article 17a of the Basic Law on the General Rights of Citizens (Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger). This provision reads as follows:

(German)

"Das künstlerische Schaffen, die Vermittlung von Kunst sowie deren Lehre sind frei."

(Translation)

"The artistic production, the dissemination of art and its teaching are free."

2. Procedural provisions

40. Criminal proceedings concerning media offences (Medieninhaltsdelikte) are mainly governed by the Media Act (Mediengesetz). The provisions of the Code of Criminal Procedure (Strafprozeßordnung) are only applicable in so far as the Media Act contains no special stipulations (cf. Section 41 para. 1 of the latter Act).

41. The principal sanction for media offences provided for in the

Media Act is the forfeiture (Einziehung) of the publication whose contents infringe the criminal law (cf. Section 33 of the Media Act). Other measures such as seizure of publications (Section 36) are subordinate to this main sanction.

42. Forfeiture may be ordered in addition to any criminal sanction under the Penal Code (cf. Section 33 para. 1 of the Media Act), but also in separate, so-called "objective", media proceedings.

43. In the latter respect, Section 33 para. 2 provides as follows:

(German)

"Auf Antrag des Anklägers ist auf Einziehung in einem selbständigen Verfahren zu erkennen, wenn in einem Medium der objektive Tatbestand einer strafbaren Handlung hergestellt worden ist und die Verfolgung einer bestimmten Person nicht durchführbar oder ihre Verurteilung wegen des Vorhandenseins von Gründen, die eine Bestrafung ausschließen, nicht möglich ist ...."

(Translation)

"Forfeiture shall be pronounced in separate proceedings at the request of the prosecutor if a publication in the media fulfils the objective facts of a criminal offence and if the prosecution of a particular person cannot be secured or if a conviction is impossible on grounds excluding the punishment of such a person ...."

44. Seizure is regulated in Section 36 which reads as follows:

(German)

"(1) Das Gericht kann die Beschlagnahme der zur Verbreitung bestimmten Stücke eines Medienwerkes anordnen, wenn anzunehmen ist, daß auf Einziehung nach § 33 erkannt werden wird, und wenn die nachteiligen Folgen der Beschlagnahme nicht unverhältnismäßig schwerer wiegen als das Rechtsschutzinteresse, dem die Beschlagnahme dienen soll. Die Beschlagnahme ist jedenfalls unzulässig, wenn diesem Rechtsschutzinteresse auch durch Veröffentlichung einer Mitteilung über das eingeleitete strafgerichtliche Verfahren Genüge getan werden kann.

(2) Die Beschlagnahme setzt voraus, daß ein Strafverfahren oder ein selbständiges Verfahren wegen eines Medieninhaltsdelikts geführt oder zugleich eingeleitet wird, und daß der Ankläger oder Antragsteller im selbständigen Verfahren die Beschlagnahme ausdrücklich beantragt.

(3) In dem die Beschlagnahme anordnenden Beschluß ist anzugeben, wegen welcher Stelle oder Darbietung des Medienwerkes und wegen des Verdachtes welcher strafbaren Handlung die Beschlagnahme angeordnet wird ...."

(Translation)

"(1) The Court may order the seizure of the copies of a work published in the media which are intended for public dissemination if it can be assumed that a forfeiture under Section 33 will be pronounced and if the adverse consequences of the seizure are not disproportionate to the legal interest to be served by the seizure. In any event the seizure is inadmissible if this legal interest can also be satisfied by a publication of a notice on the institution of the criminal proceedings in question.

(2) The seizure presupposes the prior or simultaneous institution of criminal proceedings or of separate proceedings concerning an offence relating to the contents of a publication in the media and it may take place only if the prosecution, or the applicant in the separate proceedings, has expressly requested the seizure.

(3) The decision ordering the seizure shall mention the passages of the work published in the media, or the particular production of it, which has given rise to the seizure order, as well as the offence which is suspected to be committed by it ...."

45. In the relevant proceedings the owner (publisher) of the media in question is to be summoned as a private party (Einziehungsbeteiligter). In this respect Section 41 para. 5 of the Media Act stipulates inter alia:

(German)

"... Er hat die Rechte des Beschuldigten; insbesondere steht ihm das Recht zu, alle Verteidigungsmittel wie der Beschuldigte vorzubringen und das Urteil in der Hauptsache anzufechten ...."

(Translation)

"... He shall have the rights of the accused; in particular he shall have the right to the same means of defence as the accused and to appeal against the judgment on the merits ...."

46. According to the case-law of the Austrian courts this provision has the effect of excluding the applicability of the general provisions of the Code of Criminal Procedure concerning private parties in forfeiture and confiscation cases (Section 444 of the Code). Therefore only the owners (publishers) of the medium in question, but not any other persons having rights in the object threatened with forfeiture are entitled to participate in the proceedings.

### III. OPINION OF THE COMMISSION

#### A. Complaints declared admissible

47. The Commission has declared admissible the applicant association's complaints that the seizure of the film "Das Liebeskonzil", which it had intended to show in its cinema, and the subsequent forfeiture of this film unjustifiedly interfered with its freedom of expression.

#### B. Points at issue

48. The Commission must accordingly determine whether there has been a violation of Article 10 (Art. 10) of the Convention:

- by the seizure, and/or
- by the forfeiture

of the film "Das Liebeskonzil".

#### C. As to the alleged violations of Article 10 (Art. 10) of the Convention

49. Article 10 (Art. 10) of the Convention 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. This Article 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."

1. Applicability of Article 10 (Art. 10)

50. The present case concerns the exercise of freedom of "expression" in the form of showing a film. As the last sentence of Article 10 para. 1 (Art. 10-1) implies, this activity is covered by freedom of expression. In addition it is not in dispute that the film in question was a work of art as recognised by the Austrian courts. In this respect the Commission recalls the Müller and Others case where the European Court of Human Rights acknowledged that artistic expression is included in freedom of expression within the meaning of Article 10 para. 1 (Art. 10-1) (judgment of 24 May 1988, Series A no. 133, p. 19, para. 27).

2. Scope of interference with the applicant association's rights under Article 10 para. 1 (Art. 10-1)

51. The applicant association claims that it was affected both by the seizure of the film, which prevented it from showing it in its cinema in Innsbruck on 13 May 1985, and by its subsequent forfeiture, which finally confirmed the prohibition to show the film in Austria.

52. The Government claim that the applicant association was only affected by the seizure of the film, but not by its subsequent forfeiture. It was not the owner of the copyright in the film nor the owner of the copy distributed in Austria, nor was it a party to the "objective media proceedings" which eventually led to the film being declared forfeited.

53. The Commission considers it irrelevant that the applicant association was not the owner of the copyright. Under Article 10 para. 1 (Art. 10-1) everyone may, without interference by a public authority, impart information or ideas from whatever source. The applicant association, being a licenced cinema enterprise which wished to show the film concerned as part of its programme, can therefore rely on this provision.

54. The applicant association was directly affected by the seizure of the film, in connection with criminal proceedings instituted against its manager before it could be shown. The seizure was a provisional measure whose substantive justification under Austrian law was finally determined only by the subsequent decision on forfeiture (cf. Appendix II, at p. 30 below).

55. It is true that in the forfeiture proceedings the applicant association was not a party and that its manager, who had been allowed to participate in the proceedings of first instance, was eventually not

recognised as a party. But the declaration that the film was forfeited also affected the applicant association since it was thereby definitively prevented from showing it.

56. In these circumstances, the Commission considers that there is a sufficient link between the seizure of the film and the subsequent "objective" forfeiture proceedings which entitles the applicant association to invoke Article 10 (Art. 10) in respect of both measures.

57. The Government admit that both the seizure and the forfeiture constituted interferences by public authorities with the right to freedom of expression as laid down in Article 10 para. 1 (Art. 10-1). In the Commission's view these interferences with the rights of the applicant association require to be justified under Article 10 para. 2 (Art. 10-2).

3. Justification of the interference (Article 10 para. 2)  
(Art. 10-2)

58. To meet the requirements of Article 10 para. 2 (Art. 10-2), any restriction of freedom of expression must

- be prescribed by law;
- pursue one or more of the legitimate aims set out in this provision; and
- be necessary in a democratic society, having regard to the duties and responsibilities which exercise of that freedom carries with it.

a) Lawfulness

59. The applicant association contends that the relevant provisions of the Penal Code and of the Media Act were given an unconstitutional interpretation and that therefore the measures complained of were not "prescribed by law". The Government deny that the criminal law was applied in a manner incompatible with Article 17a of the Basic Law.

60. The Commission observes that it is for the domestic courts to interpret and apply the domestic law. It notes that the measures complained of were based on Section 188 of the Austrian Penal Code in conjunction with the Media Act, and that in applying those provisions the Austrian criminal courts also considered the relevance of the constitutional right to freedom of art as laid down in Article 17a of the Basic Law. The criminal courts thus dealt with the question of constitutionality but did not find it appropriate to refer the matter to the Constitutional Court. The Commission is satisfied that this was in line with Austrian law. There is no indication that the criminal courts' interpretation and application of the relevant penal provisions was arbitrary or otherwise unreasonable in a manner incompatible with the rule of law.

61. In these circumstances the Commission sees no reason to doubt that the measures complained of were "prescribed by law".

b) Legitimate aim

62. The Government claim that the seizure and forfeiture of the film aimed at the "protection of the rights of others", including the right to freedom of religion within the meaning of Article 9 of the Convention, and the "protection of morals". The applicant association, while not contesting that "the rights of others" might be relevant,

refutes the argument that the measures in question also served to protect morals.

63. The obvious purpose of Section 188 of the Austrian Penal Code which was applied in the present case is to preserve religious peace. Thus the measures complained of served the protection of the rights of others and the prevention of disorder within the meaning of Article 10 para. 2 (Art. 10-2). It is therefore not necessary to consider whether they also aimed at the protection of morals. The Commission is consequently satisfied that the Austrian legislation, as applied in the present case, pursued legitimate aims covered by this provision.

c) Necessity in a democratic society

64. The Government claim that the restrictions imposed on the applicant association were "necessary in a democratic society" and that, in view of the contents of the film, they remained within the State's margin of appreciation.

65. The applicant association submits that the film itself involved a discussion of freedom of art. The play was presented as a story within the story of Panizza's trial. It thus created a certain distance for the spectator as regards the critical discussion of religious subjects in the play.

66. The Commission recalls that with regard to restrictions on freedom of expression it is important

"to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (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 sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued." (cf. Eur. Court H.R. Handyside judgment of 7 December 1976, Series A no. 24, p. 23, para. 49).

67. The present case concerns the exercise of freedom of expression in the form of making available to the public a work of art. The Austrian authorities recognised that the film in question was to be qualified as a work of art. Article 10 para. 2 (Art. 10-2) allows restrictions if there is a "pressing social need" for them. Any such restrictions must, however, duly take into account the particular nature of works of art and their important function in a democratic society. As the European Court of Human Rights observed in the Müller and Others case:

"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 (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. ..."

(Müller and Others judgment of 24 May 1988, Series A no. 133, pp. 21-22, paras. 33-34)

68. As the applicant association has observed, the trial story in the film constitutes a discussion of the permissible scope of freedom of art. However, the main part of the film consists in showing Panizza's play.

69. The play as such is not prohibited in Austria. It is apparently available in several editions in Austrian bookshops without any measures having been taken by the Austrian authorities in this respect. It has also been shown on the stage in Vienna without State intervention. A recent performance in Innsbruck has given rise to investigations following complaints by private persons, but eventually no prosecution ensued. Nor does it appear that any restrictions were imposed in Italy where the play was filmed and in Germany where the film was produced.

70. According to the Austrian courts the criminal offence underlying the prohibition of the film consisted in ridiculing persons and objects of Christian veneration by a combination of text and image.

71. As the quotations in the Regional Court's summary (cf. Appendix III) show, the text of the film is characterised by a strong satirical undertone concerning the religious issues treated. The film itself matches the character of the text. It is characterised by the satirical treatment of the subject and the use of caricature as a means of style.

72. The Commission considers that recourse to these artistic methods does not justify the imposition of a restriction on a work of art even if it deals with religion. This was also accepted by the Austrian Attorney General. In his statement refusing the introduction of a plea of nullity for safeguarding the law (cf. para. 36) he recognised that the approach described in the public notice announcing the film (cf. para. 23) did not as such contravene Section 188 of the Penal Code. He considered, however, that the presentation of the persons and objects of religious veneration in the film itself went beyond the announcement in the notice.

73. The Austrian courts stated that many believing Christians could be shocked or otherwise offended in their religious feelings by the way in which God, Mary and Jesus were shown in the film. The Commission, having seen the film, has come to the view that the satirical element is clearly predominant in the way the story of the film is developed and the actors behave.

74. The question therefore arises whether the State's margin of appreciation - which it had in the exercise of its function to protect legitimate interests recognised in the Convention (cf. *mutatis mutandis* Müller and Others judgment, loc. cit., p. 22, para. 35) - was overstepped by the wide scope of the measures taken: the seizure of the film in Innsbruck before the particular projection intended by the applicant association could take place, and its subsequent forfeiture which generally made it impossible for anybody in Austria to see the film.

aa) The seizure

75. Whereas in the Müller case obscene pictures had been shown in a generally accessible exhibition where the presence of such pictures could not necessarily be expected - the Court (at para. 36 of the judgment) especially underlined that the exhibition in question had sought to attract the public at large including children and that no

admission charge or age-limit had been imposed - , the applicant association's cinema addressed a much more limited public. It is true that no particular restrictions of access were foreseen for the projection of the film on 13 May 1985 at 22.00 h. However, as the applicant association has emphasised, its "cinema of art" addressed a specially interested public, an admission fee was charged and in view of the late hour it was unlikely that any small children would attend. Most important of all, a warning was given to the public as to the contents of the film in the above-mentioned public announcement, which in the Commission's view sufficiently described what was to be expected without itself giving rise to offence.

76. As to the consequences of a restriction of a work of art, the Court considered it important in the Müller case (cf. para. 43 of the judgment) to leave room to the artist to show it to interested persons in circumstances and places where the requirements for the protection of legitimate interests of others might be less strict. In the present case, however, the seizure of the film in Innsbruck prevented the applicant association from showing it to any interested audience, pending a final decision in the matter.

77. The Commission is of the view that satirical texts or films can normally not be completely prohibited even if some restrictions concerning minors or people unaware of the contents may be possible. A complete prohibition which excludes any chance to discuss the message of the film must be seen as a disproportionate measure, except where there are very stringent reasons for such an act. In the Commission's view such reasons have not been established.

78. The Commission therefore finds the restrictions imposed disproportionate and thus not "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10-2).

#### Conclusion

79. The Commission concludes, by nine votes to five, that there has been a violation of Article 10 (Art. 10) of the Convention, as regards the seizure of the film.

#### bb) The forfeiture

80. The forfeiture of the film constituted a further interference which aggravated the restriction complained of: it produced permanent effects in Austria for everybody as regards the freedom to receive and impart information and ideas.

#### Conclusion

81. The Commission concludes, by thirteen votes to one, that there has been a violation of Article 10 (Art. 10) of the Convention, as regards the forfeiture of the film.

#### D. Recapitulation

82. The Commission concludes, by nine votes to five, that there has been a violation of Article 10 (Art. 10) of the Convention, as regards the seizure of the film (para. 79).

83. The Commission concludes, by thirteen votes to one, that there has been a violation of Article 10 (Art. 10) of the Convention, as regards the forfeiture of the film (para. 81).

Secretary to the Commission

President of the Commission

(H.C. KRÜGER)

(C.A. NØRGAARD)

PARTLY DISSENTING OPINION of Mr. F. ERMACORA  
joined by MM. A. WEITZEL and L. LOUCAIDES

I have voted for a violation of Article 10 of the Convention as regards the forfeiture, but against a violation as regards the seizure, of the film for the following reasons:

The seizure was granted on the ground that the showing of the film in public would have constituted the criminal offence under Section 188 of the Penal Code.

In their decisions the Austrian Courts pointed out that God, the Father, Christ and Mary were the central persons of veneration in the Catholic Church and that also the Eucharistic ceremony was protected by Section 188. Not every injury of religious convictions was punishable under this provision, but only one that disturbed the religious peace by arousing public irritation. The disparagement of God the Father, Christ, Mary and the Eucharistic ceremony in the film was reinforced by its general character as an attack on Christian religion. It was done in a scope and manner likely to disturb the feelings of average people, in particular the majority of believing Christians. This was not counterbalanced by the fact that a small minority of persons might be able to interpret the film in a positive way, having regard to the logical context of the disparaging remarks which could be seen as criticism of historic facts and of religious practices. The freedom of art under Article 17(a) of the Basic Law on the Rights of Citizens (Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger) could not be invoked as this freedom was limited by other fundamental rights such as the right to religious freedom and by the necessity of a social order based on tolerance and respect for legally protected values. While Section 188 of the Penal Code did not in itself restrict the freedom of art, the film constituted such an intensive interference with religious feelings that its provocative anti-Christian attitude outweighed the freedom of art.

I find with the majority of the Commission that the seizure of the film was lawful and that it pursued a legitimate aim. But I am also of the opinion that it was necessary in a democratic society. In the Müller and Others judgment, quoted by the majority of the Commission, the European Court of Human Rights has confirmed that, in determining the necessity, the Contracting States have a certain margin of appreciation in determining whether a pressing social need exists (loc. cit. p. 21, para. 32). In exercising their supervisory jurisdiction, the Convention organs cannot confine themselves to considering the impugned court decisions in isolation but "must look at them in the light of the case as a whole". They must "determine whether the interference at issue was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the ... courts to justify it are 'relevant and sufficient'" (ibid.). In the same judgment the Court has recognised that 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" (loc. cit. p. 22, para. 34). With regard to "morals" the Court noted that there was no uniform European conception: "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"

(loc. cit. p. 22, para. 35).

Applying the above criteria to the present case concerning religion I note that the main subject of the film was Panizza's play as put on the stage in Rome, which ridiculed and attacked in a vehement manner God the Father, Christ, Mary and the Eucharistic ceremony. It is true that, by showing the play as a story within the story of the criminal proceedings against the author, some distance was created as to the anti-religious criticism of the play and the form of its presentation. However, the scenes of the film concerning the criminal proceedings against the author could also be understood as reinforcing this criticism. I think that the film as a whole, and in particular the presentation of Jesus Christ, could seriously offend the feelings of believing Christians both by the language used and the pictorial illustration. Access to the cinema on the date of the planned projection of the film in Innsbruck was not restricted, and therefore it was not unreasonable for the Regional Court of Innsbruck to refer to the likely reaction of average people.

The majority refers to showings of the play of Panizza's "Liebeskonzil" at the Innsbruck Landestheater which were discussed in the press and not subject to any public interference. However, the film differs from the play in its presentation and acting. The film's version of Jesus Christ as a mentally deficient and voluptuous young man who approaches Mary in a sexual way cannot be justified as satirical. It is out of any proportion as an attack against religious feelings and the common understanding of the image of Jesus Christ prevailing in countries where the majority of peoples belong, at least formally, to the Christian religion - an image which has prevailed over centuries in objects of art and in the public life of the society in the Tyrol. The presentation of Jesus Christ in the film as announced would have violated the rights of others who believe in Jesus Christ.

Therefore, I am convinced that the seizure of the film in Innsbruck was justified as a temporary measure applied in Tyrol. An abhorrent picture of Jesus Christ, presented as planned in a community like Innsbruck, would have disregarded both the rights of others and those responsibilities and duties under which freedom of expression is guaranteed. In this respect, therefore, the Austrian judicial authorities have not exceeded their margin of appreciation as recognised by the Convention organs.

#### DISSENTING OPINION of Mr. H.G. SCHERMERS

With much of the Commission's report I can agree, but not with the conclusion on the margin of appreciation a state must have in this kind of cases.

One is free not to believe in God, but if one does not believe in God one cannot make a film about Him. A film of this kind is either an effort to deny, or to ridicule, other people's belief or is at least using other people's belief as a theme. Inevitably, this kind of film effects the freedom of religion of others.

Religion does not play the same role in every society in Europe. The protection which a State may, or must, grant to religion therefore varies from place to place. Much should be left to the discretion of national, or even local authorities.

The film has a strong satirical undertone (para. 71 of the Report). The reception of satirical art also varies from place to place. Some communities are used to satire as a way of expression, others are not. Again, because of the different effect of satire, its permissibility as an excuse for otherwise blasphemous expressions should be left to member states or local authorities.

I find it difficult to accept a general European notion of blasphemy. Like many words this word should be read in the context of the cultural tradition of the community concerned. It may well be that the same expression is blasphemous in one community and not so in another.

I agree with the majority of the Commission that Article 10 is applicable to the case, but in my opinion Article 10, para. 2, justifies the interference. It was prescribed by law (see para. 61) and it served a legitimate aim (see para. 63). As to the question whether the restriction was necessary in a democratic society (see paras. 64 - 78) opinions may differ. The Austrian courts concluded that for the community concerned the restriction was necessary. In my opinion the circumstances of this case sufficiently justify them to so conclude. Therefore, I find no violation of the Convention.

PARTLY DISSENTING OPINION of Mrs. J. LIDDY

I have had the benefit of reading Mr. Ermacora's partly dissenting opinion, with which I am in broad agreement.

The fair descriptions of the film he gives and the considerations he puts forward in that opinion have, however, led me to the conclusion that the seizure answered a pressing social need for the "prevention of disorder" in the locality at the relevant time, rather than being necessary for the protection of the "right of others". The risk of outraged protests, demonstrations or other disturbances in Innsbruck at the relevant time outweighed the interest in giving an audience to a film that conveyed a high degree of intolerance and contempt for the religious convictions of others.

On the other hand, even allowing for the margin of appreciation, the permanent forfeiture of the film was not necessary for the protection of disorder and I have voted with the majority on this issue.

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
6.10.1987	Introduction of the application
2.12.1987	Registration of the application
A. Examination of Admissibility	
5.3.1990	Commission's decision to invite the Government to submit observations on the admissibility and merits of the application and a copy of the film
25.5.1990	Government's observations
5.7.1990	Applicant's observations in reply
12.10.1990	Submission of a copy of the film
7.1.1991	Commission's decision to appoint a delegation to attend a screening of the film



to the angels, he is "wounded" in the hands and feet. The Holy Family begins to deliberate how to punish mankind.

God the Father: "A slough full to the brim with sinful men, who shamelessly undo their clothes and mate like wild animals, knowing no bounds ... for that the wrath of God shall fall upon them!"

The Virgin Mary: "If we don't let them fuck, they'll hang themselves from the next tree". God's wrath increases: "I wish to trample them underfoot, to dash them to pieces, to tear them limb from limb, to grind them to powder in the mills of my wrath".

Act IV:

The celebration of the Eucharist is mocked on a grand scale. The Son of God says, "They eat me and become healthy again, free from sin and wickedness. And we are destroyed all the more. First those below stuff themselves full of sin, to bursting point, then they consume me and prosper. They become rich and free from sin."

In a scene opposing above "heaven" and below "earth" the Holy Family sees the Pope as the image of God the Father amongst other things in a circle of naked nuns. They are dismayed and call in the Devil to help. God the Father is at first incapable of parleying with the Devil and asks the Son of God to do so, but Jesus breaks down, calling out "Mummy".

The Virgin Mary then undertakes to persuade the Devil to help, using her womanly wiles. She offers herself to him. "Dear friend, we need your help. It is not necessary for anyone to know that you, dear friend, have stuck your tail in this matter".

Act V:

A degree of erotic tension arises between the Virgin Mary and the Devil, causing the Son of God to call out helplessly, "Daddy, Daddy".

The Devil suggests inflicting syphilis on mankind, so that man and woman will infect each other. The Holy Family agrees, so long as mankind remains "capable of redemption" and "in need of salvation" and is not destroyed utterly.

The task still appears too complicated to the Devil, whereupon God the Father himself attempts to persuade him to accept the task. He crawls on the floor in front of the Devil, hauls himself upright on him and exchanges a deep kiss with him. During this time, the Son of God attempts to fondle and kiss his mother's breasts. She lets him do so.

The Devil finally accepts the task. The Virgin Mary is thrilled with the way the Devil describes how he will accomplish the task. She asks how the Devil is and asks after his grandmother and his boys. His acceptance is celebrated with a banquet, to the sound of bells. God the Father, the Virgin Mary and Jesus applaud the Devil.

Act VI:

The Devil complains that those above get away with everything and those below with nothing. They only call upon him when they need help. He takes himself off to Hell to seek a poison which will not destroy mankind totally but will drive men mad. "It has to be a fine, insidious, slow-acting poison, which will affect man's descendants after him. The poison also has to issue from the summit of delight, from the pleasures of love, from the most innocent and most exquisite bliss, from the ecstasy of love ...."

Act VII:

Whilst the Devil is seeking the poison, the Virgin Mary whiles away the time by having a lewd tale read to her. She urges the reader to come "to the point" and there is no doubt she means the sexual act.

Act VIII:

The Devil finally finds the embodiment of evil in the person of Salome. His mating with her produces "his daughter", who is to spread syphilis amongst mankind.

The Devil presents his daughter to Mary the Mother of God. The Virgin Mary, jealous of the girl's beauty, first shows anger at the Devil's disrespectful mode of address. "What did you say! Eternal Virgin! Get it into your head, you asshole, it is Most Blessed Mother of God. Honour where honour is due!" The Virgin Mary does not believe that this pure, lovely creature will bring mankind to an abject end. However, the Devil sends his daughter forth, first to the Pope's Court, then to monasteries and nunneries and finally to the rest of humanity.

Act IX:

Court scene as in Act I. Panizza is sentenced. In his speech in his own defence he says, "Accursed be he who calls upon you, shall we say, to digest thoughts. You butcher him in the most gruesome manner. Thus your revenge is complete. Unless he were to become a Catholic! If someone crawled with you to the Cross, if someone went through all that with you, then he was allowed to do anything, anything, anything, just anything!"