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

COURT (CHAMBER)

CASE OF OTTO-PREMINGER-INSTITUT v. AUSTRIA

(Application no. 13470/87)

JUDGMENT

STRASBOURG

20 September 1994

In the case of Otto-Preminger-Institut v. Austria*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, President,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr B. WALSH,
Mr R. MACDONALD,
Mrs E. PALM,
Mr R. PEKKANEN,
Mr J. MAKARCZYK,
Mr D. GOTCHEV,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 November 1993 and on 20 April and 23 August 1994,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 7 April 1993 and by the Government of the Austrian Republic ("the Government") on 14 May 1993, within the three-month time-limit laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 13470/87) against Austria lodged with the Commission under Article 25 (art. 25) on 6 October 1987 by a private association with legal personality under Austrian law, Otto-Preminger-Institut für audiovisuelle Mediengestaltung (OPI).

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 44 and 48 (art. 44, art. 48). The object of the request and the application was to obtain a decision as to whether the facts of the case

* Note by the Registrar. The case is numbered 11/1993/406/485. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

disclosed a breach by the respondent State of its obligations under Article 10 (art. 10).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant association stated that it wished to take part in the proceedings and designated the lawyer who would represent it (Rule 30).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 23 April 1993, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr B. Walsh, Mr R. Macdonald, Mrs E. Palm, Mr R. Pekkanen, Mr J. Makarczyk and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant association's representative and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the Government's memorial on 24 September 1993 and the applicant's memorial on 1 October 1993. The Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 2 September 1993 the President granted leave to two non-governmental organisations, "Article 19" and Interights, to submit written observations on specific aspects of the case (Rule 37 para. 1). Their observations were received at the registry on 15 October.

6. On 14 October 1993 the Commission produced certain documents which the Registrar had sought from it on the President's instructions.

7. On 27 October 1993 the Chamber decided under Rule 41 para. 1 to view the film Das Liebeskonzil, as requested by the applicant. A private showing was held on 23 November 1993.

8. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 24 November.

There appeared before the Court:

- for the Government

Mr W. Okresek, Head of the International Affairs Division,
Department of the Constitution, Federal Chancellery,
Agent,
Mr C. Mayerhofer, Federal Ministry of Justice,
Mr M. Schmidt, Federal Ministry of Foreign Affairs, *Advisers*;

- for the Commission

Mr M.P. Pellonpää, *Delegate*;

- for the applicant association

Mr F. Höpfel, Professor of Law

at the University of Innsbruck, Verteidiger in Strafsachen,
Counsel.

The Court heard their addresses as well as replies to its questions.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

9. The applicant, Otto-Preminger-Institut für audiovisuelle Mediengestaltung (OPI), is a private association under Austrian law established in Innsbruck. According to its articles of association, it is a non-profit-making organisation, its general aim being to promote creativity, communication and entertainment through the audiovisual media. Its activities include operating a cinema called "Cinematograph" in Innsbruck.

10. The applicant association announced a series of six showings, which would be accessible to the general public, of the film Das Liebeskonzil ("Council in Heaven") by Werner Schroeter (see paragraph 22 below). The first of these showings was scheduled for 13 May 1985. All were to take place at 10.00 p.m. except for one matinée performance on 19 May at 4 p.m.

This announcement was made in an information bulletin distributed by OPI to its 2,700 members and in various display windows in Innsbruck including that of the Cinematograph itself. It was worded as follows:

> "Oskar Panizza's satirical tragedy set in Heaven was filmed by Schroeter from a performance by the Teatro Belli in Rome and set in the context of a reconstruction of the writer's trial and conviction in 1895 for blasphemy. Panizza starts from the assumption that syphilis was God's punishment for man's fornication and sinfulness 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 closely resemble the heavenly protagonists.
>
> Trivial imagery and absurdities of the Christian creed are targeted in a caricatural mode and the relationship between religious beliefs and worldly mechanisms of oppression is investigated."

In addition, the information bulletin carried a statement to the effect that, in accordance with the Tyrolean Cinemas Act (Tiroler Lichtspielgesetz), persons under seventeen years of age were prohibited from seeing the film.

A regional newspaper also announced the title of the film and the date and place of the showing without giving any particulars as to its contents.

11. At the request of the Innsbruck diocese of the Roman Catholic Church, the public prosecutor instituted criminal proceedings against OPI's manager, Mr Dietmar Zingl, on 10 May 1985. The charge was "disparaging religious doctrines" (Herabwürdigung religiöser Lehren), an act prohibited

by section 188 of the Penal Code (Strafgesetzbuch - see paragraph 25 below).

12. On 12 May 1985, after the film had been shown at a private session in the presence of a duty judge (Journalrichter), the public prosecutor made an application for its seizure under section 36 of the Media Act (Mediengesetz - see paragraph 29 below). This application was granted by the Innsbruck Regional Court (Landesgericht) the same day. As a result, the public showings announced by OPI, the first of which had been scheduled for the next day, could not take place.

Those who attended at the time set for the first showing were treated to a reading of the script and a discussion instead.

As Mr Zingl had returned the film to the distributor, the "Czerny" company in Vienna, it was in fact seized at the latter's premises on 11 June 1985.

13. An appeal by Mr Zingl against the seizure order, filed with the Innsbruck Court of Appeal (Oberlandesgericht), was dismissed on 30 July 1985. The Court of Appeal considered that artistic freedom was necessarily limited by the rights of others to freedom of religion and by the duty of the State to safeguard a society based on order and tolerance. It further held that indignation was "justified" for the purposes of section 188 of the Penal Code only if its object was such as to offend the religious feelings of an average person with normal religious sensitivity. That condition was fulfilled in the instant case and forfeiture of the film could be ordered in principle, at least in "objective proceedings" (see paragraph 28 below). The wholesale derision of religious feeling outweighed any interest the general public might have in information or the financial interests of persons wishing to show the film.

14. On 24 October 1985 the criminal prosecution against Mr Zingl was discontinued and the case was pursued in the form of "objective proceedings" under section 33 para. 2 of the Media Act aimed at suppression of the film.

15. On 10 October 1986 a trial took place before the Innsbruck Regional Court. The film was again shown in closed session; its contents were described in detail in the official record of the hearing.

Mr Zingl appears in the official record of the hearing as a witness. He stated that he had sent the film back to the distributor following the seizure order because he wanted nothing more to do with the matter.

It appears from the judgment - which was delivered the same day - that Mr Zingl was considered to be a "potentially liable interested party" (Haftungsbeteiligter).

The Regional Court found it to be established that the distributor of the film had waived its right to be heard and had agreed to the destruction of its copy of the film.

16. In its judgment the Regional Court ordered the forfeiture of the film. It held:

> "The public projection scheduled for 13 May 1985 of the film Das Liebeskonzil, in which God the Father is presented both in image and in text as a senile, impotent idiot, Christ as a cretin and Mary Mother of God as a wanton lady with a corresponding manner of expression and in which the Eucharist is ridiculed, came within the definition of the criminal offence of disparaging religious precepts as laid down in section 188 of the Penal Code."

The court's reasoning included the following:

> "The conditions of section 188 of the Penal Code are objectively fulfilled by this portrayal of the divine persons - God the Father, Mary Mother of God and Jesus Christ are the central figures in Roman Catholic religious doctrine and practice, being of the most essential importance, also for the religious understanding of the believers - as well as by the above-mentioned expressions concerning the Eucharist, which is one of the most important mysteries of the Roman Catholic religion, the more so in view of the general character of the film as an attack on Christian religions ...
>
> ... Article 17a of the Basic Law (Staatsgrundgesetz) guarantees the freedom of artistic creation and the publication and teaching of art. The scope of artistic freedom was broadened (by the introduction of that article) to the extent that every form of artistic expression is protected and limitations of artistic freedom are no longer possible by way of an express legal provision but may only follow from the limitations inherent in this freedom ... . Artistic freedom cannot be unlimited. The limitations on artistic freedom are to be found, firstly, in other basic rights and freedoms guaranteed by the Constitution (such as the freedom of religion and conscience), secondly, in the need for an ordered form of human coexistence based on tolerance, and finally in flagrant and extreme violations of other interests protected by law (Verletzung anderer rechtlich geschützter Güter), the specific circumstances having to be weighed up against each other in each case, taking due account of all relevant considerations ...
>
> The fact that the conditions of section 188 of the Penal Code are fulfilled does not automatically mean that the limit of the artistic freedom guaranteed by Article 17a of the Basic Law has been reached. However, in view of the above considerations and the particular gravity in the instant case - which concerned a film primarily intended to be provocative and aimed at the Church - of the multiple and sustained violation of legally protected interests, the basic right of artistic freedom will in the instant case have to come second.
>
> ..."

17. Mr Zingl appealed against the judgment of the Regional Court, 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 guarantee of freedom of art laid down by Article 17a of the Basic Law.

The Innsbruck Court of Appeal declared the appeal inadmissible on 25 March 1987. It found that Mr Zingl had no standing, as he was not the

owner of the copyright of the film. The judgment was notified to OPI on 7 April 1987.

18. Prompted by the applicant association's lawyer, the then Minister for Education, Arts and Sports, Dr Hilde Hawlicek, wrote a private letter to the Attorney General (Generalprokurator) suggesting the filing of a plea of nullity for safeguarding the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes) with the Supreme Court (Oberster Gerichtshof). The letter was dated 18 May 1987 and mentioned, inter alia, Article 10 (art. 10) of the Convention.

The Attorney General decided on 26 July 1988 that there were no grounds for filing such a plea of nullity. The decision mentioned, inter alia, that the Attorney General's Department (Generalprokuratur) had long held the view that artistic freedom was limited by other basic rights and referred to the ruling of the Supreme Court in the case concerning the film Das Gespenst ("The Ghost" - see paragraph 26 below); in the Attorney General's opinion, in that case the Supreme Court had "at least not disapproved" of that view ("Diese Auffassung ... wurde vom Obersten Gerichtshof ... zumindest nicht mißbilligt").

19. There have been theatre performances of the original play in Austria since then: in Vienna in November 1991, and in Innsbruck in October 1992. In Vienna the prosecuting authorities took no action. In Innsbruck several criminal complaints (Strafanzeigen) were laid by private persons; preliminary investigations were conducted, following which the prosecuting authorities decided to discontinue the proceedings.

II. THE FILM "DAS LIEBESKONZIL"

20. The play on which the film is based was written by Oskar Panizza and published in 1894. In 1895 Panizza was found guilty by the Munich Assize Court (Schwurgericht) of "crimes against religion" and sentenced to a term of imprisonment. The play was banned in Germany although it continued in print elsewhere.

21. The play portrays God the Father as old, infirm and ineffective, Jesus Christ as a "mummy's boy" of low intelligence and the Virgin Mary, who is obviously in charge, as an unprincipled wanton. Together they decide that mankind must be punished for its immorality. They reject the possibility of outright destruction in favour of a form of punishment which will leave it both "in need of salvation" and "capable of redemption". Being unable to think of such a punishment by themselves, they decide to call on the Devil for help.

The Devil suggests the idea of a sexually transmitted affliction, so that men and women will infect one another without realising it; he procreates with Salome to produce a daughter who will spread it among mankind. The symptoms as described by the Devil are those of syphilis.

As his reward, the Devil claims freedom of thought; Mary says that she will "think about it". The Devil then dispatches his daughter to do her work, first among those who represent worldly power, then to the court of the Pope, to the bishops, to the convents and monasteries and finally to the common people.

22. The film, directed by Werner Schroeter, was released in 1981. It begins and ends with scenes purporting to be taken from the trial of Panizza in 1895. In between, it shows a performance of the play by the Teatro Belli in Rome. The film portrays the God of the Jewish religion, the Christian religion and the Islamic religion as an apparently senile old man prostrating himself before the Devil with whom he exchanges a deep kiss and calling the Devil his friend. He is also portrayed as swearing by the Devil. Other scenes show the Virgin Mary permitting an obscene story to be read to her and the manifestation of a degree of erotic tension between the Virgin Mary and the Devil. The adult Jesus Christ is portrayed as a low grade mental defective and in one scene is shown lasciviously attempting to fondle and kiss his mother's breasts, which she is shown as permitting. God, the Virgin Mary and Christ are shown in the film applauding the Devil.

III. RELEVANT DOMESTIC LAW AND PRACTICE

23. Religious freedom is guaranteed by Article 14 of the Basic Law, which reads:

> "(1) Complete freedom of beliefs and conscience is guaranteed to everyone.
>
> (2) Enjoyment of civil and political rights shall be independent of religious confessions; however, a religious confession may not stand in the way of civic duties.
>
> (3) No one shall be compelled to take any church-related action or to participate in any church-related celebration, except in pursuance of a power conferred by law on another person to whose authority he is subject."

24. Artistic freedom is guaranteed by Article 17a of the Basic Law, which provides:

> "There shall be freedom of artistic creation and of the publication and teaching of art."

25. Section 188 of the Penal Code reads as follows:

> "Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful 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."

26. The leading judgment of the Supreme Court on the relationship between the above two provisions was delivered after a plea of nullity for

safeguarding the law filed by the Attorney General in a case concerning forfeiture of the film Das Gespenst ("The Ghost") by Herbert Achternbusch. Although the plea was dismissed on purely formal grounds without any decision on the merits, it appeared obliquely from the judgment that if a work of art impinges on the freedom of religious worship guaranteed by Article 14 of the Basic Law, that may constitute an abuse of the freedom of artistic expression and therefore be contrary to the law (judgment of 19 December 1985, Medien und Recht (Media and Law) 1986, no. 2, p. 15).

27. A media offence (Medieninhaltsdelikt) is defined as "[a]n act entailing liability to a judicial penalty, committed through the content of a publication medium, consisting in a communication or performance aimed at a relatively large number of persons" (section 1 para. 12 of the Media Act). Criminal liability for such offences is determined according to the general penal law, in so far as it is not derogated from or added to by special provisions of the Media Act (section 28 of the Media Act).

28. A specific sanction provided for by the Media Act is forfeiture (Einziehung) of the publication concerned (section 33). Forfeiture may be ordered in addition to any normal sanction under the Penal Code (section 33 para. 1).

If prosecution or conviction of any person for a criminal offence is not possible, forfeiture can also be ordered in separate so-called "objective" proceedings for the suppression of a publication, as provided for under section 33 para. 2 of the Media Act, by virtue of which:

> "Forfeiture shall be ordered in separate proceedings at the request of the public prosecutor if a publication in the media satisfies the objective definition of a criminal offence and if the prosecution of a particular person cannot be secured or if conviction of such person is impossible on grounds precluding punishment ..."

29. The seizure (Beschlagnahme) of a publication pending the decision on forfeiture may be effected pursuant to section 36 of the Media Act, which reads:

> "1. The court may order the seizure of the copies intended for distribution to the public of a work published through the media if it can be assumed that forfeiture will be ordered under section 33 and if the adverse consequences of such seizure are not disproportionate to the legitimate interests served thereby. Seizure may not be effected in any case if such legitimate interests can also be served by publication of a notice concerning the criminal proceedings instituted.
>
> 2. Seizure presupposes the prior or simultaneous institution of criminal proceedings or objective proceedings concerning a media offence and an express application to that effect by the public prosecutor or the complainant in separate proceedings.
>
> 3. The decision ordering seizure shall mention the passage or part of the published work and the suspected offence having prompted the seizure ...
>
> 4-5. ..."

30. The general law of criminal procedure applies to the prosecution of media offences and to objective proceedings. Although in objective proceedings the owner or publisher of the published work does not stand accused of any criminal offence, he is treated as a full party, by virtue of section 41 para. 5, which reads:

> "[In criminal proceedings or objective proceedings concerning a media offence] the media owner (publisher) shall be summoned to the hearing. He shall have the rights of the accused; in particular, he shall be entitled to the same defences as the accused and to appeal against the judgment on the merits ..."

PROCEEDINGS BEFORE THE COMMISSION

31. The applicant association applied to the Commission on 6 October 1987. It alleged violations of Article 10 (art. 10) of the Convention.

32. On 12 April 1991 the Commission declared the application (no. 13470/87) admissible.

In its report adopted on 14 January 1993 (Article 31) (art. 31), the Commission expressed the opinion that there had been a violation of Article 10 (art. 10):

(a) as regards the seizure of the film (nine votes to five);

(b) as regards the forfeiture of the film (thirteen votes to one).

The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment[*].

FINAL SUBMISSIONS TO THE COURT

33. The Government, in their memorial, requested the Court

> "to reject the application as inadmissible under Article 27 para. 3 (art. 27-3) of the Convention for failure to observe the six-month rule in Article 26 (art. 26) of the Convention, or alternatively, to state that there has been no violation of Article 10 (art. 10) of the Convention in connection with the seizure and subsequent forfeiture of the film".

34. At the hearing, the applicant asked the Court to

> "decide in favour of the applicant association and find that the seizure and forfeiture of the film were in breach of the Republic of Austria's obligations arising from Article 10 (art. 10) of the Convention, and that just satisfaction as specified be afforded to the applicant association".

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[*] Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 295-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

35. The Government maintained that the application, which was introduced on 6 October 1987 (see paragraph 31 above), had been lodged with the Commission after the expiry of the six-month time-limit laid down in Article 26 (art. 26) of the Convention, which reads:

> "The Commission may only deal with the matter ... within a period of six months from the date on which the final decision was taken."

In the first place, they argued that the applicant association (OPI) was a "party" only in the proceedings as to the seizure of the film, not its forfeiture. The final domestic decision was therefore that of the Innsbruck Court of Appeal confirming the seizure order (30 July 1985).

In the alternative, the Government pointed out that the distributor of the film, the "Czerny" company, being the sole holder of the rights to the only copy of the film, had consented to its destruction before the first hearing in the "objective proceedings" by the Innsbruck Regional Court. That court had in fact ordered the forfeiture of the film on 10 October 1986. The "Czerny" company not having appealed against that order, the Government argued that it should be counted the final domestic decision.

Acceptance of either position would mean that the application was out of time.

A. Whether the Government is estopped from relying on its alternative submission

36. The Delegate of the Commission suggested that the Government should be considered estopped from invoking its alternative plea, which had not been raised before the Commission at the admissibility stage. In his view, the fact that the Government had pleaded an objection based on the time-limit of six months laid down in Article 26 (art. 26) should not be regarded as sufficient, since the argument made then was based on facts different from those now relied on.

37. The Court takes cognisance of objections of this kind if and in so far as the respondent State has already raised them sufficiently clearly before the Commission to the extent that their nature and the circumstances permitted. This should normally be done at the stage of the initial examination of admissibility (see, among many other authorities, the Bricmont v. Belgium judgment of 7 July 1989, Series A no. 158, p. 27, para. 73).

Although the Government did invoke the six-month rule before the Commission, they relied only on the judgment of the Innsbruck Court of Appeal of 30 July 1985. There was nothing to prevent them from raising their alternative argument at the same time. It follows that they are estopped from doing so before the Court (see, as the most recent authority, the Papamichalopoulos and Others v. Greece judgment of 24 June 1993, Series A no. 260-B, p. 68, para. 36).

B. Whether the Government's principal plea is well-founded

38. The Government's argument is in effect that OPI is not a "victim" of the forfeiture of the film, as opposed to its seizure.

39. A person can properly claim to be a "victim" of an interference with the exercise of his rights under the Convention if he has been directly affected by the matters allegedly constituting the interference (see, inter alia and mutatis mutandis, the Norris v. Ireland judgment of 26 October 1988, Series A no. 142, pp. 15-16, para. 31, and the Open Door and Dublin Well Woman v. Ireland judgment of 29 October 1992, Series A no. 246, p. 22, para. 43).

40. Although the applicant association was not the owner of either the copyright or the forfeited copy of the film, it was directly affected by the decision on forfeiture, which had the effect of making it impossible for it ever to show the film in its cinema in Innsbruck or, indeed, anywhere in Austria. In addition, the seizure was a provisional measure the legality of which was confirmed by the decision on forfeiture; the two cannot be separated. Finally, it is not without significance that the applicant association's manager appears in the Regional Court's judgment of 10 October 1986 in the forfeiture proceedings as a "potentially liable interested party" (see paragraph 15 above).

The applicant association can therefore validly claim to be a "victim" of the forfeiture of the film as well as its seizure.

41. It follows from the foregoing that the "final decision" for the purpose of Article 26 (art. 26) was the judgment given by the Innsbruck Court of Appeal on 25 March 1987 and notified to OPI on 7 April (see paragraph 17 above). In accordance with its usual practice, the Commission decided that the application, which had been lodged within six months of the latter date, had been filed within the requisite time-limit. The Government's preliminary objection must accordingly be rejected.

II. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

42. The applicant association submitted that the seizure and subsequent forfeiture of the film Das Liebeskonzil gave rise to violations of its right to

freedom of expression as guaranteed by Article 10 (art. 10) of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article 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."

A. Whether there have been "interferences" with the applicant association's freedom of expression

43. Although before the Commission the Government had conceded the existence of an interference with the exercise by the applicant association of its right to freedom of expression only with respect to the seizure of the film and although the same point was made in their preliminary objection (see paragraph 35 above), before the Court it was no longer in dispute that if the preliminary objection were rejected both the seizure and the forfeiture constituted such interferences.

Such interferences will entail violation of Article 10 (art. 10) if they do not satisfy the requirements of paragraph 2 (art. 10-2). The Court must therefore examine in turn whether the interferences were "prescribed by law", whether they pursued an aim that was legitimate under that paragraph (art. 10-2) and whether they were "necessary in a democratic society" for the achievement of that aim.

B. Whether the interferences were "prescribed by law"

44. The applicant association denied that the interferences were "prescribed by law", claiming that section 188 of the Austrian Penal Code had been wrongly applied. Firstly, it was in its view doubtful whether a work of art dealing in a satirical way with persons or objects of religious veneration could ever be regarded as "disparaging or insulting". Secondly, indignation could not be "justified" in persons who consented of their own free will to see the film or decided not to. Thirdly, the right to artistic freedom, as guaranteed by Article 17a of the Basic Law, had been given insufficient weight.

45. The Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply national law (see, as the most recent authority, the Chorherr v. Austria judgment of 25 August 1993, Series A no. 266-B, p. 36, para. 25).

The Innsbruck courts had to strike a balance between the right to artistic freedom and the right to respect for religious beliefs as guaranteed by Article 14 of the Basic Law. The Court, like the Commission, finds that no grounds have been adduced before it for holding that Austrian law was wrongly applied.

C. Whether the interferences had a "legitimate aim"

46. The Government maintained that the seizure and forfeiture of the film were aimed at "the protection of the rights of others", particularly the right to respect for one's religious feelings, and at "the prevention of disorder".

47. As the Court pointed out in its judgment in the case of Kokkinakis v. Greece of 25 May 1993 (Series A no. 260-A, p. 17, para. 31), freedom of thought, conscience and religion, which is safeguarded under Article 9 (art. 9) of the Convention, is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life.

Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 (art. 9) to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.

In the Kokkinakis judgment the Court held, in the context of Article 9 (art. 9), that a State may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience and religion of others (ibid., p. 21, para. 48). The respect for the religious feelings of believers as guaranteed in Article 9 (art. 9) can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be

a feature of democratic society. The Convention is to be read as a whole and therefore the interpretation and application of Article 10 (art. 10) in the present case must be in harmony with the logic of the Convention (see, mutatis mutandis, the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 31, para. 68).

48. The measures complained of were based on section 188 of the Austrian Penal Code, which is intended to suppress behaviour directed against objects of religious veneration that is likely to cause "justified indignation". It follows that their purpose was to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons. Considering also the terms in which the decisions of the Austrian courts were phrased, the Court accepts that the impugned measures pursued a legitimate aim under Article 10 para. 2 (art. 10-2), namely "the protection of the rights of others".

D. Whether the seizure and the forfeiture were "necessary in a democratic society"

1. General principles

49. As the Court has consistently held, freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of everyone. 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 shock, offend 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" (see, particularly, the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 23, para. 49).

However, as is borne out by the wording itself of Article 10 para. 2 (art. 10-2), whoever exercises the rights and freedoms enshrined in the first paragraph of that Article (art. 10-1) undertakes "duties and responsibilities". Amongst them - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.

This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any "formality", "condition", "restriction" or "penalty" imposed be proportionate to the

legitimate aim pursued (see the Handyside judgment referred to above, ibid.).

50. As in the case of "morals" it is not possible to discern throughout Europe a uniform conception of the significance of religion in society (see the Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133, p. 20, para. 30, and p. 22, para. 35); even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.

The authorities' margin of appreciation, however, is not unlimited. It goes hand in hand with Convention supervision, the scope of which will vary according to the circumstances. In cases such as the present one, where there has been an interference with the exercise of the freedoms guaranteed in paragraph 1 of Article 10 (art. 10-1), the supervision must be strict because of the importance of the freedoms in question. The necessity for any restriction must be convincingly established (see, as the most recent authority, the Informationsverein Lentia and Others v. Austria judgment of 24 November 1993, Series A no. 276, p. 15, para. 35).

2. Application of the above principles

51. The film which was seized and forfeited by judgments of the Austrian courts was based on a theatre play, but the Court is concerned only with the film production in question.

(a) The seizure

52. The Government defended the seizure of the film in view of its character as an attack on the Christian religion, especially Roman Catholicism. They maintained that the placing of the original play in the setting of its author's trial in 1895 actually served to reinforce the anti-religious nature of the film, which ended with a violent and abusive denunciation of what was presented as Catholic morality.

Furthermore, they stressed the role of religion in the everyday life of the people of Tyrol. The proportion of Roman Catholic believers among the Austrian population as a whole was already considerable - 78% - but among Tyroleans it was as high as 87%.

Consequently, at the material time at least, there was a pressing social need for the preservation of religious peace; it had been necessary to protect public order against the film and the Innsbruck courts had not overstepped their margin of appreciation in this regard.

53. The applicant association claimed to have acted in a responsible way aimed at preventing unwarranted offence. It noted that it had planned to

show the film in its cinema, which was accessible to members of the public only after a fee had been paid; furthermore, its public consisted on the whole of persons with an interest in progressive culture. Finally, pursuant to the relevant Tyrolean legislation in force, persons under seventeen years of age were not to be admitted to the film. There was therefore no real danger of anyone being exposed to objectionable material against their wishes.

The Commission agreed with this position in substance.

54. The Court notes first of all that although access to the cinema to see the film itself was subject to payment of an admission fee and an age-limit, the film was widely advertised. There was sufficient public knowledge of the subject-matter and basic contents of the film to give a clear indication of its nature; for these reasons, the proposed screening of the film must be considered to have been an expression sufficiently "public" to cause offence.

55. The issue before the Court involves weighing up the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention, namely the right of the applicant association to impart to the public controversial views and, by implication, the right of interested persons to take cognisance of such views, on the one hand, and the right of other persons to proper respect for their freedom of thought, conscience and religion, on the other hand. In so doing, regard must be had to the margin of appreciation left to the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole.

56. The Austrian courts, ordering the seizure and subsequently the forfeiture of the film, held it to be an abusive attack on the Roman Catholic religion according to the conception of the Tyrolean public. Their judgments show that they had due regard to the freedom of artistic expression, which is guaranteed under Article 10 (art. 10) of the Convention (see the Müller and Others judgment referred to above, p. 22, para. 33) and for which Article 17a of the Austrian Basic Law provides specific protection. They did not consider that its merit as a work of art or as a contribution to public debate in Austrian society outweighed those features which made it essentially offensive to the general public within their jurisdiction. The trial courts, after viewing the film, noted the provocative portrayal of God the Father, the Virgin Mary and Jesus Christ (see paragraph 16 above). The content of the film (see paragraph 22 above) cannot be said to be incapable of grounding the conclusions arrived at by the Austrian courts.

The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for

the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the Court does not consider that the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect.

No violation of Article 10 (art. 10) can therefore be found as far as the seizure is concerned.

(b) The forfeiture

57. The foregoing reasoning also applies to the forfeiture, which determined the ultimate legality of the seizure and under Austrian law was the normal sequel thereto.

Article 10 (art. 10) cannot be interpreted as prohibiting the forfeiture in the public interest of items whose use has lawfully been adjudged illicit (see the Handyside judgment referred to above, p. 30, para. 63). Although the forfeiture made it permanently impossible to show the film anywhere in Austria, the Court considers that the means employed were not disproportionate to the legitimate aim pursued and that therefore the national authorities did not exceed their margin of appreciation in this respect.

There has accordingly been no violation of Article 10 (art. 10) as regards the forfeiture either.

FOR THESE REASONS, THE COURT

1. Holds, unanimously, that the Government are estopped from relying on their alternative preliminary objection;

2. Rejects, unanimously, the Government's primary preliminary objection;

3. Holds, by six votes to three, that there has been no violation of Article 10 (art. 10) of the Convention as regards either the seizure or the forfeiture of the film.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 September 1994.

Rolv RYSSDAL
President

Herbert PETZOLD
Acting Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the joint dissenting opinion of Mrs Palm, Mr Pekkanen and Mr Makarczyk is annexed to the judgment.

R. R.
H. P.

JOINT DISSENTING OPINION OF JUDGES PALM, PEKKANEN AND MAKARCZYK

1. We regret that we are unable to agree with the majority that there has been no violation of Article 10 (art. 10).

2. The Court is here faced with the necessity of balancing two apparently conflicting Convention rights against each other. In the instant case, of course, the rights to be weighed up against each other are the right to freedom of religion (Article 9) (art. 9), relied on by the Government, and the right to freedom of expression (Article 10) (art. 10), relied on by the applicant association. Since the case concerns restrictions on the latter right, our discussion will centre on whether these were "necessary in a democratic society" and therefore permitted by the second paragraph of Article 10 (art. 10-2).

3. As the majority correctly state, echoing the famous passage in the Handyside v. the United Kingdom judgment (7 December 1976, Series A no. 24), freedom of expression is a fundamental feature of a "democratic society"; it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but particularly to those that shock, offend or disturb the State or any sector of the population. There is no point in guaranteeing this freedom only as long as it is used in accordance with accepted opinion.

It follows that the terms of Article 10 para. 2 (art. 10-2), within which an interference with the right to freedom of expression may exceptionally be permitted, must be narrowly interpreted; the State's margin of appreciation in this field cannot be a wide one.

In particular, it should not be open to the authorities of the State to decide whether a particular statement is capable of "contributing to any form of public debate capable of furthering progress in human affairs"; such a decision cannot but be tainted by the authorities' idea of "progress".

4. The necessity of a particular interference for achieving a legitimate aim must be convincingly established (see, as the most recent authority, the Informationsverein Lentia and Others v. Austria judgment of 24 November 1993, Series A no. 276, p. 15, para. 35). This is all the more true in cases such as the present, where the interference as regards the seizure takes the form of prior restraint (see, mutatis mutandis, the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, p. 30, para. 60). There is a danger that if applied to protect the perceived interests of a powerful group in society, such prior restraint could be detrimental to that tolerance on which pluralist democracy depends.

5. The Court has rightly held that those who create, perform, distribute or exhibit works of art contribute to exchange of ideas and opinions and to the personal fulfilment of individuals, which is essential for a democratic society, and that therefore the State is under an obligation not to encroach

unduly on their freedom of expression (see the Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133, p. 22, para. 33). We also accept that, whether or not any material can be generally considered a work of art, those who make it available to the public are not for that reason exempt from their attendant "duties and responsibilities"; the scope and nature of these depend on the situation and on the means used (see the Müller and Others judgment referred to above, p. 22, para. 34).

6. The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.

Nevertheless, it must be accepted that it may be "legitimate" for the purpose of Article 10 (art. 10) to protect the religious feelings of certain members of society against criticism and abuse to some extent; tolerance works both ways and the democratic character of a society will be affected if violent and abusive attacks on the reputation of a religious group are allowed. Consequently, it must also be accepted that it may be "necessary in a democratic society" to set limits to the public expression of such criticism or abuse. To this extent, but no further, we can agree with the majority.

7. The duty and the responsibility of a person seeking to avail himself of his freedom of expression should be to limit, as far as he can reasonably be expected to, the offence that his statement may cause to others. Only if he fails to take necessary action, or if such action is shown to be insufficient, may the State step in.

Even if the need for repressive action is demonstrated, the measures concerned must be "proportionate to the legitimate aim pursued"; according to the case-law of the Court, which we endorse, this will generally not be the case if another, less restrictive solution was available (see, as the most recent authority, the Informationsverein Lentia and Others judgment referred to above, p. 16, para. 39).

The need for repressive action amounting to complete prevention of the exercise of freedom of expression can only be accepted if the behaviour concerned reaches so high a level of abuse, and comes so close to a denial of the freedom of religion of others, as to forfeit for itself the right to be tolerated by society.

8. As regards the need for any State action at all in this case, we would stress the distinctions between the present case and that of Müller and Others, in which no violation of Article 10 (art. 10) was found. Mr Müller’s paintings were accessible without restriction to the public at large, so that they could be - and in fact were - viewed by persons for whom they were unsuitable.

9. Unlike the paintings by Mr Müller, the film was to have been shown to a paying audience in an "art cinema" which catered for a relatively small

public with a taste for experimental films. It is therefore unlikely that the audience would have included persons not specifically interested in the film.

This audience, moreover, had sufficient opportunity of being warned beforehand about the nature of the film. Unlike the majority, we consider that the announcement put out by the applicant association was intended to provide information about the critical way in which the film dealt with the Roman Catholic religion; in fact, it did so sufficiently clearly to enable the religiously sensitive to make an informed decision to stay away.

It thus appears that there was little likelihood in the instant case of anyone being confronted with objectionable material unwittingly.

We therefore conclude that the applicant association acted responsibly in such a way as to limit, as far as it could reasonably have been expected to, the possible harmful effects of showing the film.

10. Finally, as was stated by the applicant association and not denied by the Government, it was illegal under Tyrolean law for the film to be seen by persons under seventeen years of age and the announcement put out by the applicant association carried a notice to that effect.

Under these circumstances, the danger of the film being seen by persons for whom it was not suitable by reason of their age can be discounted.

The Austrian authorities thus had available to them, and actually made use of, a possibility less restrictive than seizure of the film to prevent any unwarranted offence.

11. We do not deny that the showing of the film might have offended the religious feelings of certain segments of the population in Tyrol. However, taking into account the measures actually taken by the applicant association in order to protect those who might be offended and the protection offered by Austrian legislation to those under seventeen years of age, we are, on balance, of the opinion that the seizure and forfeiture of the film in question were not proportionate to the legitimate aim pursued.