
The Continuing Trials of Oskar Panizza: A Century of Artistic Censorship in Germany, Austria, and Beyond

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Even people who may have heard of Oskar Panizza are likely to be unaware of the fact that a major, precedent-setting judgment involving his 1894 play, *Das Liebeskonzil*,¹ was handed down in 1994 by the European Court of Human Rights (ECHR) in Strasbourg. The case involved a movie theater in Innsbruck, which had sued the Austrian government for preemptively seizing and banning a filmed version of the Panizza play on grounds of blasphemy.

The 1981 film, directed by the acclaimed German director Werner Schroeter, had been shown in cinemas throughout Germany and Austria without a problem. The far racier original stage version had been performed live in theaters all over the world, including in Innsbruck itself. Nonetheless, the highest court in Europe ruled 6-3 that the seizure of this film does *not* violate Article 10 of the European Human Rights Convention, which explicitly guarantees “the right to freedom of expression,” including the “freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers.”

The ECHR ruled that the banning of this art film, which contains no sex or violence of any kind, was fully justified “to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons.”²

This landmark ruling may have far-reaching consequences for all literary and other forms of artistic expression throughout the European Union. No appeal from this court’s judgment is possible. A recent article in an American law review assessed this case involving *Das Liebeskonzil* as even having “ramifications possible throughout the world.”³

The disturbing story of Oskar Panizza (1853-1921) and his ill-fated “heavenly tragedy” has been told many times during the last century.⁴ His play

about the origin of syphilis, as the punishing gift of a feeble yet vengeful God, was written to be provocative, sharply polemic, and outrageously entertaining. Set in heaven, hell, and Pope Alexander VI's Vatican court of 1495, the play was discussed by Sigmund Freud in his seminal *Traumdeutung* (1900)⁵ and continues to resonate a century later, particularly in the face of continued punitive attitudes toward AIDS victims by various religious groups.

The first trial of this psychiatrist-turned-author took place in Wilhelmine Munich. Even though the offending play had been published outside of the German *Reich* in Switzerland, in the spring of 1895 Panizza was charged with 93 counts of blasphemy under §166 of the *Reichsstrafgesetzbuch*. His trial, which took place in Munich on April 30, 1895, lasted only a brief few hours. Perhaps not surprisingly, it resulted in Panizza's conviction and immediate incarceration. The justification for the author's conviction was that "der Inhalt des betreffenden Presseproduktes geeignet ist, die religiösen und sittlichen Gefühle anderer auf das Tiefste zu verletzen, dass ferner die Auslassungen in der Schrift nicht mit der schriftstellerischen Freiheit entschuldigt werden können, vielmehr diese in unangemessener Weise missbraucht ist."⁶

This late nineteenth-century trial, which resulted in a sentence of one year in prison that Panizza served in full at the penitentiary in Amberg,⁷ has been extensively documented and discussed by such literary luminaries as Thomas Mann,⁸ Theodor Fontane,⁹ Kurt Tucholsky,¹⁰ Theodor Lessing,¹¹ and Walter Benjamin,¹² to name but just a notable few.

Less well known is the fact that *Das Liebeskonzil* has continued to be the focus of criminal prosecutions, courtroom trials, and far-reaching legal actions throughout the twentieth century and well into the 1990s, with widespread censorship ramifications for the entire European Union and beyond.

Early in the twentieth century, a tiny collectors' edition of only 50 copies of *Das Liebeskonzil*, based on the third Swiss edition of 1897 and with nine original pen illustrations by Alfred Kubin, was printed in the Netherlands and published by the Gesellschaft Münchner Bibliophilen in 1913.¹³ In view of the strict censorship prevailing at the time, each copy had the name of its future owner printed on the title page.

The second publication of *Das Liebeskonzil* in twentieth-century Germany ran into considerable opposition from the law. Dietrich Kuhlbrodt of the Hamburg district attorney's office, author of the *Liebeskonzil* screenplay and a Panizza scholar in his own right, details the plight of publisher Peter Jes Petersen in his thoughtful essay, "Panizzas Gegenwart."¹⁴ The 26-year-old Petersen, who had been impressed by Georg Grosz's painting "Widmung an Oskar Panizza" (1917/18) in the Staatsgalerie Stuttgart, obtained permission from Panizza's niece in Münster to reprint 300 copies of *Das Liebeskonzil* for his own Petersen Press. On July 1, 1962, duly armed with arrest and search warrants, two criminal investigators from nearby Flensburg raided Petersen's house in the tiny town of Glücksburg,

rifled through his library and picture collections, confiscated books, and arrested the young publisher. After an outcry of protest arose against this heavy-handed police action in the German press, all charges were dropped against Petersen in November 1962. A few months later he moved to West Berlin and had continued run-ins with the law.¹⁵

Although artistic expression is supposed to be free and unfettered in the German Federal Republic since 1949, §166 of the penal code is still in existence today, largely unchanged since the *Reichsstrafgesetzbuch* of 1871. Fines and prison sentences of up to three years are possible for "Beschimpfung von Bekenntnissen, Religionsgesellschaften und Weltanschauungsvereinigungen."

Four years after the appearance of a seminal French translation of the *Das Liebeskonzil*,¹⁶ the first twentieth-century German edition of the play for general distribution was finally published in 1964. The credit for this important milestone in the "rediscovery" of Panizza goes to Hans Prescher, whose perceptively edited, "best of" collection introduced new generations of readers to this madman from Bad Kissingen.¹⁷

Significantly, the world premiere of the "heavenly tragedy" occurred not in Germany, but in France. This historic production of *Le concile d'amour* was under the direction of Jorge Lavelli at the Théâtre de Paris in 1969, some seventy-five years after it had first been published in Switzerland. In the course of the next dozen years, major theatrical productions followed in London (1970, adaptation by John Bird), Hamburg (1973, also directed by Jorge Lavelli), and Rome. The first professional production of *Das Liebeskonzil* in Germany was anything but a shocking event. In fact, it does not seem to have been much of an event at all to some critics. This is how Ralf Kulschweski summed up the experience: "Das Ernst-Deutsch-Theater hatte zur Eröffnung der Hamburger Spielzeit die deutsche Erstaufführung von Oskar Panizzas 'Liebeskonzil' angekündigt, und mit einiger Spannung sah man diesem Ereignis entgegen.... Wir haben das Stück endlich auch einmal in Deutschland auf der Bühne gesehen. Das Ereignis blieb aus."¹⁸

However, it was enough of an event for Germany's leading theater publication to devote a large amount of space to it: in addition to the review, it featured an interview with Lavelli, four production photographs, and a reprint of the entire script.¹⁹ Lavelli, who described his relationship to the play as being religious-affective ("Ich bin Katholik"), revealed that his attraction to *Das Liebeskonzil* was due to its provocative character: "[es] geht...um die Relation von Orthodoxie und Freiheit der Gedanken. Sie sprechen Dinge an, die—besonders in katholischen Ländern—noch tabu sind. So hatte ich die Aufführungsrechte für das 'Liebeskonzil' schon jahrelang, aber kein Theater in Frankreich wollte es herausbringen, alle staatlichen Theater haben es abgelehnt" (11).

It is certainly understandable that a work of art that contains such a fierce plea for freedom of expression should encounter an equally strong move to suppress it. The 1981 production of *Il concilio d'amore* at the Teatro Belli in Rome,

under the direction of Antonio Salines, was to form the basis for one of the most important, yet little publicized, censorship cases in postwar Europe.

How the Teatro Belli production of *Il concilio d'amore* was transformed into the *Liebeskonzil* feature film, which premiered in February 1982 at the Berlin Film Festival, is carefully documented and superbly illustrated with 80 color photographs in the *Liebeskonzil Filmbuch*.²⁰ German producer Peter Berling caught the last performance of the play in the small theater about a mile from the Vatican walls on a Friday night in April 1981. That same night he got the idea of using this theatrical production as the basis for a film and, still that same night, secured the financial backing from Hanns Eckelkamp, CEO of the large Atlas-Film company in Germany. Within 24 hours, the distinguished director Werner Schroeter had arrived from Germany and cinematographer Jörg Schmidt-Reitwein from Baghdad. The Italian portion of the film was shot in nine consecutive all-night sessions.

The *Liebeskonzil* film (no definite article in the film's title) is by no means identical to the Panizza play. The "wildest" scenes, those that take place at the Vatican court of Alexander VI (Rodrigo Borgia), were not part of the Teatro Belli production and hence do not appear in Schroeter's film. Executive producer Berling assumes that, instead of any self-censorship, there were physical and economic exigencies for this omission, "sowohl Raummangel als auch Kostengründe eine ausschlaggebende Rolle spielten."²¹ During the filming, the Italian actors all spoke in their native language, which was later dubbed into German.

In Schroeter's film, the Teatro Belli production is framed by scenes depicting Panizza's 1895 trial at the beginning of the film and by his sentencing at the end. Antonio Salines, the Teatro Belli director who plays the role of the Devil, also plays Panizza in the framing scenes, which were shot in Berlin during the summer of 1981. Schroeter explained his choice of the framing scenes as follows:

Das ist das nie gelöste Problem des irdischen Machtanspruchs der Kirche, wogegen der Panizza ja auch so angegangen ist. Die Kirche ist eben ein Unterdrückungsmechanismus.... Durch die Rahmenhandlung wird das ja auch klar, was dem Mann passiert ist im Leben. Sein Angriff gegen die Gesellschaft ist so aktuell wie immer, denn es hat sich ja grundlegend nichts geändert.²²

By the time the film premiered the following February at the Berlin Film Festival at a special, out-of-competition screening, the expectations were generally running high. Just before the screening, the Bavarian jury member, Hans-Günther Pflaum, read aloud a text written for the occasion by Herbert Achternbusch, titled "Schroeter, Panizza und 'Das letzte Loch.'" ²³ The 11:00 PM showing of the 92-minute film before a sold-out audience of 1,200 at the Zoo-Palast cinema was followed by both sustained applause and derogatory whistling.

When the lights came on at the end, some of the audience had already left, apparently not so much out of outrage as boredom: "...und wenn einige Besucher den schon Tage im voraus ausverkauften Zoo-Palast vorzeitig verließen, dann wohl nicht, weil sie Anstoß nahmen am blasphemischen Charakter der 'Himmelstragödie', sondern sich schlicht langweilten."²⁴ The film was quickly labeled a flop, but not because of any provocative content: "Als ein Flop enervierender Langweiligkeit erwies sich, wider Erwarten, Werner Schroeters 'Liebeskonzil' Das Publikum gähnte."²⁵

The low-budget (DM 620,000) effort was hardly a controversial hit among the largely blasé film critics. A widely distributed reviewer for the Deutsche Presseagentur summed up the general perception of the film's perceived tameness by remarking: "Die beabsichtigte Blasphemie wirkt heute beinahe wie ein Studentenuk und ein grobes Kasperle-Theater mit geringer tieferer Bedeutung...."²⁶

Michael Stone, a reviewer who had seen the 1969 world premiere of the play in Paris, was both irritated and disappointed by what he considered the "very German" treatment in the film: "In Berlin wurde weder demonstriert noch gelacht, und schon nach einer halben Stunde verließen die ersten Zuschauer das Kino."²⁷

Most of the reviewers felt that the film was too theatrical and operatic to be taken very seriously. The reviewer for a popular Berlin weekly entertainment guide wrote: "Heute reizen die satirischen Attacken gegen einen abartigen, völlig idiotisch überdrehten Klerus kaum mehr zur Widerrede."²⁸ There was a consensus among reviewers that, whatever shocking impact the piece may have once had, it was now dated: "Schroeter leitet seine Ausdrucksmittel von der Oper her..., die mit Oskar Panizzas blasphemischen Schocker der frühen wilhelminischen Jahre heute nur noch offene Türen einrammt."²⁹

Even Bavarian critics considered the film about as harmless as a negative Christmas fairy tale: "Jedenfalls brachte die Verfilmung des Schauspiels...optisch und schauspielerisch kaum mehr als ein negatives Weihnachtsmärchen.... Was als Gotteslästerung vor 87 Jahren noch bedrohlich schien, wirkt heute wie das Elaborat eines krankhaften Ehrgeizlings."³⁰ Ten days later, this same reviewer characterized the film as a "slip" on the part of Schroeter and wholly unworthy of any principled atheist's assault on religion: "Was als italienisches Dorftheater wirken mag, wird bei kühlem Licht besehen zum Ausrutscher eines besonders plump-dümmlichen Pennälers."³¹

When the film opened in Munich after the Berlin Film Festival, one local reviewer clearly enjoyed the theatrical/operatic style of the satire: "Eine kunstvoll böse Dokumentation des griffigen alten Kirchenprinzips 'Lust ist Sünde, und Sünde kriegt Strafe'—und ein Sinnen-Delirium nach Art der Borgia-Päpste, ausdrucksbesessen, süffig-schön und opernhaf!"³²

Probably the most sympathetic and perceptive review of Schroeter's film appeared in the leading Munich newspaper:

So wie im Theaterstück der sinnlich argumentierende Teufel zum Anwalt der Menschen wird, jedenfalls entschieden humaner reagiert als die dogmatisch verbiesterten Himmelsbewohner, die ihre Felle davonschwimmen sehen, so hat sich auch der Schmierfink und Gotteslästerer Panizza als Anwalt des Menschen bewährt, als einer, der mit aller Kraft des Hasses gegen Bevormundungen und Institutionen kämpfte und ausgeleierte Rituale lächerlich machte, um den Menschen wieder ein Bewusstsein für ihre eigenen Werte zu geben.³³

Liebeskonzil was a clear flop in the few markets where it played. According to the distributor, the film's theater run was extremely brief for a variety of reasons: "Panizza ist öffentlich unbekannt, der Film galt als Theaterfilm, die provozierende Werbung hat nicht gewirkt."³⁴ The "provocative" advertising involved using the picture of a Neapolitan satyr, whose "optisch anreißerisch betont dargestellte erigierte Penis"³⁵ was cause for some local advertisers to move toward a drastic cover-up: "In einigen Zeitungsinseraten ist sein Gerecktes wegretuschiert, auf Plakaten überklebt.... Kummer ahnend, sorgte der Verleih vor: Dem Werbe-Plakat liegt ein Aufkleber bei, ein Feigenblatt."

Other than the provocative advertising that was not always considered acceptable for public display in newspapers and theater lobbies, the distributors had little reason to assume their film would encounter any legal obstacles. The film was limited to viewers over the age of 16, and the *Spitzenorganisation der Filmwirtschaft* issued the necessary approvals (*Unbedenklichkeitsbescheinigungen*) for the feature and its trailer. The mandatory pre-distribution evaluation by the film industry's oversight group concluded unambiguously: "Gegen eine öffentliche Vorführung des Spielfilms "Liebeskonzil" in der vorgelegten Fassung bestehen in *strafrechtlicher* Hinsicht keine durchgreifenden Bedenken" (emphasis in original document).³⁶

The prospect that the film could possibly lead to a public disturbance of the peace struck these legal authorities as both far-fetched and rather ludicrous:

Der sich zum Christentum bekennende Mensch mag den Film als Ärgernis empfinden, er wird aber nach Lage der Dinge in unseren Zeitläufen sich nicht dazu hinreißen lassen, auf dieses Zerrbild seiner Überzeugungen tumultartig zu reagieren, des Filmes "Liebeskonzil" wegen gar auf die Barrikaden gehen. Ebenso wenig wird er sich soweit von dem Film betroffen fühlen, dass er nach öffentlicher Vorführung des Films eine Einschränkung der Freiheit seines Bekenntnisses oder auch nur eine antichristliche Beeinflussung anderer Mitbürger befürchtet, da er in seiner modernen Aufgeklärtheit sehr wohl ein Gespür für Eintagsfliegen (hier ein kratziger Film 1982—dort die weltumspannende, fast 2000jährige Institution des Christentums) hat und sich zudem bewusst ist, dass der

Bestand und die Unberührbarkeit seines religiösen Standpunktes durch die Verfassung unseres Rechtsstaates gewährleistet ist. (7)

This point of view, however, was not shared universally. The most conservative Catholic reviewers were decidedly less complacent in their evaluation of *Liebeskonzil*. One Catholic film journal referred to Panizza's characters as "lächerliche Figuren einer einfältigen Posse.... In Inszenierung und Darstellung so weit überzogen, dass Lächerlichkeit die Folge ist und die verbalen Ausfälle weitgehend ins Leere gehen."³⁷

This same attitude was also in evidence among more conservative circles in the neighboring Republic of Austria. An official publication by the Education Ministry in Vienna plagiarized portions of the above review from the Catholic *Filmdienst*: "In Inszenierung und Darstellung so weit überzogen, dass oft Lächerlichkeit die Folge ist. Die Absicht der Verunglimpfung von Religion und Kirche ist aber offensichtlich und reicht bis zur Blasphemie. Abzulehnen."³⁸

Schroeter's *Liebeskonzil* film had short and uneventful theater runs in Vienna, Graz, and other Austria cities. On the other hand, the situation in Tyrolia was a different matter altogether. In the spring of 1985, the Otto-Preminger-Institut für audiovisuelle Mediengestaltung (OPI) in Innsbruck decided it would present Schroeter's *Liebeskonzil* film at its Cinematograph theater in Innsbruck for six evening showings, beginning on May 13 at 10:00 PM. The announcement was placed in the OPI newsletter, sent to its 2,700 members, and in various display windows in Innsbruck:

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 aufs Korn genommen und die Beziehung von Glaubensinhalten und weltlichen Unterdrückungsmechanismen untersucht. (nach Holger Twele, *Filmbeobachter*)³⁹

The newspaper advertisement also noted that the film was prohibited for persons under the age of seventeen.

On May 10, 1985, the Innsbruck diocese of the Roman Catholic Church requested the local district attorney to institute criminal proceedings against OPI's manager, Dietmar Zingl, for planning to disparage religious doctrines, an act prohibited by §188 of the Austrian penal code. The district attorney's office cooperated fully with the request, in accordance with the federal prohibition against blasphemy, which reads:

Wer öffentlich eine Person oder eine Sache, die den Gegenstand einer Verehrung einer im Inland bestehenden Kirche oder Religionsgemeinschaft

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. (*Strafgesetzbuch*, § 188)

The Innsbruck district attorney not only fully cooperated with the diocese's request, but it sprung into action with a remarkable swiftness. On May 12, a Sunday, the OPI's "Cinematograph" movie theater was ordered to hold a private screening of the film for the Innsbruck district attorney, Hautz, in the presence of duty judge (*Journalrichter*) Kandler. The local newspaper reported the event with mild amusement: "Gottvater ließ man als greisen Trottel über die Leinwand flimmern. Maria wurde als lüsternes Weib dargestellt. Und Jesus war die Rolle eines infantilen unbeholfenen Menschen zugebracht. Der Papst fand sich neben einem entblößten Frauengesäß und auch der Heilige Geist als Taube auf dem Kopf Gottvaters kam nicht zu kurz."⁴⁰

The officers of the court decided that the sole intent of the film was to be blasphemous: "Überhaupt hat der Film in seiner ganzen Darstellung nur den Zweck der Verunglimpfung Gottvaters, der Maria und der Dreifaltigkeit."⁴¹ Immediately following the private screening on May 12, the district attorney petitioned for the film's seizure under § 36 of the Austria's *Mediengesetz*. This application was granted by the Innsbruck *Landesgericht* that same Sunday. When Dietmar Zingl was informed of this situation the following day, he voluntarily cancelled the six scheduled public screenings and sent the film back to its distributor, Czerny, in Vienna. It was, in fact, seized there by law enforcement officials four weeks later on June 11.

The small public audience that showed up on the evening of May 12 was treated to a reading of the court order banning the showing of the film and the OPI's letter of protest against it, as well as to a theatrical reading of Act III of *Das Liebeskonzil*. The national press was highly critical of the actions taken to suppress the film, which were described with obvious sarcasm in *Kurier*: "Montag, den 13. Mai, knapp vor 22 Uhr erschienen zwei diskret gekleidete Herren der Kriminalpolizei im Foyer des Cinematographen in Innsbruck, um etwa 40 erwachsene österreichische Staatsbürger vor einer Verletzung ihrer religiösen Gefühle zu bewahren."⁴²

Referring also to the fate of Herbert Achternbusch's film, "Das Gespenst," which had been banned in Austria not long before, commentator Alois Schöpf posed a series of pointed rhetorical questions:

Weshalb ist die Aufführung eines Films, der in Wien und in Graz anstandslos lief, in Tirol plötzlich strafbar? Weshalb ist die Aufführung des Films strafbar, die Lesung aus dem gleichnamigen und wesentlich

härteren Theaterstück "Das Liebeskonzil", das seit Jahren in jeder Buchhandlung, auch in der "katholischen" Tyrolia, zu kaufen ist, jedoch nicht? Und wer schützt die "Gemeinschaft" derer, die als Agnostiker und Nachfahren der Aufklärung den traditionellen Religionen ablehnend bis feindlich gegenüberstehen, in unserem laizistischen Staat vor der Religion? Haben sie kein Recht, ihrer Weltanschauung mit künstlerischen Mitteln Geltung zu verschaffen?⁴³

One day after canceling the film screening, the OPI board of directors issued a strongly worded press release, denying any criminal intent and lambasting the actions taken by the court and the district attorney. The board pointed out that the main targets of the film were *secular*, not clerical authorities: "Hier werden in dramaturgischer Weise, in Form eines Pro- bzw. Epilogs, Parallelen gezogen, zwischen den weltlichen und den himmlischen Richtern.... Auch der Vorstand des Otto-Preminger-Instituts ist zur Ansicht gelangt, dass der Film vielmehr zur Anprangerung weltlicher Zustände dient."⁴⁴

Not surprisingly, the left-wing press was most critical of the court's move to impose artistic censorship. Writing in *Volksstimme*, the central publication of the Austrian Communist Party, Uli Eisner reflected on the parallels between Panizza's 1895 trial in Munich and the situation in Austria a century later: "Und nun, als wären keine neunzig Jahre vergangen, bläst man in Tirol wieder zum selbstgerechten Halali.... Heilig ist den Tiroler Amtmännern nämlich vor allem eines: das Recht auf die Bedienung des anachronistischen Willkürinstrumentes der kulturellen Zensur."⁴⁵

The court order to ban and confiscate the film was duly appealed by the OPI's board at the end of May 1985. This appeal was denied by the Innsbruck *Oberlandesgericht* on 30 July 1985, which ruled that "die Kunstfreiheit [wird] durch die Aufgabe des Staates begrenzt, ein geordnetes, auf Toleranz aufgebautes Zusammenleben der Mitbürger zu gewährleisten...."⁴⁶ Preserving the constitutionally guaranteed right to freedom of artistic expression was decidedly less important than protecting the feelings of the majority of "average" persons with "normal" religious sensibilities. The court confirmed that the film had been properly seized, "...da die mit dem gegenständlichen Film erfolgte massive Verhöhnung der religiösen Gefühle schwerer wiegt als Argumente der Kunstfreiheit" (9-10).

Again, it was the leftist press that registered the strongest outrage by the ruling of the *Oberlandesgericht*:

O, du mein armes, scheinchristliches Österreich! Kein rechter Christ fühlt sich verletzt, wenn massenweise unschuldige Menschen hingeschlachtet werden.... Weiter im Text: "Maßgeblich ist es allein, dass zweifellos die überwiegende Mehrzahl der Durchschnittschristen den Film als besonders herabsetzend und entwürdigend empfinden muss." Die "Durchschnittschristen" sitzen aber wohl kaum im Kino. Und wenn, dann in

"Rambo".... Was Kunst ist, bestimmen die Richter. Ist es wirklich schon wieder soweit?⁴⁷

Since the film was never publicly shown in Innsbruck and was surrendered to the court as ordered, the case against Dietmar Zingl, suspected of *attempted* blasphemy, was finally dropped five months after it had commenced. However, the tenaciously argued case surrounding the legality of this film's seizure was to occupy the highest Austrian and international European courts for the next decade.

The effort to challenge the banning of the *Liebeskonzil* film in the courts was supported by the membership of the OPI in Innsbruck, as well as by a special fund established by the *Interessengemeinschaft österreichischer Autoren* in Vienna. In a letter to its membership dated 24 December 1985, the organization's executive director, author Gerhard Ruiss, called on its membership to support the creation of a new fund, "...eines Solidaritätsfonds österreichischer Künstler und Publizisten zur Finanzierung von Musterprozessen sowie sämtlicher rechtlicher Schritte, die sich zur Sicherstellung der 'Freiheit der Kunst' in Österreich—auch unter Anrufung internationaler Gerichtshöfe—erweisen sollten."⁴⁸

Ruiss was responding not just to the seizure of *Liebeskonzil*, but to actions taken by Austrian authorities against other literary works, such as the book and film by Herbert Achternbusch, *Das Gespenst* (1983), and Thomas Bernhard's novel, *Holzfällen. Eine Erregung* (1984). According to Ruiss, "Dieser Fonds dient einerseits der Aufbringung finanzieller Mittel zur Weiterführung der bisheriger Verfahren, andererseits sollen damit Gutachten und sonstige zur Klärung des Rechtslage beitragende Expertisen eingeholt werden."⁴⁹ The rather ambitious general goal of this initiative was "neben der Unterstützung inkriminierter Kunst und Künstler auch die Aufarbeitung bestehender rechtlicher und gesetzlicher Verhältnisse zur Beseitigung von Rechtsunsicherheiten sowie zur Einleitung von weiteren gesetzlichen Maßnahmen, die den Intentionen des Artikel 17a Staatsgrundgesetz entsprechen." Dr. Frank Hoepfel, OPI's attorney and now a law professor in Vienna, handled the case on a *pro bono* basis through 1994, which kept the overall costs to a minimum.

On 10 October 1986 a trial took place before the Innsbruck *Landesgericht*. "Sowohl der Richter als auch der Staatsanwalt bekundeten, dass sie den Film als Kunstwerk (für ihre Person) betrachteten, doch könnte der 'gläubige Durchschnittsmensch Tiroler Prägung in seinen religiösen Gefühlen beleidigt werden'."⁵⁰ The film had again not been shown to the court in open session, a fact lamented in a commentary by the local newspaper: "Denn so kann man schwer urteilen, ob hier die Kunst in ihrer vermeintlichen Freiheit tatsächlich die Grenzen religiösen Feingefühls überschritten hat."⁵¹ The commentator proceeded to speculate on who, if anybody, was really threatened by the film: "Als Begründung für die Beschlagnahmung musste ein anonymes 'Durchschnittsmensch' herhalten. Wer ist

dieses ominöse Wesen—und wieso wissen Staatsanwalt und Richter so genau, was er denkt und fühlt?”

In his judgment issued the same day, Judge Walter Krabichler ordered the forfeiture of the previously seized *Liebeskonzil* film. In his decision, Dr. Krabichler ruled that the film, in his opinion “ein in erster Linie provokant und antikirchlich angelegter Film,”⁵² was criminally blasphemous as set forth in § 188 of the criminal code. His reasoning to limit artistic freedom and to now ban the *Liebeskonzil* film from ever being shown in Austria invoked the familiar justifications:

Die Freiheit der Kunst ist nicht ohne jede Grenzen [sic] zu verstehen. Die Schranken der Kunstfreiheit werden einmal in anderen in der Verfassung gewährleisteten Grund- und Freiheitsrechten (z.B. Glaubens- und Gewissensfreiheit), andererseits in der Notwendigkeit eines geordneten, auf Toleranz aufgebauten Zusammenlebens der Menschen und schließlich in eklatanten und intensiven Verletzungen anderer rechtlich geschützter Güter gesehen.... (12)

It is noteworthy that artistic freedom of expression had recently been expanded in 1982, just several years prior to this ruling, by the addition of Article 17A to the Austrian constitution: “Das künstlerische Schaffen, die Vermittlung von Kunst sowie deren Lehre sind frei.” Nonetheless, the court’s decision apparently gave this constitutional guarantee less weight than the traditional prohibition against blasphemy. As one Viennese newspaper insisted: “Steht die ‘Ehrlichkeit des künstlerischen Strebens des Urhebers’ außer Zweifel, sollte sich die Rechtssprechung auf den Grundsatz ‘In dubio pro arte’ beziehen, und nicht...die Kunst auf ein Maß zu reduzieren versuchen, das dem ‘Durchschnittsmensch Tiroler Prägung’ genügen mag.”⁵³

Not surprisingly, the OPI strongly criticized the court’s ruling as being based on a double standard: “ ‘Gleiches Recht für alle’ wird zur leeren Formel, wenn da Filmszenen sich an einem Ort besser zur Erregung des öffentlichen Ärgernisses eignen als anderswo.”⁵⁴ The court’s ruling in Innsbruck was seen by the OPI as a continuation of the travesty of justice depicted in the film’s framing courtroom scenes: “Vielleicht setzt sich nun die von Schroeter inszenierte Rahmenhandlung in der Realität fort.... Die gesamte Anklagebank erscheint als pomadisierte Karikatur der Unfehlbarkeit, die ironischerweise nicht durch die Darstellung im Film glaubhaft wird, sondern erst dadurch, dass die Behörde gegen den Film einschreiten will.”⁵⁵

The judgment of the regional court was appealed by Dietmar Zingl, who claimed that §188 had not been interpreted in line with the guarantee of artistic freedom set forth in Article 17a of the Austrian constitution. His appeal included a declaration signed by some 350 persons, who protested that they had been denied free access to a work of art by the court’s seizure of the film. On 25 March 1987

the Innsbruck Court of Appeals declared the appeal inadmissible, ruling that Zingl had no standing since he was not the copyright owner of the film.

Shortly after this ruling was issued, the OPI's attorney, law professor Dr. Frank Höpfel, asked Hilde Hawlicek, Austria's federal Minister for Education, Art & Sports, to help in obtaining a plea of nullity. Dr. Hawlicek obliged and sent a letter to the Viennese district attorney (*Generalprokurator*), asking him to explore obtaining a plea of nullity for safeguarding the law (*Nichtigkeitsbeschwerde zur Wahrung des Gesetzes*). In her view, the Innsbruck court's ruling was "mit den Grundsätzen einer pluralistischen, auf Toleranz aufgebauten Gesellschaft, die auch durch Art. 10 MRK [Human Rights Convention] anerkannt sind, schwer vereinbar."⁵⁶ Her suggestion was to shift the point of view away from the average citizen, whoever that might be, to that of a more open-minded, artistically oriented public. However, this approach was unproductive. Citing the Austrian Supreme Court's previous decision concerning Herbert Achternbusch's film *Das Gespenst*, the attorney general decided on 26 July 1988 that there were no grounds for filing such a plea of nullity.⁵⁷

Even before that decision was announced, the Otto-Preminger-Institut had decided to take the important step of contesting the seizure and subsequent forfeiture of the *Liebeskonzil* film before the European Commission on Human Rights in Strasbourg. On 6 October 1987, the OPI lodged an application (no. 13470/87) with the Commission to obtain a decision as to whether Austria had violated its obligations under Article 10 of the European Human Rights Convention. The OPI was clearly aware of the precedent-setting nature of its action. In the press release accompanying the application to the Commission, the OPI stated: "Nach Ausschöpfung des Instanzenzuges in Österreich findet erstmals ein Kunstbeschlagnahmeprozess des § 188 STGB seine Fortsetzung in Straßburg."⁵⁸

In view of the recent favorable rulings in previous cases, the owners of the Cinematograph were optimistic about their chances of gaining a favorable ruling from the Strasbourg court: "Mehrfach...haben die Instanzen betont, dass der Schutz der Meinungsfreiheit auch für Ideen gilt, die verletzen, provozieren oder schockieren können."⁵⁹ In commenting on his legal action, the OPI's attorney, Frank Höpfel, emphasized that artistic freedom not only benefited the individual artist but also society as a whole: "Es wird oft übersehen, dass durch strafrechtliche Maßnahmen gegenüber Künstlern und Kunstvermittlern auch in die Rechte des interessierten Publikums eingegriffen wird, 'Freiheit der Kunst' aber ebenso 'freien Zugang des Publikums zur Kunst' bedeutet."⁶⁰

The European wheels of justice were grinding very slowly in the late 1980's. Because of a huge backlog of cases, the European Commission on Human Rights did not begin to discuss the case of the *Liebeskonzil* film for almost four years after it had been submitted. The case was formally admitted on 12 April 1991. The fourteen members of the Commission finally took up the case and screened the film for the first time on 5 July 1991.⁶¹ The European dimension of this case

certainly did not go unnoticed back in Tyrolia: "Dass sich die Menschenrechtskommission erstmals mit der Freiheit der Kunst beschäftigt, ist europaweit von Interesse."⁶² Attorney Frank Höpfel saw the guiding principle in his case as being one that was essential to a free democracy: "Der 'Cinematograph' ist nicht irgendein Kino, in das man unvorbereitet hineinstolpert. Er ist vielmehr ein Programmokino, in dem ein aufgeschlossenes Publikum bereit ist, sich auch mit provokanten Werken zu befassen. Das muss in einer Demokratie möglich sein."⁶³

Actually, Höpfel's assumption ultimately proved wrong, at least if the democracy is an Austrian one. But before the European Commission on Human Rights finally reached its decision in 1993, there were two important theatrical productions of Panizza's *Das Liebeskonzil* in Austria. The first one was directed by Stephan Bruckmeier in Vienna in 1991 at the Ensemble Theater am Petersplatz. Bruckmeier's production was admittedly conceived as a provocation, but one intended to produce insight instead of scandal.⁶⁴ One reviewer hailed the production as "das beste Theater, das seit langem von einer Freien Gruppe gemacht wurde."⁶⁵

The second production was at the Tiroler Landestheater in 1992 under the aegis of its new Swiss *Intendant*, Dominique Mentha. Ironically, the regional Landestheater is just blocks away from the Cinematograph in Innsbruck, where law enforcement authorities had come to seize the film version seven years previously. Directed by Dieter W. Hübsch, this production was generally well received, though not without a certain amount of controversy and outright opposition. Innsbruck Bishop Reinhold Stecher saw no reason to take any legal action this time against the play, "weil das Stück sich selber richte."⁶⁶ Notably Armin Benedikter, a law student described by one newspaper as "ein militanter Katholik, für den Gläubige und Priester, die sich zum II. Vatikanum bekennen, Häretiker sind,"⁶⁷ tried to halt the production by filing a complaint of blasphemy, but the district attorney declined to take action this time.

The leader of the conservative ÖVP youth group in Innsbruck, Egon Saurer, complained that the play was "religionsfeindlich" and railed against what he described as a "von Steuergeldern subventionierte Verhöhnung der christlichen Religion."⁶⁸ In contrast to Saurer, the local press was generally supportive of this production:

Jeder hat das Recht, den Schutz seiner religiösen Gefühle zu fordern. Den Schutz kann er jedoch auch durch "Selbstjustiz" erlangen: indem er sich nicht provozieren lässt und das Stück nicht anschaut. So wie niemand gezwungen ist, sich vergleichsweise tatsächlich entwürdigende, brutale Kino- und TV-Filme anzuschauen oder psychisch deformierende Computerspiele zu betätigen.... Es gibt auch viele Menschen in Tirol, die ein Theaterstück wie das "Liebeskonzil" anschauen möchten. Dies sollte ihnen in einer aufgeklärten Gesellschaft nicht durch ein Aufführungsverbot verwehrt werden.⁶⁹

Despite a small demonstration outside the theater, the premiere in Innsbruck went off without a hitch. Under the title "Kein Konzils-Problem," a regional paper noted laconically: "Ruhig und ohne angedrohte Zwischenfälle verlief die Premiere des 'Liebeskonzils' von Oskar Panizza in Innsbruck. Die Aufführung des Stücks...wurde mit starkem Applaus bedacht. Lediglich einige katholische Traditionalisten demonstrierten."⁷⁰

Maria Deppermann, professor of comparative literature at Innsbruck University, described the enthusiastic reception of the play: "Während vor dem Theater kniender Gebetsprotest exerziert wurde, zollte ein begeistertes Publikum Regie, Bühnenbild und dem Ensemble, das sich überbot, stehend Ovationen, durchmischt von Halleluja- und Bravorufen."⁷¹ As a literary historian, she recognized that Panizza's "Kritik an den Figuren von Gott-Vater, Jesus Christus und der Jungfrau Maria richtete sich nicht gegen ihre göttliche Wesenheit, sondern gegen das grob verzerrte Bild, das sich die Menschen von ihnen gemacht haben" (15). She also chronicled the many hours of animated discussions that surrounded the play's performance in Innsbruck: "Prominente aus Politik, Kirche, Presse und Theaterwissenschaft disputierten bis Mitternacht, das Publikum mischte sich kräftig ein.... Einer pluralistischen Gesellschaft muss das Recht zugestanden werden, wunde Punkte ihrer Vergangenheit und Gegenwart aufzudecken und zu diskutieren, ohne dass der Kunst dabei das Maul verbunden wird" (16).

In view of the successful production of *Das Liebeskonzil* in Innsbruck in 1992, when the long-awaited and much anticipated decision by the European Commission for Human Rights in Strasbourg was finally handed down on 3 April 1993, there was little cause for shock or surprise. The Commission ruled 9 to 5 that the original seizure of the *Liebeskonzil* film by Austrian authorities in 1985 had violated the guarantee of freedom of expression contained in Article 10 of the European Convention on Human Rights. Furthermore, the Commission ruled 13 to 1 that the subsequent forfeiture and country-wide ban of the film upheld by the Austrian courts was also in violation of Article 10.

The Otto-Preminger-Institut, the plaintiff in this case, was naturally pleased by the decision. Attorney Frank Höpfel summarized the objective of his legal actions, which at this point had extended over eight years: "Das Ziel der Beschwerde war von vornherein klarzustellen, dass es in einer Demokratie möglich sein muss, Kunstwerke auch möglicherweise provokanter Art einem interessierten Publikum zu präsentieren—zumindest solange niemand gezwungen wird, das Werk zu betrachten, und eine entsprechende Vorinformation über den Inhalt angeboten wird."⁷²

Panizza had now been the object of controversy in Austrian cultural life for eight years: "Seit Mai 1985 sorgt Oskar Panizzas Theaterstück 'Das Liebeskonzil' in Tirol für Unruhe."⁷³ One Tyrolean daily newspaper began its story with the following upbeat statement: "Wie sich die Zeiten doch ändern."⁷⁴ Although time

would prove this statement to be chimerical, at least as far as censorship in Austria is concerned, there was widespread optimism that legal change of major proportions was taking place. It was acknowledged by Amnesty International, the U.S. State Department, and others that Austria had a fairly good human rights record. However, Austria did have an above-average number of complaints lodged against it with the European Human Rights Commission, especially regarding freedom of expression in the media and the arts.⁷⁵

After its April 1993 ruling that Austria had violated Article 10 of the European Human Rights Convention by seizing and banning the *Liebeskonzil* film, the Commission then referred the case to the European Court of Human Rights for a final ruling. The ECHR, the highest court in Europe and from which no appeal is possible, is also located in Strasbourg. It received the case of *Otto-Preminger-Institut v. Austria* (11/1993/406/485) from the Commission on 7 April 1993. Attorney Höpfel and his clients had high hopes that the ECHR would confirm the Commission's ruling and establish a major precedent for ensuring freedom of expression throughout Europe: "Die Straßburger Entscheidung könnte nicht nur für Österreichs Rechtsprechung Folgen haben, sondern europaweit eine wichtige Klarstellung für den Kulturbetrieb und für die Freiheit der Kunst bringen."⁷⁶

On 2 September 1993 the ECHR granted leave to two non-governmental organizations, *Article 19* (International Centre Against Censorship) and *Interights* (International Centre for the Legal Protection of Human Rights), to submit written observations on specific aspects of the case. Both groups are based in London and submitted their comments jointly. After surveying the law regarding blasphemy and insult to religious belief in ten European countries and the U.S., they concluded that "courts in eight of the ten countries [excluding Italy and England] not only would be likely to refuse to find that the showing would constitute a crime but also the seizure could not be justified since the interest in freedom of expression and art would clearly outweigh any possible harm of showing a film under these circumstances."⁷⁷

The hearing before the nine ECHR judges in this case, to determine whether "seizure and forfeiture of a film found to be blasphemous" (*Judgment* iii) did indeed violate Article 10 of the European Human Rights Convention, was held in Strasbourg's Human Rights Building on 24 November 1993. On the previous day, the court had screened the *Liebeskonzil* film at a private showing. Commenting on the hearing, at which Austria was represented by legal officials from the Federal Chancellery and from the Ministries of Justice and Foreign Affairs, a national newspaper sounded optimistic that freedom of expression would finally prevail in Strasbourg: "Das noch ausstehende Urteil dürfte abermals eine Verurteilung Österreichs sein."⁷⁸

It was, therefore, a major surprise when the ECHR's final judgment of 20 September 1994 turned out to be a crushing defeat for freedom of expression in Europe at the end of the twentieth century. The court ruled 6-3, "that there has been

no violation of Article 10 of the Convention as regards either the seizure or the forfeiture of the film" (*Judgment* 18). The ECHR based its ruling on Section 2 of Article 10 of the European Convention on Human Rights, which restricts the broad guarantee of freedom of expression contained in Section 1:

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...(16).

The majority of the judges on the ECHR clearly held that freedom of expression needed to be restricted in order to preserve what they described as "religious peace" in a part of the country where 87% (16) of the population is Roman Catholic: "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" (17). More important than freedom of expression, in the court's view, is "the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons" (14).

In their strongly worded dissenting opinion, the judges from Finland, Poland, and Sweden stated: "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" (19). The dissenters maintained, "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" (20). They further pointed out that the Cinematograph's Innsbruck audience had sufficiently been warned beforehand about the nature of the film "to enable the religiously sensitive to make an informed decision to stay away." The dissenting judges cited substantial case law to strongly affirm that freedom of expression "is applicable not only to 'information' or 'ideas' that are favorably 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" (19; emphasis in original document).

That very same day, the shockwaves of this ruling literally went round the world via a major international wire service story. Although it erroneously referred to Panizza as an Austrian writer, the 285-word United Press International story accurately summarized the ECHR ruling, "that Austrian authorities did not violate

rights of freedom of expression in banning a film that is allegedly offensive to many Christians."⁷⁹

European commentators were quick to respond. Perhaps the most dismissive was the journalist who equated the ECHR with the Catholic Church: "Wer solch eine Menschenrechtskommission hat, die heute noch auf dem Stand der wilhelminischen Justiz argumentiert (die den Panizza schon vor fast hundert Jahren traktierte und zensierte), der braucht keine katholische Kirche mehr."⁸⁰ Even the commentator in the fairly conservative Innsbruck daily newspaper was highly critical of the court's decision: "Statt des Autors wird der Film eingesperrt....Auf der Bühne durfte das 'Liebeskonzil' inzwischen hierzulande gezeigt werden. Ein schwacher Trost für jene, die davon ausgehen, dass das Recht auf Gedankenfreiheit im demokratischen Europa generell gelte."⁸¹ Another local Austrian daily, in an editorial titled "Die Inquisition lebt," was even harsher in its denunciation of the ECHR's verdict: "Dass das heil'ge Land Tirol inzwischen die leibhaftige Aufführung des Stücks... 1993 verkraftet hat, ohne dass ein Religionskrieg ausgebrochen wäre, dürfte sich bis Straßburg nicht durchgesprochen haben. Auftrieb wird nur jenen gegeben, die immer fürs Verboten sind."⁸²

One of the most detailed analyses of the ECHR's judgment was in a *London Times* article by David Pannick, a practicing attorney who teaches at Oxford. He totally rejects the Strasbourg judgment, asserting that "it is no business of the judiciary to assess whether a film makes a 'contribution to any form of public debate capable of furthering progress in human affairs.' The central purpose of freedom of expression is to allow readers and viewers to make up their own mind about the value of a work" (8 November 1994). Pannick points out that "the court fails to understand that social development, in art as well as in politics, has often proceeded from the assertion of ideas that cause offence, sometimes outrage, to established thought. Freedom of expression is of limited value if it covers only that which does not upset received opinion." He shares the view of most academic and media commentators who oppose any kind of blasphemy laws whatsoever, invoking the time-honored words of Emperor Tiberius (born in 42 BC), that "insults to the gods are the affairs of the gods."

There is a further weakness in the judgment, according to Pannick: "...for judges to assess artistic merit, and to penalize dissent, is especially dangerous in the context of established religion, which demands uncritical devotion from many of its followers, and so enjoys considerable power in religious societies." He recognizes that freedom of speech should not depend on public acceptability: "In such a climate, dissenting voices will struggle to make themselves heard. It is the task of the court to ensure that they are not silenced." Certainly Jesus, Luther, Nietzsche, and many other great men and women were initially considered to be a strong threat to the powers that be. "No doubt Galileo, Copernicus and Spinoza greatly offended religious feelings in their day, and were considered to be making no useful contribution to human knowledge." Citing U.S. Supreme Court Justice Harlan's

observation in 1971 that "one man's vulgarity is another man's lyric," Pannick concluded by strongly admonishing: "Judges, whether in national courts or in Strasbourg, should resist the temptation to act as arbiters of good taste."

Writing about the judgment in the *St. John's Law Review*, Brian Walsh noted that the *Liebeskonzil* trial "marked the first time the European Court ever heard such a case" (77). He further noted that "the holding of the European Court is quite significant considering that the God in question is the God not merely of the Jewish and the Islamic people, but of the Christian people as well. With ramifications throughout the world, the decision could easily give rise to public disorder, which is one of the reasons in favor of an intervention." He also points out that "the European Convention has not been adopted as part of the domestic law by a majority of the thirty-three member States. One reason is that in certain areas, the national law of the member State provides better protection than the European Convention."

One country where the national law would appear to provide better protection for freedom of expression is Switzerland. For the century-long trials of Oskar Panizza did not end in Strasbourg in September of 1994. Three years later, the religious group Christians for Truth took the students and faculty of the Berner Schauspielschule to court for their production of *Das Liebeskonzil*. Nor surprisingly, among the most vehement opponents of the theatrical production was the anti-immigrant, far-right Schweizer Demokraten (SD) party. They demanded "ein unverzügliches Aufführverbot des perversen und gotteslästernden Theaterstücks."⁸³ Citing the prior decision by the ECHR, SD politicians vowed to cut the funding for the offending acting school: "Der Berner SD-Stadtrat Bernhard Hess will zudem mittels eines parlamentarischen Vorstoßes Auskunft, weshalb das Aufführverbot, welches noch 1994 vom Europäischen Gerichtshof erneut bestätigt wurde, durch die Schauspielschule Bern ignoriert wird. Jedenfalls werden die SD bei so viel Gunst für schlechte Kunst die teilweise fürstlichen Kulturbeiträge noch konsequenter bekämpfen."

Most of the press, and presumably the public as well, considered the case to be something of an anachronism:

Es mutet an wie eine Reminiszenz aus versunkenen Zeiten, als die Kunst noch Skandale auszulösen vermochte und mit Zensur bestraft wurde: Im kommenden Dezember müssen die Theaterregisseurin Barbara Frey und Leonie Stein, die Leiterin der Berner Schauspielschule, im Amthaus vor dem Einzelrichter für eine Theateraufführung geradestehen.... Namentlich angezeigt sind die Regisseurin sowie die neun Schauspielschüler und -schülerinnen, die das Stück im Dezember '97 als Abschlussarbeit gezeigt hatten.⁸⁴

The uniqueness of this six-hour trial, which took place on 10 December 1998, did not go unnoticed: "Erstmals in der Schweiz ist es aufgrund einer Theateraufführung zu einer Strafanzeige wegen Störung des Glaubens- und Kultusfreiheit gekommen, die bis vor den Einzelrichter gelangte."⁸⁵ The Swiss press emphasized the weighty historic dimensions of this case:

Die Freiheit der Kunst steht selten vor Gericht zur Debatte. Umso bedeutungsvoller war die gestrige Verhandlung. Das ließ sich schon am Publikumsaufmarsch ablesen: Erstmals wurde ein simples Strafverfahren vor dem Einzelrichter in den großen Assisensaal der Berner Amthaus verlegt, Richter Ochsner sprach von einem Zuschauerrekord. Das Berner Verfahren ist die erste Gerichtsverhandlung gegen eine Theateraufführung in der Schweizer Rechtsgeschichte. Und einer der seltenen Fälle, dass über den Artikel 261 des Strafgesetzbuches geurteilt wird, in dem die Störung der Glaubensfreiheit festgelegt wird."⁸⁶

The judge agreed with the defense in this case that blasphemy itself was not a punishable offense: "Richter [Lienhard] Ochsner gab in seiner Begründung des Freispruchs Hänni recht, dass nicht die Blasphemie selber, sondern erst die böswillige Anwendung gegen den Religionsfrieden strafbar sei."⁸⁷ The acquittal in this case was seen as an affirmation of artistic freedom of expression: "Die Anklage ist anachronistisch und hätte die Freiheit der Kunst aufs empfindlichste beschädigen können. Wenn ein hundertjähriger Bühnenklassiker nicht mehr gespielt werden dürfte, wären der weltanschaulich motivierten Zensur Tür und Tor geöffnet,"⁸⁸ wrote Sandra Leis. The dangerous threat of artistic censorship, such as was carried out in Innsbruck and upheld by the ECHR in Strasbourg, was averted by the decision of this latest *Liebeskonzil* trial in Bern. As her editorial in *Der Bund* warned: "Jeder hat das Recht, sich mit Kunst zu konfrontieren oder auch nicht. Gefährlich wird es, wenn man die eigene Meinung zum einzig richtigen Maßstab erklärt und eine Bevormundung anderer diktatorisch postuliert."⁸⁹

The German press also took note of this landmark trial in Bern. Reinhardt Stumm pointed out in the *Frankfurter Rundschau*: "Nicht Gotteslästerung ist eine strafrechtlich relevante Tat, sondern die Störung des öffentlichen Friedens. Würde sie behauptet, hätte der Nachweis einer vorsätzlichen Störung der Grundrechte anderer erbracht werden müssen. Das aber wäre gar nicht möglich gewesen."⁹⁰ Stumm describes how the judge in this case traced the principle of tolerance back to Henry IV's Edict of Nantes in 1598. The religious freedom guaranteed today also includes the freedom to believe anything or nothing at all: "Atheisten und Agnostiker haben dieselben Grundrechte—sie können an einen Gott glauben oder an mehrere Götter oder an gar keinen, auch sie hat der Staat vor der Intoleranz von anderen zu schützen."

While the 1998 Bern acquittal was certainly a victory for freedom of expression, at least within the tiny Swiss Confederation, some on the far-right continued to rail at what was viewed as the evils of artistic freedom. Writing for the Eidgenössisch-Demokratische Union (EDU), Thomas Feuz asserted: "Mit dem Berner Urteil, so scheint es, hat die Religion verloren und die Kunst obsiegt. Wie war doch damals anlässlich der Revision der bernischen Staatsverfassung, als die EDU nicht zuletzt wegen der Stipulierung der 'künstlerischen Freiheit' die Verfassung abgelehnt hatte? Die Entwicklung hat den damaligen Befürchtungen im wahrsten Sinne des Wortes 'Recht' gegeben!"⁹¹

For more than a century now, Oskar Panizza's infamous *Liebeskonzil* has functioned as a kind of prime litmus test for freedom of artistic expression in Germany, Austria, Switzerland, and beyond. In its satirical, farcical presentation of a deadly serious topic, the origin of sexually transmitted syphilis, the play questions many fundamental assumptions regarding free speech and censorship that have often gone unexamined. The play's various productions have provided unique opportunities for proponents and opponents of artistic freedom to test the judicial system's ability to balance the fundamental right to freedom of religion with the equally fundamental right to freedom of expression. Our review of the trials of Oskar Panizza and his *Liebeskonzil* has shown how precarious this balancing act proved to be throughout the entire twentieth century.

¹ Zürich: Schabelitz, 1895 (actually late 1894). Two revised editions, which include extensive comments by friends and critics, were published there by Panizza in 1896 and 1897. Reprints and translations have appeared throughout the twentieth century. Still in print is Oskar Panizza, *Das Liebeskonzil. Eine Himmels-Tragödie in fünf Aufzügen* (Darmstadt & Neuwied: Luchterhand, 1989).

² European Court of Human Rights, Case of Otto-Preminger-Institut v. Austria [Case no. 11/1993/406/485, Application no. 00013470/87], *Judgment*, Strasbourg, France 20 September 1994, iv; hereafter cited as *Judgment*. Officially published at <<http://hudoc.echr.coe.int/Hudoc1doc/HEJUD/sift/482.txt>>. The complete text of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), with its amendments, is on the ECHR's web site, <<http://www.echr.coe.int>>.

³ Brian Walsh, "Remarks," *St. John's Law Review* 70/1 (Winter 1996): 78. A more comprehensive discussion of this case within the context of Austrian law is Christoph Rümmele, *Die Freiheit der Kunst im Spannungsverhältnis zum Strafrecht am Beispiel des Films "Das Liebeskonzil" von Werner Schroeter (nach dem gleichnamigen Bühnenstück von Oskar Panizza)*, Diplomarbeit, Universität Innsbruck, Juli 1997.

⁴ The standard biographical works are Peter D.G. Brown, *Oskar Panizza—His Life and Works* (New York: Peter Lang, 1983); Michael Bauer, *Oskar Panizza—Ein literarisches Porträt* (Munich: Carl Hanser, 1984); and the recent psychiatric case history by Jürgen Müller, *Der Patient als Psychiater—Oskar Panizzas Weg vom Irrenarzt zum Insassen* (Bonn: Psychiatrie-Verlag, 1999).

⁵ Leipzig/Vienna: Deuticke, 149.

⁶ Oskar Panizza, *Das Liebeskonzil—Mit Materialien zum Film von Werner Schroeter* (Sammlung Luchterhand 388) (Darmstadt & Neuwied: Luchterhand, 1982), 98; Knut Boeser, ed., *Der Fall Oskar Panizza—Ein deutscher Dichter im Gefängnis. Eine Dokumentation* (Berlin: Edition Heinrich, 1989), 74.

⁷ Founded in 1785, Amberg has now become a prison museum, with a special display devoted to Panizza, its most famous inmate. See Karl Städele, "Museum hinter Gittern. Amberg dokumentiert die Geschichte des Strafvollzugs," *Süddeutsche Zeitung*, June 16, 1995.

⁸ "Das Liebeskonzil," *Das zwanzigste Jahrhundert* 5 (April-September 1895, 2. Halbband), 522.

⁹ "Briefe an Maximilian Harden," *Merkur* 10 (November 1956): 1091-98.

¹⁰ "Panizza," *Die Weltbühne* 38 (1 September 1919): 321; "Oskar Panizza," *Freiheit* (11 July 1920); "Sprechstunde am Kreuz," *Die Weltbühne* 50 (12 December 1928): 881.

¹¹ *Der Fall Panizza. Eine kritische Betrachtung über "Gotteslästerung" und künstlerische Dinge vor Schwurgerichten* (München: Wohlfahrt, 1895).

¹² "E.T.A. Hoffmann und Oskar Panizza," *Gesammelte Schriften* II/2 (Frankfurt: Suhrkamp, 1977), 641-48.

¹³ Reprinted 1991, ed. by Michael Bauer (Munich: Edition Spangenberg).

¹⁴ Oskar Panizza, Werner Schroeter, and Antonio Salines, *Liebeskonzil Filmbuch*, ed. Peter Berling (Munich: Schirmer/Mosel, 1982), 153-54; reprinted in Uwe Böttjer, *Oskar Panizza und die Folgen - Bilder und Texte zur Wiederaufführung seines Liebeskonzils* (Brunsbüttel: Koog-Haus Press, 1991), 18-20.

¹⁵ Petersen's career as a gallery owner and occasional cocaine smuggler are chronicled in Helmut Höge, "Sag ja zu Jes! Der Berliner Verleger und Galerist Jes Petersen stammt eigentlich aus Flensburg, wurde am 2. November im Moabiter Knast 60 Jahre alt und läuft nun wieder frei in Charlottenburg herum," *Die Tageszeitung*, December 14, 1996.

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¹⁷ Oskar Panizza, *Das Liebeskonzil und andere Schriften*, ed. Hans Prescher (Neuwied: Luchterhand, 1964).

¹⁸ "Ein Pamphlet? Über «Das Liebeskonzil» von Oskar Panizza," *Theater heute* 14.10 (October 1973): 10-12.

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