

Another conviction in a freedom of expression case in Austria

The Homosexual Initiative (HOSI) Vienna was convicted for defamation/libel for calling a parliamentarian of the governing ÖVP a "mental descendant of the brown Nazi myrmidons."

Vienna, 5 May 2006. On 21 April 2006, Kurt Krickler, Secretary General of the *Homosexual Initiative (HOSI) Vienna*, was convicted by the Vienna Regional Criminal Court and sentenced to a suspended fine of 240 € and a reparation of 1.500 €, for having called Walter Tancsits, MP of the governing Austrian People's Party (ÖVP), a "mental descendant of the brown Nazi myrmidons" ("geistiger Nachfahre der braunen Nazi-Schergen").

This critical remark about MP Tancsits, together with another one vis-a-vis the ÖVP, namely that it is "taking ideological views of the Nazis" ("vertritt nationalsozialistisches Gedankengut"), were made by the HOSI in a press release on 4 March 2005. It referred to a debate in the Austrian Parliament about a March 2003 motion by the Green Party that homosexual victims be included in the Federal Nazi Victim Compensation Act, which had only been put on the agenda of the Parliament's social affairs committee after having been parked there since then. The parliamentary majority of the conservative ÖVP and right wing populist FPÖ defeated the motion, and the ÖVP spokesperson on social affairs, Walter Tancsits, defended and justified his party's refusal in the parliamentary debate in 2 March 2005.

In the incriminated press release, the HOSI explained why they had come to these two harsh conclusions. Without endorsing these explanations, the IHF nevertheless considers that they qualify as value judgments permissible in a democratic society and that the press release was part of a political debate on how to deal with the Austrian Nazi past, in particular, how to honor and also materially compensate victims of the Nazi regime.

"The IHF is convinced that Mr Krickler was expressing an opinion, not stating facts, and his opinion was grounded in a serious concern - the persecution of the homosexuals by the Nazi which was not adequately dealt with by the government and by the international community. This was not simply bashing or instigation to hatred and discrimination. Also, Mr. Krickler's opponents had sufficient access to the media to respond to the accusation." According to Aaron Rhodes, Executive Director of the IHF

"Even if opinions sometimes contain exaggerations they are as such legitimate forms of expression in a democratic society and do not deserve to be punished," Rhodes added.

The IHF has consultative status with the United Nations and the Council of Europe.

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The HOSI argued that the ÖVP's continued efforts to uphold the discrimination against homosexual Nazi victims constitute something akin to the ideological views of the Nazis. Furthermore, MP Tancsits did not only defend the strategy, 60 years after the end of the war, to once again postpone considerations about amending the law, but also asked to identify recent cases which were refused compensation. This was perceived as provocative by HOSI, given that there were numerous rejections in the years after the Second World War, and that to date there are nearly no more living survivors.

After an acquittal on 28 April 2005 by the Vienna Regional Criminal Court, referring to a number of judgments by the European Court on Human Rights, MP Tancsits appealed to the Vienna Court of Appeal (OLG), which on 30 January 2006 quashed this decision and remitted the case to the first instance for reexamination. While the acquittal of 28 April 2005 was based on the assessment that „the incriminated text passages constituted value judgments based on a true factual substratum, which are covered by the right to freedom of expression under Article 10 of the European Convention on Human Rights, as it allows also exaggerated and provocative statements”, the OLG's main argument for remitting the case to the first instance was that HOSI committed a so-called “excessive value judgment” (“Wertungsexzess”) by publishing statements, ”that have to be regarded as totally excessive or lack any degree of objectivity”. In view of Austria's history, an accusation that a person is upholding ideological views of the Nazis would amount to a severe accusation, and thus requires a sound cause. The OLG notes that the HOSI had failed to mention Mr Tancsits’ statement in the parliamentary debate, that he preferred an individual recognition and compensation of these victims to a collective one, since a symbolic act had already been created with the 1995 enactment of the "Federal Law to Establish the National Fund of the Republic of Austria for Victims of National Socialism" ("Nationalfondsgesetz").

In taking into account the OLG judgement, the Vienna Regional Criminal Court did not sufficiently considering several rulings of the ECHR, including similar cases of prominent Austrian journalists and politicians (for example Oberschlick, Scharsach and News Verlagsgesellschaft respectively), as well as an OLG ruling in the case of political scientist Anton Pelinka. Thus, once again, an Austrian court has handed down a conviction for expressing an opinion.

Background:

Immediately after the Second World War, the dominant view in Austria was that it has been the first victim of Nazi Germany (and not its integral part). Similarly, the compensation of victims was performed rather superficially; many victims seeking redress were not recognized or compensated at all. Up to 2005, Austria refused to grant compensation and rehabilitation to certain groups of victims, including those persecuted for their homosexuality. Since the mid 1990s, this was due to the ÖVP and the FPÖ, who opposed amendments to this law in 1995, 2001 and 2002. However, in 2003, the Green Party made another attempt and tabled a motion to change the respective definition in the Federal Nazi Victims Compensation Law (Opferfürsorgegesetz - OFG).

Only persons persecuted on racial, political or religious grounds were legally entitled to compensation under the OFG. Homosexual Nazi victims were considered ordinary criminals, as the total ban on homosexuality had already been enacted by the 1852 Austrian penal code; the ban was repealed only in 1971. However, the Nazis did not consider homosexuality an ordinary crime but a social scourge they wanted to eradicate completely. Both in Germany and in Austria after the “Anschluss”, the number of cases and convictions on homosexual grounds, thus, increased tremendously. Many

homosexuals were deported to concentration camps, where they were a distinct group, forced to wear a pink triangle, and not the symbol reserved for criminals. Lesbians were deported for “asocial” behaviour and had to wear the black triangle.

Approximately 800 – 1.000 homosexual victims survived the concentration camps. After the war, all applications filed by survivors with the pink triangle were turned down for lack of a legal basis. And the Parliament refused to include gay and lesbian victims in the OFG, which had consequences in other areas, too. For the calculation of the retirement pensions, the time spent in concentration camps does not account for pension contribution periods in respect of victims not recognized under the OFG, whereas this is the case for SS guards.

In 1995, on the occasion of the 50th anniversary of Austria’s liberation, the newly enacted “Federal Law to Establish the National Fund of the Republic of Austria for Victims of National Socialism” (“Nationalfondsgesetz”) included “sexual orientation” as a basis for a claim. The law was aimed at providing redress for “forgotten” and needy victims of the Nazis. However it does not foresee any legal entitlement to receive compensation from this fund, nor does it provide the same victim status as under the OFG.

Note: The background documents including the rulings in the case can be found on the webpage of HOSI under <http://www.hosiwien.at/?p=266>

For more information:

Henrietta Schroeder, IHF Press Officer, +43-676-725 4829

Joachim Frank, IHF, +43-676-312-2348