Controversial Works of Art. Some Notes on Public Conflicts
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Abstract: Art is a public affair because its meaning is always collectively negotiated. Thus, public conflicts that are triggered by works of art are essentially political and inevitable. The analysis of these conflicts points to the effective limits of acceptability of art in a given social constellation.

The following paper investigates two types of art conflicts: (1) conflicts that, at first glance, revolve around the interpretation and the aesthetic appreciation of an artwork; and (2) conflicts that explicitly call into question the legal legitimacy of publication of an artwork. This investigation aims to reveal the variety of contents and conditions which pre-structure public conflicts. Further, it opens a normative discussion of the current forms of dealing with such conflicts in the mass media and in the jurisdiction. Such a critical discussion is necessary, since the political quality of a society can be assessed on how it relates to its own conflicting nature.

Keywords: public conflict, censorship, culture policy, public pressure, jurisdiction, mediation

Introduction
Art is capable of representing political power. This is something it has been doing for centuries and for this purpose it is undoubtedly still used. This, however, is just one side of the relationship between art and power. Art can sometimes refuse to perform this function. Then it represents opposition and evokes conflict. I would like to address this field of tension, although I do not wish to explicitly advocate an aesthetics of subversion or resistance.

The controversial nature of art is, in any case, a social phenomenon pointing to the currently effective limits of acceptability of artistic claims in a given social constellation. The analysis of conflicts aroused by art may therefore be of heuristic value for the social sciences in general. It may reveal something usually hidden, i.e., the nature of hegemonic culture as a system of norms, institutions and practices giving rise to the distinction between the legitimate and the non-legitimate.

The fact that public conflicts have only sporadically been unleashed over works claiming artistic validity (I deliberately refrain from saying “works of art” since this status is controversial in the conflict) expresses two things: First, the relatively small number of art conflicts indicates that the large majority of art production is conventional (albeit not in a pejorative sense). That is to say, the art world and the public at large do not call into question these works’ claim as valid artworks. Second, the at least partially controversial nature of art is an indication that art is not a self-contained, self-referential social system, as for instance Niklas Luhmann (1994) or Jean-François Lyotard (1986) contend through reference to various arguments. The argument pertaining to the loss of the cultural relevance of contemporary art (as put forward by, inter alia, Hermann Lübbe (1998), and in a different context, by Peter Bürger (1974)) hardly seems compelling.

I do not just view the semantic openness of art concepts and the pluralism of artistic practices as the prerequisites for conflict. Rather, I would suggest to consider art in general as a catalyst for social interactions. Along these interactions people interpret and evaluate the artistic value and the social significance of a particular work of art. Public conflicts over art arise because of the practical relevance of the recognition of
some entity (an object, concept, or performance) as a work of art. Both in legal terms (i.e., copyright law, criminal law, tax law etc.) and in the art market, it makes a difference whether an individual has the status of an artist and whether an object is recognized as an artwork.

The relationship between art and public conflict presupposes the following: Firstly, it is necessary for people to see the difference between art and non-art as significant and to attribute an epistemic value to aesthetic judgements. Secondly, in the case of conflicts in the political realm there must be a public who is interested in artistic matters and is involved in and identified with them. The existence of a goal or of prevalent interests usually accounts for the individual conviction that it is worth fighting over matters related to art.

**Art Conflicts – An Attempt at Analysis**

Some art conflicts are immediately related to private law (e.g., copyright, labour and contract law). This type of conflict is normally not explicitly political. I will not take it into account here in order to focus on conflicts that are primarily public in nature. Conflicts that are fought out in public differ from private, interpersonal conflicts, first, by the large number of individuals affected and second, by the fact that not everyone affected can have a say. The legitimacy of the representatives of various groups who appear as “speakers” of a community is often very questionable. In such conflicts, the public domain can serve as an arena in which the conflict is fought out.

A diverse range of public conflicts are triggered by works of art. Both the initial situation and the intentions of the parties involved vary, so that it is only possible to formulate a general typology of conflicts. Here we can distinguish between two main types:

a) Conflicts that, at least at first glance, revolve around the interpretation and the aesthetic appreciation of an artwork.

b) Conflicts that explicitly question the legal legitimacy of the publication of an artwork.

To the extent that conflicts exist at the level of aesthetic appreciation, aesthetic criteria are explicitly applied. Here one could, for instance, think of a public debate on whether an art project (e.g., Hans Haacke’s installation “Der Bevölkerung” in a patio of the German Reichstag building in Berlin, in 2000) is worth supporting, or of the debates about the significance of a memorial (e.g. Rachel Whiteread’s holocaust memorial on Judenplatz square in Vienna, 1996-2000), or of debates about the architectural quality of a building for public representation. Statements on artistic value cannot be reduced to moral or artistic categories such as good vs. bad, beautiful vs. ugly or innovative vs. traditional. Art judgments are complex in terms of structure and content because they involve different concepts of art, objectives, values and cultural practices. It would thus

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1 In 1998 Hans Haacke was invited to participate in a competition for a public artwork to be placed in the parliament building. His idea, a neon-light installation bearing the inscription “Der Bevölkerung” (“To the inhabitants”) was a reference to the existing inscription on the western Reichstag’s entrance. The last German emperor had commissioned the construction of the building bearing the dedication “Dem deutschen Volke” (“To the German people”) at the end of the 19th century. Haacke expressed criticism of the nationalist connotations of the choice of words used for the dedication; he thought that the state, and parliament, ought to care for everybody living on FRG soil and expressed this by his modified dedication wording. In January 2000 the art committee approved of Haacke’s project. After a controversial public debate carried out in the media, a majority of MPs voted for realization. In September 2000 the light installation was opened to the public. See Diers/König 2001.

2 In 1996, Rachel Whiteread submitted her project for a holocaust memorial on Judenplatz in Vienna. The same year, her project was selected among several others. Realization, however, took another four years, inter alia because excavation work below the memorial site unearthed the foundations of an old, destroyed, synagogue. See Wiesenthal 2000.
be naive to believe that such conflicts are only based on particular differences in taste and appreciation. On the contrary, aesthetic conflicts that are fought out in public almost always touch on basic questions of society. If, for instance, some art aficionados do not find the “Fledermaus” (an operetta by Johann Strauss) staging of Hans Neunfels during the Salzburg Festival (August 2001) to their liking and would like the removal of artistic director Gérard Mortier. In the debates surrounding the “Fledermaus” the issue was not just “what is good interpretation and staging of a work of art?” and the assessment of Mortier’s artistic decisions. Rather, there was also a more general underlying question: Is it more important to systematically cultivate certain traditions, such as the image of the Salzburg Festival, and thus encourage a stable and homogenous identity? Or is it generally more desirable to normalize the way one deals with difference and to thus see cultural “otherness” and deviance as a legitimate social manifestation? If the goal is homogeneity and coherence, then all of these “nest foulers”, “anti-establishment artists” and “decadent nihilists” who “waste our hard-earned money”, have no business in our beautiful country.

Yet if the political community seeks to deal with otherness in a positive way, then it must be willing to recognize that difference and confrontations enrich social life; on the one hand, such confrontations promote active participation in political life. On the other, they can stimulate contact and exchange between social groups who previously had little to do with each other. This can lead to a revision of deeply rooted prejudices and enable mutual understanding.

The second type of conflict that questions the legitimacy of an artwork has to do with the raison d’être of a work of art. Here I would like to mention some well-known examples from recent years: the first showing of Herbert Achternbusch’s film “Das Gespenst” in Graz, 1983, the staging of Thomas Bernhard’s play “Heldenplatz” at the Burgtheater in Vienna, in 1988, Robert Mapplethorpe’s exhibition “Perfect Moment” in Washington, 1989, Otto Mühl’s painting “Apokalypse” at the Vienna Secession in 1998, Chris Ofili’s painting “The Holy Virgin Mary” in the group show “Sensation –
Young British Art” at the Brooklyn Museum, New York, 1999 and Virginie Despentes’s film “Baise moi” in France in the year 2000. One could, of course, add other examples to this list such as Nazi agitation (poems with xenophobic contents, pictures with swastikas) claiming legitimacy with reference to the freedom of art and of artistic expression.

The legitimacy of questioning the freedom of exhibition and publication of a controversial artwork results from the fact that such artworks make inroads into symbolic value spheres that are very important, even “sacrosanct”, to a state or individual social groups. These value spheres comprise the symbolism of a state or religion, general morality, the human dignity of the individual, etc. as objects of legal protection by the constitution. That is to say, these kinds of “strong values” are generally aspects having to do with collective or individual identities (Taylor 1989, Part I). Seen in this light, art conflicts are an expression of profound cultural and political differences that must not be minimized or trivialized.

The Inevitability of Art Conflicts
Art conflicts can be provoked artificially. They are then, as Lewis Coser (1972, 55-64) described them, “unreal” conflicts. In such cases the parties to the conflict are pursuing aims that have nothing to do with the issues apparently at stake. The actual conflict simply is a means for different purposes. Yet some conflicts are not external but stem, as pointed out above, from the given social and hegemonic formation. For any further analysis and understanding of such conflicts it is necessary to grasp their underlying causes.

Some causes lie in the actors’ concrete social constellation and can be revealed through sociological analysis of the situation. Other causes elude such a description since understanding them requires epistemic insight into the process of ascribing meaning and value. The constitution of meaning and value should thus be understood, here, not as a subjective act of consciousness nor as a psychological process of empathy. Instead, understanding is more fundamental and primarily represents, in keeping with Ludwig Wittgenstein, a practical function of the mastery of a language game and a function of the form of life (“Lebensform”).

The “seeing as” – an apt characterization of personages that may be identified by the viewer. Walter Meischberger, former FPÖ secretary general, who recognized himself in the painting, sued for personal insult and tried to have the incriminated artwork removed. After one and a half years of legal proceedings involving various appellate courts, Meischberger won the case. The organiser of the exhibition, Wiener Secession, brought the case before the European Court of Human Rights, where it is pending.

9 In protest against the exhibition of a painting by Chris Ofili, which depicts the Virgin Mary with African features and also includes a collage of a vagina as well as elephant’s droppings – New York City mayor Rudolf Giuliani ordered the cancellation of monthly subsidies to the Brooklyn Museum. The Museum went to court and won. See Dubin 1999, 246-275.

10 The film contains scenes of violence (rape, murder, etc.). The French ministry of culture permitted very restricted viewing only (viewing forbidden for persons under age, viewing after midnight only). Catholic associations then appealed to the Conseil d'Etat which issued a total ban. Two years later the ban was lifted again.


12 In her essay “Judgement and the Moral Foundations of Politics in Hannah Arendt's Thought” Seyla Benhabib (1992, 125) emphasizes the moral grounds of human societies: “Moral judgement is what we ‘always already’ exercise in virtue of being immersed in a network of human relationships that constitute our life together.”

13 “[T]o imagine a language means to imagine a form of life.” And “[true or false] is what human beings say that is true and false, and they agree in the language they use. That is not an agreement in opinions but in form of life.” (Wittgenstein 1953, § 19 and § 241.)
tion and of understanding – indicates that these acts do not glean an objectively given meaning; rather, they are both based on schemes and they contain sediments of previous acts. “Sense-giving” is, in other words, linked to habits and typicity (Polanyi 1969, 181-207), generally effective prior to reflection. This means, they cannot be fully grasped by individuals. For this reason, the horizon of an individual’s understanding is by no means infinite. Understanding is circumscribed by the cultural and practical mooring of an individual as a participant in one (or more) social collective(s). That understanding is embedded in practical life does not, however, imply any determinism. In each process of understanding, the relative indeterminacy of acts and symbols create leeway for interpretation that can be occupied and thus leave each process of understanding open. This is the reason why we constantly find a diversity of interpretation in each and every social situation.

The analysis of the perception and interpretation of an artwork is of central relevance as its reception is essential to its social existence. While artworks materialize in a certain way (as concepts, objects, or performances), they are only actualized through active reception: “Esse est percipi!” (“Being is being perceived!”, Berkeley 1901, § 3, 258). In any case, the forms of reception vary. Humans can hear, see and read artworks in a variety of ways – not so much subjective, but rather inter-subjectively, i.e., in keeping with shared habits, conventions of perception, and patterns of interpretation. The results of perception and understanding are often articulated emotionally (and are thus emotive), because the articulation in language of tacit and semi-subconscious movements of thought that constitute the process of ascribing meaning and value is only possible to a certain degree (Johannessen 1994, 240ff.). While emotional reactions – enthusiasm, astonishment, bewilderment, indignation, etc. – are not free of theory and ideology, they do differ from formulated aesthetic judgements. In connection with such acts of perception and understanding, subjective evidence, i.e., the feeling of immediacy of “sense-giving” plays an important role. The impression of immediacy in grasping meaning generates in the beholder a feeling of certainty that makes it more difficult to explain further the ascription of meaning. Certainty stems from familiarity and identification with one’s own cultural experiences, as there are always certain sentences and presuppositions that are exempted from all doubt. Perception subsequently becomes something that is completely taken for granted.

In summary, the meaning and value of works of art are thus conceived as social constructs which are actualized in varying ways. They are constructs arising in the course of interaction between a work and the context of its presentation and its reception, taking on diverse shapes and forms. The reception of art, moreover, is inseparable from the respective underlying effective cultural practices. We may see art objects as aesthetic, political, or historically oriented, etc., depending on current expectations, interpretative frameworks and institutional contexts.

Reasons, Motives and Interests
The fact that we interpret works of art in different ways generates disagreement, but disagreement alone does not cause conflict. People generally also need motives and reasons to instigate conflict. In a concrete social situation, they have to perceive vital interests whose realization is worth a dispute. Decisive for the concrete analysis of each particular case is, first and foremost, the clarification of the question: “This controversial artwork or artistic act is ‘art’ or ‘non-art’, ‘obscene’, ‘immoral’, ‘offensive’ and ‘defamatory’, or merely ‘socio-critical’, and hence ‘acceptable’ -- for whom?” This question should not lead one to believe, first, that certain positions are generated by individuals and, second, that there is a binding, objectifiable interpretation of an artwork that we can assimilate by means of argumentative rationality. By this I do not mean to
say that conflicts are irrational. I would just like to emphasize that we cannot claim that such conflicts are based on a number of assertions that can be true or false. In addition, the aspect of individual commitment to art has central significance. Conflicts over cultural values and world images correlate with social practices and political positions that cannot be simply changed by the persons affected like pieces of clothing. Conflicts about artworks can emerge spontaneously in a certain sense, since the dissonance of interests and the non-commensurability of differing views on art provide enough material for clashes. Conflicts, however, can also be deliberately provoked as part of a strategy of self-presentation and intervention. In such cases, public conflict is primarily employed as a means of achieving concrete, extraneous aims. Provocation, sharp criticism or actionist forms of intervention are efficient strategic weapons which, if successful, are certainly highly effective. Thomas Bernhard’s play “Heldenplatz” (Vienna 1988), for example, was a well-calculated reaction by the author to the habit of certain members of the political élite to suppress memories of the role played by many Austrians during national socialism – a case in point was the so-called Waldheim affair going on at that time. Schlingensief’s happening “Bitte liebt Österreich” (“Please, do love Austria!”), in Vienna, 2000\(^\text{15}\) deliberately uses provocation as a means of artistic expression. By the same token, political parties can gain status as representatives of certain social groups or as moral authorities. The search for adversaries is, as is well known, a promising approach to unite various social groups behind oneself (Coser 1956, 87-95 and 104-110) – consider, for example, the well-known, controversial FPÖ (Austrian Freedom Party) poster with the text “Lieben Sie Scholten, Jelinek, Häupl, Peymann, Pasterk ... oder Kunst und Kultur?” (1995)\(^\text{16}\), or the persistent and aggressive\(^\text{17}\) campaign carried on by far-right conservative politicians and journalists against

\(^{14}\)“Artworks are tangible realisations of culture, in support of identity.” (White 1993, 7.)

\(^{15}\)During the Wiener Festwochen season, Christoph Schlingensief organised a seven-day happening (11-17 June, 2000). He had five large containers placed in front of the state opera building, which twelve non-Austrian male and female persons were to inhabit for a week. Whatever happened inside the housing containers was transmitted live to the public via cameras and video-screens installed on the public square outside the containers. Each day, the viewers were to decide by voting which two of the container inhabitants should be “deported”. This procedural happening, at first sight, gave the impression of being a parody of the RTL reality show “Big Brother”. What caused a scandal were the symbols used by Schlingensief. On the container roofs, he hoisted an FPÖ flag and two banners, one reading “Ausländer raus” (“Out with foreigners!”), the other “Unsere Ehre heißt Treue” (the sinister historical SS slogan “Our honour is faithfulness”). Both texts explicitly targeted FPÖ politicians. The Austrian minister of justice, Dr. Dieter Böhmdorfer (FPÖ), promptly announced that Schlingensief would be sued for “neo-national socialist activities” (“nationalsozialistische Wiederbe- tätigung”). It was interesting that the minister did not take note of Schlingensief’s critical intention in interpreting the situation. After some weeks, however, the public prosecutor dropped the case. For a documentation of the event, see Lilienthal/ Philipp, 2000.

\(^{16}\)The FPÖ habitually tried to incriminate cultural politicians and artists. The main accusation was that they were using art as a pretext for personal enrichment or stabilization of political power.

\(^{17}\)The term “aggressive” was also used in the report on the political situation in Austria in 1999 by the so-called “three wise men”. The report characterises the FPÖ as a “right wing populist party with extremist expressions”. It also states that “one of the most problematic features concerning important members of FPÖ are attempts to silence or even to criminalize political opponents if they criticize the Austrian government”. (Ahtisaari et al. 2000, § 92-93, 27f.)

Being involved in law suits creates enormous economic pressure for many cultural institutions. According to a verbal communication by a Secession board member, the cost of the legal dispute between Walter Meischberger and Wiener Secession over Otto Mühls painting “Apokalypse” has so far reached € 40,000. The museum deliberately accepted the financial risk of rejecting out-of-court settlement because it wanted to defend its autonomy as an art institution against inadmissible censorship attempts by FPÖ.
Elfriede Jelinek.18 The analysis and explanation of the formative conditions of conflicts must therefore try to reveal possible underlying causes and background interests. Such an analytic approach is necessary because the opponents usually define their positions but do not state their central interests and motives. Many conflicts that are carried out in public are explicitly linked to concrete political intentions. On the one hand, a number of artists are themselves politically active and see their artistic work as engaged, political, interventionist art. They make a statement on topical social issues and sometimes even dare to address taboo themes (sexuality, violence, discrimination etc.). On the other hand, there are a number of cultural projects and cultural events that are financed by the government and are linked with certain objectives, for instance with the intention of creating a link between “nation” and “culture”. This is partly true of the design of country pavilions at the international art biennials, as well as of the focus on one particular country at the annual Frankfurt book fair. The presentation of art in such contexts is seen as a means for constituting a national-cultural identity. Subsequently, at least in the minds of some cultural politicians, certain normative functional expectations are triggered which art is to fulfil. The dispute about the adequacy and effectiveness of art selection with regard to the fulfilment of such normative expectations is pre-programmed. Even when aesthetic aspects are the focus of public dispute, political and ideological motives are central. In other words, in conflicts that are deliberately fought out in public, the public domain is used as a means for realizing specific goals. This indicates that artworks are often place holders for something else. To the extent that artworks are used (or abused) as proxies for conflict, aesthetic and symbolic confrontations have an immanent political character. The Gramscian concept of cultural hegemony is thus relevant for understanding this dimension of art conflicts.

Dealing with Conflicts
The American political scientist Russell Hardin defines conflict as a state in which “one party can only gain if another loses” (Hardin 1995, 26). This remark seems plausible to the extent that it underscores the antagonistic moment of conflicts. However, it oversimplifies matters, since a resolution of conflicts is not just an either-or result. It can also be achieved by settlement. Ralf Dahrendorf astutely noted that the maturity of a society can be assessed by observing how it relates to its conflicting nature (Dahrendorf 1965, 161-175). It is well-known that conflicts are phenomena occurring in all social formations and political orders. Value conflicts represent a special sort of conflict. They are, as William Gallie (1962, 122) noted, “head-on conflicts of interests or tastes or attitudes, which no amount of discussion can possibly dispel; we are consequently inclined to dismiss the so-called rational defences of the contesting parties as at best unconscious rationalisations and at worst sophistical special pleadings”. The state (legislation, jurisdiction, political system) has the task of intervening in conflicts to regulate and mediate. The responsibility of a liberal democratic state is also to constitute and promote a public

18 The writer Elfriede Jelinek has repeatedly commented political events in public. This constituted a violation of a taboo, since certain political actors do not like artists to make public political statements. Defamatory texts attacking Jelinek were appeared in the right-wing press. To quote just one example, on 17 December 1989, the poet-in-residence of the Kronen Zeitung, Wolf Martin, published the following poem in this daily newspaper: “(...) So lebt Elfriede Jelinek als wie die Made in dem Speck/ Sie ist als Kummerl so exotisch/ so interessant pervers-erotic/ und schöpfte sogar aus ihrem Frust/ der Auflagezahlen höchste Lust.” (“So, E.J. lives like a maggot in bacon/ as Communist she is so exotic/ so interesting and perverse-erotic/ and derives from her frustration/ the greatest pleasure of high circulation figures). (Wolf Martin in Kronen Zeitung, quoted in Janke 2002, 26.)
realm with the greatest possible pluralism. The concept of public realm designates a relatively diffuse sphere in which numerous members of a community come together to communicate, to present their interests and opinions and to debate them – Jürgen Habermas (1992, 435f.) refers to it as a “network for communication”. Yet the public realm is not homogenous and transparent. A public forum produces a counter-public, contradiction and resistance. Thus, there are constantly several public realms that are formed in public space which, however, only partially correspond to the heterogeneity of the social field.

In the following, I will discuss two usual ways of conducting conflicts, i.e. via the media and in court, and, in addition, I will also analyse a third way of coming to terms with conflicts, i.e. through mediation as a novel way of resolving public discord.

The Media Public Sphere as an Arena
In modern societies, public places are largely defined with participation by the mass media and other political organizations. The resulting forums are stages for (self-)staging and (self-)representation. As Erwing Goffman pointed out, any public appearance is governed by the indelible awareness of the actors that they are being watched by a mass public whose attention and empathy they have to win. In the mass media, the ability of the actors for discourse is eliminated by the media’s growing visuality (particularly on TV and in the Internet). During a public appearance in the media, the disputing parties often do not appear to be very interested in convincing the other side of the correctness of their own points of view. Of prime importance is successful communication of certain messages to the general public. As Jürgen Habermas (1990 (1962), 267) observed as long as forty years ago, “die Öffentlichkeit übernimmt Funktionen der Werbung” (“the public takes over advertising functions”). In the media public, there is communication but generally not communication in the sense dialogue, but rather in the sense of propaganda. In the worst case, nothing is taboo for those intent on publicly projecting their own image; they frequently employ rhetoric that discriminates and demonizes the adversary, so as to generate empathy for themselves. In this connection one recalls the heated debates of the early 1990s carried on in the US press about so-called “obscene” art and “community values”. The conflict was inter alia sparked off by an exhibition of photographs with explicitly sexual content by the photographic artist Robert Mapplethorpe who had died from AIDS in 1989.19 Conservative writers not only questioned the justification of using public funds to subsidize exhibitions of “obscene works”, they also wondered whether homosexuals, who at that time were closely associated with AIDS, constituted a potential danger to the public. Another problem affecting democracy, which arises in this connection, is the current framework in which the media operate. The existing market concentration (for Austria, see Tschmuck 2003, 259-283), excessive marketing of public forums, as well as intensive interchange between media companies and political actors, have a negative effect on the way in which political concerns unfold and are articulated. Since access to the media platforms has become an extraordinarily expensive commodity, people’s real access to the media public is everything but free or egalitarian. The deficits in democracy that can be noted in today’s media landscape can hardly be emphasized enough. The present media public is definitely not the discursive public that many democracy theorists desire.

On the basis of these critical considerations, the public strikes me as a place of political

19 Public debates about the Mapplethorpe case were documented in Bolton 1992, 37-88. For recent public campaigns against artists in Austria, see Klimitsch 1994, UNIKUM 1996, Janke 2002, as well as http://www.ewigesarchiv.at (dated 12 November 2003).
conflict in general. It is not an adequate medium for finding consensual problem solutions, i.e. the minimum conditions for a dialogue are often not really given. The power asymmetry which results, for instance, from unequal access of conflicting parties to the media public due to differences in information, not to mention the different resources that can be mobilized in each case, is decisive for the influence that can be brought to bear on the public process of opinion formation, and it also exerts massive pressure on political decision-making authorities (e.g., also on law courts). In such cases the main issue is a claim for hegemony – “Kulturkampf” (cultural battle) is a fitting metaphor for this. What prevails is not the better argument but the stronger fighter. The public domain as neutral space for the negotiation of ideas and suggestions has revealed itself to be a fata morgana and part of the ideology that legitimizes existing oligarchic structures as “democratic”.

The Courts as Resolvers of Conflicts

If a party to some conflict wants to prevent the staging, exhibition or publication of some work of art, it may have to enforce its objective by means of a court decision. Recourse to the courts as a way of enforcing one’s interests is usually the option when the plaintiff believes the dialogue has failed or when it seems to be an ineffective means of pursuing the plaintiff’s interests. Asking the courts to impose a ban or sanctions against a disliked artist is, however, only possible if a criminal offence has been committed – to be more precise, if some legal interest protected by the constitution (civil rights, personal rights, etc.) has been violated by some artistic activity or work. This often involves disturbance of religious peace or denigration of religious doctrines or state symbols, or violation of an individual’s rights (slander, violation of highly personal domains of life or honour), sexual offences (violations of pornography law, morality, public decency, or violation of laws protecting children and young persons).

In most European countries preventive censorship is banned by their constitutions, but legislation refers to “intrinsic limits to the freedom of art”, thereby recognizing the general right of each individual to appeal to a court to enforce a ban on publication under certain conditions. The precarious thing about such measures is that such a ban radically negates the existential right of the artwork in question, since a work can actually cease to exist once its publication is banned (Zembylas 2000, 34-49). The existence of an artwork is contingent on its being perceived – perceived by a communicative and art-interested public.

A court-imposed ban of an exhibition or a performance is a repressive act of the state, which is justified by stating that the freedom of art is not without limits. Who would want to question this? The European Court of Human Rights has, however, noted that this freedom of opinion and artistic expression must also apply to forms of expression that “violate, shock or upset the country or a part of the population” (quoted in Frowein/Peukert 1996, 384). The distinction between a warranted claim to guaranteed freedom of art and abuse of artistic freedom involves a value judgement which – apart from protection for an unwilling observer and some other cases (see Hoffman 1991, 40) – is generally difficult to argue from a liberal point of view. There are cases in which transgressions of boundaries and violations of taboos are productive in the sense that they challenge the meaning of taboos or because they take on non-reflected or suppressed social issues that have yet to be addressed. There are undoubtedly also cases of boundaries being transgressed that a liberal-democratic society cannot tolerate – for instance, racist utterances or incitement. One could now ask whether, in principle, a court hearing is the right medium for dealing with art conflicts involving the political domain, since those usually are cultural value conflicts. Some experts on constitutional law describe this as cases that overtax the law or individual judges (Luf 2000, 22). This
claim is, in my view, really worth reflecting upon. We must examine it in connection with an analysis of the process of court decisions.

In the Austrian legal environment, artistic freedom is protected by the constitution. Basically, freedom of art may only be limited if it massively violates other constitutional provisions. For instance, in the case of obscenity or denigration of religious doctrines, the court must first ascertain whether such circumstances actually exist. Second, the court must assess whether the interests represented by the plaintiff justify the limitation or suspension of the freedom of artistic expression on the part of the defendant. In various legal texts we can find clauses whereby the law aims to help the courts reach a decision. Such clauses, for example, take into account “the moral feelings of the average person”, or “of the moral values of present-day society”, or they mention the existence of a non-specified “warranted offence” (berechtigtes Ärgernis).

What at first perhaps seems possible to grasp proves to be completely diffuse in practice. No one can say who the “average person” is, which values are recognized by present-day society, or how one can determine whether some recognized public nuisance exists. All these concepts are misleading. Even if social statistics could infer the normative orientation of the “average individual” on the basis of complex sampling procedures and representative analyses, the actual findings would not have any special bearing on the possible limitation of the freedom of art. The constitutional guarantee of the freedom of artistic expression implicitly presupposes that art requires special protection, mainly because it cannot or must not always adhere to average values. If it were to do so, or if it were required to do so, then there would be no reason at all for the legislator to issue a guarantee for the freedom of art. (Of course, there will be those who will raise the objection that the guarantee of artistic freedom can only be understood as a right to prevent arbitrary action by state authorities, which implies no subjective rights or entitlements. That is to say, artistic freedom cannot determine whether basic rights of third parties are worthy of being protected.) Since concepts like “recognized public nuisance” and “average individual” are diffuse points of reference, though commonly used in legislation, they often have fatal and not-so-liberal results (Zembylas 1997, 43-53).

A paradigmatic example of this issue is the legal dispute about performance of the film "Das Liebeskonzil" (directed by Werner Schroeter, 1981) in Austria. The film is based on a satire written by Oskar Panizza in 1893. The satire contrasts the close connection assumed to exist between sin and sexuality according to Catholic doctrine with the debauchery committed at the court of Pope Alexander VI of the house of Borgia.

The film takes up the satire’s arguments, accusing the Catholic church of misusing sexual morality as a means of secular repression. In the event, the Innsbruck bishopric brought the case before the state prosecutor, seeking an indictment of film performances by the Otto-Preminger-Institut, an association supporting and promoting independent cinematographic culture, for violation of § 188 StGB (denigration of religious doctrines). One day before the planned first performance, the film was shown in private session, in the presence of a judge, who subsequently ordered seizure of the film. The organizers appealed against this decision to the higher court at Innsbruck but lost the case. This decision was based on the film’s supposed anti-religious content attacking the Catholic church in a provocative way. After passing through all Austrian levels of appeal, the case was brought before the European Commission on Human Rights. This Commission concluded that the basic right of freedom of expression had been violated, so the case

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20 See “Herabwürdigung religiöser Lehren” (denigration of religious doctrines) §188 StGB, as well as a number of sentences in connection with sexual offences (e.g. OGH, 6 July 1971, 10 Os 80/71; and OGH, 11 June 1975, 9 Os 65/74).

21 Oskar Panniza was convicted for blasphemy in 1895 (see Leiss 1971, 138-140).
went on to the European Court of Human Rights (ECHR). It is impossible, in this paper, to go into the complex considerations of ECHR. It decided, however, that in this particular case an international court of justice was unable to ascertain any uniform European standards and, on this basis, ECHR concluded that “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.” (Quoted in Holzleithner 2000, 60.) Therefore, the Austrian state was called upon to prove to the European court that the chosen restrictive measures had been indispensable for protecting religious and social peace. The public prosecution argued, successfully, that 87% of Tyrol’s population was Roman Catholic; the film would have contemplated the religious feelings of many Tyrolians and thus constituted a public nuisance. In order to prevent people from feeling attacked for their religious faith, it was necessary to seize the film. The ECHR agreed with this line of argument and upheld the sentence. What was left out of consideration was that the film had been intended exclusively for audiences older than 17 years and that the Otto-Preminger Institute, as avant-garde association, would only attract specialized audiences. Anyone not wishing to view the film could easily have avoided the planned five performances. What was most problematic in the whole issue, however, was the construct of the “Catholic Tyrolians”. One may fairly assume that a large majority of Catholic Tyrolians condone neither debauchery having taken place at the court of a historical pope, nor do they agree with all current doctrines on sexuality propagated by the Catholic church. Tyrolians of Catholic faith are unlikely to be so intolerant and latently aggressive that they will resort to repressive force because of a film that is critical of religion (or possibly even blasphemous). In my opinion, the argument that 87% of the Tyrolians would be insulted by the film and that it threatened religious peace, was highly exaggerated. The freedom of art, as a basic right, must not be tied to any majority. Basic freedoms, particularly of minorities, must be upheld strongly.

Jurisdiction as Instrument of Political Control – The Austrian Situation as an Example

The far-reaching issue of court decisions on the freedom of art can also be analysed empirically. We can speak of three phases:

I. Until the mid seventies, courts regularly addressed the issue of art or non-art in an explicit way and tried to deny the artistic nature of incriminated artworks and happenings (Viennese Actionism exemplified by Günter Brus, Otto Mühl (1969); Peter Weibel, Valie Export (1971) and others). Whenever the judges were unable to discern “genuine artistic aspiration” and “serious artistic values” (Supreme Court, Vienna, 1971), it was considerably easier to apply criminal law and to impose relatively severe punishment on incriminated artists.

II. As part of the liberalization efforts by Bruno Kreisky’s Socialist government in the seventies, a slow change of climate could be noted, which culminated in the decree on guaranteed freedom of art (article 17a, StGG, 1982). The courts then changed their line of argument. To avoid court decisions tainted in an unwarranted way by personal preferences, the judges were forced to evade the question whether a particular action or work was, or was not, “art”. The reasoning of the court in the case of Achternbusch (Landesgericht, Graz, 1984) is exemplary: “One could not get around stating that it was in fact a work of art ...”. (Quote taken from Öhlinger 1985, 193.) The condemnation of an artwork took place by stating the criminal circumstances and by arguing that artistic freedom is not stronger than the protection of

22 On the sentence, see Österreichische Juristen Zeitung, Series A, no. 295-A, 1995, 154; as well as http://www.dhcour.coe.fr/Hudoc1doc\HEJUD\sift\482.txt.
other basic rights.

III. The third phase started in the nineties. The supranational jurisdiction of the European Court of Human Rights rendered it increasingly difficult to prosecute artists under criminal law (see Frowein/ Peukert 1996, 383-408). (In 1965 it had still been possible to prosecute Günter Brus for his action, “Wiener Spaziergang” (“Vienna Stroll”), on the grounds of disturbance of public safety and order. Brus had simply covered himself with white paint and intended to walk through the centre of Vienna.) There was a certain danger that the sentences would be branded as too “conservative” or “reactionary”. (The impression that court decisions were too conservative or otherwise politically tainted might undermine public trust in the objectivity of justice and would impair public acceptance of particular sentences.) Consequently, allocation of money, or rather, cutting or withdrawing public art funding became the new means of exerting political pressure on unpopular art.23

In effect, using public art subsidies as a means of exerting political pressure constitutes indirect censorship. Although the freedom of performing and publishing art is not infringed upon, the withdrawal of funds effectively restricts creative activity. The justification of such measures follows a simple pattern: someone claims that a certain work of art does not meet the taxpayers’ taste; next, there are calls not to waste taxpayers’ money. The argument that “our people don’t want this” (i.e., reference to “the people”) is, however, not characteristic of a democratic mindset. Art has always been part of minority culture – unless it directly represents political power. It would be impermissible to interpret guaranteed freedom of art as a privilege enjoyed by artists; rather, it simply protects artists as reasonable and fair compensation for the traditional asymmetric power relations. The populist call to protect the “interests of the people” is more commonly found in totalitarian systems, just as dictatorships hide their authoritarianism behind a constructed “volonté générale” (public will). At times, though, the language of populist cultural politicians becomes clear and straightforward. For example, Andreas Mölzer, former cultural adviser to provincial governor Jörg Haider (Austrian Freedom Party, FPÖ) in Carinthia, issued warnings against politically opposed artists and accompanied the withdrawal of funding with the outspoken statement: “...after all, you shouldn’t bite the hand that feeds you.”24 This statement by Mölzer clearly demonstrated that the FPÖ is using public subsidies as a means of disciplining artists and influencing their behaviour.

In such cases of politically motivated withdrawal of public funds, some politicians take advantage of a legal vacuum, since the function of public art funding is formulated in very general terms. While stating qualitative criteria for “development and cultivation of the arts”, the legal aim of Federal Arts Promotion Act (§1 Abs. 2) is basically permissive and does not warrant a ruling on art by the state, nor any ideologically or party-politically motivated art funding policy (e.g. against “die linke Kulturschickeria” (left-wing art snobs)25). It is still legally very difficult, if not impossible, to dispute a decision by federal or provincial authorities on cultural policy issues. Funding the arts is, to some degree, an act of free will by the state26, so public authorities act almost like “private

23 There are numerous examples of initiatives affected in this way, e.g. “Public Netbase”, a cultural association in Vienna mainly concerned with critical review of electronic information media (www.t0.or.at/t0), or “UNIKUM”, a cultural centre in Klagenfurt organising critical art projects and various cultural events (see www.unikum.ac.at ), or the avant-garde dance group “Ikarus” in Carinthia, etc. For documentation, see www.ewigesarchiv.at; www.netzkultur.at; www.igkultur.at.
24 Andreas Mölzer, in an interview in the magazine Format, no. 15, 1999, 142f.
25 Jörg Haider and other FPÖ politicians are constantly using this derogatory expression.
26 The Federal Arts Promotion Act (§4 (4) explicitly states that it does not provide for “any individual right to receive subsidies”.

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patrons”. This opens up a wide range of possibilities for cultural politicians to pursue their particular interests.

**Mediation – An Alternative Way of Dealing with Art Conflicts**

In addition to media visibility and legal dispute, there is also the option of conflict mediation. The conditions for sensible use of mediation are very restricted, however. If a conflict is “specious”, that is, if it is artificially produced by one of the parties to this conflict because it needs a pretext for achieving certain political goals (e.g., to stir media attention, or to mobilize followers and various groups of supporters), then dialogue is neither possible nor desired.

In the case of “real” conflict, the path to dialogue should be the first choice. Generally speaking, I believe that it is better when people recognize their own responsibility for their conflicts and do not leave decision-making to their lawyers or to law courts. Moreover, the requirement that a lawyer must represent one party to the conflict only is often counter-productive and adverse to settlement. Enforcing a one-sided solution to cultural conflicts often prepares the ground for future disputes. Dialogue between conflicting parties – possibly with the help of neutral mediators – can often prevent unwarranted criminal conviction of individuals, often the outcome of litigation, or aggravated animosity triggered by constant moralistic incriminations by the media. I would therefore appeal for adopting a dialogue approach – even though this may not seem very “realistic” – which could lead to a better way of resolving conflicts over art.

Of course, the initial question to be discussed would be: Is communication and constructive dispute on cultural or ethical problems possible at all? (Communication, here, is not simply referred to in a purely technical sense, but rather the concept of communication must, as Jürgen Habermas (1992, 140) emphasizes, be conceived in a normative way, as well.) In my view, the answer cannot be a comprehensive yes or no, but rather a ‘more or less’ that must relate to communicative contexts. Some analytic philosophers believe that the opacity and lack of precision of everyday language can only be eliminated by means of linguistic critique. However, the project of cleansing language from metaphysical and logically inconsistent old burdens can today be regarded as having failed or, at best, as epistemically impossible to implement. Linguistic analysis, of course, continues to be a useful instrument, but issues related to the concept of art transcend its scope and competence. Here, as analysis alone is not enough, one has to proceed in a practice-oriented and interpretative way.

The structure of communicative practice is, in any case, controversial. Some adhere to a notion of communicative rationality (e.g., Karl Jaspers, Hannah Arendt, Jürgen Habermas). Others, most notably some post-modern thinkers like Jean-François Lyotard, insist that consensus – genuine reconciliation – can never be brought about among the various normative viewpoints and forms of life. Everything thus revolves around power and domination, which are the basic determinants of any conversation. I would like to take an intermediate position and assert that constructive dialogue between conflicting parties may be possible under the following ideal-typical conditions:

- **Common epistemic basis**: Constructive debate is possible if the parties involved agree on common ground, e.g., if they agree on common definitions or the shared recognition of some “authorities” or “standards” (Janik 1989, 109-115). (If the epistemic dissonance is especially pronounced, as, for example, among representatives of a critical avant-garde and ultra-conservatives, mutual understanding is impossible.)

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27 “[T]he ideal of correctness is a deadening one, that it is in vain to set up a language police to stem living developments.” (Waismann 1962, 117.)
Engagement: The opponents in a debate must at least partly believe in the meaningfulness of the dispute, i.e., in the possibility of distinguishing between legitimate and unfounded arguments. It would be cynical and meaningless to initiate a process of mediation if a party to the conflict is not willing to be honest.

Veracity and uprightness: A debate on substantially controversial concepts can only succeed if the opponents encounter each other with a minimum of goodwill, respect and recognition. This is the normative imperative for any mutual communication. (A state that must be eliminated is the tendency to no longer discuss the facts at hand but to summarily view the opposite side as the actual problem.)

Epistemic modesty: The opponents should accept the limits of argumentative rationality and justification. The most difficult thing to achieve is a situation where the opponents give up the goal of trying to defeat each other at any price. It is better to leave with an agreement that both recognise the position of the other, even if they are not convinced that the other position is right.

Relative equality of negotiating positions, that is, fairness: One of the most frequent causes for a negotiation to not materialize or to fail is the extreme power asymmetry prevailing before a conflict, or appearing in the course of communicative interaction. The basic conditions for articulating and defending the various positions and interests must be optimized for all conflicting parties.

Linguistic style: Since aesthetic-symbolic conflicts are value conflicts based on different ways of life, ideologies and beliefs, communication may improve if value-oriented, moralising language is avoided.

The complexity of art conflicts due to partly historical and partly socio-cultural causes, render simple, overall solutions impossible. Exclusion of media presence is often well-advised, as otherwise the actors feel compelled to concentrate on self-promotion. Moreover, media reports sometimes tend to use a moralizing linguistic style hinting at scandal and thus sabotaging confidence-building measures. Engaging in a dialogue and getting to know the other side demands a lot of energy and time, but also facilitates learning processes that represent important chances for growth. What is gained is a richness of experience and social competence and, subsequently, a more circumspect way of dealing with foreignness and otherness. If those involved succeed in fostering greater understanding toward those who think differently, then this is a significant contribution to the quality of social and political life.

Literature