Cultureel ondernemerschap. Een ethische en juridische benadering
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Summary

Cultural entrepreneurship – an ethical and legal approach

In this doctoral thesis, I have made an ethical and legal analysis of what I call the 'economization' of cultural policy in the Netherlands. The government actively promotes cultural entrepreneurship among subsidized cultural institutions, while cutting back on subsidies for art and culture. By forcing these cultural institutions to rely more on market competition, the government aims to find more public support for its policy.
By taking into consideration the economic value of art and culture and by requiring subsidized cultural institutions to exploit their commercial potential, the government has changed its view on cultural policy. Regulations on *cultural* entrepreneurship may however lead to new difficulties. Take for example the case of *Wereldmuseum Rotterdam*. This museum focuses on ethnology and has long relied on subsidy from the municipality of Rotterdam. After a cutback to its subsidy, the museum was able to earn barely enough revenue. To avoid liquidation, the museum director radically changed the revenue model and started developing commercial activities, thereby neglecting the cultural purpose of the museum. This case led to public commotion.
The economization of cultural policy raises several questions. My central research question is: How does the goal of stimulating cultural entrepreneurship relate to the legitimacy of cultural policy and which limits does the law set on imposing regulations on subsidized cultural institutions to achieve this goal?
I have limited my research to the policy of the Minister of Culture. As for the definition of art and culture, I have used the term 'cultural expression' in line with the Cultural Policy Act. Briefly stated, something is a cultural expression if the Minister of Culture has indicated it as such. Furthermore, I have used the term 'public interest', which is defined as a social interest of which the representation is required for society and carried out by the government, because the interest would otherwise not be represented.

Chapter 2 – Legitimacy and norms
In the second chapter I set out my methodology by answering the first sub-question: Which approaches are relevant to the assessment of whether the government has acted legitimately? Although there are other approaches, I have described two of them in which the law plays a role: the ethical and the legal approach. Both approaches are normative, meaning that they distinguish between what the law is and what the law should be. The legal approach is formal: in order to act legitimately, the government *must* take it into account. In the legal approach, the law is *the* source of legitimacy. The ethical approach on the other hand is informal: the government is not required to take it into account, but by not doing so, it may erode the legitimacy of its actions in the long run. In the ethical approach, the law is *a* source of legitimacy. As it is difficult to assess whether the government has acted ethically legitimate, a practical method would be to use the idea of minimal moral legitimacy, that is to assess whether government action is at least in accordance with the Constitution.
The government can use norms to legitimize its actions. Following Dworkin, I have drawn a distinction between principles, rules and policies. The first two norms are legal norms. Rules are laid down in valid legal documents and applicable in an all-or-nothing fashion. Principles on the other hand are fundamental legal conceptions that derive their applicability from society itself. They do not prescribe a specific outcome, but rather point in a certain direction. I argue that principles play an important role

in cultural policy, as they provide a framework for the government to assess its legitimacy. By making an appeal to one or more principles, the government shows that it is pursuing some form of justice.
In addition to principles, I have paid attention to fundamental rights. These rights qualify as rules, as they are laid down in legal documents – international treaties and the Constitution – from which they derive their applicability. Fundamental rights have the character of principles however, as they are not applicable in an all-or-nothing fashion and need to be considered on a case-by-case basis. Their weight depends on the circumstances of the case. Finally, fundamental rights are useful for identifying the underlying principles they aim to express.
Because the Minister of Culture enjoys a great deal of discretion in developing cultural policy, arguments of policy play an essential role. The minister can for example make an appeal based on economic interests to legitimize his policy. There is no hierarchy between principles or policy, although they serve other purposes.

Chapter 3 – Cultural rights
In order to answer the central research question, I first had to make an ethical and legal analysis of the legitimacy of cultural policy, using law as a source. My second sub-question therefore was: How does the law protect the interests of art and culture? Which tasks does the law assign to the government to look after those interests? In the third chapter I made an analysis of the fundamental rights in treaties and the Constitution that specifically refer to art and culture. These rights are known as cultural rights and can be classified as fundamental social rights, which impose best-efforts obligations on the government. Furthermore I have looked at the freedom of expression, which is sometimes explicitly linked to artistic freedom. Unlike cultural rights, the freedom of expression is a classic fundamental right.

There are several treaties that contain cultural rights. A prime example is Article 15 of the International Covenant on Economic, Social and Cultural Rights. On the basis of that article state parties recognize the right of all individuals to – among other things – take part in cultural life. Steps to be taken by state parties to achieve full realization of this right include those necessary for the conservation, development and diffusion of culture. The Committee on Economic, Social and Cultural Rights has interpreted culture as a broad, inclusive concept, encompassing all manifestations of human existence. According to the committee, the right to participate or take part in cultural life has three components: participation in, access to and contribution to cultural life.
Other treaties that I have analyzed are the International Covenant on Civil and Political Rights, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the Charter of Fundamental Rights of the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Because of its impact on national law in the Netherlands, I have paid specific attention to the ECHR and the case law of the European Court of Human Rights on the freedom of expression.
Last of all I have looked at Article 22, paragraph 3, of the Constitution, according to which the government creates conditions for social and cultural development and leisure activities. The significance of that article is debated, as it is unenforceable at law. The article may however play a role as a basis for the political debate between the Minister of Culture and parliament.

The result of my analysis is that the interests of art and culture are firmly laid down in cultural rights and the freedom of expression. Cultural rights are however vaguely worded and only impose best-efforts obligations on the government; they are not legally enforceable. Although they do impose certain tasks on the government for the pursuit of cultural policy, the government is free to fill in these

tasks. On the other hand, cultural rights have an ethical basis. As they also aim to express the underlying principles, I have used them to identify the principles that underlie cultural policy.

Chapter 4 – Principles

My third sub-question was: Which fundamental legal conceptions (principles) underlie cultural policy? Knowing which principles are relevant for cultural policy can elucidate why the government is allowed to – or even should – implement cultural policy. Both cultural rights and the literature on the subject provide indications.

In the fourth chapter I have distinguished four principles that are closely connected to each other: freedom, equality, diversity and subsidiarity. Freedom is the main principle from which the other principles are derived in some way. The principles of freedom, equality and diversity concern the ways in which the government should organize society. The principle of freedom requires the government, on the one hand, to give citizens as much freedom as possible to do what is within in their power without interference, but on the other hand implies that the government should empower citizens to develop themselves, for example by giving them the chance to get acquainted with a broad range of cultural expression. The principle of equality implies that the government should make an effort to give citizens who are in an unequal position, for example because they have less money to spend, access to art and culture. To avoid the availability of cultural expression from becoming too one-sided, for example because it is dominated by the culture of the majority, the government should also make an effort to guarantee cultural diversity.

The principle of subsidiarity implies that the government should not be involved in establishing cultural expression on its own. Instead, it should empower society to create art and culture; the government only creates the conditions for society to do so.

To summarize, cultural rights and the principles of freedom, equality, diversity and subsidiarity underlie cultural policy. These rights and principles make it possible to assess the ethical legitimacy of new developments in cultural policy. Their legal function is however limited, as these rights and principles are not legally enforceable.

Chapter 5 – The economization of cultural policy

In the fifth chapter I have made an analysis of developments in cultural policy that relate to economization to answer my fourth sub-question: How do government expectations concerning cultural entrepreneurship undergo change? How does cultural policy evolve in this respect? I have primarily focused on policy notes from the various ministers who have been responsible for cultural policy since 1982. These notes give voice to their thoughts about art and culture, the implementation of their task and their priorities.

From the view of point of the government, I have defined ‘economization’ as making a greater appeal to market competition instead of public norms to coordinate society. Economization therefore implies that the government to a lesser extent takes responsibility for the interests of art and culture and to a greater extent leaves that responsibility to society itself, in particular to the individuals who have an interest in it.

The economization of cultural policy in the Netherlands first took flight in the early eighties of the twentieth century. Ever since, eight ministers have – to a greater or lesser extent – contributed to this economization, regardless of their political colors. Two years were especially important. In 1999, cultural entrepreneurship was officially introduced as a tenet of cultural policy. In 2011, the government made significant cutbacks to the culture budget, which was partly legitimized with the argument that cultural institutions should rely more on market competition rather than on the government.

Over the years since, government expectations concerning cultural entrepreneurship have increased. Cultural institutions that wish to obtain subsidies must be more entrepreneurial, generate more revenue and give more frequent accounting of their activities and results on the basis of quantitative data. Finally, the Minister of Culture pays more attention to the economic interests of art and culture, for example in relation to the gross domestic product. Since 2005 the Minister of Culture has also developed policy for the creative industries in association with the Minister of Economic Affairs. This policy overlaps with cultural policy.

Chapter 6 – Economization in perspective

My fifth sub-question was: How does this development - that is, the economization of cultural policy - relate to the principles that underlie cultural policy? In the sixth chapter, I have answered this question in combination with the sixth sub-question: How does cultural entrepreneurship fit into that relationship?

The law offers the Minister of Culture a great amount of discretion when developing policy. From a legal perspective, cultural rights do not stand in the way of representing economic interests in cultural policy. This means that aspects of economization are formally compatible with the Constitution. From an ethical perspective however, this is a meager conclusion. To assess whether economization meets the minimal standard of moral legitimacy, it is also important also to take the fundamental and normative character of cultural rights and principles into account. While these rights and principles determine that the government should show some effort for the public interests of art and culture, economization seems to indicate a movement in the opposite direction: the government seems to be trying to make cultural institutions accept financial responsibility for representing social interests.

To make an ethical assessment, I have taken two approaches to art and culture into consideration: an economic and a cultural approach. The two approaches value art and culture differently and take different views on the role of government. The economic approach considers the value of cultural goods and services to be the price that consumers are willing to pay for them. The government should refrain from interfering with the free market, unless there is good justification to do so. In the literature, there is no consensus on the question of whether this is the case for cultural subsidies.

According to the cultural approach on the other hand, the value of art and culture depends on what people think is important to themselves or society. A broad range of views could fall under this approach. This means that cultural value is normative: it cannot be reduced to a financial valuation.

In principle, the cultural and economic approaches can coexist. Art and culture can have both cultural and economic value. As long as these values are not mutually exclusive, there will be no friction between them. Economization can however disturb this balance when the economic value becomes dominant and displaces the cultural value. This is due to the fact that the two approaches are not founded upon the same rationality. While the economic approach is instrumental, the cultural approach is substantial, focusing more on the intention to act.

By taking responsibility for the social interests of art and culture, the government creates scope for cultural value. As market competition becomes more influential, due to the government distancing itself, the scope for cultural value diminishes. There are three fundamental objections to this development. In the first place, the market is not as neutral as most people would like to think. The monetary value of a cultural good or service may for example express the interests of private persons and companies who are capable of exercising influence on the price. In the second place, the idea that consumers are ‘free’ in a market competition situation is contestable. Even when the government is not involved, they are for example still affected by advertising or media. In the third place,

commodification has a certain corrupting effect. If consumers put a monetary value on life, other values – such as cultural value – are overlooked.

One thing that cultural value and cultural rights and principles have in common is that they are normative and substantial. Market competition does not assign an independent value to principles; it offers no guarantee for freedom, equality or diversity. For example, it does not preclude art and culture from becoming luxury products that are unavailable to people with low incomes, or only the cultural expressions of the majority from being commercially interesting. While democracy makes it possible for people to influence government action, they have no equivalent control over market competition, in which some competitors are more powerful than others. Although it might be difficult to tell when a turning point has been reached, the objections to a purely economic approach to art and culture show that the economization of cultural policy in the end will erode the legitimacy of cultural policy.
Art economists have tried to reconcile both approaches into a cultural economic approach in which cultural value has its own significance. I have argued that the idea of cultural entrepreneurship fits in with this approach, at least for as far as it concerns the original meaning of the idea. In that sense, cultural entrepreneurship is about pursuing a cultural goal. Raising finances is subordinate to that goal. Depending on the goal, cultural institutions can compete in the market, search for sponsors or patrons or apply for subsidy.

The answer to the fifth and sixth sub-question is thus that the economization of cultural policy is legally and ethically compatible with cultural rights and principles, unless it results in cultural value being displaced by economic value. In that case, economization would no longer be ethically compatible with the principles, as it would erode cultural policy in the long run.

Chapter 7 – Cultural subsidies
In the final chapters 7 and 8 I have given an answer to my seventh and eighth sub-questions: How have changed government expectations been laid down in law? What boundaries does the law set on this development and what would be the consequences if the government were to exceed these boundaries? To answer these questions, I have taken both subsidy and competition law into account.

To stimulate cultural entrepreneurship, the government has introduced two provisions that apply to cultural institutions that want to apply for subsidy. They will need to meet a generic standard for private revenue and their application will be assessed using entrepreneurship as a criterion. These provisions create tension however. The generic standard disregards for example that not all cultural institutions operate under the same circumstances. While some might carry out activities that are commercially attractive, others do not. Because the minister is prevented from making any distinction, the only way he can differentiate is by granting exemptions from the rule on the ground of hardship, which can erode the standard.
Furthermore, the Council for Culture, which is responsible for assessing subsidy applications, lacks the expertise to assess entrepreneurship. The council therefore must depend on third parties, thereby inviting questions about conflict of interest. To assess entrepreneurship, the council takes the business operations and organization of a cultural institution into account. I have analyzed a few cases in which the council has made demands that are not – or barely – compatible with subsidy law. Imposing an obligation to merge with another entity for example exceeds the boundaries of the law; this would be improper in relation to the entitlement to provide subsidy for cultural expressions.

While the Minister of Culture seems to allow subsidized cultural institutions more leeway to run their businesses, the government also imposes greater obligations on semi-public institutions to safeguard

the public interests they represent. Subsidized cultural institutions are semi-public institutions as well. For example, the government has laid down rules on salaries for top-ranking officials, and on financial investments. Although such rules can be perfectly justifiable with regard to public interests, they reduce the freedom to act which is crucial to conducting a business.
Finally the Minister of Culture should consider the costs involved in carrying out public interests. This is specifically important when he imposes obligations on subsidized cultural institutions to carry out activities that are commercially unattractive, such as requiring them to program unknown young talents or to go barnstorming across the country. Requiring subsidized institutions to fulfil standards of good employment can also impose burdens that demand compensation.

Chapter 8 – Culture and competition
At first sight, the relationship between cultural subsidies and European competition law is not particularly problematic. Although Article 107 of the Treaty on the Functioning of the European Union (TFEU) states that state aid, like subsidy, is incompatible with the internal market of the European Union and therefore unlawful, a derogation is made in paragraph 3 for state aid to promote culture and cultural heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest. Both the Treaty of the European Union (TEU) and the TFEU assume that art and culture do not merely have economic value; providing subsidy therefore should be possible.
In practice, most aid given to cultural institutions falls outside the scope of state aid, either because it does not meet all the criteria or the cultural derogation applies. Subsidized cultural institutions may carry out economic activities as long as those activities remain subordinate to the cultural activities. The scope of the derogation however partly depends on national cultural policy. It matters whether the government regards cultural institutions as regular businesses or as institutions that add cultural value. The European Commission has laid down an assessment framework in the General Block Exemption Regulation (GBER). According to the commission, state aid that meets this standard can be qualified as aid for a cultural purpose. Although the European Union is not entitled to regulate national cultural policy and the GBER only concerns the exemption from compulsory registration of state aid, it is likely to have a broader impact on national cultural policy. Acting in accordance with the GBER means that the government is 'safe' to subsidize cultural institutions. Should the government however regard cultural policy as an extension of its economic policy, the character of its subsidy would alter.

This means that the Minister of Culture is bound by the law in two ways: he is not entitled to impose improper obligations on cultural institutions that apply for subsidy (chapter 7) and he must continue to distinguish cultural institutions as institutions that carry out cultural, non-economic activities.

Conclusion
In order to find an answer to my central research question, I have made an ethical and legal analysis of the economization of cultural policy. From an ethical perspective, economization is no threat to the legitimacy of cultural policy as long as the economic value of art and culture does not displace their cultural value. If the economic value were to become dominant however, economization would pose a threat to the principles and cultural rights that underlie cultural policy.
From a legal perspective, the law itself does not prohibit economization. The government may use economic arguments just as it relies on cultural rights and principles to legitimize its policy. These rights and principles are not legally enforceable. When carrying out policy, the government is restricted however by subsidy and competition law. In that regard the government must bear in mind that aid for cultural purposes is permitted and cultural institutions therefore should be distinguished from regular economic businesses.