From public to private rights in the arts sector

Michael Hutter Privatization is a buzz word. Michael Hutter puts the question about the effect of this on the arts sector. He distinguishes several methods of privatization, linking them with his misgivings. If the subsidies just keep flowing, does the privatized organization still have a motive to improve itself? Are intellectual rights appropriate for artistic inventions? And if almost every square inch of the public highway is sold for advertising billboards, will government bodies tend to interpret cultural privatization more broadly than simply meaning buying public goods? Not only does Hutter raise these questions, he concludes his concise essay with a prediction.

Changing views on state intervention

The existence of so-called public goods has been a long-standing challenge to policy-makers. Public goods are generally defined as goods that fulfil the following two conditions: they can be consumed without rivalry in consumption and they make it impossible to exclude anyone from their consumption. As a pure public good, only national security qualifies. Even the consumption of air has proven to be rivalrous. Yet, there are many goods, like parks, railways, telecommunication and networks in general, which show strong public good characteristics. It stands to reason that standard commodity markets are not the best way to provide such goods and services. Commodity prices depend on scarcity values, and the enforcement of transactions depends on the ability to exclude others from the use of the good purchased. As a consequence, investment in public goods occurs at a level far below that which is desired by the members of a given society.

For a long time, it was accepted without question that state intervention and provision is an adequate policy response to such conditions. National security and internal safety were the first to be provided by the state. Infrastructure goods like roads, transportation and energy followed as state involvement in the provision of goods with some public dimension increased. In the case of art and art-related services, the extent of intervention varies considerably between countries. But there is no doubt that the state-organized provision of art and art services has a long tradition in all modern societies.

Recently, the self-evidence of that policy choice has been doubted. The conviction has grown that state agencies may be less effective in providing public good services than private suppliers would be. Two major arguments have been fielded. First, the 'public choice argument' states that anyone who yields power over disposal rights will apply his own optimization criteria to their use. The argument holds for organizations and agencies as well as individuals. Therefore, there is little reason to believe that state agencies are mere media for implementing political intentions. Instead, they will use available funds to further their own intentions, bank accounts and tastes. Secondly, the 'free competition argument' argues that innovation and change in the provision of all goods, including public goods, depends on a process of rivalry through which new ideas are discovered and invented. Therefore, markets should be instituted even in cases where the public good characteristics have prohibited their self-generated emergence.

These two arguments appear frequently in the literature, while a third argument gets less attention: all state-related rights are limited to the geographical scope of that particular institution. Communities, provinces and countries have clearly delineated borders, whereas private organizations are capable of adjusting their field of activity to their tasks.

Based on the strength of these arguments, a vast process of 'privatization' has been initiated. In sectors like telecommunication, energy and transportation, national state monopolies are being dismantled, and private rights of access to these markets are being designed around the globe.

Art as a public good

In the course of this development, the privatization of the arts sector has also been promoted. It is not surprising to find the arts among the public goods that seem to be in need of state intervention. Art works are appreciated not for their material content, but for the interpretations which those who look at images, listen to sounds or read words draw from them. Even in those cases where the work of art takes on a physical shape, like an oil painting or a porcelain vase, the value depends on the property of the piece to be regarded, commented on and debated by a multitude of viewers. Art works that are removed from view lose their communicative power. Even the private collector or builder expects others to look at that which is his property. Admittedly, there are situations where the consumption of art works becomes clearly rivalrous. The crowds in the recent Vermeer exhibition at the Mauritshuis in The Hague may serve as an example. But, on the other hand, the immense distribution of Vermeer reproductions is the public process which has preceded a situation where hundreds of thousands develop a desire to look at the sources from which these streams of images have flown.

While the non-rivalry in consumption is fairly clear, it still seems that art consumption is very well excludable. Objects have private access, music takes place in private concert

halls and texts are sold in the shape of private books. But such exclusiveness is a fairly recent and highly sophisticated accomplishment. Technically, the reproduction of books, tapes and CDS is cheap and easy, and, in consequence, 'piracy' is a continuous problem. In the case of aesthetic ideas, the protection of inventor's rights has proved to be very difficult. Furthermore, every nation or culture builds up a stock of buildings, paintings, works of music and literature that constitute its cultural heritage. That classical heritage is used in a multitude of contexts, from education to product advertising - free of charge, because access is not excludable. Therefore, we find the typical conditions of underinvestment.

It follows that arts and art services are among those public goods that have been the object of state intervention. It also follows that the privatization arguments have been applied to them as well. It is not clear, however, to what extent these arguments are justified under the peculiar circumstances of the art sector and, in consequence, it is not clear to what extent and in what form privatization should be pursued in that field.

I will try to outline the features that are likely to be encountered in the attempt to transform state rights into private rights to the promotion and distribution of art goods and art-related services. This text is intended as an essay, not as a survey of the pertinent literature. It will concentrate on the issue of rights construction, and it will not discuss the issue of channelling financial resources into the sector.

Distinct interpretations of privatization

The issue of privatization has frequently been discussed from two extreme, opposite positions. One position sees the move towards private rights as part of a historical pattern in which the provision of all goods and services is channelled through private markets as the only adequate form. The other position identifies public rights with state rights and, in consequence, rejects private rights as inadequate and detrimental to social welfare. Both positions are at fault. In the course of history, rights of unlimited access or 'public rights' have been substituted by state rights as well as by private rights. The real issue is the mix of the rights construction in operation in a particular sector. Therefore, we have to begin by clarifying several distinct interpretations of the the term 'privatization'.

Four distinct strategies of implementation can be distinguished:

1. Private management. For-profit enterprises have developed particularly efficient ways of controlling financial flows and monitoring workers' contribution to overall performance. State agencies or institutions which have been granted 'public status' by the state are, under this approach, compared in their routines and results to private companies;
2. Incorporating private law actors. The lack of autonomy of state-run art institutions suppresses incentives for change. In order to expose them to competition, museums, theaters, art councils, music schools et cetera have been given the status of private enterprises, like limited-liability companies or private foundations;
3. Defining private rights. Inherently public goods can be provided in competitive markets if sufficiently exclusive and transferable rights to artistic performance are established and enforced;
4. Selling access to public spaces and activities that were traditionally free from commercial messages. The private actors, in this case, are the community administrations who can use the income from such sales somewhere else in their budgets.

Private management

It is only twenty-fife years ago that economists began to realize that activities within firms are valid rational alternatives to activities in open markets. Private, in this context, means a position that is complementary to the public nature of the market. Within firms, contractual links and human capital specificity, i.e. loyalty and know-how, create a degree of cohesion that permits complex, long-term strategies and manoeuvres with results that could not emerge through the loose market cooperation of small operators. Firms are organizations, and organizations are self-organizing entities with 'private' structural conditions.

The central feature of these privacy conditions is autonomy. That explains why successful firms develop a clear process of internal decision making. The process need not be hierarchical, but it must be clearly perceivable for the members of the organization. Secondly, the organization needs a mode of self-observation. Self-observation, at a basic level, refers to the flow of materials and funds within the firm. For that purpose, elaborate systems of controlling and accounting have been developed. At a more sophisticated level, self-observation focuses on internal intentions, decision-making structures and other aspects of corporate culture. Part of those observations may relate to the principal-agent relationships within the organization and with other actors in its environment. Thus, a more precise and realistic picture with regard to the firm's strategic choices and opportunities emerges.

It is quite clear that most state agencies do not fulfil these autonomy conditions. The drive towards more private management, therefore, is quite appropriate. However, the transfer of tools and techniques developed in commercial contexts has its difficulties. Not the commercial firms are worth being copied, but certain organizational patterns. The primary steps comprise the delegation of decision power to the agency, and the installation of internal evaluation and consultation systems.

Private management's capacity to evaluate depends primarily on the observation of the generated income stream. The success of management consists to a large degree in its ability to respond quickly and creatively to changes in demand, in consumer taste or in supply conditions, as they are reflected in revenue and cost figures. However, under the public good conditions in the art sector, a substantial fraction of income will continue to come in the form of subsidies and other transfer payments from state budgets. The challenge, therefore, consists in designing management routines that are able to handle such payments in a way that still leaves incentives for cost reductions and the tapping of new income sources.

For art institutions, there is an additional complication: there is, within the art community, a fairly clear scale for evaluating artistic quality. Commercial firms, however, gain a good part of their effectiveness through their reference to results that are valued in monetary units. By introducing private management, one is likely to introduce that mode of reference as well. Other political values, as they might be expressed by voters, do not count anymore when state agencies are reorganized and rates of return on investment become the indicator of success for an art institution. But there still remains the institution's internal goal of achieving artistic excellence. In consequence, the goal of private management in an art institution is the maximization of artistic quality under the constraint of generating a revenue stream that is sufficient to maintain the activity of the institution.

The granting of autonomous rights to agencies or the 'out-founding' of institutions must not be seen as sudden, painless switch to a new status. In the contrary, such decentralization inevitably has to resolve its conflict with the very nature of political power. Institutions like Art Councils or Heritage Foundations may initially accept themselves as creatures of political will. But there will be a time when their own decision contradicts the intention of the political power holders. There are two basic patterns of resolution for that conflict: either the institution cuts loose from political intentions at this point, and finds its own position in the economic and political network of a society; or the experience of autonomy has failed, and the dependence on some political actor becomes visible. Such a show of domination has, of course, its effects on the behavior of those who work within such an institution 'put on leash'.

Private law actors

In modern societies, the ability to public action depends on the definition of an independent legal identity. A good part of private law consists in developing adequate fictions of 'legal persons'. Legal persons can take very different forms and shapes, from loose associations to global stock companies.

For the purpose of transforming dependent art institutions from public law actors into private law actors, foundations and limited-liability companies have been the most popular choices. But the transformation is not that simple. A whole range of issues has to be clarified, and only a small part of them finds its reflection in the formal statutes. I will briefly mention the most relevant ones, as they might apply to an opera company or a museum.

There is, to begin with, the issue of property ownership. Does the real estate asset belong to the institution, or is it only transferred from the state on a temporary basis? In the case of the paintings of a museum, the transfer of property surely does not extend to the unconditional right to sell the goods which justify the museum's existence. Then, there are the issues of liability and insolvency. In both cases, there will be a privilege of state intervention. The question of tax status has been resolved through the construct of the non-profit enterprise. Still, one has to keep in mind that the tax loss due to non-profit enterprises is another form of subsidy, and that such provisions are frequently turned into loopholes for evading taxes on commercial activities. Connected to the tax status is the issue of public accounting. The nature of public good institutions would speak for very transparent account books. But such transparency is cumbersome and expensive and thus interferes with the primary goals of the institutions.

Three more general issues warrant mentioning. One is the question of certification. In order to assure that the private law actors continue to pursue their goal of public good provision, the state authority will often only grant a temporary state of autonomy to an institution. Renewal of the status is then connected to some sort of evaluation or certification procedure. That procedure, in turn, will have severe repercussions on the viability of the institution itself. Secondly, it seems worthwhile to examine the legal environment in which such new and experimental legal persons operate. The law of contract, for instance, may not be able to accommodate their peculiar connections with public law entities. Finally, the emphasis on new legal actors may shift to very small entities as artists begin to see themselves as independent entrepreneurs. Thus, questions of social security and personal insolvency come into play.

In short, a rather new breed of legal hybrids is likely to emerge. These hybrids have rights to property and contract and thus establish the preconditions for successful private management. At the same time, they remain bound to their public good purpose through a variety of safeguards and intervention rights.

As it stands now, the transformation to private law actors often gets stuck half-way: a new status is proclaimed and implemented, but the rules and regulation of the public sector are not changed at the same time. In such cases, things are made worse by installing the second, deviating set of statutes. It becomes unclear to the decision makers which set of rules takes precedence. The result is a hybrid form that has the appearance of a private organization, yet the central decisions continue to be state-controlled. As a consequence, internal action will be more hampered than it was before. Such confusion may even be inevitable. But it would be advantageous to allow enough time before a process of status transformation is judged as being successful.

Private property rights

One of the features of public goods is their incongruency with the standard properties of distinct, separate private goods. Non-rival consumption and non-excludability are properties of networks and relations, not properties of pieces of material. Yet, the link with the legal concept of private property is not impossible. If it succeeds, it does assure stability of expectations over the future use of a good, be it a musical score or a logo. When such rights of property are successfully defined, then privatization takes place on the immediate level of the artistic work or performance which can now be turned into a negotiable good or service.

Historically, it took until the 1960s before economists began to realize that they had used a very simple concept of private property rights. Goods do not come equipped with their complete set of exclusive and transferable rights. For instance, disposition rights are usually complemented by liability rules in cases of external effects. Private rights, in all of these cases, are a sophisticated legal construction.

As regards the arts, we are faced with the particular difficulties of designing exclusive rights for information goods. On the one hand there is public interest in generating and spreading new ideas and works, be they scientific or artistic. On the other hand, there is the attribution of such consumable benefits to the one entity, individual or organization, that has authored the new information. Private initiative needs private incentives.

Since the 17th century, there exists a tradition of granting temporary rights of intellectual property, either connected to a specific work (copyright) or to an author (*droit d'auteur*). Such rights are supported by measures that increase the ability of the right holder to determine the dissemination of the original work or event. The success of those measures is mixed. Intellectual property rights are notoriously difficult to enforce, particularly in an international setting with sovereign jurisdictions.

The usefulness of copyright law for artistic inventions is limited. There are many kinds of creative activity which are either difficult to conceal, or easy to copy, or quick to be replaced by new inventions. In all these cases, intellectual property rights cannot be defined or enforced. At the same time, there are strong efforts to apply copyright law to the new forms of information goods, simply because there exists no other adequate legal construct to protect ownership in computer programs or channel access. That leads to the problem of

Michael Hutter
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using a form of property that was invented to protect artistic work, for the protection of commercial inventions in the software and data retrieval sector. In consequence, there is strong pressure by the lobbying groups of the interested industries to modify the existing rules in ways which suit their products, e.g., to extend the life span of a right to seventy years. The result may be a privatization of intellectual property rights that is adequate for software innovation, but much less applicable to artistic works and ideas.

A further problem yet to be solved lies in the mechanism by which income from the use of copyrights is distributed to inventors and authors. The multitude of copying acts makes it necessary to install an organization capable of handling the task. Such 'collecting societies', by their nature as clearing houses for rights to text, to visual or to aural inventions and performances, have monopoly status. They set their own distribution rules and they administrate themselves. Given the present volume of transactions, these societies seem to function reasonably well. But it is not clear how the currently active organizations will perform when the volume of rights, licenses and members multiplies.

Selling public rights

The execution of a privatization policy that reduces an agency's or a municipality's sphere of influence runs against that organization's interest. That effect will slow down efforts at rapid privatization. The scenario changes drastically, however, if privatization generates an income over which the same entity has disposal rights. Then there is an incentive to sell off rights that were part of the accumulated wealth of a community. In other words: public goods that yield a long-term stream of benefits and incomes, but also maintenance and operation costs, are sold to realize a single monetary payment.

The difficulties are political as well as technical. After all, public rights that had once been transformed into state rights for their effective protection are now converted into private rights, not to be retrieved. But once the pattern of procedure has been recognized, there is virtually no limit to the temporal and material dimensions of public space that state authorities may be prepared to part with. Municipalities, for instance, can sell spaces on streets and public buildings that were previously free of any message for advertising purposes. Architecturally prominent buildings and sites command premium prices. Before, these spaces were simply part of the public space around the community. Now, they are parcelled out and sold, and the members of the community have to cope with a new source of information pollution in their environment.

In the cultural field, there is a certain danger that state agencies legitimize their withdrawal from the support of art production by invoking 'privatization' although all they do is to sell off assets held as public property at their commercial value. Such strategies are still restrained at present because they violate the accepted code of conduct. But the speed with which the slashing of culture budgets has become accepted practice around the world demonstrates how quickly such conduct can change.

Conclusions

The question of privatization has been restructured from a simple pro-and-contra issue to a set of differentiated options. These options depend in their validity on the particular features of an art good or service and its environment of recipients. Moreover, the different forms of instituting private rights are interdependent. Private management depends on legal autonomy, and both depend on the enforceability of rights to information products. In many cases, public budgets will remain the major means for channelling tax revenue into art institution. The result will be precariously balanced public-private-partnerships. Given such complexity one should hesitate to assume that privatization is a policy that is easily executed by any political entity.

Even when and where privatization is successfully brought under way, there remains a strong role for the state. Competition in public good sectors is not as easily installed and enforced as competition in private good markets. Information goods emerge not in material, but in virtual space. In consequence, there are constantly new definitions to be drawn and new types of rights to be enforced, particularly in the art sector with its high rate of change and innovation. The focus of politically legitimized institutions will change from direct provision of such goods to surveillance and update of the rules of the game. Rule-making and rule-enforcement will become an ongoing, major activity. The need for such a regulation - not of activities, but of the rules for activities connected with public goods - has become apparent in many of the sectors where privatization is implemented. It will equally assert itself in the arts sector.

Bibliografische gegevens
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