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CULTURAL LEGISLATION

WHY? HOW? WHAT?

Report prepared by
Delia Mucica

Cultural Policy and Action Department
Directorate General IV – Education, Culture and Heritage, Youth and Sport

The opinions expressed in this report are those of the author and do not necessarily engage the responsibility of the Council of Europe.

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INTRODUCTION

In the last decade, I have heard many times different groups of peoples saying the same phrase: "*We need a law"*. During seminars, workshops, in different meetings and in different countries, representatives of quite diverse groups of cultural players were saying, basically, the same thing: *to solve our problems, we need a law.*

Is this really true? Can a law, or for that matter, any kind of regulation, solve all problems that culture is facing, satisfy everybody and make culture flourish? Is cultural regulation the problem-solving panacea for the cultural sector? My answer to these question is NO. Regulation in general or any particular piece of regulation cannot achieve all these goals by mere virtue of their adoption and enactment.

But then, why is cultural regulation necessary? What is the purpose of drafting and enacting regulations for the cultural field? What is the scope of cultural regulation? And what are its limits? What issues should it address? Should cultural regulation be sectorally oriented or should it address cross-sectoral cultural issues? Should "cultural activities" be enshrined in separate pieces of regulation? Do we need distinct pieces of regulation for specific cultural activities or sectors? Or do we need an all-embracing "Law for culture"?

And equally important is the law-making process itself and the democratic principles and procedures that ought to be followed, of which consultation and participation are paramount. How can a sound and coherent cultural policy be transposed into an implementable and enforceable regulation? How can a coherent and balanced overall regulatory framework pertaining to culture be enacted and implemented? What is a "good" law and what is a "bad" one?

These questions could be called the "Why? What? How?" approach. It is the writer's belief that the answer to these questions might help policy-makers and law-makers to produce a coherent and effective regulatory system, beneficial for the development of culture. In addition to this set of three questions, a fourth one should be added, the most important one: Who? Who should be the beneficiaries of this new regulatory environment?

This volume aims at addressing these questions, and others, mainly from a law-makers' perspective. Therefore, it does not attempt at analysing the content of cultural policies, but only the relationships between cultural policies and regulation, seen as one of the tools policy-makers have at their disposal for implementing their policies, as well as the principles and tools which could produce a "good" regulation.

Many policy-makers and law-makers who read it will find that they already know the answers. This is but normal, as the material which guided the writer has been distilled from the numerous studies undertaken either by the Council of Europe within its review of cultural policies in European countries or by numerous other organisations, both at the international and national level. However, I hope that cultural administrators, artists and their organisations, as well as politicians, might find it useful as a handbook against which to test the declarative, the expected and the actual results of the regulation addressing issues of interest for the cultural players, which is being drafted or enacted in their respective countries.

The message of this volume is that regulation is not an end in itself. Moreover, enacting regulation is not the end of the road for decision-makers. The most arduous task is yet to come: implementation and compliance are the benchmarks against which the success of a cultural policy transposed into one or several pieces of regulation should be assessed.

I should like to underline that the reflections and conclusions are entirely mine and do not necessarily reflect the position or opinion of the Council of Europe.

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Dr. Delia Mucica

PART I. CULTURE AT PRESENT TIMES – OPPORTUNITIES AND CHALLENGES

CHAPTER 1. A NEW INTERNATIONAL ENVIRONMENT

The last decade of the 20th century has witnessed fundamental shifts in the political ideologies of the countries of Central and Eastern Europe, the enlargement of the European Union and the relaxation of its internal frontiers. These changes were accompanied and heightened by the development of new technologies, the growth in importance of the cultural industries, increased awareness of multicultural and multilingual issues as well as changes in trans-national cultural practices.

And now, at the beginning of the third millennium, European countries face a dramatic challenge in their approaches and their responses to the economic, political and cultural changes that are sweeping not only Europe, but the whole world.

1. Globalisation, Again…

First, globalisation, which is rapidly becoming the *cliché* of our times. Globalisation, this fast expanding and intricate system of integrated markets, international trade and investments, multinational corporations (MNCs), and converging technologies, presents both challenges and opportunities for our cultural life, given the unprecedented volume of creative and cultural exchanges between peoples around the world. However, it also creates a global environment for marketing and distribution of cultural goods and services, as well as for the production of these, which may place national or local cultures and identities at risk.

There are various theories concerning the contemporary aspects of globalisation in relation to culture:

- Cultural globalisation viewed as *heterogenisation* (the globalisation process is unavoidable; more variety and diversity of cultural products; "the magic of the market", "the consumer is the king").
- Cultural globalisation viewed as *homogenisation* (cultures are becoming the same everywhere; the local is under threat by the global; the westernisation / Americanisation of culture: "cultural imperialism").
- Cultural globalisation as *hybridisation* (mixing of Asian, African, American and European cultures: hybridisation is the making of global culture as a global “mélange").

However, these theories do no exclude each other; they are, in fact, complementary.

While globalisation offers great opportunities for the promotion of cultural diversity, it also poses enormous challenges to the ability of governments, of civil society and of the private sector to nurture, to promote and to protect this diversity. The main challenge is therefore to find the means to remain open to what the world has to offer, while developing, at the same time, a domestically rich and diverse cultural expression.

But there is always another side of the coin. Globalisation is not only a challenge to cultural diversity, it represents also an incentive.

Is it true that globalisation offers all peoples broader access to creative content, cultural products and cultural services, democratising their production and distribution? Or does it have a homogenising effect on culture?

Is it necessary to take pro-active steps and measures to protect cultural diversity and pluralism? How can different cultural values best be preserved, protected and developed? How do we address conflicts that may stem from these cultural differences?

How can different and diverse cultures be enhanced by their interaction? How can this global cultural environment promote understanding of peoples?

And how can national regulations best address these issues?

These are only some of the questions that are being on the agenda of politicians, decision-makers and cultural players, but which do not have an easy or unique answer, as globalisation is a paradoxical phenomenon.

On one hand, globalisation leads to a certain degree of homogenisation of institutions, legislation, ideas, ideals, morals and social practices, and forms of life. On the other hand, it also encourages heterogeneity, cultural diversity, distinctiveness. In addition, it also leads to a certain degree of hybridisation. Since a society is more likely to succeed in the global competition if it has something distinctive to offer, globalisation also encourages it to find new ways of defining and distinguishing itself. Hence, the rediscovery of the importance of indigenous and local traditions, of community values and cultures, of multi-culturality.

Most countries have already begun to recognise the need to safeguard the distinctiveness of their cultures, traditions, language and heritage. Such an approach presents new challenges for their domestic cultural policies which should be re-defined and re-designed accordingly.

Globalisation processes are thus affecting culture in many ways. Preserving and promoting cultural diversity requires therefore not only global or regional responses, but national/domestic responses as well.

2. A Tripartite Europe or a Pan-European Public Space?

Secondly, the European continent is reshaping its geography as "old" frontiers have disappeared and "new" ones might be looming in the future. From a political and economic point of view, Europe is no longer divided by the Iron Curtain but might be divided according to the relationships to the European Union of the countries within the European continent: member States, accession States and non-accession States.

A reaction to such a possible development might be found in the concept of a "*pan-European public space*", which emphasises, *inter alia*, the need for the exchange of ideas, for dialogue between cultures, for inter-cultural co-operation.

The process of European integration presents its own specific and complex opportunities and challenges of political, economic and cultural nature. Although often perceived as a reaction to globalisation seen as "Americanisation", the European Union and the process of European integration is much more than that. It has been argued more and more that the European Union should be considered not only a political-economic-monetary union and that culture should not play a secondary role in this new European architecture.

The process of European integration has developed over the past half century as a balance between accepted common values and principles and national and local specificity. But it is an on-going process, and therefore it poses specific problems not only to accession countries, but to EU member States as well.

While adhering to the core of accepted common values and principles, each country, and within it each community, has to develop its own specific responses to culture, embedded in their cultural policies.

On the other hand, the idea of a "European cultural policy" has been advanced in recent years, especially in the context of the growing policy-making role of the European Union. But the concept of a common European cultural policy is a highly controversial one, and a number of critics disagree with the notion, considering that what is indeed needed is "European co-operation", "policies for culture in Europe" rather than a "European cultural policy". Starting with the 70's, some common ideas of common cultural policies have been supported via programmes like Kaleidoscope, Raphael and Ariane, which were lately incorporated into Culture 2000.

But does such a policy exist already? And what is the rationale for developing such a supranational approach to cultural policy? What will a more pro-active European cultural policy look like?

What is the relationship between “European cultural cooperation” and “European cultural policy”?

How can existing or future structures and policies best address the issues of enlargement towards the East, while retaining a pan-European perspective? How can enlargement promote and protect national cultural identities as well as cultural diversity, whilst promoting a European identity?

Does enlargement offer broader access to diverse cultural products and cultural services, as well as means of production and distribution? Or will enlargement have another form of a homogenizing effect on the culture of European countries?

Is it necessary to think and enact new measures to protect cultural diversity, different cultural values and pluralism on a pan-European level? How shall be addressed conflicts that may arise in such a diverse cultural and social environment?

How can European cultural co-operation best promote the mutual understanding of the peoples and communities within the whole continent? How can the cultural traditions and values of the European countries be part of the globalized exchange of cultural goods and services, whilst retaining their specificity and, at the same time, being open to the new infusion brought about by this unprecedented flow of information, ideas, ideals, art forms and technology?

And how can national regulations best address these issues within the general framework of EU legislation?

These are some of the issues that are also on top of the agenda of political, economic, social and cultural debates, be they held in European or regional fora or at the national or local levels of policy-making.

At the same time, the enlargement process is likely to require institutional reforms of EU structures, in order to accommodate a Europe of 25. From 13 to15 December 2001, Heads of State met at Laeken to discuss the future reforms of the EU, where they issued a declaration of intent. Although the *Laeken Declaration*[1] makes no specific mention of culture, all of the issues it addresses have relevance for the cultural sphere:

- the democratic challenge facing Europe;
- Europe's new role in a globalised world;
- the expectations of Europe's citizens.
- a better division and definition of competence in the EU;
- simplification of the Union's instruments;
- more democracy, transparency and efficiency in the EU;
- towards a Constitution for European citizens.

The final part of the Declaration proposes the convening of a Convention on the future of Europe, which will assist the Member States and EU institutions in developing meaningful reforms. It was felt that the Convention could become a vital forum in voicing the concerns of the third sector and in arguing the case for culture and for the importance of cultural values and diversity.

To answer the above mentioned questions, it would be necessary to address several issues, including the legislative and institutional basis of European Union policy-making, the roles of national governments and the historical background of cultural cooperation in Europe. From the numerous documents pertaining to cultural policies and co-operation in Europe, there is a highly relevant one: the “*Ruffolo Report*”[2].

“*The time has come for the European Union to match its solemn declarations on the importance of culture with concrete commitments*. “ This is the view expressed by Georgio Ruffolo, Vice President of the European Parliamentary Committee on Culture, in the introduction to the above-mentioned document.

[1] *The Future of the European Union* – Laeken Declaration
[2] *Unity of Diversities - Cultural Co-operation in the European Union, 2001*

The *Ruffolo Report* argues that a European (or at least an EU) cultural policy is needed. "*It would be a model of how a distinctive identity can be moulded by bringing diversities together*." It further considers that a common cultural policy would be a factor of cohesion, because it would recognise the richness of a shared cultural diversity rather than regard it as a source of division and, therefore, it could be an important factor in building a European identity.

In its session on 26 November 2001, the Council approved the significant *Resolution on the role of culture in the European Union*, which includes many of the points raised in the *Ruffolo Report*, and invited member countries "*to consider culture as an essential element in European integration, particularly in the context of the expansion of the Union*".

The Study on the Cultural Policies of Member States contained in the *Ruffolo Report* analyses different issues, such as cultural policy objectives and priorities, institutional arrangements for cultural policies, public financing, the role of the private sector etc. To a certain extent this Study draws on the materials prepared for the excellent *Compendium* of *Cultural Policies in Europe*[3] of the Council of Europe, an initiative that should be more widely acknowledged.

There is, nevertheless, at least one significant difference between the two documents: while the Study contained in the *Ruffolo Report* is limited to EU member States, the Council of Europe's *Compendium* presents a pan-European panorama, including not only EU member States and accession States, but non-accession States as well.

Any discussion on European cultural cooperation or cultural policies ought to address these three complementary groups, unless the pan-European perspective will be missed. And the Council of Europe is in the ideal position to do so, as almost all countries within the European continent are its members or have ratified the European Cultural Convention.

The Council of Europe's cultural programmes aim at promoting awareness of Europe's multi-faceted cultural identity, thus emphasising four major principles which are also key issues for cultural policies at a pan-European level: promotion of cultural identity, respect of multicultural diversity, stimulation of creativity and participation in cultural life.

In this respect, and with a view to encourage and foster regional and international co-operation, two major programmes were launched by the Cultural Policy and Action Department of the Council of Europe.[4]

If existing cultures and national cultural heritage are among the pillars of the actions and programmes of the Council of Europe, they should also be acknowledged as fundamental political elements in the forthcoming new architecture of Europe.

3. The "New Democracies" – Old and New Attitudes towards Old and New Challenges

In this diverse, contradictory and ever changing reality, Europe is facing yet another challenge: the "post-communist" transformations under way in the former communist states generally referred to as the "new democracies".

It is an understatement to say that political pluralism, free elections, rule of law and vibrant civil societies are indispensable for modern democracies. But at the same time, the state has a critical role in shaping, fostering, and protecting democratic regimes. Moreover, an effective state is indispensable in initiating and implementing fundamental and much needed economic, political, and social reforms.

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[3] *Cultural Policies in Europe: a Compendium of Basic Facts and Trends*, at http://www.culturalpolicies.net

[4] MOSAIC, which aims to create a framework for cultural exchanges and co-operation among the countries in South-East Europe and to assist them in the design of their cultural policies and STAGE, within which a framework for cultural exchange and co-operation among the countries in the Caucasus area is being built. More information can be found at the site of the Cultural Policy and Action Department of the Council of Europe.

An analysis of the last 12 years of post-communism can be achieved via the answers to some of the following questions, among many others:

To what extent former organisational structures and activities are continuing? Are ”new democracies” expanding or reducing their institutional organisation, powers and role?

Are ”new democracies” capable to secure individual rights and liberties, to provide services to the community, to promote and maintain the legal, administrative and economic environment necessary for the existence of a market economy and of democratic institutions?

Are ”new democracies” transparent and accountable? Are the checks and balance mechanisms set in place and functioning?

And yet, these are only a few of the challenges “new democracies” have to meet.

If it is true that the “political divide” between West and East has disappeared, that political borders are fading and that geographical borders are being blurred, it is equally true that different other “divides” still hamper the democratic and economic development of the “new democracies”. First and foremost, there is the democratic “deficit”, especially in terms of the rule of law. But, apart from these, there is another distressing development: cultural differences, which were secondary before 1989, have emerged at the top of different political agendas, with the results we all have witnessed.

It is well known that, for political and propaganda reasons, the communist states have placed a great emphasis on culture and on the promotion of cultural *elites*, by actually monopolising all cultural institutions and activities, censoring all forms of expression and transforming almost all creators and artists into state functionaries. The “stick and carrot” approach was dominant, and thus quite a majority of creators and artists became a “*political clientèle*”.

“New democracies” need therefore to change not only the institutional framework within which cultural activities took place, but they need to change also the mentalities and approaches to the cultural sphere: from “state institutions” to “public institutions”, from passivity and obedience to pro-active participation, from pyramidal hierarchical structures to diversified multi-centred structures, including independent agencies, from administrative hierarchical control to accountability, from censorship (be it implicit or explicit) to freedom of expression, from state functionaries to civil servants, from providers of cultural services to the status of creator, from state funding to public-private partnerships etc. This shift is eliciting new approaches and profound changes in mentalities, not only at the level of the Government or of the Legislature but, even more importantly, at the level of all cultural players.

After this first decade it has become clear that the failure to do so will pose under serious risks the entire process of democratic transformation of the cultural sphere. Therefore, “new democracies” have to undergo a major transformation of their attitudes and policies in relation to culture.

With some notable exceptions, the focus in the past 12 years has been on maintaining existing cultural infrastructure and institutions and thus policies related to culture were not pro-active. They merely tended to address the new developments and challenges brought about by the political changes in rather old, conservative ways, passively managing the *status quo* instead of actively seeking to reform the system.

The inefficiency of such a passive approach argues the case for different, “new” approaches.

What would these be?

3.1. Starting With Another Definition Of Culture….

The attitudes and, therefore, the responses to the new challenges brought about by the democratisation processes and the disappearance of the communist “model” are shaped, *inter alia*, by the approaches of the new democracies to culture. Indeed, the communist perception of culture is no longer sufficient and acceptable. Culture cannot be limited to the activities of the “traditional” public cultural institutions, of the cultural *elites,* of carefully

selected celebrations of traditions or historical heritage, which emphasise “high culture” as opposed to popular culture, regarded as inferior.

Current trends in Europe are moving away from such a narrow, hierarchical definition of culture towards a broader one, associated with human development.

As defined at the *World Conference on Cultural Policies*[5]: "… *culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterise a society or social group. It includes not only arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs*."

It is therefore essential, when designing cultural policies, whether at the European, national or local level, to start with a definition of the cultural sphere which is consistent with these current perceptions.

This shift in the perception and definition of culture has been the result of several complementary factors. First, culture has become the most dynamic component of our civilisation, equalling or outreaching even the dynamism of technological developments. And this dynamism, this search for new forms and modes of expression, for change and novelty, is both a result and an engine of the “information society” or “knowledge-based society”, as our times have been coined. And as society, as a whole, has started to accept this new leading role for the creative impulses, a legitimisation of culture has come about. Culture is no longer perceived as a static phenomenon in which only *elites* were indulging or which was shaped by those *elites’* tastes, it is brought “*in from the margins*” as the often quoted *Report*[6] states, it is an important factor of our development.

Acknowledging the centrality of culture[7] in our sustainable development has been an important theoretical development. It is the role of Governments and public authorities to implement this new approach in their respective cultural policies.

3.2. …Continuing With New Approaches to Cultural Policies

In *Our Creative Diversity*[8], the report of the *World Commission on Culture and Developme*nt[9], the chapter entitled ‘Rethinking Cultural Policies’ lists a series of challenges to policy-makers:

“When culture is understood as the basis of development the very notion of cultural policy has to be considerably broadened. Any policy for development must be profoundly sensitive to and inspired by culture itself... defining and applying such a policy means finding factors of cohesion that hold multi-ethnic societies together, by making much better use of the realities and opportunities of pluralism. It implies promoting creativity in politics and governance, in technology, industry and business, in education and in social and community development -- as well as in the arts. It requires that the media be used to open up communication opportunities for all, by reducing the gap between the information ‘haves’ and ‘have nots.’ It means adopting a gender perspective which looks at women's concerns, needs and interests and seeks a fairer redistribution of resources and power between men and women. It means giving children and young people a better place as bearers of a new world culture in the making. It implies a thoroughgoing diversification of the notion of cultural heritage in social change... It requires new research.”

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[5] *Report of World Conference on Cultural Policies* organised by UNESCO in 1982 at Mexico City.

[6] Report of the European Task Force on Culture and Development: *In From the Margins: A Contribution to the Debate on Culture and Development in Europe,* Strasbourg: Council of Europe Publishing, 1997.

[7] Report of the Intergovernmental Conference on *Cultural Policies for Development*, organised by UNESCO at Stockholm in 1998.

[8] *Our Creative Diversity*, UNESCO Publishing, 1999.

[9] The independent World Commission on Culture and Development (WCCD) was established jointly by UNESCO and the United Nations in December 1992. In November 1995, its President, Mr. Pérez de Cuéllar, presented the Commission's report, *Our Creative Diversity*, to the General Conference of UNESCO and the General Assembly of the United Nations.

The same report states, in addition: "*Most cultural policies are focused upon the arts and heritage. The perspective can be broadened, first by moving away from monolithic notions of 'nation culture,' accepting diversity in individual choices and group practices. Support to the arts and artists is essential; but equally so is an environment that encourages self-expression and exploration on the part of individuals and communities."*

It is therefore evident that if culture, in its broader sense, is to be a central part of development policies, cultural policies need to be reconstructed so as to encompass a much broader sphere. In its report "*In from the Margins*", the European Task Force that produced it highlights four key themes:

- *promotion of cultural identity;*
- *endorsement of Europe's multicultural diversity;*
- *stimulation of creativity of all kinds;*
- *encouragement of participation for all in cultural life.*

The success of future cultural policies will depend on whether and how the relationship between culture and development can be effectively integrated and on the capacity of policy-makers to consider culture as a cross-sector issue. They have to meet new challenges in the arts and the heritage but they also have to go further on, so that new cultural policies address also the issues of human development and the promotion of pluralism, as well as the fostering of social cohesion.

Thus, culture and cultural-related aspects have to be embedded into national and international development policies. It is, therefore, extremely important to reposition cultural policies in this way and to link them more closely with policy approaches in other fields.

The 1998 *Intergovernmental Conference on Cultural Policies for Development* has adopted an Action Plan with the following five objectives:

- *to make cultural policy a key component for development strategy;*
- *to promote creativity and participation in cultural life;*
- *to reinforce measures to preserve cultural heritage and promote cultural industries;*
- *to promote cultural and linguistic diversity in the information society;*
- *to make more human and financial resources available for cultural development.*

To tackle these challenges, a de-sectoralisation of policy-making is necessary, by developing "integrative" or "cross-sectoral" approaches that could cover complex policy issues that are interrelated, although they were traditionally treated as distinct sectors, placed under the responsibility of distinct central or local authorities.

From such a perspective, local and regional authorities are one of the major players. They are not only dialogue partners with central authorities for the formulation of national cultural policies, but policy-makers in their own right. Although this seems to be common understanding in many fields, it appears to be not so clearly understood in the field of cultural policy.

In this respect, among many different and important initiatives, a recent one should be mentioned: the 2001 annual meeting of the European network of local and regional authority officials, whose main theme was *Social Cohesion and Cultural Diversity*[10]*.* At the conclusion of the proceedings the participants issued a Declaration stating that:

- *Access to culture is a fundamental right in our societies and essential component for democratic freedom and political action;*
- *State intervention is a central lever for cultural policies;*
- *Cultural policymaking plays a central role for social integration and economic development, which implies that cultural aspects should be taken into consideration in the development of all policies;*

[10] Annual meeting of *Les Rencontres*, the *European network of local and regional authority officials*, Rotterdam, 18 – 20 October 2001.

- *A necessary link should exist between artists and politicians based on autonomy and responsibility to improve the quality of professional standards and contribute to the social responsibility of arts organisations;*
- *A fruitful dialogue between local authorities from East and West should be encouraged to promote the circulation of artists and professionals, reinforce cultural democracy and set up collaborative projects.*

In recent years, the concept of social cohesion has emerged on political agendas as a cross-sectoral horizontal issue within which policy-makers can address the problems of fragmentation of contemporary society. As such, social cohesion can be seen as an outcome of investments in social and cultural programs and in social capital and, therefore, acknowledges the centrality of cultural policies in building social connections within increasingly diverse societies and communities.

Broader perspectives on culture and new approaches to cultural policies[11] have to stem from a qualitatively different approach to policy-making, an approach that recognises, on one hand, the necessity of active participation of all cultural stakeholders in the formulation of such policies and, on the other hand, cultural rights as fundamental rights.

Thus national cultural policies would no longer be equated with a ministry of culture policy confined to the cultural public sector.

CHAPTER 2. STATE, PUBLIC ADMINISTRATION AND CULTURE

The State as a legal and social construction has been the subject of various theories. Generally speaking, all theories start from the principles of democracy, rule of law, hierarchy and control.

The evolution of state functions has led, on one hand, to major delegation of their powers and functions and, on the other hand, to an increase in their functions and structures. This major delegation of powers led, in turn, to an important de-politicisation of various spheres of activity while, at the same time, administrative and hierarchical control over these activities was no longer possible.

In conjunction with the phenomenon of devolution of powers, the expansion of State functions and structures has determined the apparition of a new model, in which the state cannot be described any longer from a hierarchical or mono-centred perspective. Indeed, what can be described as the new emerging architecture of public authorities and public administration is more of a multi-centred model, where different public and private actors, at different levels and with different public or private roles and functions are intertwined, in quite a complex pattern of relationships, ranging from traditional bureaucratic, hierarchical relations to public-private partnerships. In such a new architecture traditional administrative structures would coexist with various structures of state-owned or public corporations and foundations, arm's length bodies, private not-for-profit organisations, reorganised public service providers, independent regulatory authorities, etc.

1. The State and Culture: Paying the Piper or Calling the Tune?

Initially, the former "inherited" communist state was considered to be the "problem" and, therefore, different measures were initiated to limit its powers, size, and especially its presence in political and economic domains. As time went by, state weakness has been

[11] Analyses of the current issues to be addressed by cultural policies can be found, *inter alia*, in François Matarasso and Charles Landry, *Balancing Act: 21 Strategic Dilemmas in Cultural Policy*, Strasbourg, Council of Europe Publishing, 1999, in Simon Mundy, *Cultural Policy: A Short Guide,* Strasbourg, Council of Europe Publishing, 2000, and in Christopher Gordon and Simon Mundy, *European Perspectives on Cultural Policy*, Paris, UNESCO, 2001.

identified as one of the main causes of policy failures, of unsuccessful reforms, of the explosion of social problems etc.

In its 1997 Report[12], the World Bank, which for years has been promoting the idea of a circumscribed role for the state, highlighted the importance of effective state administration: "*an effective state is vital for the provision of the good and services - and the rules and institutions - that allow markets to flourish and people to lead healthier, happier lives. Without it, sustainable development, economic and social, is impossible*."

While these and similar recommendations are addressing the governability crisis affecting developing countries in general, they are of immediate relevance and applicability to post-communist countries.

In an influential book Ralph Dahrendorf[13] has set the theoretical agenda for the study of the post-communist transformations, emphasizing three parallel developments:

- establishment of a democratic political regime,
- creation of a market economy, and
- reconstitution of civil society.

Any survey of post-communist countries has to start from the fact that during the communist era, the power of the state was of a "despotic" nature, based essentially on party/political power and repression. The collapse of the communist regimes and the ensuing institutional chaos revealed how intrinsically weak and ineffective these states were, how inefficient and un-professionalized their bureaucracies were. And, paradoxically, these weak and ineffective structures were entrusted with the enormous task of redefining the state structure and functions, of reconfiguring and institutionalizing a new legal, administrative, social, economic and cultural environment.

Generally speaking, institutional and legal reforms were rather slow to implement and, more often than not, they did not go sufficiently deep as to reshape the inherited state bureaucracies and to modify the mentalities and the behaviour of their employees, from state functionaries to civil servants. Many of the post-communist countries were facing specific problems, such as the absence of rule of law, low or inexistent accountability of public officials, fiscal crisis, and diminished state power.

In this rather chaotic environment, a new role for the State in relation to culture had to be found. The old mechanisms of top-down control and command, backed by a centralised funding system, were no longer working. On one hand, the democratic pressure shattered the old patterns of command and control. On the other hand, the scarcity of financial public resources forced the public authorities to drastically reduce the public funding of culture and thus to withdraw from their role as unique funder. And the old saying "*He who pays the piper, calls the tune*", which has its equivalent in almost all countries, seemed obsolete.

In a classical essay, Harry Hillman-Chartrand and Claire McCaughey[14] identify four models of the relationships between the State and culture in relation to funding: Facilitator, Patron, Architect and Engineer:

"The Facilitator State funds the fine arts through foregone taxes - so-called tax expenditures- provided according to the wishes of individual and corporate donors; that is, donations are tax deductible. The policy objective of the Facilitator is to promote diversity of activity in the non-profit amateur and fine arts. The Facilitator supports the process of creativity, rather than specific types or styles of art… The Patron State funds the fine arts through arm's length arts councils. The government determines how much aggregate support to provide, but not which organisations or artists should receive support. … The arts council supports the process of creativity, but with the objective of promoting standards of professional artistic excellence.

[12] World Development Report 1997, *The State in a Changing World* , issued on September 1997
[13] Ralph Dahrendorf, *Reflections on the Revolution in Europe*, Random House, New York, 1990.
[14] Harry Hillman-Chartrand and Claire McCaughey, "*The Arm's Length Principle and the Arts: An International Perspective - Past, Present, and Future*" at http://www.culturaleconomics.atfreeweb.com/arm's.htm

The policy dynamic of the Patron State tends to be evolutionary, responding to changing forms and styles of art as expressed by the artistic community.

The Architect State funds the fine arts through a Ministry or Department of Culture: Granting decisions concerning artists and arts organisations are generally made by bureaucrats. The Architect tends to support the arts as part of its social welfare objectives. It also tends to support art that meets community rather than professional standards of artistic excellence. The policy dynamic of the Architect tends to be revolutionary. Inertia can result in the entrenchment of community standards developed at a particular point in time, leading to stagnation of contemporary creativity....

The Engineer State owns all the means of artistic production. The Engineer supports only art that meets political standards of excellence; it does not support the process of creativity. Funding decisions are made by political commissars and are intended to further political education, not artistic excellence. The policy dynamic of the Engineer State tends to be revisionary; artistic decisions must be revised to reflect the changing official party line…"

Lately, an almost general consensus has been reached as to the necessity of public authorities' involvement in cultural policy and of broadening the support of government for culture [15], due to the new and broader definition of "culture". This, in turn, determined a certain convergence in the priorities of cultural policies. The *Ruffolo Report*[16] considers that the convergences in the priorities of the various cultural policies are as follows:

- a devolution of powers over culture-related issues from central government to the lower levels;
- greater support for cultural demand;
- strong emphasis on training and artistic education;
- considerable support for contemporary art;
- the introduction of new forms of public/private partnership.

To this list could be added the devolution of functions over culture and cultural-related issues to independent public bodies, public foundations and to the private sector.

However, - or perhaps especially in this new architecture of the public sphere-, the question of how public authorities' involvement ought to be materialised still remains to be answered.

Experience has shown that the above-quoted four different roles are in general combined, following different governmental policies and according to different historical and cultural traditions[17].

One of the questions that arise thereby concerns the division of responsibilities between the central, regional and local levels of government, or the "three-tier administrative system".

In an important work, strongly supported by detailed empirical evidence gathered over a period of over 25 years in Italy, Robert Putnam[18] analyses the institutional performance and the regional government's responses to citizens' needs. Putnam work argues that the conditions for creating strong, responsive, effective and representative institutions depend less on the socio-economy of a region and much more on its civic endowments. Although Putnam's book does not focus especially on cultural-related issues, his findings are, *mutatis mutandis*, of relevance for the analysis of regional and local authorities' cultural policies and involvement in culture.

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[15] J. Mark Schuster, "*Arguing for Government Support of the Arts: An American View*," in Olin Robison, Robert Freeman, and Charles A. Riley, eds., *The Arts in the World Economy: Public Policy and Private Philanthropy for a Global Cultural Community*, Hanover, New Hampshire, University Press of New England, 1994.

[16] Op. cit, [2]

[17] John Pick*, The Arts in a State: A Study of Government Arts Policies from Ancient Greece to the Present,* Bristol, Bristol Classical Press, 1988.

[18] Robert D. Putnam with Robert Leonardi and Raffaella Y. Nanetti, *Making Democracy Work: Civic Traditions in Modern Italy*, Princeton University Press, 1994.

At the same time, the relationship between the public sector and the private sector is being redefined, as the private sector is having an increasingly important role in the cultural sphere and new forms of public-private relations emerge, converging towards real partnerships.

However, even if the State alone is no longer paying the piper, it can still call the tune through the administrative and regulatory framework it sets up, through its cultural policy, through its overall reform policy. The question is therefore to what extent the public authorities should call the tune and what mechanisms should be put in place so that cultural stakeholders participate in the formulation of reform policies. Such reform policies should, *inter alia*, acknowledge and promote the necessary democratic changes in the public cultural administration and in the system of cultural public institutions.

2. The Buzz Words: Decentralisation, Privatisation, Désétatisation, Arm's Length Bodies

Back in 1826, Alexis de Tocqueville referred to local government as the "*fertile germ of free institutions*". After the collapse of the communist regimes, the democratic forces throughout the region realized that this germ was a primordial component of the democratisation process as it was evident that local authorities were better positioned to understand and to respond to the needs of the peoples, as well as to implement programs and policies that would satisfy to a greater extent the demands of their communities.

2.1. Decentralisation and the Need for Careful Planning

The complex process of transferring powers and responsibilities, which during the communist regime belonged to central authorities, towards local authorities has been encapsulated in the concept of "decentralisation"[19]. The devolution of powers and responsibilities from central to regional and local levels of public administration is therefore at the core of any decentralisation process.

However, the increase in the responsibilities local and regional authorities faced required an increase in the financial resources, an increased managerial capacity and an increase in human resources. These were some of the reasons why many central governments in the former communist countries chose to delegate substantial authority and powers to local authorities, therefore placing a great part of the transition processes within the remit of the lowest level of government. It soon became apparent that for any decentralisation process to be successful, several prerequisites were needed:

- the devolution of responsibilities had to go hand in hand with the devolution of powers to raise and retain different taxes;
- central governments had to provide local levels of authority with different forms of financial assistance, such as block grants, transfers or shared taxes;
- local authorities had to be endowed with previously state-owned property;
- local authorities should not retain the role of unique funder or exclusive provider of community services;
- the legal and regulatory framework should implement the principles of local autonomy, of subsidiarity, and enable local authorities to attract investments, to forge new public-private partnerships, to privatise different services, to design specifically suited local policies etc.

In many cases, central authorities were rather eager to share the new responsibility of satisfying the needs and demands of local communities by bestowing certain powers and

[19] In an administrative perspective, decentralisation is a mode of organisation according to which the State entrusts decision-making powers to regional and local authorities. *Decentralisation* is thus opposed to *deconcentration*, where powers at the local level are retained by locally-based representatives of the central authorities, therefore subjecting the decision-making process to the hierarchical control of the central powers. In an economic perspective, decentralisation is one of the essential principles of the market economy, which is often called decentralized economy (in opposition to centrally-planned economy).

responsibilities upon regional and local authorities which, in turn, were more than willing to exert these new powers.

Paradoxically, the locally-based public institutions, and especially the cultural institutions, were more reluctant or, in several cases, were opposing this trend. Such an attitude stemmed from 50 or more years of centralist mentality which could be encapsulated in the notion that centrally-funded cultural institutions were at the "national level"[20] or "national flagships" and, therefore, more important than "local" institutions – not only in terms of prestige, but in financial terms as well. This attitude was also sustained by a deeply ingrained and sometimes justified fear of a "politicising" process of local cultural administrations and institutions and by the fact that the organic relations with the local community were rather slow to develop.

An overview of the decentralisation process within the cultural field[21] in the post communist countries shows varied degrees of success or sometimes even failures. In several cases, the decentralisation in the cultural sphere was deemed to be just the administrative transfer of public cultural institutions from the Ministry of Culture to the regional or local authorities, without a prior implementation of appropriate funding schemes and of an adequate regulatory framework that would have enabled local authorities to implement their own cultural policies. To palliate the adverse results of such hasty and unprepared steps, ad-hoc emergency regulations became necessary in many of these cases.

Making decentralisation a success story requires therefore not only careful management of the regulatory relationships between central and local governments, but also the replacement of annual budgetary transfers with a new system of tax assignment. If the fiscal framework is not carefully synchronized with the delegation of responsibilities, there is a potential high risk of fiscal destabilisation and of a collapse of essential services.

It therefore became apparent that decentralisation was not so much a policy in itself (decentralisation for the sake of it) or a process that could be insulated from the rest of the transition processes, but the result of an all-embracing and planned strategy of democratisation and restructuring.

It also became apparent that there is a need to create a balance between decentralisation and hierarchical control and that in some cases central-local partnerships to address specific cultural issues should be envisaged, as a first step in the decentralisation strategy.

And although the decentralisation process is part of a larger trend in Europe, there is not and there cannot be a universal model for the "right" degree of cultural decentralisation. Each country should therefore design its own model of cultural decentralisation, its different sequential steps and adjoining measures while keeping in mind that its presumed benefits will largely depend on the implementation of an overall democratic system. And the challenge of cultural decentralisation is therefore the setting up of a democratic system within which new roles would be assigned and new relationships would be built between the cultural players, the citizens and the regional or local authorities.

2.2. Privatisation and Its Limits

Whatever the success of the decentralisation measures, the failure of the traditional public sector to meet the needs and aspirations of the citizens, to improve the quality of their life, to answer in real time to the new challenges and to ensure fair and efficient allocation of resources within each sector, is now almost generally recognized. One of the responses was

[20] In this respect, it is interesting to note the abundance of public cultural institutions that, in the early 90's, have added "national" to their names, in an effort to legitimise their *raison d'être* and to enhance their position.

[21] For more information, see Ilkka Heiskanen, *Decentralisation: Trends in European Cultural Policies*, Cultural Policies Research and Development Unit, Policy Note No. 9, Strasbourg, Council of Europe, August 2001.

that central and local authorities have embarked upon massive programs of privatisation, mainly based on the experiences in Great Britain and the USA.

Since the early 90's in the former communist countries there has been a rather heated debate about privatisation in the field of culture. *Is it necessary? Is it feasible? Is it applicable to cultural institutions?* The answers varied greatly, not only from one country to another, but especially from one group of stakeholders to another, according to their specific interests and perceptions. Objections have been raised by quite different groups: public authorities reluctant to lose their power, trade unions afraid of losing influence, state employees afraid of losing their jobs etc.

Fundamentally, privatisation means simply that public-owned (by the State or by regional and local authorities) companies and their assets are being sold out to private entities and thus the direct involvement of the state in the economy is substantially diminished. However, a survey of the different reform programmes all over Europe shows that the concept of privatisation has different meanings and is used in different ways in different countries, as Mark Shuster pointed out[22]**.** But irrespective of its meaning within the context of a specific policy, in both Western European countries and in the post-communist countries privatisation is a part of a wider reform programme aiming at reducing the size of public authorities and at reshaping its role and functions, with the expected result of improved efficiency (both in managerial and financial terms), economic growth and reduction of public expenditures[23].

Privatisation is qualitatively different from the emergence of the private sector as such, where private individuals or companies set up their own private commercially or for-profit-oriented activities. It is nevertheless true that the privatisation process plays an important part in the development and strengthening of a viable and competitive private sector.

Within the cultural sphere, the early 90's witnessed both the emergence of a private sector and the privatisation of certain categories of former "state" and "public" cultural institutions. What was privatised? As a rule, the privatisation process was limited to state-owned publishing houses and newspapers, book and newspapers distribution, recording houses, film facilities and movie-theatres. In other words, only formerly state-owned cultural industries were privatised. And it was within the same sphere that for-profit private enterprises emerged. The rationale of these two convergent processes is self evident, as the above-mentioned activities could be quite easily turned into profitable enterprises.

At the same time, however, an opposing realisation surfaced: there are limits to the processes of privatisation inasmuch as there are limits to the ability of the private commercial sector to improve the quality of life. The effects of privatisation on the cultural sector are complex and sometimes have a boomerang effect, leading to the closing down of privatised cultural organisations.

Such adverse effects can be obviated by finding a balance between the public and private cultural sectors. Moreover, part of the emphasis had to be shifted from ownership issues to managerial and funding ones.

And a central question has therefore to be answered: which forms of privatisation of cultural organisations are consistent with the overall cultural policy of a given country, offering carefully balanced solutions to identified problems and priorities? A tentative answer might be

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[22] J. Mark Schuster, "*Deconstructing a Tower of Babel: Privatisation, Decentralisation, Devolution, and Other Ideas in Good Currency in Cultural Policy*," in Voluntas. International Journal of Voluntary and Non-Profit Organisations, Vol. 8, No. 3, 1997.

[23] An analysis of the complex phenomenon of privatisation can be found in *Privatisation/Désétatisation and Culture. Limitations or opportunities for cultural development in Europe?* Conference Reader of the Circle Round Table 1997 edited by: Annemoon van Hemel and Niki van der Wielen, Amsterdam, 1997 and in Christopher S. Adam, William Cavendish, and Percy S. Mistry. *Adjusting Privatisation: Case Studies from Developing Countries*. London, James Curray, 1992.

that irrespective of the privatisation forms chosen, such a process will not be successful unless appropriate legal, economic, fiscal and social measures are implemented at the same time, within a coherent regulatory framework.

2.3. A New Approach to Public Management: Désétatisation

But equally important, it became apparent that different approaches, concepts, measures and mechanisms, mainly "borrowed" from the commercial sphere, had to be implemented if the cultural public sector were to fulfil its mission. Thus, Western European countries started to introduce a variety of measures such as performance contracts, programme budgeting, partnership operations, contracting out of services and activities, etc., that were all part of the "*new public management*[24]" concept. This concept covers not only the above-mentioned measures; it represents a qualitatively new approach to organisational structures and to the control and command mechanisms incorporating such processes as decentralisation, privatisation, *désétatisation* and de-institutionalisation. This concept is used to describe distinctive new styles and patterns of public service management with a view to reform public administration.

As Ritva Mitchell pointed out[25], "*Désétatisation is, after the 1997 CIRCLE Round Table in Amsterdam, a familiar term to the members of the CIRCLE network. In its widest sense it covers all phenomena relating to the devolution of the state power, and the dissolution of state-central control and hierarchical bureaucracy"* and continues by defining *" De-institutionalisation refers to a more flexible use of funds and organisational channels instead of establishing and financing permanent structures; the catchwords are increasingly networks and projects instead of institutional policy implementation."*

From an economic perspective, *désétatisation* is an economic measure aiming at the withdrawal of the State from the economic sphere, on the assumption that State intervention in this sphere leads to a rigid offer and response, as opposed to the self adjusting mechanisms of the free market and free competition. Promoting the "*laissez-faire*" principle, *désétatisation* is accompanied by the deregulation principle. However, from an administrative perspective, *désétatisation* encompasses various measures within the "new public management" concept, with the aim of reducing or even suppressing the administrative hierarchical command and control mechanisms and of implementing different forms of public-private partnerships as well as arm's length relations of the public authorities with the cultural organisations.

Such an approach elicits important and profound structural changes in the overall architecture of the administrative system of culture. But this new approach does not mean that the "old" cultural administrations will necessarily and automatically disappear. A realistic course of action would appear to be to restructure old structures, in terms of human and financial resources, so that they are equipped to respond to the new needs identified, alongside with the new structures that are set up.

2. 4. Arm's Length Bodies

Within the "new public management" concept may well be placed that of "arm's length", which is a public policy concept applied to a wide range of public relations in many Western countries. This concept may well be considered as the cornerstone of a general system of "checks and balances" which is acknowledged as fundamental in a pluralistic democracy. It aims to avoid unhealthy concentrations of powers and undue conflicts of interests. Its application to cultural institutions is therefore quite an obvious course of action, inasmuch as the political powers are willing to fulfil their pledge of democratisation of the cultural public sector.

[24] Michael Barzelay, *The New Public Management. Improving Research and Policy Dialogue,* Wildavsky Forum Series *3,* The University of California Press, 2001.
[25] Ritva Mitchell, *Survey on Cultural Co-operation In Europe* in CIRCLE 1998.

But the implementation of this concept raises several questions: To whom are arm's length organisations accountable? And to what extent? Are specifically designed monitoring mechanisms necessary so that the "free reign" given to arm's length organisations does not have any adverse results?

The first "arm's length" cultural organisation was the Arts Council of Great Britain, established in 1945. It is interesting to note that this was considered quite a major breakthrough, since although it created the framework for public involvement with the arts; it was at the same time an important step towards the disengagement of political powers from the cultural sphere, the accent being shifted from hierarchical control to support mechanisms. "*I do not believe it is yet realised what an important thing has happened. State patronage of the arts has crept in. …. At last the public exchequer has recognised the support and encouragement of the civilising arts of life as part of their duty"* said John Maynard Keynes, the first Chairman of the Arts Council of Great Britain, and he continued describing the purpose of the Arts Council: "*The purpose of the Arts Council of Great Britain is to create an environment, to breed a spirit, to cultivate an opinion, to offer a stimulus to such purpose that the artist and the public can each sustain and live on the other in that union which has occasionally existed in the past at the great ages of a communal civilised life.".*[26]

However, different "arm's length" organisations have been for quite some time under intensive scrutiny and investigation[27]. They were occasionally subjected to severe criticism, especially over some decisions that were unpalatable or, to say the least, unorthodox from different perspectives.

But whatever the scepticism professed by its critics, the "arm's length" structures still offer one of the most effective mechanisms for supporting cultural activities and fostering excellence without censorship or administrative control mechanisms. However, their commitment to fostering artistic excellence is often perceived as support for *élite* culture.

At the same time, as a result of the democratic changes, the role of the not-for-profit sector and of the private commercial sector in the provision of social and cultural services and in shaping the cultural life of the community has increased. In a historical perspective, the space between the individual and the state has been filled by civil society, which is defined by Ralph Dahrendorf as follows: "*Civil society describes the associations in which we conduct our lives, and that owe their existence to our needs and initiatives, rather than to the State"*[28]*.*

Civil society is now considered a necessary condition to bring about sustainable development. The major problem the "new democracies" are facing in this respect is that the third sector is quite a new player in the cultural field, as it came fully into existence after the collapse of the communist regimes. And, as any new player, it still has to assert its central position in the cultural sphere, especially in relation to public powers which, in turn, still have to fully acknowledge this new partner.

3. From Governing to Governance or the Collapse of the Ivory Tower

The whole array of changes that have been discussed could be considered, in fact, as embodying the shift from the concept of "government" to that of "governance", from the coordinated, hierarchical and top-down administrative control architecture of public powers

[26] John Maynard Keynes, in a radio broadcast quoted in the *Report of the Royal Commission on National Development in the Arts, Letters and Sciences.1949-1951*, at http://www.nlc-bnc.ca/2/5/h5-400-e.html

[27] Alan Peacock, et al., *Calling the Tune: A Critique of Arts Funding in Scotland*, Edinburgh, Policy Institute, 2001.

[28] Ralph Dahrendorf, *A precarious balance: economic opportunity, civil society, and political liberty*, in *The Responsive Community: Rights and Responsibility*, Volume 5, Issue 3, Summer 1995.

and authorities to more pluralistic, diverse, participative and non hierarchical models of conduct of public affairs.

In conjunction with these changes, a general reform of public administration was undergone in many Western European countries, where the emphasis was put on goals and output-criteria, together with an emphasis on evaluation mechanisms and criteria.

Many theories[29] connect these changes to the general changes in our societies brought about by the complex phenomenon of globalisation. Governance therefore comprises multiple functional systems, which are functioning on several fields and levels and have a reciprocal and complex interdependence between them.
The concept of governance has been the subject of many studies[30], which have all recognised not only the existence of several and qualitatively different centres of government but the interdependence between them.

Some of the sources identified for the shift from government to governance were: the inefficiency of public administration in conjunction with the emergence of the "*new public management*" concept; the decentralisation process that resulted in the creation of multi-centre governments with the effect that the role of political central government was reduced; the apparition of new levels of decision – e.g. the European Union , which in turn led to a fundamental change in the role of national authorities; the increased complexity of policy issues, that had to be addressed in a cross-sectoral approach and which led to convergence of previously vertical functions and competences.

Although there are many definitions of governance[31], all of them recognise the increased complexity of relations and interactions among the different institutions and processes, the deep interdependence among the participating players, the apparition of open systems as well as the unprecedented complexity of the stakeholders. An important element of governance is the combination of different levels of government and administration, both at the national and local level and at the supra-national or trans-national levels. Governance is also intimately related to a qualitatively different participation of the governed to the decision-making processes, thus leading to concepts such as empowerment, stakeholders, etc. And governance means not only regulation but solving problems which, in turns, emphasises the crucial importance of information, knowledge, and expertise.

The new and interdependent relations between public and private players is generally described using the concept of networks, therefore emphasising the emergence of the so-called "*heterarchies*", where various public and private players complement each other and depend upon each other.

In this new environment – tri-tiered or multi-tiered public authorities, heterarchies, public cultural institutions, creators, various public and private cultural players – one of the core issues remains how to strike the right balance between such different opposing and rather conflicting, albeit legitimate views, when designing national cultural policies.

What forms of intervention and partnerships are to be chosen, and according to which criteria?

What funding mechanisms and schemes are best suited? What decision-making processes should be implemented in relation to public intervention in the cultural sphere?

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[29] Beate Kohler-Koch, *Catching Up with Change: The Transformation of Governance in the European Union,* in Journal of European Public Policy, 1996.
[30] See, inter alia, Inger Johanne Sand, Changes in the organisation of public administration and in the relations between the public and the private sectors. Consequences of the evolution of Europeanization, globalisation and risk society, in ARENA Working Papers, WP
[31] For further analyses, see Guy B. Peters "*The Future of Governing: four emerging models*", University of Kansas Press, Kansas, 1996; Rob A. W. Rhodes, "*Governance and Public Administration*", in "*Debating Governance"*, J. Pierre, ed., Oxford University Press, Oxford, 1999.

Is it possible to meet the demands of the citizens, who as taxpayers are funding cultural activities, while at the same time answering the needs of the creators and supporting excellence, creativity and innovation?

And what regulatory framework is necessary to implement these new cultural policies? Is it always necessary to enact new regulations?

PART II. CULTURAL REGULATION. A REGULATOR'S APPROACH

CHAPTER 3. CULTURAL REGULATION – A TOOL FOR IMPLEMENTING CULTURAL POLICIES

In any society, the State, through its authorities, enacts laws, makes policies, collect taxes and allocates resources. Therefore, any public policy, including public cultural policy, can be generally defined as a system of laws, regulatory measures, courses of action, and funding priorities concerning a given topic, which are implemented by public powers. A major aspect of public policy is law-making. Thus, it is not surprising that public policy debates occur mostly over proposed regulation and resource allocation.

As with many other words, legislation and regulation seem to have acquired a multitude of meanings, sometimes merely confusing and sometimes contradictory. For purposes of clarity, and since there are no accepted international definitions of either word, the term "*regulation*" shall be used to describe the full range of legal instruments and decisions (constitutions, parliamentary laws, secondary regulation such as decrees, orders, norms, etc., as well as guides of conduct and instructions) through which are established the conditions pertaining to the behaviour of citizens and enterprises, *via* requirements for mandatory behaviour, prohibitions and sanctions as well as incentives. Regulation therefore is being issued and enacted by various public powers and authorities, according to the national constitutional order. The first and most important sub-category, that of "law", or "primary regulation" is adopted by the Parliament, whereas "secondary regulation" is enacted and adopted by the Government, including regional and local governments, as well as by independent regulators (therefore being sometimes referred to as "regulation")[32].

Irrespective of the content of their cultural policies and of their approach to culture, public powers or authorities have a finite set of tools at their disposal to formulate and implement these policies. These tools are, in fact, the generic tools that "governments" use in any field. Mark Shuster and John de Monchaux [33] have identified five tools that governments can use to implement their policies in respect to cultural heritage and which may possibly be considered as the only tools available to governments in any area of intervention. These five tools are:

- *"Ownership and operation"*
- *"Regulation"*
- *"Incentives"*
- *"Establishment, allocation, and enforcement of property rights"*
- *"Information"*

The choice of the tools, the different emphasis put on each of them, their various possible combinations are, evidently, issues closely related to the models of conduct of public affairs that States are choosing and to the different roles of the State in relation to culture.

From a different perspective, regulation is one of the main functions of "governments", alongside to taxation and funding[34].

But whatever the definition and content ascribed to the different tools and whatever their number, at least one remains a constant: regulation. Indeed, regulation is the governing tool "par excellence".

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[32] Other distinctions could be made, as in the French system, where regulation in its broader sense is equated with "reglementation" and regulation in its narrower sense is proper "regulation".

[33] John de Monchaux and J. Mark Schuster, "*Five Thing to Do*," in J. Mark Schuster, John de Monchaux, and Charles Riley II, *Preserving the Built Heritage: Tools for Implementation* (Hanover, New Hampshire: University Press of New England, 1997.

[34] In Scott Jacobs, *Introduction: Improving The Quality Of Laws And Regulations*, in *Improving The Quality Of Laws And Regulations: Economic, Legal And Managerial Techniques***,** OCDE/GD(94)59.

In a narrower sense, government is the executive power in the traditional democratic division of powers within the State; as such, it has generally two different but converging powers with respect to shaping the regulatory framework: on one hand, governments issue regulations within the framework of existing laws, and in order to implement these laws. On the other hand, governments have the power to initiate laws, therefore taking an active part in the law-making process. And in certain cases, and within specific constitutional frameworks, certain limited law-enacting powers may be delegated to governments, under specific conditions and restrictions (e.g. in cases of emergency, during Parliamentary recess, etc.).

Thus, the national regulatory framework is being shaped by the combined action of the legislature, of the governments and of the independent regulatory authorities. However, this does not mean that they are the only players. In any democratic society the relationships and inter-relations between the public powers or authorities and other sectors of society are being recognised as a crucial factor in fostering the public good.[35] And therefore all stakeholders should have the right to participate not only in the formulation of policies, but in the actual drafting of any importance piece of regulation and to this end different democratic mechanisms are put in place, as will be described in the following chapter.

1. National Regulatory Frameworks Pertaining to Culture and Their Sources

National cultural policies are implemented, *inter alia*, through national regulatory frameworks. Regulations pertaining to culture are therefore the illustration of these cultural policies within the larger context of the overall policies at a certain moment. After 1989, the democratic changes that transformed the post-communist countries required a profound change in the legal systems of these countries. But in many cases the adoption of new laws and regulations was rather hasty and ill-prepared, and therefore the expected results were not attained and the regulatory framework became too complex, with sometimes contradictory stipulations. Moreover, regulations of poor quality can have opposite effects to those intended by policy-makers, thus ruining the faith of the citizen in them.

Generally speaking, there are several sources for the national legislation with respect to culture. These sources can be grouped into the following broad categories:

- *legally binding international or regional instruments such as treaties, conventions, charters, agreements etc., to which the States are parties;*
- *international or regional instruments that are not legally binding such as declarations, resolutions, recommendations, action plans, guidelines etc;*
- *norms, guidelines or principles developed by international non-governmental organisations, which have a non-binding character but are collecting internationally accepted best practices in a given field;*
- *national cultural policies;*
- *national legal and cultural traditions and national constitutions*.

A survey of the existing international and regional instruments, legally binding or non-binding and of the existing best practices or codes of conduct illustrates the range and context of internationally accepted principles on culture, cultural activities and cultural products that currently exist.

However, the existing instruments do not address the whole range of cultural issues that countries around the world are facing, especially in connection with the new developments brought about by globalisation, free trade and interconnection.

Moreover, some legally binding instruments often retain a largely declaratory character and therefore do not include an enforcement or dispute settlement mechanism. Thus, such instruments are not directly enforceable.

[35] For an interesting view of associative models of governance, with a focus on the organisation of welfare, see Paul Hirst, *Associative Democracy: New Forms of Economic and Social Governance*, Amerherst, University of Massachusetts Press, 1994.

The question to be considered is how and to what extent the various international or regional instruments, principles and best practices must be incorporated into national regulatory frameworks. The answer to such a question varies.

First, the principles, measures and mechanisms contained in legally binding instruments to which States are parties have to be incorporated into national regulation and therefore States must take all appropriate and necessary steps for full compliance with these, including the adoption of new regulation or the amendment of the existing one.

Second, States are not legally bound to incorporate into their national regulatory framework the principles, guidelines or measures set forth in non-binding legal instruments. However, States have a moral and political obligation to comply with such instruments, which have been agreed upon by consensus in inter-governmental fora and therefore, national regulation should be modified accordingly.

Third, States are under no obligation to incorporate into their domestic regulatory framework the norms, principles and best practices developed by international non-governmental organisations. However, it should be borne in mind that these represent a wealth of knowledge and experience accumulated from various countries and referring to various circumstances, summing up the most successful approaches to specific issues. Therefore, a sensible solution would be to draw upon them when drafting new laws or regulations or when amending them.

Fourth, it must be reminded that national regulation is a tool for implementing national cultural policies. Therefore, new laws, as well as secondary regulations, should be drafted so that they implement the objectives of the cultural policy and existing regulation should be reviewed accordingly and benchmarked against these objectives and goals.

And finally, national legal and cultural traditions should be taken into account, and new regulation should be consistent with these so as to achieve a coherent and unitary regulatory framework and respond to the national cultural traditions and perceptions.

Another source for national regulation could be that of other countries, especially that of Western countries. This source, however interesting and appealing, should be used with utmost caution, as it is generally quite difficult, if not altogether impossible, to transpose a particular piece of legislation from a certain constitutional and legal context into a different one. National regulatory frameworks are rooted in the specific and unique history and experience of a community. As there are distinct legal cultures which permit or prohibit different kinds of socio-economic and cultural behaviour, their transposition from their organic environment to a different one might prove a hazardous task.

1.1. Legally-binding Instruments

A survey of the different cultural aspects where the international community considered that unified and common legally binding provisions are necessary reveals that basically these are:

- protection of creativity via copyright and copyright-related instruments[36];
- protection of the cultural heritage;
- circulation of cultural goods and cultural services.

These three basic categories may be considered as reflecting the fundamental approach of cultural policies to creativity: protection of present creativity, protection of past creativity, embodied in the concept of “cultural heritage” and the fundamental right of access to these, through circulation, dissemination, cooperation and co-production. In this perspective, “cultural heritage” encompasses not only movable and immovable/built heritage, but also the immaterial heritage, traditional knowledge. It is interesting to note, in this respect, that the

[36] For a list of the most important instruments, see Appendix 1.

fundamental right of participation to culture in general is not represented as such in legally-binding provisions. It is an indication, again, of the unbalanced treatment of cultural rights through legally-binding international provisions.

To these instruments should be added the legal instruments and provisions related to the general approach to culture, such as the *European Cultural Convention* of 1954 and the provisions contained in *Article 151 of the EU Treaty*.

The purposes of the *European Cultural Convention* are to develop mutual understanding among the peoples of Europe and reciprocal appreciation of their cultural diversity, to safeguard European culture, to promote national contributions to Europe's common cultural heritage while respecting the same fundamental values and to encourage in particular the study of the languages, history and civilisation of the Parties to the Convention. Therefore, the Convention contributes to concerted action at a pan-European level by encouraging cultural activities of European interest.

Article 151 of the *EU Treaty* affirms the respect for national and regional diversity and at the same time affirms the importance of the common cultural heritage. It further provides for encouraging cooperation between Member States and, if necessary, for supporting and supplementing their action in the following areas:

- *improvement of the knowledge and dissemination of the culture and history of the European peoples;*
- *conservation and safeguarding of cultural heritage of European significance;*
- *non commercial cultural exchanges;*
- *artistic and literary creation, including in the audiovisual sector*.

The Community and the Member States are urged to foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe and to take cultural aspects into account in their action under other provisions of this Treaty. Article 151 further provides for the possibility of adopting incentive measures, excluding however any harmonisation of the laws and regulations of the Member States.

1.2. Non-binding legal instruments

All the other issues related to culture and cultural-related aspects are addressed, both at the international and at the regional level in inter-governmental fora, through a wealth of non-binding legal instruments, such as Recommendations, Declarations, Guidelines and Principles, etc.

An analysis of these principles demonstrates the wide recognition and consensus reached in international and regional inter-governmental with regard to a variety of cultural and cultural-related aspects.

In 2000, the International Network for Cultural Diversity commissioned a *Catalogue of International Principles Pertaining to Culture*[37], which is a comprehensive, although not exhaustive inventory of relevant instruments and documents, listed and commented according to 10 working categories:
"1. Cultural Rights as Basic Rights;
2. Preservation of Cultural Heritage;
3. Protection of Copyright;
4. Circulation of Cultural Goods and Services;
5. Culture as a Component of Development;
6. Dialogue among Cultures and International Cultural Cooperation;
7. Co-Production and Cultural Dissemination;
8. Cultural Policies;
9. Artists and Cultural Creators (status and circulation);

[37] Ivan Bernier, *Catalogue of International Principles Pertaining to Culture*, Ottawa, International Network on Cultural Policy, 2000.

10. Promotion of Linguistic Diversity."

Although these working categories might be considered somewhat confusing, as, for instance, it might be argued that several of the categories are, in fact, issues of cultural policy, and do not stand alone, the Catalogue represents an important and much-needed tool for policy-makers and regulators.

1.3. The Non-Governmental Approach: Best Practices, Guidelines and Principles

A survey of the most important international non-governmental organisations in the field of culture reveals an interesting development. Until the early 90's international non-governmental organisations were most active in the "traditional" fields of protection of cultural heritage and of creativity protection.
The 90's brought about new approaches and new forms of organisation. On one hand, the existing organisations decided to combine their expertise and to enhance their impact by creating umbrella organisations, such as the Blue Shield. On the other hand, new approaches emerged, as the creation of networks or of specialised organisations, that managed to pool an impressive expertise in various cultural issues, such as cultural policies, cultural economics, financing of culture, etc.

This highly diversified spectrum of organisations provided the cultural practitioners, the decision makers and the academics all over the world with enhanced opportunities for in-depths analyses, for exchange of information, for comparisons of approaches, and for evaluation of results, both sectorally and cross-sectorally.

Apart from their lobbying and advocacy activities, these organisations have drawn codes of conduct, inventory of principles, guidelines, and best-practices which represent an important source of inspiration for national decision makers and legislators, and which should not be overlooked in the process of designing national cultural policies.

Whatever their scope and legal status, all these instruments and documents illustrate the paramount concern expressed at all levels for respect, preservation and promotion of different cultures, of diverse and distinct cultural values, of cultural rights.

2. "We Need a Law" Syndrome

The recourse to regulation, and especially to the enactment of "new laws", is particularly tempting in the former communist countries. It is interesting to note that, in many cases, both sides – the regulators, on one hand, and the cultural players, on the other, - share the same view, that almost any specific problem should be addressed via specific regulatory provisions. This indiscriminate approach can be coined as the *"we need a law*" syndrome and it derives mainly from a misconception and misunderstandings of what are the functions, scope and limits of regulation. It is, also, a case of misunderstanding of the roles and functions of the other tools of governance.

While in many cases it is necessary to enact a specific regulation, be it a law or a secondary regulation, this course of action should be used with caution, as there are inherent limits to what any kind of regulation can achieve by itself.

The indiscriminate recourse to legislation is, in fact, the recourse to a "higher" authority, a "paternalist" one, and it is a reflection of a certain passivity of the cultural players.

The regulation "syndrome" is partly an expression of a lingering mentality which equates State/centralised intervention to acknowledgement or confirmation of the centrality of culture or of the importance of the professional group that is lobbying for it (museum people, librarians, theatre people, etc.). Second, this illustrates the tendency to consider that the partial withdrawal of the State from their funding role, through the state budget, could be balanced or replaced by the state intervention via adoption and enactment of regulatory measures. Moreover, it must be remembered that prescriptive and detailed regulation has

been the "norm" in the former communist regimes and that traditionally, many people are used to such an approach, which puts the burden of responsibilities on the "higher" authorities.

However, the recourse to regulation is, generally speaking, a reflection of the dissatisfaction of the cultural players with the existing state of affairs within the cultural sphere.

But in many cases, the existing problems that cultural players are facing cannot be solved by mere enactment of a new regulation. An interesting argument to prove this contention is given by the sponsorship laws that have mushroomed in the 90s in all former communist countries. The cultural players, both from the private and the public sector, considered that a law on sponsorship would solve their funding problems and therefore sponsorship laws has been enacted in different countries. A review of the results of this approach has been undertaken under the auspices of the Budapest Observatory[38], whose excellent work in this field should be more widely known. Generally speaking, the results are rather deceiving, as they do no meet the expectation and hopes put on these specific laws. Although some of the critiques expressed are true – insufficient incentivisation, cumbersome procedures, etc. – the real motives were not explicitly acknowledged: the precarious state of the economy, low rate of profit, low interest in associating a company's name with a cultural event, non-existent or unconvincing marketing and promotion of cultural activities, as well as lack of managerial expertise of the cultural players. Moreover, the expectations put on the enactment of the sponsorship legislation were rather unrealistic and did not take into account the fact that it takes time to change mentalities and to build a culture of patronage, sponsorship and charity.

The massive recourse to regulation could also be an indicator of ill-conceived cultural policies and "half-baked" measures, based upon insufficient data and without *ex ante* impact assessments. These, in turn, would trigger inadequate or "bad" regulations, with the result that further amending regulation would be required –the "snowball" effect.

3. Sectoral Versus Cross-Sectoral Approaches

Another aspect that needs a careful scrutiny is related to the old debate about sectoral legislation or, in other words, domain-specific or vertical legislation, as opposed to cross-sectoral, transversal legislation. But first, how should be defined a specific cultural sector or domain? And what is the best legal approach to regulating a cultural sector? What is the relationship or the difference between sectoral cultural policies and objectives and sectoral regulation or between cross-sectoral cultural policies and cross-sectoral regulation?

Several examples might help clarify these issues. For instance, the cultural policy objective of free circulation of cultural goods cannot be implemented via a single piece of regulation: it requires, for its implementation, regulatory interventions within the body of customs and taxation regulations. The specific cultural policy objectives should be incorporated in these regulations, which are enacted and implemented by the authorities responsible for the corresponding public policies.

Likewise, the book sector may well be considered a cultural sector, where "book policy" is the unifying concept around which different cultural strategies and objectives revolve, each having at its core a different aspect: first, the authors and their protection; second, the translations and translation-related policies, including financial support in the form of "*aides à la traduction*"; third, the publishing industry, as cultural industry, and the whole array of regulations and incentives designed for it; fourth, the printing facilities and the distribution services, with their set of specific rules and regulations; fifth, the legal deposit legislation and sixth, library operations and systems. Many of these problems are being addressed by the general regulatory framework: authors' and translators' protection cannot be dissociated from the general copyright regulations; financial and fiscal incentives, tax relief, etc. should find their place in the general financial and fiscal regulation, even – or especially – if they represent exceptions or derogations from the general system put in place; likewise, library operations and organisation are an altogether different subject-matter, which cannot

[38] Regional Observatory on Financing Culture in East-Central Europe, at www. budobs. org

convincingly be married to book publishing. It is obvious that all these disparate problems cannot be coherently addressed in a single piece of regulation, and from a legal point of view, the policy culture sector of books cannot be transposed into a sectoral regulation.

However, whatever rules and regulations are applicable to the different links of the book chain, they should be harmonised so as to result into a coherent regulatory framework. Needless to say, each and every such regulatory measure should be consistent with the goals and strategies of the national cultural policy, thus leading to the enactment of a coherent regulation for the whole book sector through sectoral legislation, instead of a single law, as proposed by a cross-sectoral regulatory approach.

A similar analysis could be made with respect to the proposed “law of culture”, which has been advocated from a cultural policy perspective. However, from a regulatory perspective, drafting a law on “culture” poses nearly insurmountable problems, related to its coherence and to the regulatory quality of such an endeavour. Moreover, the recourse to this approach is generally, albeit not always conscientiously, motivated by the inexistence of a prescriptive and detailed document on “national cultural policy “. Thus, a “law of culture” is viewed as a substitute of a holistic cultural policy statement. However, it should be mentioned that the title “Law on Culture” is misleading, as almost none of these laws regulates “culture” as a whole. The existing and proposed laws on culture are in fact regulating only the administrative aspects of the organisation and functioning of public cultural institutions and of their subordination and are generally addressing the need to restructure existing institutions, which have been initially organised via a law. Therefore, in application of the principle of symmetry, a new organisational scheme ought to be implemented by a similar regulatory approach, which would also repel the previous law.

In an apparently opposite approach, a draft law on the organisation of museums’ collections, their conservation and restoration, which was implementing several UNESCO and ICOM guidelines, would apply only to the museums of the ministry of culture and not to the museums of the Academy of Science or of other ministries, which were considered as an altogether different sector, on the grounds that these institutions belonged to different other bodies.

Likewise, a recent draft proposed that the managers of local cultural institutions be granted the status of civil servants, whereas the regulation for the equivalent “national” cultural institutions did not contain such provisions.

Coming back to the sponsorship laws, it should be added that a similar approach was proposed in certain countries, following the dissatisfaction felt by cultural players with regard to the immediate results of this legislation: drafting an even more specific law, which would address solely sponsorship in the cultural field, as a narrow sub-sector of sponsoring.

Furthering this analysis, another issue should be discussed: whether or not a separate regulation on sponsorship was indeed necessary, as the distinct fiscal incentives provided for in those laws could very well be incorporated in the general fiscal legislation of the country. Although the latter might seem to be the most sensible approach, it has nevertheless a circumstantial drawback: the difficulty of laymen to understand the intricacies and the rather hermetic and highly codified vocabulary of the fiscal regulatory framework. To this should be added an argument put forth in various other occasions: the educative value of certain legal acts, which introduce to the general public new concepts, such as the sponsorship one. All these circumstantial arguments illustrate a rather troubling fact: the misunderstanding of the functions, scope and limits of legislative acts, on one hand, and the poor quality of the regulation enacted and of the whole law-making process, on the other hand, which is not tested against any quality standards.

The above-mentioned examples demonstrate that there is sometimes a world of difference between the cultural, sociological, philosophical or just commonly used definition and perception of the various cultural sectors or sub-sectors and their corresponding definitions within the regulatory approach, and that the internal logic of a law or regulation and of the regulatory framework as a whole should be borne in mind whenever the drafting of a piece of

regulation is required for the implementation of a certain aspect of the national cultural policy. In other words, the common denominators approach from a legal perspective should prevail, so that the basket fruit does not mix fruits with pickles, but contains only fruits.

Therefore, the cultural policy approach to a sector does not necessarily meet the regulatory approach to the same sector. More often than not, a sectoral cultural policy would be implemented through a whole array of distinct sectoral pieces of legislation and regulation, according to the internal logic of the national legal system.

However, this is just an apparent contradiction since, at the end of the day, the cross-sectoral, holistic approach of cultural policies to the cultural sphere, including sectoral strategies, is translated into a holistic system of laws and regulations.

Nevertheless, the old saying about each rule having an exception just to confirm the existence of the rule, is applicable as well to the above assertions and numerous pieces of regulation that have been enacted do not follow the principles and techniques of law-making.

What really matters nationally is the political will and its translation into holistic cultural policies, implemented, *inter alia,* through a coherent and articulate regulatory framework[39]. And internationally, what really matters is the compliance or, as the case may be, the harmonisation of national regulatory frameworks with the provisions included in the different international instruments pertaining to culture.

Whatever their subject matter, their scope or their content, all regulations must comply with the principles of legal equality, of legal security and of proportionality. In addition, regulation must be based upon sufficient information, and must be based on reasonable and proper grounds that must be published.

CHAPTER 4. REFORMING THE REGULATORY FRAMEWORK FOR CULTURE. TOOLS AND PRINCIPLES

Rewriting or amending old regulations pertaining to culture and drafting new ones are the two major components of any reform programmes of the regulatory framework pertaining to the cultural sphere. Moreover, many development policies such as reforms of the public administration, of the fiscal and taxation systems or decentralisation initiatives, that do not constitute a reform of the cultural sector *per se*, result nonetheless in changes of the regulatory framework of culture.

Although new regulations are adopted by all European countries, in order to harmonise their national regulatory framework with the legally-binding provisions contained either in new EU legislation or in other international instruments, it must be acknowledged that post-communist countries are under a much heavier time pressure to do so, as they need to reform their entire regulatory and administrative system. Accession countries have to adapt their whole regulatory framework and regulatory institutions to the requirements contained in the body of EU legislation, within the time span agreed upon through their accession commitments. And although only some of these regulations relate directly to culture (as is the case with copyright protection), the general reform policies and regulations have an important effect on the cultural sphere, therefore triggering the enactment of new regulations directly related or with impact to the cultural sphere itself. The same holds true, to a large extent, for non-accession countries as well.

Regulators in post-communist countries often consider that new laws, new regulations would implement the reforms simply through their adoption. This is a belief that is also shared by the

[39] For an overview of the policy and regulatory developments in a pan-European perspective, an essential instrument for information and a valuable tool for policy-makers is the *Compendium of Basic Facts and Trends* of the Council of Europe.

different stakeholders, as has been described in the previous chapters. Thus, the drive for drafting and adopting many new regulations stems from the assumption that their enactment represents the end of the road or, in other words, the reform "mission is accomplished".

Yet, it must be repeated, regulation is not an end in itself. It is just one of the tools that policy-makers may use to reform the administrative or regulatory environment, to implement their public policies.

1. A Major Challenge: Quality Regulation

In developing their policy-making and law-making capacity, the post-communist countries still need to improve all phases of the policy cycle: definition of the policy objectives; development and assessment of the policy options; elaboration of the implementation instrument or law-making; implementation and assessment of results.

The quality of the regulation enacted is therefore intrinsically linked to the quality of the policy it should implement. A "good" policy is easily, although not automatically, transposed in a "good" regulation, whereas a "bad" policy cannot be as easily transformed into a good one through the law-making process. On the other hand, a good and sound policy can be turned into a "bad" one, or an ineffective one, if attention is not paid to the quality of the implementing regulation.

The quality of the regulation enacted depends largely on the appropriate use of several other tools and techniques. When these tools and techniques are not appropriately used, the resulting regulation might be impossible to implement, for various reasons: for its internal flaws, for its external contradictions with other existing regulations or reform options, for its complexity, for its unforeseen side-effects or because institutional capacities are not capable of implementing it or, simply put, because they do not achieve their goals. Although all these findings can be applied to any sector where reform, policy-making and law-making are necessary, they are somehow even more important in the cultural sphere, if only because cultural policy, in its broader sense, encompasses so many diverse aspects – from international trade in cultural goods and services to administrative reforms of cultural public institutions, from social protection of independent artists to human rights, etc. – that need harmonised and coherent regulations.

The quality of regulation can be tested against a set of standards. Although there is no consensus on such quality standards, several countries as well as OECD[40] have set a list of quality regulation standards, which include:

- "*User standards such as clarity, simplicity, and accessibility for private citizens and businesses;*
- *Design standards such as flexibility and consistency with other rules and international standards;*
- *Legal standards such as structure, orderliness, clear drafting, terminology, and the existence of clear legal authority for action;*
- *Effectiveness standards such as relevance to clearly-defined problems and to real-world conditions;*
- *Economic and analytical standards such as benefit-cost and cost-effectiveness tests, or measures of impacts on small business, competitiveness and trade;*
- *Implementation standards such as practicality, feasibility, enforceability, public acceptance, and availability of needed government resources*."

This set of standards responds to the most important quality requirements of any piece of regulation: reliability, coherence, effectiveness, cost-efficiency, compliance, implementability and enforceability.

[40] In Scott Jacobs, *op. cit.*

The quality of enacted regulations and, therefore, the quality of the whole law-making process, is extremely important in every country, but even more so in the former communist countries because their constitutional and administrative systems (where the continental European model is predominant) generally require the implementation of almost all policy instruments to be done by different types of regulation. In addition, to repel "old" regulations a symmetrical act is needed.

To conclude, the design of sound and coherent cultural policies is intrinsically linked to the development of the policy-making capacity, for which the use of several tools is necessary. In addition, the implementation of cultural policies, through enactment of regulations, requires the use, in the law-making process, of different tools and techniques. And finally, the success of a cultural policy is tested against its results, i.e., *inter alia*, the degree of compliance, implementability and enforceability of the regulatory framework enacted.

But the quality of regulation must be tested also against the underlying principles of democracy:

- The principle of legal equality;
- The principle of legal security;
- The principle of proportionality.

It is also important that the transition from old to new regulatory frameworks is done in a smooth, continuous way, so as to avoid the apparition of gaps in the overall legal system, of so-called "regulatory voids", which lead to legal uncertainty.

2. Why? How? What? Or a Tentative Checklist for Decision-Makers

The process of enacting new regulations, which has an unprecedented pace especially in the post-communist countries, is a result of several factors already mentioned: the indiscriminate recourse to regulation seen as the problem-solving panacea, on one hand, and on the other hand, the poor quality of certain regulations or policies, which in turn determined the adoption and enactment of correcting regulation. The pressure to create new laws and regulations is further enhanced by the need to adjust the regulatory framework to the transformations aimed at establishing democratic institutions and market economies and therefore at reforming and restructuring, *inter alia*, the whole system of government, independent regulators, public authorities and cultural institutions. An additional factor is the new approaches to cultural policies, as integrated, cross-sector policies. Moreover, the international instruments pertaining to culture need to be transposed in the domestic regulatory frameworks.

As all intellectual endeavours, policy-making and law-making could be approached in the frame of Quintilian hexameter: "*Quis, Quid, Ubi, Quibus Auxiliis, Cur, Quomodo, Quando*?"[41] The answer to these questions is a first important step to decide, *inter alia*, on responsibilities, means, timing and content of proposed regulation.

One of the main tasks cultural policy-makers face in this context is to decide when the tool of regulation is to be used to implement their policies and therefore an assessment of existing regulation and its capacity to implement those policies is the first necessary step in this respect.

Such an approach would help limit the excessive proliferation of regulatory instruments, since in some cases a careful assessment would reach the conclusion that a new regulation is not necessary. In many other cases, however, such an exercise would lead to the conclusion that the proposed course of action would not have the intended result, unless it is substantially amended.

Substantial improvement of the quality of regulation, both in terms of its content and quantity could be achieved by a careful assessment of the answers to at least three important sets of questions:

[41] *Who, what, where, in what ways, why, how, when*?

Why is a new regulation proposed? Why is it necessary? Why is it important?

What should its content be? What is to regulate? What is the relevance and effectiveness of the proposed regulation? What is its compatibility to the legal standards?

How shall a certain issue be addressed? How is the law-making exercise going to proceed, in terms of tools and techniques used? How shall this regulation be implemented and enforced? How shall its impact be assessed?

The answer to the first question is a highly political one. It is related to the priorities put forth in the political agenda as well as to the international commitments of states, such as accession to EU or agreements with the International Monetary Fund or the World Bank. To these political commitments, both internal and external, are added the factors described above, which more often than not, are intermingled with the political ones.

However, the development of new regulations should not be seen only from this perspective, as its ultimate goal is to ensure the well being of the citizens, the enjoyment of their human rights.

The "why" question is therefore addressed mainly to policy-makers, who should decide at least on the following issues:

- *which of the possible policy options is to be preferred?*
- *should (and could) this policy option be implemented through regulation or through non-regulatory tools?*
- *Is a regulatory intervention justified, feasible and implementable?*

In this respect, caution and restraint should be the key words, bearing in mind that regulation must be considered in its entirety and that it has not only considerable strengths, but important limitations as well.

But whatever the answer to the first question, the second question, related to the content of the proposed regulation is a crucial one. Indeed, if the corresponding cultural policy does not identify and circumscribe correctly the policy issue that is going to be addressed through regulation, the quality of the ensuing regulation would be rather poor and shall not constitute an adequate response to the identified need.

The transposition of a policy issue into regulation would generally produce a complex of inter-related proposed regulations, each addressing specific issues. In addition, during the law-making process new issues of relevance could be identified, which were not originally foreseen, and therefore a complex process of harmonisation of different perspectives and approaches would be needed.

The "what" question therefore is mainly related to the substantive content of the regulation. In addition to the survey of *pros* and *cons* arguments over sectoral and cross-sectoral approaches, the policy content of proposed regulation must be evaluated against certain specific criteria. Many governments have already developed such standards and criteria. A special mention should be made for the effectiveness and compatibility criteria. Indeed, these are the most important criteria to help policy-makers assess *ex ante* the import of proposed regulations and to decide whether the proposed course of action is the right one.

In this respect, several questions, *inter alia,* should be addressed:

- *is the basic approach adopted in the proposed regulation consistent with the real situation?*
- *are there alternatives to the proposed approach and if yes, have they been evaluated?*
- *is the proposed regulation consistent with other rules and international standards?*
- *is the proposed regulation clearly addressing the identified needs?*
- *what is the foreseen impact of proposed regulation?*
- *is the proposed regulation establishing the authorities that should put it into effect?*
- *does the proposed regulation contain sufficient provisions as to the regulatory and administrative mechanisms that are necessary to implement it?*

- *does the proposed regulation provide for realistic funding of proposed measures?*

It is impossible, within the limited space of this volume, to analyse and evaluate the content of the whole regulatory frameworks pertaining to culture that have been enacted in the former communist countries and this is not its goal. Moreover, this information can be easily found in *Cultural policies in Europe: a compendium of basic facts and trends.* However, the minimum requirements with regard to the regulatory content for two basic cultural sectors – creativity and cultural heritage - as well as its implementation and enforcement will be discussed in the annexed case-studies.

The third question is addressing mainly procedural issues, in relation to the tools and specific techniques used in the law-making process and in the ensuing evaluation of the results. The following sub-chapters are devoted to these issues.

Although stated separately, these questions, and in fact others as well, are inter-related and the answers to them cannot be completely separated. However, the answers to all these questions could help decision-makers and law-makers to improve the quality of regulation and to produce a reliable, effective, coherent, implementable and enforceable regulatory framework, through which cultural policies could be implemented as part of the overall public policies or, in other words, to produce a "good" regulation. And, from this perspective, a good regulatory policy should not permit the unnecessary proliferation of cultural regulations, which not only carries heavy administrative costs, but weakens the reliability of the regulatory framework as a whole and undermines the legal security of the cultural environment.

3. What Tools for Law-Making?

Law-making is, even under "normal" conditions, an arduous task, one that requires specific expertise and qualifications and the use of specific tools and techniques. If these techniques are not followed, if these tools are not used, the result is, more often than not, a "bad" regulation. A "bad" regulation is generally considered that regulation which, for whatever reasons, does not implement correctly or at all the cultural policy option, which produces unforeseen and unprepared for side-effects or which is not implementable and enforceable.

3.1. Impact Assessment

The most important technical tool that policy-makers and law-makers have at their disposal is impact assessment. Generally speaking, the objective of any impact assessment exercise is twofold:

- to improve the regulations themselves; and
- to reduce the number of legal instruments by avoiding unnecessary legislation.

The results of a good impact assessment exercise could help produce fewer but clearer regulations. In certain cases, the findings of the impact assessment would point out that no regulatory intervention is needed. The reason for this could be that either a regulatory intervention would not solve the problem or that the proper enforcement of the existing regulation would suffice.

However, it should be stressed that impact assessment is only one of the tools policy makers have at their disposal and, at the end of the day, their decisions would be also influenced by other factors, including their political agenda.

When impact assessment is used to evaluate the possible results and consequences of a proposed policy and regulation, it is described as *ex ante assessment*, or *regulatory impact analysis*[42]. The evaluation of the impact of already enacted regulations is done through *ex post* assessment. When correctly used, the impact assessment approach may provide law-makers with a wealth of information concerning especially unforeseen effects, possible

[42] For further information, see "*Regulatory Impact Analysis: Best Practices in OECD Countries",* OECD, 1997.

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problems of implementation and compliance, unforeseen extra-costs, etc., therefore being one of the fundamental bases for informed decision-making.

Although both types of impact assessment are extremely useful tools, the *ex ante* approach is more specific to the law-making phase. Through it, policy-makers and regulators can improve the quality of the proposed regulation and ensure that its consequences, side-effects and costs are examined and evaluated in advance, and that such findings represent an additional input during the law-making process, enabling regulators to adjust, to amend or to change altogether their regulatory approach. Thus the basic goal of any impact assessment exercise is to enhance the quality of the overall decision-making process.

Generally, an impact assessment of a draft regulation is aimed at assessing whether the proposed regulation is meeting the policy objectives, whether it is practicable and effective, clear and therefore implementable, whether the implementation costs have been reasonably foreseen, etc.

Impact assessment is also a useful tool to evaluate the compatibility and effectiveness of "old" regulation, thus providing policy-makers and regulators with sound arguments either for repelling or for maintaining specific regulations or, as the case may be, for their amendment. *Ex post* impact assessment exercises would generally evaluate and analyse the degree of effectiveness of the implemented regulation, the degree of implementability and compliance of that regulation, as well as the side effects that occurred and their degree of importance.

Discarding old regulations on the sole ground that they are old especially when new regulations are not enacted at the same time and without careful impact assessment of the implications and effects of the ensuing so-called "legislative void" could well be considered a "bad" policy. The effects of such a political option should be carefully assessed. Such a case happened in a post-communist country, where the whole corpus of regulations pertaining to the protection of cultural heritage was abrogated in 1990 and a new comprehensive, coherent and enforceable regulatory framework was enacted only in late 2000. During the elapsed 10 years, partial regulations were enacted, but a coherent system of protection could not be put in place, for various political reasons, with the result that the implementation and enforcement of policies and whatever regulations existed in the field of cultural heritage protection were not really possible.

Impact assessment may be carried out through a variety of means, such as consultations, statistical analyses, and cost-benefit or cost-efficiency analyses and, even more important, through simulation or testing of proposed regulations.

Today, there is a consensus among EU Member States that impact assessment exercises should be conducted, in a form or another, before any legislative changes are to be discussed.

In addition to using these technical tools, the law-making process must abide by the democratic standards of good governance: *transparency and openness* of regulators, with appropriate *communication and information* procedures and *consultation and participation* of stakeholders.

3.2. The Case for Transparency and Openness

The principle of transparency fully entered into European Union law with the Treaty of Maastricht, to which was attached Declaration No. 17 on "the right of access to information". On the basis of this declaration, a code of conduct was adopted by the Commission in 1994 and the Council in 1993, detailing the conditions under which access to information held by these institutions could be requested. A further step has been done by the Amsterdam Treaty, adopted in 1977, which introduced a right of access to documents, although it was subjected to detailed procedural rules that were adopted only in 2001.

The case for transparency and openness is very well argued by Bernard O'Connor[43]:

"*The lack of transparency in public decision making can, and most often does, lead to bad decisions which do not take into consideration the needs of all persons affected. With time closedness leads to corruption. In addition the lack of openness leads to the lack of confidence. The institutions of a state or the Community rely on the confidence of the citizens to retain their legitimacy. If that confidence is lost the institutions crumble. Transparency and openness are therefore essential not only to avoid bad decisions and possible corruption but for the very fabric of the social structure*."

However, the principle of transparency and openness was also at the core of the political debate in almost all European countries, in the Western as well as in the Central and Eastern European countries.

Although of crucial importance for the whole governance approach and for the democratic process of policy-making, the principle of transparency and openness is not of immediate import to the law-making process as such.

However, transparency and openness is linked to the information function that is one of the pillars of the new approaches to the management of public affairs. Providing citizens, the private sector and businesses with information on what the government, the public authorities is doing or will be doing can be easily achieved through notification, publishing of information either in traditional formats or through the new communication services. Either way, this is a one-way communication, from the authorities towards the public.

But the application of the transparency and openness principle opens the way to the other important principle of democratic life, that of consultation and participation.

3.3. The Case for Consultation and Participation

It has been often argued by reform-oriented officials that, if they were to hold open consultation procedures, many of the reforms would be stalled. This contention is, alas, partly true, as many of the envisaged and necessary reforms are likely to bring about some rather unpalatable changes, as far as various concerned groups view them and, therefore those groups would oppose the proposed reforms. But this is only partly true and actually proves that the proposed reforms are not accompanied by those measures necessary to palliate or to alleviate their adverse outcomes.

Moreover, this affirmation is, in fact, a strong argument in favour of consultation procedures. Indeed, through public debates and scrutiny of proposed policies and regulations, through consultations on the major reforms that are being proposed and of the actual content of their proposed implementing tools, policy-makers and, subsequently, law-makers, could inform and be informed, could conduct impact assessment exercises and, in the end, could adjust their approach to reasonably meet the expressed needs and expectations of the various stakeholders. From this perspective, consultation and participation are enhancing and transforming the information function of public authorities, from a one way monologue to a two-ways dialogue.

There is, nevertheless, a qualitative difference between consultation and participation. Whereas consultation is no more than a two way dialogue, participation means that stakeholders are not only expected to express opinions on the proposed regulation, but also to actively participate in the actual drafting. And although regulators would have the final decision, participative procedures bring the public to the decision-making level.

Consultation and participation are not necessary only at the policy-making stage, they are equally important at the law-making stage, providing an extremely useful opportunity for both sides – regulators and stakeholders – to exchange views and information which could help improve the regulatory approach as well as its substantive provisions. Consultation and

[43] In Bernard O'Connor, *Transparency and Openness in EC Decision Making*, Liuc Papers 46, 1997.

participation are equally important for the further implementation and compliance to the proposed regulation, as stakeholders would be better informed and would also develop a "proprietary" feeling towards regulations to the drafting of which they participated.

The implementation of appropriate mechanisms for consultation and participation would necessarily require and determine important changes not only in the law-making processes, as such, but in the mentalities and attitudes of the regulators and of the civil servants, towards an improved "responsiveness" from their part. Similar changes of mentalities and attitudes would be necessary on the part of the stakeholders.

Another crucial aspect, although easily overlooked, is that of accessibility criteria. Who are the interested groups that should participate? What criteria should be used for choosing those? What incompatibilities should be taken into consideration, if any? Who should decide? The answers to these questions leave regulators with a wide choice of options, among which the most suitable solution for specific situations ought to be chosen. However, it is sometimes quite difficult to ensure that all interested groups of society participate in this process, as some of the groups may not have organised representations, while other organisations may not be known to the regulators organising the consultation. One solution could be to create a register where all interested groups can register and state their fields of interest.

The participatory dimension of policy-making and law-making enhances the role and importance of a "healthy and vibrant civil society".

The application of the consultation and participation principle also increases the interdependence and shared responsibility of public administrations and citizens, being therefore and important principle of good governance.

3.4. The Case for Compliance and Implementation

The difference between a "bad" regulation and a "good" one resides not only in its actual wording, but equally important, in its implementability and enforceability and in the degree to which the public is complying with the new regulatory provisions. Unrealistic regulations would not be possible to implement and their enforcement would cause serious problems, therefore undermining the reformatory approach as well as the credibility of the policy-makers.

However, the degree of implementation and compliance to a regulation is not necessarily an indicator of a "good" or "bad" law or regulation. A good regulation might be as difficult to implement as a bad one.

Implementation requires therefore careful planning and special techniques on the part of the implementing authority or, in other words, special "compliance and implementation" strategies.

Such strategies should include: information and promotion activities, monitoring systems, assessment of implementation capacities, etc.

PART III. CULTURAL DIVERSITY AND CREATIVITY IN RELATION TO HUMAN RIGHTS

CHAPTER 5. CULTURAL RIGHTS AND CULTURAL DIVERSITY

Although cultural rights should take a central place not only in cultural policies but also in the consideration of human rights issues, these rights have been, for quite some time, the least understood and developed of all human rights that are guaranteed under international law.

This paradoxical phenomenon derives partly from the fact that generally, the focus was put on civil and political rights, on one hand, and on economic and social rights, on the other, while economic, social and cultural rights as a whole were granted insufficient attention. The diverse and different definitions of "culture" are further adding to the complexity of the issue.

1. Human Rights in International Instruments

The universality of human rights has been clearly established and recognised in international law and the United Nations proclaimed in its *Charter* that human rights are "*for all without distinction*". The 1948 *Universal Declaration of Human Rights* states that human rights are the natural-born rights for every human being; they are not privileges.

Universal human rights are further established by the two International Covenants on human rights – the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Civil and Political Rights*, as well as in the other international standard-setting instruments.

At the European level, the first specific legal instrument was the *European Convention on Human Rights.* The Council of Europe's Convention sets forth a number of fundamental rights and freedoms, including freedom of expression, provided for in Article 10:

"*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The *European Union*'s activities are also based on the main international and regional instruments for the protection of human rights, including the *European Convention on Human Rights*.

A considerable step towards the integration of human rights and democratic principles into the policies of the European Union was taken with the entry into force of the *Treaty on European Union* (TEU) on 1 November 1993. The *Treaty of Amsterdam*, which came into force on 1 May 1999, marks another significant step forward in integrating human rights into the legal order of the European Union.

At the 2001 Nice Summit *the EU Charter of Fundamental Rights* has been officially proclaimed. Although the EU Charter has codified material from various sources of inspiration, such as the European Convention on Human Rights, common constitutional traditions, and international instruments, it has its own, specific legal value and is completely autonomous from its sources. Therefore, the interpretation and jurisprudence based on the Charter will have their own development.

The EU Charter sets forth a number of human rights and freedoms, including freedom of thought, conscience and religion, freedom of expression and information, freedom of the arts and sciences and makes provisions for cultural, religious and linguistic diversity. Freedom of the arts and science is stated in Article 13:

"*The arts and scientific research shall be free of constraint. Academic freedom shall be respected*."

And the provision on cultural, religious and linguistic diversity is stated in Article 22, which draws on Article 6 and on Article 151 paragraphs 1 and 4 of the EC Treaty:

„*The Union shall respect cultural, religious and linguistic diversity*."

2. Cultural Rights between Declaration and Legal Protection - What Are the State Obligations?

Cultural rights are declared both at the universal and regional levels. At the universal level, these rights are first declared in the *Universal Declaration on Human Rights.* Although later provisions in international law reflect a broader perception of cultural rights, the direct references to cultural rights in the 1948 *Universal Declaration of Human Rights* are rather narrow:

"1. *Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*
2. *Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."*

And Article 22 of the same instrument states:

"*Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."*

Cultural rights acquired a treaty binding character by virtue of Article 15 of the *International Covenant on Economic, Social and Cultural Rights*, which entered into force in 1976 and which states:

"1. *The State Parties to the present Covenant recognize the right of everyone:*
a) To take part in cultural life;
b) To enjoy the benefits of scientific progress and its applications;
c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. *The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.*
3. *The State Parties to the present Covenant undertake to represent the freedom indispensable for scientific research and creative activity.*
4. The State Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields."

Other international documents have a declarative nature, stating principles and urging Governments to take steps for the recognition and enjoyment of various categories of cultural rights. Any list of such documents should include, *inter alia*, the following:

- UNESCO *Declaration on Principles on International Cultural Co-operation, adopted on 4 November 1966*, whose Article 1 states:

"*1. Each culture has a dignity and value which must be respected and preserved.*
2. Every people has the right and the duty to develop its culture.
3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind."
2]

- The 1986 UN *Declaration on the Right to Development* (Article 1):

"*The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized*."

- The 1982 Mexico City *Declaration on Cultural Policies* (Principle 2), which states:

"*The assertion of cultural identity therefore contributes to the liberation of peoples. Conversely, any form of domination constitutes a denial or an impairment of that identity."*

- The 1993 *Vienna Declaration and Programme of Action*, is addressing the duty of states to promote and protect human rights, stating that:

"*the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind*."

- The 2001 *UNESCO Universal Declaration on Cultural Diversity* is addressing the issue of human rights and cultural diversity.

The above list of international instruments and documents pertaining to cultural rights illustrates the fact the *International Covenant for Economic, Social and Cultural Rights* is the only legally-binding instrument that contain direct and specific provisions on cultural rights as such. The declarative nature of the other international instruments and documents provide only for a moral obligation to comply.

Considering that the existing framework of human rights protection does not ensure adequate recourse to violations of cultural rights, The *World Commission on Culture and Development* recommended in its international programme, called "*International Agenda*" an action plan addressed specifically to the protection of cultural rights as human rights, proposing that:

- *"an inventory of cultural rights that are not protected by existing international instruments be drawn up. This would enable the world community to enumerate and clarify existing standards of international law concerning the protection of cultural rights;*
- *an International Code of Conduct on Culture be subsequently drafted so as to provide the basis for consideration and action in cases of blatant violations of cultural rights. The Code or its provisions could be made part of the "Draft Code of Crimes against the Peace and Security of Mankind" now under consideration;*
- *the possibility be considered of establishing an independent International Office of an Ombudsperson for Cultural Rights to negotiate the peaceful settlement of cultural rights-related disputes."*

Within the framework of the two Covenants, economic, social and cultural rights can be protected against their violation through the mechanisms of civil and political rights, leading to the so-called integrated approach.

However, the approaches adopted by the UN Human Rights Committee and the European Court of Human Rights differ. While the *International Covenant for Civil and Political Rights* makes provisions for the prohibition of discrimination, the *European Convention of Human Rights* in its Article 6.1 provides for the fair trial clause. Although the non-discrimination clause in the *International Covenant for Civil and Political Rights* and the right to a fair trial in the *European Convention of Human Rights* are not the only civil and political rights that lead to judicial protection of economic, social and cultural rights through the integrated approach,

they are the most important ones. Moreover, although the complaints procedures under the instruments protecting civil and political rights have proved to be helpful, in recent years complaints procedures are being created in connection to the instruments protecting economic, social and cultural rights. On the other hand, given the interdependence and indivisibility of all human rights and the ensuing difficulty in classifying a certain right as belonging solely to one category, it would appear that a strict categorisation of the rights is not only impossible, but counterproductive. This argument is further supported by the fact that economic, social and cultural rights can be also protected through the instruments protecting primarily civil and political rights.

A survey of the different aspects concerning the protection of economic, social and cultural rights show that the difference between these rights and those counted as civil and political rights is not as evident as it was advanced and state obligations in relation to both categories of rights are the same, although there are inherent differences in the degree to which a particular right requires positive and negative obligations.

Economic, social and cultural rights, like any other human rights, impose three types or levels of obligations on States Parties to the international or regional legal instruments: to respect, to protect and to fulfil.

The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights whereas the obligation to protect requires States to prevent violations of these rights by third parties. The obligation to fulfil economic, social and cultural rights can be realised by facilitation or direct provision.

The different instruments pertaining to economic, social and cultural rights impose different obligations as regards the respect, protection and fulfilment of these rights[44], varying from moral obligations to the adoption of adequate legal frameworks, the provision of judicial remedies, and/or administrative, financial, educational and social measures. In this respect, it is worth noting that, for instance, the Committee on Economic, Social and Cultural Rights, in its *General Comment* on article 2 of *the International Covenant on Economic, Social and Cultural Rights* stated, *inter alia*, that the phrase "*achieve progressively the full realization of the rights*" must be understood in the sense "*move as expeditiously as possible towards the realization of the rights*" and that under no circumstances it should be interpreted as implying that states have a right to indefinitely defer their efforts in this direction.

However, because of the existing division of human rights into two categories, the category of economic, social and cultural rights is still, at least to some extent, thought of as "less binding". Therefore, a change in this perception is needed if cultural rights are to be recognised as rights among the universally accepted human rights**.**

2.1. Cultural Rights - Indivisibility and Interdependence

The existence of two separate Covenants gave rise to different interpretations concerning the nature of the economic, social and cultural rights and of the political and civil rights. The economic, social and cultural rights were considered as objectives, which could be fulfilled "progressively" over time, rather than true human rights. The enforcement of this group of rights would require the State to take positive action (such as national policies and programmes), whereas civil and political rights are directly applicable individual rights, and for their realisation governments are simply required to refrain from interfering with them, inasmuch as the domestic legal system provided for means of judicial redress. As the implementation of the economic, social and cultural rights was considered to be an obligation of result, it was argued that these rights could be defined as programmatic rights, as opposed to legal enforceable rights[45].

[44] For further analyses, see Asbjørn Eide, Catarina Krause and Allan Rosas (eds.) *Economic, Social and Cultural Rights - A Textbook*, Kluwer Law International, the Hague, 2001.

[45] For further analyses, see Martin Scheinin, *Economic and Social Rights as Legal Rights* in Asbjørn Eide, Catarina Krause and Allan Rosas (eds.) *Economic, Social and Cultural Rights - A Textbook*, Kluwer Law International, the Hague, 2001.

Such arguments did not take into consideration the fact that unless all basic necessities of life, such as work, food, housing, health care, education and culture are adequately and equally available to everyone, the right to a dignified life cannot be attained. Economic, social and cultural rights are designed to protect and ensure these basic necessities of every human being.

Although economic, social and cultural rights and civil and political rights were included into two separate covenants, all human rights are interrelated and indivisible. This has been repeatedly reasserted in international fora, e.g., in the 1993 *Vienna Declaration and Programme of Action*, which states in Article 5 that:
"*All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis*."

Moreover, it has been emphasised that promoting and protecting one category of rights should never exempt states from the promotion of other rights. This means that political, civil, cultural, economic and social human rights are to be seen in their entirety as they all are of equal value and apply to everyone.

While culture, in its broader sense, affects all aspects of human life, cultural rights illustrate the indivisibility and interdependence of all human rights. Indeed, it is rather difficult, if not impossible altogether, to discuss a cultural right isolated from other cultural rights; moreover, cultural rights are often an intrinsic part of other human rights. For instance, all civil and political rights are interdependent and essential to the ability of individuals and communities to learn about, live in, express and perpetuate their cultures. Thus, the freedom of conscience and opinion guarantees and is inter-related to the freedom to think within the particular framework or from the particular perspective of one's culture; the right to political participation, the freedom of expression and of association are inter-related to the right of expressing one's culture within the public sphere.

In its *General Comment 4*, the *Committee for Economic, Social and Cultural Rights* states that the social right related to adequate housing, derived from the right to an adequate standard of living which is at the core of social rights, must encompass also the right to cultural identity, expression and diversity, as the structure and grouping of the housing in the original location is likely to facilitate the perpetuation of specific cultural patterns within the community. As a result, cases of forced eviction and displacement policies might raise issues not only of the right to housing but also of cultural rights.

Moreover, the right to education, a social right, is essential for the expression of one's culture, as education is a conveyor of values, including cultural values.

The principles of equality and non-discrimination, as fundamental guarantees of human rights, are at the core of minority rights. According to Article 1 of the *1993 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities:*
"*States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.*"

At the same time, Article 2 goes on to detail the issues covered by this guarantee, including, inter alia, the right of minority groups to participate effectively in decisions that affect them.
With regard to the same issues, Article 27 of the *International Covenant on Civil and Political Rights* states:
"*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language*."

Therefore, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The 1982 UNESCO *Declaration on Race and Racial Prejudice* makes specific reference to the culture of minorities in its Article 5.1:

"*Culture, as a product of all human beings and a common heritage of mankind, and education in its broadest sense, offer men and women increasingly effective means of adaptation, enabling them not only to affirm that they are born equal in dignity and rights, but also to recognize that they should respect the right of all groups to their own cultural identity and the development of their distinctive cultural life within the national and international contexts, it being understood that it rests with each group to decide in complete freedom on the maintenance, and, if appropriate, the adaptation or enrichment of the values which it regards as essential to its identity*."

These are only some examples that support the assertion that cultural rights encompass a wide range of interrelated and indivisible human rights.

2.2. Cultural rights - individual rights and a collective right

Within the international legal frame of human rights, cultural rights are recognised not only as individual human rights (according to Article 15 of the *International Covenant on Economic, Social and Cultural Rights)*, but as a collective right as well. Indeed, the first Article of the *International Covenant on Economic, Social and Cultural Rights* states that:

"All peoples have the right of self-determination. By virtue of that right they ... freely pursue their economic, social and cultural development."

This free pursuit of cultural development, linked to and strengthened by the political right of self-determination, allows people to preserve their cultural identity.

The collective right to culture supplements the individual's cultural rights, and enhance them. Since cultural rights are to a certain extent a collective right, their realization requires international technical co-operation, assistance and solidarity, as stipulated in the Covenant.

Cultural rights as collective rights are therefore discussed in the context of preserving and promoting the cultural identity.

The concept of cultural identity has been highlighted, *inter alia*, by the *Mexico City Declaration on Cultural Policies* which recommends the States to respect and work to preserve the cultural identity of all countries, regions, and peoples, and to oppose any discrimination with regard to the cultural identity of other countries, regions and peoples.

Considering cultural rights as fundamental human rights led to the formulation of a series of principles, of which the most important are:

- *Everyone is entitled to satisfy his or her cultural rights.*
- *The satisfaction of cultural rights is indispensable to the dignity and development of human beings.*
- *Everyone is entitled to participate in the cultural life of the community.*
- *Every people has the right and the duty to develop its culture. Everyone has the right to participate in and/or benefit from scientific progress.*
- *Every State should recognise and protect cultural and linguistic diversity.*

3. Cultural Rights – A Tentative Inventory

A consensus over a single universally accepted and recognised definition of cultural rights has proven to be impossible, given the different perceptions and definitions of culture and the intricacy of the inter-relations between cultural rights and other human rights. Another contributing factor is the conflict between the universality of human rights and the concept of cultural relativism. Therefore, various definitions of cultural rights both as a collective right and an individual right exist, and some of them have been mentioned above.

Whatever its definition, any attempt at defining the corpus of cultural rights has to start with the fundamental guiding principles which underlie the international human rights law: the obligation to respect and preserve the inherent dignity of every human being and the principle of equality and non-discrimination.[1]

In order to circumvent these difficulties a solution would be to prepare an inventory of cultural rights starting with the recognised rights and adding those cultural rights that have not been yet expressly recognised. This is the approach put forth at the *1998 Stockholm Intergovernmental Conference on Cultural Policies for Development* in the excellent preparatory paper on cultural rights submitted by Halina Niec[46] as well as in the "*International Agenda*" of the *World Commission on Culture and Development*.

Any inventory of existing cultural rights should start with the basic rights:

- *the right of access to cultural life and*
- *the right to participate in cultural life*

These rights were highlighted also in the 1976 *UNESCO Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It.* In its Article 2.b) the Recommendation defines participation as an individual and collective right*:*

"by participation in cultural life is meant the concrete opportunities guaranteed for all - groups or individuals - to express themselves freely, to act, and engage in creative activities with a view to the full development of their personalities, a harmonious life and the cultural progress of society".

The participatory dimension of cultural rights is further strengthened in the *UN Declaration on the Right to Development* which states that it is an essential part of the enjoyment of human rights by all. The right to participate in the cultural life should be understood as meaning also the right to participate in the designing of cultural policies, either as an individual or as a community. The same holds true with regard to the right of access.

The concept of cultural rights is nevertheless much more complex. Article 27 of the *Universal Declaration of Human Rights* and article 15(1) of the *International Covenant on Economic, Social and Cultural Rights* contain the right to take part in cultural life, the right to enjoy and share the benefits of scientific advancement, the right to benefit from any scientific, literary or artistic production of which the beneficiary is the author, and article 15(3) of the *International Covenant on Economic, Social and Cultural Rights* also contains the freedom of scientific research and creative activity.

From this starting point, and bearing in mind the fundamental principles pertaining to all human rights, an inventory of the different components of cultural rights could be drawn up. However, if many of these components should be analysed separately, others may be considered, from different perspectives, as separate human rights with a cultural component.

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[46] Halina Niec, Krakow, Poland, *Cultural Rights: At the End of the World Decade for Cultural Development*.

An almost general consensus has been reached that cultural rights should include, in addition to the two basic rights of access and participation, the following:

- *the right to respect for cultural identity;*
- *the right to identify with a cultural community;*
- *the right to access to cultural heritage;*
- *the right to protection of research;*
- *the right to protection of creative activities;*
- *the right to protection of intellectual property;*
- *the right to education, including artistic education and education for the arts;*
- *the right to freely pursue cultural activities, including the right to mobility of creators and artists and of their works;*

From this perspective, cultural rights encompass, therefore, not only creativity expressed through the arts, but the more fundamental acknowledgement of cultural diversity and its connection to development.

Cultural rights do not impose a unique or unifying cultural standard, but rather a legal standard of minimum protection necessary for human dignity that reflects the coordinated efforts of the international community. Therefore, cultural rights do not represent one cultural approach to the exclusion of others.

4. Cultural Rights, Cultural Identity and Cultural Diversity

This broader conception on cultural rights has attained prominence as the twin concepts of cultural identity and cultural diversity came into the focus of the international debate. This trend started, however, quite some time ago, ever since the 1966 UNESCO's General Conference adopted the *Declaration of the Principles of International Cultural Cooperation*, mentioned above. From this perspective, the whole corpus of cultural rights is an important mechanism for the protection and promotion of cultural identity and cultural diversity.

The merit of the cultural rights approach is to address the issue of cultural diversity at the fundamental level of human rights.

This approach is highlighted, *inter alia*, in the *UNESCO Universal Declaration on Cultural Diversity* which states the intrinsic relationship between cultural rights and cultural diversity in its Articles 4 and 5, as follows:
"Article 4 – Human rights as guarantees of cultural diversity

The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.

Article 5 – Cultural rights as an enabling environment for cultural diversity

Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and cultural Rights. All persons should therefore be able to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons should be entitled to quality education and training that fully respect their cultural identity; and all persons should be able to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms."

Cultural diversity has been a key issue in international fora as well as at national or local levels of policy-making for several years. Different reports, such as *Our Creative Diversity:*

The Report of the World Commission on Culture and Development, In From the Margins and *The Power of Culture: The Final Report of the Intergovernmental Conference on Cultural Policies for Development,* are all considering cultural diversity as a central issue to be addressed by cultural policies. It is however necessary to address cultural diversity issues both at the international level, with reference to national cultures, and at the national level, as different cultures within a country.

All these important documents stress the connection and interdependence between cultural diversity and the social and political agendas, considering that diversity is not only a means of achieving social cohesion but also an important means for overcoming social exclusion and, therefore, a central issue in the democratisation process. Cultural diversity is also viewed as paramount for the development of cultural industries and, more broadly, of the knowledge-based society and, as such, an important pillar to sustainable cultural development.

"Cultural diversity" is conceptualised in different ways, according to the *Inventory on Cultural Diversity. Challenges and Opportunities*[47]*:*
"Cultural diversity" is described and understood in many different ways in survey responses. It is associated in some countries with the need to acknowledge the importance of diverse local communities, whose traditions cannot be overridden by either national or global pressures. In virtually all countries it is associated with growing levels of ethno-racial diversity brought about by higher levels of immigration. The protection of linguistic diversity was central to the diversity agenda for a number of countries. A range of other "communities of interest", including feminist, gay and lesbian and youth cultures formed yet other forms of diversity.
…. the significance of generational diversity: "(The older generation) is still defining its identity in contrast to all that is different, all that is 'foreign'. The younger generation on the other hand is more inclined to identify itself in interaction with the 'others'. The traditional opposites – North-South, East-West, centre-periphery – are being challenged".
A number of countries picked up on this theme speaking of the importance of policies and policy approaches that recognize and celebrate specific culturally diverse communities (multiculturalism) while also fostering interaction among these communities (interculturalism)."

It is therefore essential that States' policies should take into account the necessity for the inclusion and participation of all peoples and groups, with their varied and distinct cultural identities, as a guarantee of social cohesion and peace.

Peaceful coexistence of different cultural identities requires not only mutual tolerance, but also respect for cultural differences and distinctiveness and, therefore, respect for cultural rights. Moreover, respect and understanding of cultural identity and diversity are the building blocks for a world of intercultural communication and cooperation.

5. Enjoying Cultural Rights - A Change in Mentality

Full enjoyment of cultural rights cannot be dissociated from the enjoyment of human rights. This means that, on one hand, States should meet their obligations as described above and, on the other hand, that individuals and communities should have a pro-active attitude in these issues.

Although advocacy, education and training programmes have been developed with respect to human rights in general, or to specific politic, civil, social or economic rights, similar programmes dedicated to cultural rights are sorely lacking.

Enjoying cultural rights means, first, that peoples should be made aware of their existence and of their content or, in other words, of the fact that they do have cultural rights. Moreover, specific education and training programmes are necessary with regard to possible violations of cultural rights and existing means to redress these.

[47] Prepared in May 2000 by Greg Baeker, ACP: Cultural Research and Consulting, for the *International Network on Cultural Policies*.

An increased awareness of the importance of the cultural rights within the economic and social rights group of rights will determine a full acknowledgement of the status of these rights as universally accepted human rights, and the division into categories, as such, will become more and more theoretical.

To conclude, it is important for the effective protection of cultural rights that they are understood as legally binding individual and collective human rights. And human rights are the birthright of every person.

CHAPTER 6. CREATIVITY – A FUNDAMENTAL RIGHT

The case for the centrality of creativity in the present-day world needs hardly to be argued as it is extensively discussed from various angles and approaches in international and regional fora [48].

Creativity, as an intellectual endeavour with outcomes that are original, and as an inextinguishable wealth of each nation, binds the policies for culture together with education, business and social policies and recognises the centrality of creativity to work, life and leisure.

Equally important is that creativity is first and foremost a fundamental human right, provided for, *inter alia*, in the *International Covenant on Civil and Political Rights*, in the *International Covenant on Economic, Social and Cultural Rights,* in the *European Convention on Human Rights* and more recently in the *EU Charter of Fundamental Rights*. Creativity is freedom of thought and freedom of expression, which includes freedom of creative expression. Moreover, creators, as any person, are entitled to the whole protection of their civil, social, economic and cultural rights granted by the international instruments and their creative expression is protected as their property.

Creativity is not only at the core of the knowledge-based society, it is the engine that keeps going the knowledge economy, with an impact on the future prosperity of the countries that was unforeseen several decades ago. Thus, nurturing and fostering creativity have become one of the key issues in almost any national public policy. Creativity is equally central to the international approaches on culture and development, on cultural diversity, on education, on the knowledge-based society, etc.

Although an international consensus has been built in this respect from a theoretical approach and at the declarative level, a cross-sectoral holistic public policy approach to creativity is yet to come in some countries. And, from national policies geared at fostering and nurturing creativity to their appropriate implementation, there are not one, but several bridges to be crossed.

From a regulatory perspective, the question to be answered is: *What regulatory environment is necessary to address these issues?*

The responses to this question vary greatly according to the different perspectives and priorities that are put forth in the national cultural policies. However, starting from the assumption that at least the basic principles laid down in the 1980 UNESCO *Recommendation concerning the Status of the Artist* and in the *Final Declaration* of the 1997 *World Congress on the Status of the Artist* are included in national cultural policies, this chapter attempts at identifying some of the areas where regulatory provisions aimed at nurturing and fostering creativity either via specific regulations or via specific provisions in the general regulatory framework should be considered.

[48] A cursory search on the Internet came up with over 2,300.000 entries for “creativity” and almost 650.000 entries for “culture and creativity”.

Any national approach to "creativity" should take into consideration that there are basically four perspectives to it: those of governments, creators, cultural industries and of the public.

The challenge to regulators is to identify a regulatory approach that would implement the agreed-upon principles without being too intrusive and therefore to create a regulatory framework that would induce the sought-for developments, balancing the legitimate interests and needs of the creators and of the creative industries while at the same time answering the needs and the interests of the public. A first direction should be the creation of a regulatory environment aimed not only at protecting the authors and artists, but also aimed at supporting the development of creativity, where the following affirmation would not be held true anymore: *"…over recent decades, creative people in this country have often felt that their success was despite, not because of, Government and local authority structures.*"[49] In addition, this new regulatory system should also respond to the needs and expectations of the public in relation to their rights of access and participation to culture. Equally important is to facilitate the development of the "creative industries".

A survey of the existing legally-binding international instruments shows that these could be basically divided into two distinct sets: on one hand, the corpus of copyright and related rights instruments and on the other hand the corpus of instruments related to employment, work conditions and social protection.

Although addressing different issues, these two sets of instruments share the same basic approach, as they are aimed at protecting fundamental human rights: civil, social, economic and cultural rights. Undoubtedly, this approach is and will always be crucial to the implementation of any public policy.

The question is whether this approach is sufficient to wholly implement the policy goal of fostering creativity. As experience shows, this policy goal needs to be addressed through a complex and diversified range of policy tools, including through adequate regulation. Therefore, it becomes apparent that the regulatory approach should not be confined to the provisions laid down in Intellectual Property Law and Labour Law. New regulatory provisions ought to be enacted, in order to implement the policy options; these could range from financial and fiscal arrangements for alternative funding via, *inter alia*, dedicated Lotteries or Cultural Funds to establishment of prizes, awards, etc., to support of public access to "creativity" (e.g. partial support of book prices so as they become economically accessible to the general public), to special arrangements for the direct and indirect taxation of creators' earnings including tax relief, to subsidised- interest loans for small and medium size creative enterprises, equity funds, etc. The list of such possible policy options is very long and it is the role of decision-makers to identify the best possible approaches to the specific problems they are facing within the national context and to assess the implementability of the proposed regulations.

1. Creativity and Intellectual Property Rights

These developments led the way to a new understanding of creativity, which went beyond the "copyright" approach; creativity was no longer considered only in terms of artistic, literary or scientific expression of an intellectual original work, of an individual act of creation, but as an *'"essential contribution that can be made …. to improving the quality of life, to the development of society.."*[50]. Although creativity is an individual act of creation, creative activities are also shaped by community experiences. This new conception acknowledges, at the same time, the centrality of creative activities in relation to the new industries, a development that led to the apparition of the concept of "creative industries" (or, according to the technological approach, "content industries"), which evolved in the late 90's from the older, more limited term of "cultural industries."

[49] In *Culture and Creativity: The Next Ten Years*, the Green Paper of the Department for Culture, Media and Sport, UK.
[50] *Final Declaration* of the World Congress on the Status of the Artist, UNESCO, 1997.

However, creativity is not confined only to literary, artistic and scientific works, which are protected by Copyright Law. Creativity is protected by the whole body of Intellectual Property Law which covers, very broadly, the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. The Convention Establishing the World Intellectual Property Organization (WIPO) of 1967 states that:

"Intellectual property shall include rights relating to:
- literary, artistic and scientific works,
- performances of performing artists, phonograms, and broadcasts,
- inventions in all fields of human endeavour,
- scientific discoveries,
- industrial designs,
- trademarks, service marks, and commercial names and designations,
- protection against unfair competition,
and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."

The traditional division of intellectual property law in two branches, "industrial property" and "copyright" is the expression of the different rules and procedures that apply in each of these branches. However, the basic principles of protection of creativity as well as the basic aims of the whole body of intellectual property law are identical.

The aims of the legal protection granted by intellectual property law are threefold: first, it is the recognition of the moral and economic rights of creators over their creations and the implementation of a regulatory system to protect these rights; second, it establishes the rights of the public in relation to their access to those creations; third, it is the expression of public policies of promotion and support of creativity, of its dissemination and application and of encouraging fair trading which in turn would contribute to economic and social development. Generally speaking, intellectual property law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain rights to control the uses which are made of those. These rights do not apply to the physical object in which the creation may be embodied; they are aimed at protecting the intellectual creation, the expression of creativity as such and this is why intellectual property is also referred to as immaterial property. Unfortunately, this led in certain countries to the consideration that violations of immaterial property rights are not as "*socially harmful*" as violations of material property rights.

The rights related to literary, artistic and scientific works are provided for in the copyright law, whereas the rights related to the performances of performing artists, phonograms, and broadcasts are generally referred to as "related rights" or "neighbouring rights". However, Copyright Law, as a branch of Law, covers not only copyright proper, but related rights as well.
The rights related to inventions, industrial designs, trademarks, service marks,
and commercial names and designations are protected by Industrial Property Law as well as,
up to a certain extent, the area of unfair competition.
Scientific discoveries are dealt with in the *Geneva Treaty on the International Recording of Scientific Discoveries* (1978).

1.1. Copyright and Related Rights

Traditionally, the protection of creators and of their works was addressed via Copyright Law, which has a long established international legal tradition, embodied in the 1886 *Berne Convention for the Protection of Literary and Artistic Works,*[51] the treaty with the longest

[51] The Berne Convention is based on the three basic principles of national treatment, automatic protection and independence of protection and on a mechanism for identification of the country of origin of a work. The principle of national treatment means that works originating in one of the contracting States (works of which the author is a national of such a State or works which were first published in such a State) must be given the same protection in each of the other contracting States as the protection this State grants to the works of its own nationals. The principle of automatic protection means that protection must not be conditional upon compliance with any formality, being provided as

history, the greatest number of adherents, and the highest level of protection, as a response*, inter alia,* to the revolution in public communication brought about by the printing press.

Since then, the two major waves of technological developments that followed have widened the perspective on creativity in relation to the new means of public communication, of dissemination of the creative works. The first wave of technological developments determined mass consumption of films, records and radio and television programmes, which led to the apparition of new and striving industries and businesses: the film industry, the recording industry and broadcasting.

With the emergence of this business sector, a repositioning of the relations between authors, interpreters and performers, and the business became necessary, together with a need for protection of these businesses' investments and rights. Thus, the 1961 *Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* and the 1971 *Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms*[52] were adopted.

The Rome Convention of 1961 was jointly drafted by BIRPI (the predecessor organisation to WIPO), UNESCO and the International Labour Office, as during that period the latter organisation started to address the issues related to the status of performers, in their capacity of employed workers.

The second wave of technological developments brought about unprecedented possibilities for cross-border worldwide distribution and dissemination of creative works, with satellite and cable communication, personal computers, digitisation and the World Wide Web and thus new industries, new businesses were created.

The responses to these new developments are found, albeit partially, in the new international legally-binding instruments: the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* or the *TRIPS Agreement*[53]*,* which came into effect in 1995, the*1996 WIPO Performances and Phonograms Treaty* and the*1996 WIPO Copyright Treaty*[54]*.*

In addition, it should be noted that within the EU framework, a significant effort towards harmonisation in the area of intellectual property and especially with regard to copyright and related rights has been undertaken, in order to eliminate barriers to trade and to adjust the legal framework to the new forms of exploitation and to the new developments in

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soon as the work is created. The principle of the independence of the protection means that such protection is independent of the protection available in the country of origin of the work.

[52] The Rome Convention provides for protection of the neighbouring rights of performers, on one hand, and of producers of phonograms and broadcasting organisations, on the other hand. In this respect, it introduced the "safeguard clause", under which the protection of copyright must in no way be affected by the protection of neighbouring rights. The Rome Convention was followed by the Geneva Convention of 1971, which addressed especially the phenomenon of piracy in relation to phonograms and by the "Satellite Convention", which responded to the need to provide protection for broadcasting organisations for the distribution of programme-carrying signals transmitted by satellite.

[53] The TRIPS agreement covers several broad issues: application of the basic principles of the trading system and of other international legal instruments on intellectual property; protection of copyright by incorporation of the Berne Convention provisions, with the exception of those related to moral rights, which the TRIPS Agreement does not cover; adequate enforcement of rights; dispute settlement mechanisms; The basic principles of the TRIPS Agreement are the principle of national treatment and the principle of most-favoured-nation treatment.

[54] The two "Internet Treaties" were adopted with a view to update copyright law for the digital environment. Although it was accepted that the exceptions and limitations provided for in the existing instruments can be carried forward and extended in the digital environment, it was considered that the Berne Convention does not provide for full coverage of the rights of communication to the public and distribution in this new environment. The solution adopted to cover the gaps in the Berne Convention is referred to as the "umbrella solution" and it is the result of a diplomatic "*compromise*".

technology[55]. The need for such a harmonised approach is repeatedly expressed by EU legislators:
"A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers."[56] All these instruments reflect the most important international principles pertaining to the protection of copyright and neighbouring rights. This protection is enacted through a highly complex system of rules pertaining to the uses of expressions of creativity.

Generally speaking, copyright protects every production in the literary, scientific and artistic domain, whatever the mode or form of expression, if the form in which they are expressed is an original creation of the author. Equally important, this protection is independent of the quality or of the value attached to the work and even of the purpose for which it is intended. A non-exhaustive, illustrative enumeration of works eligible for copyright protection is contained in copyright law. Usually, national copyright laws usually provide for the protection of the following categories of works: *literary works, musical works, artistic works, maps and technical drawings, photographic works, motion pictures or cinematographic works, computer programs*, *works of applied art, choreographic works, as well as derivative works.*

Copyright protection is provided by recognising and granting exclusive and inalienable economic and moral rights to the creator of the protected work. The creator is generally, at least in the first instance, the owner of copyright in the work he created. The owner of copyright in a protected work may use the work as he wishes and may exclude others from using it without his authorisation. Therefore, the rights bestowed by law on the owners of copyright in a protected work are described as their "exclusive rights". These exclusive rights are defined as covering the acts in relation to a work which cannot be performed by persons other than the copyright owner without the prior authorization of the copyright owner and cover, *inter alia*, copying or reproducing the work; performing the work in public; making a sound recording of the work; making a motion picture of the work; broadcasting the work; translating the work; adapting the work. The "authorisation" of using a work is usually realised either via an assignment of rights or via a licence and, through the transfer of these rights, the third party becomes the copyright holder of owner. However, national copyright laws may provide for an exception to this principle, in the case of a work created by a person who is employed for this purpose and when the employer may be the owner of copyright, although the moral rights remain with the creator.

In addition to their exclusive rights of an economic character the original authors of protected works have also "moral rights". These rights are perpetual, inalienable, and cannot be waived, and they are generally described as the non-property attributes of an intellectual and moral character which exist between a literary or artistic work and its author's personality. Moral rights, according to the Berne Convention, are the right to claim authorship of the work (paternity right) and the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the work, which would be prejudicial to the author's honour or reputation (integrity right). However, in many countries national legislations have identified four major components of the moral right: integrity, paternity, divulgation, and withdrawal. The right of divulgation gives the author the absolute right to determine whether and when a work is ready to be communicated to the public while the right of withdrawal gives the author the exclusive right to withdraw a work from public communication, under certain conditions as regards the expenses incurred by his licensee.

In addition to these rights of the creator of a work, there are rights related to, or "neighbouring on", copyright. It is generally accepted that there are three kinds of related rights: the rights of performing artists in their performances, the rights of producers of phonograms in their phonograms, and the rights of broadcasting organisations in their radio and television programmes.

[55] These seven Directives are listed in Appendix 1.
[56] EU Directive 2001/29/EC.

However, there are certain limitations to copyright and related rights. A first category of these limitations is the temporal and geographical ones. A well-established principle is that copyright is territorial in nature and thus protection under a national copyright law is available only in that country. Other limitations are described under the concept of "fair use" and of "compulsory licences" or "legal licences". These refer to certain uses for which the prior authorisation of the rights owner is not necessary, if certain conditions are met.

Thus an international standardisation and codification of these rights is necessary, especially in the present-day world, with its unprecedented trans-border public communication and circulation of cultural goods and services. However, one of the major challenges that national regulators have to face in this new environment is to maintain a balance between an adequate level of protection of creators and of their works, public interest and the needs of modern society.

The protection of copyright and neighbouring rights is one of the building blocks on which are based public policies with respect to the protection and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large.

The protection of copyright and related rights is considered a short-term priority issue for the accession countries as well. Although the substantive provisions of the Directives (with the exception of the two Directives adopted in 2001) are, generally speaking, transposed in the national regulation on copyright, it is a well-known fact that full compliance and enforcement of the protection granted under domestic legislation is still a problem to be solved.

The major problems identified in several accession and non-accession countries can be summarised as follows:

- lack of information on existing rights and of legal remedies;
- low level of compliance and ineffective enforcement;
- high levels of piracy;
- ineffective implementation mechanisms, including rather ineffective collective management.

Some of these problems can be solved within the existing legal framework, inasmuch as it is consistent with the body of international instruments described above. For the implementation of existing regulatory provisions, non-regulatory measures are needed, such as information and awareness-raising campaigns, education and training.

1.2. The Modern Plague - Piracy and Counterfeiting

However, the piracy issue could, and most probably should, be addressed also via additional regulatory measures. This is one of the cases where the regulatory measures enacted in other countries can be a valid source of inspiration for national regulators, together with a closer cooperation with the "creative" industries whose products are pirated.

Piracy can well be described as the modern plague of copyright. The term piracy is generally used to describe the deliberate infringement of copyright for commercial gain, by unauthorised reproduction of copyrighted content and the subsequent sale or distribution of the illegally reproduced work, although a distinction should be made between piracy proper or simple piracy, counterfeiting and bootlegging[57].

Piracy occurs not only in cyberspace, but in the physical world as well. Although piracy acts may occur in relation to any copyrighted work, they are generally directed against music

[57] Simple piracy is considered the unauthorised duplication of an original recording for commercial gain without the consent of the rights owner, in a different packaging than that of the original; counterfeits are copied and packaged to resemble the original as closely as possible and bootlegs are the unauthorised recordings of live or broadcast performances.

recordings, software products, video recordings and broadcasts. However the highest levels of piracy are in relation to the music industry and to business and entertainment software. This surge in piracy is further facilitated by new technological developments, such as CD-R burners. The alarming growth in the sales of pirated or counterfeited products, the proliferation of international rings involved in the production and distribution of pirated material are to be addressed seriously.

First and foremost, a system of real deterrent penalties and damages should be implemented. In addition, inspection of premises on which it is believed some activity is being carried on which infringes the copyright on certain works should be made possible, with due respect to the rights of the party suspected (an example could be the Anton Pillar Orders issued by the English Court of Appeal in 1976). Improvement of customs control measures and techniques should also be taken into consideration. Among the additional measures that should be worth considering is the use of copy control technologies or digital identifiers such as the proposed Compulsory Source Identification codes (SID). Other approaches could be envisaged as well, such as the introduction of licensing procedures for CD plants, registration procedures, introduction of hologram stickers for certain categories of products.

Effective copyright enforcement is generally hampered by a combination of factors: lack of resources, absence of clear lines of authority within the Government, unclear organizational responsibilities with regard to copyright enforcement, insufficient human resources in the enforcement agencies, insufficient training of enforcement officials, etc.

Piracy is not only illegal, but it has also dire economic and social effects. The pirate never produces a new material and therefore he does nothing whatsoever to encourage creativity. The pirate pays no royalties to the authors or performers and makes no payment to the original publisher or producer. In addition, the pirate pays no taxes. This results in: reduction of direct and indirect revenues for state budgets, losses of income for the industries as well as for the authors and performers whose works are being pirated, loss of jobs in the creative industries sector, development of the black economy and escalation of criminality. The failure to enforce copyright regulation with respect to piracy would result in a climate of legal uncertainty, which is likely to undermine the implementation of rule of law and to determine a loss of credibility of the respective government, let alone possible economic sanctions that could be imposed upon a country under existing multilateral agreements.

1.3. Collective Management – A Partial Solution

In different cases, individual management of rights whether it is done by the owner of rights or by the user is, for practical reasons, virtually impossible with regard to certain types of use. This created a need for collective management organisations, which have the role to bridge the gap between right owners and users of copyrighted works and to ensure that, as owners of rights, creators receive payment for the use of their works.

Collective management of rights is far from being a new development. Its inception can be traced back to Pierre-Augustin Caron de Beaumarchais' initiative, who in 1777 created the *General Statutes of Drama* in Paris which eventually led to the creation of the "*Société des auteurs dramatiques*".

Collective management of rights does not, however, diminish the importance of the creator's right to negotiate directly what is being referred to as the "primary" remuneration. Indeed, collective management organisations are, generally speaking, confining themselves to the negotiation and collection of certain "secondary" remunerations, and especially of those derived form uses for which the prior authorisation of the rights owner is not required. Thus, collective management is complementing individual management of rights.

Generally speaking, collective management organisations take care of the following rights:

- The right of public performance;
- The right of broadcasting;

- The mechanical reproduction rights in musical works;
- The performing rights in dramatic works;
- The right of reprographic reproduction of literary and musical works;
- Related rights (the rights of performers and producers of phonograms for the broadcasting or the communication to the public of phonograms).

In addition, in some countries copyright legislation provide that private copying compensations, such as blank tape levies, must be collected through collective management organisations.

Traditionally, collective management organisations, acting on behalf of their members, negotiate rates and terms of use with users, issue licenses authorising uses, collect and distribute royalties. They can also be organised as "*rights clearance centres*", which act as an agent of the right owner who decides on the individual terms of use; the centre grants licenses to users according to the conditions set by the right owner. "*One-stop-shops*" are a new development, in the form of a "coalition of separate collective management organizations" that associates separate collective management organisations, thus offering users a centralised source to obtain all authorisations required. One-stop-shops are especially useful for multimedia productions. Moreover, in the online environment the collective management of rights is taking on new dimensions, which are yet to be fully explored.

Collective management organisations negotiate with users or groups of users and authorize those to use copyrighted works from their repertoire against payment and on certain conditions; these organisations also distribute copyright royalties to their members, according to certain distribution rules. Collective management organisations perform the same services to owners of related rights inasmuch as the national legislation provides for a right of remuneration payable to performers or producers of phonograms or both, whenever commercial sound recordings are communicated to the public or used for broadcasting. The fees for such uses are collected and distributed either by joint organisations set up by performers and producers of phonograms, or by separate ones, depending on the regulatory framework applicable.

In certain countries, collective management organisations may also establish for their members various systems of social protection, generally under the form of health insurances, pensions or a guaranteed income based on the members' previous royalties. Thus, collective management organisations tend to involve themselves more actively in social protection issues and, therefore, the theoretical divide between collective management as part of copyright protection and trade unions, as players within the social and labour protection system, seems to fade away. Although such developments might help creators in asserting their rights, it should nevertheless be noted that in many countries the regulatory framework for social and labour protection (Labour Law) need to be amended accordingly. This is especially true in post-communist countries where the pension schemes of the former communist "creators unions" (i.e. professional associations or guilds) have collapsed in the early 90's because of the lack of an adequate system of guarantees of these funds.

In addition, collective management organisations may, according to mandatory legal provisions or to their statutes, devote part of the royalties collected to promote and foster creativity via, *inter alia*, the organisation of festivals, competitions etc., prizes and other awards, or the organisation of programmes devoted to youth creativity.

Insofar, the management of intellectual property has not been harmonised at EU level. This harmonisation is however necessary for a proper functioning of the Internal Market but, even more so, in the context of the development of the new communication services.

Although collective management societies represent an important development and are essential for a full enjoyment by the creators of their rights and for securing them an important part of their revenues, these organisations are not fully operational in the former post-communist countries, with the notable exception of composers societies, that have a long tradition of sound organisation.

One of the main causes for the apparent disinterest of creators to actively engage in the organisation of such societies lies with the fact that there is little, if anything, to be collected by these organisations since, as stated above, compliance and enforcement have very low levels. Creators are further dissuaded to involve themselves in the organisation of collective management by the fact that the almost "standard" copyright agreement contains clauses of exclusive licensing of all their rights against a lump sum, without any further royalties. Here, again, information, promotion and awareness raising campaigns should be seriously taken under consideration by the respective authorities.

The collective management of rights is a very good solution, if correctly understood, to help creators collect extra money as benefits of their creativity.

However, it is only a partial solution and, more often than not, it will not work properly unless it is seen as part of a more broader approach, aiming at setting up other complementary structures of which the most important is the trade union-type structure or a similar professional organisation.

2. Creativity and Economic and Social Rights

The relationships developed between creators, as individuals, and the different institutions, organisations and industries using their creativity are more and more market driven. Thus, creators are entering into different forms of labour relations and are subjected to labour regulations. Therefore, creators should be entitled to social protection whether in their capacity of independent artists or free-lancers or in their capacity of employed persons.

In addition, they must have the right of access to education and vocational training, and access to employment and to particular occupations, which are incorporated by the *International Labour Organisation* in the *Discrimination (Employment and Occupation) Convention of 1958 (No. 111)* in the concept of "employment and occupation". Moreover, the terms and conditions of employment should be non-discriminatory, a principle that covers equality with regard to remuneration and security of tenure and dismissal.

To these issues must be added that of mobility which, with reference to creativity, means both mobility of creators and mobility of creative works, a subject matter related, but not limited, to fundamental civil rights and to the free trade in goods and services. Last, but obviously not least, there is the issue of creators' earnings and of their taxation.

The right to employment and occupation, the right to social protection, the right to labour protection and the right to fair wages and equal remuneration for work of equal value are components of the fundamental economic and social rights provided for in the *International Covenant on Economic, Social and Cultural Rights*. These issues are further addressed, both at the international and national levels, within the Labour Law, which includes, generally, social protection as well.

National regulatory systems establishing these rights as well as the corresponding means of redress as fundamental principles addressed to the whole population have therefore their primary source in the international legally-binding instruments administered (with the exception of the *International Covenant on Economic, Social and Cultural Rights*) by the *International Labour Organisation*. However, according to their constitutional and administrative systems, in different countries certain issues have been further regulated by collective agreements.

Labour Law focuses, generally, on the establishment of legal principles and of the means of judicial redress, providing the frameworks within which the relationships between the social and economic players in the labour market – employers, employees and their organisations - are being structured. Labour Law is, therefore, enabling these players to participate in the regulation of certain aspects of the labour market, principally through collective bargaining

and social dialogue. Such an approach is consistent with the democratic principles of good governance, of stakeholders' participation and empowerment.

At the core of the debate lies the question of whether the existing national regulatory system is sufficient to ensure full enjoyment by the creators of social, economic and cultural rights, given the specificity of their work. The view expressed by the creators themselves, and shared by many governments, is that special provisions in this respect are further required.

The subsequent question is therefore how best to implement these provisions and what are the key regulatory interventions needed?

2.1. The "Status of the Artist" – A Compact of Social, Economic, and Cultural Rights

From this perspective, the introduction in national regulatory systems (either by amendments to existing regulation or by collective labour agreements or by a combination of these two approaches) of the principles contained in UNESCO's "*Status of the artist*[58]" as well as in the Final Declaration of the *World Congress on the Status of the Artist* organised by UNESCO in 1997, should be recognised as an essential building block of national public policies.

The "Status of the Artist" is an important guide to national policy-makers and to national regulators, as it is putting together, in a coherent and comprehensive form, almost all the major issues that should be addressed in national regulatory frameworks. This important instrument should be understood as a "compact" of social, economic and cultural rights, whose transposition into national regulatory frameworks should be done via numerous regulatory initiatives, aimed principally at amending the existing regulation so as to answer the specific needs of the creators.

The first and foremost step should be a needs assessment exercise, conducted in cooperation with the creators' organisations. The identified needs could then be the subject of a national "compact" between government and creators' organisations, against which further initiatives should be tested.
However, a compact or any kind of inventory of needs and corresponding measures is not sufficient; the amendment of the regulatory environment requires, on one hand, a firm commitment of decision-makers and, on the other hand, a structured and powerful organisation of creators, with sufficient bargaining power.

Among the most important issues addressed in the UNESCO non-binding instrument are those related to labour protection, social protection, employment and occupation.

The corpus of labour regulations pertaining to the creator's activity is organised following a classical opposition: on one hand the independent, "free lance", activity and on the other hand the employed activity, which is characterised by a bilateral labour agreement where the creator as employee is subordinated to his contractual partner, the employer. These two different situations are the basis for different rights and obligations and are determining, to a large extent, different legal environments.

While labour law and social protection law and the ensuing legal clauses of labour agreements were modified during the 90's with a view to their harmonisation with the principles and rules of international instruments, these regulations have been usually targeted to address the general issues of employment and occupation, labour and social protection for the entire work force, without any special or specific provisions concerning creators and artists.

Moreover, the two distinct situations – employment and self-employment - have received unbalanced attention from regulators. One of the main reasons is given by sheer numbers: there is only a small percentage of active people which are self-employed and an even

[58] *Recommendation concerning the Status of the Artist,* adopted in 1980 at the General Conference of UNESCO.

smaller percentage that conduct an independent creative activity. In addition, during the communist regime, almost all creators, with some notable exceptions, were employed on the basis of labour agreements, being subjected to the general provisions of labour law.

Thus, the notion of self-employment has entered the post-communist countries quite recently and generally speaking, the regulatory framework has not yet been adapted to respond to the specific rights such a status entails. In addition, whatever amendments to the labour and social protection have been made with respect to the "new" category of self-employed persons, these did not cater for the specific needs of self-employed creators.

Generally speaking, independent professional activities allow for a much greater freedom in choosing the means, working methods, working hours for achieving a self-assigned result, including a much greater contractual freedom; on the other hand, all the risks inherent to such an activity are being shouldered by the free-lance. The applicable regulation for independent professional activities is not, however, a homogenous and autonomous body of law, with its internal logic, such as that of Labour Code. This situation is also the result of the persistent ambiguity in defining a professional activity. Thus, creators should develop their own statutes and codify their own practices, according to their specific activities.

However, creative independence, which is essential for any creative activity, is not necessarily linked with the sole status of independent creator or artist. A well balanced labour agreement could allow, as well, for the necessary creative independence.

Whatever status creators are opting for – self employed or employed – their creative activity should give them the right to social protection, for which adequate provisions should be included in the regulatory framework. One of the specific features of creative activities is that creators are more and more combining those two different statuses and therefore the regulatory framework should also provide for this new development.

In this respect, several aspects should need further clarification. Social protection law, which includes protection against risks incurred during a professional activity, social risks and unemployment risks, being designed to protect employed workers against work hazards, still needs to harmonise its internal logic to the requirements of the specific case of self-employed creators and artists. While performing artists have achieved a certain homogenisation of their social protection, being generally recognised as employed persons, other categories of creative self-employed professionals still need a tailored system of social protection that would meet their specific needs. Although the regulatory solutions vary greatly from country to country, the general approach is to grant self-employed creators the minimal protection available under the general system, via a total or only partial assimilation to employed persons. While this is, in certain cases, an improvement compared to non-existent protection, the minimum protection is still not sufficient. In this respect, an additional factor should be taken into consideration: the irregularity of income of self-employed creators.

In addition, the labour regulatory system needs further amendments and corrections so as to address issues related to health, safety and welfare that are specific for different categories of creative activities (such as, inter alia, working hours, rehearsals, shooting hours, minimum basic rates of remuneration and conditions, overtime premiums, working environment – stress, high levels of sound, health hazards, etc.).

The situation is further complicated by the existence of a black labour market, where creators are completely unprotected.

Another important aspect that needs to be addressed is that related to the application of the principles of free movement of persons, freedom of establishment and freedom to provide services. The mobility of creators and of persons working in the cultural sector not only enforces international and regional cooperation within this sector, it also enhances peoples' access to culture and promotes cultural diversity.

These principles are guaranteed under international and EU law. Moreover, these principles are further implemented through the international system of recognition of diplomas and qualifications and through the specific programmes of the Council of Europe and of the European Union.

However, mobility has not only an international dimension; it has a national dimension as well. Therefore, at the national level public policies should also address the issues related to mobility in a cross-sectoral approach that would include training, employment, labour protection and social protection and identify the regulatory measures specific to the situation in each country.

Public policies should also address the issue of the need for new skills for improved job prospects, by implementing programmes aimed at developing specific skills.

Decision makers should also take into account the fact that a significant part of the jobs within the creative industries sector are project-specific, short-term and part-time engagements and therefore should consider the possibilities of creating sustainable jobs within the sector in the context of their national employment plans, as well as addressing the issue of social protection between jobs.

In addition, the restructuring of the public cultural sector would result, more often than not, in a reduction of full time jobs, and therefore appropriate measures ought to be designed and implemented, such as professional training and job reorientation, support for setting up micro, small or medium size cultural enterprises, etc.

Decision-makers should address all the above issues via an approach that ideally would combine regulatory measures needed for setting up the general framework and for defining the different categories of beneficiaries of each protection system, with regulatory provisions that would allow for further collective bargaining which would result in a system that would eventually meet the specific needs of the different categories of creators both employed and self-employed.

To address these issues, an important source of inspiration could be the regulatory framework of Western countries, which not only have already implemented the relevant international instruments but also have a long tradition in designing these specific public policies.

2.2. Advocating for collective agreements and trade-unions

Although the beneficiaries of a balanced labour regulatory system are the creators and their employers, this is established by extensive consultations between the social dialogue partner organisations and by their participation in the actual drafting, as well as by extensive bargaining held collectively between creators' trade unions or professional associations and employers' associations.

Hence, respect for the principles of freedom of association is essential for a proper functioning of the labour relations system. The basic ILO instruments dealing with the right to organise are the *Freedom of Association and Protection of the Right to Organise Convention of 1948* (No. 87) and the *Right to Organise and Collective Bargaining Convention of 1949* (No. 98). In application of these conventions, creators and their employers may form and join organisations "of their own choosing", which means that they also may form new organisations if and when they so choose.

Although a diversity of such organisations is necessary for a healthy environment and prevents a trade-union monopoly, an excessive fragmentation of creators' trade-unions is however a negative development, as it may significantly weaken their bargaining power and therefore prejudice their members' interests. In this respect, it must be recalled that in some countries certain bargaining rights, especially for inter-occupational collective agreements, are reserved only to the "most representative organisation".

It is yet another of the paradoxes of post-communist countries that the trade-union movement is quite weak, especially where creators are involved. But when considering that for more than 50 years membership to state-controlled and totally ineffective trade-unions was compulsory, the creators' refusal to engage in union activities is understandable.

Another non-negligible factor, which is adding to the confusion, is the existence of revamped former Stalinist-type "unions of creators". Although such professional associations or guilds have been initially created in the early 1920s, the advent of communism changed completely their statutes, transforming them in acquiescent tools of political control and censorship. During that period, these "unions" also performed some functions of collective management - within the limitations of the copyright regulation of that period – and some functions of social protection. As a general rule, they were closed clubs of the *elites,* and membership was difficult to obtain, being subjected to various political conditions and criteria, not necessarily related to artistic excellence. Thus membership of such a "union" was a consecration of the status of "professional creator" and entailed important advantages, both social and economical. This discriminatory system of members and non-members, of haves and have-nots, led to the development of an "*esprit de corps*" based on extra-artistic criteria. After the collapse of the communist regime, these organisations have undergone major changes but in many cases they have yet to determine their future role and functions.

However, and irrespective of their role and functions, the rationale of these professional associations is that of recognition of achieved excellence and therefore they must establish eligibility criteria accordingly. In contrast to this legitimate approach, trade-unions are opened to all creators or artists, as their roles and functions are to protect creators' social and economic rights. Thus, the two approaches are not contradictory; they are, in fact, complementary and both should be promoted. The third pillar of the organisational structures that would help creators in achieving an adequate protection of their rights is represented by the collective management societies.

Despite the initial reluctance expressed by many creators and artists with regard to trade-unions, it has become more and more evident that substantial improvements in their social and economic status can be achieved especially through collective labour agreements, where the bargaining parties are trade-unions and employers associations.

Collective bargaining is recognised and protected by several ILO Conventions and Recommendations, in particular the *Right to Organise and Collective Bargaining Convention of 1949 (No. 98)* and the *Collective Bargaining Convention of 1981 (No. 154)*. Article 2 of Convention No. 154 defines collective bargaining as extending to
"… all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for:
(a) Determining working conditions and terms of employment; and/or
(b) Regulating relations between employers and workers; and/or
(c) Regulating relations between employers or their organisations and a workers' organisation or workers' organisations. "

The importance given to collective bargaining in these international instruments recognises the fact that collective protection of interests, collective power to negotiate better terms and conditions of employment with employers are far more effective than individual negotiations[59].

Thus, national regulatory frameworks should recognise, promote and encourage free and voluntary collective bargaining, allowing the bargaining parties the greatest possible autonomy.

[59] For further analysis, see *Promotion of Collective Bargaining*, International Labour Conference, 66th Session, 1980.

In addition, the regulatory framework should expressly provide for the right of freelance creators to join or organise trade-unions and for the right of these to participate in collective bargaining.

3. Access to Creativity

Access to creativity means not only access to and enjoyment of the cultural goods and services that are currently produced, embodying the intellectual endeavours of contemporary creators; it means also access and enjoyment of the creativity of the past, of the cultural heritage, both in its material and immaterial forms of expression. To meet this goal, various cross-sectoral policies need to be designed and hence, various regulatory measures have to be enacted.

Access to culture is one of the basic goals of the Council of Europe and of the European Union, which has been enshrined both in the European Cultural Convention and in the EU Treaty and has been subsequently addressed in numerous other instruments.

From the multitude of issues that policy-makers need to address in this context, two at least are of crucial importance to the "new democracies". The first issue to be addressed is related to the role and functions of the traditional public cultural institutions in this new administrative and economic environment. The second issue is related to the development of the private commercial sector or what has been coined as "cultural industries" or "creative industries". Both these sectors – the public sector of cultural institutions and the private commercial cultural sector – are the essential vectors that allow access of the public to creativity. Hence, the unifying factor of cultural industries and cultural public institutions is that at their core is creativity protected by copyright law.

Moreover, both sectors are essential for developing employment policies for creative people and, therefore, they represent important stakeholders and social dialogue partners, which should be consulted in the design of each and every national policy concerning not only employment and occupation, but also labour protection and social protection. Although these two sectors are crucial for any cultural policy, they are not the only ones: the not-for-profit private cultural sector is an increasingly important presence on the scene.

3.1. Developing Creative Industries. How?

The term "creative industries" is a new-comer in the cultural policy discourse. It has been used in the late 90's in UK to describe *"those activities which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property".*[60]

This new term is meant to capture the distinct contribution of creative industries and of creativity protected by copyright to the cultural life and to the economy and encompasses the following activities: Advertising, Architecture, Arts and Antique Markets, Crafts, Design, Designer Fashion, Film, Interactive Leisure Software, Music, Television and Radio, Performing Arts, Publishing and Software. This approach does not, however, consider cultural heritage related industries and cultural tourism as part of the "creative industries", whereas in other countries, the definition of cultural industries includes also these two sectors.

In the EU, for instance, it is considered "…*that the most important cultural industries include, inter alia, cinema and audiovisual production, the performing arts, music, visual arts, architecture, publishing and press, multimedia, recording industries, design and industrial arts and cultural tourism and that the cultural heritage is an important basis for the creation of new cultural products."*[61]

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[60] *Mapping Document* of the Creative Industries Task Force, Department for Culture, Media and Sport, 1998.

[61] *Resolution on cultural cooperation in Europe* of the European Parliament, 5 September 2001.

From a business economics perspective[62], creative industries and the creative economy represent the sum of four sectors: the copyright, patent, trademark and design industries.

A substantial literature is devoted to defining and analysing, from various perspectives, this industry sector, either as arts industry, cultural industries or creative industries. However, irrespective of the definition accepted, this new approach has the merit of bringing creativity, through its social and economic benefits, at the top of policy agendas.

The concept of "creative industries" captures the characteristics of the new knowledge-based or information economy, recognising that technological and organisational developments are leading towards a new, more diversified relationship with the public. Moreover, creative industries are organised in a variety of forms, from micro-enterprises and small and medium size enterprises to giant multinational corporations. And because one of the characteristic features of creative industries is that they are content-orientated, their "value" resides more in their intangible assets that in the traditional tangible assets and, in turn, these intangible assets require creativity to be continuously developed.

Creative industries are not only important vectors of ensuring public access to culture, through the production and distribution of cultural goods and services, they are also important job-creators, important contributors to the state budget through direct and indirect taxation and an important pillar of economic development due to their high growth potential.

Micro, small and medium size enterprises within the creative industries sector are sharing the same problems that any business of the same size is facing but, in addition, they are confronted with some specific problems. However, irrespective of their problems, all these companies are engaged in conducting business in a free market, competition driven environment, where state-aids, government intervention or support have to be carefully weighted against the principles and limitations established by international or regional instruments related to free competition. On the other hand, it is generally recognised that public policies should aim at promoting and developing creative industries. The question is therefore: What should be the role of regulators in supporting the development and competitiveness of creative industries within the logic of a free competition trans-border global market?

At the European Union level, one of the EU tasks is to ensure that the necessary conditions are in place for Community industries, including creative industries, to be competitive. Therefore and in order to help these industries to develop, to benefit from the results of research and to use the new opportunities offered by the single market and the new technologies, the European Union has set up a competition-friendly environment through legal and financial measures as well as support programmes for certain cultural industries (audiovisual and multimedia). Although state-aid is prohibited insofar as it affects trade between Member States by favouring certain firms or the production of certain goods, such aid intended to promote culture and heritage conservation may be authorised, but only if it does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.

One of the aims of the EU enterprise policy is to improve the access of small and medium size creative enterprises to the capital market, through long-term bank loans and venture capital instruments. In addition, the European Union has adopted rules harmonising tax systems, particularly in relation to indirect taxation. According to these rules, Member States are free to apply a reduced rate of VAT on certain goods and services such as the supply of books and periodicals, access to cultural events, receiving of radio and television broadcasts, and services provided by artists/performers, as well as for works of art, antiques and collectors' items.

[62] John Howkins, *The Creative Economy: How People make Money from Ideas*, 2001

All these measures could also be implemented in the national regulatory frameworks in the post-communist countries. However, the regulatory framework should first and foremost provide for a stable legal environment with adequate enforcement mechanisms, including also intellectual property protection, labour protection and social protection.

In addition, the public policies should also develop appropriate programmes for entrepreneurship and management training, for developing new skills both for business management and for the creative people, etc.

The general problems that creative industries are facing in the new democracies could be summed up as follows: unstable legal environment, unfriendly regulatory environment (especially for SMEs), unfriendly competition environment, inefficient intellectual property protection, impossibility to access capital market, inexistence of structural funds, lack of investments, especially for start-up and development, lack of export opportunities, lack of incentives for job creation, skills shortage, etc.

As it can be seen, almost all these problems need to be addressed by other governmental bodies than those responsible for “culture” and the protection of creators and development of creativity. Since the policies are addressing so many different issues, which fall normally within the remit of different branches of government, a joined-up, horizontal task force could be created, following the example of different Western countries. Therefore, it must be stressed that the development of creative industries cannot be considered in a vacuum, although creative industries have their own specificities and risks; it is an integral part of the overall enterprise policies, of the economic and social policies that post-communist countries are implementing.

However, it must not be assumed that it is the government's job to solve all these problems. Government’s job is to use all its tools to help create a competition-friendly environment, based on a sound and stable regulatory framework which is implemented and enforced, and to help develop support programmes in the areas mentioned earlier in this chapter.

3.2. Rethinking the Regulatory Framework for Public Cultural Institutions

The term of “public cultural institutions” is used to describe all formerly state-owned cultural organisations which have not been privatised and it generally includes “memory institutions”, such as museums, archives, libraries and “performing arts institutions”, such as theatres, opera houses, ballet and dance ensembles and orchestras.

One of the main differences between public cultural institutions and creative industries is that the former category seeks government support through regulation and funding, whereas the latter seeks government protection in the form of an enabling regulatory framework. Another important difference stems from the fact that public cultural institutions are, generally speaking, guardians of public-owned goods, which they are entrusted to administer and manage in order to fulfil their missions.

However, following the changes undergone by the whole public sphere, their traditional missions are under scrutiny and a legitimate question, albeit difficult to answer, is: what are their missions, what role and functions are these institutions called to accomplish? What is their *raison d’être*?

There is not one single answer to these questions. And the issue is further complicated by the fact that all these cultural institutions have to compete, in terms of their offer to the public and experience value, in a new, unusual environment, subject to the market forces, and they have to adapt to the principles of new public management. A huge gap is growing between what cultural institutions are doing, what they should be doing and what they are actually doing.

Any attempt at identifying their new roles and functions should start from the undeniable fact that certain categories of cultural services cannot be made available to the public at large by the industry sector because of their high costs, and therefore some sort of government

intervention is needed, as well as public funding of certain activities. In addition, cultural institutions, and especially museums, libraries and archives, have still retained a prominent role in promoting and protecting cultural identity and diversity, in promoting creativity.

The changing political, economic, social, administrative and cultural environments are forcing policy-makers and cultural institutions to reconsider not necessarily the core activities of these organisations, but their operations, their organisational structure, their management and their relations with the public. The need for these changes is heightened by the urgency of adapting their practices to the integration of information and communication technologies in their internal and external workflow.

An additional but non-negligible factor is that public money is becoming rather scarce, and therefore both government as former funder and cultural institutions as former recipients of important subsidies need to find new schemes for funding the latter's operations.

Therefore, the cultural public sector needs greater independence and flexibility, which would enable them to respond to these new conditions, to identify new partnerships, new opportunities to develop their activities and to maximise the use of their human potential and assets.

Decision-makers and cultural institutions must also adapt their thinking to the business-developed models of assessing the use and non-use value of cultural resources (e.g. contingent valuation), as well as towards the assessment and evaluation of their intangible assets (i.e. prestige value, educational value). There is therefore an urgent need for a re-valorisation of the cultural goods that public institutions are entrusted with, made even more urgent in light of the changing public expectations related to their use.

Policy-makers and cultural organisations from all over the world have agreed that one of the keys to success lies in strategic partnerships and co-operation: inter and cross-domain co-operation between institutions as well as co-operation between public and private organisations.

One of the major challenges will be the development of human resources, as generally the public sector is sorely lacking in managerial, marketing, promotion, and fund raising expertise and therefore training programmes to address these needs are essential. In addition, a change in mentality is required, as employees in the public cultural institutions still consider themselves as state functionaries. A complicating factor is the brain-drain process, from the public to the private sector, where better pay is offered.

Other real problems are organisational, political and financial and they need to be addressed within quite a limited time span, or else these institutions might lose their public. The future of public cultural institutions depends largely on political priorities and on the interdependencies of various public policies, on which they have only limited influence. National cultural policies should therefore provide guidelines for further development of the institutions within this sector.

Without a new approach to these issues, all public resources will continue to be spent each year managing the *status quo*, instead of being used to restructure, reorganise and reposition cultural institutions within the system of producers and providers of cultural goods and services for the community.

Thus cultural institutions have to become learning organisations if they are to compete successfully in this new environment. This competition is not only between the public institutions and the business sector, it also happens between public institutions.

There can be little doubt that all these new challenges and opportunities need to be addressed within a coherent cross-sectoral policy approach and that a regulatory adjustment is necessary.

However, the regulatory approach should be kept at a minimum, as in this area there is a real risk of trying to replace old overly prescriptive and limitative legal provisions with new but equally prescriptive, detailed and, in the end, equally limitative regulations.

In addition, there is an undeniable tendency of regulating at the highest level – through laws - all aspects pertaining to the operations of cultural institutions, following the argument that these are first and foremost public institutions, and hierarchical control is necessary. And hierarchical control and the ensuing "sanctioning powers" must have a legal basis in the law's provisions permitting or prohibiting various acts or activities. This argument stems from old top-down control and command mechanisms, which allowed only for quite limited independence of cultural institutions – the so-called "functional independence". Actually, "functional independence" means that cultural institutions are granted only the limited powers and decision-making abilities that are necessary to perform their day-to-day functions within a heavily regulated environment, where the more strategic decisions are taken by the bureaucratic hierarchy. This approach is no longer a workable one, as it is not consistent with the new public management concept, or with the new changes of the administrative system. Even more important, this could act as a brake on any initiatives aimed at exploring and developing new partnerships, new working methods, and new ways of thinking. It is also confining the head of the cultural institution to the passive role of administrator, as he is not granted any real managerial responsibilities.

Another limitation of enacted regulation may come from a misunderstanding of the role and scope of legal provisions. It is the "battle" between two opposite conceptions: on one hand, "whatever is not explicitly prohibited is permitted" and on the other hand, "whatever is not explicitly permitted is prohibited".

In addition, it must be added that many of the laws enacted to regulate the operations of public cultural institutions contain detailed prescriptions on their internal organisation, even on the functions of different compartments. This is not only contrary to the principles related to the scope of primary regulation, it is also contrary to the principles of "quality regulation", as any changes deemed necessary with respect to the operations of an institution or of a category of cultural institutions would require another law.

Ideally, primary legislation should create the general framework, establishing principles and, as the case may be, defining violations and sanctioning these, while subsequent secondary regulation should contained more specific or detailed provisions. However, these detailed provisions, enacted within the general legal framework and in its application, should not be overly prescriptive, leaving enough space for initiative and responsibility at the institution's level.

Finally, the new regulatory framework pertaining to public cultural institutions is an illustration of the public policies adopted and, as such, it should be harmonised with the enacted or proposed regulations addressing related issues, such as public finances, taxes, ownership of public goods, etc.

But the qualitative changes in the operations and management of public cultural institutions need not only a new regulatory frame; they need also a new frame of mind.

CONCLUSIONS. QUID PRODEST?

The three parts of this volume aim at addressing three main questions which policy-makers are called to answer in relation to their regulatory approach to culture: Why? How? What?

Why is new cultural regulation needed? The regulatory approach to culture stems from a variety of objective and subjective needs. A new regulatory environment is primarily needed because the new political, economic and social environment requires the implementation of specifically-targeted policies through a new regulatory environment. Old regulatory systems do not provide adequate responses anymore. But subjective needs are also at play. Political agendas, lobbying pressures of certain groups, the "law" syndrome, may also influence policy-makers in their regulatory approach. It is the task of policy-makers to evaluate all these needs and to find the "right" balance between sometimes conflicting views.

The second basic question that cultural decision-makers are called upon to answer is: *What specific regulatory intervention is needed? What should be the content and the scope of proposed cultural regulation? What should be its expected results*? The answer to these questions should result from a correct identification of needs, and from a policy assessment of possible responses and of the outcomes of proposed approaches.

Whatever cultural policy approach is chosen, the specific content and scope of proposed regulation and the law-making process itself should be tested against the respect and protection of fundamental human rights.

Among the major concerns that cultural policies should address are those related to the protection of cultural identity and cultural diversity and to the creation of an environment where creativity would flourish. The starting point in addressing these issues should be cultural rights and their interrelated economic and social rights.

The third question asked is: *How should regulators proceed*? Regulators should respect the underlying democratic principles of transparency and openness, of consultation and participation and use in their approach specific technical tools and measures, such as *ex ante* impact assessment. And respect for the fundamental principles of legal equality, legal security and proportionality is crucial.

Regulation is an ongoing process, as it has to adjust to ongoing social and economic developments. But the regulatory approach takes time if it is to be done correctly. And time is what post-communist countries are lacking. Therefore, decision-makers should explore alternative possibilities to implement their policies and should be aware that problems are not necessarily solved by regulation. The regulatory approach might well become a trap. Excessive proliferation of regulation will have, more often than not, the opposite effect: it will determine regulatory instability which in turn will undermine trust in government and lead to non-compliance to enacted regulation. Therefore, regulation should be kept at a minimum and it should be flexible, establishing general frameworks or, in short, "quality regulation".

However, an overall assessment of any piece of regulation could be achieved by the answer to a simple question: *Quid Prodest*?

When drafting a new piece of regulation the question *"Quid Prodest?"* is sometimes forgotten, or receives only partial answers. Actually, this question should be addressed not only to regulators, but to policy-makers as well and therefore it could be reformulated as follows: *Who should benefit from the proposed regulation and who really benefits from the enacted regulation?*

A "good" cultural policy and a "good" regulation should ideally give identical answers to this question. But to answer it, an *ex post* impact assessment of the regulation enacted should be compared with the results of the *ex ante* assessment. Sometimes the regulatory answer to "who benefits?" is not the same as the policy statement to the question "who should benefit?"

This is an indication that either the policy itself was ill-conceived or that the regulatory approach failed.

Moreover, the answer to this question must be analysed and assessed against the overall cultural policy objectives, of which the fundamental cultural rights of access and participation to culture should be the pillars. And sometimes lobbying pressures may lead to partial answers of policy-makers and to the enactment of regulation that tend to cater only for the needs expressed by certain groups, at the exclusion of other interests or views. Cultural or cultural-related regulation should ideally benefit the public and as well the creators. Cultural institutions and creative industries are not to be forgotten, but primarily they are vehicles enabling access and participation to culture and creativity.

In this respect, Article 8 of the UNESCO Universal Declaration on Cultural Diversity could be quoted: "*in the face of present-day economic and technological change, opening up vast prospects for creation and innovation, particular attention must be paid to the supply of creative work, to due recognition of the rights of authors and artists and to the specificity of cultural goods and services which, as vectors of identity, values, and meaning, must not be treated as mere commodities or consumer goods*".

The foregoing analysis suggests the importance of cross-sectoral cultural policies as a holistic, integrative approach to the cultural sphere that would help establish short-term and medium-term priorities and design strategies that could be implemented through, inter alia, regulation. In turn, it should always be acknowledged that regulation is a subsequent step to designing cultural policies and that regulation cannot compensate for the lack of clear policy goals and objectives.

Cultural policy objectives may sometimes conflict other public policies as is the case, for example, with competition and communications policies encouraging free competition and cultural policies arguing the case for the strengthening of copyright protection. Such potentially conflicting interests would require a balancing and proportionate policy from the government. However, it must be reaffirmed that governments or governmental policies cannot and should not be too intrusive and therefore enough leverage should be given to cultural players to act according to their best interests, within a broad regulatory framework.

The challenge for every cultural policy is not only how to prescribe an environment of protection for a received body of art and tradition, or how to construct one of creative dynamism and innovation in all areas of the arts and sciences, but how to address both these issues in a balanced and proportionate approach and how to implement these policies. The ensuing challenge is thus how to conceive a regulatory framework that would help attain these objectives, without being unduly prescriptive and restraining while at the same time ensuring adequate accountability of public cultural players.

Failure to meet these challenges will transform countries into passive consumers of imported creative content, will put at risk their cultural identity and will impoverish all our cultures.

APPENDIX
KEY LEGALLY-BINDING INSTRUMENTS PERTAINING TO COPYRIGHT

1. International Instruments

- The Bern Convention for the Protection of Literary and Artistic Works of 1886, revised by the Paris Act of 1971 and its Amending Protocols.
- The Universal Copyright Convention of 1952, revised in 1971.
- The Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961.
- The Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms of 1971.
- The Convention relating to the Distribution of Programme-carrying Signals transmitted by Satellite, adopted at Brussels in 1974.
- The Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, adopted at Madrid in 1979.
- The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) which came into effect in 1995.
- The WIPO Performances and Phonograms Treaty of 1996, which came into force on 20 May 2002.
- The WIPO Copyright Treaty of 1996 which came into force on 6 March 2002.

2. Council of Europe's Instruments

- European Convention on Transfrontier Television of 1989 and its Amending Protocol of 1998.
- European Convention relating to questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite of 1994.
- European Convention on the Legal Protection of Services Based On, or Consisting Of, Conditional Access of 2000.

3. European Union Instruments

- Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.
- Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.
- Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.
- Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.
- Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
- Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

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