## COMMENTARY

# Judicialization of Culture

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Traditional cultures and intangible cultural heritage are undergoing a process of judicialization. Various social and cultural phenomena, such as traditions and tangible or intangible expressions, are increasingly viewed as also having a judicial nature and being redefined in legal discourses. However, a legal definition always implies a position of power, one which may ultimately influence the very substance that the law aims to protect and safeguard. Therefore, judicialization should always be a dialogical process involving legal and cultural expertise, but various cultural stakeholders as well.

Judicialization can be recognized from the growing body of international and national laws that govern cultural issues. Driving forces behind this process, such as public policies, are well-intended and have important objectives, such as safeguarding and protecting cultural heritage, but it must be noted that judicialization always implies a legal assessment of the social phenomenon in question. When defining culture as a legal right or cultural expressions as legal objects, the foundations of this assessment are based in law and not in the socio-normative systems wherein culture and its expressions have originated. Legal definitions of "culture", "tradition" or "folklore" do not necessarily coincide with the anthropological or folkloristic significations given to these concepts, yet the ultimate authority in organizing and defining social relations arises from the interpretation of law. However, the rule of law not only reflects different interests within a society, but at the same time it arranges social relations and gives models of behaviour for its subjects, i.e. for individuals and communities living under the authority of law. When legal definitions are given for such concepts as "tradition" or "culture", these definitions also influence how social phenomena and social relations are perceived, reproduced and formed. Law reflects the needs, values and beliefs of a society, but it also actively moulds society and defines the positions in which individuals and communities can exist and act within it.

The normative nature of intangible cultural heritage is founded on traditional rules and customs and on the shared histories of communities, where individual experiences are merged into a single communal framework expressed through that which is shared and intangible. Therefore, there is always a risk in implanting an external authority, namely the rule of law, which is enacted outside of communities, to traditional environments (Forsyth 2012,


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202). The risk in the judicialization of culture is that legal definitions and judicial views start to govern the image of a social phenomenon or dictate the social processes by which traditions are being reproduced. Eventually the rule of law will define what is "traditional" in culture and what elements belong to it rather than the socio-normative systems within communities. A judicial evaluation and legal thinking may be granted an authorial position in defining what social things are ultimately about, without paying due account to the social-normative systems upon which the traditions and traditional communities are originally based.

## Judicialization as a concept

The term "judicialization of politics" refers to "the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies" (Hirschl 2008). The *Merriam-Webster Dictionary* defines "judiciality" as something's "quality or state of being judicial". Many spheres of life have been increasingly judicialized in the 19th and 20th centuries, and Hirschl has noted that:

> "national high courts worldwide have been frequently asked to resolve a range of issues from the scope of expression and religious liberties and privacy to property, trade and commerce, education, immigration, labor, and environmental protection" (Hirschl 2008).

Additionally, new fields of law are continually emerging, such as environmental laws or cyber laws, and new interpretations of laws governing, for example, privacy or freedom of speech reflect the changes in societies and the different needs, interests, challenges and problems within them. The growing judicialization of societies may be an inevitable feature of the digitalized and globalized age, where common social denominators and the base of socio-normative systems (such as shared values, joint customs, unified beliefs) grow thinner and, at the same time, global and digital interrelatedness and the plurality of values are increasing. The diminishing authoritative nature of socio-normative systems leads individuals to seek resolutions to social questions more often from the courts, where they quickly become legal matters and, for example, traditions become "rights". The validity of social and moral claims is substantiated by the authority of law instead of by social norms, and the authority of law is being extended into new spheres of life.

In this commentary, I asses questions concerning the judicialization of culture and intangible cultural heritage. Judicialization of culture is used here to mean a mode of thinking whereby cultural and social phenomena, such as

traditions and intangible heritage, are increasingly gaining a judicial quality, buttressed by the belief that the different interests and conflicts that reside in intangible heritage can, and even should, be solved via legal decision making.

The purpose of this writing is not to criticize the legal approach and legal regulation of different cultural phenomena as such. Judicialization may be an inevitable result of the increasing level of social complexity and interrelatedness of globalized civil societies. However, legal thinking and legal assessment abide by their own nature and logic and introducing new social phenomena under the authority of law should always be done with a deep understanding of the socio-normative systems in which they are embedded.

## New colonies of law – judicialization of culture and culture as a "right"

"Judicialization of culture" can be observed in a growing body of legislation governing, protecting, defining and/or administering different cultural matters, which has grown significantly during the last 50–70 years. Different national laws and international conventions are used to foster, administer and regulate cultural matters and to secure cultural rights for individuals and communities. Also, different kinds of labelling and classification systems are being established to administer and safeguard cultural issues and to protect cultural heritage. Cultural issues are more often the points of focus of legal assessment and the subjects of judicial evaluative statements.

Along with human and basic rights and different specific cultural laws, traditions and intangible culture heritage are also increasingly being assessed in the light of intellectual property rights, such as copyright and trademark laws. The purpose is often to seek legal remedies for indigenous people and local communities by using these private law mechanisms, but ultimately cultural heritage is also being assessed as private or communal property as far as intellectual property laws are concerned. The very nature of "property" might conflict with the perceptions and concepts defining cultural heritage, yet it might in some cases be the only way to protect intangible heritage from unauthorized use, namely "as property". The importance of traditions and cultural heritage is also recognized, to some extent, in intellectual property laws as well. For example, many intellectual property laws have integrated elements of cultural protection, such as protection for the performance of folklore in Finnish copyright law in 2005, or the protection of names of traditionally produced goods under trademark laws and under the European Union's quality schemes (such as the Traditional Speciality Guaranteed protection), or the requirement of free and prior informed consent from stakeholders when using genetic resources while patenting new inventions, as defined by the Conven-

tion on Biological Diversity. While culture and intangible heritage are more often perceived "as intellectual property", at the same time the value of traditions and intangible heritage are increasingly being recognized in the domain of intellectual property rights as well.

Given all of these changes, it can be said that the authority of law is encircling culture, traditions and intangible heritage in both the public and private spheres and that the pace of judicialization is accelerating. Lawyers and legal authorities are more often involved in the process when matters concerning traditions and heritage are being assessed. The question then is, what is the evolutionary nature of this legal process, and can it affect to the very subject it aims to safeguard and protect?

The modern foundations of the idea that culture and cultural issues have a judicial nature were first recognized in the Universal Declaration of Human Rights of 1948, in which Article 27 refers to the concept of everybody's right to participate in the cultural life. Cultural rights have also been recognized in the 1966 International Covenant on Economic, Social, and Cultural Rights, in Articles 13 and 14 (concerning education) and in Article 15 (concerning the right to take part in cultural life), and in growing body of international legislation arising mainly from United Nations practices. The concept of "culture" has also evolved in legal practices. For example, the universal declaration of human rights sought to protect individual persons from oppression and discrimination and to secure equal rights for everyone to participate in cultural life. Legal literature on the topic has noted that the "right to cultural life" was originally thought to secure the access of the wider public to enjoy the "works of high culture" within society, i.e. everybody had a right to enjoy literature, music, art and other refined forms of cultural endeavour (Ringelheim 2017, 6; O'Keefe 1998, 8). However, the conceptual evolution concerning the legal understanding of 'cultural life' has been twofold, as pointed out by *Ringelheim*, covering first also cultural works in the popular sense and not only works of 'high culture', and secondly perceiving culture also from an anthropological point of view and 'as a way of life' (Ringelheim 2017, 6).

The conceptions of "culture" and "cultural life" have evolved in legal parlance to include different forms of folk culture and communal expressions. "Culture" also consists of customs and social behaviour that are administered by socio-normative systems. A willingness to perceive culture and cultural matters as a unitary field of law is also reflected in resolution 10/23, drafted in 2009 by United Nation's Human Rights Council to establish an independent expert in the field of cultural rights (Ringelheim 2017, 4).

Besides the UN's practices, the judicialization of culture and perceiving of culture as "rights" has also occurred through the practice of the Europe-

an Court of Human Rights, (Council of Europe 2011, 4). As noted in a report by the Court, the concept of "cultural rights" can at least in a broad sense be interpreted from the articles of the European Convention on Human Rights as concerning the right to respect for private and family life, freedom of conscience and religion, freedom of expression and of a right to education (Council of Europe 2011, 4). The formation of cultural rights as a legal topic is driven also by an increase in the number of cases submitted before the Court, often by individuals belonging to minority groups, concerning various social and cultural issues, such as the right to "maintain a minority identity and to lead one's private and family life in accordance with the traditions and culture of that identity" (Council of Europe 2011, 4). The Court's decisions have covered issues such as "artistic expression, access to culture, cultural identity, linguistic rights, education, cultural and natural heritage, historical truth and academic freedom" (Council of Europe 2011, 4), and whether a certain work constitutes a significant part of cultural heritage (*Akdaş v. Turkey*, 2010), the significance of an individual's right to visit relatives' graves (*Sargsyan v. Azerbaijan*, 2015) and the right to "lead one's private and family life in accordance with [that] tradition" (*Chapman v. the United Kingdom [GC]*, 2001).

The idea of "cultural rights" has further evolved into a debate over whether individuals should have a specific "right to a cultural identity" (Donders 2002). Some claim that this right has already been validated on the basis of various articles in the European Convention on Human Rights, such as the right to respect for private and family life (Article 8), which has served as a basis for "the right to lead one's life in accordance with a cultural identity and the right to choose freely a cultural identity", Article 9 (on freedom of thought, conscience and religion), which secures a right to freely choose a cultural identity, and Article 11 (on freedom of assembly and association), which protects the freedom of association with a cultural purpose (Council of Europe 2011, 14).

The focus of such a human and basic rights framework has concerned the fundamental rights of individuals and groups for protection against oppression. However, intangible heritage as such has been the focus of UNESCO's emphasis on it being everyone's responsibility to safeguard heritage. In addition to the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, six other conventions aim to "safeguard and nurture some aspect of culture and creativity" and cultural diversity (UNESCO 1). Although UNESCO's conventions are not predominantly binding legal agreements, they guide the work of authorities at the national level and represent a widely accepted judicial approach to different aspects of tangible and intangible heritage. UNESCO's conventions also establish a basis for legal definitions about different cultural phenomena.

There is a growing tendency to also perceive culture and intangible cultural heritage as a matter of private or communal property and as a subject of exclusive rights. To this extent, intellectual property rights, namely copyright law and other intellectual property rights such as trademark laws, are sometimes applied to provide legal remedies for indigenous people and local communities as well as to protect cultural and civic interests. The idea of using intellectual property rights in the field of folklore and the study of traditional cultures dates back to the 1960s, when mainly due to the pressure by developing countries, the protection of folklore arose in the international legal agenda concerning the Berne convention for the Protection of Literary and Artistic Works. The motivation for applying intellectual property rights regimes to the context of indigenous cultures is to prevent cultural appropriation and misuse of intangible heritage, and it is being done due to the lack of other comprehensive legal remedies. International discussions concerning the use of intellectual property rights with respect to indigenous people and local communities is centred on the World Intellectual Property Organization's Intergovernmental committee in Geneva, which aims, among its other objectives, to develop "international legal instrument, which will ensure the effective protection of traditional knowledge and traditional cultural expressions" (WIPO). The conceptual evolution of such terms as "folklore", "traditional culture" and "indigenous people" has occurred in WIPO and UNESCO contexts when judicial definitions have been applied to a wide array of social phenomena concerning traditions and cultural heritage. New concepts have likewise evolved within this international framework, such as "traditional cultural expression", which in many instances have superseded the use of the term "folklore" in legal parlance.

One statistical sign of the judicialization of culture is the increasing amount of specific legislation concerned with cultural issues. For example, there are currently 275 different national laws worldwide that are to some extent concerned with "intangible cultural heritage" (UNESCO 2). More than 40% of these laws were enacted in the 2000s, and roughly 30% in the 1990s. The growth of international legislation concerning intangible cultural heritage represents the growing legal emphasis given to culture and intangible heritage.

Finally, the evolving concept of "community" as a right holder must be noted. Even if human and basic rights were originally mostly concerned with securing an individual person's rights against oppression, the existence and importance of local communities and groups has been recognized as well. Group rights have been recognized in the UN's practices by the Committee on Economic, Social and Cultural Rights in General Comment No. 17 from 2005 (CESCR). It notes that not only are individuals being protected, but also

communities and groups; cultural phenomena, such as traditions and intangible heritage, can subsist specifically in communities and groups. However, it must be noted that even if some rights can be located in communities and groups as such, the representation of these rights must be organized through individuals, such as communal leaders and representative bodies. This may also affect how the individuals within groups can enjoy the legal protection or benefits secured at communal levels.

## Growth of cultural legislation in Finland

In Finland, cultural rights are rooted in the Finnish constitution, specifically in Articles 17, 20 and 121, in accordance with international human rights conventions and agreements. Furthermore, Finnish legislation consists of more than 43 different laws and regulations specific to the fields of arts and culture (OKM). The amount of cultural legislation has grown exponentially during the last few decades, as can be seen from historical statistics on legislative work. Until the 1960s, only five laws pertaining to the fields of art and culture were enacted, and they mainly concerned contributions and allowances in the field of arts. Legislative work concerning culture was fairly dormant in the 1970s and 1980s, and only four new laws were enacted, whereas in the 1990s alone the government passed eight new laws pertaining to the field of arts and culture. In the 2000s, it passed 11 new laws, and finally in the 2010s it enacted 15 new laws relating to the arts and culture. The first two decades of the new millennium witnessed almost double the amount of laws enacted in the fields of arts and culture than the previous 40 years of legislative work combined. Furthermore, it is noteworthy that 17 of the 43 new "cultural laws" are related specifically to the fields of museums and cultural heritage, and 11 of the 17 laws have been enacted in the 2000s. In other words, 60% of laws concerning the fields of museums and cultural heritage have been enacted in 2000s. The growth in Finnish cultural legislation is related to a rapidly growing body of international and national legislation concerning the fields of arts and culture, and particularly concerning cultural heritage, indicating the growing judicial nature of cultural issues, including matters of traditional cultures and intangible heritage.

## Managing the process of judicialization

Since the signing of the Universal Declaration of Human Rights in the 1940s, the perception that culture, traditions and intangible heritage are also legal issues has become more common. This can be seen in the increase in international and national legislation concerning cultural issues, but also in how the evolution of legal language influences the common usage of such concepts as

"traditional" or "culture" and how it has also produced new concepts like "traditional cultural expression".

The purpose of this commentary has not been to criticize the judicialization of culture as such, but to make encapsulating observations about this process. The objectives of different "cultural laws", whether they concern the rights of individuals or groups against oppression or discrimination or the responsibilities of societies and individuals to safeguard cultural heritage, are for the benefit of mankind as a whole. Legal means might also be necessary remedies for resolving many complex challenges and problems faced by, for example, indigenous people and local communities in an increasingly intertwined and globalized world, which cannot be resolved by socio-normative systems, such as customs and traditional norms. This may be the case when, for instance, third parties misappropriate cultural heritage for economic purposes.

However, it should be noted particularly when considering intangible culture that legislation, with all the authority it entails, may influence the very substance it tries to safeguard and protect. When a law is enacted to regulate and administer a social phenomenon, the authority behind the law intends to displace any social-normative systems upon which traditions are based and which have been used to regulate them in the past. Defining social phenomena is always an authoritative act that implies a position of power. Legal definitions have a normative nature and they impose their own meanings on the subjects they seek to regulate. The content of legal concepts is interpreted in legal practices and in courts, not in the social interactions between the people and communities that ultimately upheld, maintained and developed such traditions and cultural heritage.

When legally defining social phenomena such as "tradition" or "intangible heritage", there should be a profound ethnographical understanding involved as well. For example, Article 45 § of Finnish copyright law protects the performance of folklore. A performance of folklore cannot be recorded and published without the performer's consent. However, before applying the clause in an actual legal case it is important to define whether the performance in question constitutes a part of "folklore", and for that matter, what "folklore" is in question. Whose folklore is it? Does the performer have to be a member of the community for which the folklore is being performed? Is folklore only something old, or does it also cover something that is produced or created using old methods? Is it necessary for a folklore performance to have some contemporary significance for the performer or for the audience? Finally, what is the difference between a "performance of folklore" and folklore proper? Is there modern or urban folklore?

Quite quickly after a door has been opened for one legal definition, it will reveal many others. Law has an active effect on social reality, and it largely establishes the very positions through which individuals and communities can act and exist in society. Legal definitions must be sufficiently precise, but in being so, they always risk creating artificial borders delineating social reality that do not always apply in the real world. There is always a risk of the bureaucratization of culture. Definitions and the forms given to certain cultural phenomena may start to control the reproduction and substance of such phenomena.

The judicialization of culture may also affect heritage, acquiring "brand-like" characteristics, if the structuring and classifying of intangible heritage starts to influence its very substance. For example, when a tangible site is declared to have a certain cultural value (such as UNESCO's heritage sites or the European Union's sites of heritage), this very act of defining something "as heritage" might influence the ways in which the site is perceived by its stakeholders (for example, the local communities to whom the site bears intangible values), and just who visits it. Ultimately, the recognition may influence the intangible traditions connected to it. A cultural site might be considered, recognized and accepted "as heritage" not because it is promoted and maintained by individual people and/or communities, but because it has been recognized as such by the authorities and has been included in a certain classification. "Heritage" is also an economically valuable classification, and this very act of classification may influence the intangible substance related to it. The interpretative authority may be remote from the community that originally had maintained and safeguarded the intangible heritage.

As a conclusion, it can be said that culture and intangible heritage are increasingly becoming areas of law and perceived as natural legislative concepts as well. While judicialization as such may be beneficial for the safeguarding of traditional cultures and empower many stakeholders of cultural assets, it should also be remembered that legislation always has a socially creative influence as well. The rule of law never merely reflects and administers social reality; it always at the same time creates social reality by defining the positions and actions that individuals and communities can take with respect to the law. There should be a continuous dialogue between the fields of law, ethnography, anthropology and cultural studies, and various stakeholders, when assessing cultural phenomena as subjects of law. Before passing any judicial acts, authorities should ask how traditions or cultural heritage may be influenced by the law and whose interests are reflected in different definitions. Intangible culture is particularly sensitive because intangible phenomena exist only through social interactions, and the tacit nature of traditions might

be influenced by legal definitions even without any intentionality on behalf of the legislator.

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