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CULTURE THROUGH THE STATE: LAW AND POLICY AS A FRAME TO CULTURE

Colonial processes have resulted in complex interactions within diverse societies around the world. They have been distinguished by mechanisms of domination that need be dismantled if we are to construct democratic and non-discriminatory societies. With this aim in mind, there is a real need for cultural policy that can allow different cultures to grow and interact on a more equal footing. The main argument of this article is that cultural policy is part of a legal framework and is, as such, defined by the historical perceptions behind notions of cultural heritage. It is argued that cultural policy is projected through the opportunities offered by intellectual property protection. In order to see the way law is connected to cultural policy and how historical injustices can be projected into the future, it is necessary to see law from a socio-legal perspective. With such an approach, one can find the remaining traces of colonialism left in the legal framework for culture, which constitute a major obstacle to improving the well-being of culturally diverse states.

Keywords: cultural policy; cultural heritage; intellectual property; indigenous peoples; Mexico

The history of colonial processes has resulted in complex interactions within diverse societies around the world, with some cultural groups continuing to dominate others and exert undue influence over state policies and laws. These processes need be reversed if we are to construct democratic and non-discriminatory societies in which the cultural mosaic, which is the reality for most countries, can exist and develop. The well-being of all citizens, an objective often seen as the cen-

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tral concern for social policy (Dean 2006), cannot be successfully promoted in a context where one culture dominates. In order to reverse cultural domination processes, it is evident that a cultural policy should allow different cultures to grow and interact on a more equal footing. The main argument of this article is that cultural policy is part of a legal framework and is, as such, defined by the historical perceptions behind notions of cultural heritage. It is argued that cultural policy is projected through the opportunities offered by intellectual property protection.

Recognition that a legal framework exists defining the way public cultural policies function requires an understanding of the law that places it within the context of social processes. As all social policy is designed and implemented by the state, cultural policy is effectively connected to state-produced law and has little to do with any pluralist conceptions that could take it beyond the state. Nevertheless, the logic of a formalist/positivist legal dogma usually understands the law not only as a system independent from society and therefore self-sufficient and self-explanatory but also recognises the independence and self-sufficiency of its various legal divisions. This approach, however, does not allow us to fully comprehend how law translates into policy or how it affects the past and future of a country's culture. Instead, a socio-legal approach is necessary to demonstrate how this interaction occurs and reveal how historical injustices can be projected into the future. While all social policy also requires an interdisciplinary approach, \a socio-legal perspective is valuable as it demands that law be understood with reference to the social context in which it is embedded. By employing such an approach, one can find the remaining traces of colonialism left in the legal framework for culture.

From this interdisciplinary perspective, it is evident that law and culture are intertwined and co-dependent and that this relationship can be examined from many standpoints. Colonization processes have made sense of several epistemic conceptions that guide our notions of the world, making concepts into carriers of deep historical meaning. Law and culture and the interaction that occurs between them can also be seen in this light. For colonial purposes, law was a rational way for colonizers to express the value of their practices, while culture was the disorganized expression of much less advanced societies (Coombe 1998). State law is therefore the law of the dominant people, while the differences between colonized and colonizers are explained in terms of culture. As it is, we have three separate and extremely problematic categories: culture, the state and law. But is law not part of the culture of every people? Or, is it possible to argue that state law is the only kind of law there is? In a context of diversity, these two assumptions can create great problems. And so it becomes important to transcend and transform these three categories, while recognising them in their historical configuration. Hence, as Rosemary Coombe (1998: 21) suggests, the relationship between law and culture should not be defined too vigorously so as to leave flexible categories that can be used to understand society. The separation of law and state from the idea of culture is accepted here in order to establish a model of relationships, as a model of ana-

lysis. This is done, however, without any intention of implying that they are truly separate or that state law is the only possible law.

Given that the aim of this article is to analyse the ways the state contributes towards cultural constructions, especially through the law, the focus will be on those areas of law that have a direct impact on the way we experience culture, both as consumers and as creators of it. These are, in the main, areas such as cultural heritage, cultural policies and intellectual property. These are to be seen in the context of diverse societies, where the law plays a particularly important role in the development of culture. Following this, examples will be drawn from the context of Mexico, which, while emerging from colonial processes that historically undermined indigenous cultures, also formally aims to overcome this history by adopting a pluralist perspective in its constitution. Two main assumptions inform this article: firstly, that the state has different means of "affecting" the culture of the peoples that live within its territory; and secondly, that this is done through law.

Managing the past: cultural heritage

Instead of beginning by describing cultural policy and then analysing how it is defined by our comprehension of the past, it would appear to be more appropriate to ask how and by whom the past is managed. Law mediates the relationship between different cultures within a state and one of the clearest ways it does this in the management of heritage. Cultural heritage is the institutionalization of the way we construct our identity by structuring the relevance of the symbols of our past. It is comprised of those cultural traits considered fundamental for a particular people and must, therefore, be transmitted from one generation to another and become part of the collective memory. Cultural heritage is not only a matter of social perception; formal legal recognition is required in order to add for new components. As such, there are two sides to cultural heritage, both how it relates to identity and the legal aspect of it.

On the one hand, heritage is understood as an aspect of identity that is not only an interpretation of the past but a part of its continuing interpretation and reinterpretation that has occurred throughout history. Peoples are defined by their history as the source of belonging and cultural roots within a given place and/or with a group of persons. It can be said that the past makes peoples. Each generation is marked by the life experiences of the one that preceded it and the choice of what should be passed on or changed only occurs in relation to the existing canon of events deemed important to that people. History is, however, usually written by the victors and in their account certain meanings will gain a privileged position over others that are de-legitimated or denied a voice (see, Meskell 2002; Smith 2004, 2006). It is within these processes of decision-making that all educational agendas are constructed. They also influence the architecture that surrounds us and what we come to consider as our traditions.

It is necessary to focus on a particular case to reveal how choices over how the past can influence is represented can influence the relationship between different cultures. This is typical in cases where there are efforts to forge a sense of national unity by excluding, marginalizing and silencing alternative visions and oppositional understandings. The case of Mexico can show how cultural heritage plays an important role in the way the past is reconstructed. Mexico emerged from a context of colonization as a multi-ethnic polity. But as independent Mexico sought to construct its statehood, indigenous peoples faced attempts by the government to annihilate their culture. Their demands were significant in times of war and indigenous peoples were also a significant force in the battles that the country would face. By the mid-twentieth century, after about a hundred years of constant war, the country found itself sufficiently stable and functioning but the consolidation of a stabile idea of what it meant to be "Mexican" took longer (several accounts of this process can be found: Bonfil 1999, 2008; Florescano 2008; Warman 2003).

In this context, as Javier San Martín Sala (1999: 37) explains, national cultural identity becomes a myth, a fetish, useful for the political elites to establish themselves as representatives of a deeply historical identity. In this account the Mexican was mestizo, a mix of old pre-Hispanic cultures and Spanish influences. But no serious mention was made of the indigenous peoples. Buildings were decorated with paintings of the dual past; there was an important development in archaeological sites. But as far as history went, the indigenous people died with the colony; the living, present and very real indigenous were systematically ignored (e.g. García 1987; Granillo 1997; Bonfil 1999, 2008; Warman 2003; Blancarte 2007). Cultural policies were informed by an understanding of the past that needed to be projected into the future. The decisions as to which elements of history should be promoted were selected fit the image of Mexico the authorities wished to project. This choice was not based on merely technical considerations of historically valuable objects, places and traditions; rather it was a political choice based on political needs. The regulation of archaeological sites and cultural artefacts in public spaces would be promoted to construct a history that, to some extent, legitimated mestizo dominance. These indigenist cultural policies sought to integrate indigenous cultures into that of the mestizo were challenged by the end of the previous century, which brought the discourse of cultural pluralism into the state and its law.

However, the legal side of heritage was for a long time a matter of state government; even if not always by direct legal means, governmental approaches to heritage would be guided by practices still in place today. Such practices include the creation of monuments or official holidays to commemorate that are considered important enough to be remembered. But as time has gone by, such practices have been reinforced by the international attention that heritage has gained. Institutions such as the United Nations Educational Scientific and Cultural Organization (UNESCO) devote themselves to identifying and providing the means to protect heritage sites and practices, since the definition of heritage has expanded to include the intangible. These declarations often ap-

pear to be innocuous and disconnected from politics, as the technical considerations of the historical relevance of the tangible or as intangible proof of the trajectory of a people. But this is hardly the case. Such declarations are certainly informed by the same considerations that determine state identity and the state also has significant input into what will even be considered by UNESCO and that will always imply a political choice. UNESCO recognition is not only a matter of prestige and reinforcement of its value, it also comes with extra economic investment. These two elements are important incentives driving governments to seek heritage recognition.

However, far from being entirely in the control of the state, cultural heritage can also be used as a tool for social movements to validate their right to decide upon the important points of history. As Michael Brown (2003) has documented, native groups, mainly in the USA but also in Canada and Australia, have gained new experience in ways to use heritage to regain control over the historical testimony. They have managed to obtain recognition for their religious grounds as sites of cultural heritage, reducing their misuse and promoting their conservation. In such deals with the state, social mobilization has managed to use international instruments to pressure local governments to recognize the value of their cultures. As such, questions about the past need not be left to the state, whose tend to projected them through cultural policies. On the contrary, it is only through the participation of people themselves that narratives about history can be transformed, both to denounce injustices and to reclaim the meaning of cultural heritage.

Still, this is a process of negotiation with the state and its laws, one that brings different challenges for indigenous communities around the world. Just as the state can appoint the indigenous communities as guardians of this cultural heritage, the state can also exclude indigenous groups from national practices and spaces. There have been cases in Mexico when sites that have been the means of survival for indigenous communities have been turned into archaeological sites or a nature reservations. There have also been cases of the state finding a particular practice to be relevant and appropriating it from its context and implementing it artificially elsewhere, removing its human content and again obscuring its primary practitioners and their realities. Take for example, the case of the Chinkultik archaeological site, which was discussed by Aragón and Andrade (2013), when the efforts of the indigenous community to recover a site led to their violent expulsion by the Mexican state. This occurred in 2008, well after a pluricultural declaration was entered into the Mexican Constitution, which raises real question about the real achievements of pluricultural policy. Indeed, the guarding of the traditional sites remains the responsibility of the state, which limits the chance for traditional communities to entirely control the fate of their cultural domain. The declaration of cultural heritage and its meaning for a people depends then on the cultural policy setting in which it takes place.

Cultural policies

While an understanding of heritage informs and is informed by the cultural policies of a state, it is clear that the implications and meanings of cultural policies extend further. Cultural policies are means through which the state can "govern or regulate permissible expressions of social and cultural identity" (Coombe 2009: 398). While the state promotes certain aspects of culture, other aspects are left behind, which would inevitably allow the former to develop much more than the latter. State promotion suggests that something is desirable; it is the way in which future heritage is selected by present preferences and declarations of importance. Of course, this does not occur without resistance from certain dissenting sectors of society, which is a part of every cultural dynamic. And even if the state does not endorse a particular cultural trait, this does not mean that people will not contest social policy find a way to ensure its continuity; it just makes it harder to ensure its survival.

There are also different ways in which non-support can be expressed by different state institutions. This can even entail the actual use of criminal law to punish those involved in cultural practices that are seen as damaging to the state. Social movements around the world have found their music, painting or other forms of expression subject to persecution. Even the languages of cultures opposed by the state can become illegal. The criminalization of Basque culture, including the Basque language, during the Franco dictatorship is a relatively recent example of the opposition of certain states towards minority cultures. Most countries in Latin America have adopted some of these practices in times of dictatorship; some more democratic states have also sought to control opposition by these means. Culture can be discouraged but it can also be punished. But while these cases of criminalisation of culture imply an attack on cultural mosaics and undermine the movement toward a democratic society, there practices are carried out in the name of cultural expressions that perpetuate violent discourses and actions driven by racism and/or sexism. Such practices become harder to implement without the punitive capabilities of the state. This diversity in cultural expressions makes regulation extremely complicated but it is clear that the law is hardly a suitable criterion for them. Too many racist and discriminatory systems in the world have been buttressed by legal frameworks, which is yet another reason to question the law as an inherent guide of justice and correctness.

Returning, however, to the contexts of diversity that derive from colonisation processes, it is important to note that, in Latin American states like Mexico, there has been a change of political views regarding social diversity after centuries of indigenous mobilisations. As mentioned above, Mexican politics in the last century openly aimed to push indigenous cultures into a fusion with the mestizo identity. Indigenous were thought to be poor because of their cultural identity (the languages they spoke or their habits and ways of thinking) and this identity, therefore, needed to be eradicated (see, García 2002, 2003; Warman 2003; Bonfil 2008). However, the indigenous movement in Mexico regained momentum in the 1990s, when the

500th anniversary of the Spanish arrival in the Americas gave a boost to the indigenous transnational movement. The entire region entered a period marked by politics of recognition that aimed to rescue indigenous cultures and acknowledge their value (Stavenhagen 2002). A discourse of acceptance and promotion of diversity was then integrated into the Mexican Constitution. And although there is much room for improvement, as will be seen throughout this article, this change of legal discourse can only be explained through a historical-political lens.

Policies in Mexico are now impregnated with a discourse of pluralism that speaks of the need to protect and promote indigenous cultures as representatives of the diversity within society. But the discourse is yet to be proven effective in practice; qualitative research (García 2002, 2003; Ibarra 2011) has argued that the implementation of cultural policies in indigenous communities, more often than not, still implies different degrees of integration and assimilation and results in local systems of value and organization being altered in important ways. It is not, however, just that the pluralist discourses become misunderstood in the practice of implementing cultural policies. Rather, the design of the laws supporting pluricultural policies led to the identification of problems in a manner that is almost entirely market oriented and therefore produces aims which diverge from pluralistic discourses themselves (Ibarra 2013). This happens to some extent because indigenous peoples are still seen as a static component of diverse societies who, given current trends of cultural industries, are both an obstacle and a value. They tend to be an obstacle when they limits the actions of the state and the possibilities for private investors in the cultural industries. They are seen as a value when aligned with notions like "traditional" or "ancestral" as selling points for a cultural market or tourism. The pluralist perspectives that could be an asset for the defence of indigenous cultures often become a legitimating strategy to continue policies resembling dispossession.

Despite changes in ideology that are manifested in cultural policy, even if they compliment a neoliberal agenda, they remain challenged by the historical understandings that inform such policies, many of which remain fixed in law. Even in a context of change toward pluralism, there is still considerable inertia on the part of public policy to change the mindset that looks for ways to make indigenous peoples more appropriate for the "modern" or "civilised" world. This is also complicated by the fact that many legal aspects do not change with the change in discourses. This happens, for example, when there are no participation mechanisms for indigenous peoples in the design of cultural policies and when public administrators are still mainly mestizos.

Intellectual property rights

Just as cultural policy is determined by a historical understanding of our heritage, the intellectual property rights system also has ways to shape the potential of cultural policy and the future of different cultural expressions. Intellectual

property is established as a *sui generis* form of ownership that allows people to create rights of exclusivity over the products of intellect, both in terms of permanent recognition as the creator or author and in accruing economic benefits from them. Although ideas have to be expressed in the form of objects or practices so that they can really be protected, the aim of intellectual property is not to protect the objects but the actual idea behind them. As an author I am not the owner of every book that contains my ideas but I am the owner of its content; or at least this is the basic assumption behind the notion of intellectual property.

Intellectual property rights emerge from the context of the industrial revolution and the need of printers in England to protect their investment, hence the right to copy something or copyright (Drahos 1996). The original justification was that since someone had invested in the production, that person should also get the profit from it. But the right has never been permanent and nor was it planned to be. One of the reasons given for the limited temporality of economic rights on intellectual property is the understanding that in order to create something new, one still needs something to work with and this is the human knowledge and creativity that precedes us. New creations never start from a completely blank canvas; we all have previous knowledge and ideas that inspire us. But it is not only the recognition that new ideas have a background; perhaps the most important aspect is that human creation cannot proceed if everything that is meant to serve as background or inspiration is simply illegal to use without payment. And so it is in humanity's best interest to keep the flow of ideas free or, at least, partially free. From its origins, copyright was seen as a pervasive monopoly that needed to be limited (Macaulay cit. in Sokolovsky 2012).

The international tendency has been to increase the scope within which intellectual property operates. The U.S. has been the active force behind instruments like the Trade Related Aspects of Intellectual Property (TRIP's), which were adopted by the World Trade Organization (WTO) to ensure the commercial exclusivity value of intellectual property around the world (Drahos 1995). It is also worth mentioning initiatives discussed in the U.S. Congress of the Stopping Online Piracy Act (SOPA) and the Protecting IP Act (PIPA), which sought to control the flow of information via the Internet and have been replicated in similar, and also unsuccessful initiatives in countries like Mexico[1]. Although, in reality, even without these legal instruments file-sharing websites are being closed down, from the non-profit library.nu that offered thousands of e-books for free to the much more notorious use of the criminalization tool in the megaupload case. Despite the fact that international negotiations on intellectual property tend to be rather contentious and it has been impossible to manage a uniform intellectual property international system, its

[1] The influence of the U.S. on the Mexican regulation on intellectual property has preceded even the incorporation of the TRIPs in the WTO. Mexico changed its intellectual property laws and institutions, according to the TRIPs, as part of negotiations over the North American Free Trade Agreement in the early 1990s.

evolution continues as the types of protection diversify and expand. Despite its growth, several problems have been raised in the way that creative industries exploit the intellectual property rights system. Does this model of rights really represent authors' interests, especially when the gross economic gain is left to the distribution companies (publishers or record labels)? Will it possible to create something in the future if everything is being privatized? What is the use of these tools when creation's value depends on distribution? The only clear thing is that the system is far from perfect and a lot remains to be discussed.

Furthermore, the tendency towards strengthening intellectual property rights, as problematic as it is, becomes even more unfair if we take into account that intellectual property protection is in fact very hard to achieve for certain groups. Those who create in a way differing from western standards often have problems registering their work at the highest level of protection that intellectual property can offer such as copyright/author's rights and patents. Folk artists, indigenous musicians and electronic music performers all challenge the way intellectual property understands art, as individually created and based on innovations that separate significantly from former influences (this has been largely studied, e.g. Oehlerich 1999; Greenfiled, Osborn 2006; Hermanns 2006; Flores 2007; Mackay 2009; Ibarra 2010). Indeed, it is possible to find several examples around the world of communities that create in a collective manner and understand creation as a continuous process through time. This situation has been central to debates in the World Intellectual Property Organization (Kongolo 2008: 31) and has had an impact on some local legislation. In the Mexican case, a special section is devoted to works of art whose author cannot be identified and indigenous communities are given the right to prohibit the use of their names and symbols when used in a manner that misrepresents them. However, indigenous cultural expressions are free for anyone to use and there is no consideration regarding any complications for indigenous communities over how to control this, they are, as such, denied any economic gains from this.

This situation shows a general hierarchy in the value that law gives to different kinds of knowledge, which has created complications for several indigenous communities around the world. There is, of course, the epistemic injustice that indigenous knowledge and creations continue to be undermined, a reminder that colonial ways of seeing the world remain engraved in the most traditional views of intellectual property. This, however, also prevents these creators from benefiting from some of the economic gains of these cultural products. Often the biggest problem, however, is that they are not able stop somebody else from appropriating it. As Oehlerich (1999) explains, indigenous communities have often seen their culture registered by others; from music to fashion they have influenced many people, but while those others can profit of their culture, the indigenous communities cannot. And ultimately what can happen is that those who now have rights over the indigenous culture, without being indigenous themselves, can in fact prevent them from continuing the

practice, not to mention the fact that they unjustly claim knowledge that belongs to humanity in general and to indigenous communities in particular.

However, the most notorious aspect of the practice of stealing through rights, setting indigenous communities in opposition to intellectual property rights, is the case of natural resources and the knowledge of it. Highly diverse states in terms of natural richness are often also highly diverse in terms of culture, somehow making the two closely linked. Indigenous communities then, have very deep knowledge of their environment and the possibilities it offers; the healing properties of some plants are entwined with the religious elements of their culture and traditional practices in a holistic universe where this has been identified as traditional knowledge (Kongolo 2008). But this knowledge is not necessarily new, nor does it belong to someone in particular but is in fact part of their heritage (even if not in the legal sense). This would not be a problem if it were not for the fact that western scientific development talks about inventions as being made by specific people. It is not only in the arts that indigenous have been robbed but that this is something that has been done also by "scientists" (Oehlerich 1999; Posey, Dutfield 1999; Brown 2003).

As the phenomenon expands, indigenous communities have tried different means to deal with situations preventing them from using their knowledge and resources. They have tried litigation with some success, although this success depends largely on many other elements, such as local and transnational social movements, perceptions of prestige or waiving economic interests, rather than on the actual good workings of the law (Rodríguez-Garavito, Arenas 2005). Some communities have tried employing tools such as trademarks, commercial secret and databases to create records of their knowledge that can be understood in line with western criteria (Aguilar 2001). And even some partnerships have been established between scientists and communities to benefit from the productive possibilities of traditional knowledge (Brown 2003). However, no solution has been shown to be effective against the discrimination of knowledge and the economic hegemonies sustained by intellectual property rights.

What is not often considered, however, is the way intellectual property determines the possibilities of public cultural policy. As intellectual property cannot be employed as a means of protection by most indigenous peoples and other subaltern groups, there are also no policies that can be designed with the use of those rights. This, in turn, limits the possibilities for those sectors to be incorporated into the creative industries as holders of rights, exposing them not only to the abovementioned theft but also to appropriation on the part of the state. As such, it becomes increasingly harder to demand the return of cultural narratives to peoples that have suffered the negative consequences of colonisation, since through its policies the state takes advantage of their cultural expressions being in the public domain. In practice, it is the state holds the right to determine the future of subaltern groups that cannot access intellectual property. This very exclusion also justifies the lack of policies to increase their control over their own cultural narratives.

Final considerations

As has been shown throughout this article, cultural policy cannot be understood if we do not attend to the different elements that shape it and compliment it. This entails seeing cultural policy as a part of a legal framework for culture, which integrates different aspects of the legal system and the possibilities that it opens for the citizens of a state. Evidently, there are several other aspects that could be included. While I have chosen those that clearly and directly deal with the development of culture and its comprehension through the use of the past and for the future, this does not mean that those are the only ones that define cultural policy. This point can be extended to other aspects of the legal system. This is not to suggest that legal systems have the coherence that is usually attributed to them by legal dogma but rather that the connection between different elements is much closer than traditional classifications suggest. And, furthermore, the intention here was to show how these hidden interactions, once revealed, can expose those discrepancies in discourses and the historical tendencies that limit greater participation of subaltern groups in determining how the future interaction of different cultures in diverse societies.

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