

Thinking of the museum as a legal category: what are the issues around definition?

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In the history of the museum, the exercise of defining the museum comes rather late in legal texts. It was probably considered that the museum institution is a kind of self-evident truth, a reality that should naturally be clear to everyone. Law and deontology were tackled in this exercise at the end of the first half of the twentieth century. ICOM's first definition came very soon after the institution was created. As for museum legislation, few legislations today have not adopted a legal definition of a museum, a definition sometimes very much inspired by the ICOM Statutes. I would like to look at this defining exercise, which I believe is of a special kind in the legal sphere. Two issues seem to me to dominate, that of the need for a legal definition and that of the function of the legal definition.

I. The need for legal definition

The question of the need for a specified definition arises both in the field of law and in that of ethics, as is evident from the many discussions surrounding the definition of museum for ICOM. Of course, there are differences in approach due to the way the standard is produced. However, there are some rather similar questions in this aspiration to define the museum as a special category of public action.

The need for a specified delimitation - In the two areas of law and deontology, a corpus of standards has been built up, imposing itself on museums with varying degrees of force, although inspired by the same idea of subjecting the museum institution to a common set of rules. These rules can be very diverse, relate to several of the museum's purposes and impose a certain level of requirement in their implementation, a certain type of behaviour in the face of variable situations (public, guardianship, communities, sensitive objects, partnerships, etc.).

And this normative project necessarily requires the capacity to delimit its field of application in advance. Who is this corpus of rules intended for? Which are the museums to which these obligations apply? In these two areas of developing the standard, the question of the need for an *ad hoc* definition arises. If it were a matter of purely and simply referring to a consensual reality, there would be no need for a legal definition. The law, and ethics, could easily be based on a reality that only needs to be named. When, for example, in France, the first laws recognised the right of authors of works of fine arts, they did not specify what such works were. This is understood and does not require a definition. It was later, with the appearance of industrial arts and photography that a definition was imposed, when the limits of a work of art became harder to delimit. An interposing category became indispensable.

As for the differences in defining approaches: in the case of ethics, compliance with the standard relies on a voluntary adherence mechanism. We are dealing with flexible, soft law. Each museum is free to subscribe or not to the prescriptions of ICOM's Code of Ethics. The law proceeds differently since, as a general rule, it imposes a status on certain institutions, which it characterises. It forges its own categories, including that of museum, which will, if necessary, lead to exclusion. This process of forming a standard is not purely voluntary, which obviously means that the need for a definition will not have the same meaning, that it carries with it a certain conception of the institution in question and responds to a need for legal certainty. Since it imposes rules, it must delimit their perimeter. All legal systems agree on this rather basic mechanism, regardless of the legal family, whether it be Common law, Romano-Germanic law, Asian law, etc., but the need for a definition of the institution in question will obviously not have the same meaning. All contemporary museum laws have a

definition, and have therefore felt the need for a definition, which shows that the definition of museum is not automatically understood.

It could probably be argued that the differences observed between law and ethics, in terms of the process of standard-setting, strongly influence the way this delimitation is thought out, the way the idea of the museum is constructed. However, in reality, we find similar questions in the reflection on the correct definition of the museum. In this case, the two approaches are intimately linked, inasmuch as several legislations have drawn, sometimes very substantially, on the ICOM definition and have transposed it into domestic law, so that it has acquired normative force. Furthermore, as ICOM France recalls in its contribution to the reflection on a new definition of the museum: "The ICOM definition of museum is included in its statutes, and so serves as a reference in many countries that do not have a legislative corpus".

This is a measure of the scope of the ICOM definition and the legal burden that a number of States have placed on it by incorporating it into their domestic law. The ICOM definition therefore goes far beyond its own needs for definition, since it becomes, taken up by national legislators, a genuine legal concept.

It is necessary to consider the function that a legal definition fulfils.

II. What function does a definition serve?

In relation to the reality of the museum, deontology and law seem, once again, to deploy different approaches or rather different strategies. In principle, the function of the definition is not of the same nature in these two normative registers. In one case, it is inclusive, in the other more selective. There are, however, similarities in the way the two normative regimes assign a function to the definition of the museum.

In deontology, definition has an inclusive aim

In the discourse around the definition exercise, through its various iterations, one gets the feeling that the guiding idea is to seek to embrace museums in all their diversity. The successive modifications are above all dictated by the concern to keep pace with the profound changes that the institution is undergoing including digital requirements, handling intangible heritage, the development of the museum's social function, the circulation of resources and know-how, etc. There are many plans for development.

The idea is not to exclude museums that have moved from the conservatory era to the laboratory era, in the sense that the laboratory is above all a place for experiments and experimentation. In the end, the approach involves getting as close as possible to the reality of the museum. The ICOM website says that ICOM has worked to update "this definition in accordance with the realities of the global museum community". It is as if the function of the definition is to act as a mirror. Here it is a matter of rendering the reality of the museum in all its complexity, i.e. of trying to grasp it as faithfully as possible.

The law, on the other hand, develops a selective vision and, because it is selective, in some respects it is exclusive.

Under this selective approach, the definition exercise has several functions.

1. An institutional and prescriptive function:

This time it is not a question of describing and grasping the reality of the museum as clearly as possible, but, in another approach, of highlighting its irreducible characteristics, the identifying elements without which there would be no museum. It is not a question of sticking to reality, but of saying which museum deserves protection and under what conditions, which implies identifying the

key words, to use the expression of ICOM France. Legal vocabulary¹ defines a legal definition as follows: “*Opération (et énoncé qui en résulte) par laquelle la loi principalement (...) caractérise une notion, une catégorie juridique par des critères associés*”. “Operation (and resulting statement) by which the law mainly (...) characterises a notion, a legal category by associated criteria”. The definition has a prescriptive function. However, the scope of a legal definition needs to be qualified. While it may contain indications of a regime, it is not a programmatic tool. Its primary purpose is to delimit the sharp edges of a category. Thus, the prescriptions of what the museum is and the obligations it must comply with are also to be found not in the definition, but in the body of applicable rules, which impose, for example, rules of mediation, conditions of accessibility, etc. In addition, the aims of the museum, such as equal access to culture, enrichment of the collections, etc., are specified separately. In its aims or obligations there is a principle of public participation, and also a mention that museums must cooperate with the populations concerned by the museum's resources.

2. A distinctive function.

This exercise of determining boundaries combines with the first one. It is also a question of identifying the distinctive features, the characteristics that distinguish a museum from other institutions. A museum is not a media library, an archive service or a cultural venue. The whole question is to decide what makes it unique, in relation to these other heritage sites, which may have certain questions in common, in particular, regarding their relationship with the public and society. The presence of a collection, invested with one or more symbolic values, is in most legislations one of the important distinctive elements, with, in its extension, the aims of conservation, presentation, education and transmission.

3. An exclusive function

Engaging in a selective approach presupposes a proper mastery of exclusionary choices. Some legislations reserve protection for museum institutions which carry on their activity for non-profit-making purposes, but this is not true everywhere. In French law, in the absence of a permanent collection (a characteristic which makes it necessary to preserve the property that makes up the collection for the long term), in the absence of aims involving conservation and presentation, the institution cannot join the circle of the museums of France, a name protected by the Heritage Code. The name museum may also be reserved for certain types of museums, certain types of collections. The solutions vary again.

In the implementation of a legal definition, it can be seen that, in many legislations, characteristics such as the permanent nature of collections, the requirement of a public or private legal entity, the notions of conservation and presentation, accessibility, education, etc. are quite frequently mentioned. Variations occur rather in the statement and hierarchy of missions, the nature of resources, whether tangible, intangible, cultural or natural, the formulation of the values which govern the recognition of the museum, the place given to the social dimension and the meaning given to the service rendered by the museum, hence the difficulty of drawing a common definition which everyone can relate to, and which accommodates the diversity of the museum landscape.

¹ G. Cornu, *Vocabulaire juridique*, PUF, 2020, V° définition