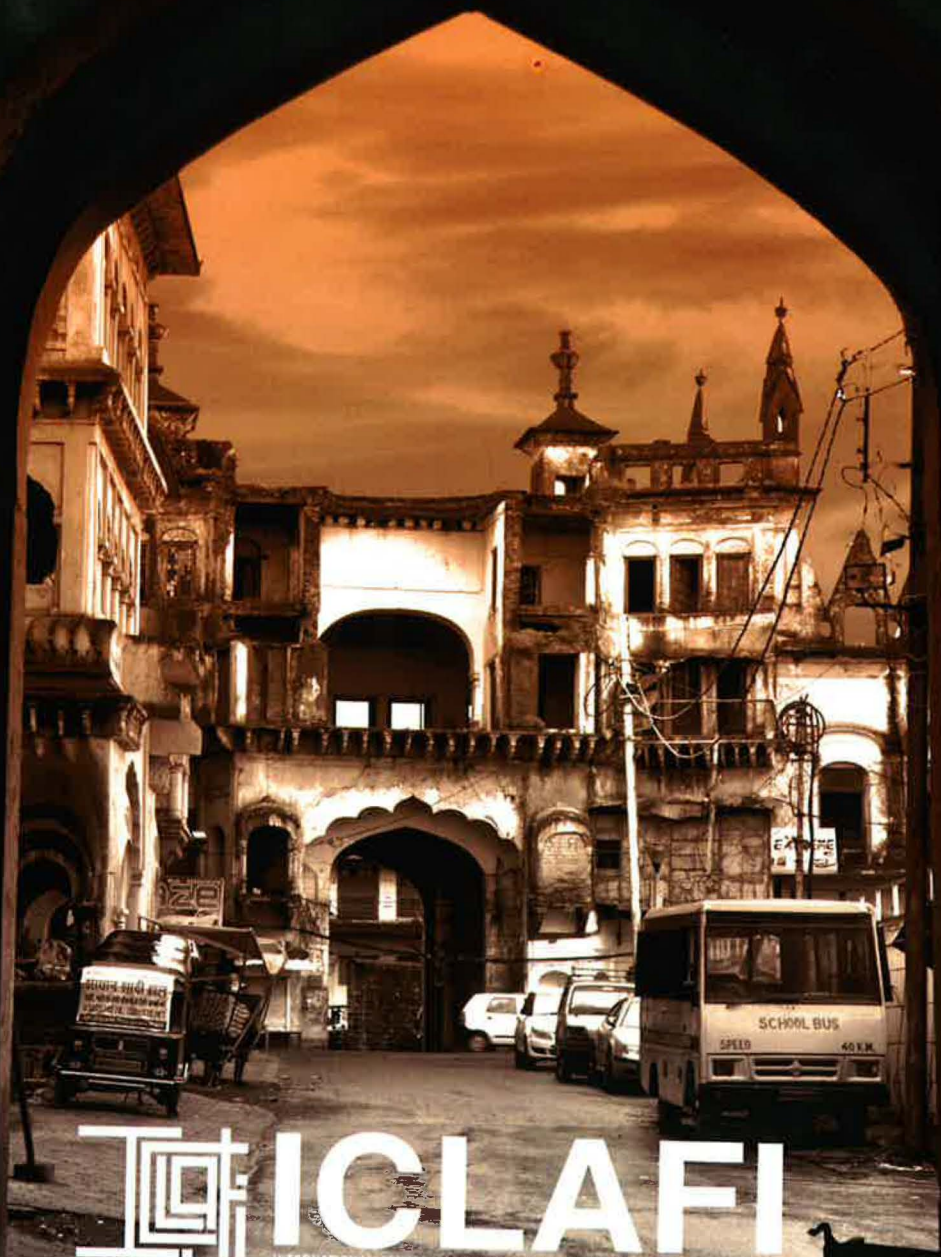


SHARED GLOBAL EXPERIENCES FOR PROTECTION OF BUILT HERITAGE



 **ICLAFI**
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SCHOOL OF PLANNING AND ARCHITECTURE, BHOPAL



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Legal Framework of Protection of Monuments under Polish Law

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Abstract

Various legal instruments under the Polish law for the protection for Cultural heritage, various issue concerned and possible solutions are discussed in the following paper.

Keywords

Antiquity, Monument Conservator, Legal Instruments

1.0 Introduction

Before discussing the legal basis for protection of cultural heritage in Poland, the heritage that is protected in our country and the heritage protected in India should be differentiated. First of all, the fundamental part of the most ancient Indian heritage consists of stone buildings that could survive until now. The oldest Polish heritage comprised wood or wood-and-earth work structures, minute parts of which have survived under the ground level. Construction of stone buildings started in the 10th century AD. Nonetheless, stone was soon replaced by brick, which has become the basic construction material since then.

The second most important difference between cultural heritage protections in both countries is the fact that a large portion of the Polish heritage was destroyed, particularly during the Second World War. These irreversible losses have affected the contemporary Polish monument protection doctrine, which permits reconstruction of buildings that are particularly important for the Polish national identity. This was the basis for complete reconstruction of such edifices as the Royal Castle in Warsaw.

As far as the heritage protection concept is concerned, the basic rules and legal instruments are included in the Act on the protection of monuments and care of monuments¹. The title of the act itself shows that the tasks in this regard have been divided into protection and care. In general, the former includes obligations of the authorities, while the latter encompasses the duties of the owner or holder of the monument. Article 4 of the Act clearly states that protection of monuments consists particularly in public administration bodies taking measures aimed at "prevention of risks that may result in loss of the value of the monument (point 5) and "prevention of damage or misuse of monuments" (point 3), and finally, "control of the state of conservation and purpose of the monuments" (point 5). On the other hand, care of monument, which is performed by its owner or holder, consists particularly in ensuring conditions for "protection and maintenance of the monument and its surroundings in the best possible condition" and "using the monument in a manner that ensures preservation of its value" (Article 5 (2), (3), (4)).

These obligations indubitably refer to a monument defined in Article 3 point 1 of the Act. This provision defines monument as "an immovable or movable property, or parts or complexes thereof that are man-made objects or are related to human activity which are a testimony of a past age or event and whose preservation is in the interest due to its historic, artistic or academic value." The former half of the text does not require any explanation. Undoubtedly, objects that can be classified as monuments include immovable or movable property and their parts or complexes that are direct or indirect products of human activity. However, some problems arise when the latter part is to be interpreted. The term "testimony of a past age or event" included there is certainly a statutory definition of "antiquity", but unlike the first Polish legislative act of 1918 concerning monuments, which included a simple minimum age requirement of 50 years, it is not easy to interpret. If "a past event" might mean virtually any event that took place in the past, even recently, "a past age" is much harder to define. Thus, it seems that the only solution is to assume that this term should be interpreted literally regardless of the fact that terms such as "age" are disputable and their starting and ending

points are difficult to determine, just like in the case of other terms that refer to periodisation. This means that a monument conservator who decides on including a monument in the register will have to demonstrate that a specific object belongs to an age that has passed, i.e. a closed period of history. Similarly, the term "testimony" is to be interpreted literally because the legislative body has not defined if it refers to an "outstanding", "significant" or "representative" testimony, or one that has been defined in some other way.

After the above issues have been solved, the object needs to be assessed with regard to its compliance with the criteria of historic, artistic or academic value. It can be done by providing a positive answer to at least one of the following questions as applicable to the type of the specific object: Does the specific object have any documentary value, and what exactly does it document, and, supposing its authenticity, to what extent? Does the specific object have any artistic value, and what does this value consist in? Does the specific object have any academic value, and, if so, what is its value for specific academic disciplines? Only after these questions have been answered, can the public interest in the preservation of a specific object be assessed in terms of its historic, artistic or academic value.

In addition, the Act includes in detail the terms and conditions of use of such monuments, various type of works concerning it, controls it, and legal instruments that make it possible to stop or to order them. Pursuant to Article 25 (1) of the Act, management of an immovable monument included in the register requires that the owner or holder has "conservation documents that determine the conservation status of an immovable monument and the possibility to adapt it taking account of the historical function and historic value of the monument" (point 1) and "an immovable monument conservation works programme that has been agreed with the Provincial Monuments Conservator and defines the scope and the manner of the works as well as the necessary materials and techniques" (point 2). If the holder of the monument submits a relevant application, "the Provincial Monuments Conservator shall present written conservation recommendations that define the manner of use of the monument, relevant security measures and conservation works, as well as the scope of permissible modifications that can be done to the monument" (Article 27 of the Act).

What is very important from the perspective of heritage protection is the further provision, i.e. the requirement of special permission from the Provincial Monuments Conservator for any important works in this regard. This particularly regards "performance of conservation, restoration or construction related to the monument included in the register" (point 1), "performance of construction works in the surrounding of the monument" (point 2), "performance of a conservation study of a monument included in the register", "permanent relocation of a movable monument included in the register which violates the decoration of the interior where the monument is located that has been sanctioned by tradition" (point 7), "division of an immovable monument included in the register" (point 9), as well as "placement of technological devices, boards, advertisements and text on a monument included in the register, subject to Article 12 (1)" (point 10), and finally "initiation of other actions that could result in the violation of the substance or a change to the appearance of a monument included in the register" (point 11).

Works performed under a permission and compliance with monument protection and care regulations are subject to control by the Provincial Monuments Conservator. Pursuant to Article 38, the Provincial Monuments Conservator has at their disposal a number of instruments that allow them to perform their function effectively. For example, they are permitted to "enter premises if there is a reasonable suspicion of destruction or damage to a monument" (paragraph 3 (1)), "check compliance of all actions undertaken with regard to monuments included in the register (...) with the scope or terms and conditions set out in the permit and with approved documentation" (paragraph 3 (3)), or finally, "demand spoken or written information necessary for determining the actual state with regard to scope of control" as well as to demand production of relevant documents and provision of any data (paragraph 3 (4) and (5)). Such control may be enforced in special situations because "the Provincial Monuments Conservator may apply to the local police commander for assistance if it is necessary to perform control measures", and the local police commander is obliged to provide such assistance (paragraph 4 (a) and (b)). After the control procedure has been completed, the Provincial Monuments Conservator may issue follow-up recommendation to the natural person subject to control or the manager of a controlled organisational unit (Article 40 (1) of the Act), and in applicable cases, they have to notify the police, the prosecutor's office or the court of an offence or a misconduct (Article 41 of the Act).

Other outcomes of control may include the decision to stop works performed without the permission or in a manner not compliant with the scope, terms and conditions defined in the permit, which applies to conservation, restoration and plain construction works concerning a monument included in the register (Article 43 of the Act), and a monument not included in the register, if the monument meets requirements for inclusion in the register (Article 46 of the Act).

As mentioned above, the Provincial Monuments Conservator may also issue a decision with an obligation to perform conservation or construction works concerning a monument if such works are necessary due to the risk of destruction or severe damage to the monument (Article 49 (1) of the Act). They can also order the substitute performance of such necessary works and then secure them with judicial mortgage on a property owned by the State Treasury in this regard (Article 49 (3) and (4) of the Act).

When discussing these provisions, we should also mention numerous penal provisions that also support protection of a monument against harmful modifications. It is indubitably the purpose of Article 108 (1), pursuant to which anyone who destroys or damages a monument shall be liable to imprisonment for a term from three months to five years, or the provision of Article 109a, pursuant to which anyone who forges or modifies a monument for trade purposes is liable to a fine, restriction of liberty, or imprisonment for a maximum term of two years, or finally the provision of Article 110, which imposes a fine or restriction of liberty on an owner or a holder of a monument who fails to properly secure it against damage and destruction. The act also includes provisions that impose penalties for the monument holder's failure to act, but there are two more articles that should be first pointed to. Pursuant to Article 117, a person who performs maintenance, restoration or construction works, or even just conservation or architectural studies concerning a monument included in the register or construction works in its surrounding without permission or against terms and conditions of a

permit is punishable by fine. The latter provision is Article 118, which makes it possible to impose a fine for placement of a technological device, boards, advertisements or text on a monument included in the register.

A discussion of legal instruments that can be used by monument conservators cannot omit court decision that serve for their practical execution, and express their interpretation. The case law is quite abundant, but the only decisions that should be mentioned here concern the colour of a building and prohibited exchange of window woodwork, as well as placement of advertisements. In the former case, the court has decided that "the issue of colour of the building is a change to the appearance of the monument, which requires a permit from the Provincial Monuments Conservator pursuant to Article 26 (1) point 11 of the Act (...) (a provision discussed above – W.K.)"ⁱⁱ. As far as the woodwork is concern, the court has determined that "the owners of living premises in a building included in the register of monuments replaced the window woodwork that formed the glazing of the loggia with a PVC window without profiles. What is more, historic balcony woodwork that separated loggia from the room had been removed and replaced with modern sliding door. The said works were performed without permission required by the law. In such a situation, the decision that obliged the owners of the premises to restore the monument to the best condition possible by removing the PVC window as the closure of the loggia on the back side of the building and restoring the balcony woodwork replaced by the arbitrarily installed sliding door according to the plan agreed with the Provincial Monuments Conservator complies with the law." The evidence in the case shows that the woodwork that had been removed has not survived. The only solution is to reconstruct woodwork on the basis of existing original woodwork at the remaining loggias in the building maintaining the form, division, proportion, profile, and historic material. In the general conclusions in the justification for the decision that ordered the restoration of the original woodwork, the court has stated that "in the case of historic buildings, the only solution to the issue of window replacement permissible from the perspective of monument conservation is reproduction of the features of the original woodwork, i.e. the shape, proportion, division, and size of original window lights and profiles. The material that makes it possible to reconstruct the characteristics of the window is wood. PVC windows without profiles do not meet these specific requirements and differ from the original model."ⁱⁱⁱ

As far as the last issue is concerned, the court has stated that "placement of a large advertisement in the premises included in the register of monuments significantly changes its appearance and the fact whether the said advertisement is fixed or placed temporarily, on scaffolding erected due to maintenance works concerning the building. Thus, placement of such advertisement requires a relevant permit from the monuments conservator"^{iv}.

Having completed the review of the legislation regarding monument protection, we should state that they form a coherent legislative construct that unambiguously defines rights and duties of both owners and public administration authorities. It should be added that it primarily comprises the Provincial Monuments Conservators, who have been mentioned many times and act on behalf of the state provincial authorities (voivodes). The appellate body is the General Monuments Conservator who is a Deputy Minister of Culture and National Heritage. Their decisions are controlled by administrative courts.

The above shows that the state monuments conservation service has a number of opportunities for action in case a monument is threatened due to works regarding it. The current regulations include regulations that define the scope of permitted works, regulations that permit their inspection, regulations that authorise monuments conservators to remove improper products thereof and products of illegal works by restoring the previous state, and finally regulations that allow monuments conservators to impose penalties and defining them. Of course, it goes without saying that all those regulations also concern the protection of the aesthetic appearance of the monuments. Thus, the law itself is not an issue, but the effectiveness of actions taken by monuments conservation service is an issue because the law provides the monument conservation service with all relevant instruments.

While discussing monuments protection, we should notice that modern architecture classified under the monument category may additionally and simultaneously protected by protecting the authors' rights under the Copyright Act. In this case, the applicable legal instrument is the right to integrity, which may be used by living architects, their heirs, or architect associations. As far as the Polish law is concerned, the basic provision is included in Article 16 of the Copyright Act^v, which protects the right to integrity as part of protection "not limited in time and not subject to waiver or disposal of copyright by the author". The right, which is set out in the said provision as the author's right to "integrity of the form and the content of the work", authorises them to oppose to any changes, modifications, "improvements", etc. to such works as a building that may deform its original form. It should be clearly stressed that the above mentioned author's right to oppose changes is not affected by their results and any opinions on them, e.g. a common judgement that those changes were positive, or at least favourable to the perception or use of the building. The only thing that matters is the author's opinion, due to the romantic principle that a work is an extension of the author's personality, so the whole of it testifies about the author, and thus no other person can interfere in its form or content. Only in some cases interference in a building, even without consulting the architect, are allowed and will not constitute the basis for a claim concerning violation of integrity. These include actions, primarily technical in character, that are necessary due to specific reasons without any reasonable grounds for the author to oppose them. Typical examples include conservation procedures.

If these works have been mentioned, it should be explained that the Act on the protection of monuments and care of monuments defines conservation and restoration separately. Pursuant to Article 3 points 6 and 7 of the Act, conservation works are "measures aimed at securing and preserving the substance of the monument, preventing destructive processes and documenting such measures", while restoration works mean "measures aimed at exposing artistic and aesthetic qualities of the monument, including, if there is such need, supplementing or reconstructing parts thereof and documenting these measures".

Conclusions

It is worth adding that the products of the said works themselves may be protected under the above mentioned copyright regulations. This is due to the fact that according to the contemporary art conservation doctrine, virtually any works of that kind interfere in the work and affect its aesthetic qualities, thus the conservator-restorer will always "be the creator of new aesthetic qualities in the work being restored by revealing, adding or removing its elements"^{vi}. This results from the simple fact that modern art conservation „is not simply a technical matter"^{vii}, but also a „number of creative choices"^{viii}.

End notes:

ⁱAct of 23 July 2003 on the protection of monuments and care of monuments, Dz.U. 2003, No. 162, item 1568, last amended, Dz.U. 2009, No. 97, item 804.

ⁱⁱDecision of the Provincial Administrative Court (WSA) in Warszawa of 18 May 2006, files No. I SA/Wa 1628/05, LEX No. 232229.

ⁱⁱⁱDecision of the Provincial Administrative Court (WSA) in Warszawa of 2 June 2006, files No. I SA/Wa 1543/05, LEX No. 232927.

^{iv}Decision of the Provincial Administrative Court (WSA) in Warszawa of 7 July 2006, files No. I SA/Wa 2217/05, LEX No. 271575.

^vAct of 4 February 1994 on copyright and related rights Dz. U. 1994, No. 24, item. 83, hereafter referred to as "the Copyright Act".

^{vi}Act of 4 February 1994 on copyright and related rights Dz. U. 1994, No. 24, item. 83, hereafter referred to as "the Copyright Act".

^{vii}The complete text reads: "...art restoration is highly skilled, professional work involving complicated and controversial exercises of judgement and, in particular, is not simply a technical matter". E. van de Wetering: *Intimidatie tactiek Goldreyer werkt in Nederland niet*. NRC Handelsblad, 9 December 1991, p. 6 in: C. Forder: *Who's Afraid of Red, Yellow and Blue III?* International Journal of Cultural Property 1994, Vol. 3, No. 2, p. 90.

^{viii}Words by T. Dreier, who considers art conservation a work subject to copyright if it "involves a sufficient number of creative choices". T. Dreier: *Restoration and Moral Right Under Comparative Law*. in: *La restauration des objets d'art. Aspects juridiques et éthiques*. Zürich 1995, p. 164.

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Bare Act

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