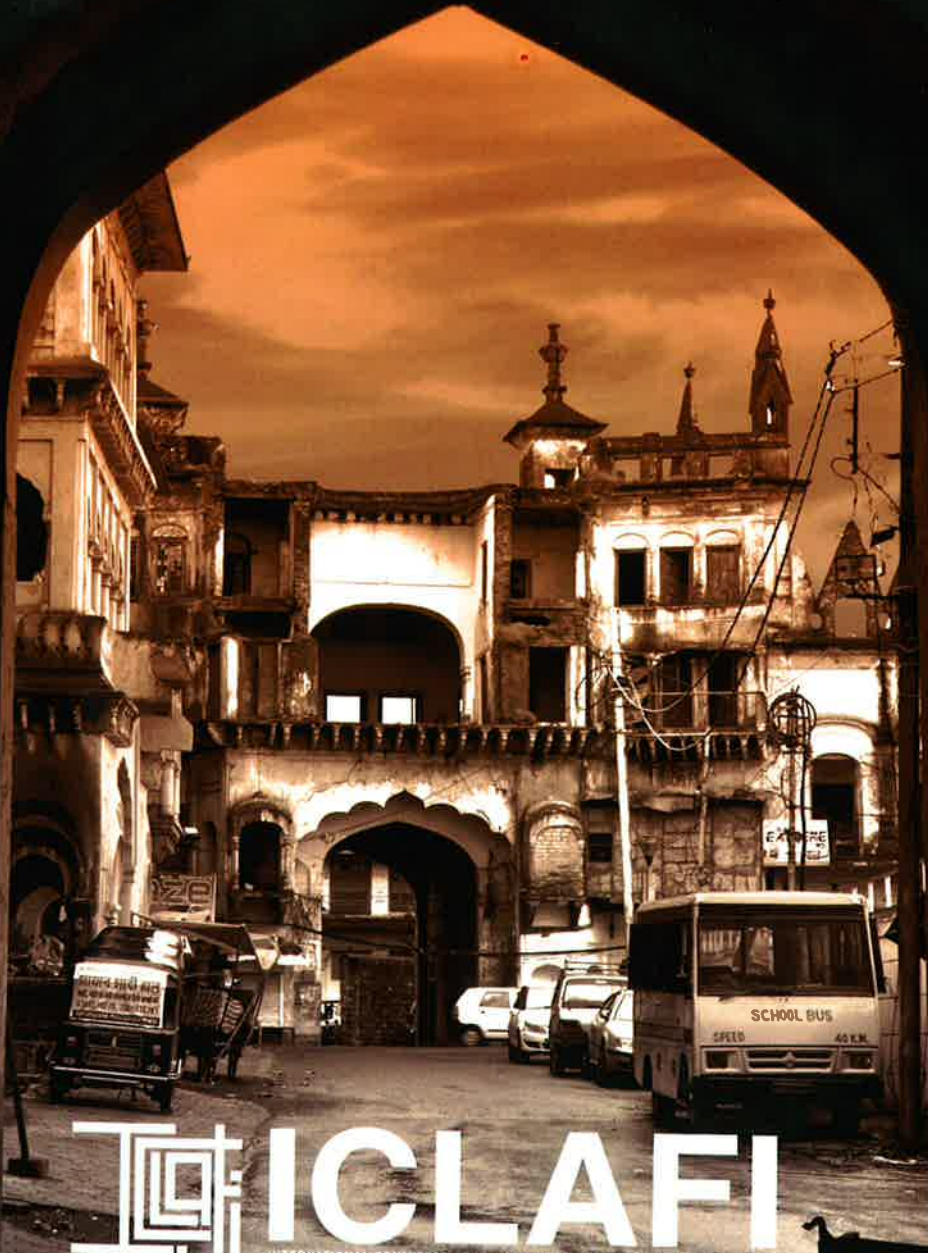


SHARED GLOBAL EXPERIENCES FOR PROTECTION OF BUILT HERITAGE



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The Preservation of Cultural Heritage in Germany: Legal, Administrative and Financial Aspects

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Abstract

This paper discusses in particular the Legal Framework for the protection of heritage in Germany along with its aspects of public participation, administrative framework and financial incentives for the protection of heritage.

Keywords

Legislation, Monuments, Federation, Public Participation

1.0 The Legal Basis

The Federal Republic of Germany is a federal state made up of 16 autonomous states which have their own parliaments and governments. The responsibility for the exercise of state authority and the discharge of state functions is assigned by the **Grundgesetz (Basic Law = Constitution)** to these states (Länder) except as otherwise provided for or admitted by the Basic Law itself. Thus both legislation and administration including the execution of federal laws is **entrusted** in principle **to the states (Länder)**. In other words all competences are deemed to lie with the states unless otherwise specified.

Under this arrangement **legislation concerning cultural heritage** is passed both by the **Federation (planning and building laws)** as well as by the **Länder (laws for the protection and maintenance of cultural monuments)**. Within this broad outline the relevant legislation for the preservation and protection of monuments is the following. Town planning is regulated in the Federal Building Act. Essentially there are two levels of planning: the land-use or master plan as the preparatory plan and the building plan as the binding development plan.

The different heritage laws of the 16 German states contain basically the same provisions. They all give definitions of monuments and regulate the procedures for identifying a monument and then entering it in a list of monuments or a "book of monuments", as the list is called in some states. The Bavarian Law for the Protection and Preservation of Monuments for example defines monuments as follows:

Monuments are man-made things or parts thereof from a past epoch whose preservation, because of their historic, artistic, urban design, scientific or folkloristic significance, is in the interests of the general public.

- (2) Built monuments are structures or parts thereof (including historic decorative details) from a past epoch which possess the significance listed in Paragraph 1, insofar as they are not covered by Paragraph 4. Movable objects can also be historic decorative details if they are an integral part of an original interior design or a comparable historic refurnishing or redesign. Gardens are also considered to be built monuments insofar as they fulfill the requirements listed in Paragraph 1.
- (3) Built monuments can also include more than one structure (historic district or Ensemble); every individual building in the /Ensemble /need not fulfill the requirements of Paragraph 1, if the townscape, square or streetscape as a whole is worthy of preservation.
- (4) Archaeological monuments are movable and immovable monuments which are or were in the earth and in general date from prehistorical or early historical times.

Definitions in the 16 different laws are similar and again, there are 16 different monument lists, as each state keeps its own list according to its own law. In some German states listing is a pre-condition for application of the appropriate provisions for protection; in other words, listing has a constitutive character as to the monument quality. In other German states listing has only a declaratory nature, meaning that the monument quality derives directly from the definition laid down in the law. In both cases the listing is proof of the monumental quality of a building and as such is accepted by the different authorities. Unlike the protection systems

in other countries, France being the classic example, there are no legal categories of monuments and there are no special regulations for monuments listed as UNESCO World Heritage. From a legal point of view all German monuments are equal. Especially in the practice of direct financing however, to say it as George Orwell, some monuments are more equal than others.

Besides individual monuments like historic buildings, the 16 German protection laws also contain regulations on archaeological monuments and on monument areas (ensembles) like historic districts. Unauthorized alterations or demolition of protected buildings can be fined on the basis of these laws.

In addition counties *and county-free municipalities* which have their own *legal powers in local matters* as self-governing authorities are competent to pass bye-laws based on federal and state laws (e.g. development and building plans).

2.0 The Administration

2.1 Decision making administrative authorities

Decision making administration in most German states is based on a *three tier structure* except for the city states Berlin, Hamburg and Bremen and some area states where it is based on a two tier structure. Three tiered structure has a *state ministry on top as the highest level authority*, an *administrative district on the middle level* and *counties and county-free municipalities* (i.e. bigger cities) *on the lower level*. In numbers: there are 16 states forming the Federal Republic of Germany, 22 administrative districts, 323 counties and 116 county-free municipalities. In the two tiered structure the middle level is omitted. Whereas on the ministerial, the top-level of administration competences are divided between different ministries there is a concentration of competences on the middle and on the lower level. Illustrating this taking the example of Bavaria, it means the highest authority for the protection of monuments is the Ministry of Culture and the highest building authority is the Ministry of Interior and there is no differentiation on the middle and on the lower level. The higher authorities have supervisory powers over the authorities beneath them.

The principle of concentration of competences is advantageous for the citizen as his partner is only one public authority where he can apply for different permits needed when e.g. planning to work on a protected historic building.

Decisions binding the citizen are taken by the lower administrative authorities. If the applicant objects to the decision taken he may appeal against the administrative act. If the lower administrative authority is not willing or able to change its decision pursuant to the appeal then the final decision is taken by the middle administrative authority (or in the two tier structure by the higher administrative authority). These procedures are regulated in a federal and in state administrative procedure laws. If the appeal proves unsuccessful the way is opened for another appeal this time to the administrative court.

2.2 Advisory expert administrative authority

In the administration of German conservation legislation, a distinction is generally made between "*Denkmalschutz*", *the protection of monuments*, and "*Denkmalpflege*", *the care for monuments*. The protection of monuments is assigned to the decision making administrative authorities whereas for the care of monuments in most states a specialized public authority, the *State Office for the Preservation of Monuments* under the supervision of the competent ministry is responsible.

This Office *serves* in a professional advisory capacity to both *other government bodies and the public* especially the owners of protected monuments. Its tasks include the *inventorization and registration of monuments* and sites, *review and guidance of restoration work* on all protected monuments through site visits and consulting reports, giving technical advice on matters of maintenance and restoration, *distribution of grants and loans*, approving expenditures on monuments for tax benefits, *research and publication work* etc.

Apart from these responsibilities the main task of these State Offices for the Preservation of Monuments is to *represent the public interest of protecting and preserving monuments in the planning and authorization* procedures both general and particular which are necessary under the protective and building legislation. Thus these offices have more or less the function of a political lobby run by the government. This is an exception as other public interests like the conservation of nature for which no such advisory authorities exist.

The State Offices for the Preservation of Monuments have to be consulted by the decision making administration in all procedures which may have an impact on protected monuments. This means the advisory expert authority must be consulted not only in procedures concerning a single monument but also in planning procedures referring to areas containing monuments. The lower administrative authority which always is the first to decide on a plan or request for a building permit or protective approval may not decide contrary to the opinion given by the State Office for the Preservation of Monuments. If it wants to deviate from the given opinion it has to submit the matter to the next higher administrative authority which then takes the final decision which may override the opinion of the State Office for the Preservation of Monuments.

Thus the administration of cultural heritage in most German states is structured on a two track system consisting of advisory expert public agencies on one hand and the decision making authorities on the other hand.

2.3 Administration of the Federation

The implementation of Federal laws is principally the responsibility of the states, except for activities attributed by the constitution to the Federation like to name the most important-foreign relations and defence; the Federal Administration lacks to a large extent an administrative substructure.

Concerning cultural heritage the Federation subsidizes investments for monuments of national importance (the *Federal Commissioner for Culture and the Media*) and for World Heritage sites (Federal *Ministry of Transport, Building and Urban Development*). These grants

are administered by the Federal Office of Administration (Bundesverwaltungsamt). This is a superior federal authority performing administrative tasks for different federal ministries. The Office employs about 2400 people and manages budgetary funds of around 7 billion Euros annually.

2.4 Administration of state owned monuments

Most German states have special administrations for the monuments owned by them. These administrations have different legal forms, in Thuringia for example this administration is a public foundation funded by the state whereas in Bavaria it is an agency or department under the supervision of the Bavarian Ministry of Finance.

To illustrate the tasks and the organization of such an administration again Bavaria is taken as an example. In Bavaria the **Bavarian Department of State-owned Palaces, Gardens and Lakes**, otherwise known as the Palace Department is responsible and manages 45 palaces, castles and residences as well as a number of historical gardens, some churches and other historical monuments and the Bavarian lakes. The predecessor of the Palace Department was founded in the 18th century as a division at the Bavarian Court. The objects taken care of include the Castle of Neuschwanstein and the Residences of Munich and Würzburg. Altogether over five million visitors are attracted by the monuments administered by the Palace Department.

The Palace Department has a staff of about 850 collaborators including specialists in restoration, art historians, building specialists and a garden department. The central department is responsible for personnel and budgetary matters, the properties with their numerous leased restaurants and function rooms, the lakes and the publicity. The Department has the function of the lower decision making administrative authority as far as its own monuments are concerned and it is not obliged to obtain expert opinions from the State Office for the Preservation of Monuments.

3.0 Participation of the Public in administrative procedures

Public participation i.e. **consultation of the public and of the individual citizen in the planning procedures** takes place for a first time during the drawing up of land-use plans and of building plans. The Federal Building law provides for the public notification of the public as early as possible i.e. as soon as the local authority has decided to draw up a plan. It has to inform the public about

- The general aims and purposes of the plan;
- The foreseeable effects of the plan and;
- Other possible solutions under consideration for the renovation and development of the planning areas.

The first public consultation is therefore performed before the draft of the plan is finalized. The local authorities can decide themselves on the means and ways of information. For non-problematic planning procedures, the local authorities provide, usually through advertising in

the press, the opportunity for a single discussion forum in the rooms of the administration. For extensive and significant or controversial planning procedures, civil assemblies are often convened, in which the planning is presented and discussed. Citizens' arguments in this consultation procedure are to be included in further planning considerations.

When drafting the plan the arguments put forward by the public have to be taken into consideration. As soon as the draft of the plan is finalized, a second formal public participation follows. The topic of this consultation is the draft plan, which must be publicly displayed. The display must be announced in advance. The draft plan must then be displayed for one month for public inspection together with an explanatory report or statement of reasons. The local authority must deal with the content of the comments and communicate the result of this review to the public. Should the local authority not follow the arguments of the public, it must submit these arguments to the next highest (middle) administrative authority which has to approve the plan.

For all **individual decisions and rulings** by an authority **which intervene in the rights of a person concerned, the person must be consulted**. This obligation results from the federal administrative procedure law and similar laws of the Länder and is also, to a certain extent, specially regulated in building and in heritage law. However even when no explicit regulation is standardized there, the provisions of the administrative procedure laws take effect. Thus, for the decision about applications for a building contract, or for a permission in heritage law, for example, each neighbour of the property must be granted a hearing prior to the decision. For the registration of historic buildings or sites in a list of historic buildings or sites, the owner of the property must be granted a hearing if this registration has a constitutive effect.

Both planning and individual decisions are subject to **legal control by administrative courts**. Citizens affected in their rights can have building plans inspected by means of a direct judicial review of the norm or they can wait and see if an individual decision is taken against them or if an adverse ruling is issued on the strength of a building plan, before having these underlying statutes and plans inspected in a trial on the legitimacy of the individual decision ("incident-review"). Individual decisions which affect a citizen's rights (this can also be a neighbour for example), are examined by an administrative court after entering into legal action. Such legal action is conditional on the performance of administrative proceedings reviewing the objection, i.e. the citizen must always initially turn to the administrative authority which issued the decision objected to.

4.0 Financial aid for the preservation of monuments

4.1 Direct financial aid

Direct financial subsidies in the form of **non-repayable or repayable grants** are given for the restoration of monuments by the Federal Government, by the Länder and by district and local authorities, and of course also by the European Union.

4.2 Indirect financial aid through tax concessions

German tax law is federal law. However the revenues from most taxes are split between the federal government, the federal states and the local authorities, as is the case with the two

most important taxes, namely turnover tax (VAT) and income tax. Other taxes are due in full either to the federal government or to the federal states. Basically, there is a different law for each tax and one law regulating taxation procedures (Abgabenordnung).

4.2.1 Income tax

72 % of the costs of rehabilitating a protected historic building (Herstellungskosten - building costs) can be deducted from taxes over a period of eight years (annually 9%) and the remaining 28% over a period of four years (7% annually). This is an advantage in comparison to non-protected or new buildings because normally building costs can be deducted at a rate of only two or 2 ½% per year, depending on the age of the building, over a period of 40 or 50 years compared to the ten-year deduction period for the rehabilitation costs of a monument.

4.2.2 Other taxes

Under certain conditions real estate tax and inheritance and donation tax can be reduced for monuments if the income from the property is consistently lower than its costs.

5.0 Conclusion

Monuments are man-made things or parts thereof from a past epoch whose preservation, because of their historic, artistic, urban design, scientific or folkloristic significance, is in the interests of the general public. When drafting the plan the arguments put forward by the public have to be taken into consideration. As soon as the draft of the plan is finalized, a second formal public participation follows. Direct financial subsidies in the form of **non-repayable or repayable grants** are given for the restoration of monuments by the Federal Government, by the Länder and by district and local authorities, and of course also by the European Union. The implementation of Federal laws is principally the responsibility of the states, except for activities attributed by the constitution to the Federation like to name the most important- foreign relations and defense; the Federal Administration lacks to a large extent an administrative substructure.

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