SHARED GLOBAL EXPERIENCES
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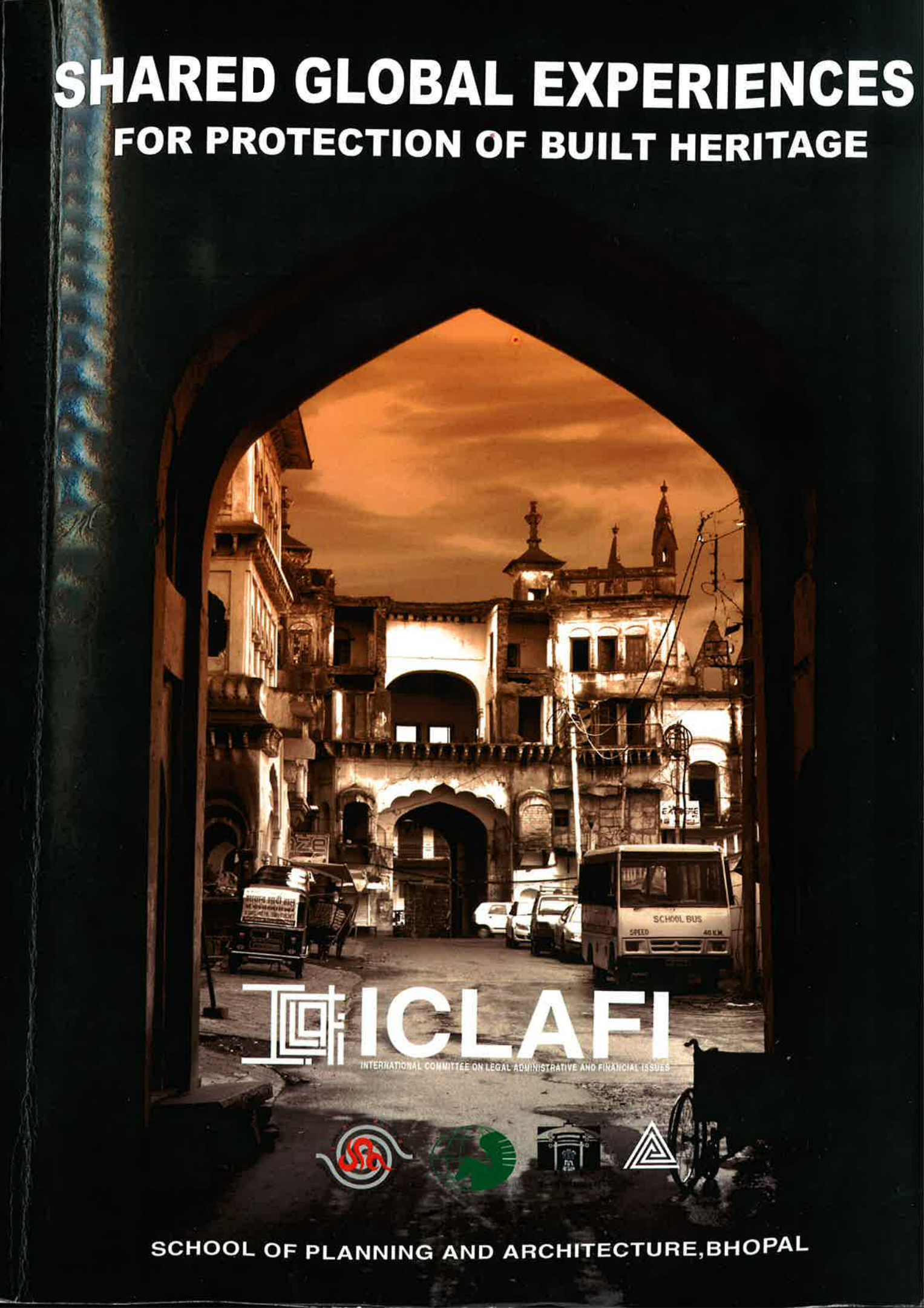

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Which is more effective: General rules or specific decisions? Some remarks prompted by the Swedish heritage legislation

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Abstract

This essay is about legal technique. Is it more efficient to regulate protection of the cultural heritage by issuing more or less detailed decisions, or is it sufficient to issue rules in general wording? The choice of technique is not devoid of importance. With general rules the effect can be made much far-reaching, but the interpretation may be more contentious. Individual decisions demand much office work, but may in consultation with parties concerned result in good implementation. Some pros and cons are discussed here, illustrated by the Swedish heritage legislation, where general rules have a long standing.

Keywords

Legal Protection, Heritage Legislations, Ancient Remains

1.0 Introduction

In many countries legal protection demands specific decisions, identifying item for item which special restrictions apply, how large an area is covered and other aspects of how the item is to be preserved. These decisions may appear under different terms: designation, listing, classification, inscription, protective order, notification or registration. In some jurisdictions the method is another: protection in more general terms, resting on the legal texts in themselves, and leaving to landowners, land users and the authorities to interpret what is under protection. Is such a"lax" attitude defensible and reliable?

In the hierarchy of legal norms, second to the constitution, rules adopted by the parliament are normally paramount. Rules made by the parliament – acts is the usual term in the English language – may, however, in many cases be supplemented by rules issued by the government. Norms issued by the government are usually called regulations (or similar in other languages).

Acts of parliament are by nature rather general in their contents. Less so regulations made by the government, but to an extent they too are general. They are meant to govern private individuals, corporations or sub-governmental agencies, but they do so with wide strokes of the brush, formalised in general wording. There may be limits as to how specific the directions from parliament or government may be. Under e.g. the Swedish Constitution (Chapter 12 Section 2 of the Instrument of Government), parliament is expressly forbidden to make decisions as to how a public agency should determine the exercise of public authority regarding a private individual, a local government or the application of law. In principle, the same applies to the national government, but parliament may have delegated the use of public authority in matters, for instance, of issuing permissions under a certain act to the government. The government, in its turn, may have delegated its powers to a subordinated agency. If the latter is the case, the government must not intervene when that agency tries a delegated issue, unless that is specifically provided for.

Governing a state by rules (an alternative is, of course, always the power of the purse) is therefore subject to a modicum of generality. Neither the parliament nor the national government will normally clamp down on an individual and tell him what to do in a specific issue. The general rules will have to be interpreted by organs of the state appointed for that purpose, be they agencies of the government or independent courts-of-law. If specific direction is desirable, then a decision applying the general rules will be taken.

Heritage issues are not intrinsically different from other matters of governance. To protect the heritage legally, i.d, with recourse both to general rules, and/or specific decisions, is therefore a question of what is practical under the overriding rule-of-law doctrine of the state in question.

In the Swedish context both general rules and individual decisions are used as methods to point out what is protected either on land, under water, or in individual buildings or groups of buildings. Which are the prerequisites, advantages and drawbacks of the two basic methods? Can they fruitfully be combined?

2.0 Sweden's heritage legislation

The Swedish Cultural Heritage Act (CHA) could be seen as a fairly updated piece of legislation. Its year of publication in the Swedish Official Journal is 1988 (SFS 1988:950), and in 2013 it underwent an overhaul, which was proclaimed to be an overall revision – at least linguistically – but which in reality touched very little of the substance of the legislation. At its year of adoption, in 1988, a modern approach was the ambition to engulf many of the physical aspects of the heritage. Protective provisions for archaeological remains were followed by rules for the architectural heritage, to which were added a chapter for church buildings and other ecclesiastical objects. The movable heritage was also included in a chapter regulating export of old objects, soon to be followed by another chapter, devoted to procedures for return of illegally exported objects under a European Union Directive, applicable in Sweden as of 1994. So the act could be said to reflect a modern,"holistic" attitude to several aspects of the Swedish heritage.

As a matter of fact, however, the 1988 act was not much more than an amalgamation of older acts and regulations, which were now brought under one "hat". The former act on ancient remains, now with some changes brought into the CHA as its 2nd Chapter, had its principal predecessors dating as far back as 1666, when a royal decree was issued proclaiming that nobody "whoever it was, should from this day" break down or destroy any castle, house, fortress, fortification, or cairn regardless how small it may seem, or standing stones with any runic inscription, but let them be in their place, together with any mounds of earth or gravesites of former kings and noble persons. Nor should any church, monastery or cloister and the graves or monuments belonging thereto undergo any willful destruction. All officers of the kingdom and the clergy were instructed to spread the message of the proclamation and to watch over its obedience.

For this obedience it was necessary to amass and disseminate knowledge of the remains of past. Royal efforts to this effect had already been underway for almost a century, mainly through the clergy, and under the inspiration and leadership of appointed officials, carrying the imposing title of antiquaries of the realm (The title is still used for the director general of the National Heritage Board). So using this legal technique of protecting the heritage in rules of general applicabilty was not unrealistic even from its inception. The same technique has been used ever since in successive acts and regulations.

3.0 Ancient remains (archaeological heritage)

Today the Chapter 2 of the CHA effects protection in the following fashion. First, there are rather sweeping general criteria:

"Ancient monuments and remains are the following *traces of human activity* in *past ages*, having resulted from *use in previous times* and having been *permanently abandoned.*"

A few comments on what is in italics: Traces means that it is physical remains that the law concerns itself with, and they should have resulted from the use of humans in past ages/previous times. Paleontological remains are thus not covered. Until recently, there was no specific time requisite, but now it has been set at the year 1850 AD. This will be further

explained later. The final general criterion is that the traces could be considered to have been permanently abandoned. Thus, if there is still a current use of something that appears ruined, it does not qualify for protection as an ancient remain.

Then there are further general criteria, which, however, go along the road to specification. The following categories of remains are covered.

1. graves, funeral buildings and burial grounds, and also churchyards and other cemeteries,
2. raised stones and also stones and rock bases with inscriptions, symbols, marks and pictures, as well as other carvings or paintings;
3. crosses and memorials;
4. places of assembly for the administration of justice, cult activities, commerce and other common purpose;
5. remains of homes, settlements and workplaces and cultural layers resulting from the use of such homes or places, and similarly remains from working life and economic activity;
6. ruins of fortresses, castles, monasteries, church buildings and defence works and of other buildings and structures;
7. routes and bridges, harbour facilities, beacons, road markings, navigation marks and similar transport arrangements, as well as boundary markings and labyrinths;
8. Wrecks.

Outside of these eight categories, formations of nature associated with ancient customs, legends or noteworthy historic events are also protected.

The reader will have discovered several of the remains mentioned already in the royal proclamation of 1666, so there is continuity in the Swedish legislation. It should be noted that category 6, encompassing all abandoned buildings and structures, seems very wide: the minute remains of a croft, a smitty or lumberjock's hut seem to be covered. Before 2014 the legislation had sought to limit this implication by insertion of the word "remarkable" before building and structures, in order to exempt what is too commonplace or insignificant. After many years of rather unproblematic application, the margin of appreciation was still considered too wide, so in the 2013 overhaul the word was eliminated and a general time limit was put in place. Protection does not apply to remains that can be assumed to have come into existence – or have been wrecked – after 1850.

It does not mean that younger remains are impossible to protect. But the legal technique will have to change. A new provision makes it possible for the administration to issue an "ancient remains order", which will then protect the remain as if it were older. From general to the specific in other words. To make a decision of this kind, the administration will have to consult the landowner and other concerned parties, primarily the local government. The decision can be appealed, but comes into force immediately.

Legal protection for ancient remains means that any land use that will – or might – affect the remain, including covering it up, will have to be scrutinized by the administration. An application may be refused, but even if the administration issues a permission, it will usually

be on condition that archaeological investigation take place and that special measures should be taken to prevent the remain from being damaged.

The list of categories of remains 1 – 8 is rather concrete, but it seems certain that there will be many cases were it might be difficult to assess if a planned project may affect an ancient remain, by just looking at the legal text. However, assistance is available. There is public web access to a register of ancient remains, digitally kept by the National Heritage Board of Sweden. http://www.fmis.raa.se/cocoon/fornsok/search.html?utm_source=fornsok&utm_medium=block&utm_campaign=ux-test. The register contains some 1.1 million entries, representing approximately 700,000 sites. There are also official maps which will provide further guidance. In addition, if a project might affect an ancient remain, the developer is duty bound to always first consult with the administration. This consultation is still free of charge, in sharp contrast to what applies to applications for other projects that may negatively influence the environment.

So Sweden now operates both techniques for its ancient remains/archaeological heritage: the general rules, and in some – probably for a long time very few – individual decisions in the form of protective orders. Was this change necessary and has it strengthened protection?

The time limit was put there to clarify to landowners, developers and to an extent also the public at large what is and what is not a protected remain. Instead of brooding upon the question whether something in the ground that could be the ruins of a building is"remarkable" or not, the question to be dealt with is now: are these ruins older than from 1850? To my mind this question is no easier to resolve than the previous one. How can anyone but a trained historian or archaeologist credibly verify such an examination? Very little, if anything, has been achieved in the way of clarity. Either question will have to be dealt with recourse to the knowledge available, i. e. the register of ancient remains and the official maps. It could be noted that neither the register, nor the map system, are resources mentioned in the legislation. It probably would have more practical to introduce a more specific mentioning of these resources in the legal text.

There is, however, a worse problem concerning the clarity of the legislation. Protection of an ancient remain does not cover just what can be observed as the remain in itself. Protection also applies in an area around it large enough to preserve the remain and to afford it adequate scope with regard to nature and significance. The extent of this area is very seldom defined beforehand. Thus, the area has to be determined ad hoc whenever something may affect its vicinity. Not surprisingly, landowners and land users may have another opinion than the heritage authorities. To my mind, it is strange that a legislative reform aiming at greater clarity concentrates only on the time aspect, and does not even mention the geographic uncertainty. In many countries, this adjoining area has been delimited in more certain terms: so and so many metres from the remain, but this has never been discussed in Sweden.

Ancient remains are not only difficult to assess on the ground or on the seabed. There is also the fact that we do not know all of them. Many new finds are made every year. One advantage with the general approach taken in the Swedish act is that protection of newly found remains works automatically. No decision needs to be taken to afford them protection.

Works that turn out to affect previously unknown remains must be stopped, and the find has to be reported to the administration.

4.0 Churches (ecclesiastical heritage)

Churches, monasteries and cloisters were subjects for protection already under the 1666 royal proclamation. In fact, as early as in 1571 there were rules placing under control unwanted changes to churches. Also this legal situation has prevailed until today. With the reformation, which in Sweden took place in1527, the church became an established Lutheran church, firmly placed under the King. This meant that the clergy were appointed by the King, or later the government, and that changes made to church buildings or other ecclesiastical objects were monitored by the state. Only in 1951 legislation was the permitted individual freedom of religion adopted. However, the church still did not have independence from the state. After many years of deliberation, including efforts to solve the riddle as to who legally was the owner of church property, the new millennium saw this independence coming into being. One of the questions to be resolved at this "divorce" or "changed relationship" as the official term is, was how the state could maintain control of church heritage, although the church had now become the formal owner and decision making within the church was independent of the state. The solution came in the way of continued legal regulation of the church heritage, in exchange for which the state committed itself to make a rather substantial annual economic contribution to the upkeep of church buildings.

The present rules consist of the following elements: Church buildings to which the CHA is applicable are buildings which have been consecrated for the services of the Church of Sweden before 1 January 2000 and on that date were owned or managed by the Church of Sweden or any of its organisational parts. A church site is an area surrounding a church building, connected with the function and environment of the building and not constituting a cemetery (Chapter 4 Section 2 of the CHA).

However, not all church buildings and sites are under protection. Protection is afforded to church buildings erected and church sites constituted before the end of 1939. It consists of a duty not to alter them in any significant way without permission from the administration. In the case of a church building permission must always be obtained for demolition, relocation or structural changes of the building, and also for interference with or alteration of its exterior and interior including permanent fittings and artistic decorations, and also for alterations to its colour scheme. In the case of a church site, permission is always required for enlargement of the site and for the erection or significant alteration or buildings, walls, portals or other permanent features of the site.

So here is another example of how an important part of the Swedish heritage is regulated only by the general rules of the act. In comparison with the rules for ancient remains, however, it is much easier to interpret and understand to what objects the rules apply. It is well known, especially to the church management, which churches or sites were created or constituted before 1940. In 2008 the count of protected churches stopped at 2905.

But are there no churches or sites from later days that possess heritage value and therefore would deserve protection? Yes, and in these instances the act opens up a possibility for the

administration to take a decision in the individual case to achieve the same kind of protection. In 2008 the number of specially protected churches amounted to 83.

To complete the relation of protection for ecclesiastical heritage it should be briefly mentioned that burial sites, whether managed by the church or secular, are under the same basic rules: If they existed before 1940 they are automatically protected directly by the act; if younger a special decision can be taken.

Church movables are also protected. Protection here is afforded to any ecclesiastical heritage item that is on the list of church heritage inventory, which every parish has to keep. Once on the list, such items must not be disposed of, deleted from the list, repaired, altered or relocated without permission from the administration. The administration has the power to inspect and add items to the list.

5.0 Historic buildings (architectural heritage)

Buildings, groups of buildings, parks and areas of prominence from a historic perspective, can also be protected, but here Sweden operates a system with individual designations. There are now approximately 2400 buildings which are covered by designations and protective orders under the CHA.

6.0 Conclusion

Swedish heritage legislation seems to do good with general rules, up to a point. One prerequisite for the system to work is good knowledge and documentation to illustrate the general rules. Then it is up to the owner, user or manager to take this knowledge into consideration and then respect the rules.

It is, of course, possible to say that the system would be safer, if an individual decision was taken regarding all protected sites and objects. Then the concerned owners etc. would really know what protection applies to their property. But with so many ancient remains – 700000 sites – and so many protected churches – close to 3000 – it would take an enormous bureaucratic machine to administer all those decisions. And with regard to ancient remains, the paper machine would still not be able to reach all those remains that are still unknown.

However, I am dodging the original question: which system is more effective? I have to admit that answering this one is well beyond my scope. It would involve an enormous investigation of the state of the heritage in several jurisdictions, using one or the other system. And in order to compare one would also have to invent a scale of balances, where the weights would consist of information available on the heritage, general level of education, economic resources and many other factors that would make an evaluation more than mere guesswork. It is, perhaps, wishful thinking that such a study could be conducted. In the meantime, we would have to resort to the kind of reasoning that I have tried to lead in this paper.

Bibliography

Bare Acts

Heritage Conservation Act (1988:950) including amendments up to and including SFS 2002:1090