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Listing Cultural Property: What Do We List and What are the Consequences for Listed Property. Observations with Regard to Sweden.

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1 *Introduction: avi au lecteur*

Listing is here taken to mean two things: 1. A heritage evaluation process by which certain property is selected for special treatment, and 2. That special treatment is legal protection (but could also entail financial consequences). The two of them are hinged together, and this discourse will start with the protective aspect in order to lay a fundament for a discussion of the selective procedure. However, a reader who cannot be bothered with the details of protection might go directly to section 7.

2 *The roots of legal protection*

Legal protection of historic vestiges has long standing in Sweden. In 1666 a royal proclamation with the force of law placed under royal prerogative ‘Old Monuments and Antiquities’. It became prohibited to interfere with vestiges that reminded of the greatness of the forebears, particularly those of royal ascent. Graves, stones with runic inscriptions, ruined buildings and similar obvious remains of the past were not to be tampered with.

The legal instruments have since been developed and replaced by others, but the core of the legal message has survived: The physical elements of the cultural heritage shall be preserved. If necessity dictates interference with a monument, then the extent of alterations shall be determined and monitored by the authorities. Vanishing elements shall be carefully recorded.

There has been a difference in attitude towards remains of what has already been abandoned and has lost economic importance, and structures that still have a viable function in society. Rules protecting the archaeological heritage have been adopted earlier than rules protecting architectural values. Ecclesiastical buildings, however, have enjoyed supervision of the profane authorities even before the days of the royal proclamation.

The question what should be singled out for protection – or in the meaning of this colloquium ‘listed’ - in Sweden can best be answered by looking at the legal texts and providing them with an explanatory overview.

3 *The protective system: an overview*

The safeguarding of the cultural heritage has always been a responsibility for the national government (the Kings of yesterday often took a personal interest; today the Ministry of Culture) and its agencies. These agencies are the National Heritage Board and the cultural heritage departments of the twenty-one County Administrations. Gradually local governments (their actual number is 289) have become engaged in and entrusted with legal responsibilities, particularly with regard to the architectural values of the built environment.

The statutory framework for protection of heritage values consists of several acts of

Parliament, supplemented by government regulations. The main statutory instrument is the *Cultural Monuments (etc.) Act* (SFS 1988:950). This act covers ancient monuments and sites, listed historic buildings, ecclesiastical heritage and cultural objects (export/restitution).

The *Environmental Code* (SFS 1998:808) - in force as of 1999 - proclaims as one its aims the protection and care of a valuable natural and cultural environment. It provides *inter alia* for the establishment of cultural reserves.

The *Planning and Building Act* (SFS 1987:10) provides legal tools for the local governments in looking after cultural values. This act contains rules as to how the cultural heritage should be identified and safeguarded in planning procedures and in the screening of building applications.

4 *The Cultural Monuments Act*

The act's introductory provision holds that protecting and caring for Sweden's cultural environment is a responsibility to be shared by everyone. The County Administrations monitor this task within their respective regions, whereas surveillance at the national level is entrusted to the National Heritage Board.

4.1 *Ancient monuments and sites*

are protected directly by statute, *ipso lege*. No administrative order is necessary. The extent of protection is determined in a provision, which lists protected categories of remains, chiefly of an archaeological nature: burial sites, erect stones and stones with inscriptions and markings, gathering places, vestiges of dwellings, ruins of buildings or structures, wrecks (more than one hundred years old), to name some of the most important categories. Any object which falls under a heading in this list is protected, provided it also falls under the general prerequisite of being a remain of human activity in past days (no fixed time limit, except for wrecks) and being permanently abandoned.

Not just the actual remain, but also a surrounding area is under protection. The exact extent of this area may be determined administratively, but this has happened only in few cases. Normally just the wording of the statute: an area sufficiently large for conservation of the character and significance of the remain, is applicable.

The responsibility to determine whether an object is to be considered a protected monument or site rests on individuals and authorities. Protection means that anyone with the intention of using land where protected remains may be affected must first consult the County Administration. Physical interference with protected remains needs permission by the County Administration.

If permission is given it is generally on condition that the applicant pays for archaeological investigation and documentation. This does not apply to protected remains, which were entirely unknown at the start of the operation; the State then bears responsibility for archaeological costs. If permission is denied, the applicant may appeal against the decision in an administrative court of law. Decisions regarding archaeological costs may be contested in a real property court.

4.2 *Portable ancient finds*

are defined as objects, which have no owner when, found, and which are *either* discovered in or near an ancient monument or site and are connected with it, *or* are found in other circumstances and are presumably at least one hundred years old. The former accrue to the State when found; the latter accrue to the finder. A finder, however, must invite the State to acquire objects that consist

1. wholly or partially of gold, silver, copper, bronze or other copper alloy, or
2. of two or several objects, which presumably were deposited together.

The National Heritage Board determines matters of acquisition. Compensation must be reasonable and cover at least the value of the metal plus one-eighth of that value, i.e. 112,5 percent. The Board's decision may be appealed in an administrative court of law.

Offences may render *penalties*, ranging from a maximum of four years' imprisonment to fines. In addition to penalties, offenders may have to pay damages for repair, reconstruction or archaeological investigation necessitated by the offence.

4.3 Historic buildings

can be protected through individual listing by the County Administration. Parks and gardens and structures other than buildings can also be listed. In the course of a listing the County Administration will issue a Protective Order to specify what restrictions apply to a listed building with regard to demolition, alteration and upkeep.

Only the 'elite' of culturally important buildings etc. is meant to be protected under the Cultural Monuments Act. Other buildings of cultural eminence can be protected under the Planning and Building Act.

Who owns a historic building is not relevant to whether it may be listed, with one exception: buildings owned by the State are under a special regulation (SFS 1988:1229). The National Heritage Board nominates buildings for this regulation and monitors the management when the Government has confirmed the nomination and issued a protective order.

If necessary, the protective order may cover an area adjoining the building to ensure that this area be kept in such a condition that the appearance and the character of the building will not be jeopardised.

Pending listing, the County Administration may prohibit temporarily any measures that might lessen the cultural value of a building; most notably it may stop an imminent demolition.

Non-consenting property holders may claim compensation for adverse effects of restrictions laid down in the Protective Order, but there is a threshold of economic damage that must be passed before owners become eligible for indemnification. Very serious restrictions entitle the owner to call for redemption of the property. He will receive compensation for its market value, and will also have his own costs for value assessment in a real property court covered by the State.

Once a building has been listed, the protective order is meant to govern its physical

shape, including matters of upkeep and care. It is possible for the owner to apply for permission by the County Administration to make changes to the building contrary to the protective order, if he can claim special reasons. Permission may be granted on condition that the change is made in accordance with specific directions and that the owner records the state of the building before and during the work that will change it. If listing causes an obstacle, inconvenience or costs out of proportion to the importance of the building, the County Administration may change the protective order or revoke protection altogether.

A breach of the protective rules for historic buildings may lead to injunctions to restore damaged buildings, enforced by contingent fines. There could also be penalties. These, however, could not exceed a fine.

4.4 *The ecclesiastical heritage*

is regulated in the Cultural Monuments Act, but mainly only insofar as it belongs to the Church of Sweden. Now autonomous, the Church of Sweden until the end of 1999 had the status of an established church. The protective system has retained a large measure of State control.

The Cultural Monuments Act is applicable to

1. church buildings and church sites built or laid out before 1940, or later, if listed by the National Heritage Board,
2. cemeteries laid out before 1940, or later, if listed, and
3. furnishings of historic value of a church or of a cemetery, regardless of age.

The concept of a cemetery includes secular cemeteries and cemeteries of other denominations than the Church of Sweden. It also includes buildings on a cemetery and other immovables or movables.

Protection under 1. and 2. is *ipso lege* and no further administrative action need be taken. No church building, church site or cemetery may be changed in any considerable way without the County Administration's permission. Normal or urgent repair may, however, be carried out without approval. The act states that material and methods should be chosen with regard to the cultural values in question.

Protection of furnishings depends on individual listing. Every parish has to keep a list of furnishings with cultural value. If an object on the list belongs to, or is kept by somebody else, it shall be noted. Furnishings must be kept safe and in good repair. A listed item must not be disposed of, deleted from the inventory, repaired or altered, or removed from the place where it has long since belonged without the County Administration's permission. Privately owned objects may be on the list, but are exempted from these restrictions. The County Administration is also authorised to inspect furnishings, add them to the list of protected items and to take items into custody.

4.5 *Certain old cultural objects*

The Cultural Monuments Act regulates dispatch out of the country of cultural objects. Sweden, like most other Member States of the European Union, has used the exception under Article 30 of the Community Treaty to retain national legislation to

protect its 'treasures of archaeological, historic or artistic value' from the freedom of movement stipulations for goods in general. Dispatch requirements apply regardless of whether an object is to leave for another Member State or a third country.

Like ancient monuments and sites, Swedish cultural objects under dispatch control are listed in categories. The list of categories coincides with the list in the European Council Regulation (EEC) No. 3911/92 on export of cultural goods but age limits and economic value thresholds are defined differently. Most notably the Swedish thresholds are much lower. There is a difference between Swedish and foreign cultural objects. Dispatch of foreign cultural objects needs permit if the object has been in Sweden more than one hundred years. Other manifold of details in the list of categories will have to be left out here.

Permit should not be granted for objects of great significance for the national heritage. In certain situations permit must be granted regardless of cultural importance: e.g. if the owner moves from Sweden to settle in another country or if the owner is a resident of another country and has acquired the object through inheritance, a will or the legal distribution of an estate. Permit will also be granted for temporary loans by certain public institutions or for public cultural activities abroad.

Permits are issued by five different authorities: The National Library (printed and unprinted books etc.), The Nordic Museum (furniture, textiles, musical instruments, arms etc.), The National Archives (unprinted matter), The National Art Museum (furniture, paintings, arts and handicraft) and The National Heritage Board (archaeological artefacts). All applications are filed with the latter agency, which distributes them to the proper authorities.

A denial of permit can be appealed to an administrative court of law. There are no rules on economic compensation or pre-emption by the State in cases where permit is refused.

The Cultural Monuments Act finally contains the Swedish rules for implementation of the European Council Directive 93/7/EEC on the *return of cultural objects* unlawfully removed from the territory of Member State. The central authority responsible for the carrying out of tasks provided for in the directive is the National Heritage Board. No listing in Sweden of objects is involved.

5 *Environmental Code*

This code encompasses provisions for all kinds of activities that may affect the environment. It lays down general rules of consideration, which have to be respected by authorities and individuals. With regard to cultural values the code is instrumental in two various aspects.

First, the code catalogues fundamental requirements for the use of land and water areas. Areas, which are of *importance* owing to natural or cultural values or to outdoor recreation shall, as far as possible, be protected against measures, which may be substantially damaging to these values. If an area harbours values of *national importance*, the requirement is stricter: then the area shall be protected. The County Administrations and other government agencies in conjunction with the local

governments determine which these areas are. Certain large tracts, especially along the coastline and around lakes and rivers, where the natural and cultural values are defined to be of national importance, have already been geographically defined in the code.

The effect of these provisions is that not just individuals, but also public authorities, e.g. the Public Road Administration or a local government in applying its planning powers, must refrain from taking damaging measures in an area of national importance. Decisions that do not satisfy the requirements could be cancelled.

An area with nationally important cultural values might also be subject to other claims of national importance. The code does not in one formula solve conflicts of national interests (apart from the fact that national defence is to have priority over other national interests).

Second, the environmental code introduces a concept parallel to nature reserves: the *cultural reserves*. These can be set aside by the County Administrations, or - subject to delegation - by local governments, in order to protect historic landscapes which are valuable due to cultural influence. Use restrictions necessary to ensure the purpose of the reserve may be issued, such as prohibitions to erect buildings, fences, storage etc., or against digging, mining, felling etc. A property holder may also have to endure the construction of roads, parking facilities, public footpaths, sanitary installations etc. within the reserve. The fact that an area may contain buildings or other elements already protected by the Cultural Monuments Act does not prevent the area from being set aside as a cultural reserve.

Decisions to set up cultural reserves are appealable, either to the County Administration or to the government.

Property holders whose current use of land are affected by a cultural reserve are entitled to compensation from the State or local government to the extent that their rights are considerably impeded thereby. If restrictions are severe, an owner could request the state to redeem the property at market value. Unresolved questions regarding compensation can be tried by a real property court.

Offences against restrictions imposed in cultural reserve may render a penalty of a fine or up to two years' imprisonment.

6 *Planning and Building Act*

This act gives local governments a wide degree of autonomy in regulating planning and other development within their respective districts. The State may, however, intervene in planning procedures in certain cases, for instance if an issue of *national importance* according to the Environmental Code has not been duly considered. Areas delimited to be of such importance due to cultural value should therefore be safeguarded from damaging development.

The act provides for protection of cultural values in several modes. It contains general requirements for buildings and other structures and for sites and public spaces. Alterations to existing buildings and structures shall be carried out with care so that characteristics are preserved, and constructional, historical, environmental

and architectural values are taken into consideration. All buildings should be maintained in order to keep their characteristics as far as possible. The conservation requirements are stricter for buildings, which are *particularly valuable* from a historical, environmental or architectural viewpoint, or which are a part of an area of this kind. These buildings must not be disfigured and shall be maintained in such a way that their characteristics will be preserved.

The act holds that all local governments must adopt *comprehensive plans*, covering their entire districts. A comprehensive plan shall note the main aspects of the proposed use of land and water areas, the local government's view on how the built environment should be developed and preserved. It shall also describe how the local government intends to take into consideration national interests and qualitative norms under the Environmental Code. A comprehensive plan, however, is not binding on either authorities or individuals.

Binding ordinances regarding land use and of development are effected through *detailed development plans*. Alternatively, *area regulations* may be adopted, if needed to achieve the purpose of the comprehensive plan or to ensure the safeguarding of national interests. With these two planning instruments a local government may decide upon regulations in several respects which affect the preservation of cultural values. It may e.g. regulate the extent to which building permission and demolition permission is needed for individual projects. It may also prohibit demolition and specify how buildings of particular cultural value shall be preserved.

Even if a demolition prohibition has not been laid down in a plan or area regulation, the local government may refuse applications to demolish buildings that are culturally particularly valuable.

Decisions under the Planning and Building act can be appealed against to the County Administration, and further either to the Government or to an administrative court of law.

To the extent binding planning measures or refusals to grant demolition permission cause economic damage to holders of property rights, these may claim compensation. As in the Environmental Code there are thresholds, which the damage must exceed, but the thresholds are somewhat differently defined. A serious impediment to property rights might obligate the local government to redeem the property at market value. As is the case with other matters of compensation, a real property court can resolve disputes between the parties.

Disobedience of provisions under the Planning and Building Act may, and should, cause the local government to intervene. It could then decide on fines, contingent fines or, in the final instance, the pulling down of a building at the owner's expense.

7 ***Synthesis: listing in the crossroad between politics and expertise***
As has been described two different devices are used in singling out which entities of the Swedish cultural heritage should be legally protected: *ipso lege*-protection and individual listing.

The *ipso lege*-technique is used for ancient monuments and finds, for churches and other ecclesiastical structures and for dispatch of cultural objects. The system may appear rather straightforward. Parliament has confirmed that certain categories of property shall be under a special regime. This has come to happen without political contention and as a result of what has been considered over centuries as fitting and necessary. There is very little opposition to this kind of ‘automatic’ protection.

Protection, to be sure, seldom impedes all changes to property concerned. Changes will, however, be under government control. Applications may be refused, but more often they will be granted on condition that certain measures be taken to offset or mitigate adverse consequences to heritage values. The politicians have left the implementation of the legal protection to civil servants and - in the second instance – to judges. Both tiers could be expected to consult expertise in the relevant field of cultural heritage protection. The legal texts provide the starting point of this procedure by placing responsibility on owners and caretakers to identify their obligations and to turn to the authorities for further guidance and determination.

Even if there is general acceptance of the system, individual cases might, of course, end in controversy. One bone of contention is archaeological costs. Take as a poignant example a homeowner who wants to build a new garage too close to an Iron Age burial site. The site will often be invisible to the naked eye and there may be several similar sites in the neighbourhood. The readiness of the owner to pay dearly for an archaeological excavation will not be great, and lessens even more as nothing more exciting than burnt pieces of bones and shattered ceramics gets dug up.

One problem with *ipso lege*-protection is the difficulty for the layman to become alert to the fact that a place or an object is under protection. This can be intricate even for someone with access to the statutory texts. The texts obviously have to be worded in general terms. They point to categories of physical elements. What belongs to each category can be difficult to grasp from just reading the text and looking at the site. To offset this unavoidable weakness, there is the obligation to consult the authorities to have the extent of protection defined. If consultation gets under way with the County Administration, then at least a procedure has started, which – if it ends in disagreement – can be tried judicially.

Consultation, however, can be neglected for two different reasons. One, of course, is that the concerned party simply does not realise that there is something for him to ask about. The rather opposite case is when he realises or suspects, but takes refuge behind the generality of the text or relative obscurity of the remains to feign ignorance. Whatever the reason, events may turn out so that harmful measures have been already been taken when the authorities get involved. Indeed, there are penalties and liability to pay for rescue archaeology, but irretrievable losses may already have been suffered, and the rogue may find the risk worth taking.

To a great extent guidance can be gained from non-legal sources. Most ancient monuments and sites are on official maps. The National Heritage Board and the County Administrations keep a register containing over one million entries of such remains, and these are gradually opening up to web accessibility.

Still, it may be difficult in the extreme for the layman to understand how far

protection goes. As was mentioned above, the statute protects an area surrounding ancient monuments and sites ‘sufficiently large’ for conservation. How does the untrained person construe this provision in an individual case? Does he realise that intended measures hundreds of meters from an ancient monument can affect it? It is amazing that this very open-ended provision does not get misconstrued more often than actually seems to happen.

A rather special case of *ipso lege*-protection is the use in the Environmental Code of areas of national importance due to heritage values. The rules do not give directly binding legal protection. A landowner may be granted building permission by his local government even though this might jeopardise heritage values. The efficiency of the system hinges on mainly two circumstances: the awareness and acceptance of permit giving authorities of national priorities, and the willingness of authorities set to watch over the national interests to use the corrective powers given to them in the Code. Issues where local and national authorities fail to reach the same conclusion will be tests of how well environmental protection functions in Sweden.

A few sentences also about the effectiveness of *ipso lege*-protection with regard to export of cultural objects. The statutes are complicated and genuine mistakes are frequently to be expected. But there are other reasons to believe that the protective system in this field is almost totally without consequence. One is that control is difficult to maintain at the borders. Other priorities will be predominant in the search for what travellers bring along. Another reason is that no gain for the heritage will be secured by refusing an export application or by catching goods about to leave the country. The statutes frankly are not interested in what happens to cultural goods once it has been retained in Sweden. There are no means of pre-emption for public collections or other provisions to secure public access to interesting cultural objects. Nor is there a way to safeguard the physical upkeep or even continued existence of such items. Once cultural objects have been prevented from leaving the country legally, their destiny becomes entirely irrelevant. The Cultural Monuments Act in this regard is very much of an empty vessel. The few drops therein, however, have a bitter taste for proprietors who want to enjoy international price levels, and will thus invite circumvention.

The other protective device, *individual listing*, is the method used for historic buildings and church furnishings under the Cultural Monuments Act, for historic landscapes, which can be set aside as cultural reserves according to the Environmental Code, and for particularly valuable buildings under the Planning and Building Act.

There are value criteria in each of the three statutes that have to be met by the authorities responsible for the selection of objects. As has already been noted the designation of a building as *historic* should only occur for buildings with a certain excellence. Using the word ‘historic’ in English – the corresponding word is not used in the Swedish text – adds explanatory value, as contemporary buildings are not considered eligible for listing under the Cultural Monuments Act, whatever architectural merits they may possess. Local governments need not scrutinise this point, as the Planning and Building Act gives a larger scope for action. The fact that much inventurisation has been going on and that both County Administrations will help administrative practice and local governments have reasonable guidelines and

plans of action to go by.

It is difficult to summarise what kind of buildings and other structures that are in focus for being listed as historic. The very old structures always defend their place in such a context. Through dendrochronological analysis it has been established that a number of wooden structures are older than previously assessed.

The industrial heritage has received much attention in later years. The size of some plants has accentuated difficulties in funding conservation of non-viable enterprises and in finding alternative use. Much effort has gone into making a list of priorities, still under discussion. Many outmoded public buildings have been under debate and quite a few controversies have opened up between local governments and the County Administrations about responsibilities and resources. To name just one example: a superfluous State prison was sold sixteen years ago from the National Prison Administration to a local government's public housing corporation. The idea was to convert the 'castle' into residences. The County Administration initiated proceedings to list the building as historic, and in the course of this action, the State finally had to take the property back into its ownership. Reimbursement is now being decided in a real property court. During the years of abandon the building has been seriously damaged by fungus. It is going to be extremely expensive to have it restored. It would not have been bad, had listing come earlier.

The effectiveness of the provisions regarding cultural reserves is a bit difficult to analyse, as they are new and very similar to the well-established institution the nature reserves. Some uncertainty exists as to wherein the difference lies. There is, currently, political pressure on using the instrument, so one can expect a rising number.

For clarity's sake individual listing is, of course, much better than *ipso lege*-protection. The procedure has to start with the authorities, who will have to consult the owner - instead of vice versa. The resulting dialogue will increase awareness of what will be needed in order to conserve the object. There are possibilities for a continued dialogue in practical matters after the listing decision has been taken. Financial issues can also be brought up in this dialogue. With regard to historic buildings a grant programme opens up, even though grants are not always, or immediately available.

The strength of individual listing versus *ipso lege*-protection is, however, not of the magnitude that one can presage the demise of the latter system or even a substantial weakening of it. It would not be considered possible to protect legally by individual decision the one million entries in the ancient remains' register. That would involve too much bureaucracy for too little effect. The County Administrations find it cumbersome to proceed with historic building listings in cases where a great number of owners or other concerned parties have to be involved individually. Thus there is no dissatisfaction among involved officials with the *ipso lege*-system. Indeed, if asked both civil servants and politicians would probably opt for more *ipso lege*-protection. (In neighbouring Norway, where there has for a long time been an *ipso lege*-system for buildings erected before 1538, this was recently extended to include buildings up to 1650!). For those who – as this author – hold the view that the present order could fare well from a degree of refinement, there is little in the way of

accidents or mishandling of monuments to point to as an argument for rule improvement.

Stockholm, 9 February, 2002

Why TDRs Will Not Work in Sweden

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1 *The need to accommodate changed opinions*

All societies are changing. So is the need from time to time to regulate how land may be used for various purposes. The last half-century has been characterised by growing environmental concerns. Also preservation of the cultural heritage – of buildings, archaeological remains and religious establishments – is regularly on the agenda. Both concerns demand regulatory mechanisms, which might clash with proprietary interests.

How these regulatory mechanisms are constructed and construed depends, of course, to a great deal upon the structure and size of the societies that they serve. One would expect quite a difference between the USA with its 50 federal states and 250 million inhabitants, and legally much more homogenous Sweden with 9 million people living in partly very sparsely populated parts. The area of the entire country covers approximately two thirds of Pennsylvania. There are other differences as well: common law versus statute law traditions, judicial influence on the political procedure to name but a few.

It is my impression that zoning legislation in the US is a matter for the states, and that the states by enabling legislation confer it further to the local governments: counties or municipalities. There is a great deal of difference both in enthusiasm and reticence toward the change of scenery that normally results from development. There is probably also a great difference with regard to procedure. What is true in Athens, Georgia, may be a bad joke in Rome, Maine. A lot of different questions will be asked, and the particular answer would depend on where the question will be posed.

In Sweden there is one Planning and Building Act, which lays out one system, applicable both at regional levels and for the 289 local governments, varying in size from approximately five thousand to one million inhabitants. That the system is uniform does not, however, imply that it is centralised. Control over planning and building in Sweden has been devolved to the local governments. There are exceptions: issues where the national government has reserved judgement for itself, but for most practical purposes the local governments have what in Sweden is known as a 'monopoly on planning', and for all practical purposes they have veto powers when it comes to unscheduled development.

So, with regard to regulatory powers, much is different between the two countries, but that circumstance should not suppress that what is common is a strong local power base, curtailed to a certain extent by federal or national possibilities to intervene.

Transferable development rights do not exist in Sweden. Obviously the reason for creating an instrument such as the TDR: the need from time to time to redistribute rights emanating from land use regulation does exist in Sweden as well as everywhere. It could perhaps be interesting to share a few thoughts on how that need can – or cannot - be met under Swedish land use legislation.

2 *Curtailed development vs. Property interests*

Basically, what can be effected by a TDR in certain American cities, in Sweden is normally achieved by a change in a zoning ordinance: a plan in the Swedish terminology. A plan may

be downsized or terminated under certain circumstances, and building rights could be created elsewhere through a new or changed plan on that location.

What then of proprietary interests? How much of an obstacle are they when it comes to rescheduling development? To leave very many points aside, it is my impression that there is common ground also on that score in a comparison between Sweden and the US. I suppose that a majority of jurists in both countries would agree that one of the most readily understood definitions of ownership is the 'bundle of rights' theory. The question is, of course, how many sticks to the bundle? Society has the right to take some of them away or at least bend them in certain directions. In the US a taking must not go uncompensated. How far restrictions may extend without amounting to a taking is subject to judicial review, and a number of cases could be cited to illustrate in more concrete terms where the limit is to be drawn.

The Swedish property rights guarantees are fundamentally the same, yet a bit different. If property is to be taken – expropriated – the decision in itself could be questioned first at the national government, and ultimately by judicial review, on grounds of it not meeting the constitutional requirement that the taking must be necessary to fulfil 'significant public interests' (Chapter 2 Article 18 of the Instrument of Government). Compensation for expropriated property will be assessed in a court of law (if either party wants to have it that way). But the line between a taking and a non-taking is drawn differently. Expropriation is a legal measure, by which property rights are transferred from one party to another. Restrictions to the use of property – e.g. a demolition prohibition – do not transfer specific rights to anybody and are not considered to be expropriation. This does not necessarily mean that the restriction will go uncompensated. There are statutory provisions itemising in which case compensation is due to an injured party. Most of these provisions are complicated; the Planning and Building Act e.g. operates with two different thresholds. If the higher of the two is overtrodden, then the injured party still will not be compensated for damage below the sill. Overstep of the lower threshold, however, entitles to full compensation. A local government wanting to cut down on permitted development will have to include difficult assessments as to how far it can exercise its 'monopoly on planning', with or without compensation to injured proprietors.

In the 'bundle of property rights', how much development will be considered as a property right with or without special permission? The answer to that question would, I assume, be rather lengthy in all western jurisdictions, and I am certainly not prepared to expound on it for the US. In Sweden a fairly succinct answer may follow these lines: A proprietor can feel reasonably secure that land use already established will be permitted not just to go on, but also allowed slack in the way of rationalisation. To take a simple example: an industrial plant would be permitted to be rebuilt and expanded moderately to accommodate a new production line. A farmer will without permission be allowed to build new sheds and barns for an increased stock of cattle, and – with local government permission – to build himself a new house upon retirement. If – for overriding reasons – society deems necessary to restrict the 'right of current use', then it also has to compensate economically.

A change in the use of land is not guaranteed in the same way. Society has reserved for itself to try new development and to refuse without economic indemnification those who harboured expectations. It goes without saying that environmentally hazardous development will be permitted only if bad effects are sure to be kept within safe limits. Not even proprietors in sparsely populated areas will enjoy any right to build or develop land other than on condition.

Certainly, the doctrine of legitimate expectations could be invoked in Sweden too, but few expectations concerning previously unexploited land are of that nature.

One way of creating legitimate expectations is local government planning. A fundamental element of the Planning and Building Act is that for every detailed plan a *period of implementation* must be determined, between five and fifteen years. The lapse of the implementation period does not mean anything for the plan in itself; it affords the same building rights as before. But after the end of the implementation period the plan can be changed without compensatory effects. Building rights can be scrapped, if this is deemed necessary by the local government. The situation is perhaps not as straightforward as that; considerations should still be had for already established uses. However, development that has not come in place during the implementation period is not secure any more. As long as that development is still in line with local government intentions, the plan runs on and building permission will be granted. But if the local authorities prefer a park to the factory foreseen in the plan, then the industrial purpose can be stricken from the plan without any duty on part of the local government to compensate holders of non-implemented building rights.

Two explanations here. The term building rights will be used to refer to specific Swedish circumstances; it is closer to Swedish terminology and also implies that planning is often not the only permission needed for development. Building rights under a Swedish detailed plan are transferable in the simple sense that they can be traded from one person to another. The landowner can, of course, sell the land or let it to someone who will use the rights afforded. But rights can not be switched from one place to another, except, as mentioned, through a change of one or several plans for concerned areas.

The fact that implementation periods are fairly short gives scope for new views and directions in local government land use schemes. The procedure to change plans and thereby – if desired – swap building rights from one place to another is cumbersome, but not impossible, and the present system also gives a degree of security for proprietary interests which it probably would be impossible to do without. (Before the Planning and Building Act the solution to re-planning needs was simply to halt all development within the planned area. Nevertheless projects favoured by the local government could be allowed to go ahead, with ensuing misgivings as to due process and subsequent erosion of the credibility of planning.)

So if the Planning and Building Act makes it possible to rethink new development from time to time, the period of limitation system does not do the same trick for the already built heritage. The regulatory way to preserve buildings is to introduce a prohibition on demolition in a detailed plan or in area regulations, another instrument provided for in the Planning and Building Act but without building rights. This typically has negative effects on the right to current use of the property as it takes away the possibilities to modify and rationalise buildings and other structures to the extent permitted according to the general principle explained above. If it is to happen, it may result in a duty to compensate, depending on whether the compensatory threshold gets overstepped or not (somewhere in the range 15 – 20 percent of the value of the concerned property). If a demolition prohibition is to be introduced in an already adopted plan during its period of implementation, the local government will have to compensate injured parties for their losses regardless of thresholds. This means that there are often precarious economic evaluations involved in efforts to save buildings through demolition prohibitions. If the need arises within a newly adopted plan, it could turn out very costly to save the building by regulatory force. One might assume, perhaps, that miscalculation of that nature should not be frequent.

Outside of planned areas there are no building rights. This does not mean that no buildings will be permitted. Local governments may grant building permission after having measured the individual reasons against various criteria laid down in the Planning and Building Act. Projects that are intended to support or extend already existing activities have a stronger position than others do. Instead of accepting or refusing an application directly, the local government may decide that the project needs be studied in a plan. The costs for the planning procedure may be levied on the applicant.

There could be other obstacles to the project than the lack of a plan. In Sweden there are general prohibitions against building on ancient remains and within 100 meters of all waterfronts (prohibition extendable to 300 meters). Dispensations can be given, but usually on rather tough conditions. Theoretically these prohibitions could apply also within planned areas, but such planning accidents should not occur. So if building rights are to be switched from one place to another, having them secured in a plan is the only platform conceivable.

To sum up: Building rights are secured only during the implementation period, i. e. a maximum of fifteen years. In that period the need to rethink the plan should not occur very often, and after the lapse of the implementation period the local government can change the plan without having to barter building rights from one locality to another. This is one factor to explain why that there is scant use for a TDR system in Sweden.

3 *From plan to reality*

Building rights and permissions in a plan is only the groundwork of development. Whether development will actually be realised depends on the actual economic prospects. Investments in infrastructure are, of course, one of the main factors to be considered. The Planning and Building Act contains provisions which are basic to these economic considerations. The ground rule is that the local government is responsible for public facilities such as roads, public parks, playgrounds, sewage and water supplies. These should be built before the end of the implementation period. With consent of the County Administration a local government may take without compensation land that according to the plan is necessary for fulfilling this obligation. In addition the local government may order landowners to pay the costs of these investments and share them equitably. These costs will, of course, be carried over as the value of the building rights of the plan is assessed. Needless to say, there is a breakeven point below which intended development will be scrapped. One of the obligations of the local government in the planning procedure is to calculate the costs of development so that this does not happen.

Even if planners are cost-conscious, development still does not come in place if landowners do not come to terms with contractors. This is beyond the scope of the Planning and Building Act, but still a concern for the local government. In one scenario the local government itself is the landowner. Agreements with a contractor will then often encompass a settlement on the contents of the plan – subject to council approval – and how costs for the infrastructure will be met; one solution here is the sale of the planned area to the contractor or to another developer such as the local government's own housing corporation. One element in financing the operation could be the barter of building rights from one place to another. Seen from a negotiatory point of view this scenario is rather straightforward. The local government has the land, controls the planning procedure and thereby also the amount of building rights to go with the land. The developer has the money and other resources, and – as the case may be – building rights elsewhere that might be attractive for the local government to see downscaled.

Similarly, if the developer holds the land from the beginning and the planning initiative comes from that quarter, the local government might be interested only on terms that include less development somewhere else. The arithmetic may be more or less difficult, but if only two parties are involved the problems can very likely be sorted out.

4 *Profit sharing as an alternative to TDRs?*

What has been said so far concerns the simplified situation where the local government meets one developer to find out the terms for new development on virgin land. If the land that is up for planning or re-planning is taken up by already established structures and use, then it also normally divided between many owners, e.g. an urban rehabilitation project. Needless to say negotiations may get very complicated, especially in the rare case that re-planning concerns a plan which still runs in its implementation period and consequently every square inch of downscaled development theoretically needs to be compensated. Even if building rights do not cease to exist after the lapse of the implementation period, their value becomes uncertain. The minimum value implemented rights can sink to equals the principal right of current use. This value will, of course, depend very much on the general demand for land. It will be much higher in the cities than in depopulating areas.

To address this complex situation where restrictions for local government re-planning get tangled with various, perhaps mutually conflicting owner interests, the Planning and Building Act has been supplemented by another act, the Act on Co-ordinated Development. The essence of this statute is to facilitate development within areas with complex implementation of new or altered plans. One prerequisite is local government consent. Another is that the total gain of co-ordinated development must exceed the disadvantages. A third is that owners in general in the area must not be duly opposed. Owners in the minority who do not want to take part cannot be forced to do so. Their land, however, can be taken and either added to another lot within the area or be collective property of the participating owners.

The local government determines in general terms the area for co-ordinated development by adopting or changing a plan. Owners within the area make up a legal collectivity, in which they hold shares according to landed area contributed. The surveyor's office leads the procedure, determines whether the gain requirement is met, finalises the extent of the area and allocates shares to contributing owners. The collectivity concludes necessary agreements with the local government regarding infrastructure. All members of the collectivity get their share of the profit. If land cannot be redistributed to an owner in accordance with his shareholding, the difference will be compensated. Owners, who decide not to take part, will be compensated for the market value of their land. They will not, however, get a share of the value added by the new or altered plan.

What we have here is in a sense a vehicle for exchanging building rights, a vehicle which will, if necessary and with local government blessing, transport the rights of a non-consenting minority of owners to those who are more eager. What seems different from a TDR-system is among other things that co-ordinated development is designed for *one* area, in which building rights so to speak may be switched from one patch to another with due compensation to non-consenting owners. The geographical limitation is perhaps not an obstacle; there does not seem to be any bars to letting the legal area encompass several tracts of different location. The gain requirement, however, could be a major obstacle to the implementation of plans where preservation is the primary object, and valuations of concerned property may show a total value decrease.

These reflections, however, are more of theoretical than practical nature. There has not been much demand for the co-ordinated development procedure in Sweden since its inception in 1987. In fact, publicly financed campaigns to promote this legal vehicle repeatedly seem to have failed. My personal guess is that the procedure seems too unwieldy and perhaps unpredictable from the start. It does not replace negotiations between owners and the local government, and can solve only minor differences. It may seem safer for a developer to buy out the less willing parties. Whatever the reason, the tool simply is not asked for.

This paper started with the assertion that TDRs will not work in Sweden. Hopefully, the main supports for this projection have protruded from the above, and also what means are available to solve the underlying problem. There is, however, also another factor that might explain why a TDR-system would not be any more successful than its Swedish third cousin would: co-ordinated development. Whereas it certainly is possible to develop land without owning it, it is almost always preferred to acquire the full proprietary rights: to get as many sticks to the bundle as possible. This is not just the safest for the developer; the creditors too will be interested in the best security. Consequently financial costs can be kept to a minimum. So development will almost always start with someone buying up the property, whether the buyer be the local government, its housing subsidiary, a private construction corporation or a middleman. In Sweden real property transactions are relatively easy to conduct. There is a good, nation-wide computerised land register, which will instantly reveal present owner, details of his acquisition, the area of the property, its taxation status and all liens on the property (the details of these may merit a closer study). The legal formalities are few, and there is normally no need to involve attorneys. There is no notarisation, simply a duty to have a purchase registered within three months and a transaction tax (1,5 percent or 3 percent for legal persons). So when the stars are right, land acquisition is quick and easy.

For the creditors an outright purchase is often a prerequisite for involvement in a development project. To finance derived rights would appear riskier and would be more expensive. Just as co-ordinated development has become a flop, so has REITs and similar schemes designed to facilitate real estate financial operations (with the exception of sale-lease back operations). It seems that the Swedish real property establishment is a very traditional one, and one need not go far back in history in order to find the reason for caution. The failed expectations and huge bankruptcies of the late 1980's are still in living memory.

12 March, 2002

INVENTAIRE DU PATRIMOINE HISTORIQUE

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La connaissance des monuments et sites, leur inventaire et les mesures légales de leur sauvegarde et de leur protection de même que leur mise en valeur dans le cadre du développement d'une ville historique suppose la prise en compte d'un certain nombre d'éléments qui peuvent être regroupés en quatre (04) phases à savoir:

Phase 1: Inventaire et diagnostic physique et institutionnel du patrimoine historique.

Cette phase expose les principes méthodologiques, leur application les analyses et notes récapitulatives, sur les résultats séquences par séquences et les propositions concrètes d'amélioration du cadre institutionnel.

Elle comporte :

Les recherches documentaires et spécialisées : il s'agit de faire le point des ouvrages déjà publiés sur le champ d'étude, de recenser les textes juridiques existants (lois, décrets, arrêtés, notes de service etc.) de collecter les données des traductions orales relatives aux pratiques coutumières en matière d'occupation foncière et de protection du patrimoine, de faire le point de la méthodologie en matière d'inventaire et le proposer un format d'inventaires (fiches et dossiers d'identification pour les éléments à inventorier).

Information, sensibilisation des autorités locales et des communautés : il s'agit dans ce cas d'informer et de sensibiliser des autorités locales et des communautés, de faire attention aux leaders communautaires (chefs religieux, chefs de quartiers, chefs de famille, etc.) et de recueillir les traditions coutumières.

Analyse des textes juridiques, des pratiques coutumières et du cadre institutionnel relatifs à l'occupation foncière et à la protection du patrimoine : il faut faire dans ce cas : une analyse des données juridiques et coutumières recueillies, une analyse du cadre institutionnel actuel de gestion du patrimoine de la ville et de faire ressortir les forces et faiblesses du cadre institutionnel.

Lancement de l'opération d'inventaire sur le terrain :

Il s'agit ici de lancer l'opération pratique d'inventaire des éléments constitutifs du patrimoine de la ville et de regrouper en typologies et / ou en catégories.

Phase 2: Analyse des besoins des parties prenantes et de l'expérience de la conservation / préservation.

Cette partie analytique permettra de mettre un accent sur les besoins réels des parties prenantes pour une meilleure prise en compte des actions de conservation.

Elle comporte :

Enquêtes : il s'agit de lister les bâtiments et sites ayant fait l'objet de réhabilitation avec identification de :

- Propriétaires
- Financement
- Initiateur
- Objectifs

Lister les bâtiments ayant fait l'objet de destruction ou de dénaturation :

- Propriétaires
- Auteurs
- Raisons évoquées

Analyse : il s'agit de faire les logiques positives passées (et en cours)

- bâtiments publics, sauvetage de patrimoine, aménagement / réhabilitation de l'espace de travail, combinaison des (deux) 2 logiques.
- Bâtiments privés , sauvetage et espace de travail, combinaison des (deux) 2, prestige.

Logiques négatives passées et en cours

- destruction
- dénaturation

Point de l'état actuel de conservation avec une attention particulière aux problèmes d'entretien courant

- Financement
- Savoir – faire
- Organisation de conservation préventive.

Propositions pour un plan de gestion du patrimoine : il s'agit de faire les propositions de plan de gestion du patrimoine déjà réhabilité

Evaluation et ajustement de plan de gestion du patrimoine: il s'agit de faire l'évaluation critique de plan de gestion proposé.

Modalités de gestion.

Bilan des forces et faiblesses.

Phase 3 : Proposition de stratégies.

Elle permettra de mettre en place un plan global de sauvegarde du patrimoine après les contacts et négociations avec les occupants et les autorités qui ont en charge la protection sur le plan local, national.

Cette phase comprend :

Préparation du document de synthèse : il s'agit de faire la vision, objectifs généraux et particuliers, et les moyens d'action possibles pour la sauvetage et la valorisation du patrimoine de la ville.

Moyens d'action

- Ajustement du cadre légal, réglementaire et institutionnel
- Sensibilisation pour adhésion des parties prenantes.
- Mobilisation des ressources financières
- moyens publics centralisés, décentralisés
- moyens privés et / ou communautaires

- Organisation de la gestion de ce patrimoine
- Critères de sélection et d'éligibilité.

Séminaire de réflexion : il s'agit de faire l'ajustement et validation du document de synthèse

Plan global de sauvetage des tissus anciens de la ville : il s'agit de faire l'élaboration de la liste prioritaire du patrimoine de la ville par typologie et catégorie.

Sources de financement possibles :

- financements autonomes, etc.,

Elaboration du plan de sauvetage comportant :

- un guide d'entretien des bâtiments réhabilités,
- mesures de protection pour les non – réhabilités mais présentant un intérêt particulier

Mise en place du mécanisme de suivi et d'évaluation.

Négociations avec les propriétaires : il s'agit de signer des contrats de confiance et d'objectifs pour la réhabilitation, la valorisation et la gestion du patrimoine des bâtiments et sites identifiés pour le programme pilote.

Phase 4 : Définition d'un programme pilote

Cette phase permettra de faire des démonstrations en vue d'une sensibilisation conséquente des populations sur la base des actions de vulgarisation de savoir faire traditionnel appuyé des mesures contemporaines d'intervention sur le patrimoine. L'essentiel du contenu de ce chapitre sera développé sur la base des expériences vécues sur certaines villes historiques du sud du Bénin et du Togo sur lesquelles nous sommes entrain de travailler.

Elle comporte :

Sélection des bâtiments ou sites du programme pilote : il s'agit la proposition de programme pilote de réhabilitation pour les bâtiments et sites suivants :

- Ceux qui auront été sélectionnés sur la base des critères de sélection et d'éligibilité sur la liste du patrimoine de la ville définie en phase 3.
- Ceux pour lesquels un courant de confiance et d'objectifs aura été passé avec les propriétaires.
- Ceux pour lesquels l'utilisation et le financement spécifique de l'entretien après réhabilitation auront été clairement définis et approuvés par les parties prenantes.

Atelier de validation des choix et test du mécanisme de suivi et d'évaluation.

Relevés et documents graphiques : il s'agit de faire les relevés des bâtiments sélectionnés.

Documents graphiques par bâtiments. Evaluation de l'état physique des bâtiments et sites. Réalisation des études d'avant – projet détaillé.

Evaluation des termes de référence : il s'agit de faire l'élaboration des TDR relatifs à :

- L'exécution des travaux de réhabilitation des bâtiments et sites au titre du programme pilote.
- La sélection de la structure de contrôle et de suivi de ces travaux.
- La formation des artisans intervenants sur le patrimoine.

- L'élaboration des textes sur le cadre institutionnel et de gestion du patrimoine.

Elaboration des dossiers de consultation des entreprises (DCE) : il s'agit de faire le dossier de consultation comportant :

- Avis d'appel d'offres
- Règlement particulier de l'appel d'offres

Le cahier des clauses et conditions particulières

Le cahier des prescriptions techniques

Le cahier des charges fiscales

Le cadre du bordereau des prix unitaires

Le cadre du devis quantitatif et estimatif des travaux

Les modèles de conventions, de cautions, de soumission, de demande d'avance.

¿REALMENTE EXISTE EL DERECHO DE PROPIEDAD PRIVADA EN LOS BIENES CULTURALES?

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I.-Introducción: la diferente situación jurídica del propietario en España. II.- La graduación del interés cultural de los bienes y su repercusión jurídica. III.- El contenido del dominio. 1. Las facultades como elemento configurador del dominio. 2. Las facultades y sus limitaciones. A.- Sobre el derecho de libre aprovechamiento: A'.- El derecho a usar; B'.- El derecho a disfrutar. B.- La libre disposición del bien: A'.- Facultad de enajenar; B'. Facultad de transformar; C'. La facultad de destruir.

I.-Introducción: la diferente situación jurídica del propietario en España

La titularidad de bienes del patrimonio histórico español, como lo denomina nuestra Ley estatal de 1985, o de bienes culturales, como hacen una gran parte de las Comunidades Autónomas, se presenta como una de las grandes dudas acerca de la existencia de un auténtico régimen de propiedad. Y, por auténtico, hemos de entender aquella configuración de la relación dominical conforme a la Constitución Española de 1978¹ y al art. 348 del Código civil², ya que han sido las “leyes especiales” en la materia las que han desfigurado de tal manera el concepto y, sobre todo, el contenido de este derecho, que nos hacen cuestionarnos la verdadera dimensión de la titularidad privada sobre este tipo de bienes.

A lo largo de este trabajo intentaremos mostrar cómo las limitaciones introducidas sobre las facultades básicas e inherentes del derecho de propiedad nos acercan más a una concesión administrativa que a un verdadero derecho dominical. Siendo la función social el argumento político-jurídico que enmascara la regulación “protectora” del patrimonio cultural español.

Antes de pasar a ver el cúmulo de medidas coercitivas que imponen las normas reguladoras del patrimonio cultural en España es necesario precisar cuáles van a ser esas normas y cómo se diferencian entre sí. Lo primero a tener en cuenta es el distinto marco competencial del que emana la regulación del patrimonio cultural e histórico. En el ordenamiento jurídico español conviven normas emanadas de tres instancias competenciales: el Derecho originado en la Unión Europea, el Derecho proveniente del Estado y el de las Comunidades Autónomas³.

En esta materia de patrimonio cultural que afecta a la esfera del sujeto titular del bien, nos encontramos con que la Unión Europea ha prestado especial atención a la protección jurídica del patrimonio de sus países miembros a partir de la supresión de las barreras aduaneras el 1 de enero de 1993. La UE, mediante dos Reglamentos y una Directiva⁴, ha venido a regular el problema del tráfico interno y externo de bienes culturales, delimitando las actuaciones del propietario de cara a poder trasladar sus bienes de un país de la UE a otro, y de un país de la UE a un tercero. Estas medidas hay que incardinarlas en el marco de las excepciones al mercado interior sin barreras establecidas por el actual art. 30 del Tratado de la Unión Europea en el que se autorizan “las

prohibiciones o restricciones a la importación, exportación o tránsito justificadas por razones de orden público, moralidad y seguridad públicas, protección de la salud y vida de las personas, animales, preservación de los vegetales, *protección del patrimonio artístico, histórico o arqueológico nacional*⁵ o protección de la propiedad industrial o comercial”. Por tanto, los bienes del patrimonio histórico y cultural de los países miembros no están incluidos en el principio de la libre circulación de mercaderías dentro del territorio de la Unión, establecido como uno de los pilares del mercado común europeo.

Por otro lado, nos encontramos, dentro del territorio español, que las competencias en materia de patrimonio cultural están divididas entre el Estado y las CCAAs. A modo de resumen se puede señalar que el Estado tiene competencia exclusiva en la defensa del patrimonio cultural, artístico y monumental español contra la exportación y la expoliación (art. 149.1.28ª CE). Y decimos lo de resumen porque a pesar de la aparentemente inocua Sentencia 17/1991, de 31 de enero, del Tribunal Constitucional, contra determinados preceptos de la Ley 16/1985, de 25 de junio, del Patrimonio Histórico Español⁶ en la que declara la constitucionalidad de todo el texto de la misma, determinando únicamente una serie de interpretaciones de algún precepto de ella, hoy, las únicas competencias del Estado en materia de patrimonio histórico son las referentes al tráfico internacional de estos bienes y a su expolio. Pero, incluso, creo que hay que precisar un poco más, después de la definición del término expolio que realiza el art. 4º de la LPHE⁷ y de la inexistencia de actuaciones del Estado recurriendo a esta competencia marcada en exclusiva por la CE, hay que concluir que el Estado sólo tiene competencia exclusiva en la exportación e importación de bienes culturales. Tal situación determina que sean las CCAAs, a través de sus leyes de patrimonio histórico o cultural, las que delimiten el contenido del dominio sobre estos bienes, quedando la LPHE como subsidiaria en defecto de éstas (ya sea por la falta de regulación total o parcial, fenómeno que se produce en más casos de los que parecen a simple vista)⁸. Actualmente, son 13 las CCAAs que han aprobado una norma propia de patrimonio cultural o histórico con rango de ley:

- Ley de Patrimonio Histórico de Castilla - La Mancha (Ley 4/1990, de 30 de mayo)⁹.

- Ley de Patrimonio Cultural Vasco (Ley 7/1990, de 3 de julio)¹⁰.

- Ley de Patrimonio Histórico de Andalucía (Ley 1/1991, de 3 de julio)¹¹.

- Ley de Patrimonio Cultural Catalán (Ley 9/1993, de 30 de septiembre)¹².

- Ley del Patrimonio Cultural de Galicia (Ley 8/1995, de 30 de octubre)¹³.

- Ley del Patrimonio Cultural Valenciano (Ley 4/1998, de 11 de junio)¹⁴.

- Ley de Patrimonio Histórico de la Comunidad de Madrid (Ley 10/1998, de 9 de julio)¹⁵.

- Ley de Patrimonio Cultural de Cantabria (Ley 11/1998, de 13 de octubre)¹⁶.

- Ley del Patrimonio Histórico de las Islas Baleares (Ley 12/1998, de 21 de diciembre)¹⁷.

- Ley de Patrimonio Cultural Aragonés (Ley 3/1999, de 3 de marzo)¹⁸.

- Ley de Patrimonio Histórico de Canarias (Ley 4/1999, de 15 de marzo)¹⁹.

- Ley de Patrimonio Histórico y Cultural de Extremadura (Ley 2/1999, de 29 de marzo)²⁰.

- Ley de Patrimonio Cultural del Principado de Asturias (Ley 1/2001, de 6 de marzo)²¹.

Sin embargo, esta realidad jurídica no puede hacernos obviar la realidad social en la que puede desembocar: diferentes normas = diferentes estatutos jurídicos de la propiedad. Y esto sí que nos parece más grave. Primero, porque si tal supuesto se produce, que a mi juicio sí, sería inconstitucional; “Todos los españoles tienen los mismos derechos y obligaciones en cualquier parte del territorio del Estado” (art. 139.1 CE). La división del Estado en CCAAs no puede acarrear la desigualdad de derechos entre los ciudadanos españoles en atención a la Comunidad a la que pertenezcan; y, segundo, porque si tal desigualdad jurídica se produce, ello puede llevar a un desplazamiento del patrimonio cultural mueble de una Comunidad a otra dependiendo del trato que dé al “coleccionista” o titular singular de bienes de naturaleza cultural. Nos encontramos ante “una bomba de relojería”, ya que, tarde o temprano, los titulares privados de estos bienes, ante la falta de control de la constitucionalidad de estas leyes por las autoridades competentes, van a llevar la cuestión al TS y al TC y éstos tendrán que pronunciarse sobre los distintos estatutos jurídicos de la propiedad sobre bienes culturales en los distintos territorios del Estado.

II.- La graduación del interés cultural de los bienes y su repercusión jurídica

Una vez tenemos prefijado el problema de la complejidad del marco competencial del que van a emanar las normas delimitadoras del dominio sobre estos bienes, y los posibles efectos que ello puede determinar en el titular del bien, es necesario ver cómo las normas del patrimonio cultural dividen al mismo atendiendo a su “valor cultural”, procediendo a las clasificaciones de bienes culturales (y eso excluyendo a la normativa urbanística, que en el caso de los inmuebles de naturaleza cultural realiza, a su vez, nuevas graduaciones de los mismos).

El modelo, sin duda alguna, lo constituyó la LPHE, que marcó unos niveles de protección atendiendo a un concepto jurídico tan abstracto, y me atrevería a decir que de igual manera estético, como el de la “relevancia” respecto al Patrimonio Histórico Español-art. 1º.3 y 26.1 LPHE²². Esta “relevancia” cultural hizo clasificar los bienes culturales de la siguiente manera:

- 1º.- Bienes de Interés Cultural (BIC)
- 2º.- Bienes muebles incluidos en el Inventario General (BIG)
- 3º.- Los demás bienes del Patrimonio Histórico Español

La categoría básica, en torno a la cual gira la protección del patrimonio histórico español es la de los BIC. Los BIC son, por tanto, los “bienes más relevantes del Patrimonio Histórico Español” y los que “gozan de singular protección y tutela” (art. 9º.1 LPHE). Singular protección y tutela que se manifiesta en una serie de medidas que van a convertir al titular y, en muchos casos, de igual manera al poseedor de estos bienes, en un mero “concesionario” del mismo.

Los BIG y el grupo de lo que aquí denominamos “demás bienes del Patrimonio Histórico Español” presentan una regulación más peregrina. Por un lado, los BIG aparecen como una categoría diferenciada por dos criterios: el primero, por la “singular relevancia” respecto al Patrimonio Histórico Español, que no llega a ser tan relevante como para estar dentro de los BIC; y, segundo, porque sólo pueden ser bienes de naturaleza mueble (art. 26.1 LPHE). Esta absurda diferenciación entre los bienes culturales de naturaleza mueble e inmueble ha hecho que el modelo de los BIG como bienes muebles exclusivamente, haya

sido rechazada por la práctica totalidad de las normativas autonómicas de patrimonio cultural²³. Es más, esta variación de criterios legislativos, los BIC como bienes muebles e inmuebles, y los BIG como bienes únicamente muebles, ha llevado a la Administración, a la hora de proceder a la ordenación del Registro General y del Inventario General respectivamente, a considerar la categoría de BIC como la dedicada a los inmuebles, y la de los BIG como la dedicada a los muebles, entendidos éstos sin ningún rigor jurídico. Solución que si bien nos parece de lo más práctica no deja de ser una interpretación irregular de la norma.

En cuanto a los demás bienes del Patrimonio Histórico Español por ellos entiende la LPHE aquellos “inmuebles y objetos muebles de interés artístico, histórico, paleontológico, arqueológico, etnográfico, científico o técnico” que no hayan sido declarados BIC o BIG. Es decir, su clasificación como tales es meramente residual, con el peligro que se deriva de esta abstracción. A mi juicio, tal inexistencia de declaración formal por parte de la Administración conlleva la falta de protección de esta parte de nuestro patrimonio cultural que es, sin duda alguna, la más extensa, y aquella en la que los atentados son más asequibles por su falta de conocimiento y, sobre todo, por su escaso control. Esta parte de nuestro patrimonio cultural, que como decimos es la que representa la mayoría del mismo, presenta una regulación nimia. Al no estar delimitada, el legislador ha previsto una serie de declaraciones de obligaciones genéricas que van dirigidas a todos “los bienes integrantes del Patrimonio Histórico Español” y que nos parece que son meras declaraciones de principios con escasa relevancia práctica por la dificultad de su control. Así, por ejemplo, la declaración del art. 36.1 LPHE que nos dice que “Los bienes integrantes del Patrimonio Histórico Español deberán ser conservados, mantenidos y custodiados por sus propietarios o, en su caso, por los titulares de derechos reales o por los poseedores de tales bienes”.

Como se ve, la incardinación del bien en cuestión va a determinar la aplicación de un régimen jurídico u otro en el titular del derecho real. Pero el problema en torno el propietario no finaliza ahí. Dependiendo de donde se halle sito el bien, se va a encontrar con que esas clasificaciones estudiadas van a variar. La mayor parte de CCAAs han regulado el régimen jurídico de su patrimonio cultural en normas tan detalladas, y en algunos casos más que la referenciada LPHE. Lo cual, ha desembocado en unas clasificaciones de los bienes diferentes a las de la LPHE y, en distintas configuraciones del derecho de propiedad sobre bienes culturales en España. Tal anomalía no ha sido puesta de manifiesto todavía, pero mostrará toda su virulencia en el momento en que cualquier titular lleve alguna controversia respecto de su titularidad en uno de estos bienes.

III.- El contenido del dominio

El estatuto jurídico de la propiedad en España se delimita de forma muy general en los artículos 33 de la CE y 348 Cc. y, de forma especial, en las leyes y demás normas encargadas de regular el dominio en determinados tipos de bienes a los que los legisladores, Estatal y autonómicos, han dotado de singular relevancia como en el caso que nos ocupa.

La CE reconoce expresamente el derecho de propiedad pero delimitada por la función social. La función social, sin embargo, no creo que consista únicamente en una “delimitación” del contenido de este derecho. La función social engendra unos efectos negativos o delimitadores en el titular del derecho de propiedad, así como en los demás derechos reales, y otros de carácter positivo. Esta interpretación, casi a *sensu contrario* del

término empleado por el legislador constitucional, hay que encontrarla en la finalidad de la mencionada función social. La función social tiene como objetivo el “beneficio social”²⁴, entendido éste como el derecho a la participación de todos en los bienes dotados de valores de interés general. Tal derecho subjetivo de fruición o goce colectivo es a la que está destinada la función social, y ese es su destino: conseguir que se armonice la preexistencia de un derecho privado con lo que podríamos denominar derecho público. Dicha armonía, no se suele conseguir únicamente con medidas limitadoras para el que posee o es titular del bien, sino que las denominadas medidas de fomento son el otro tipo de instrumentos que van a permitir que la sociedad disfrute de tales bienes de goce común. A ese equilibrio va destinada, a mi juicio, la función social. Ya que la manera de alcanzar que esos bienes sean de fruición colectiva se realiza a través de la armonía y no de la imposición exclusiva como se encarga de demostrar constantemente nuestra normativa de bienes culturales. De hecho, gracias a normas que piensan que la función social consiste únicamente en configurar a los titulares de estos bienes como meros detentadores, volcándoles sobre su derecho la batería de limitaciones que a continuación vamos a ver, entendemos, como en España hoy en el siglo XXI se puede hablar de que el coleccionista de bienes culturales es un coleccionista clandestino (*clandestino, na*. “Aplíquese generalmente a lo que se hace o se dice secretamente por temor a la ley o para eludirla”. *Diccionario de la Lengua Española*. Real Academia Española, XXI Edición, Edit. Espasa Calpe, Madrid.).

1. Las facultades como elemento configurador del dominio

El contenido de la propiedad privada ha sido objeto de enumeraciones, descripciones y concienzudos estudios destinados a saber hasta donde llegan las facultades del titular del bien en concreto²⁵. Desde hace tiempo, la técnica detallista ha dejado paso a una más realista postura científica tendente a demostrar que la enumeración de facetas de las que el *dominus* es titular carece de eficacia y sobre todo de contenido práctico. La propiedad en nuestros ordenamientos jurídicos es el máximo derecho que se reconoce sobre un bien: *ius plenum in re corporali*. De ahí, que su contenido haya de ser definido en torno a un todo, y no en torno a una descripción de facultades que siempre va a resultar inexacta²⁶. Son las limitaciones las que nos van a permitir perfilar el verdadero contenido del dominio, ya que, son los efectos negativos los que individualizan las facultades del *dominus* respecto al todo²⁷. Sabiendo de lo que se nos ha privado, podremos concretar qué es lo que realmente tenemos. Por ello, sí tiene utilidad diseccionar, con carácter didáctico, el contenido de la propiedad sobre bienes de carácter cultural: para entender qué situación jurídica crean estas leyes respecto de los titulares de estos bienes. Viendo, como las limitaciones que se introducen en la propiedad sobre los mismos terminan por socavar el contenido esencial de este derecho²⁸.

2. Las facultades y sus limitaciones

Siguiendo la división trazada por SÁNCHEZ ROMÁN²⁹ sobre los “derechos del dominio”, nos podemos orientar para poder precisar el alcance de las limitaciones en los bienes culturales. Tales facultades o derechos son clasificados de la siguiente manera:

A.- Sobre el derecho de libre aprovechamiento

Dentro del aprovechamiento SÁNCHEZ ROMÁN, en su conocido esquema, señalaba que se incluían los derechos de usar, disfrutar y abusar del bien del que se es titular. En los bienes de naturaleza cultural este derecho de libre aprovechamiento está ampliamente constreñido. Veamos porqué.

A'.- El derecho a usar el bien está dentro del genérico derecho de goce recogido en la definición que de la propiedad da el art. 348 del Cc. No creo que plantee ninguna duda, que la facultad de uso o goce forma parte de lo que la CE denomina contenido esencial del derecho de propiedad. Si la ley privara del derecho de uso al propietario, sería tanto como predicar la expropiación forzosa del bien sin justiprecio. Evidentemente, ninguna ley en nuestro país llega a impedir el uso de un bien por parte del titular del mismo, ello supondría la inconstitucionalidad de la misma a la luz de la protección dispensada a este derecho por el art. 53.1 CE. Si bien, si encontramos variados supuestos que modalizan el uso de los bienes de los que uno puede ser titular.

Éste es el caso de la LPHE, que entiende que el uso, y las demás facultades del derecho de propiedad privada están supeditadas a la función social que llevan implícita los bienes: “Porque los bienes que lo integran se han convertido en patrimoniales debido exclusivamente a la acción social que cumplen, directamente derivada del aprecio con que los mismos ciudadanos los han revalorizado”³⁰.

Hay que tener en cuenta que la relación cultura-libertad es el punto de partida de la “socialización” de los bienes incluidos en estas normas. No olvidemos que la propia Exposición de Motivos concluye con esta idea, “en un Estado democrático estos bienes deben estar adecuadamente puestos al servicio de la colectividad en el convencimiento de que con su disfrute se facilita el acceso a la cultura y que ésta, en definitiva, es camino seguro hacia la libertad de los pueblos”. Y en este aspecto sí que debemos estar de acuerdo. La función social que cumplen estos bienes o la “acción social que cumplen” como expresa el legislador de la Ley del Estado, se debe a que la cultura es parte de todos los ciudadanos de una nación e, incluso, del mundo, debiendo los poderes públicos garantizar ese acceso a la cultura a la que todos tiene derecho. Pero tal apreciación, no puede hacernos perder de vista que sobre estos bienes se proyectan distintas situaciones de titularidad. Dichas situaciones, no pueden llevar a concluir, como desde luego se desprende del tratamiento de la Ley hacia los titulares no públicos de bienes culturales, que la socialización de todos los bienes culturales es el mejor instrumento para conseguir el ideal de aprovechamiento o acceso de todos a la cultura que los mismos representan. Y ello, por indudables razones jurídicas y económicas que a todos nos asaltan cuando pensamos en una posible titularidad pública de todo el patrimonio cultural en España que, a mi juicio, llevaría antes a la destrucción del mismo más que a su conservación y desarrollo.

El uso de los bienes culturales aparece delimitado con obligaciones de hacer y de no hacer que van a desembocar en que determinadas actuaciones del titular sobre sus bienes sea visada previamente por la Administración competente o que tenga prohibido su comportamiento en determinados supuestos.

En cuanto a las obligaciones de hacer y de no hacer que recaen sobre los propietarios de bienes culturales, destaca la obligación genérica de conservar, mantener y custodiar que pesa de igual manera sobre los titulares de cualquier otro derecho real sobre

los mismos (art. 36.1 LPHE). Esta obligación es la base de todo el régimen de limitaciones que se establecen en las normas del patrimonio histórico o cultural de nuestro país, y de cualquier otro que así considere estos bienes. Hay que tener en cuenta que esta obligación conlleva, prácticamente, todas las posteriores que vamos a estudiar. Principalmente, porque en ellas está todo lo necesario para evitar la desaparición de un bien cultural, o del valor cultural que el mismo encierra, para las generaciones presentes y futuras. La conservación, mantenimiento y custodia son actividades destinadas a la preservación del bien cultural, entendidas éstas como la realización de las conductas necesarias “para asegurar su integridad y evitar la pérdida o deterioro de su valor cultural”³¹. Es más, estas conductas, como han hecho algunas normas autonómicas, se pueden resumir en un genérico deber de conservar, entendido éste como “deber básico” que “comporta salvaguardar la integridad del bien y no destinarlo en ningún caso a usos que pongan en peligro la pervivencia de los valores que hacen de él un bien cultural” (art. 18.1 *in fine* de la LPHM).

Tal deber genérico se concretiza en una serie de medidas limitativas del dominio que podemos enumerar del siguiente modo:

a) *Obligación de utilizar el bien conforme a los valores que aconsejan su conservación* (art. 36.2 LPHE). De manera muy similar se expresan los arts. 25.1 LPCC, 23 LPCV, 18.1 LPHM, 26 LPHB, 28.2 LPCAst. Para intentar precisar el contenido de los valores que aconsejan la conservación del bien cultural es importante destacar la regulación que de esta obligación realiza la LPCVal. Cuando hablamos de que la propiedad es en gran parte el derecho a usar el bien del que se es titular y, por otro, de que los bienes culturales se han de usar de forma que siempre se garantice su conservación, nos encontramos con que todo bien con su uso sufre un deterioro que, en principio, parece contrario a su conservación. Y señalo, en principio, porque no creo que sea así. El legislador estatal, y la mayoría de los autonómicos, tienen un concepto museístico decimonónico a la hora de referirse al uso de estos bienes, tendiendo a prevalecer en ellos la idea de que el no uso garantiza mejor la conservación. Sin embargo, esa noción no puede estar más lejos de la realidad como el legislador valenciano a puesto de relieve. Para la LPCVal. La acción de las administraciones públicas de dicha Comunidad se dirigirán “de modo especial a facilitar la incorporación de los bienes del patrimonio cultural a usos activos y adecuados a su naturaleza, como medio de promover el interés social en su conservación y restauración”. Pero va más allá, en esa obligación destinada a poner en uso “activo” los bienes culturales como medio para su conservación se incluye la cesión de los bienes, incluso declarados de interés cultural, a las personas o entidades que garanticen conservación, restauración y promoción adecuada de los mismos³². Es decir y como conclusión a este extremo: el adecuado uso de los bienes culturales garantiza su conservación, siendo el particular en determinados casos mejor conservador que cualquier Administración por pública que sea su actividad.

b) *Cualquier cambio de uso ha de ser autorizado por la Administración competente*³³ (art. 36.2 LPHE, y 29.2 LPCV, 33.1 LPHA, 29.2 LPCC, 36.2 y 41.1 LPCVal., 54.1 LPHCan.). Entendiendo por cambio de uso “una alteración sustancial en la utilización de la cosa”³⁴, ya que sino no implicaría ninguna actividad en contra de la conservación del bien.

c) De igual manera, *es necesaria autorización para la realización de cualquier obra interior o exterior* que afecte directamente a un BIC o a alguna de sus partes integrantes o pertenencias. (art. 19.1 LPHE y 33-35 LPCV; 29, 34, 35 LPCC; 37-39 LPCG; 33-34 LPHA Y 44-55 RPHA; 35, 36 Y 38 LPCVal.; 32 LPHM; 55-58 LPHCan.; 31-33 y 37 LPHCE; 37 LPHB; 47, 52-53 LPCCa.; 35 LPCAr, 56-57 LPCAst.)³⁵. El principio que se recoge en esta materia es que toda obra sobre un bien cultural declarado necesita previa y expresa autorización.

Las normativas autonómicas, en algunos casos, han detallado más esta obligación de sometimiento a la autorización previa de la obra que se realice sobre un BIC. Así, se ha descrito por las leyes culturales un amplio sistema de control de las mencionadas obras e intervenciones: junto a la citada autorización es necesario el cumplimiento de los criterios de intervención por ellas establecidos, criterios, basados en una más adecuada puesta del bien al servicio del valor cultural que generan³⁶.

Junto a tales extremos, nos encontramos al tratar de las obras sobre BIC, uno de los temas de armonización más complicada en las leyes del patrimonio histórico o cultural. Es el referente a la interrelación patrimonio cultural-urbanismo. En este sentido, la LPHE dedica los arts. 20 y 21 a tal función, basándose en la técnica del planeamiento especial para conseguir la mejor defensa del patrimonio. Constituyendo la redacción de un Plan Especial de Protección una obligación de los Municipios donde se hallara sito el BIC declarado Conjunto Histórico, Sitio Histórico o Zona Arqueológica. Tal precisión se ve acompañada de otro principio básico en la materia: la normativa de patrimonio histórico tiene preferencia normativa sobre la de urbanismo. De tal principio, se deriva, que tanto en el planeamiento como en la ejecución de licencias será necesaria la autorización de la respectiva Administración cultural competente para poder proceder a su aprobación, sin la cual no será válida la actuación urbanística. En este punto, las CCAAs han desarrollado la citada interrelación llegando a casos de especial consideración como el del planeamiento, entendiendo estos no como elementos distorsionadores del sistema de la normativa cultural, sino como instrumentos de protección del patrimonio cultural no ajenos a las normas culturales. La última ley de patrimonio cultural aprobada, la LPCAst., entiende así la armonía de tales cuerpos normativos. Siempre sometiendo los elementos de actuación urbanística relacionados con los bienes culturales a la Administración cultural y regulando los supuestos en que tales normas pueden entrar a reglamentar un mismo supuesto como mecanismos destinados al mismo fin. El ejemplo más estimulante en este sentido ha sido, en la LPCAst., el uso de los catálogos urbanísticos de protección como parte de la clasificación de los bienes culturales (art. 9)³⁷, tras la de los BIC y Bienes incluidos en el Inventario del Patrimonio Cultural de Asturias. Siendo además, un elemento destinado “a reforzar la capacidad de los Ayuntamientos para desarrollar acciones e iniciativas propias en esta materia”³⁸.

d) *Es necesaria también la autorización previa y expresa si el titular del bien pretende colocar en la fachada del inmueble declarado BIC, o en su cubierta, cualquier clase de rótulo, señal o símbolo* (art. 19.1 y 2 LPHE). Las normativas autonómicas han incluido esta actuación de sometimiento a control por parte de la Administración competente, dentro de los criterios de intervención señalados para la realización de obras en el bien cultural. Esta postura me parece acertada, más, si pensamos que la colocación de esos rótulos, señales o símbolos, en muchos casos va a llevar aparejada la realización de alguna obra en el citado inmueble de mayor o menor relevancia.

Sin embargo, como se ha percatado algún legislador autonómico, esta actividad de señalización o colocación de rótulos en los inmuebles culturales puede presentar diversas formas y cumplir distintas finalidades³⁹, llegando incluso a contradecir a la LPHE por la solución tomada al respecto. Este es el caso de la LPHCan. que distingue entre la señalización de bienes de interés cultural para su adecuada identificación (rotulación unificada obligatoria, art. 27), “rótulos de obra” (art. 35, también obligatoria), y rótulos comerciales sin justificación histórica que “se permitirán únicamente si van adosados a los huecos de fachada, prohibiéndose las vallas publicitarias en todo el ámbito de los Conjuntos Históricos” (art. 34.4). Este último aspecto de la legislación canaria vuelve a poner de manifiesto el peligro de la regulación diferenciada de estos bienes atendiendo a la CCAA en la que nos encontremos, determinando, para este caso en concreto, que los rótulos comerciales, p.ej., estarán prohibidos en Castilla y León y no así en Canarias. Variando el régimen de la propiedad atendiendo a la Autonomía en la que se encuentre sito el bien, conculcando el régimen de igualdad autonómica consagrado en el art. 139 CE.

e) Más allá va la LPHE en lo que concierne a la colocación de publicidad en los BIC inmuebles. *Se prohíbe la posibilidad de colocar publicidad comercial en los citados bienes, así como la de cualquier clase de cables, antenas y conducciones aparentes en los mismos* (arts. 19.3 LPHE y los referentes a los criterios de intervención de las normativas de las CCAAs). Éste sí es un criterio mantenido por la práctica totalidad de las CCAAs sin diferencia, de hecho, es una medida tan histórica⁴⁰ en nuestro Derecho cultural como inaplicable. Y señalamos inaplicable porque no hay más que pasearse por los centros históricos de nuestras ciudades declarados Conjuntos Históricos para ver como se incumple tal medida que, en determinados casos, es consentida y “patrocinada”⁴¹ por las autoridades públicas: Ibiza, Segovia, Ávila, Cáceres, Granada, Sevilla, Córdoba⁴²... Tengamos en cuenta, además, que las mismas prohibiciones se derivan de las normas sobre publicidad y sobre Telecomunicaciones: arts. 1º y 2º del Decreto 917/1967, de 20 de abril, por el que se dictan normas sobre publicidad exterior, y el art. 18 de la Ley 31/1987, de 18 de diciembre, de Ordenación de las Telecomunicaciones.

f) *El derecho de acceso a los bienes culturales inmuebles y el de préstamo de los muebles para exposiciones temporales* suponen uno de los puntos más conflictivos jurídicamente con el derecho de propiedad privada sobre los mismos. La LPHE y las normativas autonómicas sin excepción (arts. 13.2 LPHE y la Disposición Adicional Cuarta de Real Decreto 111/1986, de 10 de enero, de desarrollo parcial de la LPHE; 24 LPCV; 15.2 LPHA y Capítulo II del Título II del RPHA; 26 LPCG; 30.1.c) y 70 LPCC; 18.3, 18.4 y 32 LPCVal.; 19 LPHM.; 42 LPCCa.; 34 LPHB; 28 LPHCan.; 33 LPCAr.; 24 LPHCE; y 43 LPCAst.).

Los derechos de acceso vienen motivados en la normativa cultural por razones:

- de inspección por las autoridades administrativas,
- de investigación por personas acreditadas para ello (en algunas normas ni siquiera precisa de la acreditación),
- y de visita pública por cualquier ciudadano de forma gratuita al menos 4 días al mes (algunas CCAAs incluso lo extienden).

Dichas obligaciones, a la vez, se complementan con el posible depósito temporal del bien con carácter cultural para exposiciones o para su visita en centros museísticos públicos, o

cuando se ponga en peligro su seguridad o su conservación. Medida que nos recuerda más a una expropiación temporal sin justiprecio, es decir una incautación que a una medida de acceso a la cultura.

El problema del que parecen no haberse percatado los legisladores estatal y autonómicos, con las tres excepciones que luego veremos, es el de la jerarquía normativa y el respeto a la inviolabilidad del domicilio. Los derechos a la intimidad personal y familiar aparecen estrechamente vinculados al concepto de domicilio. Domicilio, en el que sólo se puede entrar con el consentimiento del titular, con resolución judicial y en el caso de que en él se esté cometiendo un flagrante delito (art. 18.2 CE). Ninguna ley, por muy importante que nos parezca, puede ir en contra de la Constitución, y aquí es donde la normativa cultural en vez de procurar el acuerdo y la armonía entre los derechos de carácter social y los de carácter particular fracasa estrepitosamente. Sólo parece que han tenido en cuenta este mandato constitucional tres normas autonómicas y no de forma taxativa:

1ª- La LPCV en su art. 24.3 al regular el derecho de visita pública como obligación de los titulares de derechos reales sobre el bien cultural, exime de ésta si los titulares acreditan “causa justificada fundamentada en el derecho a la intimidad, honor y otros derechos fundamentales y libertades públicas, o cualesquiera otras causas que fueran estimadas por el Departamento de Cultura y Turismo del Gobierno Vasco”. Si bien, las causas alegadas se acreditaran en un procedimiento administrativo que se establecerá al efecto y sólo se refiere a la visita pública y no a la inspección y al acceso a los investigadores. Hecho que es difícil de entender, o ¿es que los el derecho a la intimidad existe en un caso y en otros no?

2ª- En la LPCVal. Al regular el “Régimen de visitas” en su art. 32 establece que éste “deberá garantizar debidamente el respeto al derecho a la intimidad personal y familiar”. Pero volvemos a notar la falta de la misma precisión en lo que respecta a los derechos de acceso por inspección y por investigación recogidos en su art. 18.

3ª- La moderna LPCAst. recoge todos los derechos de acceso comentados en un mismo artículo, el 43, pero los diferencia en su régimen de visitas atendiendo a que sea realizada por la Administración del Principado de Asturias o por investigadores y ciudadanos. Sólo en este segundo caso se eximirá de tales obligaciones de acceso a los titulares de derechos reales sobre los mismos, de forma total o parcial, en “aquellos casos en que los inmuebles a que se refieren tengan el carácter de domicilio particular, cuando por razones de residencia continuada sea imposible su cumplimiento sin violación de la intimidad del mismo”.

Por tanto, aun quedan muchas “batallas” por resolver para saber si realmente estos derechos para la comunidad, servidumbres para los titulares de derechos reales sobre los bienes culturales, tienen fundamento a la luz de la CE o más bien son “salidas de tono” de legisladores más centrados en una parcela mínima del ordenamiento jurídico que en su plural dimensión real.

g) Acción pública para la incoación de expediente para la declaración de BIC y de defensa del Patrimonio Histórico Español (arts. 10 y 8 LPHE; 5º y 7º LPHCM; 3º.II y 11.2 LPCV; 5º y 8º.1 LPCC; 3º y 9º LPCG; 5º y 9º.1 LPHA; 5º.2 y 3, y 27.1 LPCVal.; 5º y 10.1

LPHM; 16, 9º.1 y 5º, y 39.5 LPCCa; 7º.2 Y 3 LPHB; 19.1 LPHCan.; 18.2 Y 6, Y 8º LPCAr; 7º.2 y 3º.1 LPHCE; 14.1 y 4º.1 LPCAst.).

Estos son, a mi juicio, dos de los mecanismos más acertados para la defensa, por parte de la sociedad civil, de nuestro patrimonio cultural. Son la expresión máxima de que la protección de los bienes que representan nuestra cultura es un derecho y una obligación de todos aunque, indudablemente, la concienciación social de que eso es así esté muy lejos de producirse. Sin embargo, tales derechos sociales desembocan en unas obligaciones de padecer a los titulares de la propiedad sobre estos bienes, que la van a ver coartada con la declaración de sus bienes como de interés cultural.

Tales derechos de protección social del patrimonio, tengamos en cuenta que son extensibles a todos los ciudadanos de la Unión Europea, suponen un avance cualitativo en la generación de situaciones jurídicas culturales para la sociedad. Sin embargo, estos derechos sociales tienen un importante riesgo hacia el propietario dimanante del mal uso que puede darse de ellos por sujetos con intenciones perniciosas. Y no me estoy refiriendo a un “supuesto de laboratorio” ni mucho menos, si no a la realidad de que con base en estos preceptos se están vulnerando derechos fundamentales de los titulares de dichos bienes. Así, la Sentencia del Tribunal Supremo nº. 2239/1998, Sala de lo Penal, de 9 de julio de 1999, condena por prevaricación al Presidente y a los miembros del Consejo de Gobierno de Cantabria que utilizando estos preceptos de la LPHE pretendían causar un daño en el Ayuntamiento de Santander y en el titular de los terrenos, evitando la construcción en los mismos. Si tenemos en cuenta la gravedad del hecho y los sujetos implicados, nos percatamos de la posibilidad real de que estos derechos sociales se conviertan en auténticas armas jurídicas que sin su debido control pueden llegar a disparates como el que realizó el Gobierno de la citada CCAA.

B'.- El derecho a disfrutar del bien del que se es titular no aparece constreñido por las normativas del patrimonio cultural o histórico español siempre y cuando por tal entendamos el derecho a percibir los frutos que el bien en cuestión puede producir. Este derecho de percepción de frutos no se ve en ningún momento limitado o constreñido por el legislador cultural directamente. Y digo directamente, porque, si la cesión del uso parece que va a ser el principal medio para la obtención de frutos por parte de estos bienes, después de haber visto las limitaciones que recaen sobre el uso, difícilmente la posibilidad de producción de los mismos será equiparable a la de un bien carente de dicho valor.

De ahí, que haya que concluir que la facultad de disfrutar se ve igualmente constreñida y casi carente de virtualidad, ya que el uso está de tal manera limitado, que se le priva de gran parte de su aprovechamiento.

B.- La libre disposición del bien

Siguiendo del esquema de desarrollo planteado con los mencionados fines didácticos, nos encontramos con que la facultad de libre disposición sobre el bien que tiene el propietario se suele dividir en las subsiguientes facultades: de enajenar, de gravar, de limitar, de transformar y de destruir. La normativa del patrimonio cultural hace referencia a la primera y a las dos últimas, si bien, las facultades de gravar y de limitar el bien por parte del titular, se van a ver restringidas por la misma razón que se señalaba al tratar la facultad

de disfrute. Independientemente de tal matización es necesario detenerse en los siguientes aspectos:

A'.- Facultad de enajenar: Las leyes de patrimonio cultural sí prestan singular atención a esta faceta del derecho de propiedad, fundamentándose en que dicha facultad, unida a la posterior exportación del bien, es una de las causas de empobrecimiento de nuestro patrimonio. Ejemplos como los que hoy encontramos en distintos museos de Estados Unidos de América han pesado mucho en la mente del legislador cultural a la hora de regular esta facultad, sin percatarse que estas salidas del territorio nacional de bienes culturales sólo han sido la punta del iceberg de la pérdida de nuestro patrimonio histórico-artístico.

La enajenación de bienes con valor cultural (ya sean BIC o BIG, o sus correlativos de las clasificaciones autonómicas) aparece profusamente regulada tanto en la LPHE, art.38, como en su Reglamento de desarrollo, arts. 40-44, así como en las normas autonómicas de contenido cultural: arts. 25-26 LPCV; 26-27 LPCC; 27-28 LPCG; 18 LPHA y 28-32 RPHA; 22-24 y 22-23 LPCVal.; 20-22 LPHM; 43-44 LPCCa.; 32 y 45-46 LPHB; 42 y 50 LPCCan; 25-26 LPCHE; y 45-47 LPCAst. Habiéndose detenido éstas, incluso, en el traslado de bienes culturales muebles que, en bastantes casos, exige la autorización o comunicación de su desplazamiento fuera del territorio de la CCAA.

La enajenación, independientemente de que norma estudiemos ya que en esta facultad siguen todas el diseño de control establecido por la LPHE, aparece sometida a un doble derecho de adquisición preferente por parte de la Administración. El titular ha de notificar a la Administración competente⁴³ en la materia, la intención de enajenar el bien cultural declarado como tal, con constancia, en la mencionada notificación, del precio y condiciones en que se proponga realizar la transmisión⁴⁴. La Administración, en el plazo establecido por las normas culturales, podrá ejercitar el derecho de tanteo que le reconocen, obligándose, en este caso, a pagar el precio fijado por el propietario en el acto de la notificación. Uno de los dislates que se introducen en este punto, es el exagerado plazo que se da a las Administraciones para cumplir con su obligación de pagar el precio al vendedor: ¡dos ejercicios económicos!, “salvo pacto con el interesado de otra forma de pago”. Me parece, que conceder dos ejercicios económicos para pagar una compraventa deja en una posición jurídica y económica muy debilitada al propietario. Porque en caso de necesitar el dinero el titular del bien, probablemente una de las razones principales por las que se produce la enajenación, sí se le estaría privando del contenido esencial de la propiedad. La demora excesiva en el pago de un bien, sea el que sea, supone el vaciamiento del contenido que la CE declara como inabarcable por los poderes públicos. Posibilitar que durante dos años alguien pueda estar sin el bien, del que ya no es titular, y sin el precio obtenido por su venta, se acerca más a una medida confiscatoria que al respeto a los derechos reconocidos por la CE⁴⁵.

De manera similar opera el segundo derecho de adquisición preferente correlato del anterior. Cuando la notificación de la enajenación no se hubiera realizado, incumplimiento total, o se hubiera llevado a cabo pero de forma incompleta, incumplimiento parcial, la Administración competente podrá ejercitar el derecho de retracto, en un plazo convenientemente amplio desde que conoció la enajenación llevada a cabo.

Y para finalizar, las normas culturales, cierran las garantías de que se haya producido tal observancia de las obligaciones del titular que pretende enajenar un bien

cultural a través de los Registradores de la Propiedad y Mercantiles que “no inscribirán documento alguno por el que se transmita la propiedad o cualquier otro derecho real sobre los bienes a que hace referencia este artículo sin que se acredite haber cumplido cuantos requisitos en él se recogen”.

Este sistema de control de la enajenación, salvo por los plazos concedidos a la Administración, parece conveniente para evitar desapariciones de bienes culturales. Pero es el sistema de circulación internacional de estos bienes el que realmente ha de evitar la salida ilegal de este patrimonio cultural español y, a mi juicio, no parece igualmente de respetuoso con las exportaciones que con las importaciones de estos bienes. Aunque eso, es materia de otro artículo.

B'. Facultad de transformar: las leyes de patrimonio cultural no hacen referencia explícitamente a esta facultad, si bien, por tal podemos entender un conjunto de actuaciones que van a estar limitadas por la injerencia que se puede realizar en el bien en cuestión que pueden llegar a hacerle perder parte de su valor cultural.

En principio, y como señalábamos al tratar de las obras, la autorización es la técnica de control elegida por el legislador para fiscalizar esta facultad. Así, el tratamiento, la intervención y las restauraciones⁴⁶ (art. 39 LPHE) están bajo autorización y bajo los criterios de intervención que, como vimos, fijaban las normas autonómicas con mayor precisión que la LPHE, a la hora de proceder a su realización.

Sin embargo las actuaciones más traumáticas, como pueden ser la reconstrucción o la separación de in BIC inmueble de su entorno, están prohibidas por las normas culturales (arts. 39.2 y 18 LPHE), salvo que sus valores culturales no puedan sobrevivir sin adoptar este tipo de actuaciones.

C'. La facultad de destruir: este derecho, como nos podemos imaginar, aparece desterrado de la esfera de poder del titular sobre estos bienes. Pero no porque lo diga expresamente la norma cultural, sino porque se deriva de toda la finalidad de esta regulación y de su configuración en torno a la función social y valor cultural de los mencionados bienes. Evidentemente, la propiedad se presupone libre. Las mermas sobre la titularidad dominical han de ser expresas en las normas, pero con las actuaciones e injerencias sobre el propietario en atención a las citadas características que desempeñan, hacen imposible jurídicamente la destrucción de un bien cultural declarado, lo cual no puede hacernos obviar que tal posibilidad no lo sea tal en el mundo de la realidad. En cuyo caso, estaríamos en presencia de los tipos penales recogidos en los arts. 321 y ss del Código penal y no de la normativas administrativas que nos traen a estudio.

Como conclusión podemos destacar, que mientras los legisladores en materia de patrimonio cultural no adopten una postura más positiva hacia la propiedad privada de estos bienes, las leyes y disposiciones estudiadas se convierten en difícilmente aplicables de acuerdo al sistema de jerarquía de fuentes previstas en nuestro ordenamiento jurídico. Y lo que es más grave, el afán paternalista de tales legisladores, traducido en dicha opresión normativa, hace inviable la adecuada conservación del patrimonio histórico de España.

¹ En adelante CE.

² En adelante Cc.

³ En adelante CCAA.

⁴ Reglamento (CEE) núm. 3911/92 del Consejo, de 9 de diciembre de 1992, relativo a la exportación de bienes culturales; Reglamento núm. 752/93 de la Comisión, de 30 de marzo de 1993, relativo a las disposiciones de aplicación del Reglamento (CEE) núm. 3911/92 del Consejo, de 9 de diciembre de 1992, relativo a la exportación de bienes culturales; y la Directiva 93/7/CEE del Consejo, de 15 de marzo, relativa a la restitución de bienes culturales que hayan salido de forma ilegal del territorio de un Estado miembro de la Unión Europea (incorporada al ordenamiento jurídico español por la Ley 36/1994, de 23 de diciembre)

⁵ La cursiva es del autor.

⁶ En adelante LPHE.

⁷ “A los efectos de la presente Ley se entiende por expoliación toda acción u omisión que ponga en peligro de pérdida o destrucción todos o alguno de los valores de los bienes que integran el Patrimonio Histórico Español o perturbe el cumplimiento de su función social. En tales casos la Administración del Estado, con independencia de las competencias que correspondan a las Comunidades Autónomas, en cualquier momento, podrá interesar del Departamento competente del Consejo de Gobierno de la Comunidad Autónoma correspondiente la adopción con urgencia de las medidas conducentes a evitar la expoliación. Si se desatendiere el requerimiento, la Administración del Estado dispondrá lo necesario para la recuperación y protección, tanto legal como técnica, del bien expoliado.”

⁸ Excepto Castilla y León (con un Proyecto de Ley de Patrimonio Cultural de 27 de mayo de 2001), La Rioja, Murcia y Navarra, todas las demás han aprobado una ley de patrimonio histórico o cultural de su territorio respectivo. Si bien, como se señalaba, tal regulación presenta una dependencia mayor de la aparente después de ver cómo se ha regulado esta materia por las CCAAs. En este sentido, baste señalar, la falta de regulación jurídica que está apareciendo en las clasificaciones de los bienes, atendiendo a su valor cultural, dadas por las normas autonómicas. Tal falta de referencia, una vez producida, supone que es el régimen jurídico de los Bienes de Interés Cultural recogido en la LPHE el que va a venir a suplir tal vacío. Aplicándose en numerosas ocasiones las previsiones de la Ley del Estado.

Junto a la citada influencia de la LPHE sobre la regulación jurídica de la propiedad de estos bienes culturales, no podemos perder de vista la influencia que ejerce la Ley estatal en la aprobación posterior de la normativa cultural autonómica. La estructura, preceptos y contenido de éstas aparece íntimamente ligado a la Ley de 1986 que supone el punto de partida para todas ellas. De ahí, que la estructura expositiva que vamos a seguir esté vinculada a ese nexo de unión entre todas ellas que es la LPHE.

⁹ En adelante LPHCM.

¹⁰ En adelante LPCV.

¹¹ En adelante LPHA.

¹² En adelante LPCC.

¹³ En adelante LPCG.

¹⁴ En adelante LPCVal.

¹⁵ En adelante LPHM.

¹⁶ En adelante LPCCa.

¹⁷ En adelante LPHB.

¹⁸ En adelante LPHAr.

¹⁹ En adelante LPHCan.

²⁰ En adelante LPHCE.

²¹ En adelante LPCAst.

²² *Artículo 1.*

“1. Son objeto de la presente Ley la protección, acrecentamiento y transmisión a las generaciones futuras del Patrimonio Histórico Español.

2. Integran el Patrimonio Histórico Español los inmuebles y objetos muebles de interés artístico, histórico, paleontológico, arqueológico, etnográfico, científico o técnico. También forman parte del mismo el patrimonio documental y bibliográfico, los yacimientos y zonas arqueológicas, así como los sitios naturales, jardines y parques, que tengan valor artístico, histórico o antropológico.

3. **Los bienes más relevantes del Patrimonio Histórico Español** deberán ser inventariados o declarados de interés cultural en los términos previstos en esta Ley.”

Artículo 26.

“1. La Administración del Estado, en colaboración con las demás Administraciones competentes, confeccionará el Inventario General de aquellos bienes muebles del Patrimonio Histórico Español no declarados de interés cultural que **tengan singular relevancia.**”

²³ La Ley de Patrimonio Histórico de la Comunidad de Madrid es de las únicas que sigue la misma clasificación de los bienes culturales que la LPHE. Sin embargo, y a pesar de ser la más parecida en este extremo a la LPHE junto con la de Castilla la Mancha, a la hora de tratar los bienes incluidos en el Inventario General los define en su art. 14 como: “Los bienes muebles e inmuebles, materiales o inmateriales del Patrimonio Histórico de la Comunidad de Madrid que, sin tener el valor excepcional de los declarados de Interés Cultural, posean especial significación e importancia, serán incluidos en el Inventario de Bienes Culturales de la Comunidad de Madrid y gozarán de la protección prevista en esta Ley y en la legislación general del Estado”.

²⁴ L.A. ANGUITA VILLANUEVA, *El derecho de propiedad privada en los bienes de interés cultural*, Madrid, 2001. Edit. Dykinson, pág. 49.

²⁵ En nuestra doctrina es ya clásico el esquema enumerativo que hizo F. SÁNCHEZ ROMÁN, *Estudios de Derecho Civil. Tomo Tercero. Derechos reales. Derecho de la propiedad y sus modificaciones*. 2ª Edición, Madrid, 1900, Est. Tipográfico <<Sucesores de Rivadeneyra>>, pág. 85. Esquema que fue repetido en su exposición por CASTÁN, pág. 181, y que aquí vamos a seguir a efectos de demostrar hasta donde llegan las limitaciones de la normativa cultural hacia los titulares de bienes culturales.

²⁶ No creo que hoy existan fisuras en la doctrina a la hora de precisar esta idea. LACRUZ señala que “resulta ocioso el intento de enumerar exhaustivamente, o aun clasificar, las posibilidades de actuación del dueño (...). Pero, sobre todo, tampoco una enumeración completa de las facultades que comporta de las facultades que comporta expresaría la esencia de la propiedad, pues este derecho no sólo puede prescindir ocasionalmente de muchas de ellas, sino que, en la situación actual de sujeción del interés del interés privado al público en tantos aspectos, las facultades varían según la naturaleza de la cosa en propiedad (casas, campos, árboles. Solares, obras de arte, etc.), sin que por ello mude la naturaleza del derecho, cuyas facultades no son un *prius*, sino un *posterius*: cobrando vida a partir de la propiedad, por lo cual no podrían servir para definirla. Finalmente la doctrina está hoy de acuerdo en que la suma de las diversas facultades del dominio no recompone la propiedad.” (*Elementos de Derecho civil. Tomo III. Derechos reales. Volumen primero: posesión y propiedad*. Edición revisada y puesta al día por A. LUNA SERRANO. Dykinson, 2000 pág. 232).

ALBALADEJO por su parte precisa que “hacer una enumeración exhaustiva de facultades es imposible, porque siempre quedará algún aspecto del señorío sobre la cosa, en el que quepa pensar singularmente, y concebirlo como otra nueva facultad” (*Derecho civil. Tomo III, Derecho de bienes. Volumen primero: parte general y derecho de propiedad*. Octava edición, edit. JMBosch, Barcelona, 1994).

Esta misma característica también la puso de relieve la jurisprudencia desde muy pronto: sentencias del Tribunal Supremo de 3 de diciembre de 1946, de 12 de junio de 1958, de 30 de enero de 1964...

²⁷ “sólo puede quedar perfectamente perfilado este contenido [el de la propiedad] teniendo en cuenta las limitaciones a que se halla sometido” J.L. PUIG BRUTAU, *Fundamentos de Derecho civil. Tomo III. Volumen I*. Edit. Bosch. Barcelona, 1978, pág. 167.

²⁸ Sobre esta conclusión véase ANGUITA, op.cit., págs. 35 y ss.

²⁹ Si bien, estableceré algunas diferencias en el mencionado esquema para poder adecuar las limitaciones a los derechos en el señalados. Tengamos en cuenta las diferencias que existen entre estudiar las facultades o derechos de la propiedad, aspecto positivo, que las limitaciones sobre los derechos como hace la normativa cultural, aspecto negativo.

³⁰ Exposición de Motivos de la LPHE.

³¹ Así lo han matizado los legisladores autonómicos al citar estas obligaciones. La frase entrecomillada es del art. 28.1 de la Ley 1/2001, de 6 de marzo de 2001, de Patrimonio Cultural del Principado de Asturias que, siendo cronológicamente la más reciente, no hace sino recoger la precisión que ya estaba presente, con mayor o menor detalle, en las leyes de las Autonomías que han desarrollado esta materia. Así los artículos: 20.1 LPCV, 15 LPHA, 21 LPCC, 25 LPCG, 18.1 LPCVal., 18 LPHM, 39.1 LPCCan., 22.1 y 26 LPHB, 52 LPHCan., 6 y 33 LPCAr., 22.2 LPHCE.

³² “3. Las administraciones públicas, cuando sea conveniente para la mejor conservación, restauración y promoción de los bienes inmuebles incluidos en el Inventario General del Patrimonio Cultural Valenciano de que sean titulares, podrán ceder el uso de tales bienes, incluso de los declarados de interés cultural, a las personas o entidades que lo soliciten y garanticen adecuadamente el cumplimiento de los fines mencionados.

Cuando se trate de inmuebles que hubieren sido donados por particulares se dará preferencia a sus antiguos propietarios o a sus sucesores. La cesión requerirá en todos los casos el informe previo de la Conselleria de Cultura, Educación y Ciencia, que tendrá carácter vinculante. En el expediente, que será sometido a información pública, deberá constar también el informe favorable de al menos dos de las instituciones consultivas a que se refiere el artículo 7 de esta Ley.

La cesión se realizará mediante la suscripción del correspondiente convenio con el cesionario, que será publicado en el «Diari Oficial de la Generalitat Valenciana» y en el que constarán la donación y demás condiciones de la cesión. En caso de incumplimiento, la cesión será inmediatamente revocada.

Se exceptúan de lo dispuesto en este apartado los bienes declarados de interés cultural cuya especial significación histórica, social o religiosa sea incompatible con su uso privado.”

³³ Como regla general son competentes en materia de patrimonio para todo este tipo de actuaciones las consejerías de cultura de la CCAA respectiva.

³⁴ L.A. ANGUITA, op.cit., pág. 93.

³⁵ Como puede verse, el número de artículos dedicados a esta obligación por parte de los legisladores autonómicos es mucho mayor. Ello es debido a la mayor precisión con la que determinan el cumplimiento de la obligación de autorización para la realización de obras sobre los BIC. Precisión, que va a incluir criterios que recoge la LPHE en preceptos diversos para unificarlos en este punto.

³⁶ De muy similar contenido son los citados criterios de intervención en las disposiciones de las CCAAs. Como ejemplo basta citar el artículo 39 de la LPCG que ha sido seguido por otras CCAAs. (p.ej. si leemos el art. 33 de la LPHCE observamos que son idénticos):

“*Artículo 39. Criterios de intervención en inmuebles.*

1. Cualquier intervención en un inmueble declarado bien de interés cultural habrá de ir encaminada a su conservación y mejora, de acuerdo con los siguientes criterios:

a) Se respetarán las características esenciales del inmueble, sin perjuicio de que pueda autorizarse el uso de elementos, técnicas y materiales actuales para la mejor adaptación del bien a su uso y para valorar determinados elementos o épocas.

b) Se conservarán las características volumétricas y espaciales definidoras del inmueble, así como las aportaciones de distintas épocas. En caso de que excepcionalmente se autorice alguna supresión, ésta quedará debidamente documentada.

c) Se evitarán los intentos de reconstrucción, salvo en los casos en que la existencia de suficientes elementos originales así lo permitan.

d) No podrán realizarse adiciones miméticas que falseen su autenticidad histórica.

e) Cuando sea indispensable para la estabilidad y el mantenimiento del inmueble, la adición de materiales habrá de ser reconocible.

f) Se impedirán las acciones agresivas en las intervenciones sobre los paramentos.

2. En los monumentos, jardines, sitios o territorios históricos, zonas arqueológicas situadas o no en suelo urbano, lugares de interés etnográfico y zonas paleontológicas no podrá instalarse publicidad, cables, antenas y todo aquello que impida o menoscabe la apreciación del bien dentro de su entorno.”

³⁷ “ *Artículo 9. Categorías de bienes.*

Los bienes que conforman el Patrimonio Cultural de Asturias se protegerán mediante su integración en alguna de las siguientes categorías de protección: Bienes de Interés Cultural, Bienes incluidos en el Inventario del Patrimonio Cultural de Asturias y Bienes incluidos en los Catálogos urbanísticos de protección así como mediante la aplicación de las medidas contempladas en los regímenes específicos relativos al patrimonio arqueológico, etnográfico, histórico-industrial, documental y bibliográfico.”

³⁸ Exposición de Motivos de la LPCAst.: “En todos estos aspectos se adoptan, asimismo, medidas dirigidas a reforzar la capacidad de los Ayuntamientos para desarrollar acciones e iniciativas propias en esta materia, de forma tal que las obligaciones que tienen, concurrentes con las de la Comunidad Autónoma y el Estado, puedan llevarse a cabo por medio de instrumentos adecuados. En ese aspecto tiene especial importancia la regulación de los catálogos municipales de protección de bienes inmuebles con valor cultural.

Afrontar el reto que supone la necesidad de garantizar la conservación y promover el enriquecimiento del patrimonio cultural exige la participación de todos: Administraciones públicas, instituciones, propietarios y poseedores de los bienes y ciudadanos en general”.

³⁹ Ej. la “armonía del conjunto”, arts. 43.3.c). LPCAr. Y 31.2 LPHB., o la armonía de entorno en el que se halla incardinado, art. 53.1.g) y 53.2.e) LPCCa.

⁴⁰ Art. 33 de la Ley de 1933, art. 34 de su reglamento de desarrollo, art.6.II del Decreto de 8 de agosto de 1962...

⁴¹ Creo que en casos determinados sería necesario inaplicar la norma para conseguir la conservación y mantenimiento del bien que, al fin y al cabo, es la finalidad de todo este tipo de normas. Me estoy refiriendo a casos como el de la consolidación del Acueducto de Segovia que fue patrocinada por Caja de Madrid, cubriendo en numerosas ocasiones las fases del proyecto de ejecución con publicidad de la citada institución financiera. Supuesto de marketing que me parece lógico después de la inversión de la citada entidad.

⁴² Véase a este respecto el informe realizado por el Defensor del Pueblo de Andalucía titulado: *La contaminación visual del patrimonio histórico andaluz: el impacto visual en los bienes del patrimonio histórico-artístico causado por el cableado, antenas, y otras instalaciones*. Sevilla, 1998.

⁴³ Piénsese que en este caso puede haber, conforme a la relevancia cultural del bien, dos Administraciones “competentes”: la del Estado y la de la CCAA. En estos supuestos, entiendo que la mayor relevancia cultural del bien, es decir que su valor lo configure como del Patrimonio Histórico Español más que por su relevancia patrimonial autonómica, determinaría la preferencia en la adquisición por parte del Estado.

⁴⁴ Esta obligación, no sólo la tiene el titular del bien, sino los “subastadores” de bienes integrantes del Patrimonio Histórico Español, tengan declaración administrativa como tal o no.

⁴⁵ Sobre este extremo de la enajenación y sus consecuencias ANGUITA, op.cit., págs. 138-168.

⁴⁶ Ej. art. 39.3 LPHE al tratar las restauraciones hace mención a que si estas se producen han de respetar las aportaciones de todas las épocas.

IMPLEMENTATION OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

1. Armed conflicts and the protection of cultural property

"From the times of the Bible and the shedding of Abel's innocent blood, history has been written in blood, most of its pages inscribed with a sword and only a smaller part under candle light with the pen of a humanist"¹

The part of human history written in blood can, without doubt, open to question our belief in man and his capacity to learn from the experience of others. Therefore, before embarking on this and similar topics, one should take on a realistic approach and be completely aware of the fact that one more negative or instructive experience, this time written in Croatian blood, will neither bring about a radical change in human behaviour, nor have an impact on future international relations. In spite of that, however, we the truth to history because someone will study it someday.

One of the oldest documents testifying to man's desire to preserve cultural heritage in times of war is the decision brought by the Delphi amphictyony² about 1100 BC which prohibited, in case of the attack on a city that is a member of the association, its complete destruction and leaving it without water during the siege. By the same document the Amphictyonic Council prescribed not only the protection of the Delphi shrine but also stipulated very strict sanctions for violators of this decision which is one of the first known international agreements containing laws on warfare and rules on the protection of cultural heritage.

The second written trace from ancient history is found in the legal complaint and Cicero's³ speech before the court at the trial of Gaius Verres⁴, the notorious governor of Sicily convicted for theft and shrine plunder. In his fourth speech Cicero mentions as an example the Roman commander Marcellus⁵, who did not permit the destruction and plundering of cultural heritage during the siege of Syracuse.

Even after the Vandals appeared in 445 and in fact gave the present meaning to the word "vandalism" because they conquer and plundered Rome and destroyed Roman cultural heritage, we find no written traces by Roman legislators on regulations aimed at preventing such behaviour in the future.

Not until the 18th century did the humanistic worldview take hold resulting among other things in the attempt to humanise war. This is the period in which Napoleon⁶, owing to his military campaigns, actually created Louvre⁷, which is to this

¹ Josip Depolo, "Croatian Los Desastes, On the margins of Ivan Lacković Croatia's new (anti) war cycle of drawings", from the collection "The Eyes of Truth", a series of exhibitions prompted by the war in Croatia and held in Zagreb and abroad.

² A religious and political association of neighboring states in ancient Greece with common religious festivities.

³ Marcus Tullius Cicero, Roman orator, philosopher and statesman (106-43 BC)

⁴ Gaius Verres was the governor of Sicily from 73-71 BC, known as a thief, swindler and despot.

⁵ Marcellus, Roman commander, the conqueror of Syracuse in 212 BC an example of humanness, honesty and educated lover of culture.

⁶ Napoleon I Bonaparte (1769-1821) French general and emperor.

day one of the richest museums in the world. The same period saw the spreading of opinions such as Vattel's⁸, who claimed that "the intentional destruction of public monuments, shrines, graves, sculptures, paintings, etc, was absolutely condemnable even by natural, human law, as unnecessary in the legitimate course of warfare" although their seizure as spoils of war was not considered an illegal act.

Not until the mid-nineteenth century, were there any serious attempts to legally regulate the protection of cultural property in the event of war. The development of legislation in this field can be traced through the following documents:

- ❖ Instructions for military land troops of the United States of America of 1863, Articles 34 and 35 of which prescribed the protection of cultural property in times of war, particularly in respect to private and church property, namely, collections in museums and scientific institutions;
- ❖ Project concerning the international declaration on the laws and customs of war, as the outcome of the Brussels Conference held in 1874, and in its time one of the most serious attempts to codify rules on warfare;
- ❖ Oxford Manual concerning the Law on Land Warfare of 1880, drafted after the "Brussels Project" by the Oxford Institute for International Law, but never translated into an international law act;
- ❖ Conclusions of the I Hague Peace Conference and Convention on the Laws and Customs of War on Land with Regulations of 1899 which prohibited the destruction or misappropriation of enemy property "except in circumstances in which such destruction or misappropriation are absolutely required by war necessity". The provisions of this Convention for the protection of cultural property represent the first international codification of such rules;
- ❖ II Hague Conference and Convention on the laws and customs of war on land of 1907 in the provisions of Articles 27, 28 and 58 of the Regulations on the laws and customs of war on land;
- ❖ IX Hague Convention on naval bombardment in times of war of 1907 which stipulated in the provisions of articles 5, 6, and 7 the protection of cultural property during armed conflicts;
- ❖ Draft War regulations in the event of air bombardment prepared by the Commission of lawyers at the Hague session in 1923 proposed, as a novelty, the more detailed regulation of the protection, particularly of valuable cultural property;
- ❖ Treaty on the protection of artistic and scientific institutions and historic monuments (Washington or Reerich's Pact) of 1935 represented the first international treaty that was exclusively devoted to the protection of cultural property against threats of war;
- ❖ Draft of the international convention for the protection of monuments and works of art during armed conflicts prepared according to the instructions of the International Museum Organisation and submitted in September 1938 to the General Assembly of the League of Nations. Its adoption was, however, interrupted by the Second World War.

In the course of the Second World War, once again an enormous quantity of cultural property was destroyed in spite of the fact that in the majority of cases their destruction or damage was not dictated by immediate military necessity, but rather was the result of implementation in practice the principle of total warfare. Accordingly,

⁷ The Louvre Museum acquired its most valuable collections during Napoleon's campaigns. The director of the Museum at that time, Vivant-Denon accompanied the emperor's troops in these campaigns, choosing along the way works of art "worthy" of his Museum.

⁸ Vattel Emmerich (1714-1767) Swiss lawyer who devoted himself to studying the theory of international law.

immediately after the establishment of UNESCO,⁹ in the course of the first four sessions of its General Assembly, a widespread initiative was launched for establishing an international system for the protection of cultural property in the event of armed conflict. After numerous resolutions and long standing preparations which lasted from 1952 to 1954, the text of the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention was drafted. These documents were adopted at the Conference in The Hague in 1954. Forty-five out of 56 participants at the Conference signed the Final Act of the Conference. The Convention for the Protection of Cultural Property in the Event of War with the Regulations for the Execution of the Convention was signed by 37 member states, and the Protocol by 22 member states. Three additional resolutions were adopted at the Conference.

⁹ UNESCO - United Nations' Educational, Scientific and Cultural Organization, founded in London in 1945.

2. Convention for the Protection of Cultural Property in the Event of Armed Conflict

"Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection, The Hague Convention was adopted."¹⁰

The principles concerning the protection of cultural property in the event of armed conflict as established in the Conventions of The Hague of 1899 and of 1907 and in the Washington Pact were taken as the point of departure for drafting the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

The Convention has forty articles divided into eight chapters. Their provisions establish the regime of protection for cultural property and stipulate the following:

- ❖ the definition of cultural property to which protection shall apply according to the provisions of the Convention (Article 1 of the Convention);
- ❖ principles of general protection of cultural property which include their safeguarding and respect in the event of armed conflict as well as the prohibition and refrain from any act of hostility that would inflict damage to cultural property (Article 2-4);
- ❖ the obligation of occupational forces to enable and assist in the protection of cultural property on occupied territories (Article 5 of the Convention);
- ❖ the manner of distinctively marking cultural property so as to facilitate its recognition (Article 6 of the Convention);
- ❖ the obligation of introducing in military regulations or instructions provisions as may ensure observance of the present Convention and of establishing specialist personnel for the implementation of military measures in the event of armed conflict (Article 7 of the Convention);
- ❖ granting of special protection for cultural property, the marking of cultural property under special protection with distinctive emblems, as well as ensuring the immunity of cultural property under special protection (Article 8-11 of the Convention);
- ❖ the manner of transporting cultural property and granting of immunity from seizure, capture and prize (Articles 12-14 of the Convention);
- ❖ the obligation of respecting personnel engaged in the protection of cultural property by the opposing Party /Article 15 of the Convention);
- ❖ the distinctive emblem of the Convention and manner and conditions of its use (Article 16 and 17 of the Convention);
- ❖ the application of the Convention in time of peace and in conflicts not of an international character (Article 18 and 19 of the Convention);
- ❖ regulations for the execution of the Convention and sanctions in cases of the breach of the Convention;
- ❖ Final provisions which stipulate the legal implementation of the Convention (Article 29 to 40).

The most sensitive part of the Convention is contained in the provisions of Article 11, which enables the withdrawal of immunity from cultural property in exceptional cases of "unavoidable military necessity". This provision was drafted at the

¹⁰ Part of the text from the Preamble of the Convention for the Protection of Cultural Property in the Event of Armed Conflict.

time of the bloc division and cold war climate in the 1950s. Nevertheless, even today after crucial changes have taken place on the political arena and as far as world security is concerned, and after the disappearance of bipolarity, numerous barriers still exist, especially in military circles, for deleting this provision from the Convention. On the other hand, experience has unequivocally shown that "military necessity" can in fact invalidate any serious attempt of protecting cultural property in times of war and that it serves as a justification for the destruction or damage of cultural property. The data on the number of cultural monuments damaged in Croatia's War of Independence clearly testifies to this.

The Convention for the Protection of Cultural Property in the Event of Armed Conflict, with Regulations for the Execution of the Convention that is its component part is dated May 14, 1954. Fifty states have ratified it up to February 13, 1954. The former Federal People's Republic of Yugoslavia ratified the Convention on February 13, 1954. In accordance with Article 102 of the Charter of the United Nations, the Convention entered into force on August 7, 1956.

By September 30, 1995, eighty-seven member states had ratified the Convention, and 74 member states had acceded to the Protocol. The Republic of Croatia acceded to the Convention on July 6, 1992.

It is important to mention that by notifying the Director-General of UNESCO, Serbia and Montenegro acceded to the Convention on April 27, 1992, invoking the accession of the SFR of Yugoslavia to the Convention.

3. The Protection of Cultural Property during the Croatian War of Independence

"The bombing of hospitals and other civilian buildings, the disregard of any war and humanitarian laws, the brutal abuse of the population by the Chetniks and other Serbian militants, evidence of which was given by refugees, are absolutely scandalous. On the other hand, we cannot but admire the serene courage and good organisation of the Croatian people."¹¹

3.1. Measures of protection taken prior to and during the aggression on the Republic of Croatia

The protection of cultural property in the Republic of Croatia prior to the aggression was regulated by special laws which included: the Law on the protection of cultural monuments¹², Law on museum activities¹³, Law on the protection of archival materials and archives¹⁴, as well as by other regulations. Within the framework of the legal system for the protection of cultural property, criminal legal protection was codified by the criminal law valid at that time which prescribed that damages to, destruction or pillage of cultural property in times of war, were criminal offences in accordance with Article 28 of the Convention.

In the implementation of Article 3 of the Convention, the then institutes for the protection of cultural monuments carried out activities geared at acquainting and educating the owners and holders of cultural property with measures they should undertake in order to protect cultural property in case of armed conflict or in other extraordinary circumstances. Special guidelines were prepared for the holders of cultural property with specific instructions on the procedures that should be taken for safeguarding cultural property from the consequences of the armed conflict. Activities on introducing security and technical conditions in the buildings and institutions holding valuable cultural property or collections (museums, archives, galleries, private and sacral collections) were systematically implemented. At the same time measures were taken for the systematic protection of the documentation on cultural property, by micro-filming and storing them for safekeeping on three different locations.

We can therefore note that even before the aggression on the Republic of Croatia, appropriate preparations were undertaken by competent state bodies and professional institutions of the Republic of Croatia, in compliance with the Convention.

In mid 1991, when armed conflicts on Croatian soil became increasingly frequent, the then Ministry of Culture and Education, within the framework of which the Service for the protection of cultural monument was active, undertook a number of measures aimed at protecting and safeguarding cultural heritage from the aggression. The bestiality of the aggression against Croatia's cultural heritage was clearly evident from the very first attacks. For example, in the night of 25/26 July 1991, in the artillery attack on the Croatian town of Erdut, the medieval fortress, an immovable cultural monument of the greatest importance was heavily damaged.

¹¹ Part of the statement by Bernard Stasia, member of Parliament of the Republic of France, who visited the Republic of Croatia on January 4, 1992.

¹² Official Gazette, no. 7/67, 13/67, 25/77, 31/86, 47/89, 19/91, 26/93, 52/94

¹³ Official Gazette, nos. 12/77, 47/86, 96/93, 50/95

¹⁴ Official Gazette, no. 25/78

In line with the then instructions and orders of the Minister of culture and education¹⁵, the following measures were undertaken:

- ❖ transition of the Service for the protection of cultural monuments and other similar institutions to work in extraordinary circumstances;
- ❖ the removal of permanent exhibits in museums and galleries and their storing for safekeeping;
- ❖ selection of the most significant cultural property according to the level of possible threat from the consequences of armed conflicts;
- ❖ packing of movable cultural property and their evacuation to safe places;
- ❖ distinctive marking of the most significant immovable cultural property and institutions housing cultural property with emblems stipulated in Article 16 of the Convention;
- ❖ the marking of vehicles and personnel engaged in the protection of cultural property in the event of armed conflict with emblems prescribed in Article 16 of the Convention;
- ❖ technical protection of the most important immovable cultural property.

Accordingly, in only ten days, from July 27, 1991, onwards, 794 immovable cultural monuments had been distinctly marked in the Republic of Croatia with the emblems stipulated by the Convention.

Considering that the Serbian aggression on the Republic of Croatia continued with undiminished intensity, the Service for the protection of cultural monuments carried out the organised evacuation of movable cultural property and collections, so that by the end of 1991, 149 evacuations were executed in which over 6,000 packages were transported from the war threatened regions to places of safety. The largest part of movable cultural property and works of art was evacuated from sacral spaces and museum collections, while a smaller part from private collections. This data does not pertain to cultural property and works of art evacuated by the owners themselves, or those protected "in situ", that is, at the place of their location.

With a view to protecting the most important immovable cultural monuments, technical protective measures were implemented, such as the placing of wooden structures or wooden boarding on buildings, sandbags, including other technical measures in order to increase their resistance to damages from artillery and air attacks. In 1991, technical measures of protection were carried out on 143 cultural property items.

During the entire course of Croatia's War of Independence activities on the salvage of cultural property from the war-inflicted regions were continued, and especially in the regions liberated by police and military operations "Bljesak" (Flash) and "Oluja" (Storm).

3.3. Implementation of the Provisions of the Hague Convention in Croatia's War of Independence

The government authorities of the Republic of Croatia, by undertaking the above mentioned measures aimed at protecting and preserving cultural property from war devastation, attempted to implement in full the provisions of the Hague Convention. In view of

¹⁵ Instructions on the undertaking of measures for the protection of cultural property in states of emergency (class: 612-08/91-01-43, Reg. no. 532-03-3/2-91-02) of July 8, 1991; Decree on measures of direct protection and salvage of cultural property in the Republic of Croatia (Cat. 612-08/91-01-91-60, Reg. no. 532-03-3/2-91-01) of August 22, 1991; Guidelines on the distinctive marking of cultural property (Cat. 612-08/91-01-43, Reg. no. 532-03-3/2-91-06) of July 29, 1991; Supplement to the Instructions on the undertaking of measures for the protection of cultural property in states of emergency (Cat. 612-08/91-01-43, Reg. no. 532-03-3/2-91-12) of September 19, 1991 and Decree on intensified measures of protection (Cat. 612-08/91-01-43, Reg. no. 532-03-3/2-91-14 of September 20, 1991.

the fact that prior to the aggression, the Republic of Croatia did not have its own armed forces, no possibility whatsoever existed that the Croatian military forces destructed or damaged cultural property. On the other hand the armed forces of the then SFRY (the so-called Yugoslav People's Army - JNA), deployed its troops in a large number of buildings categorised as immobile cultural property. The Fortress in Slavonski Brod can be mentioned as an example, then the summer house Garaganin-Fanfoga, the Gripe Fortress in Split, buildings within the Osijek Fortress, the Erdody Palace in Varaždin, the Citadel in Benkovac as well as many other cultural monuments the enumeration of which is impossible here.

As already mentioned, during the aggression on the Republic of Croatia, a large number of immovable cultural goods has been damaged or destructed regardless of the fact that the majority was marked with the distinctive emblem of the Hague Convention and that special technical measures had been taken regarding them. The disrespect of cultural property by the aggressor was the result of a premeditated strategy, the so called "scorched-earth tactics", and which implied not only the goal of conquering but also the execution of ethnic cleansing of the entire non-Serbian population, including the destruction of the material evidence of Croatian national identity. Evidence of this is the large number of plundered and destructed cultural monuments on the occupied territories, the unscrupulous bombing of the historic centre of Dubrovnik even after UNESCO's flag began to flutter on its walls, as well as numerous misappropriations of movable cultural property, the best known examples of which are the museum and sacral collections from Vukovar and Drniš.

The aggressor did not refrain from acts of razing cultural property to the ground, evident from the groundless destruction of cultural property on the occupied territories. We can mention as an example the Catholic church in the village Aljmaš, which the aggressor not only destroyed but removed its foundations and cleared the terrain in order to erase any trace of the church's existence. There are a large number of such examples. We cannot but mention the church of the Sacred Virgin Mary in Voćin, a unique example of medieval sacral architecture and which the aggressor filled with explosives and blew up when withdrawing from the village.

As can be concluded from the above, the behaviour of the aggressor on the territory of the Republic of Croatia did not comply with the provisions of Article 5 of the Convention since assessment of the status of cultural property in those regions was not permitted, and even less so the undertaking of measures for their preservation and protection by competent national authorities.

The Monitoring Mission of the European Community (ECMM) had as part of its mandate the task of assessing the status of cultural property, and jointly with the Croatian Conservation Service it monitored its status on the territory of the Republic of Croatia, with the exception of those in the occupied regions. The conclusion that can be drawn from the report of the European Community's Monitoring Mission is that during the whole duration of Croatia's War of Independence the Mission did not have full insight into the status of cultural property in the temporarily occupied regions. Just how the EC's Monitoring Missions kept a check on and assessed the status of cultural property can be depicted from the official forms used for that purpose (see pages 15-20).

After the arrival of UNPROFOR to the war inflicted regions the representatives of the Republic of Croatia requested on a number of occasion that UNPROFOR's mandate extend to establishing the status and salvaging the cultural property located on the occupied territories. This initiative gave certain results in the course of 1994.

As regards the implementation of Article 15 of the Convention, which stipulates that the opposing party respects the personnel engaged in the protection of cultural property, it should be noted that, as a rule, the personnel was expelled from the occupied territories, let alone had immunity or protection envisaged by the mentioned Article of the Convention granted.

Co-operation with UNESCO existed during the entire duration of the aggression against the Republic of Croatia. UNESCO actively participated in the protection of the historic centre of Dubrovnik included in the World Heritage List in 1979, and due to the war, in the Register of Cultural Property Under Special Protection. UNESCO's delegations visited

occupied Vukovar and Plitvice Lakes in order to gain insight into the status of cultural property and assess the level of damages caused by the war.

As far as the implementation of Articles 18 and 19 of the Convention is concerned, in the case of the Republic of Croatia the provisions of the Regulations on the Execution of the Convention were not applied. This can in part be explained by the fact that at the very beginning of the war it did not formally have the character of an international armed conflict. However, after the proclamation of the sovereignty and independence of the Republic of Croatia as well as its international recognition in 1992, the aggression on Croatia became an international issue. However, not even then were the mechanisms of protecting cultural property stipulated in the Regulations on the Execution of the Convention activated.

4. The Croatian Experience as an additional impetus for amending the Hague Convention

*"Aliorum exempla commonent."*¹⁶

Immediately after the first demolition of protected cultural property, which the Serbian aggressor began systematically implementing, the Croatian Service for the protection of cultural monuments was faced with limited possibilities of action. The cultural heritage that remained in the temporarily occupied regions became completely inaccessible. On the other hand, from the very beginning of the armed resistance of the Croatian people (considering that there were still no military formations at that time), exceptional co-operation was established between these resistance units and the Service for the protection of cultural monuments. Precisely this co-operation, which later continued with the formal units of the Croatian police and the military, enabled the salvage of a large number of movable cultural property items and taking of technical protection measures on immovable cultural property. Experience has therefore shown that the protection of cultural property in war is impossible without an educated army that is ready to co-operate with competent services for the protection of cultural monuments.

Having this experience, Croatia supported the initiative for the establishment of "Blue Shields", conceived as specialised units for protecting cultural heritage threatened by armed conflict or the consequences of certain natural disasters. According to the basis idea behind this initiative, these units would be established on three levels: international, national and local. The "Blue Shields" as a "first aid" system operate for the time being, only at the international level through the International Committee of the Blue Shield under UNESCO, while there are no visible developments on the national level in regard to establishing such units. It is important to note here that the Draft¹⁷ provisions for revising the Hague Convention recognise this new form of their activity, stipulating the inclusion of a representative of the International Committee of the Blue Shield as a member of the body that would monitor the execution of the Convention.

The Croatian service for the protection of cultural monuments, recognising that the fact that it faced an aggressor whose aim was to destroy Croatian national cultural heritage, systematically informed the international community of this intention, particularly all international specialised organisation such as UNESCO, ICOMOS, ICOM, Department for Cultural Heritage of the Council of Europe, and other bodies. Each report that was sent stirred the hope that Croatia would receive assistance at least in saving its cultural heritage. Accordingly, Patrick J. Boylan in a study¹⁸ on the Execution of the Hague Convention, commissioned by UNESCO and prepared in 1993, noted that during the war in Croatia serious damage was inflicted on the cultural heritage of mankind.

The aggressor justified every act of destruction by "military necessity", even the destruction of Catholic churches and other monuments deep within the occupied territory where no war operations were lead (for example, the church of the Blessed Virgin Mary in Aljmaš, in Voćin, etc.). Although it was clear to everyone that conditions for applying the institute of "military necessity" stipulated by Article 4 and 11 of the Convention did not exist, the systematic destructive behaviour of the aggressor and the violation of the Convention did not result in criminal prosecution.

¹⁶ "The example of others should serve as a warning", Latin legal saying, A. Romac "Latin legal sayings", p. 191, Globus Zagreb, 1982

¹⁷ Draft provisions for amending the Hague Convention established at the third meeting of states parties to the Convention held in Paris on November 13, 1997 and Resolution calling all member states to submit their comments on the Draft.

¹⁸ "Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict", UNESCO, 1993

It is interesting to note that almost at the same time the Croatian side was reprimanded for deploying in the defence of its cities and villages its troops along the front lines, and thereby in the immediate vicinity of cultural property. Disputing the right of a people to defend itself was really absurd, particularly because at the same time the aggressor's violation of the fundamental provisions of international laws of war, and among other things, the Hague Convention were tolerated.

Proceeding from the experience attained in the War of Independence, in the discussions on the future amendments to the Hague Convention, the representatives of Croatia opted for all changes that would increase the levels of effectiveness in the protection of cultural property in the event of armed conflict, and particularly for:

1. re-examining Article 1 of the Hague Convention which contains the definition of cultural property in view of the fact that from the adoption of the Convention to the present a large number of countries have in their national legislation expanded the definition of cultural property, including in it new types of cultural property such as, for example, cultivated landscapes;
2. establishing special protection in line with the Hague Convention for all cultural property included in UNESCO's List of World Heritage. UNESCO should submit the proposal for including that property in the International Register of Cultural Property Under Special Protection;
3. extending the definition of the grave violation of the Convention provisions to include the systematic, planned, and intentional destruction of protected cultural property, regardless of whether they are under special protection according to the provisions of the Hague Convention, and particularly in respect to the systematic, planned and intentional destruction of the same kind of cultural property, such as, for example, sacral buildings, museums, graveyard structures and etc.;
4. making responsible those individuals who have ordered such activities, including the responsibility for omitting to take measures and thereby seriously violating the provisions of the Hague Convention.

Croatia presented its experience by actively participating in all international gatherings and meetings on this topic, initiating processes geared at amending the Hague Convention. Accordingly, the representatives of Croatia took part at the NATO Partnership for Peace Conference¹⁹ held in Krakow on the topic: "The Protection of Cultural Heritage in Times of War and States of Emergency".

¹⁹ The Conference was held in Krakow from June 17-22 1996, and the representatives of Croatia were the only participants from a non-member country of NATO's Partnership for Peace.

**REPUBLIC OF CROATIA
MINISTRY OF CULTURE
AGENCY FOR THE PROTECTION OF CULTURAL HERITAGE
SPECIAL CENTRAL COMMISSION FOR THE LISTING
AND EVALUATION OF WAR-INFLICTED DAMAGE ON
CULTURAL MONUMENTS**

**WAR-INFLICTED DAMAGE
ON CULTURAL MONUMENTS 1991-1995
FINAL REPORT**

LEGAL FOUNDATION

The listing and evaluation of war-inflicted damage on cultural monuments have been performed under Article 5 of the War-Inflicted Damage Assessment Act ("Official Gazette n° 61/1991), in compliance with the Directive (of the minister of finance) on the Application of the War-Inflicted Damage Assessment Act ("Official Gazette n° 54/1993), and with the Instruction on the Application of the War-Inflicted Damage Assessment Act on Cultural Monuments on the Territory of the Republic of Croatia (Ministry of Culture & Education, Institute for the Protection of Cultural Monuments, Zagreb, 1993).

PREPARATIONS

Preparations for the listing and evaluation of war-inflicted damage on cultural monuments have begun in the course of fall, 1991, by establishing an expert commission at the Institute for the Protection of Cultural Monuments of the Ministry of Culture & Education. The said expert commission has performed the necessary professional preparations for the listing and evaluation of war-inflicted damage on cultural monuments and has elaborated the Instruction on the Application of the War-Inflicted Damage Assessment Act on Cultural Monuments on the Territory of the Republic of Croatia.

A special software was made for the computer processing of the data collected, installed on the local computer network of the Institute for the Protection of Cultural Monuments.

The State Commission for the Assessment of War-Inflicted Damage has appointed (by the act, Class Mark: 422-03/93-01/32; Reg. n°: 513-11/93-2 of 5 July, 1993) a Special Central Commission for the Listing and Evaluation of War-Inflicted Damage on Cultural Monuments, consisting of the following experts:

- Prof. Vladimir Ukrainčik, Head of the Department of Research & Information/Documentation Affairs at the Agency for the Protection of Cultural Heritage of the Ministry of Culture, Chairman of the Special Central Commission,
- Mr. Božidar Uršić, grad. eng. of arch., Senior Lecturer at the Zagreb University School of Architecture, Deputy Chairman of the Special Central Commission – for immovable cultural monuments,
- Prof. Ranka Saračević-Würth, Advisor at the Department for the Protection of Movable Cultural Monuments of the Agency for the Protection of Cultural Heritage of the Ministry

of Culture, Deputy Chairman of the Special Central Commission – for movable cultural monuments,

- Mr. Tomislav Petrinc, grad. eng. of arch., Advisor at the Regional Institute for the Protection of Cultural Monuments, member of the Special Central Commission – for immovable cultural monuments,
- Prof. Mario Braun, Director of the Art Restoration Institute, member of the Special Central Commission – for movable cultural monuments.

On 1 October, 1994, Prof. Branko Lučić, retired Senior Advisor at the Regional Institute for the Protection of Cultural Monuments in Zagreb replaced Ms. Ranka Saračević-Würth as the Deputy Chairman of the Special Central Commission – for movable cultural monuments. Ms. Saračević-Würth was even prior to that appointed for the evacuation and moving of movable cultural monuments.

All professional and organizational work on the listing and evaluation of war-inflicted damage on cultural monuments was completed in the course of 1992.

THE METHOD OF LISTING AND EVALUATING WAR-INFLECTED DAMAGE ON CULTURAL MONUMENTS

In compliance with clause 2 of the Directive on the Application of the War-Inflicted Damage Assessment Act ("Official Gazette n° 54/1993), it has been established that the war-inflicted damage on cultural monument is the pecuniary amount which must be ensured in order to cover the costs of restoring the cultural monument to its original state prior to damaging.

Based on the methods applied in earlier lists and evaluations of damage caused by earthquakes (Dubrovnik, 1979; Dalmatia; 1986), and the Instruction on the Application of the Act on the Establishment and Work of Commissions for The Listing And Evaluation of War-Inflicted Damage, taking into account specific occurrences resulting from war destructions, the present Expert Commission has elaborated a special method for the listing and evaluation of war-inflicted damage on cultural monuments.

Abiding by the aforementioned Directive of the minister of finance, it was necessary to establish how is the listing and evaluation of war-inflicted damage on cultural monuments different from war-inflicted damage assesment on other buildings.

The most important element of the evaluation specified by the said Directive of the minister of finance, "Standard Calculation of Civil Engineering Works", was adapted to the needs of the war-inflicted damage assesment on cultural monuments by making a catalogue (a classification) of the historic buildings' construction elements under clause 27 of the said Directive.

The listing and evaluation of war-inflicted damage on immovable cultural monuments were performed mainly using the elemental breakdown. By using this particular evaluation method, damage was assessed done to individual construction elements (in quantitative terms, i.e. in percentage) with regard to their condition prior to damaging. Using a special customized software, the total amount of damage referring to individual cultural monuments was established.

Apart from elemental breakdown, bill of quantities was also used. This method has ensured the highest possible accuracy and has been applied in all cases where the owners themselves have prepared the technical documentation for reconstruction i.e. in cases where there were financial records of the reconstruction already performed.

In cases where the lack of documentation or the impossibility to recognize original building elements (due to complete destruction and removal of debris) made it impossible to apply either of the two above mentioned methods, we have applied the overall assessment.

The listing and evaluation of war-inflicted damage on movable cultural monuments were performed according to a method that was entirely suited to material types, while it was at the same time also set by the Instruction on the Application of the War-Inflicted Damage Assessment Act on Cultural Monuments on the Territory of the Republic of Croatia.

IMMOVABLE CULTURAL MONUMENTS

General Comments

The listing and evaluation of war-inflicted damage was performed by expert teams consisting of three members each, coming mostly from the institutes for the protection of cultural monuments. Before the beginning of the field work, they received a special training organized by the Institute for The Protection of Cultural Monuments of the Ministry of Culture and Education, instructing them on their obligations, manner of work, and application of the method of listing and evaluation of war-inflicted damage set by the Directive of the minister of finance and the Instruction on the Application of the War-Inflicted Damage Assessment Act on Cultural Monuments on the Territory of the Republic of Croatia (Ministry of Culture & Education). These commissions featured 120 experts (architects, civil engineers, art historians, ethnologists, archeologists, art restorers specialized in various fields, museum curators, archivists, and librarians). Along with their regular jobs at their parent institutions (mostly cultural monuments protection institutions), they were performing a highly strenuous, and often even dangerous job of reviewing damaged, destroyed and uncleared historic buildings debris.

The verification of the listing documentation for the Special Central Commission for the Listing and Evaluation of War-Inflicted Damage on Immovable Cultural Monuments was performed by Mr. Božidar Uršić, grad. eng. of arch., Deputy Chairman, and Mr. Tomislav Petrinc, grad. eng. of arch., member of the Special Central Commission For The Listing And Evaluation Of War-Inflicted Damage on Cultural Monuments.

For the State Commission for the Assessment of War-Inflicted Damage, the verification of the listing documentation was performed by Mr. Dražen Aničić, DSc, principal reviser of the State Commission for The Listing And Evaluation of War-Inflicted Damage.

Areas Accessible by June i.e. August, 1995

The field work on the territory of the Republic of Croatia accessible by June i.e. August, 1995 was completed by 30 June, 1994, while the final processing and verification were performed by December, 1995. Over 2,000 historic buildings were inspected in that area and the war damage was assessed on 1,861 immovable cultural monuments. It has been established that the total floor area of damaged/destroyed cultural monuments in this area was 1 552,587 m², and that it amounts to DEM 261,778,714,28.

Areas Liberated by the Police/Military Actions “The Flash” and “The Storm”

The field work in areas liberated by the police/military actions “The Flash” and “The Storm” was performed in the fall of 1995 and in the course of 1996, while the final processing and verification was completed towards the end of May, 1997. Over 500 historical buildings were inspected in that area and war-inflicted damage was assessed on 378 immovable cultural monuments. It has been established that the total floor area of damaged/destroyed cultural monuments in these areas was 181,485 m², and that it amounts to DEM 123,836,857,14.

The Danube Basin Area

Over 300 historical buildings were inspected in the Danube Basin area and war-inflicted damage was assessed on 201 immovable cultural monuments (31 on the territory of the Osijek/Baranya County, and 170 on the territory of the Vukovar/Syrmia County. It has been established that the total floor area of damaged/destroyed cultural monuments in the Danube Basin area was 142,511 m², and that it amounts to DEM 145,353,285,71 .

The Territory of the Republic of Croatia

On the entire territory of the Republic of Croatia, war-inflicted damage has been assessed on 2,423 immovable cultural monuments with the total floor area of 1 859,162 m² in the amount of DEM 529,000,142,86.

TYPE OF BUILDING	NUMBER OF DAMAGED MONUMENT – DAMAGE DEGREE ²⁰							FLOOR AREA m ²	AMOUNT DEM
	1	2	3	4	5	6	Σ		
Historic-memorial	4	4	3	0	1	3	15	32501	3,580,142,86
Civil	405	564	458	117	176	39	1759	1342325	305,411,428,57
Military or Defence	12	23	20	4	1	0	60	161120	19,292,714,28
Industrial	6	14	11	13	8	9	61	42701	9,994,571,43
Religious	88	78	101	64	83	81	495	259060	189,074,142,85
Sepulchral/Cemeteries	3	3	2	3	2	2	15	1376	1,215,857,14
Sculpture/street furniture	6	4	5	0	1	2	18	20086	431,285,71
TOTAL	524	690	600	201	272	136	2423	1,859,169	529,000,142,86

Most cultural monuments were damaged on the territory of the Dubrovnik & Neretva County (683 cultural monuments) and on the territory of the Osijek & Baranya County (356 cultural monuments).

Out of all building types, the ones hit the most were those civilian (1,759). Most of them were damaged or destroyed in the area of historic urban complexes, while the war-inflicted damage on historic buildings within these complexes amounts to nearly ¾ of total war-inflicted damage on immovable cultural monuments (72.6%).

Religious cultural monuments (churches and monasteries) come second as regards the number of damaged monuments. Most severely affected are the religious buildings in the areas that were occupied. In these areas nearly all religious buildings belonging to the Roman Catholic Church were either heavily damaged or completely demolished, most frequently by planting explosives or burning down. We should stress that these areas (and especially that of the Zadar/Knin and Šibenik Counties) hold most early Romanesque and Romanesque buildings from the earliest periods of Croatian history.

The heaviest damage was assessed in the areas that were temporarily occupied.

On the territory of the Vukovar & Syrmia County, 5th and 6th category damage was established for 94 cultural monuments (34.6% with regard to the total number of damaged

²⁰ War-inflicted damage degrees: 1 - light superficial damage; 2 - light structural damage; 3 - light bearing structure damage; 4 - heavy bearing structure damage; 5 - partially demolished buildings; 6 - completely demolished buildings.

cultural monuments i.e. 25.4% with regard to the entire monumental holdings of immovable cultural monuments on county territory).

On the territory of the Zadar/Knin County, the 5th and 6th category damage was established for 44 cultural monuments (40.0% with regard to the total number of damaged cultural monuments i.e. 15.9% with regard to the entire monumental holdings of immovable cultural monuments on county territory).

On the territory of the Sisak and Moslavina County, the 5th and 6th category damage was established for 84 cultural monuments (37.6% with regard to the total number of damaged cultural monuments i.e. 20.3% with regard to the entire monumental holdings of immovable cultural monuments on county territory).

On the territory of other counties affected by war destruction, the percentage is much lower or there are no destroyed (category 6 damage) or partially destroyed cultural monuments (category 5 damage).

The heaviest damage, where the pecuniary amount is the highest, has been established for the following monumental complexes and individual immovable cultural monuments:

SETTLEMENT, MONUMENTAL COMPLEX/ MONUMENT	ACREAGE m ²	DAMAGE CATEGORY	DEM
LIPIK, health resort historical complex	12009	3-5	14,892,714,28
VUKOVAR, the Eltz manor house complex	7425	5-6	13,096,000,00
VUKOVAR, Franciscan friary and the church of St. Philip and Jacob	4384	5	12,540,857,14
VUKOVAR, the Workers' Hall building	3891	5	11,195,857,14
VUKOVAR, the regional court palace	3600	5	7,379,000,00
Zagreb, ViceRoy's palace	5148	4	6,661,000,00
BELIŠĆE, the Gutmann palace	2969	5	5,741,142,86
PETRINJA, St. Lawrence's parish church	1077	6	5,528,142,85
VUKOVAR, the Syrmia county palace	2675	5	5,435,000,00
OSIJEK, St. Paul & St. Peter's church	3815	4	5,198,000,00
GORA, St. Mary's church	686	6	5,039,000,00
VUKOVAR, the old gymnasium building	3855	5	4,844,571,43
HRVATSKA KOSTAJNICA, St. Nicholas' church	1007	6	3,978,857,14
KARLOVAC, St. Nicholas church	600	6	3,861,428,57
STARA GRADIŠKA, the "Tower" building	5715	4	3,824,571,42
VOĆIN, the church of the Visitation of the Blessed Virgin Mary	710	6	3,742,571,43
DUBROVNIK, Franciscan friary and St. Francis' church	6082	4	7,127,285,71

Since the total number of the so far registered and preventively protected immovable cultural monuments on the territory of the Republic of Croatia amounts to 7,023 cultural monuments, it turns out that around 34.5% of its legally protected monumental holdings has been damaged more or less heavily. If we take into account that the 5th and 6th damage category buildings are unusable i.e. entirely destroyed, it means that – in the course of war destruction during the Patriotic War from 1991-1995, nearly 6% of Croatia's immovable monumental holdings have been destroyed.

Some Properties of War-Inflicted Damage on Immovable Cultural Monuments

Damage done to historical buildings in the course of aggression against Croatia in the 1991-1995 period may be classified into several characteristic groups:

- war damage caused during the war (towards the end of 1991 and the beginning of 1992) in settlements in the vicinity of which war operations were conducted. Damage due to a large number of mortar shells was mostly caused to roofs (demolished or damaged cover, direct hits damaging roof and inter-floor structure) and building fronts (mostly by shell fragments and less frequently by direct hits). Such damage has been established on a large number of historical buildings in the areas of historic urban complexes of Osijek, Vinkovci, Pakrac, Slavonski Brod, Otočac, Gospić, Karlovac, Zadar, Šibenik, Mali Ston, and Dubrovnik, as well as of the historical health complex of Daruvar. Damage caused in such a way was not destructive and usually does not transgress damage category 3 ("light structural damage").
- In the vicinity of war operation zones, the Yugoslav National Army was attacking with larger calibre shells, while the use of ammunition with phosphorous fill has also been registered. Damage resulting from such actions was established on the historical complexes of Dubrovnik, Zadar, Vinkovci, and Karlovac, and of the historical health complex of Lipik. Thus caused damage has had far heavier consequences than the ones just mentioned. Direct hits caused mostly 4th or 5th damage category ("heavy structural damage" or "partially destroyed building"), as is the case with seven Dubrovnik's palaces within the City, the library in Vinkovci, or the Rector's Palace in Zadar and centre of a village Čilipi.
- Religious buildings in the settlements that were not occupied mostly suffered damage to church towers which were hit although they were visibly marked by The Hague Convention sign. The most obvious such case is St. Ladislav church tower in Pokupsko, where it was precisely The Hague Convention sign that was hit by automatic weapons, or St. Lawrence's church tower in Petrinja which was, before the church was completely destroyed, hit from the local military barracks in spite of the visibly placed The Hague Convention sign.
- In temporarily occupied areas, the Serbian terrorist and paramilitary groups were plundering, burning, and planting large quantities of explosive into all Catholic religious buildings. The same destiny was shared by numerous villages with predominant or only Croatian population, holding many traditional buildings and characteristic housing/outbuilding complexes prior to destruction. Such damage has been established in all areas that were – for a longer or shorter period of time – occupied by paramilitary Serbian and Chetnic formations i.e. on the entire territory liberated by the operations "The Storm" and "The Flash"; in Konavle (especially Čilipi), in the area of Slano, in Lipik and Voćin. The same kind of damage has been established in many Slavonian villages in the area of the Vukovar and Syrmia County (Bogdanovci, Cerić, Donje selo, Antunovac, Lipovac, Marinci, and so on). The area of Ravni kotari in Zadar hinterland was particularly heavily hit: the explosive was planted in nearly all Roman Catholic churches and monasteries, while the Serbian Orthodox buildings remained nearly intact.
- Heavy consequences in all areas affected by war actions were established on all buildings where the necessary – at least preventive or temporary – repairs were not undertaken immediately after damaging. In such cases, even minor damage done to cultural monuments, often caused by minor shell hits or even merely air impacts (upset cover and the like) could lead to catastrophic consequences if they were abandoned after damaging and exposed to prolonged (several-year) impact of the weathering factors.

WAR-INFLICTED DAMAGE ON MOVABLE CULTURAL MONUMENTS

Due to priority identified for the listing and evaluation of war-inflicted damage on immovable monuments, given the huge number of objects that needed attention and the lack of expert personnel, it was impossible to begin the listing of movable cultural monuments at the same time as that of those immovable. That is why during the time when the present report was being elaborated, there were still no conclusive data on the consequences of war actions on movable cultural monuments.

The data supplied by all those involved in the the listing and evaluation of war-inflicted damage on movable monuments, (cultural monuments protection institutions, the Museum Documentation Centre, the Croatian National Archives, the National & University Library) make it possible to draft a preliminary report on the war-inflicted damage done to movable monuments, according to which:

- 2,207 movable cultural monuments are missing / destroyed / plundered from 151 mostly religious buildings. According to the yet insufficiently processed and unverified listing documentation, the total war damage is estimated at DEM 37,139,475,86.
- war damage done to movable cultural monuments that have been evacuated or moved from the original place has been established for 1,809 items from 80 religious cultural monuments. According to the insufficiently processed and unverified listing documentation, the total war damage is estimated at DEM 9,201,808,28.
- war damage caused to archival holdings has been listed, but the listing documentation has been processed only partially and has not been verified yet. It has been established that 402 archival holdings have been destroyed in the total length of over 3,182 meters, preliminarily estimated at the amount of DEM 15,914,075,00.
- museum holdings pertaining to 45 museums and museum collections have been damaged (6,551 museum exhibits are missing, with 1,430 being destroyed and 728 damaged), while the war damage - according to the insufficiently processed and unverified listing documentation, is estimated at DEM 5,666,672,00 .

RECAPITULATION OF THE WAR-INFLICTED DAMAGE ON CULTURAL MONUMENTS AND CONCLUSION

War damage on immovable cultural monuments	DEM	529,000,142,86
War damage on movable cultural monuments	DEM	67,922,031,14
Costs of listing and evaluation of war-inflicted damage on cultural monuments	DEM	341,939,66
Total	DEM	597,264,113,66

The listing and evaluation of the war-inflicted damage has assessed the current condition of nearly one third of the total number of legally protected cultural monuments on the territory of the Republic of Croatia, the destruction of which began in 1991. Apart from the very difficult condition caused by abandonment, neglect and inadequate conduct towards many monumental buildings, which was known even before, the listing has established the catastrophic condition of a part of cultural heritage – both movable and immovable – that has been exposed to savage actions of paramilitary groups, but also of the former state's regular army which was the legal signatory of The Hague Convention. Its Government, while adopting The Hague Convention, has adopted and published a special Declaration on the Protection of Cultural Property in Cases of Armed Conflicts, and its chief commanding officer has ordered to the military forces of Yugoslavia the application of the international war law, which, in the chapter on the protection of cultural monuments, states in particular the

following: "While bombarding defended places, all the necessary precautions must be undertaken in order to protect as much as possible ... cultural property and buildings intended for religious services (churches and temples), unless they are used for military purposes". Destruction of cultural property has been qualified in the Directive as a criminal act. Contrary to these international commitments, the Yugoslav National Army and the paramilitary forces accompanying it were targeting also buildings intended for religious services and cultural property, none of which was used for military purposes.

Athina Christofidou

Architect - ICOMOS/Greece

The concept of permanent cultural properties in International and European Conventions, Declarations and Charters

In 1931, in the capital of Greece, which is homonymous with our host city, the first International Congress on monuments and their management, organized by the International Museums Office, formulated the first principles of the conservation and restoration of monuments and stressed the need for an international cooperation in that area. The 72 years since then have been very fruitful with regard to the production of international instruments on that issue. The 1st International Congress of Architects and Technicians of Historic Monuments, which took place in Paris in 1957, tried to specify the Athens guidelines, however it was the establishment of ICOMOS and the approval of the Venice Charter by the Second International Congress of Architects and Technicians of Historic Monuments, which took place in Venice in May 1964, that was a turning point in the history of the conservation and restoration of monuments and sites.

The Venice Charter does not contain any definitions. It considers the concept of “historic monument” for granted and commonly accepted and simply incorporates sites as well in that concept, clarifying that: *“The concept of an historic monument embraces not only the single architectural work, but also the urban or rural setting in which is found the evidence of a particular civilization, a significant development or a historic event. This applies not only to great works of art, but also to more modest works of the past which have acquired cultural significance with the passing of time”* (Article 1). The Venice Charter makes a short reference to Historic Sites (Article 14). In this particular area, it was supplemented in 1987 by the Charter for the Conservation of Historic Towns and Urban Areas, which was adopted by the ICOMOS General Assembly in Washington, DC.

Criteria are established and definitions are made for the first time by the Convention concerning the protection of the World Cultural and Natural Heritage (Paris 1972), which, however, pertains only to monuments, groups of buildings and sites of an outstanding universal value and not to the permanent cultural properties of each State’s cultural heritage. For the purposes of this Convention, the following cultural properties are considered as “cultural heritage”:

- *“monuments: architectural works, works of monumental sculpture and painting, elements or*

structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

- *groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;*
- *sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view”.*

The same Convention provides definitions for the elements of “natural heritage”.

The European Charter of the Architectural Heritage, adopted in September 1975 by the Committee of Ministers of the Council of Europe, takes for granted the concept of monument. It neither gives any definitions nor establishes criteria, it does, however, define the content of the European Architectural Heritage in its 1st Article: *“The European Architectural Heritage consists not only of our most important monuments: it also includes the groups of lesser buildings in our old towns and characteristic villages in their natural or manmade settings”*. The concept of integrated conservation is introduced for the first time in the same text.

That same year, the European Congress on the Conservation of the Architectural Heritage, which was the most significant event of the European Architectural Heritage Year (1975), acknowledges the previous Charter and incorporates its principles in the Declaration of Amsterdam for the protection of the European Architectural Heritage, placing emphasis on groups of buildings. It moreover specifies that: *“The architectural heritage includes not only individual buildings of exceptional quality and their surroundings, but also all areas of towns or villages of historic or cultural interest”*, proceeding to give an indirect definition of groups of buildings, incorporating therein historic towns, the old quarters of cities and villages with a traditional character, as well as historic parks and gardens. The Florence Charter (1981) refers to the latter, proposing measures for their protection and providing a definition, classifying historic gardens in the category of monuments: *“An historic garden is an architectural and horticultural composition of interest to the public from the historical or artistic point of view. As such, it is to be considered as a monument”*.

The Declaration of Amsterdam does not forget future heritage, and therefore calls for every effort to be made to ensure that contemporary architecture is of a high quality. It furthermore adopts

the concept of integrated conservation, placing the conservation of the architectural heritage among the most important urban and country planning objectives, stressing the need for the substantial participation of local authorities and the citizens and analyzing the social and economic dimensions of conservation.

A few months later, on April 14, 1976, the Resolution (76)28 of the Committee of Ministers of the Council of Europe “Concerning the adaptation of laws and regulations to the requirements of integrated conservation of the Architectural Heritage” regulated in an exceptionally analytical and systematic manner the issues pertaining to integrated conservation. It clarified this concept offering the following definition:

“By integrated conservation of the cultural heritage of monuments and sites is meant the whole range of measures aimed at ensuring the perpetuation of that heritage, its maintenance as part of an appropriate environment, whether manmade or natural, its utilisation and its adaptation to the needs of society”.

It placed the principal objectives of the measures to be adopted in the implementation of integrated conservation:

1. *“The conservation of monuments, groups of buildings and sites through:*

- *measures to safeguard them;*
- *steps to ensure the physical preservation of their constituent parts;*
- *operations aimed at their restoration and enhancement.*

2. *The integration of monuments, groups of buildings and sites into the physical environment of present-day society through programmes designed to:*

- *revitalize monuments and old buildings belonging to groups by assigning them a social purpose, possibly differing from their original function but compatible with their dignity, and as far as possible in keeping with the character of their setting;*
- *rehabilitate buildings, particularly those intended for habitation, by renovating their internal structure and adapting it to the needs of modern life, while carefully preserving features of cultural interest”.*

The same Resolution formulated for the first time definitions for a State’s cultural heritage:

“For the purpose of the present resolution, a country’s cultural heritage of monuments and sites is considered to comprise:

- *the architectural heritage consisting of monuments and groups of buildings,*
- *sites.*

The term monument denotes architectural works, whether conceived on a grand or on a modest scale, including both fixtures and fittings, as well as monumental sculptures of historical,

archaeological, artistic, scientific, cultural or social interest. The term group of buildings denotes a group of urban or rural buildings fulfilling the following criteria:

- *They must be of interest by reason either of their social, historical, archaeological, scientific or artistic value, or of their typical or picturesque character;*
- *They must form a coherent whole or be remarkable for the way they fit into the landscape;*
- *They must be sufficiently closely grouped to allow the buildings, the structures connecting them and the site which they occupy to be delimited geographically.*

The term site denotes an area with well-defined limits created by nature, or by man and nature jointly, remarkable for its beauty or its archaeological, historical, artistic, cultural, scientific or social interest”.

Particular attention was paid these years in the protection of Archaeological Heritage. One ICOMOS Charter, two Conventions of the Council of Europe and one Recommendation were devoted to this issue:

- The Charter for the Protection and Management of the Archaeological Heritage (Lausanne, 1990) defines Archaeological Heritage as that *“part of the material heritage in respect of which archaeological methods provide primary information. It comprises all vestiges of human existence and consists of places relating to all manifestations of human activity, abandoned structures and remains of all kinds (including subterranean and underwater sites), together with all the portable cultural material associated with them”.*
- The European Convention on the Protection of the Archaeological Heritage (London, 1969) also provides a definition of the Archaeological Heritage: *“For the purposes of this convention, all remains and objects, or any other traces of human existence, which bear witness to epochs and civilizations for which excavations or discoveries are the main source or one of the main sources of scientific information, shall be considered as archaeological objects”.*
- The Recommendation R(89)5 concerning the protection and enhancement of the Archaeological Heritage in the context of town and country planning operations supplemented the previous Convention.
- In 1992, the European Convention on the Protection of the Archaeological Heritage was revised by the Valetta Convention with the same title and supplemented with the principles of integrated conservation. The revised Convention also supplemented the definition of the Archaeological Heritage:

1. “The aim of this (revised) Convention is to protect the Archaeological Heritage as a source of the European collective memory and as an instrument for historical and scientific study.

2. *To this end shall be considered to be elements of the Archaeological Heritage all remains and objects and any other traces of mankind from past epochs:*

- *the preservation and study of which help to retrace the history of mankind and its relation with the natural environment;*
- *for which excavations or discoveries and other methods of research into mankind and the related environment are the main sources of information; and*
- *which are located in any area within the jurisdiction of the Parties.*

3. *The Archaeological Heritage shall include structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under water”.*

In 1985, the Convention for the Protection of the Architectural Heritage of Europe (Granada Convention) clearly rephrases the definitions of monuments, groups of buildings and sites, adding “technical interest” to the qualitative criteria of the previously mentioned Resolution R(76)28, thus enlarging the concept of the heritage:

- *“Monuments: all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings;*
- *Groups of buildings: homogeneous groups of urban or rural buildings conspicuous for their historical, archaeological, artistic, scientific, social or technical interest, which are sufficiently coherent to form topographically definable units;*
- *Sites: the combined works of man and nature, being areas which are partially built upon and sufficiently distinctive and homogeneous to be topographically definable and are of conspicuous historical, archaeological, artistic, scientific, social or technical interest”.*

Even though these are definitions expressed in broad enough terms to cover all permanent cultural properties requiring conservation, the Convention also provides for buildings “*which are of interest from the point of view of their setting in the urban or rural environment and of the quality of life*”. In Article 10, it calls for the conservation and use of these buildings in the process of country and town planning. Furthermore, it does not overlook the future heritage and in Article 17 urges the Contracting Parties to adopt measures on the promotion of architectural creation as our age’s contribution to the European Heritage.

Apart from the definitions, the basic points of the Granada Convention text are the following:

- It requires the identification and recording of the architectural heritage.
- It prescribes specific actions for the Administration towards an effective protection of the architectural heritage (establishment of statutory protection measures, financial-taxation

measures, encouragement of private initiative, improvement of the quality of the surroundings of monuments, anti-atmospheric pollution policies, penalties for infringements of the law protecting the architectural heritage).

- It establishes the principle of integrated conservation.
- It encourages the use of protected properties.
- It stresses the need for making visits to the monuments easier.
- It emphasizes the significance of participatory processes, the development of sponsorships, the information and training of the public.
- It asks for the promotion of training in the various occupations and craft trades involved in the conservation of the architectural heritage.
- It places the foundations for the coordination of protection policies at a European level.

The importance of the Granada Convention is great. One could say that it has expressed, in the framework of one instrument, all the modern tendencies in the protection of the architectural heritage. The protection of the architectural heritage escapes its former meaning of isolation and conservation in museums and becomes part of the individual policies on economic, social and cultural development, being considered - no more as an inhibitory factor - but as a means for the improvement of the environment in which man lives. Modern man is no more the passive recipient of whatever restrictions are the result of the conservation of a monument, becoming instead an active participant, with a right to information. The whole text of the Convention revolves around this central idea.

However, the preoccupation with this issue does not stop in 1985. The protection “umbrella” is constantly enlarged. The following Recommendations of the Council of Europe come next:

- “On urban open space”, R(86)11, which makes note that open space is an essential part of the urban heritage, as well as a strong element in the architectural and aesthetic form of a town.
- “On the protection and enhancement of the rural architectural heritage”, R(89)6.
- “On the protection and conservation of the industrial, technical and civil engineering heritage in Europe”, R(90)20.
- “On the protection of the twentieth century architectural heritage”.

At the 3rd European Conference (Malta, January 16-17, 1992) the Ministers responsible for the Cultural Heritage call for the continued development of the concept of cultural heritage protection, specifically by identifying categories of monuments that are inadequately protected or not even protected at all and drawing up appropriate specific strategies.

Thus, the number of permanent cultural properties requiring protection is constantly rising. Are we worshipping the past or seeking our lost identity? I believe that we must answer this question with a characteristic extract from the Declaration of Amsterdam, which is still appropriate, and with which I will bring this short “tour” of the International Principles on the protection of the cultural heritage to its conclusion:

“The significance of the architectural heritage and the arguments for conserving it are now more clearly recognised. It is accepted that historical continuity must be preserved in the environment if we are to maintain or create surroundings which enable individuals to find their identity and feel secure despite abrupt social changes”.

**CULTURAL RESOURCES LISTINGS:
PHILIPPINE NATIONAL LAWS**

By: ROSE BEATRIX CRUZ-ANGELES

“The importance of these places and objects in delineating our identity as a nation cannot be denied. As they coalesce with the environment as sources of images and memories, they embody the historicity of our culture. Culture is an abstract concept and can be concretized tangibly through material cultural artifacts. Physical cultural heritage structures/objects are by nature neither renewable nor reproducible. Each cultural artifact is created within the contextual specificity of geographic, temporal, and social environment, and conveys with it the testimony of people’s knowledge, experience, values, and way of life. When cultural objects are damaged or destroyed, a fragment of this testimony is irrevocably lost.”¹

Jaime C. Laya
Chairman
National Commission for Culture and
the Arts of the Republic of the
Philippines

¹ LAWS AND JURISPRUDENCE ON BUILT HERITAGE, National Commission for Culture and the Arts, Manila, 2001, page ii

The Philippines, whose rich history can still be discerned in its remaining few heritage sites, suffers from a surfeit of protective national laws. The lack of a single comprehensive legislation for the protection and conservation of built heritage has led to much confusion in the implementation of existing Philippine laws on the subject matter. Currently, the Heritage Conservation Society, the first national non-government organization aimed specifically at the protection, preservation and promotion of Philippine built heritage has undertaken to lobby to update and rationalize the various scattered bits of legislation. It is hoped that this paper will contribute to that effort.

Protected Sites

Sites considered protected are categorized as monuments², cultural properties, historical sites, archeological sites,³ national shrines,⁴ military memorials⁵ or battle monuments⁶, and edifices⁷.

² REPUBLIC ACT No. 841 An Act to Designate the District or City Engineers to Take Charge of Reconstructing, Maintaining, Protecting and Cleaning Monuments and Historical Markers Situated Within Their Respective Jurisdictions and Regulating the Construction or Manufacture of Such Structure or Plaque to Perpetuate the Memory of a Person or Event (1953) sec. 2 and

A monument is defined as a construction built for the purpose of perpetuating the memory of a person or event.⁸

Cultural properties, on the other hand, are a specific category designated by law⁹ to protect certain outstanding cultural property among others, old buildings, monuments, shrines, documents and objects which may be

REPUBLIC ACT No. 4846 An Act to Repeal Act Numbered Thirty Eight Hundred Seventy Four, and to Provide for the Protection and Preservation of Philippine Cultural Properties (1968) as amended by PRESIDENTIAL DECREE No. 374 or Amending Certain Sections of Republic Act No. 4846, Otherwise Known as the Cultural Properties Preservation and Protection Act, sec. 3 (1974) and PRESIDENTIAL DECREE No. 260 Declaring the Sta. Ana Site Museum in Manila, the Roman Catholic Churches of Paoay and Bacarra in Ilocos Norte, the San Agustin Church and Liturgical Objects Therein in Intramuros, Manila, Fort Pilar in Zamboanga City, the Petroglyphs of the Rockshelter in Angono, Rizal, the Petroglyphs of Alab, Bontoc, the Stone Agricultural Calendars of Dap-ay, Guiday in Besao, Bontoc, the Mummy Caves of Kabayan, Benguet and of Sagada and Alab, Bontoc, the Ifugao Rice Terraces of Banaue as National Cultural Treasures, and the Barasoain Church in Malolos, Bulacan, Tirad Pass in Cervantes, Ilocos Sur, the Miagao Church in Miaga, Iloilo, the Site of the Battle of Mactan on Mactan Island, Cebu, the San Sebastian Church in Quiapo, Manila, and the Church and Convent of Santo Niño in Cebu City, as National Shrines, Monuments and/or Landmarks, Defining the Implementing Agencies and Providing Funds Therefore, (1973) as amended by PRESIDENTIAL DECREE No. 1505 Amending Presidential Decree No. 260, as amended, by Prohibiting the Unauthorized Modification, Alteration, Repair and destruction of Original Features of All National Shrines, Monuments, Landmarks and Other Important Historic Edifices (1978) sec. 4.

³ REPUBLIC ACT 4846 (1968) as amended by PRESIDENTIAL DECREE No. 374 (1974), *ibid*

⁴ PRESIDENTIAL DECREE No. 105 Declaring National Shrines as Sacred (Hallowed) Places and Prohibiting Desecration Thereof (1973)

⁵ PRESIDENTIAL DECREE No. 1076 Amending Part XII on Education and Part XIX on National Security of the Integrated Reorganization Plan, By Transferring the Functions of the Defunct National Shrines Commission to the Department of National Defense.

⁶ PRESIDENTIAL DECREE No. 1076 (1977) *ibid*

⁷ PRESIDENTIAL DECREE No. 1505, Amending Presidential Decree No. 260, as amended, by Prohibiting the Unauthorized Modification, Alteration, Repair and destruction of Original Features of All National Shrines, Monuments, Landmarks and Other Important Historic Edifices (1978)

⁸ REPUBLIC ACT No. 841 sec. 2, *ibid*

⁹ REPUBLIC ACT No. 4648, sec. 3a, *ibid*

classified as antiques, relics or artifacts, landmarks, anthropological and historical sites, The purpose of the law is to classify certain cultural property into national cultural treasures¹⁰ or important cultural properties¹¹. National cultural treasures are unique objects found locally, possessing outstanding historical, cultural, artistic and/or scientific value which is highly significant and important to the country. Cultural properties which have been singled out from among the innumerable cultural properties as having exceptional historical and cultural significance to the Philippines, but are not sufficiently outstanding to merit the classification of “national cultural treasures” are important cultural properties. Designated National Cultural Treasures are required to be marked, described and photographed by the National Museum¹².

Cultural Properties may be historical sites or archeological sites. Historical sites¹³ are places, provinces, cities, towns and/or any location or structure, which has played a significant and important role in the history of the Philippines. Such significance and importance may be cultural, political,

¹⁰ REPUBLIC ACT No. 4648, sec. 3c, *ibid*

¹¹ REPUBLIC ACT No. 4846, sec. 3b *ibid*

¹² REPUBLIC ACT No. 4648, sec. 7a

¹³ *ibid*, sec. 3 (i)

sociological or historical. (RA 4648). Archeological sites¹⁴ are places which may be underground or on the surface, underwater or at seal level which contain fossils, artifacts and other cultural, geological, botanical, zoological materials which depict and document evidence of paleontological and pre-historic events.

National shrines are sites of birth, exile, imprisonment, detention or death of great and eminent leaders of the nation.¹⁵ Military memorials or battle monuments are kinds of national shrines under the protection and maintenance of the Department of National Defense, (PD 1076).

The term “landmark” (PD 1505) appears in various Philippine laws, specifically those designating the National Historical Commission, now Institute, together with the term “historic markers¹⁶” and “names¹⁷” (RA 841 and PD 105) however, none of these terms appear to have a specific definition under the law, and we presume them to carry to their ordinary meanings.

¹⁴ *ibid* sec. 3 (j)

¹⁵ PRESIDENTIAL DECREE No. 105, *supra*

¹⁶ REPUBLIC ACT NO. 841, *supra*

¹⁷ PRESIDENTIAL DECREE No. 105, *supra*.

How listed

National Cultural Treasures are declared by a panel of three experts convened by the Director of the Museum¹⁸. The panel is composed of experts in the field of among other, “shrines and monuments,” and after careful study and deliberation these experts decide which among the cultural properties in their field of specialization qualify to be declared as national cultural treasures of important cultural properties.

The panel is convened only as the need for their services arise, and may be convened to declassify cultural properties.

Prior to the actual designation, the owner, if the property is privately owned, is notified at least fifteen days prior to the intended designation¹⁹. The said owner is then invited to attend the deliberation and given a chance to be heard. Failure on the part of the owner to attend the deliberation does not bar the panel from rendering its decision. Decision must be given by the panel within a week after its deliberation. In the event that the owner desires to seek reconsideration of the designation made by the panel, he may do so

¹⁸ REPUBLIC ACT No. 4846, sec. 6

within 30 days from the date that the decision has been rendered. If no request for reconsideration is filed after this period, the designation is then considered final and executory. Any request for reconsideration filed within thirty days and subsequently again denied by the panel, may be further appealed to another panel chaired by the Chairman of the National Commission for Culture and the Arts (NCCA)²⁰, with two experts as members appointed by the NCCA Chairman. Their decision shall be final and binding.

Historical sites, monuments and shrines which do not constitute national cultural treasures or important cultural properties are deliberated upon and declared as such by the National Historical Institute Board composed of the Director of the National Library, the Director of the National Archives, and two notable historians. No criteria are available on how such declarations are made. However, the NHI Board does require the submission of an in-depth historical study of the importance of the site prior to deliberations.

Effects of Listing

¹⁹ *ibid* sec. 7

²⁰ REPUBLIC ACT No. 4648 as amended by Executive Order No. 80 (1999)

National cultural treasures and important cultural properties, once listed as such are subject to the jurisdiction of the National Museum. The owner retains possession of the same but the Museum is required to keep records containing such information as the name of article, owner, period, source, location, condition, description, photograph, identifying marks, approximate value, and other pertinent data²¹.

National cultural treasures once designated as such need prior approval prior to any change in ownership except by inheritance ²². Sales must be approved by the Director of the National Museum, after prior notification to and notations made by the Museum in the records. Where there is no heir, National Cultural Treasures revert to the National Museum or to any other state museum.

(All restorations, reconstructions and preservations of government historical buildings, shrines, landmarks, monuments and sites, which have been designated as National Cultural Treasures and “important cultural properties” may only be undertaken with the written permission of the

²¹ REPUBLIC ACT No. 4648 as amended sec. 7a

Director of the National Museum who shall designate the supervision of the same.²³

Once listed, it becomes unlawful to explore, excavate or make diggings on archeological or historical sites for the purpose of obtaining materials of cultural, historical value, without the prior written authority from the Director of the National Museum²⁴. Excavations or diggings are allowed only in with the supervision of an archeologist certified as such by the Director of the National Museum, or of such other person who, in the opinion of the Director, is competent to supervise the work. Such supervising archeologist is then required upon completion of the project, to deposit with the Museum a catalogue of all the materials found on the site, and a description of the archeological context in accordance with accepted archeological practices.

It is also of note that even absent any listing or declaration, when excavators strike upon any buried cultural property, even if such diggings are made outside of an archeological context, such as construction, the law requires the suspension of the excavation. After such suspension, the matter must be

²² *ibid*, sec. 8

reported immediately to the Director of the National Museum who in turn is required to take the appropriate steps to have the discovery investigated and to insure the proper and safe removal of transportable and movable materials therein. The action of the Museum Director however, is subject to notice and consent of the property owner. The Museum Director has sole discretion over the period of suspension of the excavation²⁵.

All explorations, excavation or diggings on government and private property for archeological or historical purposes may be undertaken only by the National Museum or any institution duly authorized by the Director of the National Museum

Apart from the foregoing restrictions, the National Cultural Properties Act also provides for tax incentives for donations or support²⁶ by private individuals or institutions to the National Museum and any investment for the purchase of cultural properties registered with the National Museum or for the support of scientific and cultural expeditions, explorations, or excavations when so certified by the Director of the National Museum shall

²³ *ibid*, sec 13.

²⁴ *Ibid*, sec. 12

²⁵ *supra*

²⁶ *ibid*, sec. 14

be tax exempt and deductible from the income tax returns of the individual or institution.

Donations of National Cultural Treasures and important cultural properties to the National Museum or any accredited institution for preservation for posterity shall be deductible from the income tax returns of the individual or institution, provided such donations are duly acknowledged by the recipient and receipted by the Director of the National Museum. Similarly, monetary contributions made to the National Museum or any accredited institution for the purchase of National Cultural Treasures and important cultural properties shall also be deductible from the income tax returns of the individual or institution, subject to the same conditions of acknowledgment and receipt.

The Government is given the first option within three months of a sale, to buy cultural properties placed on sale. Prior to such however, the sale of any cultural property is required to be registered with the National Museum. The proceeds of the foregoing are considered income therefore subject to taxation²⁷.

²⁷ *ibid*, sec. 15

A prison term of not more than two years or a fine of ten thousand pesos (P10,000.00) (about \$190) is imposed as a penalty for those who violate any of the provisions of the Cultural Properties Act²⁸.

Two agencies have overlapping functions in relation to the protection and preservation of national cultural property. The National Museum, which administers the Cultural Properties Act²⁹ and the National Commission for Culture and the Arts³⁰ which is empowered to regulate activities inimical to the preservation/conservation of national cultural heritage/properties.

In addition to administering the Cultural Properties Act, the National Museum is also a cultural center³¹ which “takes the lead in the study and preservation of the country’s artistic and cultural heritage in the reconstruction and rebuilding of the (our) past, and the development of the national cultural wealth.”

²⁸ *ibid*, sec. 20

²⁹ REPUBLIC ACT No. 4648 as amended

³⁰ REPUBLIC ACT No. 7356, An Act Creating the National Commission for Culture and the Arts, Establishing a National Endowment Fund for Culture and the Arts, and For Other Purposes sec. 13 (1) (1992)

³¹ REPUBLIC ACT No. 8492 AN ACT ESTABLISHING A NATIONAL MUSEUM SYSTEM, PROVIDING FOR ITS PERMANENT HOME AND FOR OTHER PURPOSES, sec 6.3. (1998)

Among its duties and functions, the Museum³² regulates the registration, excavation, preservation and exportation of Philippine cultural properties through a legal and customs department, and undertakes research on salvage archeology, monitor and control archeological excavations, diggings and researches into Philippine pre-history and proto-history. It maintains, preserves, interprets and exhibits to the public the artifacts in sites of the Paleolithic habitation site of the possible earliest man to the Philippines, the Neolithic habitation of the ancient Filipinos at the Tabon caves, and other important archeological sites³³.

The NCCA on the other hand, formulates and implements policies and plans³⁴ in accordance with the principle that it is the duty of every citizen to preserve and conserve the Filipino historical and cultural heritage and resources³⁵. Its law provides that the retrieval and conservation of artifacts of Filipino culture and history shall be vigorously pursued. Pursuant to this therefore, it is mandated to support, monitor and systematize the retrieval and conservation of artifacts of Filipino culture and history and all Filipino cultural treasures from all over the archipelago and other countries. It also

³² *ibid*, sec. 7.5.

³³ *ibid*, sec. 7.20

³⁴ REPUBLIC ACT NO. 7356, sec. 12

³⁵ *ibid*, sec. 7

supports and promotes the establishment and preservation of cultural and historical monuments, markers, names and sites. It must be noted however that the NCCA has administrative supervision over the National Museum and the National Historical Institute.³⁶

The National Historical Institute also has some overlapping functions with the National Museum and the NCCA in the matter of cultural properties which are declared by the NHI as historical sites, monuments, or shrines. Its law provides that the NHI has the right to declare historical and cultural sites and edifices as national shrines, monuments and/or landmarks. It is also assigned the preservation, restoration, and/or reconstruction of specifically designated historic sites and buildings. It is however, presumed that the power to restore, preserve and reconstruct is limited to those buildings specifically declared by the legislative authority³⁷, as historically sites, and not those sites declared by the NHI itself. This interpretation however, has not been judicially tested, though it is the opinion issued by the National Museum's Director when it declared 26 Philippine churches as national cultural treasures. Some of these churches are themselves already declared historical sites by the NHI.

³⁶ EXECUTIVE ORDER NO. 80, series of 1999

Exclusively under the jurisdiction of the NHI are, among others National Shrines, which are considered hallowed places. The desecration of the same in the form of disturbing their peace and serenity by digging, excavating, defacing, causing unnecessary noise and committing unbecoming acts within the premises of the said National Shrines, is strictly prohibited by law.³⁸ Punishment comes in the form of imprisonment for no less than ten years or a fine of ten thousand pesos (about \$190) or both, at the discretion of the courts.

Furthermore, National Shrines, monuments, landmarks and other important historical edifices declared and classified as such by the National Historical Institute, nor any of the original features of such structures or sites may not be altered, modified, repaired or destroyed without the prior written permission of the Chairman of the NHI. Violation of this provision shall, upon conviction, be punished by imprisonment for not less than one year nor more than five years or a fine of not less than one thousand pesos (about \$19.00) or both at the discretion of the court or tribunal concerned³⁹.

³⁷ PRESIDENTIAL DECREE NO. 260, sec. 4

Historic sites are also afforded protection under various other laws such as the Forestry Reform Code⁴⁰. This law prohibits the classification of historic sites as alienable and disposable land, barring their private ownership, if the same is still designated public lands. This provision applies whether or not the NHI of the National Museum or any other agency has declared the site as such.

This same law provides that those historic sites specifically declared as such by the President -- when the Philippines was under martial law and the Executive also had legislative powers – and the same had been titled to a private owner, such title may be cancelled, or amended or the titled area expropriated⁴¹ provided that the public interest so requires such action.

Similarly historic sites, whether declared by the National Historical Institute or the National Museum or any other such agency, is exempt from the urban and housing development program which allows for the conversion of public

³⁸ PRESIDENTIAL DECREE No. 105

³⁹ PRESIDENTIAL DECREE No. 1505, sec. 1

⁴⁰ PRESIDENTIAL DECREE No. 705 REVISING PRESIDENTIAL DECREE NO. 389, OTHERWISE KNOWN AS THE FORESTRY REFORM CODE OF THE PHILIPPINES sec 16 (9) (1975)

⁴¹ *ibid*, sec. 16 (10)

lands into housing projects⁴². However, strangely enough, the law provides a clause which states that such exemption shall not apply when the use or purpose of the said lands has ceased to exist. Obviously, this law does not provide penal sanctions for the loss of a site's historic value, but rather creates a mechanism to allow its use as a housing site. In a developing country such as the Philippines, such an automatic reversal of land classification makes for a dangerous loophole, which could allow for bad faith destruction of historic sites.

In the City of Manila, the city government is currently under fire for allowing the construction of a school in a historic hundred and forty-three year old botanical garden. The city government claims that the historic character of that had been lost when the site was converted into an ordinary park as opposed to its original use as a botanical garden. The city government's incapacity to overturn a declaration of historicity made by a national agency notwithstanding, the City of Manila to this date claims that it can unilaterally take note of the loss of historic value of any site within its jurisdiction and reverse the site's use. The controversy is still pending.

⁴² RA 7279 AN ACT TO PROVIDE FOR A COMPREHENSIVE AND CONTINUING URBAN DEVELOPMENT AND HOUSING PROGRAM, ESTABLISH THE MECHANISM FOR ITS IMPLEMENTATION, AND FOR OTHER PURPOSES sec. 5 (d) (1992)

The National Commission on Indigenous Peoples also has some executive jurisdiction over historic and archeological sites. Indigenous Peoples and Indigenous Cultural Communities⁴³ have the right to receive from the national government all funds especially earmarked or allocated for the management and preservation of their archeological and historical sites and artifacts with the financial and technical support of the national government agencies.

It is of note, however that the Department of National Defense is tasked with the maintenance and development of national shrines consisting of military memorials or battle monuments⁴⁴.

Finally, Presidential Decree No. 1586 (1978), a law implemented by the Department of the Environment and Natural Resources (DENR), which establishes an environmental impact statement system, and provides for other environmental management related measures, includes areas of “unique historic archaeological or scientific interest” as one of those which

⁴³ (RA 8371 AN ACT TO RECOGNIZE, PROTECT AND PROMOTE THE RIGHTS OF INDIGENOUS CULTURAL COMMUNITIES/INDIGENOUS PEOPLES, CREATING A NATIONAL COMMISSION ON INDIGENOUS PEOPLES, ESTABLISHING IMPLEMENTING MECHANISMS, APPROPRIATING FUNDS THEREFORE AND FOR OTHER PURPOSES), sec. 37 (1997)

are environmentally critical areas and therefore require an Environmental Compliance Certificate (ECC).

An ECC is a document issued by the DENR Secretary or the Regional Executive Director certifying that based on the representations of the proponent and those who prepare the same, as reviewed and validated by the Environmental Impact Assessment Regional Council (EIARC), the proposed project or undertaking will not cause significant negative environmental impacts, and that the proponent has complied with the requirements of the EIS system⁴⁵.

Subjecting all construction projects to the requirements of PD 1586 and its Implementing Rules and Regulations provides for an additional overseeing body that requires clearances for any development or construction activity in a historic or archeological site. Thus far, this system has proven the most effective in regulating construction or demolition activities that endanger such sites.

⁴⁴ PRESIDENTIAL DECREE No. 1076, sec. 2 (1977)

⁴⁵ Procedural Manual and Implementing Rules and Regulations for PD 1586, p. 4

The same law requires consultations with all stakeholders in any given project in an environmentally critical areas in a process called “scoping.” Department Administrative Order No. 96-37 defines scoping as the stage in the Environmental Impact Statement (EIS) System where information and assessment requirements are established to provide the project proponent with the scope of work for the EIS. This is where most of the key issues and concerns in the EIS are discussed, clarified and agreed upon among the key actors (e.g. proponent, the person/s preparing the EIS, the Environmental Management Bureau which makes the preliminary determination of whether or not an Environmental Compliance Certificate is required, the Department of the Environment and Natural Resources Regional Office, LGUs, and stakeholders) of the EIS system. More importantly, it prepares the proponent in handling the issue of social acceptability, which is a critical requirement in the ECC application.

“Scoping sets the tone of the EIS process. It is here where a proponent can already determine whether his or her project will experience “rough sailing” or difficulty in getting the approval and support of the local community⁴⁶. It determines the coverage, depth and extent of environmental assessment. It is

⁴⁶ *ibid*, page 20

initiated by the proponent at the earliest stage of project development to define the range of actions, alternatives and impacts to be examined.”

Among the objectives of scooping is to allow stakeholders to ventilate their concerns about the project and ensure that the Environmental Impact Assessment adequately addresses the relevant issues. It is at this stage that conservationists usually intervene against potentially destructive activities that endanger sites, since such groups are identifiable stakeholders and therefore entitled to participation in the scooping process.

Public participation is essential in the scooping process and the failure to include the appropriate parties renders the scooping mechanism void and the resultant ECC can be revoked. In consonance with Presidential Decree No. 1151 or the Philippine Environmental Policy, prior clearance is also obtained at this stage, from the appropriate government agencies that are empowered to issue clearances for construction in historic or archeological sites – the NHI and the National Museum.

In the case involving the botanical gardens in the City of Manila, the site, known as the Mehan Gardens, (named after its first American Park

Superintendent, John C. Mehan), the city government, designated a portion of the said historic site as a parking and bus terminal and allowed for the construction of an edifice for that purpose. The Department of the Environment and Natural Resources (DENR) upon petitions made by the Heritage Conservation Society and other cause-oriented groups, reviewed the clearances obtained by the construction company and found the same void for having been issued without the necessary clearances required from the NHI, and, since the site also proved to be an archeological site, from the National Museum.

In addition to the foregoing, the DENR Administrative Order No. 95-23 series of 1995 or the Implementing Rules and Regulations of the Philippine Mining Act of 1995⁴⁷ provides for conditions and limitations of quarry or commercial or industrial sand and gravel permits. Among the restrictions is that no extraction or removal of materials shall be allowed within a distance of one kilometer from the boundaries of reservoirs established for public water supplies, archeological and historical sites and of any public or private works or structures, unless the prior clearance of the agency or owner concerned is obtained.

⁴⁷ REPUBLIC ACT No. 7942 (1995)

Problems Arising from the Overlapping of Functions.

The confluence and concurrence of several agencies in the protection and supervision of protected sites makes for marked confusion and diminished protection. On more than one occasion the overlap has forced all agencies into inaction. Such happened in the case of a church located in Taal, Batangas, designated both as a national cultural treasure and a historical site. The NHI granted permission for the construction of *a porte cochere* connected to the church façade thus marring one of the more significant features of the Philippine baroque church. Protests from the National Museum supported by the National Commission for Culture and the Arts went unheeded and no reversal was done. Instead however, all future projects for the restoration of the church were and still are held in abeyance, pending the resolution of the issue of which agency can undertake the restoration of the said church.

Clearly so many agencies doing many of the same things can be at best confusing, and at worst destructive. Legislation is therefore necessary for the

rationalization of all the protective national laws on conservation, restoration and preservation of significant Philippine sites. It is hoped that in this eventuality, these fragments of testimonies that constitute the country's built heritage shall help complete the Philippine national identity.

EDUCATION & TRAINING IN HERITAGE CONSERVATION LAW

Presentation by Marc Denhez, Canada

“Know the case you have to meet.”

Legal proverb

Introduction

This paper is based on three propositions:

1. That heritage education (whether pertaining to law or any other profession) must be designed to bridge the “knowledge gap” that exists;
2. That the traditional paradigm of heritage conservation law (i.e. law pertaining to the identification, regulation and subsidization of heritage properties) is disturbingly incomplete, in that it *fails to develop a climate where heritage can take care of itself*; and
3. That a major component of the “knowledge gap” that currently exists is this: can the professional team (including lawyers) working with the private sector assist their clients
 - to develop viable heritage projects,
 - as competently as they would assist with other non-heritage) projects?

It is my submission that the typical professional team

- currently able to advise clients on how to conduct a self-sufficient heritage project,
- that this has serious negative effects, and
- that bridging this “knowledge gap” would be immensely beneficial to heritage efforts.

1. Bridging the “Knowledge Gap”

1.A. Revisiting the Definition of Heritage Law

What do “heritage lawyers” actually do, and what is the skill set that they need to do it?

Over the past decades, the work in this area has concentrated on two major categories of properties:

- a (a) property (movable or immovable) whose importance is overwhelmingly in its *artefact* value (e.g. archaeological monuments, movables of artistic and historic *significance* etc.); and
- b (b) property whose importance is only partly in its artefact value, and (at least equally) in its ongoing *functional* value (e.g. buildings in continued use, historic districts, distinctive historical transportation systems etc.).

Although the legalities involved in (a) are complex, those in (b) have arguably been even more so: the latter share the same legal issues as all other functioning components of society, *plus* an overlay of heritage issues.

For example,

- in the case of properties in category (a), the overwhelming objective is conservation (implying only occasional – and extremely careful – repair). In a number of aspects, the object is being frozen in time.
- In the case of (b), the objective of ongoing (and efficient) functional use creates a different dynamic: the necessities of that function mean that while certain *features* are being conserved, the object as a whole is *not* being frozen in time (far from it). It is actually undergoing a process of ongoing “development” which, when handled competently and in a manner complementary to the heritage features of the property) is sometimes called “heritage-friendly development.”

In the case of buildings and districts, this “heritage-friendly development” is a specialized extension of the already established and currently booming renovation industry. Over the next decade, for example, North Americans are expected to spend over \$5 trillion on improvements and additions to existing buildings. On the residential side, this industry substantially outpaces new construction nationally. The part of the industry that does “heritage-friendly” work:

1. Makes buildings look the way that they were originally intended to look;
2. Brings mechanical, electrical and plumbing systems up to today’s standards;
3. Does any additional work that may sometimes be required to bring the building up to safety standards;
4. Sometimes encourages owners to piggyback energy-efficiency upgrades onto the project (such as insulation and, where appropriate, low-e glass);
5. Introduces (where appropriate) lifestyle improvements, notably to kitchens and bathrooms.

This is not to suggest that everyone associates this work with “heritage” In fact, as a development format, it can apply to a much broader range of properties than those considered of architectural or historic interest.

But the essential question is: Why isn’t “heritage-friendly development” more widespread, on a self-sustaining basis?

In the case of purely artifact properties, the answer is relatively straightforward: it is because there is no immediately obvious party who can derive an economic benefit and who is therefore likely to invest. In the case of functional properties, however, the situation is more complex. If private developers are not gravitating *naturally* toward heritage-friendly developments, then what can be done to modify this situation?

That question, in many countries, is at the core of heritage law. Heritage law is perceived as a three-pronged subject:

- i (i) the *identification* of properties which will be subjected to special legal treatment;
- ii (ii) a *regulatory* system to prevent other parties from doing the wrong thing with heritage properties; and
- iii (iii) a *subsidization* system (via grants, tax incentives, low-interest loans or otherwise) to attract heritage-friendly projects where they might not otherwise go on the basis of private sector economics alone.

The above subjects have also been the stock-in-trade of “heritage lawyers”. Their client base has traditionally been focused on “public sector” issues, e.g.

- o legal regulation of projects (public sector or private sector) which would affect properties which could be considered heritage; and
- o design of incentive programs and (once the programs are introduced) advice to applicants).

In short, those were the skills that were considered necessary; and which would be at the core of a program for education and training in heritage conservation law.

Is that approach sufficient today?

The first shortcoming is fairly obvious to anyone who allows the current transition, in many jurisdictions, toward systems that are less predicated on an adversarial approach than on mediation and Alternative Dispute Resolution (ADR). This is an international cross-sectoral reaction to the overcrowding of the courts. In some jurisdictions (such as the Province of British Columbia in Canada), all construction disputes are now being submitted to compulsory mediation, which demands a different set of skills (on the part of lawyers) than what they were traditionally accustomed to. The question is therefore whether heritage law, like other branches of legal scholarship, should also be taking a closer look at mediation-based or consensus-based approaches.

Some lawyers would argue, however, that heritage law is already heading in that direction – in the form of “co-opting” the private sector into collaborative arrangements via subsidies/incentives.

Is this true?

It has certainly kept many lawyers busy. There is an almost unlimited range of possible incentive formulas to choose from; and when these are integrated with e.g. the domestic

tax system (which also has an almost unlimited number of formulas), the range of possible permutations and combinations can be incredible. It is therefore no surprise that the design of financial support mechanisms – and advice to applicants – both constitute a growth industry in the legal professions of some countries. It is limited only by politicians' largesse.

But again, does it address the core of the issue, or only the symptoms?

Why does heritage law exist? Why is it even necessary for the State to intervene, via a regulatory veto on damaging projects? And why is it assumed that the primary way to “bring the private sector on side” is to subsidize it, i.e. bribe the entrepreneurs with public money?

The core issue, according to conventional thinking for several generations (at least in some countries) is that there is an *intrinsic* adversarial relationship between the conservation of heritage and the maximization of profit. According to this view, heard on both the left and right sides of the political spectrum, **developers (both public and private sector) would “naturally” gravitate toward projects which were inimical to heritage...if there were not laws to stop them, or subsidies to buy them off. This situation, according to some, is the very *raison d'être* of heritage law.**

It is the contention of this paper that any system of education and training in heritage conservation law, based upon the above premise, is incomplete to the point of being fundamentally flawed.

1. B. Getting to the Core of the “Knowledge Gap”

Countless groups have observed (logically) that in the absence of any strategy to the contrary, the existing predominant pattern of development will likely continue.

In the case of buildings and districts in many countries, that pattern was established generations ago. Although there are exceptions, it is indeed true that most developers assume that the optimal way to make money on a lot with an old building on it, or in an older district, will be to redevelop it along the conventional “International Style” model. This will mean increasing the density. The real estate economics of that process have been taught for generations, and the calculations are relatively straightforward. In order to build (to this increased density), the developer will need to begin with a vacant lot, or a lot whose buildings will be removed. In North America and in many other countries, the design will usually be the tried-and-true highrise, with the obligatory windswept plaza at the front. Costs are relatively easy to calculate, and there are many competent construction companies to choose from. When the highrise is finally built, a number of neighbouring owners will discover (as in most North American cities) that their own Highest and Best Use for their properties is parking. This, in turn, will cause more pressure for the removal of buildings, and for the continuation of this pattern. The main obstacle to redevelopment would be economic: Can the developer get a decent return on investment? In North America, where interest rates fell to a low level, the cash-on-cash

return required to make a project viable also dropped (many assume that a 9% prospective return is now an acceptable threshold to launch projects, although this depends on the entrepreneur's risk tolerance). The entrepreneurs who are skilled or lucky enough to "get all the pieces together" for a development will do so; others will simply bide their time, waiting for the right opportunity. If they happen to own existing older buildings on their property, they will try to maximize their short-term income by whatever means; but most will not lose of their long-term goal, which is to conduct (or be bought out by) a highrise redevelopment project. In fact, there may be many owners who assume that this residual highrise option is the only way that they can justify the purchase price and carrying charges on their property.

That has been the "default setting" of the development process for decades. That is the competition. But it is not the only way to do development.

The key element in a viable development process, whether it is called "cap rate" or "cash-on-cash return" is not gross return, but the percentage of net return on the investor's own money. Can heritage-friendly development compete? For years, heritage advocates in many countries have been producing case studies that show that it can.

But the next (and key) question is: if heritage-friendly development is economically attractive (at least to some entrepreneurs), then why isn't there more of it?

If heritage-friendly development has not already happened enough, it is because of specific obstacles that will need to be (a) isolated and (b) solved.

Although it is fashionable in some circles to believe that those who plan developments are in an *inherently* adversarial position with heritage, another view is that one major reason why there aren't more owners and developers doing heritage-friendly development is that ***they don't know how***. Countries like Canada like to think of themselves as fairly literate, yet (unlike highrises) the economics of this side of real estate are not taught anywhere in Canada, are in no textbooks, and are not widely understood. Successful practitioners are, in this country, entirely self-taught. This reality stretches all the way down the work chain: it applies not only to the entrepreneurs who launch the development, but also to their bankers and even their architects (until the 1990s, the rehab of existing buildings was not part of the core curriculum of any Architecture school in Canada, and practitioners had no choice but to learn from experience). At the level of contractors and trades, similar problems exist; although there were occasional training programs for restoration of national monuments (to museological standards -- with prices accordingly), a national training program for more mundane buildings is only now in its embryonic stages. That is not to say that the country didn't develop a solid level of expertise; they can now boast some of the most qualified people anywhere; the problem is that they are few in number, there is no system to disseminate their expertise, and the process of putting those skills at the disposal of the development community is an utterly hit-and-miss affair.

Lawyers are *supposed* to be part of the solution. In fact, in Canada and several other countries, lawyers are typically part of the development team of any major project, and routinely attend the decision-making meetings for developments that will (a) replace or (b) improve heritage properties. In Canada at least, lawyers are typically conversant with all the legal aspects of (a), and almost none of (b). In that sense, they are little different from the other professions.

The clients (and other team members) for these lawyers are the people who make development projects work – whether they are heritage-type projects, or redevelopment projects: these are

- Owners,
- Other residents (tenants),
- Others who work in the area (merchants, other business operators and commercial tenants);
- Governments;

they also include all those involved with the real estate industry, including

- Entrepreneurs
- Bankers,
- Trades,
- Realtors,
- Home inspectors,
- Property and facility managers etc.

1.C. Core Issue Restated

There is an old saying that “instead of giving a man a fish, it is better to teach him to fish”. When it comes to heritage-friendly development, how many people have been taught to fish”? In other words, how many “heritage developers” know how to take on a neglected old building and fix it up for a profit? How many realtors promote heritage properties intelligently? How many contractors and tradespeople know how to handle these properties on a budget, without either going bankrupt themselves, or propelling their client into bankruptcy?

And if the answer is that the world doesn’t have enough people who know how to fish (which is unquestionably the case, given the paucity of self-generating heritage projects), then isn’t the logical outcome to discover that this is the gap that must be filled?

If people are to “learn how to fish”, then what we need is as a catalyst to bring together the partnerships and fuel the critical mass to **start a “heritage industry” which can then take care of itself**. Such partnerships have proven their worth, notably in the housing and renovation industries. Governments are asked specifically to provide the invitations and the forum through which stakeholders can produce the real solutions that will reduce their cost of supply in real terms (notably via training and improvements in efficiency) and increase demand/their return (notably by connecting with markets and using better messaging).

To recap: if the number of self-generating heritage projects is so limited, it must be for one of more of the following three reasons:

- The cost of supply is too high, and/or
- The return/demand is too low, and/or
- The people involved weren't sure of what they were doing.

Therefore, if heritage-friendly development is to take hold for the long run, on a market-driven sustainable basis, it will have to get onto every developer's "radar", and it will need to be as easy as possible.

This means:

- Identifying/publicizing opportunities,
- Lowering cost,
- Improving demand/return, and
- Disseminating know-how.

2. Impacts

The paucity of education and training, on how to do cost-efficient heritage-friendly development, has both direct and indirect negative effects.

As long as this situation exists, there is a direct risk that countless projects will be chronically overpriced, either because the participants actually didn't know what they were doing, or because they were sufficiently wary of other contractors that they felt obliged to build a huge contingency factor into their quote. That is a major part of the problem to be solved.

There are also indirect impacts, which affect how heritage lawyers serve as "advocates" for heritage conservation.

How are we expected to advance the proposition that heritage is a "natural and rightful part of twenty-first century life", which *every* owner should support, while at the same time scaring off investors by predicting that heritage "*always*" costs more than other property"?

And how do we serve as advocates for the argument that "intelligent heritage work costs more", while avoiding the corollary proposition that "stupid projects cost less" [*sic*]

Finally, even if we acknowledge that incentive programs are useful (and sometimes essential) in the short term (to give the 'heritage industry' a critical mass), is that the course that we wish to adopt *indefinitely*?

The very word "incentive" hits negative buttons in some industry/economist circles because it apparently connotes a) a "band-aid", and b) a temporary measure (prone to be axed in the next austerity budget). Instead of "incentive", a term like "tax measure" is preferred because it is perceived as being more neutral; but regardless of the term used, incentives of any kind are best used as temporary measures to "jump-start" a process by artificially giving that process momentum at the beginning so that it carries on into the future.

In the long term, however, incentives are not considered by industry or economists as a useful tool.

The Canadian housing industry is an interesting example of the reasons for this attitude. In the early 1980s, the industry formally renounced government support programs, in part because “what the government giveth, the government taketh away”, leading to an artificial boom-and-bust cycle (on the precedent of U.S. programs in the 1980s), and even more importantly, because such programs were felt to be artificial and had the effect of distracting the industry away from solving its own root economic problems. The primary fault of incentives, according to one Canadian Home Builders Association president of the day, is that “they allowed the industry to get sloppy”.

3. Promising Prospects

In practical terms, how do we create a climate whereby people take care of their own heritage themselves? This is an ideal time to rethink the fundamentals.

If the decision-makers for heritage property are to “learn how to fish”, then governments and educational institutions have an ideal role to play (and it is a role that only they can play). That is as a catalyst to bring together the partnerships and fuel the critical mass to start a “heritage industry” which can then take care of itself. Such partnerships have proven their worth, notably in the housing and renovation industries. In such partnerships, rather than being asked merely to provide “incentives” and regulations, governments are asked to provide the forum through which stakeholders can produce the real solutions that will reduce their cost of supply in real terms (notably via training and improvements in efficiency) and increase demand/their return (notably by connecting with markets and using better messaging).

In other words, this is the ideal opportunity to take action on two fundamental propositions, namely:

That the highest priority should be to show people (and their advisors, including lawyers) how to take care of their own heritage; and That heritage should be seen as a specific kind of development (involving specific kinds of restoration and rehabilitation activity).

Any proper campaign for capacity-building for heritage would involve education and training accordingly. Finally, in terms of straight cost-benefit analysis, the potential long-term impacts are huge compared to the modest coordinating cost of getting the process up and running.

To summarize:

heritage law is not just about the identification, regulation and subsidization of heritage property. As lawyers, it is part of our function to advise clients on the *root causes* of problems; and in this case, a major root cause is that most people who decide on the future of heritage property have no idea how to do a cost-benefit analysis of heritage-friendly development, compared to other kinds of development. That is a fundamental part of the “knowledge gap” that must be bridged.

The ultimate long-term objective is therefore to create a legal, economic and tax climate which, with as little artificiality as possible, ***makes heritage capable of conserving itself.***

Marc Denhez

Marc Denhez is an Ottawa lawyer whose private practice specializes in housing and district revitalization plans. He also serves on the board of Canada's National Capital Commission, and on the Executive of the Renovators' Council of the Canadian Home Builders' Association, where he chaired its Industrial Adjustment Committee on professionalization of the renovation industry. His books include The Heritage Strategy Planning Handbook, Heritage Fights Back, The Canadian Home and Capitalizing on Heritage, Arts and Culture. He has taught in the planning schools of four universities in Canada and Europe.

COMPENSATION OF ADMINISTRATIVE EASEMENTS ON THE PROTECTION OF NATURAL OR CULTURAL HERITAGE

In France, there are many legislations on the protection of cultural and/ or natural heritage. At the beginning of the 20th century, due to the very significant protection of proprietary rights, when administrative easements were drawn up, at the time texts were set up to compensate an owner in the case of restrictions of his right to use cultural property. However, these compensations are now less current.

Today, I want to speak only about direct compensations, in the case of legal easements, by payment of damages, or by transfer of development rights. I will not be speaking about other kinds of financing; such as public subsidies for maintenance or restoration of historical buildings, or fiscal mechanisms, where maintenance or restoration works allow the owner some tax reductions (For this, please refer to my presentation: Financing heritage protection and enhancement in France, Meeting of the legal committee of ICOMOS, Croatia, May 2000). Nor I will be talking about compulsory purchase, which, of course, shall be compensated, nor about compensation for the protection of moveable cultural goods.

Currently, in French law, we have three types of regulation. Some of which are in the « Urban planning code » (which will be studied in the first part of my presentation), others which come from specific texts (to be studied in Second part) and, lastly, some which appear only in case law (The third and final part of this presentation).

I Urban planning code

In the urban planning code, there are many provisions for the protection of cultural or natural heritage.

First, some texts (articles L.145-1 and the following and L. 146-1 and seq.) protect mountainous and coastal sites , making it possible to safeguard the main cultural elements , as building in these natural areas is restricted or, even, forbidden in a 100 metres strip of land next to the coast.

Urban local plans (articles L.123-1 et seq.) can set up very strict regulations for building such as areas where any development work is forbidden, delineation of classified woodland areas where the woods have to be absolutely protected ; or rules on architectural constructions such as height limitation, use of materials , choice of colours., etc.

But , we have, above all, a very specific legislation for the protection of exceptionnal historic districts. In these protected sectors, the State draws up a protection and enhancement plan which, beyond the same easements contained in the local urban plan, can specify the properties to be conserved (thus also enabling the checking of works carried out inside the buildings) , and may even order the conditional demolition of certain parts, to reconstitue, for example, gardens which no longer exist° (articles L. 313-1 and seq)

All these easements can cause very heavy financial strains , but, usually , no compensation can be given , even though some particular mechanisms exist for the transfert of building rights .

A The principle : no compensation for urban easements.

To avoid general compensations which would prevent these from being any urban policy, article L. 160-1 of the urban planning code forbids any compensation for all easements settled in application of the code , especially in the area of the use of the land,, the height of buildings, , or where construction is forbidden

However, three exceptions do exist . The first two are provided by the code .Should the owner suffer direct, material and certain injury to his property , a compensation could be awarded if :

-1° the previous status of the land is changed, although , until now, no court has condemned public bodies on this basis ;

2 ° or in the case of breach of definite rights. For example, if an owner has already undertaken works to portion his land, and, afterwards, due to a change in the urban provisions, he is , then , forbidden from building, and also would not be entitled to sell his plots . . In this case, a compensation must be awarded . As would be the case of someone who had been allowed to excavate a quarry ,and then, had close to it .¹

3 ° So as, to be in conformity with the case law of the European Court of Human Rights, , the French Conseil d'Etat adds a third case of compensation, which is when the owner suffers specific and exorbitant injury , out of all proportions to the public aim that administrative bodies are pursuing²

Courts are , however , very strict . So, the owner who buys land for development cannot have any compensation if , afterwards, building permission is not allowed Along the same lines, if the protection and enhancement plan provides for the conditionnal demolition of a building, this doesn't lead to the general illegality of the plan³ But, in this case, up until now, no individual owner has ever asked the court to decide whether, or not, a compensation could be due , because of large consequences of this easement. Some judges think damages should be awarded , others not.

B. Transfers of development rights

Such a system isn't usual in French law . However , two mechanisms exist :

¹ C.E. 1 déc. 1984 , Soc ; Ciments Lagarge, R. 432

² C.E. 3 juill. 1998 ; Bitouzet, RFDA 1998, Concl. Abraham

³ C.E. 10 juin 1987 , Mme L'official , AJDA 1987.599

1° Local governments can , in the frame of the urban plan, classify a land as a protected woodland area . This means that trees cannot be felled , and any development is forbidden. However, a kind of compensation is given to the owner, but only if he makes over for free his land to bodies , which are then entitled to give him in return a plot of land to build on . It is also possible for the owner to make over 90 % of his land , which is definitively protected , and in exchange he is allowed to build on 10 % of his remaining property (article L. 130-2 Urban planning code) .

2 ° In another hypothesis, the building rights are very restricted, in a natural zone. So building is almost impossible , except on large plots of land . The Urban planning Code (article L. 123-4) does allow the transfer of all development rights, if the administrative body and all owners agree, in a small part of a natural area . So building becomes only possible in this part , and the majority of the land is protected .

PLEASE REFER TO THE ATTACHED DOCUMENT

ARTICLE L 123 4 URBAN PLANNING CODE

EXAMPLE

AREA OF THE ZONE 100 000 SQUARE METRES

BUILDING RIGHTS 0.01 (1000 SQUARE METRES FOR THE ZONE AS A WHOLE)

TRANSFER OF DEVELOPMENT RIGHTS IN 5 % OF THE ZONE :

1000 SQUARE METERS OF BUILDING RIGHTS ON 5000 SQUARE METRES .

95 000 SQUARE METRES PROTECTED

For this, you can see the main interest of this type of regulation

II Specific texts

Here , there are two series of texts ; on the one hand the law on monuments, natural reserves, and natural or cultural sites (A); on the other hand, the natural national parks legislation (B.) .

A Historic monuments , classified sites or natural reserves

In all three laws , the regulations are similar. Owners of ancient buildings, or of lands located in sites or in reserves can obtain damages , which are decided by the courts if the public bodies and owners don't agree, only if the protection decision orders specific provisions which cause « a change in the condition or in the use of possessions , which is the source of a direct, material and certain injury » (article 5, law of 31 december 1913 , article L. 332-5 environment code - for natural reserves -, article L. 341-6 Environment code for the sites) So , compensation is very unusual for works which are required by law to have a special prior authorization. Damages can't be awarded, except if there are changes in the previous situation For example, if owner has to demolish a part of an old building for security reasons or if an exploitation of bauxite has to stop, due to the listing of the site. But, generally, the injury is only conditional . For example, no damages are awarded if the monument's classification forbids its demolition , even if the owner can't carry out his development project, as this project wasn't previously authorized . So, there aren't any status changes ⁴ The same decision applies if the owner of lands included in a site can't portion

⁴ Amiens , 9 mars 1984

them , or isn't able to excavate a mineral quarry, if development licences haven't been granted before .⁵

B. Natural national parks

Here, the regulation is rather different. The law refers to principles implemented in the field of compulsory purchase. So, any kind of injury can be compensated . For example, an owner who had to stop authorized works, and was then unable to sell his building plots , obtained , in 1975 , 60 000 euros worth of damages⁶ . Infringement of owner's rights is also compensated , due to the change of its status , but , in theory, this can be more broad . In practice, damages are awarded , mainly, when wild animals (bears, or wolfs) hurt (sometimes this is only imaginary , but the legal bodies prefer to pay) flocks and cultivated lands . Some money is also given when , for example , the right to hunt is restricted . Bodies try to avoid conflicts with inhabitants by giving generous fundings

III The case law

When there aren't any specific texts, courts have ordered administration to compensate injury caused by legal easements, in case of special and abnormal injury⁷ . But it is, again, very difficult to receive such compensation. However, we have a very interesting example in the field of archaeological heritage. When somebody finds, by chance, archaeological remains , he has to report them to the authorities of the ministry of culture. He ought , also , to take all measures for protection of the site ; and the « préfet » is entitled to oblige him to stop his development work for six months at the most (article 14 , Law of 27 september 1941). Although the text hasn't made provisions for any compensation , the Conseil d'Etat has said administration should give damages , in case of special and

⁵ Cass ? Civ ? 3 ème, 28 oct ; 1987 , Bull. n°177

⁶ Cass . civ. 3 ème 12 mai 1975 , Bull. p. 127

abnormal injury. So, when building works have been stopped for many days, due to an accidental discovery, or when administration has, even, ordered construction to be abandon, owners have received exceptional compensations. In these cases, changes in authorized plans have also occurred.

Conclusion

As you see, easements for the protection of cultural or natural heritage aren't, usually, compensated.

Damages are awarded, only if there is some infringement of established rights or conversion of previous status, when the owner's rights are changed. (article L. 160—5 Urban planning code, law on classified monuments or sites, case law on archaeological discoveries)

Are these rules compatible with constitutionnal or international law?

For constitutionnal law, the answer is simple. Our constitutionnal court (Conseil constitutionnel) draws a basic distinction between privation of property, which has to always be compensated, and restrictions in the use of possessions. Except in very rare situations, no compensation needs be given, in this case⁸.

At the international law level, according the 1st article of the first protocol of the European Convention on Human Rights, « every person is entitled to the peaceful enjoyment of his possessions ». So, the European Court of Strasbourg also draws a difference between privation with obligatory compensation, and necessary limitations to control the use of property. In some situations, it orders, even in this case, damages to be awarded the owner who has suffered special and exorbitant injury. But, the court

⁷ CE 28 février 1986, Cne de Gap-Romette

⁸ CC 17 juillet 1985, CC 13 décembre 1985

allows to the states an important scope of appreciation . So, for example, a owner , who, due to the classification of his land as a site , wouldn't be able, t able to build a hydroelectric factory , couldn't obtain damages. , because the European convention wouldn't have been contravened ⁹ .

All theses solutions are along the same lines as the famous phrase written, in 1830 , by Victor Hugo, our great poet, who was born , two centuries ago, - it is the Hugo year - in Besançon , « vieille ville espagnole » . In an article where he was protesting against the hammer which was mutilating the face of France, he said : « there are two things in a building, its use, and its beauty . Its use belongs to the owner, its beauty to everybody. So to destroy it , is over exceeding the right of property » .

. And , last at all, could I stay with V. Hugo. Up , until now , I have only been speaking about very materials things, legal questions on intangible heritage . To finish, I ' d like to speak about tangible heritage. . Might I quote some of the Victor Hugo's most beautiful lines , which are as simple , as they are moving . Victor Hugo is adresssing his daughter, who drowned in the Seine, a few months previously , and so he had still suffering from shock. In this poem , he says to her : « I 'll go to the graveyard , without looking either at the golden sunset, or at the far sails in the port ; and I' ll place on your gravestone a bunch of hooly and of heather in flower » .

Thank you for your attention .

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⁹ CEDH 16 décembre 1992 , G eouffre de la Pradelle

PATRIMOINE IMMOBILIER EN AFRIQUE:FORMATION EN GESTION ET EN LEGISLATION

*Présenté par Aimé GONCALVES,Architecte du Patrimoine
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L'éducation et la formation en matière de conservation supposent la prise en compte de certains principes assortis de démarches analytiques structurées comme suit en objectifs notamment:

- La création d'un cadre juridique, politique, administratif et social au sein duquel les pratiques de conservation peuvent être accomplies avec succès.
- L'accroissement des compétences des diverses personnes impliquées dans la conservation du patrimoine culturel immobilier.
- La création d'un réseau de communication qui permettra l'échange d'informations, compétences, savoir-faire entre les professionnels africains et les autres professionnels du monde .

Le public concerné comprend :

- Les étudiants et chercheurs impliqués dans le patrimoine
- Les professionnels y compris les artisans impliqués dans la planification, la gestion et la conservation et l'entretien des monuments et sites.
- Les communautés y compris les femmes et les jeunes qui vivent dans ou près des sites du patrimoine culturel.
- Les hommes politiques et les décideurs responsables de la conservation du patrimoine culturel immobilier.

Ces formations auront pour point focal, la gestion des monuments et sites à travers la prise en compte des principes directeurs notamment:

- 1- **Le patrimoine africain** (différentes catégories, Convention du Centre du Patrimoine Mondial – Stratégie globales) ;
- 2- **Cadre institutionnel international** (l'UNESCO, le Centre du Patrimoine Mondial, l'ICOMOS, l'ICCROM, Institutions Africaines.) ;
- 3- **Cadre institutionnel et administratif national** (structures statiques et privées nationales, avantages et inconvénients des différents systèmes) ;
- 4- **Documentation et inventaire** (recherches documentaires, information, sensibilisation, fiches et dossiers d'inventaires, opération d'inventaire) ;
- 5- **Cadre législatif** (récueil, analyse, efficacité, proposition de renforcement) ;

- 6- **Sensibilisations** (expositions et autres méthodes, rapport avec les médias etc.) ;
- 7- **Tourisme durable** (désirs et besoins des touristes, avantages et inconvénients du tourisme de masse, tourisme durable) ;
- 8- **Planification et gestion des sites** (limites, histoire, valeurs, description physique, cadre juridique et législatif, gestion et utilisation, état de conservation, SWOT, vision, principes directeurs, objectifs, activités, plan d'action, suivi et évaluation) ;
- 9- **Gestion participative** (identification des différentes parties, rôle influence et vellités des parties intéressées, différents niveaux de décision et d'implication, évaluation des possibilités des gestion, stratégies de mise en œuvre) ;
- 10- **Partenariat et recherche de financement** (mise en place de partenariat, élaboration de dossiers de financement).

Cette démarche déjà expérimentée dans certaines écoles de formation en Afrique permettra de mettre en place un cadre institutionnel global où seraient impliqués les pays africains et le reste du monde .

Cet enseignement peut être transmis dans un premier temps de façon théorique et ensuite de façon pratique par un exercice d'établissement du plan de gestion des sites retenus sur lequel pourraient travailler effectivement les étudiants.

L'efficacité de ce système de formation réside dans la prise en compte du public concerné par le patrimoine notamment les communautaires, les hommes politiques et les décideurs responsables de la conservation du patrimoine en question. Ce qui permettra de saisir les intentions réelles des parties prenantes en vue d'une meilleure atteinte des objectifs.

L'apport du Comité International de L'ICOMOS sur les lois aux Comités nationaux peut se définir par

des échanges d'expériences à présenter de façon périodique au cours des conférences, les échanges d'experts dans le cadre de formation similaire envers les étudiants et les jeunes professionnels et enfin les échanges d'experts dans le cadre de formation du genre dans le but de transmettre effectivement les méthodes efficaces propres à l'éducation et à la formation sur législation relative à la conservation du patrimoine immobilier.

The review of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, reasons leading to the adoption of the Second Protocol to the Hague Convention and its main features¹

Conference “Conservation.Law.Heritage 2002,” the University of Georgia, Athens, Georgia, 3 – 6 April, 2002)

My presentation focuses on the review of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (“the Convention”), reasons leading to the adoption of the Second Protocol to the Convention and its main features.

Before I start analysing the review of the Convention and other related issues, I will introduce very briefly the main tenets of the Convention because there may be some participants in our Conference who are not familiar with it.

The Convention is the first universally applicable international agreement to focus exclusively and in detail on the protection of the tangible cultural heritage. Its scope covers immovables such as monuments of architecture, art or history and archaeological sites, and also movables, which include works of art, manuscripts, books and other objects of artistic, historical or archaeological interest as well as scientific collections and

¹Jan Hladík, Programme Specialist, International Standards Section, Division of Cultural Heritage, UNESCO

important collections of objects of art. All such property is generally protected under the Convention, regardless of its origin or ownership.

States party to the Convention are required to take preventive measures for the safeguarding of cultural property not only in time of hostilities (when it is usually too late), but also **in time of peace**. These measures may include the wide dissemination of knowledge about the letter and spirit of this Convention, the preparation of inventories of movable and immovable cultural property, the marking of some buildings and monuments with the distinctive sign of the Convention, and the creation of special units within the military forces that are responsible for the protection of cultural property. It should be stressed that preventive measures may prove helpful not only in case of armed conflict but also in the event of natural disaster or as a highly effective weapon against art theft.

In time of armed conflict each Party to the Convention is requested to respect cultural property. Furthermore, it must prohibit, prevent or stop any form of theft, pillage, misappropriation or vandalism against cultural property.

In the event of occupation, the occupying State is under an obligation to support (as far as possible) the relevant authorities of the occupied country in safeguarding and preserving its cultural property. The occupying State is also required to take the most necessary measures to preserve cultural property situated in occupied territory and

damaged by military operations, if the competent national authorities of the occupied State are unable to do so.

In addition to the general protection, the Convention also provides for special protection which I will describe in detail when introducing enhanced protection under the Second Protocol.

The Hague Convention is applicable in the event of declared war or of any other armed conflict, even if the state of war is not recognized by one or more belligerents. It may also be applied if one of the States in conflict is not a Party to the Convention, provided that the State declares that it accepts its provisions and applies them. In the case of a conflict not of an international character occurring within the territory of one of the Parties to the Convention, each party to the conflict is bound to apply, as a minimum, its provisions relating to respect for cultural property.

States Parties to the Convention are required, within the framework of their ordinary criminal jurisdiction, to prosecute and to punish persons (regardless of their nationality) who violate its provisions or order such violations.

The procedure for the application of the Convention is defined in the Regulations for its execution, which constitute an integral part of the Convention. These Regulations contain details on the control system of the Convention, namely the Commissioners-General, the International Register of Cultural Property under Special Protection, the

transport of cultural property and the distinctive emblem. Finally, the Convention is administered by UNESCO which is based in Paris.

The Convention was adopted together with a Protocol which prohibits the export of cultural property from occupied territory and requires the return of such property to the territory of a State where it came from. The Protocol also expressly forbids the appropriation of cultural property as war reparations.

Currently, 102 States are party to the Convention, 83 of which are also Parties to the 1954 Protocol. The United States of America participated in the 1954 Hague Intergovernmental Conference which elaborated and adopted the Convention and its 1954 Protocol and signed the Final Act of the Conference and the Convention. In January 1999 the then President William J. Clinton transmitted the Convention and the 1954 Protocol for the advice and consent. To date, the United States of America has not become party to the Convention and its 1954 Protocol.

Let me come to the second part of my presentation – the review of the Convention.²

The end of the Cold War and the disappearance of bipolarity have resulted in a recrudescence of a number of armed conflicts in the world, in particular in the former

² On the review of the Hague Convention in general, see my article *The Review Process of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Impact on International Humanitarian Law*, Yearbook of International Humanitarian Law, Vol. 1, T. M. C. Asser Press, 1998, pp. 313 - 322

Socialist Federal Republic of Yugoslavia and the then Soviet Union. Such conflicts have demonstrated a blatant disregard for the law of armed conflict and a loss of respect for human life and cultural heritage. They have also demonstrated deficiencies in the implementation of the Convention. For this reason, in 1991 the Secretariat initiated, together with a number of States party to the Convention, the review of the Convention, principally in order to elaborate a new supplementary legal instrument to fill in existing gaps, such as the lack of clarity in the interpretation of the clause of "military necessity", the application of special protection and of the control system of the Convention, and the reinforcement of penal provisions, as well as the lack of an institutional body to monitor the implementation of the Convention.

The eight-year review of the Convention resulted in the adoption of the Second Protocol to the Hague Convention by the March 1999 Hague Diplomatic Conference.³

In comparison with the original Convention, the Second Protocol is a considerable advance on the level of protection in the Convention in the following respects: it provides a clear definition of the notion of "military necessity", thus preventing possible abuse or ambiguous interpretation; it creates a new category of enhanced protection for cultural heritage of the greatest importance for humanity which is protected by relevant national legislation and is not used for military purposes; it elaborates sanctions for serious violations against cultural property; and it defines conditions under which individual

³ For an overall review of the results of the Hague March 1999 Diplomatic Conference, see my article *Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, Netherlands (March 15 – 26, 1999)*, *International Journal of Cultural Property*, Vol. 8, No. 2, 1999, pp. 526 - 529

criminal responsibility applies. Finally, a most important advance is the establishment of a twelve-member Intergovernmental Committee, which will have powers in the implementation of the Convention and the Second Protocol, in respect of those States which will be party to both instruments.

Let me now dwell upon each issue in detail. I will start with one of the most controversial issues in the history and implementation of the Hague Convention – the issue of military necessity⁴. For those of you who are not familiar with this notion, I will refer to Articles 4(2) and 11(2) of the Convention. The former relates to the notion of “imperative military necessity” applicable to generally protected cultural property as defined in Article 1 of the Convention and the latter concerns the notion of “unavoidable military necessity” related to cultural property under special protection as set forth in Article 8(1) of the Convention.

The reference to Article 4(2) of the Convention enables the States Parties to use cultural property and its immediate surroundings or of the appliances in use for its protection, situated within their own territory as well as within the territory of other States Parties, for military purposes and to conduct hostilities against such property “where military necessity imperatively requires such a waiver”. The notion of “unavoidable military necessity” in Art. 11(2) has stricter conditions for its application with regard to cultural property under special protection. In particular, the immunity may be withdrawn “only for such time as that necessity continues”; it is further provided that

“such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger”. Finally, this provision foresees a possibility of an advance warning concerning the withdrawal of immunity.

However, as there is no universally recognized definition of military necessity, this situation gives room for a loose interpretation or even abuse. When researching this issue for my presentation, I consulted different sources and I would like to provide you with three definitions which may be of interest to you. The first is quoted from the Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863, also known as the Lieber Code, and states the following:

“Art. 14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, which are lawful according to the modern law and usages of war.

Art. 15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy’s country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

4 For the notion of military necessity with regard to the Hague Convention, see my article *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the notion of military necessity*, IRRC Review, September 1999, Vol. 81, N° 835, pp. 621 - 635

Art. 16. Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessary difficult.”⁵

The second definition comes from Morris Greenspan who defined the military necessity as “the right to apply that amount and kind of force which is necessary to compel the submission of the enemy with the least possible expenditure of time, life and money”.⁶ Finally, the Black’s Law Dictionary states that military necessity is “[a] principle of warfare that permits enough coercive force to achieve a desired end, as long as the force used is not more than is called for by the situation.”⁷ and provides a background reference to the Hague Convention on Laws and Customs of War on Land of 18 October 1907.

It is important to point out that military commanders were aware of this ambiguity and in this connection I wish to quote General Eisenhower's order of 24 December 1943: "Nothing can stand against the argument of military necessity. This is an accepted principle. The phrase 'military necessity' is sometimes used where it would be more truthful to speak of military convenience or even of personal convenience. I do not want

⁵ *The Laws of Armed Conflicts (A Collection of Conventions, Resolutions and Other Documents)*, edited by Dietrich Schindler and Jiří Toman, Martinus Nijhoff Publishers, Dordrecht, The Netherlands, Henry Dunant Institute, Geneva, 1988, p. 6

⁶ Morris Greenspan, *The Modern Law of Land Warfare*, Berkeley and Los Angeles, University of California Press, 1959, pp. 313 - 314

⁷ *Black’s Law Dictionary*, Abridged Seventh Edition, St. Paul, Minn., 2000, p. 806

it to cloak slackness or indifference."⁸ For this reason, the Second Protocol elaborates further the notion of military necessity related to cultural property under general protection (Article 6 - Respect for cultural property) as well as those under enhanced protection (Article 13 - Loss of enhanced protection).

What are the main substantial issues contained in the new definition of military necessity in the Second Protocol? In the author's opinion, Article 6 includes two new elements: first the waiver of imperative military necessity in the case of transformation of cultural property into a military objective (Art. 6(a)(i)), and second, such waiver in case of use of cultural property for purposes likely to expose it to destruction or damage (Art. 6(b)) when such use is necessary for obtaining military advantage. The first provision concerns the attacker, while the second applies to the defender. In addition, Article 6 (a)(i), which is based on Article 52(2)⁹ of Additional Protocol I 1977 on the protection of victims of international armed conflicts to the four Geneva Conventions 1949 concerning the protection of war victims, thus making a nexus between the Second Protocol and the definition of military objective under Protocol I. Article 13, which *de facto* develops the definition of "unavoidable military necessity" under Article 11(2) of the Convention,

8 *Records of the Conference convened by the United Nations Educational, Scientific and Cultural Organization held at The Hague from 21 April to 14 May 1954*, Staatsdrukkerij- en uitgeverijbedrijf, The Hague, 1961, p. 309

9 Article 52 – General protection of civilian objects

...

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." ...

Protocols Additional to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva 1977, p. 37

brings in two new elements: the decision to attack that must be ordered at the highest operational level of command, and the obligation to give advance warning.

To conclude on the issue of military necessity, let me quote an acknowledged expert in the law of armed conflict:

“Today, military necessity is widely regarded as something that must be overcome or ignored if international humanitarian law is to develop, and its original role as a limit on military action has been forgotten. As a result, the principle has not been applied in new situations where it could serve as a significant legal restraint until more specific treaty rules or customs are established.”¹⁰

Let me now turn to the issue of enhanced protection. Before I start covering this subject, I will briefly mention the special protection under the original Hague Convention. In addition to the general protection available under the 1954 Convention, Article 8(1) of the Convention also provides for special protection which may be granted to three categories of property: (a) refuges intended to shelter movable cultural property in the event of armed conflict; (b) centres containing monuments; and (c) other immovable cultural property of very great importance. The granting of special protection is essentially subject to two conditions - the cultural property in question must be situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point; and secondly, such property may not be used for military purposes. However, in case of proximity of the cultural property to an important military objective, such property may be placed under special protection if the

10 Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: the Origins and Limits of the Principle of Military Necessity*, American Journal of International Law, Vol. 92, No. 2, April 1998, p. 231

State on whose territory the property in question is located undertakes not to use it for the military effort. Special protection is not granted automatically; it is granted upon a special request of the State on whose territory the cultural property in question is situated. Such a request is addressed to the Director-General of UNESCO. Finally, it should be pointed out that in order to obtain special protection for its cultural property, the State requesting special protection is requested to obtain consent of all other States Parties; otherwise special protection will not be granted.

Cultural property under special protection is listed in the *International Register of Cultural Property under Special Protection*, a special register maintained by the Director-General of UNESCO. At present, cultural property in 3 High Contracting Parties (Germany, the Holy See and the Netherlands) is entered in the Register at the request of those States (a total number of four refuges as well as the whole of the Vatican City State). Two States (Austria and the Netherlands) have withdrawn registrations.

It should be noted that the concept of special protection has never fully developed its potential, given that only three States Parties have placed five sites under special protection and the last entry in the Register took place in 1978.

What are the reasons for which States party to the Convention abstain from placing their cultural sites under special protection? There may be several; in particular, the impossibility of complying with the condition of adequate distance from a large industrial centre or military objective for densely-populated countries; technical

difficulties in submitting nominations; or the fear of designating cultural property for special protection because of possible terrorist attacks - or, in fact, providing an eventual adversary with a "hit-list".

For this reason, the March 1999 Diplomatic Conference elaborated a new concept of enhanced protection which combines aspects of the special protection and criteria for listing of outstanding cultural property in the *World Heritage List* under the UNESCO *Convention concerning the Protection of the World Cultural and Natural Heritage* 1972. Under the new concept of enhanced protection, three conditions are to be met: cultural property in question must be of the greatest importance for humanity; it must be protected by adequate domestic legal and administrative measures; and it may not be used for military purposes or to shield military sites. A declaration to this end must be provided. Enhanced protection is granted by the entry of the cultural property in question in the *List of Cultural Property under Enhanced Protection*. In comparison with the system of special protection under the Convention, the granting of enhanced protection is accorded by the *Committee for the Protection of Cultural Property in the Event of Armed Conflict*. As in the case of special protection, objections to the granting of enhanced protection may be made but they must be based only on the three conditions which I have just mentioned. This prevents States party to the Second Protocol from making objections based purely on political animosity or mutual non-recognition, thus avoiding cases such as that of Cambodia which in 1972 requested the entry of several sites in the Register. Because of the opposition of four States party to the Convention which did not recognize the Government of Cambodia at that time, the entry was not made. Finally, unlike the

granting of special protection which requires unanimity of all States party to the Hague Convention, enhanced protection may be granted by a majority of four-fifths of the members of the Intergovernmental Committee for the Protection of Cultural Property in the Event of Armed Conflict.

Let me now turn to the next issue – penal aspects of the Second Protocol. In comparison with the original Convention which provided in its Article 28 for a very general obligation of States Parties “to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention”, the Second Protocol sets forth in its Article 15 the category of serious violations. Five offences fall within this category: making cultural property under enhanced protection the object of attack, using cultural property under enhanced protection or its immediate surroundings in support of military action, extensive destruction or appropriation of cultural property protected under the Hague Convention and the Second Protocol, making cultural property protected under the Hague Convention and the Second Protocol the object of attack and, finally, theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property protected under the Convention. Article 16(1) of the Protocol establishes universal jurisdiction with regard to the first three categories of offences. In addition, other penal aspects are covered: jurisdictional issues, extradition, mutual legal assistance as well as other violations of the Protocol.

Let me now come to one of the most important advances of the Protocol – the establishment of the twelve-member Committee for the Protection of Cultural Property in the Event of Armed Conflict. The essential functions of the Committee may be summarized as follows:

- granting, suspension or cancellation of enhanced protection;
- assistance in the identification of cultural property under enhanced protection;
- supervision of the implementation of the Protocol; and
- consideration and distribution of international assistance and the use of the Fund for the Protection of Cultural Property in the Event of Armed Conflict.

The Committee will co-operate with international and national, governmental and non-governmental, organizations having objectives similar to those of the Convention and its two Protocols, and it may invite to its meetings eminent professional organizations such as the International Committee of the Blue Shield (ICBS)¹¹, the International Committee of the Red Cross (ICRC) and the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM).

11 The International Committee of the Blue Shield is an umbrella organization created in 1996 by representatives of the International Council on Archives (ICA), the International Council of Museums (ICOM), the International Council on Monuments and Sites (ICOMOS) and the International Federation of Library Associations and Institutions (IFLA). Its main purpose is to co-ordinate expert activities and to disseminate knowledge on the Hague Convention and its Second Protocol. The term "Blue Shield" in the name of this new organization signifies the emblem of the Hague Convention which is used to mark cultural property. For more information about the ICBS role in the protection of cultural heritage during hostilities, see my article *Protection of cultural heritage during hostilities*, *Museum International*, No. 3, July – September 2001, pp. 65 – 66.

To conclude on the Second Protocol, it should be noted that this agreement is supplementary to, and in no way replaces, the Convention and the 1954 Protocol. The entry into force of the Second Protocol will result in a two-tier system of protection. The original Hague Convention is still open for ratification, accession and succession, and it will continue to provide a basic level of protection for countries not willing or not being able to become party to the Second Protocol. The Second Protocol will grant a more sophisticated protection for those Parties wishing to obtain a higher level of protection. Finally, it is necessary to point out that only a State party to the Convention may become party to the Second Protocol.

For entry into force of the Second Protocol, the deposition with the Director-General of UNESCO of twenty instruments of ratification, acceptance, approval or accession is required. UNESCO, which will provide the Secretariat for the Intergovernmental Committee, will be active in promoting participation in the Convention and both Protocols and in consulting with States on the appropriate measures for the implementation of the Second Protocol.

By 31 December 1999, the Second Protocol had been signed by 39 States. To date, it has been ratified by Belarus, Bulgaria, Cyprus, Qatar and Spain and acceded to by Argentina, Azerbaijan, Libyan Arab Jamahiriya, Nicaragua and Panama. Thus, the deposition of additional ten instruments of ratification, acceptance, approval or accession with the Director-General of UNESCO is required for its entry into force in order to

make the Intergovernmental Committee operational and to activate the system of enhanced protection.

The text of the Convention and its two Protocols together with the list of States party thereto, as well as other relevant information on our activities, is available on the UNESCO website at <http://www.unesco.org/culture/legalprotection/> or <http://www.unesco.org/general/eng/legal/index.shtml>.

Cultural Resource Listing and its Consequences under Polish Law

Modern understanding of our relation to cultural heritage assumes that each generation receives it as a legacy in trust from previous generations and holds it in trust for future generations¹. Therefore, we protect our heritage not only to enhance a quality of our own life but also as a certain deposit to be handed over to our successors. This "planetary obligation", as it is sometimes called², is defined on three levels. On the global level in the Convention Concerning the Protection of the World Cultural and Natural Heritage³, on European level in the Convention for the Protection of the Architectural Heritage of Europe⁴ and in other European documents, and finally on national level in laws issued by states.

Global Level

World Heritage Convention gives a basic definition of cultural heritage to be protected and transmitted to future generations⁵. It has descriptive character and says, that the following shall be considered as "cultural heritage":

- monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
- groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
- sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view⁶.

¹ E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, The United Nations University, Tokyo, Transnational Publishers, Inc. Dobbs Ferry, new York., p. 2.

² *Supra*, p. 128.

³ Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted by the General Conference of UNESCO at its Seventeenth Session, Paris, 16 November 1972. For the text see, Conventions and Recommendations of UNESCO Concerning the Protection of Cultural Heritage. UNESCO, Paris, 1985, p. 77 et seq. (henceforth: World Heritage Convention). On the subject of Convention in general see, among other authors, E. J. Roucouas, *Aspects juridiques de la protection du "patrimoine mondial, culturel et naturel"*, 25 *Revue Hellenique de Droit International* 1972, No. 1, p. 42 et seq.

⁴ Convention for the Protection of the Architectural Heritage of Europe, Granada, 3 X 1985, European Treaty Series, No. 121, (henceforth: European Architectural Heritage Convention).

⁵ Article 4 of the World Heritage Convention.

It is one of the principles laid down by the Convention, that each state recognises that the duty of ensuring identification, conservation, presentation and other necessary protective measures towards such described heritage situated on its territory belongs primarily to that state. Every state should do all it can do to this end, to the utmost of its own resources and with possible international assistance and co-operation⁷.

In its further articles World Heritage Convention creates a set of model obligations which should be fulfilled by states to ensure that proper measures are taken for the protection of heritage under their control. Taken together they create certain optimal world model of heritage protection that ought to be applied by states as appropriate for each of them. This model protection consists of the following obligations:

- to adopt a general policy which aims to give the cultural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
- to set up within the territory of each state one or more services for the protection, conservation and presentation of the cultural heritage with an appropriate staff and possessing the means to discharge their functions;
- to develop scientific and technical studies and research and to work out such operating methods as will make the state capable of counteracting the dangers that threaten its cultural heritage;
- to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of cultural heritage;
- to foster the establishment or development of national or regional centres of training in the protection, conservation and presentation of the cultural heritage and to encourage scientific research in this field⁸.

Besides these obligations, states undertake not to take any deliberate measures which might damage directly or indirectly the cultural heritage situated on the territory of other states. If requested, they will give their help in the identification, protection, conservation and presentation of cultural heritage situated on the territory of the requesting state⁹.

States recognise also that cultural heritage situated on their territory constitutes a part of world heritage for whose protection it is the duty of the international community as a whole to co-operate. For this purpose the Convention decided to establish a system of international co-operation and assistance to support states in their efforts to identify and conserve that heritage¹⁰. Within the framework of this system the World Heritage List¹¹ was established, containing cultural properties included in this list by the World Heritage Committee¹² due to their outstanding universal value. Committee's decision in this matter is based upon certain criteria, that taken together with the above mentioned definition of cultural heritage formulate a definition of world heritage property. So, a monument, group of buildings or site constitutes an element of world heritage if it:

- represents a masterpiece of human creative genius; or

⁶ Article 1 of the World Heritage Convention.

⁷ Article 4 of the World Heritage Convention.

⁸ Article 5 of the World Heritage Convention.

⁹ Article 6 Sections 2 and 3 of the World Heritage Convention.

¹⁰ Article 6 Sec. 1 and Article 7 of the World Heritage Convention.

¹¹ There was also established the List of World Heritage in Danger, see respectively, Article 11 of the World Heritage Convention.

¹² Article 8 of the World Heritage Convention.

- exhibits an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design; or
- bears a unique or at least exceptional testimony to a cultural tradition or to a civilisation which is living or which has disappeared; or
- is an outstanding example of a type of building or architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history; or
- is an outstanding example of traditional human settlement or land-use which is representative of culture (or cultures), especially when it has become vulnerable under the impact of irreversible change; or
- is directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance (this criterion justifies inclusion in the List only in exceptional circumstances and in conjunction with other criteria cultural or natural);

and

- meets the test of authenticity;
- has adequate legal and/or contractual and/or traditional protection and mechanisms to ensure the conservation of the nominated cultural properties or cultural landscapes¹³.

It is a duty of each state party to the Convention to submit to this Committee an inventory of cultural property situated in its territory and suitable for inclusion in the World Heritage List. The inclusion of particular property in the List requires the consent of the state concerned and gives this state a right to request the World Heritage Committee for international assistance in the protection, conservation, presentation or rehabilitation of such property. The request for assistance can also refer to the property suitable for inclusion in the List¹⁴.

Finally, it must be added that the protection of cultural heritage should not be separated from the protection of natural heritage. Discussed Convention treats cultural and natural heritage equally as inseparable elements of one world heritage to be transmitted to the further generations¹⁵.

European Level

European Cultural Convention¹⁶ gives a framework for the protection of European cultural heritage. It makes a duty of state to regard the objects of European cultural value placed under its control as integral parts of the common cultural heritage of Europe. States are also obliged to take appropriate measures to safeguard these objects and ensure reasonable access to them¹⁷.

The protection of this heritage is currently introduced by two instruments that focused on two parts of it, on architectural and on archaeological heritage¹⁸.

¹³ UNESCO. Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage. Operational Guidelines for the Implementation of the World Heritage Convention. WHC-97/2, February 1997. It should be noted that these Guidelines are currently under revision, see: World Heritage Committee. Twenty-fourth Session. Cairns, Australia 27 November - 2 December 2000. Report. WHC-2000/CONF.204?CLD.1, p. 5.

¹⁴ Article 12 and the Chapter V (Conditions and arrangements for international assistance) of the World Heritage Convention.

¹⁵ See, for example, Article 6 Sec. 1 of the World Heritage Convention.

¹⁶ European Cultural Convention, Paris, 19. XII. 1954, European Treaty Series, No. 18.

¹⁷ Article 5 of the European Cultural Convention.

¹⁸ Archaeological heritage is given a special protection in a separate Convention as this heritage is seriously threatened with deterioration because of the increasing number of major planning schemes, natural risks,

The first of them is defined in the European Architectural Heritage Convention following the general pattern adopted in the World Heritage Convention, although the content of particular elements of this definition is significantly different. According to Article 1 of the Convention:

- monuments are all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings;
- groups of buildings are homogenous groups of urban or rural buildings conspicuous for their historical, archaeological, artistic, scientific, social or technical interest which are sufficiently coherent to form topographically definable units;
- sites are the combined works of man and nature, being areas which are partially built upon and sufficiently distinctive and homogenous to be topographically definable and are of conspicuous historical, archaeological, artistic, scientific, social or technical interest.

Definition of archaeological heritage of Europe is given in European Convention on the Protection of the Archaeological Heritage¹⁹. It says, that shall be considered to be elements of the archaeological heritage all remains and objects and any other traces of mankind from past epochs:

- the preservation and study of which help to retrace the history of mankind and its relation with the natural environment;
- for which excavations or discoveries and other methods of research into mankind and the related environment are the main sources of information; and
- which are located in any area within the jurisdiction of the Parties.

This synthetic definition is assisted by the second descriptive provision stating, that the archaeological heritage includes structures, constructions, groups of buildings, developed sites, moveable objects, monuments of other kinds as well as their context, whether situated on land or under the water²⁰.

Such defined parts of European heritage are given protection according to their specific properties. In both cases states are obliged to adopt statutory protective measures and maintain proper inventories.

As far as architectural heritage is concerned states should undertake (if appropriate in the form of introducing proper legislation):

- to implement appropriate supervision and authorisation procedures²¹;
- to prevent the disfigurement, dilapidation or demolition of protected properties²²;
- to prohibit the removal, in whole or in part, of any protected monument, except where the material safeguarding of such monument makes removal imperative²³;

clandestine or unscientific excavations and insufficient public awareness (Preamble, European Heritage Convention).

¹⁹ European Convention on the Protection of the Archaeological Heritage (Revised), Valetta/La Valette, 16. I. 1992. European Treaty Series, No. 143, (henceforth: European Archaeological Heritage Convention). For more on this Convention see, for example, P. O'Keefe, European Convention on the Protection of the Archaeological Heritage. *Antiquity* 1993, Vol. 67, No. 255.

²⁰ Article 1 of the European Archaeological Heritage Convention.

²¹ Article 4 Sec. 1 of the European Architectural Convention.

²² To this end, proper legislation shall require the submission to a competent authority of any scheme for the demolition or alteration of monuments which are already protected, or in respect of which protection proceedings have been instituted, as well as any scheme affecting their surroundings. It shall also require the submission to a competent authority of any scheme affecting of a group of buildings or a part thereof or a site which involves demolition of buildings, the erection of new buildings, and substantial alterations which impair the character of the buildings or the site (Article 5 of the European Architectural Convention)

- to permit public authorities to require the owner of a protected property to carry out work or to carry out such work itself²⁴;
- to permit public authorities to compulsory purchase of a protected property if the owner fails to carry out such work²⁵;
- to provide financial support by the public authorities for maintaining and restoring the architectural heritage on its territory²⁶;
- to resort, if necessary, to fiscal measures to facilitate the conservation of this heritage²⁷;
- to support scientific research for identifying and analysing the harmful effects of pollution and for defining ways and means to reduce or eradicate these effects and to take into consideration the special problems of conservation of the architectural heritage in anti-pollution policies²⁸;
- to adopt integrated policies which include the protection of the architectural heritage as an essential town and country planning objective and ensure that this requirement is taken into account at all stages both in the drawing up of development plans and in the procedures for authorising work²⁹;
- to foster, within its own political and administrative structure, effective co-operation at all levels between conservation, cultural, environmental and planning activities³⁰;
- to foster the use of protected properties in the light of the needs of contemporary life³¹;
- to foster the adaptation when appropriate of old buildings for new uses³²;
- to ensure within the power available to it that infringements of the law protection the architectural heritage are met with a relevant and adequate response by the competent authority³³.

Protecting archaeological heritage states undertake (if appropriate by introducing proper legislation):

- to create of archaeological reserves, even where there are no visible remains on the ground or under water, for the preservation of material evidence to be studied by later generations³⁴;
- to mandatory report to the competent authorities by a finder of the chance discovery of elements of the archaeological heritage and to make them available for examination³⁵;

²³ In these circumstances the competent authority shall take the necessary precautions for its dismantling, transfer and reinstatement at a suitable location (Article 4 Sec. 2 "a" and "b" of the European Architectural Convention).

²⁴ Article 4 Sec. 2 "c" of the European Architectural Convention.

²⁵ Article 4 Sec. 2 "d" of the European Architectural Convention.

²⁶ Article 6 Sec. 1 of the European Architectural Convention.

²⁷ Article 6 Sec. 2 of the European Architectural Convention.

²⁸ Article 8 of the European Architectural Convention.

²⁹ Article 10 Sec. 1 of the European Architectural Convention. These policies shall also:

- promote programmes for the restoration of the architectural heritage,
- make the conservation, promotion, and enhancement of the architectural heritage a major feature of cultural, environmental and planning policies,
- facilitate whenever possible the conservation and use of certain buildings whose intrinsic importance would not warrant protection under discussed Convention but which are of interest from the point of view of their setting in the urban or rural environment and the quality of life,
- foster, as being essential to the future of the architectural heritage, the application and development of traditional skills and materials (Article 10 Sections 2 - 5 of the European Architectural Convention).

³⁰ Article 13 of the European Architectural Convention.

³¹ Article 11 of the European Architectural Convention.

³² Article 11 of the European Architectural Convention.

³³ This response may in appropriate circumstances entail an obligation on the offender to demolish a newly erected building which fails to comply with the requirements or to restore a protected property to its former condition (Article 9 of the European Architectural Convention).

³⁴ Article 2 Sec. i of the European Archaeological Convention.

- to apply procedures for the authorisation and supervision of excavation and other archaeological activities³⁶;
- to ensure that excavations and other potentially destructive techniques are carried out only by qualified, specially authorised persons³⁷;
- to seek to reconcile and combine the respective requirements of archaeology and development plans³⁸.

The described picture of the European approach to the protection of cultural heritage would be not complete without mentioning several Council of Europe recommendations, which are not binding instruments but they shape the model protection of the heritage. As examples the following recommendations can be given: No. R (88) 5 on Control of Physical Deterioration of the Architectural Heritage Accelerated by Pollution, No. R (89) 6, "on the Protection and Enhancement of the Rural Architectural Heritage", No. R (90) 20, "on the Protection and Conservation of the Industrial, Technical and Civil Engineering Heritage of Europe, No. R (91) 13 "on the Protection of the Twentieth-Century Architectural Heritage, No. R (91) 6, "on Measures likely to Promote the Funding of the Conservation of the architectural Heritage", No. R (95) 9 "on the Integrated Conservation of Cultural Landscape Areas as Part of Landscape Policies, and No. R (98) 4 "on Measures to Promote the Integrated Conservation of Historic Complexes Composed of Immovable and Movable Property".

National Level: the Polish Legislation.

The Polish Law on the Protection of Cultural Property currently in force³⁹ states in its Article 4 that the legal protection provided under this law shall be afforded to the cultural objects (referred to in this law as "monuments") that:

- were entered in the register of monuments,
- belong to museums, libraries and public archives,
- are obviously monuments in character.

It is clear in the context of this provision that under Polish law protection is provided in the first place to objects already registered or belonging to museums and other specialised institutions. The latter objects can be left aside as they are protected in their own way (in particular by registration in museums, libraries, etc. inventory books). There is also no need to discuss objects that are "obviously monuments" in character, as this category is rather mysterious and has no major legal and practical importance.

What do we list in Poland?

For our topic the most interesting is so the notion of cultural property used in quoted act. The definition of this cultural consists of two parts. The first part has a synthetic form and

³⁵ Article 2 Sec. ii of the European Archaeological Convention.

³⁶ This procedures should prevent any illicit excavation or removal of elements of the archaeological heritage and ensure that these excavations and prospecting are undertaken in a scientific manner. Article 3 Sec. i of the European Archaeological Convention.

³⁷ Article 3 Sec. ii of the European Archaeological Convention.

³⁸ Article 5 Sec. i of the European Archaeological Convention.

³⁹ Law on the Protection of Cultural Property of 15 February 1962, (as amended), Official Journal of the Republic of Poland 1962, No. 10, item 48, (henceforth: the 1962 Law).

says that "cultural property" means any ancient or contemporary, movable or immovable object, which is important in terms of the cultural heritage and cultural development on account of its historical, scientific or artistic value⁴⁰. The second part of the definition is of more descriptive character and points out various forms of cultural property that may be designated as protected monuments⁴¹. They are as follows:

- Heritage landscapes protected in the form of conservation areas, reservations and cultural parks;
- Works of architecture and urban development, irrespective of their state of preservation, such as historic districts of towns and settlements, parks and gardens, cemeteries, buildings together with their interiors and surroundings, groups of buildings of architectural value as well as buildings of importance to the history of architecture;
- Ethnographic sites such as typical groups of village buildings, particularly characteristic village buildings, and all kinds of furniture, tools and other objects that document the economy, artistic creativity, ideas, customs and other aspects of folk culture;
- Works of visual arts, like sculptures, paintings, engravings, etchings, and illuminations, handicrafts, arms, costumes, coins and seals;
- Historic memorabilia, such as movable military items, battlefields, historic sites connected with the struggles for independence and social justice, concentration camps, and other premises, buildings and objects connected with important historic events or with the activity of institutions or of outstanding historic figures;
- Archaeological and palaeontological sites, such as remains of prehistoric settlements and activities, caves, ancient mains, necropolis, barrows and any other products of ancient cultures;
- Objects of technical and material culture, such as ancient mines, foundries, workshops, buildings, constructions, installations, means of transport, machines, tools, scientific instruments and objects particularly characteristic for ancient and modern economy, technology and science when such objects are unique or when they are connected with important stages of technical development;
- Rare specimens of nature when they are not subject to other legal protection;
- Library material such as manuscripts, autographs, illuminations, old printed books, first editions, rare printed materials, maps, plans, scores, prints, and other visual or sound records, book bindings, if they are not part of national archival material;
- Collections of some artistic or historical value as a whole, irrespective of the nature and value of the component items;
- Workshops and studios of eminent authors, artists, scientist, politicians and other public persons as well as documents and objects connected with their life and work;
- Other movable and immovable objects that ought to be preserved due to their scientific, artistic or cultural value.

Who is responsible for listing?

The register of monuments is kept by every Regional Inspector of Monuments⁴², and comprises all cultural property located within the territory of his responsibility (territory of the

⁴⁰ Article 2 of the 1962 Law.

⁴¹ Article 5 of the 1962 Law.

⁴² Direct translation from Polish would read: "Viovodship Conservator of Monuments".

given region)⁴³. The entry of particular good (movable, immovable and collections⁴⁴) in the register is made following the decision:

- of the Regional Inspector of Monuments; this decision shall be made *ex officio* or on the proposal of the executive board of the local community council concerned⁴⁵, or of the owner or of the user of the respective cultural property;
- Minister of Culture⁴⁶.

Every decision to register an item of cultural property must contain, apart from the standard particulars required under the Code of Administrative Procedure, a statement of the effects of registration⁴⁷. It must be notified to the owner, possessor or user of the cultural property in question. Copies of this decision shall be forwarded to the Ministry of Culture and to proper executive board of the local community council. If a decision is taken by the Minister of Culture it shall be notified to relevant Regional Inspector of Monuments.

It should be added, that 1990 amendment to 1962 Law⁴⁸ introduced a new category of particularly important monuments, called "Monuments of History". Recognition of given monument as "monument of history" lies with the President of the Republic of Poland. In consequence of this recognition, monuments of history shall be presented to the World Heritage Committee to be included in World Heritage List and to be protected under the World Heritage Convention⁴⁹.

What are the consequences of listing?

It is a principle of Polish Law on the protection of monuments that any destruction, damaging and alteration of monuments⁵⁰, as well as any other activity leading to the same effects is strictly forbidden⁵¹. It is the owner or user of the monument who is in the first place obliged to ensure preservation of the monuments under their control. They must in particular:

- protect the monument against destruction, damage or ruin;
- inform the Regional Inspector of Monuments whenever anything occurs that may be detrimental to the state of preservation of this monument;
- report to the Regional Inspector of Monuments, within one month, if the monument comes into the ownership of another person⁵².

In case of movable registered monument its owner is also obliged to:

- advice the Regional Inspector of Monuments, within one month, whenever the object in question was moved and is kept in another place;
- lend the object for exhibitions or for research work, for a period of no longer than six months, every five years, as and when decided by the Regional Inspector of Monuments⁵³.

⁴³ Article 13 Sec. 1 of the 1962 Law.

⁴⁴ Cultural property kept in museums and libraries are not to be entered in the register of monuments. They are entered in museum and libraries' inventories (Article 14 sec. 2 of the 1962 Law).

⁴⁵ According to Article 13 Sec. 2 of the 1962 Law these bodies are obliged to report to the Regional Inspector of Monuments all objects that should be entered in the register of monuments.

⁴⁶ Article 14 sec. 1 of the 1962 Law.

⁴⁷ All these requirements are regulated by articles 8 to 10 of the Order of the Council of Ministers of 23 April 1963 on the Procedure for Keeping the Register of Monuments and the Central List of Monuments,), Official Journal of the Republic of Poland 1963, No. 19, item 181.

⁴⁸ Law of 19 July 1990 on Amendment of the Law on the Protection of Cultural Property of 15 February 1962, Official Journal of the Republic of Poland 1990, No. 56, item 322.

⁴⁹ Article 6 of the 1962 Law, as amended.

⁵⁰ This refers to all monuments, that is also to monuments not registered but whose character as monuments is "obvious".

⁵¹ Article 27 Sec. 1 of the 1962 Law.

⁵² Article 25 Sec. 1 of the 1962 Law.

⁵³ Article 25 Sec. 2 of the 1962 Law.

According to Article 21 Sec. 1 of the 1962 Law all works on monuments and all archaeological excavations may be done only with the permission of the Regional Inspector of Monuments. Such permission is also necessary for any move of immovable monuments if this move would lead to a change of traditionally established space. It is needed as well for any removal of movable monuments or to do anything what may damage the traditionally designed interiors of religious and secular buildings⁵⁴. This provision also applies to any works that may mar the area surrounding an immovable monument or the view thereof.

The Regional Inspector of Monuments is authorised to:

- stop all activities undertaken in contravention of above discussed Article 27 of the 1962 Law;
- order the restoration of monument or its surrounding area to its former condition at the expense of the offender⁵⁵. The same power lies in the competence of the Regional Inspector of Monuments in relation to cultural property not yet entered in the register of monuments, if there are good reasons for such registration. However, order to stop works will cease to apply at the end of a period of three months if the property in question has not been registered⁵⁶.

The Regional Inspector of Monuments may order the owner or user of a monument to carry out the necessary preservation works within a specified period. Within one month after receiving such order the owner or person entitled to the use of a monument which is not State owned should declare in writing whether he will carry out these works at his own expense. If the owner does not submit this declaration or if he does not begin or complete the works in due time, or when he is so dilatory in the execution of the work that it will not be complete on time the State may take over responsibility for the works. The decision of Regional Inspector of Monuments in this matter shall be put into effect immediately. Costs of the works are to be reimbursed later by the owner, if necessary by means of the administrative execution⁵⁷. It should be noted finally that an owner of monument registered in result of his own initiative is entitled to the following services:

- his monument may be preserved at the expense of the State;
- any transfer of ownership of this monument either by inheritance or gift will be exempted from property transfer tax;
- the monument cannot be expropriated by the State⁵⁸.

Four additional issues:

Registration of heritage complexes (buildings with decorative interiors).

According to the said law of 1962 the subject of protection are also "buildings together with their interiors and surroundings, groups of buildings of architectural value."⁵⁹. With reference to this regulation, architectural complexes, including their entire artistic external and internal decoration, may be entered in the register of monuments. This is done on the basis of one administrative decision, single for the whole complex and all movable elements of the interior.

⁵⁴ Article 27 Sec. 2 of the 1962 Law.

⁵⁵ Article 28 Sec. 1 of the 1962 Law.

⁵⁶ Article 29 of the 1962 Law.

⁵⁷ Article 31 Sec. 1 to 4 of the 1962 Law.

⁵⁸ Article 26 of the 1962 Law.

⁵⁹ Article 5 Sec. 1 of the 1962 Law.

As a good example of this practice⁶⁰ can serve the decision concerning a small church in Mostowice with its five "items" of furnishing, that are: main altar, pulpit, five candlesticks, eternal lamp and altar cross. These objects were entered in the register as they form the original historical furnishing of the church and consequently were considered "a homogenous group of works of art and artistic handicraft, late baroque and rococo in style, created in the 18th century"⁶¹.

In another case a church and monastery of the Katarzynki sisters in Orneta in the Elblag region were entered in the register including 51 movables of found in the buildings. On the contrary to the previous case, where a complex from one epoche was given, here are items created in various periods, from the 16th century when the monastery was built, till 19th century when it was extensively renovated. In spite of its enormous differences with regard to the artistic value as well as the time of creation of particular objects, all the items, "including baroque and renaissance paintings, sculptures, silver objects and Neo-Gothic benches and Art. Nouveau cupboards, became subject to joint protection as a complex being historically created unity belonging to the church and monastery"⁶².

In effect of entering the decorative complex in the monument register its owner and / or user are / is obliged to care for its state and to preserve all listed movable items in the original placement in building. And most of all the owner of the complex can neither "remove immovable monuments thus spoiling the composed or traditionally determined arrangement of grounds, nor transfer or take away movable monuments spoiling the composed or traditionally determined interior of secular and religious buildings without the consent of the proper inspector of monuments"⁶³. However, if such an event would occur, the owner is obliged to inform the inspector about the place of storage of the movable monument⁶⁴. According to Article 78 Sec. 2 of the 1962 Law, evasion of this duty will be punished.

Registration of collections.

A picture of the discussed provisions would be not complete without mentioning of collections that may be also registered as complexes. Under Polish Law, a collection is a set of movable cultural goods stored in one place, which is not a museum⁶⁵. As can be seen it is a very broad definition and can comprise collections of items gathered by various criteria. The owner of the collection entered upon his request in the register of monuments shall be entitled to certain services provided by state museums. They include:

- assistance in attribution of the authorship of the objects in the collection;
- evaluation of the state of preservation of particular objects and recommendation of necessary treatment;
- assistance in making a scientific inventory of the collection and in scientific description of its objects;
- preservation of entire collection or particular objects.

Moreover, when the collection is deposited in a state museum or stored there, it will be protected at the expense of this museum during transportation and storage in its premises. In case of need, particular objects from the collection will also be conserved at the expense of the museum providing that the owner accepted such treatment.

⁶⁰ For more information on the subject see, W. Kowalski, *Ochrona integralności zespołów zabytkowych w Polsce. Podstawy prawne i praktyka*. [Protection of the Integrity of Heritage Complexes in Poland. Legal regulations and practice]. *Ochrona zabytków [Protection of Monuments]* 1995, Vol. 3-4, pp. 253 et seq.

⁶¹ Decision No. 655/85 dated August 30, 1986, Reg. No. B. 668/1-6, not published, in authors files.

⁶² Decision No. 11/631/93 dated April 21, 1993, Reg. No. B. 41/31/93, not published, in authors files.

⁶³ Article 27 Sec. 2 of the 1962 Law.

⁶⁴ Article 25 Sec. 2 of the 1962 Law.

⁶⁵ Article 55 of the 1962 Law.

Finally, in result of registration of the collection the legal successor of its owner is exempted from tax on acquiring property rights in case of acquiring the collection by way of inheritance, donation or legacy⁶⁶.

Protection of the archaeological heritage.

According to Polish Law all archaeological finds are the property of the State. The founder of an archaeological object is obliged to report his find to proper Inspector of Monuments or museum. Such finds should be transferred to appropriate museum or other scientific institution. The finder is entitled to reward⁶⁷.

Any archaeological excavations may be carried out only with the permission of competent Inspector of Monuments. All objects of archaeological character discovered during construction or earthworks are to be notified with proper Inspector of Monuments. In such case works that can damage or destroy finds shall be suspended until appropriate decision is taken by Regional Inspector of Monuments. If this decision is not issued within three days after the notification of find, the suspended works can be resumed. All damages occurred in connection with the protection of archaeological sites and with the archaeological research are to be compensated⁶⁸.

Proposed protection of intangible cultural property.

Legal protection of intangible cultural heritage is not very common in the World⁶⁹. There are only really few countries, for example Japan⁷⁰ and South Korea⁷¹, that adopted regulations specially dedicated to address this issue. To certain extent these provisions are quite similar. They protect "art and skill employed in drama, music and applied arts, and other intangible cultural products, which possess a high historical and / or artistic value for the country", as well as "manners and customs related to food, clothing and housing, to occupations, religious faith, festivals, etc., to folk-entertainment and clothes, implements, houses and other objects used therefor, which are indispensable for the understanding of changes in people's modes of life"⁷².

Intangible heritage as a subject of protection is still rather unknown for European lawyers, although in official statement on the objectives of cultural policy in Norway one can find some lines referring to "conservation of the immaterial culture", understood there as state support for national theatre, literature and language. Also Council of Europe Declaration on Cultural Objectives says, that European heritage consists of "natural resources and human achievements, material assets as well as religious and spiritual values, knowledge and beliefs, hopes and fears, and ways of life whose very diversity provides the cultural richness (...)"⁷³.

⁶⁶ Article 59 with regard to Article 26 Sec. 1.2 of the 1962 Law.

⁶⁷ Article 24 of the 1962 Law. For more on the archaeological finds under Polish Law see, W. Kowalski, Title to Finds and Discovered Antiquities under Polish Law. *Art, Antiquity and Law* 1996, vol. I, issue 2.

⁶⁸ Article 23 of the 1962 Law.

⁶⁹ It should be noted that UNESCO has undertaken certain efforts to introduce such protection. See, *Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity. Implementation Guide*. UNESCO. Paris.

⁷⁰ See, for example, *Agency of Cultural Affairs*. Government of Japan, 1983.

⁷¹ See, for example, *Cultural Properties of the Republic of Korea. An Inventory of the State-Designated Cultural Properties*. Seoul 1990.

⁷² Article 2 sec. 2 and 3 of the Japanese Law. *Law for the Protection of Cultural Properties*. Cultural Properties Protection Department. Agency for Cultural Affairs. Government of Japan. 1977.

⁷³ Preamble. European Declaration on Cultural Objectives. Adopted by the 4th Conference of European Ministers Responsible for Cultural Affairs (Berlin 1984). Council of Europe. Strasbourg 1984.

These statements sound quite well and show right direction. However, they are only of purely declaratory character and have no legal meaning. It seems probable, that in this context recent Polish legislative initiative could be the first effort in Europe to face the problem how to protect intangible heritage in legal terms. Within the process of preparing new law on the protection of cultural property Poland's Parliament decided last year to study the possibility of adopting special provisions on intangible cultural property into this act. Proposed draft definition of such property reads as follows:

"Intangible (immaterial) cultural goods constituting an evidence of tradition or historical events, such as language, names, crests, customs and technologies, remain under protection of the Republic of Poland, aimed at their preservation and cultivation"⁷⁴.

Currently this definition is under discussion, in particular on possible subjects of protection, that is various intangible properties that could be protected, and on relevant legal instruments that could be used to serve properly and fulfil the objectives of this protection⁷⁵. Obviously, there are easily recognisable difficulties of practical enforcement of such entirely new legal provisions in European and particular Polish reality.

⁷⁴ Article 6 sec. 2 of the Draft Law on the Protection of National Heritage. Parliamentary Print No. 1629 (0253-99A.PPN), 24 May 2001. Author of this presentation was asked by Parliamentary Commission to comment on this definition.

⁷⁵ See, for example, K. Dąbrowska Budziło, Wartości niematerialne krajobrazu kulturowego [Intangible Values of Cultural Landscape], in: K. Pawłowska (Ed.), Architektura krajobrazu a planowanie przestrzenne [Architecture of Landscape and Space Planning], Kraków 2001, p. 256 et seq.

BIOGRAPHICAL NOTE

Wojciech W. Kowalski, born in Chorzów, Poland, 11 March 1950.

Study of law at the Jagiellonean University in Cracow. Awarded Polish Patent Office' prize for masters thesis (on the know-how agreement) and later for the second best doctoral thesis (on the licensor's liability for non performance of licence agreement). Habilitation (University of Silesia 1991).

State judge examination 1975, member of the Bar since 1995.

Assistant, later Assistant Professor (1980-1992) and Professor at the University of Silesia (since 1995).

Head of the Department of Intellectual and Cultural Property Laws, University of Silesia Katowice.

Visiting professor, University of Edinburgh, The Institute of Advanced Studies in the Humanities 1998-2000. Guest lecturer in London and Edinburgh, Minsk (Belarus), Heidelberg. Presented papers at numerous international conferences, among other places, in Madrid, Paris, Moscow, London, Edinburgh, Warwick, Manchester, Sofia, Arnhem, Berlin, Tartu, Vilnius, New York, Washington.

Author or co-author of 6 books, and author of 64 articles published in Polish and foreign legal journals.

Member of editorial board of *Spoils of War. International Newsletter* (Bremen/Magdeburg). Assistant Editor of the journal *Art, Antiquity and Law* (Kluwer Law International).

The Polish Government's Commissioner for Polish Cultural Heritage Abroad, 1992-1994. Representative of Poland to the Council of Europe's Cultural Heritage Committee 1992-1994. Elected Deputy Chairman of Committee 1993-1994.

Deputy chairman of the ICOMOS International Committee on Legal, Administrative and Financial Issues, 1998 - 2000.

Member of State Council for the Protection of Monuments 1997 - 2000.

Head of Polish delegation to UNESCO governmental expert conferences to work on the UNIDROIT Draft Convention on Stolen and Illegally Exported Cultural Objects (1992-1994), and on the Draft Convention on the Protection of Underwater Cultural Heritage (2001).

Chairman of UNESCO expert group to prepare draft principles on resolving disputes on works of art removed during World War II.

Ambassador ad personam in the Ministry of Foreign Affairs, since 1998.

LISTING OF CULTURAL RESOURCE IN SRI LANKA

The procedure; legal, administrative and economic consequences and the social impact of the listing of cultural resources

INTRODUCTION TO THE COUNTRY

Sri Lanka, named as *Ratnadweepa* – the island of precious stones in early Buddhist literature, *Lankadweepa* – the island of Sinhalese, *Serendib* – by the Arab travelers and *Ceylon* – by the Europeans is a tear shaped island situated at the Southern end of India. It is 435 kilometers long and 225 kilometers wide covering an area of 65,679 square kilometers. The central part of the country, which rises up to 2439 meters from the mean sea level called the ‘hill country’ while the coastal areas, which rises up to 307 meters from the mean sea level, is called as the ‘low country’. It has a tropical hot humid climate with a temperature varies from 26⁰C to 32⁰C in the low country and 8⁰C to 18⁰C in the hill country and a rain fall of 2549 millimeters in the west coast and 3810 millimeters in the central hills while 640 millimeters to 1280 millimeters in the dry zone. The country has a population of 18 million which consist of 74% Sinhalese, 12% Tamil, 5% Muslim and other communities. The main religions of the country are Buddhism, Hinduism, Christianity and Islam of which 69% of its population are Buddhist.

The written history of the country over a period of 2000 years reveals that in 6th Century BC Anuradhapura in the North Central Province thrived as the first capital up to 10th Century AD. In the 14th Century AD the South Indian invasions forced the capital to be moved to Polonnaruwa while European invasions moved it further inland to the highlands of Gampola and Kandy in the 15th Century and 16th century respectively. Portuguese in 1505 and Dutch in 1656 captured the coastal areas of the country while the traditional government continued in the Kandyan Kingdom in the central hills. The British who captured the coastal areas from the Dutch in 1796 ultimately captured the Kandyan Kingdom in 1815 and ruled the entire country till its independence in 1948. This long history of over 2000 years is documented in historical records, but its most tangible expressions is to be expressions is to be found in the architectural remains of ancient cities, palaces, monasteries, temples, gardens, landscapes, buildings, irrigation works and masterpieces of sculpture and painting which have survived since Anuradhapura period.

History of Cultural Resource Listing

Listing of Cultural Resources in Sri Lanka commenced in 1890 with the establishment of the Archaeological Survey of Sri Lanka. The primary intention was to prepare an inventory of cultural resources found in various parts of the country. In 1900 the Ordinance No. 15 was introduced for the proclamation of reservations, their clearing, maintenance, and landscaping. Inadequacy of the Ordinance No. 15 to protect the ancient monuments from unsatisfactory renovations prompted authorities to introduce more definite and more drastic regulations to protect the antiquities in Sri Lanka. After a study of the laws on antiquities in the different parts of the world, the Antiquities Ordinance No. 9 was introduced for the legislative protection of the antiquities in 1940. The Antiquities Ordinance together with its amendments in 1956 and 1998, has classified monuments as Ancient Monuments and Protected Monuments while areas for archaeological purposes were classified as Archaeological reserves. Although the Antiquities Ordinance was able to list and protect immovable antiquities in Sri Lanka, it was not powerful to

prevent the thefts, vandalism and illicit exports of movable antiquities. In order to remedy this situation the Cultural Property Act No. 73 of 1988 was introduced mainly to control the export and to provide for a scheme of licensing to deal with the cultural property. Apart from the above two legislations the Town and Country Planning Ordinance No. 13 of 1946 with its amendment in 2000 has made provisions to prepare planning schemes for the prohibition, regulation or control of the use of land and the reservation of defined areas for specified purposes and in particular the prohibition or restriction of the use or development of land for the purpose of the preservation of places and structures of religious, historical, architectural, archaeological and artistic interest. The Urban Development Authority Law No. 41 of 1978 also has contributed to the listing of the Cultural resources by way of designating special areas of religious, historical, architectural, archaeological and artistic interest there by imposing regulations to control the developments in such areas.

DEFINITIONS OF CULTURAL RESOURCES

According to the laws and regulations in existence in Sri Lanka number of definitions have been given to monuments, sites and other cultural properties. They are:

a) Ancient Monument

- Any monument lying or being found in Sri Lanka which dates or may reasonably be believed to date from a period prior to the 2nd day of March 1815.
- Any other monument that has been declared to be an ancient monument by an order published in the gazette. For this purpose only monuments that have existed or is believed to have existed for a period of not less than hundred years are qualified.
- Any tree growing in state land or any other land is of historical or archaeological importance that has been declared to be an ancient monument by an order published in the gazette.

b) Antiquity

- Any Ancient Monument
- Any Statues, Sculptured or dressed stone and marbles of all descriptions, engravings, carvings, inscriptions, paintings, writings, and the materials where on the same appear, all specimens of ceramic, glyptic, metallurgic, and textile art, coins, gems, seals, jewels, jewellery, arms, tools, ornaments, furniture, house hold utensils, and all other objects of art which are movable property lying or being found in Sri Lanka and has been in existence for more than one hundred years.

c) Archaeological Heritage

- Part of the material Heritage of mankind in respect of which archaeological methods provide primary information and includes all vestiges of human existence and places relating to all manifestations of human activity, abandoned structures and remains of all kind (including subterranean and underwater sites), together with all the portable cultural material associated with them.

d) Monument

- Any building, or other structure or erection, or any tomb, tumulus or other place of interment, or any other immovable property of a like nature or any part or remains of the same or any other site where the material remains of historic or prehistoric human settlement or activity may be found and includes the site of any monument and such portion of land adjoining such site as may be required for fencing or covering in or otherwise preserving any monument.

e) Archaeological Reserve

- Any specific area of land assigned, declare or reserved for archaeological purpose by notification published in the Gazette

f) Protected Monument

- Any ancient monument situated on any land other than state land has been published in the Gazette that is in danger of destruction or removal, or injudicious treatment and that has to be protected in the public interest.

g) Cultural Property

- Cultural Property which are specially designated by the minister on the approval of the cabinet, on religious or secular grounds as being of importance for archaeology, prehistory, history, literature, art or science and belongs to one of the following categories.
 - i. rare collections and specimens of fauna, flora, minerals and anatomy
 - ii. property relating - to history including the history of science
 - to the life of national leaders, thinkers, scientists and artists
 - to events of national importance
 - iii. products of archaeological excavations or of archaeological discoveries
 - iv. elements of artistic or historic monuments or archaeological sites which have been dismembered
 - v. antiquities more than one hundred years old, such as inscriptions, coins, currency notes and engraved seals
 - vi. objects of ethnological interest
 - vii. pictures, paintings and drawings produced entirely by hand
 - viii. original marks of stationary art and sculpture
 - ix. original engravings, prints and lithographs
 - x. rare manuscripts, old books, documents, drawings, maps, plans and publications of special interest
 - xi. postage revenue and similar stamps
 - xii. archives
 - xiii. articles of furniture more than one hundred years old
 - xiv. old musical instruments

PROCEDURE ADAPTED IN SRI LANKA FOR LISTING CULTURAL RESOURCES

The main institution responsible for the listing of cultural resources in Sri Lanka is the Department of Archaeology. It has been identified as the key institution responsible for the implementation of the Antiquities Ordinance No. 9 of 1940 and the Cultural Property Act No. 73 of 1988. The Department has to obtain the support of various other government institutions, i.e. the Land Commissioner's Department for the acquisition of land, National Physical Planning Department for the designation of special areas as sacred cities and the Urban Development of authority to designate areas as sacred areas and to speedy acquisition of land in such areas, in order to list cultural resources in Sri Lanka. The Department is also helped by the Archaeological Departments of the Universities of Peradeniya, Sri Jayawardanapura, Kelaniya, Ruhuna and Rajarata, the Central Cultural Fund, the Post Graduate Institute of Archaeology, ICOMOS (Sri Lanka), Sri Lanka Council of Archaeologists and number of interested individuals for the initial identification of cultural resources for listing. The responsibility of listing these resources lies with the Exploration Division of the Department headed by a Director. Initial requests normally comes form either from the religious owners of sites and monuments or the religious societies associates them or the politicians of the area or from the interested individuals. Apart from these request the department also carryout explorations in the country for the identification of sites and monuments. The identification of cultural resources are carried out by the exploration division of the department with the help of archeologists and conservation architects by searching through historical records, by observing the monuments and sites, by field walking, by carrying out nondestructive archaeological investigations, obtaining core samples of the sites, carrying out research excavations, etc. After the preparation of initial identification reports the Department take the following steps to list them legally under each category.

a) Archaeological Reserves

The Director General of Archaeology through the Ministry of Culture will request the land commissioner to declare by notification published in the Gazette any specified area of land to be an archaeological reserve with the approval of the Minister to whom the subject of state land is being assigned.

b) Ancient Monuments

The Director General of Archaeology will request the Minister to whom the subject of Culture is being assigned to declare, any monument laying or being found in Sri Lanka which dates or may reasonably be believed to date from a period prior to the 2nd day of March 1815, any other monument that has existed or is believed to have existed for a period of not less than hundred years and any tree growing in state land or any other land is of historical or archaeological importance, to be an ancient monument by an order published in the gazette.

c) Protected Monuments

The Director General of Archaeology will request the Minister to whom the subject of Culture is being assigned to declare any ancient monument situated on any land other than

state land that is in danger of destruction or removal, or injudicious treatment and that has to be protected in the public interest to be a protected monument by an order published in the Gazette.

d) Register of Cultural Property

The Minister to whom the subject of Culture is being assigned in consultation with the Cultural Property Board established under the Cultural Property Act, with the approval of the Cabinet will publish a notice in the Gazette specifying the categories of cultural property that shall be registered.

e) Sacred Cities

The Minister to whom the subject of the Town and Country Planning is being assigned will bring before the Parliament for the approval of the regional physical planning scheme prepared by the regional planning committee for the prohibition, regulation or control of the use of land and the reservation of defined areas for specific purposes. The specific purposes will consist of the purpose of the preservation of places and structures of religious, historical, architectural, archaeological and artistic interest. The regional physical planning scheme, which has been approved by the Parliament, will come into operation upon the publication in the Gazette by the Minister. Such areas will then be designated as “Sacred Cities”.

f) Sacred Areas

The Director General of the Urban Development Authority with the recommendation of the Board of Management will request the Minister to whom the subject of the Urban Development is being assigned to declare an area as an Urban Development area by an order published in the Gazette. Thereafter the Director General of the Urban Development Authority with the recommendation of the Board of Management will request the Secretary to the Minister to whom the subject of the Urban Development is being assigned to declare a special area as a “Sacred Area” within the declared Urban Development area by an order published in the Gazette.

LEGAL, ADMINISTRATIVE AND ECONOMIC CONSEQUENCES OF LISTING

The legal, administrative and economic consequences of listing will be explained under the different categories identified in the earlier section of this paper, as the implementation is different and unique to each of the category and the responsibility of implementation is also vested with different authorities.

a) Archaeological Reserves

i) Legal Consequences

All archaeological reserves declared by the notice published in the Gazette is deemed to be the property of the Department of Archaeology. Every person, other than the Director General of Archaeology, or a person acting under and in accordance with his direction, who –

- Clears or breaks up for cultivation or cultivates any part of an archaeological reserve
- Erects any building or structure upon any such reserve
- Fells or otherwise destroys any tree standing on any such reserve
- Otherwise encroaches on any such reserve

will be guilty of an offence and will be convicted after summary trial before a Magistrate and will be liable in addition to be ejected from the reserve, to a fine of not exceeding fifty thousand rupees or to imprisonment of either description for a term not less than two years and not more than five years or to both.

ii) Administrative Consequences

The responsibility of protecting the archaeological reserves will be the duty of the Director General of Archaeology. He together with his limited staff has taken every possible step to protect such reserves declared in the country. The District Secretary or the Divisional Secretary of each administrative district or division of the country also has promptly helped in this process. As the task of managing the declared Archaeological Reserves in the country is immense and cannot be managed through the limited staff of the Department, the Director General of Archaeology also could execute his powers by appointing any person possessed of special expertise. But it is important to mention that any political influence may hinder or delay the action taken by the Director General on the violation of regulations governing the reserves.

iii) Economic Consequences

The protection, maintenance and conducting research activities within the designated areas will be the responsibility of the Department of Archaeology. The Department using the financial allocations provided by the Public treasury is conducting these activities. Due to various financial constraints faced by the Government the annual allocations provided for the Department is very limited resulting postponement of important activities. In order to remedy this situation a Fund named as the Central Cultural Fund was created by an act of parliament to collect money and aids from local and foreign individuals and institutions and to provide funds to carryout archaeological excavations, conservation and maintenance programmes. The fund was empowered to levy of charges from visitors entering the archaeological reserves within the area called Cultural Triangle. The fund has collected about 25 million US\$ from 1981 to 2001 as entry fees to the archaeological reserves within the Cultural Triangle area. Apart from the Central Cultural Fund, the Department of Archaeology is now also permitted to levy an entrance fee where it is considered necessary at selected sites or visitor centers. Although this provision has been enforced since 1988, Department has not yet imposed it due to the reason that such collection has to be deposited at the treasury as a government revenue. On the other hand the Central Cultural Fund has more freedom to use the collected revenue for the development of monuments and sites without any approval from the treasury.

b) Ancient Monuments

i) Legal Consequences

All state owned ancient monuments declared by the notice published in the Gazette would be vested with the Department of Archaeology while private owned ancient monuments will remain to be owned by the private parties unless otherwise they are acquired with the agreement of the owner under the land acquisition act through the Divisional Secretary.

The Director General of Archaeology could impose regulations prohibiting or restricting the erection of buildings or the carrying on of mining, quarrying, or blasting operations on any land within the prescribed distance of any Ancient Monument. The present distance is of 400 yards from the declared monument.

Any person who violates the regulations will be guilty of an offence and will be convicted after summary trial before a Magistrate and will be liable to a fine of not exceeding fifty thousand rupees or to imprisonment of either description for a term not less than two years and not more than five years or to both.

ii) Administrative Consequences

The Director General of Archaeology will be responsible of the conservation, maintenance and management of state owned ancient monuments with the help of his staff. The Director General of Archaeology could also obtain the services of the Director General of the Central Cultural Fund and his staff in discharging the above responsibilities as the Fund has been given the task of collecting entry fees to the archaeological reserves and the ancient monuments. At present management of ten such sites including all six World Heritage Cultural Sites in Sri Lanka, i.e. Sacred City of Anuradhapura, Ancient City of Polonnaruwa, Ancient City of Sigiriya, Golden Temple of Dambulla, Sacred City of Kandy and Old town of Galle and its Fortifications, are been assigned to the Central Cultural Fund.

iii) Economic Consequences

As the Conservation and maintenance of state owned Ancient Monuments are the responsibility of the Department of Archaeology, it uses the financial allocations provided by the Public treasury in fulfilling its obligations. Due to the financial constraints of the Government the annual allocations received for this purpose is very limited resulting postponement of various urgent conservation and maintenance programs. On the other hand the Central Cultural Fund carries the responsibility of conservation and maintenance of Ancient Monuments that are been assigned to them by the Director General of Archaeology. From 1981 to 2001 it has spent about 36 million US\$ in the excavation, conservation, layout, infrastructure and maintenance work of the sites assigned to them.

c) Protected Monuments

i) Legal Consequences

The owner of any land on which a protected monument is situated and the Director General of Archaeology could enter into a written agreement providing for the due conservation of such monument and its protection from danger of destruction or removal and from damage by neglect or injudicious treatment.

No persons without a permit issued by the Director General of Archaeology should commence or carry out any work of restoration, repair, alterations or addition in connection with any protected monument. The permit issued in a prescribed form with prescribed conditions should contain additional conditions with regard to the supervision of the proposed work by the Director General of Archaeology or by any person approved by him for this purpose. Where a permit has not been issued or revoked the Director General with the approval of the minister, could carry out restoration, repair, alterations or additions in connection with the monument as to him may seem expedient.

The Director General of Archaeology could impose regulations prohibiting or restricting the erection of buildings or the carrying on of mining, quarrying, or blasting operations on any land within the prescribed distance of any protected monument. The present distance is of 400 yards from the declared monument.

Any person who violates the above regulations will be guilty of an offence and will be convicted after summary trial before a Magistrate and will be liable to a fine of not exceeding fifty thousand rupees or to imprisonment of either description for a term not less than two years and not more than five years or to both.

ii) Administrative Consequences

The ownership of the protected monuments declared by the Department of Archaeology will be private as such the responsibility of due maintenance and conservation of such monuments lies with the legal owner. The primary responsibility of guaranteeing their protection from danger of destruction or removal and from damage by neglect or injudicious treatment lies with the Director General of Archaeology and his staff. The Director General of Archaeology is also responsible for the supervision of any work of restoration, repair, alterations or addition in connection with any protected monument and also could carryout restoration, repair, alterations or additions in connection with the monument as to him may seem expedient. This work could be carried out either through the staff of the Archaeology Department or through the staff of the Central Cultural Fund.

iii) Economic Consequences

As the owner ship of the protected monuments are in private hands, neither the department of archaeology nor the Central Cultural Fund could levy any entrance fee unless the owner of such monument agreed upon. On the other hand the obligation of the

department to carry out restoration, repair, alterations or additions in connection with the monument as to it may seem expedient, through its own financial resources or through the Central Cultural Fund. As such the economic return from such monuments may not be sound when compared with the Archaeological Reserves and Ancient Monuments owned by the Department.

d) Register of Cultural Property

i) Legal Consequences

Upon publication of the notice in the Gazette specifying the categories of cultural property that shall be registered no person could own or have in custody or possession any cultural property specified in the notification unless such cultural property is registered by the registering officer and such officer has issued a certificate of registration. Any person who transfers the ownership or custody or possession of any registered cultural property should inform within fourteen days to the registering officer. Any person who fails to act as stated above will be of an offence be liable to a fine not exceeding one thousand rupees or to imprisonment for a period not exceeding one year or to both. The Director General of Archaeology can also issue license to any person to carry on the business of selling or offering to sell any cultural property.

ii) Administrative Consequences

The Director General of Archaeology through either by the Government Agent of a District or by any officer of the Department of Archaeology has to

- Prepare a list of the categories of cultural property required to be registered
- Conserve, maintain, repair and restore cultural property that requires registration
- Control and administer the registration, sale and protection of cultural property that require registration
- Purchase valuable cultural property with such funds granted for the purpose by the Parliament

The Director General or any officer authorized by him could inspect any cultural property in the possession of any person and study such property and could make drawings, photographs or reproductions provided that such drawings, photographs or reproductions could be sold without the consent of the owner.

The Director General also could give directions to the owner of any cultural property is in danger of being destroyed, defaced, misused, allowed to fall into decay or character is being changed to safeguard such property. If the owner is unable to comply with the directions given by the Director General of Archaeology, such cultural property could be taken into custody of the Director General and handed over to the Director of Museums for exhibition at a Museum for public display. At this point it is important to note that under the Antiquities Ordinance all undiscovered antiquities other than Ancient Monuments whether lying on or hidden beneath the surface of the ground or in any river

or lake or within the territorial sea of Sri Lanka is deemed to be the absolute property of the State. The Director General of Archaeology could also issue license for the purpose of discovering antiquities on land belongs to private persons or to the state other than any excavations carried out by or on behalf of him.

iii) Economic Consequences

The economic return from the preparation of a registry of cultural property by the Archaeology Department is negligible other than the collection of entry fees obtained from the state own museums and interpretation centers that displays them. The Director General and the Director of Museums will have to conserve and maintain the cultural property in their custody with the financial allocations provided by the Government Treasury. The help of the Central Cultural Fund also could be obtained for this purpose.

e) Sacred Cities

i) Legal Consequences

The regional physical planning scheme prepared for the Sacred Cities will consists of regulations and control of the use of land and will require approval of any development proposals with in the area from a planning committee specially set up for the purposes of controlling and monitoring activities with in the area. The executing agency of the physical plan of Sacred Cities will have the legal power to acquire any private land or discharge any state land with in the area for the fulfillment of the purpose for which the panning scheme is prepared.

ii) Administrative Consequences

The execution responsibility of the regional physical planning scheme prepared for the Sacred Cities will lies with the Director General of the National Physical Planning Department together with the Local Authority of the area. The guidelines, regulations and controls depicted in the regional planning scheme will be monitored by a planning committee set up for the area by the Minister which will consists of representatives of all institutions responsible for the development activities of the area. This will include representations from, Chief Secretary, District Secretary, National Physical Planning, Local Government, Archaeology, Road Development, Electricity, Water, Land Acquisition and Development, Survey, etc. from the area concern. The chief incumbents of the religious monuments of the area will also be invited for the meetings.

iii) Economic Consequences

The responsibility of obtaining financial resources in the implementation of the physical plan of the sacred city will be the responsibility of the National Physical Planning Department. It could also obtain the help from the other responsible agencies operate within the area such as Local Authority, Department of Archaeology, Central Cultural Fund, Road Development Authority, Ceylon Electricity Board, Water Supply and

Drainage Board, Sri Lanka Telecom, etc. But the financial requirements for the acquisition land relocation of settlements in the area and the development of infrastructure facilities has to be born by the department itself. The department could also obtain financial resources required for the maintenance of the area by renting land, shops and imposing parking charges.

f) Sacred Areas

i) Legal Consequences

Upon publication of a special area as a “Sacred Area” with in the declared Urban Development area by an order in the Gazette every person who proposed to carry out any development activity whatsoever which included alterations, additions, etc., to existing buildings, changing the use of existing lands or buildings, constructing new buildings, subdivisions of land for building purposes, construction of streets, roads, interfering with the landscape, etc., within the area is required to apply to Urban Development Authority before commencing any development activity. No activity shall be commenced until the Urban Development Authority has duly approved the application. Apart form this the Urban Development Authority acquire powers through the Urban Development Projects (Special Provisions) act No.2 of 1980 to declare any land require for the purpose of carrying out a project by an order published in the Gazette by the President of the country upon recommendations made by the Minister in charge the subject of Urban Development. If such order is published no person affected will be entitled,

- to any remedy, redress or relief in any court other than by way of compensation or damages
- to a permanent or interim injunction, an enjoining order, a stay order or any other order having the effect of staying, restraining or impeding any person, body or authority in respect of
 - any acquisition of such land in such area
 - the carrying out of any work on any such land or in any land in any such area
 - the implementation of such project in manner whatsoever

The only provision made possible by this act is the powers of the Supreme Court in respect of any application made under Article 126 and the Article 140 of the constitution if the application is made with in one month and disposing within two months.

ii) Administrative Consequences

Preparation and execution of development plans, proposal, projects and regulations with in the declared urban development area will be responsibility of the Director General and the his staff of the Urban Development Authority. At present the approval of planning applications within the area has been given to the local authority of the area. The planning committee set up for the consideration and approval of planning applications will consists of officials responsible for various acts such as, land, sanitary, engineering, archaeology, conservation, etc. Advice on the development proposals in sacred areas will

be provided by an advisory committee set up with the representatives from Chief Secretary, District Secretary, Urban Development Authority, Local Government, Archaeology, Road Development, Electricity, Water, Land Acquisition and Development, Survey, etc. from the area concern. The Divisional Secretary of the area will carry out the acquisition of land for projects.

iv) Economic Consequences

The responsibility of obtaining financial resources in the implementation of the development plan of the sacred area will be the responsibility of the Urban Development Authority. It could also obtain the help from the other responsible agencies operate within the area such as Local Authority, Department of Archaeology, Central Cultural Fund, Road Development Authority, Ceylon Electricity Board, Water Supply and Drainage Board, Sri Lanka Telecom, etc. But the financial requirements for the acquisition land relocation of settlements in the area and the development of infrastructure facilities has to be born by the authority itself. The authority could also act on behalf other government institutions, with regard to the speedy acquisitions of land, subject to the compensation is provided by the respective institution. The authority could also obtain financial resources required for the maintenance of the area by renting land, shops and imposing parking charges.

SOCIAL IMPACT ON THE LISTING OF CULTURAL RESOURCES

It is important to note that although the legal owner of most of the listed cultural resources in Sri Lanka is both the Department of Archaeology and the Department of Museums the actual users are the people of the society. On the other hand the responsibility of the society in safeguarding these cultural resources has become much more important as majority of them are religious monuments, mainly Buddhist, which are still being worshiped. Therefore, it is important to discuss the social impact in listing the cultural resources under each category explained earlier.

Generally the interest among the public for initial listing of immovable cultural resources is very sound and there are various interested groups such as religious owners of sites and monuments, religious societies associates them, the politicians of the area and the interested individuals who request the Department of Archaeology for the inclusion of them in the protected list. Generally the listing of sites as **Archaeological Reserves** by way of publishing them in the gazette. During the process of listing as the legal owner of such land will be the Department of Archaeology any person inhabit these lands by the way of settlements and cultivations has to be ejected. As the procedure of ejection through the land acquisition act takes several years, this procedure has been experienced as a legal battle with the department and with the people refusing to leave. As a result of this the political pressure will also be applied to the department either to delay or drop the idea of acquisition completely. The effected people will apply pressure through every possible way to oppose the ejection or to remain in the land by way of obtaining a lease from the department. The popular question faced by the department is the request by the people to remain in such land pointing out they are the ancestors of the people who look after the area since it became ruined or the people who provide hospitality to the religious owners of the monuments.

This has become one of the main obstacles faced by the Archaeological Department over the years.

Social impact of listing the monuments as **Ancient Monuments** is different. Some of the listed ancient monuments are belong to the Archaeological Department. The secular monuments listed only faced with the problem of unauthorized venders backed by the politicians trying to sell various food, drinks and souvenirs to the visitors. This has also resulted environmental issues in the conserved sites mainly the problem of garbage disposal. In religious sites apart from the venders the most influential problem faced is the pressure applied by the religious owners of such places for the construction of new buildings near the monuments although they are belong to the Department. This has resulted in disagreement with the legal and religious owners of such monuments creating various unsolved issues.

The social pressures applied in the **Protected Monuments** are quite different. The legal owners of such buildings will extend their fullest support to the Department until they are declared as protected monuments. Most of the legal owners feel that by designating them as protected monuments the responsibility of maintenance of these monuments will be vested with the Department. From the day that such monuments have been listed the pressure of the owners will be applied to the department for the renovation and maintenance of such monuments. When these activities postponed due to the fact that the department's financial resources are limited and the priorities will be decided on the available financial resources provided by the treasury, the owner will try to change their attitude of getting listed as they are not legally permitted to carryout any modifications or alterations or conservation without the permission and supervision from the department. On the other hand the most owners wish to add new building to the sites as well as carryout modifications using new materials and new technology. This has also resulted in developing a conflict between the owner and the department. Most popular criticism which will be heard from the legal owners would be “ the department is either not interested or cannot do such work due to financial constrains nor they will permit us to do any work in these monuments”. Apart from this the influential, powerful and rich religious owners of such monuments will carryout the additions, modifications and alterations without the permission of the department and using their political powers to prevent any legal action been taken. But it is important to note that these types of illegal work are limited for few such monuments.

The social impact of listing the movable cultural property by way preparing a **register of cultural property** is different. The department had no set back of whatsoever in the registering cultural property in the custody of government institutions. But the biggest set back has been in the attempt of registering the cultural property in the hands of private owners. While some of the owners who are the custodians of cultural property has been donated them to the museums for exhibiting them as their private collections some of the owners has simply refused completely to include them in the register prepared by the Director General of Archaeology. Although the certificate issued by the department after registering them will guarantee the authenticity of them the question of keeping the register as a confidant document as been raised by the general public and they are not willing to risk both their lives and the cultural properties by exposing them in a register. Since there is no solution has been arrived at, the preparation of the register of cultural property has been abandoned.

The declaration of special areas for the purpose of the preservation of places and structures of religious, historical, architectural, archaeological and artistic interest either as **sacred cities** or as **sacred areas** has been created the most impact in the societies. As this declaration provide the legal power to the two main institutions the National Physical Planning Department and the Urban Development Authority to prepare development proposals for the designated areas and to impose regulations and restrictions for the development activities through local councils, the majority of the society extends their fullest support for the implementation of the development proposals. These development proposal will not only consist of regulations and restriction in these areas but also will consist of programs for the provision of regular maintenance; provision of infrastructure facilities such as access roads, parking and toilet facilities, water supply, shopping, etc.; removal of unauthorized constructions, acquisition land and resettlement people from the areas with archaeological remains. Therefore, the pressure applied by the religious owners of such areas and the general public to speedy implementation of the proposals will be positive while the pressure applied by the effected parties in land acquisition and resettlement programs through the politicians of these areas will be negative. This had resulted in delaying the completion of such development programs resulting threats for the preservation of places and structures of religious, historical, architectural, archaeological and artistic.

As a conclusion it is important to note that despite number of set backs there are 120 archaeological reserves, 700 protected monuments including ancient monuments, 20 sacred cities and 01 sacred area listed, protected and maintained by the government institutions responsible for such activities.

LA DECLARACIÓN DE BIENES CULTURALES EN EL PERÚ Y LOS PELIGROS DE UNA PRESUNCIÓN EQUÍVOCAMENTE PLANTEADA.

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A MODO DE INTRODUCCIÓN.

PATRIMONIO PERÚ: S.O.S.

El territorio peruano es sumamente rico en manifestaciones culturales. Se afirma que existen por lo menos 100 000 sitios arqueológicos, de los cuales son pocos los conocidos, menos los investigados, y menos aún los formalmente declarados como zonas protegidas. A ello hay que sumarle un número importante de ciudades de la etapa virreinal y otros pueblos menores, dignos de ser conservados.

Prácticamente ningún gobierno ha tenido una política explícitamente orientada a insertar los bienes culturales en la vida nacional. Sin embargo, la década comprendida entre 1990 y 2000, que corresponde al gobierno de Alberto Fujimori, se caracteriza por haber sido un periodo en el que la ya deteriorada situación de la cultura nacional se ha visto hondamente afectada, llegando al punto en el que los bienes culturales no sufrieron sólo la indiferencia, la falta de presupuestos o la desidia oficial, sino que se convirtieron en víctimas directas de una política especulativa, que bien podría llamarse de destrucción institucionalizada.

Los dos ejemplos más graves de política institucional con consecuencias directas de destrucción, tienen que ver con los proyectos de titulación de tierras puestos en marcha sobre todo a partir de 1995.

Por un lado se trataba de entregar la mayor cantidad posible de títulos de propiedad, entre los sectores populares. El proceso migratorio campo-ciudad que se ha dado a lo largo de toda Iberoamérica, ha generado cinturones de pobreza en torno a las principales ciudades. Muchos de esos cinturones, surgieron mediante la invasión de tierras de propiedad pública o privada, o que estaban en la categoría de tierras eriazas. En Perú son numerosos los casos en que las invasiones han coincidido con la existencia de bienes culturales arqueológicos. En este supuesto, de acuerdo con las leyes de protección, no procede el otorgamiento de títulos de propiedad, siendo ilegal la posesión ejercida.

Sin embargo, el gobierno dispuso un sistema de "liberación" de tierras a fin de permitir no solo la continuación de la posesión, sino el reconocimiento de derechos al invasor.

El segundo caso, también relacionado con la utilización económica del suelo, tiene que ver con una política de ampliación de la frontera agrícola, vía la conversión de tierras eriazas en cultivables. Como se ha dicho, la presencia de bienes arqueológicos en el territorio peruano es muy importante. Por esa razón, muchos de los terrenos eriazos incluidos dentro de ese proceso, coincidían con la pre existencia de bienes culturales.

Lejos de entenderse que esos bienes culturales representan una riqueza en sí mismos y que tienen un rol fundamental para el fortalecimiento de la identidad nacional; se actuó como si la existencia de restos arqueológicos constituyera un problema. Es de esa época el Decreto Supremo 008-98-AG, que los arqueólogos calificaron como la carta de defunción del Patrimonio Arqueológico peruano. El texto establece que en cualquier proceso de titulación de tierras eriazas, el Instituto Nacional de Cultura podrá oponerse únicamente si es que cuenta con una norma previa declarativa de la zona, la memoria descriptiva y la delimitación exacta del sitio.

Como es obvio, en la mayor parte de casos se trata de bienes que, al haber permanecido cubiertos bajo tierra, están fuera del conocimiento actual, hasta su descubrimiento en razón del propio proceso de privatización y titulación.

A ello hay que sumarle los males que ya venían de antiguo: para no extenderme sólo les comentaré que en el norte peruano, en la zona de desarrollo de antiguas culturas de la época prehispánica tan importantes como la Mochica, hay lugares donde pueden contarse por miles los agujeros realizados por los expoliadores y saqueadores de tesoros arqueológicos.

Esa, además de un marco normativo e institucional ineficientes, es la herencia que el actual gobierno peruano ha recibido.

UNA LEGISLACIÓN DEFICIENTE.

La vigente Ley General de Amparo del Patrimonio Cultural del Perú, Nro. 24047, ha sido criticada prácticamente desde su promulgación en 1985. En realidad, son numerosos los vacíos, deficiencias y contrasentidos que se pueden encontrar en ese texto legal que, además, ha sufrido a lo largo de los años una serie de modificaciones que han aportado a crear una situación poco clara desde el punto de vista legal.

A lo anterior hay que agregar que existen graves problemas estructurales en el sector. El Instituto Nacional de Cultura (INC), entidad encargada de su cumplimiento, tiene escasos medios tecnológicos, cuenta con presupuestos reducidos y, durante mucho tiempo, ha renunciado a jugar un rol protagónico en la vida nacional. Actualmente viene realizando algunos esfuerzos por recuperar su presencia institucional. Pero son escasos, no siempre bien orientados, y tampoco tienen el impulso que se podría esperar, tratándose de un gobierno nuevo.

Para citar un ejemplo, en lo referente a las titulaciones a las que nos referimos en la primera parte de esta ponencia, las potestades del INC fueron drásticamente reducidas. A la fecha, no han sido plenamente repuestas. Mientras tanto el Programa Especial de Privatizaciones (PEPRI) sigue impulsando procesos masivos de titulación. No nos oponemos a que lo haga, pues se trata de una política de desarrollo del sector agrícola que interesa al país, siempre y cuando se realice de manera correcta y teniendo en cuenta todos los factores involucrados. Por ello, es necesario que se respete plenamente las zonas arqueológicas, excluyéndolas del proceso y creando, en cambio, un programa alternativo de investigación que permita la detección oportuna de los bienes arqueológicos, y la toma de medidas para su protección.

Además existe, como en otros países, una clara orientación de las políticas relacionadas con el Patrimonio Cultural, hacia la utilización turística y económica de los bienes que lo conforman, con la búsqueda de resultados inmediatos. Esto lleva a la toma de medidas contrarias a los intereses de la conservación y desarrollo a largo plazo.

La Ley 24047 contempló la creación del denominado Consejo del Patrimonio Cultural de la Nación, disposición que ha quedado en letra muerta, dado que este organismo jamás llegó a reunirse ni entrar en funciones, a pesar de atribuírsele algunas tan importantes como la formulación de la política cultural del Estado.

La ineficacia de la Ley 24047 queda demostrada si se analiza la creciente destrucción y el saqueo de valiosos monumentos arqueológicos, la demolición y modificación desnaturalizante de construcciones coloniales y republicanas, y el tráfico ilícito de bienes culturales peruanos hacia colecciones privadas, pero sobre todo hacia el mercado negro internacional del arte.

PROBLEMAS EN LA DEFINICIÓN DE BIENES DEL PATRIMONIO CULTURAL.

Entrando ya al tema central del presente trabajo, debemos referirnos a la definición de Patrimonio Cultural contenida en la Ley 24047 y que sirve de base para todo el proceso de declaración, identificación, inventario y posterior conservación y mantenimiento de los bienes culturales.

En el último proceso constitucional peruano, resultado de la ruptura del régimen democrático mediante el denominado "autogolpe" que en 1992 protagonizó Fujimori Fujimori, el tema del Patrimonio Cultural fue incorporado a este texto –de génesis apócrifa– en los siguientes términos: Los yacimientos y restos arqueológicos, construcciones, monumentos, lugares, documentos bibliográficos y de archivo, artísticos o testimonios de valor histórico, expresamente declarados y provisionalmente los que se presumen como tales, son patrimonio cultural de la nación, independientemente de su condición de propiedad privada o pública

Desde nuestro punto de vista, este texto mantiene dos graves problemas, que ya habían sido discutidos en el Perú desde que se aprobó la Ley 24047 e inclusive con anterioridad. Insistimos, mantiene, lejos de superar dos aspectos negativos: primero, la "presunción provisional", de la que hablaremos con más detalle posteriormente; y, segundo, la referencia a la "propiedad

privada o pública". Este último punto, en el que no nos extenderemos por que escapa a nuestro tema principal, no contribuye a solución alguna. Como hemos afirmado públicamente en ocasiones anteriores, el problema no radica en quién es el propietario de los bienes culturales. Lo que se necesita es el cumplimiento de las normas de protección, el respeto del bien y la posibilidad de acceso y conocimiento público en determinadas condiciones.

La Ley de 1985, en su definición básica, dice: El Patrimonio Cultural está constituido por los bienes culturales que son testimonio de la creación humana, material o inmaterial, expresamente declarados como tales por ser de importancia artística, científica, histórica o técnica. Las creaciones de la naturaleza pueden ser objeto de igual declaración.

Como elemento básico que defina qué bienes integran el Patrimonio Cultural de los pueblos, consideramos que debería tenerse en cuenta el "valor de identidad", es decir, el nexo inmaterial y profundo que existe entre estos bienes y el pueblo o cultura que ha heredado la tradición a la que pertenecen. El Patrimonio Cultural está constituido por los bienes en los que un pueblo se siente identificado.

Dichos bienes, entonces, tienen un valor intrínseco que es independiente de cualquier tipo de calificación o declaración oficial. Es decir que más que una declaración, lo que se requiere es un sistema de reconocimiento de una condición que les es propia. Por lo antes expuesto, consideramos que la exigencia de "declaración expresa", común en muchos países, resulta básicamente equivocada. En todo caso se requiere establecer específicamente sus alcances, que de ninguna manera pueden ser excluyentes. Los mecanismos de protección no se pueden limitar a lo declarado formalmente.

Sin embargo, el problema que deberá resolver un texto legislativo en este campo, es el de operativizar un sistema de reconocimiento que implique la aplicación de mecanismos concretos de protección. La declaración lo logra, pero sólo para aquello que está incluido dentro de sus alcances. El gran riesgo es que, en muchos países, las posibilidades de declarar todos los bienes que deberían ser protegidos, son mínimas. Quedan así, en un estado de desamparo real, más bienes de los amparados. El remedio resulta peor que la enfermedad.

La Ley peruana optó, aparentemente, por la figura de la "presunción de la condición de bienes culturales". Se trataría de un marco de protección general. Empero, incurre en un error de lógica jurídica que priva de toda probable eficacia a dicha presunción. En efecto, en un artículo posterior, la Ley continúa:

Se presume que tienen la condición de bienes culturales, los bienes muebles e inmuebles de propiedad del Estado o de propiedad privada, de las épocas pre-hispánicas y virreinales, así como aquellos de la republicana que tengan la importancia indicada en el artículo anterior.

Dichos bienes, cualquiera fuere su propietario, son los enumerados en los artículos 1º y 4º del Convenio UNESCO 1972 Y artículos 1º Y 2º del Convenio de San Salvador-1976.

Hasta este punto estaríamos frente a una presunción Juris tantum, planteada básicamente de acuerdo con la lógica de esta figura jurídica por la que se tiene por cierta determinada calidad o condición de un bien, hasta que se demuestre lo contrario. Empero, la lógica jurídica de la presunción referida se rompe, cuando la ley incorpora la siguiente parte del artículo:

La presunción se confirma por declaración formal o individualización, hecha a pedido del interesado por el organismo competente del estado, respecto a su carácter cultural y se extingue por la certificación por el mismo organismo en sentido contrario.

Con lo anterior, el velo protector general de una presunción aplicable a todos los bienes que aparentemente cumplan determinadas condiciones, se hace relativo. En términos estrictos, funcionará de manera plena únicamente en la medida en que se emita una confirmación formal e individualizada, lo que no difiere mucho de exigir la declaración específica. Tal es así, que en procesos emprendidos por el gobierno peruano para recuperar judicialmente bienes culturales exportados de manera ilícita, esta falta de confirmación ha sido aducida por la parte contraria en tribunales extranjeros, con resultados exitosos.

La Constitución de 1993, mantiene la misma lógica, pues habla de los bienes que "provisionalmente" se presumen como integrantes del Patrimonio Cultural. La presunción en sí misma no puede ser provisional. Opera plenamente hasta que se demuestre que no es aplicable a determinado bien, porque no reúne las características exigidas. Esa provisionalidad nos lleva nuevamente a la necesidad de confirmación. Empero, podrían precisarse válidamente los alcances de este artículo mediante una ley de desarrollo constitucional. En tal caso, la

provisionalidad implicaría la vigencia de la presunción hasta que ocurra su levantamiento, o la declaración formal del bien.

Además, cabe comentar el que a nuestro juicio es otro error en el planteamiento de la Ley 24047: tanto la Convención (y no Convenio) de 1972, de la UNESCO, como la de la OEA de 1976, declaran y no presumen. Ambas normas han sido incorporadas a la legislación peruana. Resulta un contrasentido que otra ley establezca una presunción sobre un hecho que ya está consagrado internacionalmente.

La presunción juris tantum nos parece una alternativamente jurídicamente interesante para la protección genérica básica de los bienes del Patrimonio Cultural, bajo las siguientes premisas: Que opere ante la presencia de determinadas características y condiciones (por ejemplo la antigüedad, la naturaleza arqueológica, etc.) que cada legislación debe precisar.

Que implique la aplicación de un régimen de protección similar al de los bienes declarados.

Que únicamente pueda levantarse dicha presunción, en aquellos casos en los que se pruebe de manera fehaciente que las características aparentes del bien, no coinciden en la realidad con aquellas necesarias para pertenecer a la categoría Patrimonio Cultural.

Lo anterior no debe hacernos olvidar el principio básico y universal por el que toda norma contenida en las convenciones internacionales de las que un Estado es parte, tiene carácter taxativo para dicho Estado. De esta manera todos los bienes y categorías de bienes que están consagrados en textos supranacionales, forman parte del Patrimonio Cultural de los Estados que los han aceptado, acto con el que los incorporan a su propio sistema jurídico.

Para hacer una referencia concreta, citaremos la Convención de San Salvador, sobre la Defensa del Patrimonio Arqueológico, Histórico y Artístico de las Naciones Americanas. De acuerdo a ella, forman parte del Patrimonio Cultural de los Estados que la han ratificado los Monumentos, objetos, fragmentos de edificios desmembrados y material arqueológico, pertenecientes a las culturas americanas anteriores a los contactos con la cultura europea. Igualmente, los monumentos de la época colonial.

Teniendo en cuenta lo anterior, resulta evidente que, de optarse por la presunción, esta operaría tan sólo para los bienes que no estén incluidos en los alcances de las convenciones firmadas por cada Estado. En el ejemplo, sería aplicable únicamente para aquellos testimonios de épocas diferentes a las precisadas.

IDENTIFICACIÓN Y DECLARACIÓN.

Si bien de acuerdo a su Art. 3º, la Ley 24047 establece el régimen de derecho correspondiente a los bienes integrantes del Patrimonio Cultural de la Nación sin excepción, regulando lo relativo a la identificación, protección, investigación, restauración, mantenimiento, restitución y difusión de su conocimiento, hay muchos de estos aspectos en los que la ley contiene datos insuficientes. A esto hay que agregar que desde su aprobación, hace ya 17 años, la Ley 24047 no ha sido reglamentada.

La única referencia directa que tenemos es la contenida en el texto antes citado, que habla de la confirmación de la presunción mediante declaración formal e individualización.

Insistimos en que esta norma no se corresponde con la realidad peruana. Si tenemos en cuenta la cifra aproximada de 100000 sitios arqueológicos que citamos en el primer párrafo del presente texto, podremos percatarnos de que el proceso de individualización excede las posibilidades de un Instituto Nacional de Cultura sobre cuya debilidad ya hablamos en líneas anteriores.

La declaración e individualización se hacen a pedido del interesado por el órgano competente. Para el caso de los bienes inmuebles y de muebles arqueológicos, históricos y artísticos el “órgano competente” es el Instituto Nacional de Cultura.

La declaración de bienes del Patrimonio Cultural se realizó, hasta aproximadamente el año 1992, a través de Leyes expresas o de Resoluciones Directorales (actualmente Jefaturales) del INC. A partir de ese año se limitó el proceso de declaración al nivel directoral, calificándose sistemáticamente como improcedente cualquier iniciativa legal de declaración presentada ante el Congreso de la República.

Al no operar la presunción y no reconocerse en la práctica las declaraciones genéricas de las convenciones internacionales, estamos frente a una situación de desprotección, cuyos

ejemplos prácticos ya dimos al hablar sobre el sistema de titulación de tierras que ha afectado de manera directa bienes culturales.

LAS CONSECUENCIAS DE LA DECLARACIÓN EXPRESA.

Establecidas nuestras diferencias y expresadas nuestras preocupaciones en relación con la exigencia de declaración, pasemos a ver sus consecuencias.

En primer lugar, debemos hablar del reconocimiento expreso de la pertenencia a la categoría Patrimonio Cultural, y la aplicabilidad del régimen genérico de protección establecido por la Ley. Corresponde al Estado velar por el buen estado de conservación de los bienes que integran este patrimonio. Como la Constitución vigente reza, “independientemente de su condición de propiedad pública o privada”.

Si partimos del hecho fundamental de que existe un derecho público, social, sobre los bienes del Patrimonio Cultural, debemos afirmar que, sea quien fuere su propietario, estarán sobre sus derechos, aquellos correspondientes a la sociedad en su conjunto.

Entrando al tema del registro, la Ley establece que La condición de bien inmueble del Patrimonio Cultural de la Nación será inscrita de oficio en la Partida Correspondiente del Registro de la Propiedad Inmueble, consignando las restricciones y limitaciones correspondientes a cada caso.

Esta disposición, lamentablemente, no ha sido implementada en la práctica. Se trata de una obligación legal que la Superintendencia Nacional de Registros Públicos no cumple. Así, la mayor parte de inmuebles no se hallan inscritos.

En teoría, la resolución de declaración debería incluir en su texto la precisión de las restricciones y limitaciones aplicables al bien en razón de su condición. Son, empero, contados los casos en los que se han precisado este tipo de medidas.

Otra consecuencia legal de la consagración, es la declaración de la utilidad y necesidad públicas de la expropiación de los bienes culturales privados que se hallen en riesgo de perderse por abandono, destrucción o deterioro sustancial. Se trata de otra norma de difícil cumplimiento, debido a las restricciones de una economía poco desarrollada.

El artículo 12° de la Ley 24047 establece la nulidad de todo plan de desarrollo urbano y rural, obra pública o construcción y restauración privada que se realice sin contar con una preceptiva autorización previa del Instituto Nacional de Cultura. Como se puede apreciar, las resoluciones que han permitido la titulación de tierras eriazas y la de terrenos ubicados en los llamados “pueblos jóvenes”, incurrir en contradicción directa de esta disposición. Sin embargo, y a pesar de que contravienen una norma de mayor jerarquía, dichas resoluciones se aplicaron indiscriminadamente durante el gobierno de Fujimori. El actual régimen ha seguido inercialmente la misma tendencia. Sin embargo, debemos reconocer que las circunstancias son muy diferentes. Actualmente hay un amplio debate en el Perú sobre un proyecto de entrega en concesión que afectaría no sólo a la conservación de la zona arqueológica de Kuélap, sino derechos de pobladores ancestrales de su entorno. Esperamos que en este caso prime el respeto de estas poblaciones y los principios de la conservación.

El Instituto Nacional de Cultura es responsable del inventario de los bienes inmuebles del Patrimonio Cultural y de los muebles que se hallan bajo su jurisdicción (no están bajo ella los bienes bibliográficos y documentales, sobre los que tienen autoridad la Biblioteca Nacional del Perú y el Archivo General de la Nación, respectivamente).

El inventario deberá realizarse abriendo un expediente o una ficha individual para cada bien cultural, en la que se hará su descripción y delimitación para el caso de inmuebles y la de su reconocimiento técnico y descripción de los muebles.

Esta norma debía ser desarrollada en el reglamento, el mismo que, como explicamos, no existe hasta la fecha. Así, el proceso de levantamiento del inventario de bienes culturales sólo se cumple parcialmente y con muchas limitaciones.

Hay ciudades en las que se ha avanzado notablemente. Cabe mencionar el Centro Histórico de Arequipa, declarado Patrimonio Mundial, y Trujillo. También en el Centro Histórico de Lima, que goza también del reconocimiento internacional, el proyecto llevado adelante por la Municipalidad de esta ciudad con auspicios del Banco Interamericano de Desarrollo, viene

trabajando en esta tarea de manera positiva. Pero esto no se puede afirmar de la gran mayoría de inmuebles culturales y ambientes urbano monumentales.

LA DESPROTECCIÓN DE LOS CENTROS HISTÓRICOS Y CONJUNTOS MONUMENTALES.

En nuestra opinión –y así lo planteamos en los proyectos de ley en cuya redacción pudimos participar, uno de los cuales replanteado por el congresista Pease García se encuentra en la Agenda del Congreso de la República a la fecha- los Centros Históricos y Conjuntos Urbano Monumentales deben ser considerados como una categoría específica de protección. Como se sabe, la declaración y protección aislada de bienes de gran monumentalidad, permite que importantes zonas culturales se vean débilmente protegidas, perdiéndose el entorno y degradándose finalmente los valores del propio bien declarado.

Otra situación preocupante se da con respecto a poblados rurales que tienen un valor singular, y que están débil o nulumamente protegidos, sufriendo grandes perturbaciones en su arquitectura tradicional.

Citaremos algunos ejemplos de especial trascendencia en el Perú. Uno de ellos es el del Valle Sagrado de Los Incas, zona de gran significatividad histórica y cultural, que constituye una unidad eco-cultural con el Santuario Histórico de Machu Picchu, y un eje fundamental para entender el proceso de desarrollo del Imperio Incaico. En este valle pueden encontrarse varias poblaciones, resultado de la simbiosis entre los pueblos pre hispánicos e hispánicos. Podemos mencionar los casos de Ollantaytambo, de fundación inca y vivo hasta nuestros días; Chincheros, en cuyo corazón hay testimonios constructivos incaicos inmediatos a la Iglesia de origen hispánico; y Písaq, de construcción colonial, ubicado en la parte baja de la fortaleza incaica del mismo nombre.

En todos los poblados antes citados, se pueden ver hoy grandes y graves intervenciones que desnaturalizan su arquitectura tradicional. Muchas de las obras indebidas se han desarrollado para atender los “servicios turísticos”, pero también se deben a un crecimiento natural no planificado. Estas poblaciones están desprotegidas.

En igual situación se encuentran los poblados del famoso Cañón del Colca, en el departamento de Arequipa. Ambos ejemplos son primorosas muestras de la conjunción única de patrimonio arquitectónico y arqueológico, con el inmaterial. Se realizan todavía en sus calles tradicionales ferias en las que el intercambio de productos se resiste a desaparecer frente a los flujos de las economías modernas. Cercano a ellos, todo un sistema de comunidades campesinas de orígenes ancestrales, mantiene una forma de vida especialmente valiosa. A ello hay que sumarle la importancia de la biodiversidad y la presencia de un ecosistema especialmente rico.

Dado que la reflexión sobre el patrimonio inmaterial y las formas de protegerlo se ha declarado como tarea primordial de la UNESCO y el ICOMOS, considero que deberíamos poner gran énfasis en este tipo de poblaciones rurales tradicionales, que están sufriendo en todo el mundo fuertes presiones debidas al crecimiento de los centros urbanos, los cambios en las actividades económicas, la presencia creciente del turismo y otros factores negativos. Si bien contamos con documentos técnicos relativos a la protección de esta clase de bienes, así como de los paisajes culturales, creo que su situación podría declararse en emergencia. Esos pequeños poblados están sucumbiendo rápidamente. Frente a ello, deberíamos tener respuestas igualmente rápidas para evitarlo. Propondría, adelantándome a lo que será la Sesión de nuestro Comité, que se exprese nuestra preocupación por dichos pequeños poblados rurales, testimonio único del patrimonio inmaterial vinculado profundamente con el patrimonio material. Además que, de ser posible, se constituya una comisión de trabajo para profundizar en el estudio de su situación y la formulación de recomendaciones específicas, tanto legislativas como de otra índole, para su conservación.

UNA DIGRESIÓN TEMÁTICA: PATRIMONIO CULTURAL, CONCESIONES Y TURISMO.

Durante el gobierno de Fujimori, otro de los temas que generó grandes controversias entre especialistas en conservación, funcionarios públicos y empresarios turísticos, fue una propuesta

relacionada con la explotación de los bienes culturales directamente realizada por empresarios turísticos.

Se habló inicialmente de la “privatización” de los bienes culturales arqueológicos. Las serias críticas que los más connotados arqueólogos, arquitectos, historiadores del arte y otros profesionales involucrados con la conservación formularon, hicieron que la idea se replantea. Se propuso entonces, como alternativa, la figura de la “concesión”. El planteamiento variaba desde lo que sería una concesión típica del bien cultural mismo a determinado plazo a favor de empresas privadas, principalmente del sector turismo, hasta la concesión limitada de determinados servicios.

Desde nuestro punto de vista, que defendimos en todos los foros en los que fue necesario, los bienes culturales tienen una naturaleza sui generis inequivalente con cualquier otro tipo de bienes. Por lo tanto, figuras jurídicas aplicables en otros campos, como es la que venimos comentando, resultan inaplicables para ellos, menos para aquellos que forman parte del Patrimonio Mundial.

En cuanto al tema de la concesión de servicios, resultaba una discusión insulsa teniendo en cuenta que las prestaciones brindadas al turismo han sido tradicionalmente realizadas por el sector privado. Para ese momento, tanto la que fuera Empresa Nacional de Turismo del Perú (Entur-Perú), como el Fondo de Promoción Turística (FOPTUR), se habían ya privatizado, con lo que todos los servicios turísticos eran privados.

La oposición razonable a un tratamiento de orientación exclusivamente económica, de corto plazo y que dejaba de lado todo tipo de respeto de los bienes culturales, logró que las propuestas de esa naturaleza no se implementaran. En cambio, planteamos un sistema que dinamice la participación de las universidades, de las instituciones privadas especializadas en investigación científica, organizaciones no gubernamentales, asociaciones de profesionales, etc. De esta manera se fomentaría un proceso adecuado que, partiendo de la investigación, recuperación y restauración científicas, pueda llegar finalmente al uso sostenible tanto en el turismo como en otras actividades que socialicen el patrimonio y lo conviertan en un factor de desarrollo.

Esta reflexión sobre el tema, comentando brevemente lo que fue un amplio debate especializado en el Perú, tiene vigencia porque la propuesta parece haber sido reactivada por algunos sectores vinculados al actual gobierno peruano. Como ya mencionamos, hoy se está viviendo un nuevo debate, esta vez relativo esencialmente a la Fortaleza Arqueológica de Kuélap y su zona inmediata. Este monumento y su entorno forman hoy parte de un programa de concesión similar al que hemos comentado. Es decir, no de los servicios turísticos, cuya procedencia es evidente siempre y cuando se cumplan las normas relativas al respeto y compartimiento adecuado en la zona, sino de los bienes culturales mismos.

El problema se complica profundamente cuando estamos hablando de una zona ancestralmente poblada. Las poblaciones indígenas de este territorio, se ven afectadas tanto por la pretensión de incluir espacios que son tradicionalmente de su propiedad, como al verse fuera del mecanismo económico generado por el uso de los bienes de los que son directos herederos.

Existen alternativas indiscutiblemente más interesantes y consistentes para desarrollar una propuesta turística. Se comete un grave error al pensar que los servicios tendrán que ser brindados en infraestructuras modernas, que son esencialmente similares en cualquier espacio.

Las grandes edificaciones desnaturalizantes, han dañado seriamente numerosos lugares valiosísimos del Patrimonio Cultural a lo largo del mundo. De esa manera lo que se hace es dañar la esencia del bien cultural, que es el motor del interés de los visitantes y de todo el movimiento genérico que esta actividad genera.

Frente a ello hay propuestas que involucran a la población de la zona en servicios de acogida de visitantes, permitiéndoles conocer sus culturas de manera directa, lo que genera ingresos en zonas profundamente deprimidas, para citar sólo un ejemplo. Lo cierto es que los pueblos herederos de la tradición cultural del bien del que se trate, tienen un derecho preferente a participar en la toma de decisiones que lo afecten. Es necesario que se refuerce el proceso de participación pública en la planificación relativa al patrimonio.

ALGUNAS REFLEXIONES SOBRE LA IDENTIFICACIÓN INTERNACIONAL DE LOS BIENES DEL PATRIMONIO CULTURAL.

Si bien en el contexto internacional se ha avanzado de manera notable en el establecimiento de principios de conservación y manejo adecuados del Patrimonio Cultural, aún se presentan algunos graves vacíos evidenciados en las intervenciones inadecuadas, las transformaciones de entornos, o los atentados directos contra bienes del Patrimonio Cultural en diversos lugares del orbe.

Los países económicamente menos favorecidos, se hallan constantemente ante la carencia de recursos para poner en práctica programas integrales para la conservación de su legado cultural. Pero los problemas del Patrimonio Cultural no se dan, ni mucho menos, de manera exclusiva en ellos.

Un ejemplo sumamente duro, por su relación con un hecho que ha enlutado al mundo entero, es el de la destrucción de los Budas Gigantes de Bamiyán en Afganistán. Me atrevo a tocar el tema, trayendo a colación las declaraciones del que fuera ministro de Asuntos Exteriores del régimen Talibán, Wakil Ahmad Muttawakil. Este personaje, tratando de justificar la lamentable destrucción de las estatuas milenarias, afirmó Se trata de la herencia histórica del pueblo de Afganistán. Antes de la llegada del Islam, el budismo era la religión predominante. Desearíamos haber sido cristianos en vez de budistas. Incluso la UNESCO reconoció que era nuestro patrimonio cultural. Así que tenemos derecho a hacer lo que nos parezca.

Extraña y errónea tesis avalada únicamente por el hecho de que se trataba del grupo que mandaba en el Afganistán de ese momento, con ninguna legitimidad más que aquella que le dan las armas. Pone en evidencia la incapacidad de la comunidad internacional por proteger los bienes culturales ante situaciones como la descrita.

Está claro que cuando se impone la violencia, las posibilidades reales de proteger un bien cultural son sumamente débiles y que, inclusive en contextos más estandarizados, en los que sería posible exigir la aplicación de la Convención de La Haya sobre la Protección de Bienes Culturales en caso de Conflicto Armado, la conservación sigue siendo una tarea altamente complicada.

Pero lo anterior no es óbice para que se plant

LINEAMIENTOS PARA LA FORMULACIÓN DE ESTRATEGIAS POLÍTICAS, JURÍDICAS Y SOCIALES PARA EL DESARROLLO DE UN CONSERVACIONISMO DE ALCANCE GLOBAL.

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La lectura de los considerandos de la Convención sobre la Protección del Patrimonio Mundial, Natural y Cultural (1972), contiene las bases para una plena comprensión de la importancia universal que la conservación de las manifestaciones de natura y cultura en nuestro mundo, tienen en sí mismas.

En efecto, en cuanto el referido texto internacional declara con meridiana claridad que el deterioro o la desaparición de un bien del patrimonio cultural y natural constituye un empobrecimiento nefasto del patrimonio de todos los pueblos del mundo, está poniendo en evidencia que el derecho y el deber por su conservación son universales.

Si bien los alcances de la Convención se consagran a un grupo determinado de bienes naturales y culturales cuyas características les otorgan un interés excepcional, esto no debe hacernos olvidar el principio reproducido en el anterior párrafo. Es decir que, aún cuando algunos bienes tienen una significatividad mayor para el mundo, lo cierto es que cada manifestación de la cultura y cada espacio de la naturaleza, son siempre únicos e irreemplazables.

Pese a que documentos como el que venimos analizando tratan los aspectos culturales y naturales de la conservación de manera conjunta (sin dejar de precisar aquellos puntos en que la esencia de cada clase de bien requiere de un tratamiento diferenciado), lo cierto es que son pocos los casos en los que se ha desarrollado una política que entienda paralelamente ambos campos del conocimiento.

Las estrategias puestas en práctica por quienes se dedican al tema de la conservación de la naturaleza, parecen tener un mayor eco social. Esto se debe, seguramente, a que se ha sabido presentar los contenidos de esa preocupación en términos cercanos a la vida cotidiana del ciudadano común. Por sencillo que sea el ejemplo, el proceso de reciclaje de residuos en las ciudades en el que cada vez está más implicada la población de diversos lugares del mundo, demuestra este involucramiento de la sociedad.

Claro que se trata de aspectos limitados. Pero ante peligros como el del efecto invernadero, o la alarmante contaminación en las grandes urbes, es lógico que el ciudadano sencillo reaccione de manera cada vez más sensible.

El ambiente se siente como un interés más personal: me interesa su conservación porque implica el aire que respiro, los parques donde juegan mis hijos, los espacios donde paso un fin de semana interesante, etc. Insistimos que esa es solo una visión muy limitada del problema. Por supuesto que es muchísimo más complejo. ¿Comprenderían, con igual facilidad, los ciudadanos de los países más desarrollados, en algunos casos con un nivel de consumo que supera muchísimo la capacidad de producción de su propio territorio, que el mundo requiere de su renuncia a determinados productos?. Seguramente que no lo harían. Con lo que el nicho ecológico para la producción de los bienes que consumen seguirá afectando espacios más allá de sus fronteras nacionales. En este caso, el aire que se contamina está muy lejos, los espacios verdes deteriorados no son los que ellos ven cotidianamente, la calidad de vida de quienes no se conoce más que por alguna esporádica noticia a través de la televisión, ya no preocupa tanto. Sin embargo, crece cada vez más la conciencia de la dimensión global del problema: todo lo que sea contaminante, a corto, mediano, o largo plazo, termina revirtiéndose en contra de la calidad de nuestro propio ambiente.

Esto es mucho más difícil de entender y practicar cuando estamos frente a bienes culturales. Salvo los herederos de determinadas tradiciones culturales que han sabido mantener el nexo de continuidad, histórico y anímico, con la memoria de sus antecesores, sus creaciones y testimonios de vida, es más difícil que un ciudadano entienda que su conservación le concierne. Pero ni siquiera resulta fácil para muchos de los miembros de esa comunidad anímicamente ligada al bien, comprender la necesidad de conservarlo con el mayor rigor posible. ¿Cómo hacer que el poblador de un centro histórico comprenda que no todas las supuestas innovaciones modernas son adecuadas para su hogar?. Y si no lo son ¿por qué ese poblador tendría que

conservar lo antiguo, y no reemplazarlo por una construcción novísima, adecuada a sus gustos y necesidades?.

Nosotros sabemos que la conservación de las manifestaciones culturales ancestrales es importante para la calidad de vida de los pueblos. Así como la contaminación ambiental daña el aire que respiramos, la destrucción de los elementos de la cultura social enrarece la sociedad y la afecta, haciéndola más frágil, con menores elementos para auto comprenderse, estructuralmente más débil. Y, como consecuencia de lo anterior, con menos capacidad de desarrollo.

Esa pérdida daña también a los objetos que, como materia de estudio de las ciencias arqueológicas e históricas, nos pueden dar claves fundamentales para entender el pasado y presente de la humanidad y los pueblos que la componen. Su protección y conservación constituyen, por ende, un derecho colectivo.

Los grandes cambios que ha vivido la humanidad desde la ya lejana Revolución Industrial de la Europa del siglo XIX, son cada vez más rápidos. Han tenido incidencia en la calidad de vida de una parte de la humanidad, aunque una gran mayoría se halle aún a mucha distancia de los niveles logrados en los países más poderosos. Esos cambios, cuya cara positiva podemos apreciar en muchos factores, han tenido también una cara gravemente negativa en el daño sufrido tanto por el Patrimonio Natural como por el Patrimonio Cultural durante el siglo pasado. Daño que, en nuestros días, se viene sucediendo todavía.

La situación hace que sea cada vez más urgente desarrollar estrategias conservacionistas a nivel global. Esas estrategias requieren de la suma de esfuerzos entre las dos grandes vertientes de la conservación, a las que nos venimos refiriendo en este texto. El gran reto es lograr que los principios de la conservación se desarrollen a nivel de políticas, herramientas jurídicas y que la indispensable conciencia social se identifique con esta corriente de pensamiento.

ESTRATEGIAS POLÍTICAS.

El tema podría abordarse desde las que son las dos formas usuales de entender el término política. Por un lado tenemos lo que es el mundo de las estrategias de acceso al poder y su posterior ejercicio. Por otro, el contenido técnico relativo a la dirección del desarrollo social. Ambos tienen incidencia sobre los bienes patrimoniales.

En el primer aspecto, tenemos muchos ejemplos negativos a lo largo del mundo, sobre todo en lo que se refiere a los ámbitos locales. Son muchos los encargados de la gestión de las ciudades que toman decisiones y ejecutan medidas inadecuadas, pensando tal vez en dejar las huellas de una modernidad mal entendida. Así, las áreas verdes seden el paso al granito o al cemento, los monumentos son desnaturalizados por intervenciones indebidas en su entorno o sucumben ellos mismos, para ser reemplazados por obras de una arquitectura moderna que además se caracteriza por las uniformidades tipológicas y de materiales, homogeneizando artificialmente ciudades de génesis diversa. Otro caso es el del falso respeto que lleva a la conservación exclusiva de fachadas.

A un nivel mayor, las grandes obras de infraestructura suelen arrasar con los ambientes naturales y culturales. Parece seguir primando la tendencia hacia la conservación de algunas manifestaciones singulares, sin entender que el territorio y el monumento sólo pueden ser íntegramente tratados si se tiene una visión de contexto.

Es importante que entendamos al territorio como una unidad siempre interrelacionada. Los ecosistemas, en los que estrictamente el hombre es un elemento más, sólo pueden entenderse como unidades complejas en las que la interinfluencia de todas y cada una de sus partes son fundamentales para lograr la salud ecológica o la capacidad que poseen los sistemas ecológicos para suministrar, de forma sostenible, recursos a los sistemas humanos.

La visión antes esbozada corresponde a la aproximación ecosistémica, que toma al ecosistema como unidad de estudio y busca, a través del conocimiento que se tiene sobre los principios unificadores que explican su organización y dinamismo, entender el funcionamiento del medio natural y las relaciones causa-efecto que se establecen cuando se le aplican, por parte de los sistemas humanos, diferentes modelos de explotación. (Montes y otros, 2001).

Si entendemos lo anterior, podremos saber que todo acto humano en su relación con la naturaleza genera necesariamente una reacción. Los Espacios Naturales Protegidos tienen una función que supera, con creces, sus límites estrictos. Son una constante fuente de flujos de energía de vida que alimentan y, a su vez, dependen del resto del territorio, con el que conforman una unidad ecosistémica mayor.

Esa idea del Espacio Natural Protegido como fuente de flujos de energía, también debería aplicarse a los bienes culturales. Estos son “fuentes de energía cultural”, que deben ser entendidos contextualmente. Una estrategia conjunta podría llevarnos a aprovechar positivamente no sólo los flujos de energía natural, sino los flujos de energía cultural, ambos para el objetivo del desarrollo integral.

Siguiendo con el tema de la planificación, hemos hablado de cómo el papel de los políticos muchas veces es contrario a los intereses de la conservación. Por eso creemos que es necesario que se otorgue un lugar preponderante al tema de la conservación en los planes generales de gobierno. Los técnicos tenemos en este sentido la obligación de participar y asesorar, de manera independiente y teniendo como base los principios consagrados en los instrumentos internacionales y en la doctrina de la conservación ya desarrollados.

Las propuestas que formen parte de dichos planes de gobierno, en lo referente a nuestro tema, deben seguir algunos lineamientos básicos, que ya han sido analizados por diversos autores. Mencionamos sólo algunos de ellos:

Debe entenderse que tanto el Patrimonio Cultural como el Natural son, en sí mismos, recursos para el desarrollo sostenible.

Las medidas que se relacionen con los bienes que los integran, no pueden ser de corto plazo. En este tema, el mediano y largo plazo son fundamentales.

Debe tenerse como premisa fundamental aquella acuñada en el campo de la conservación medioambiental que nos recuerda que los recursos ambientales y culturales de los que disfrutamos, no son nuestros, “sino que los hemos tomado prestados de las generaciones venideras”.

Debe darse prioridad a la participación de las poblaciones involucradas en la planificación y toma de decisiones que afecten los bienes de su comunidad.

La planificación de la gestión de los bienes y conjuntos monumentales, y de los espacios naturales, debe estar integrada dentro de todo plan de gobierno, tratándose como se trata, de temas transversales a prácticamente todas las áreas de gobierno.

Institucionalmente, tal vez sea importante analizar a profundidad la estrategia desarrollada por algunos países que cuentan con ministerios conjuntos de cultura y medio ambiente.

Hemos hablado de la transversalidad del conservacionismo. Esa condición hace que sea necesario motivar la reflexión desde todos los campos del conocimiento científico, y las técnicas para su aplicación. En nuestra experiencia personal, por ejemplo, podríamos hacer notar la necesidad de incorporar dentro de los estudios de Ciencias Políticas, los componentes ambientales y culturales. Es vital que impulsemos activamente al pensamiento del Siglo XXI una estrategia de “desarrollo sostenible”, término hoy muy manido, pero que interpretado correctamente nos lleva a resolver el grave cuestionamiento de la continuidad de nuestro mundo.

ESTRATEGIAS JURÍDICAS.

Ambas vertientes del conservacionismo han desarrollado una serie considerable de instrumentos jurídicos de carácter global, regional y nacional. Sin embargo, nos parece que en el campo de la legislación ambiental se han logrado algunos avances más significativos, lo que tiene relación con el ya comentado hecho de una mayor conciencia social con el tema.

El contenido cultural del medio ambiente supera lo que algunos autores denominan La dimensión cultural del ambiente. Para R. Huerta y C. Huerta (2000), Cuando (aquí) se afirma la existencia de razones de protección ambiental estéticas o recreativas se alude a toda una gama de capacidades o utilidades que el ambiente es susceptible de desarrollar. Todos esos usos que se pretenden proteger tienen una dimensión cultural en sentido amplio. Son los valores educativos del ambiente, los valores recreativos, turísticos, pero también aquéllos asociados a la tranquilidad y el descanso. La verdad de la anterior afirmación es indiscutible. Pero esa dimensión es mayor. El ambiente es un factor fundamental de la cultura. Y las intervenciones

“culturales” del hombre en él –la mayor parte de ellas poco felices- son también consustanciales al mismo.

Algunos de los principios que el Derecho Ambiental ha desarrollado, pueden significar derroteros interesantes para una estrategia conjunta. Por ejemplo, el principio del dominio de los intereses colectivos es ampliamente aceptado (aún cuando persistan en el mundo diversos conflictos entre intereses privados y comunitarios). Se acepta la existencia de una res comunes omnium, por el que los ciudadanos tienen derecho a disfrutar de un medio ambiente que le permita desarrollar una vida saludable y desarrollo integral.

Cabría aplicar ese mismo principio con respecto a los bienes culturales. No se trata de que estos deban y puedan ser únicamente de titularidad privada. Pero sí del reconocimiento que sobre ellos hay un conjunto de derechos colectivos. El tema no parece novedoso, y seguramente ha sido analizado y debatido en diversos contextos nacionales e internacionales. Pero sigue siendo vigente. Para ejemplificar este hecho citaré el debate que actualmente se da en el Perú con respecto a un sistema de concesiones sobre bienes culturales. En una primera etapa, durante el gobierno Fujimori, se habló de la privatización de sitios arqueológicos. Luego, el debate llegó al tema de las concesiones. La pregunta es si la utilización lucrativa de las manifestaciones ancestrales de un pueblo, es compatible con su propia naturaleza. El debate está abierto actualmente, con el actual gobierno de Alejandro Toledo, siendo su principal capítulo el relativo al Sitio Arqueológico de Kuélap. Desde nuestro punto de vista, el uso económico de los bienes culturales es no sólo importante, sino necesario. Pero de ninguna manera se puede convertir en prioritario. Tampoco se puede permitir que se convierta en un derecho exclusivo. Cualquier aprovechamiento que pueda poner en peligro los valores del bien es inadmisibles. Tampoco lo es una propuesta que conlleve el grave riesgo de excluir, o poner en un plano secundario, a quienes son los herederos legítimos del bien.

Lo anterior nos lleva a afirmar que la dimensión colectiva de los bienes ambientales, proclamada por diversos autores, tiene un símil perfecto con respecto a los bienes culturales, como también ha sido declarado ya por diversos escritores.

Rehbinder (1989) habla de tres principios del Derecho ambiental alemán: precaución, “quien contamina paga” y cooperación. La primera de estas implica que la política ambiental no está limitada a la eliminación o reducción de la contaminación ya existente o inminente sino que asegura que la contaminación es combatida de forma incipiente y que los recursos naturales son usados sobre la base de un rendimiento sostenido.

Esto podría expresarse sencillamente explicando que se trata de una política proactiva y preventiva, y no reactiva. No esperar a que surjan crisis ambientales, sino tomar medidas para prevenirlas. Este principio también está consagrado en el campo de la conservación cultural. Se busca evitar que los bienes culturales sufran daños. Esto se enfrenta a la dinámica de crecimiento de las ciudades, al interés especulativo sobre el territorio, el alto valor de los inmuebles de algunos conjuntos monumentales, etc. Por el principio de precaución, deberá incorporarse medidas para contrarrestar los posibles efectos negativos de ese tipo de presiones.

El principio segundo “quien contamina paga” es clarísimo. El tercero se refiere a la participación en la adopciones de las medidas de manejo de los bienes naturales. En ella deben cooperar los responsables de dictar las regulaciones, los posibles contaminadores, los ciudadanos afectados y las diversas instancias administrativas. Pero más allá de la cooperación, debemos hablar del derecho a participar. En especial los ciudadanos afectados, tienen derecho a intervenir en todas las fases de definición de los planes relativos a los bienes culturales y naturales.

En el ámbito de la normativa europea se habla de los principios de cautela, acción preventiva, y corrección de los atentados al medio ambiente preferentemente en la fuente misma. Todos ellos pueden entenderse plenamente para la protección jurídica de los bienes culturales. Su consagración concreta es necesaria.

Para citar un ejemplo práctico podríamos hablar de los universalmente consagrados Estudios de Impacto Ambiental (EIA). Su exigencia es común, con diversos matices, a prácticamente todas las legislaciones nacionales. Está incorporada también dentro de los principios operativos de los organismos financieros y de cooperación internacionales. Aunque se supone que estos estudios deben incluir el componente cultural, consideramos que se impone la

necesidad de establecer de manera igualmente taxativa la exigencia de “Estudios de Impacto Cultural”.

El trazado de vías de comunicaciones (autopistas, trenes), las obras públicas y privadas, los cambios de uso, etc., etc., pueden causar un impacto negativo en el ambiente. Por ello, se exige que se realicen EIAs previos a su ejecución. Pero también tienen una capacidad potencial de afectar zonas arqueológicas, paisajes culturales, itinerarios culturales y otros bienes similares. Por lo tanto, es lógico exigir los estudios específicos y especializados relativos a este factor.

El siguiente cuadro resume los principios antes referidos que consideramos de aplicación común a los dos campos que venimos estudiando:

Derecho ambiental

Derecho de protección del Patrimonio Cultural

Ejercicio del derecho.

Principio del predominio de los intereses colectivos.

Todas las personas tienen derecho a un medio ambiente adecuado para su desarrollo.

Todas las personas tienen derecho a la conservación de las manifestaciones de su identidad y herencia comunes

Se trata de derechos difusos.

Debe establecerse la “acción pública” para su ejercicio o la invocación de medidas para su pleno cumplimiento.

Principio de precaución

La contaminación es combatida de manera preventiva y los recursos naturales se usan sobre la base del rendimiento sostenido.

Debe prevenirse los potenciales riesgos que puedan afectar a los bienes culturales.

Se requieren indicadores para un control constante.

Es fundamental la incorporación del principio en la planificación.

“Quien contamina paga”

Los costos de la restauración ecológica deben ser asumidos por quien generó el daño ambiental.

Los costos de la restauración del bien deben ser asumidos por quien generó el hecho dañoso.

Debe establecerse taxativamente en la legislación de cada país. Sin embargo, debe tenerse en cuenta que en el caso de los bienes culturales el esencial valor de la “autenticidad” no es plenamente recuperable prácticamente en ningún caso.

Principio de cautela

Tiene que ver con la planificación, que debe prever daños posibles a los bienes naturales.

Tiene que ver con la planificación, que debe prever daños posibles a los bienes culturales.

Se debe establecer con precisión los tipos de planes requeridos según la naturaleza de cada bien.

Principio de acción preventiva.

Deben tomarse medidas para evitar el daño o lesión ambiental.

Deben tomarse medidas para evitar daños en los bienes culturales

Son importantes, por ejemplo, los estudios de capacidad de carga y soportabilidad, que deben ser desarrollados integral y no parcialmente.

Principio de corrección de los atentados (preferentemente en la fuente misma)

El daño ambiental debe ser reparado tan pronto como sea posible, rectificando la causa.

Este principio no sería plenamente aplicable a los bienes culturales. En todo caso debe tratarse de la restauración científica y el mantenimiento del bien en su contexto.

Los planes deberían contemplar medidas de contingencia para facilitar la pronta y adecuada restauración en caso de daños.

Principio de la participación.

La participación de la población involucrada es fundamental.

Ídem

Debe consagrarse al máximo nivel (constitucional y supranacional) el derecho de la población de participar en la planificación y toma de decisiones que afectan los valores de su entorno y que representan su identidad.

Se requieren planes de gestión de uso público.

ESTRATEGIAS SOCIALES.

Los reclamos por el desarrollo de una conciencia pública sensible a los intereses de la conservación de los bienes naturales y culturales, son constantes. Se debate permanentemente, por ejemplo, sobre el contenido de los planes de estudio a niveles escolares y superiores, por lo general débiles al respecto. Es, entonces, evidente que se deben desarrollar estrategias que conviertan a los ciudadanos en agentes conscientes de la conservación.

Los especialistas en Espacios Naturales Protegidos tratamos el tema planteando la necesidad de elaborar planes de gestión de uso público. Dichos planes son igualmente necesarios para los sitios del Patrimonio Cultural.

El concepto de uso público ha evolucionado de forma paralela al concepto de espacio protegido; pasando de ser considerado como mera actividad recreativa puntual, a un conjunto de actividades, equipamientos y servicios, estructurados en una serie de programas; y, en la actualidad como una de las áreas más importantes de la gestión que precisa de planificación. (Baraza, 2001)

Estos criterios desarrollados con respecto a los espacios naturales, parecen tener aún mayor importancia para el caso de determinados bienes culturales, como los centros históricos, en los que se desarrolla la vida humana con sus evidentes exigencias cotidianas, que deben compatibilizarse con la conservación.

En los aspectos formales, se sabe que un plan de uso público debe incluir programas de educación ambiental, de interpretación, de información y divulgación, de uso de la imagen, de señalización, de seguridad, de formación, de voluntariado y de regulación de las actividades que se realicen en torno al bien.

Sin embargo, hay otra estrategia común que debería desarrollarse, a la que hemos venido refiriéndonos a lo largo de este texto. Por un lado, para la conservación cultural es sumamente importante alcanzar un nivel en la conciencia pública, similar al que se viene consiguiendo en cuanto a la conservación natural. Esto podría lograrse consolidando un conservacionismo que asuma ambos campos de manera conjunta.

Por otro, para la conservación de los valores naturales, es importante aprovechar el caudal de los conocimientos ancestrales en relación con formas de vida que han sido altamente compatibles con el medio ambiente, la diversidad de especies, la productividad del suelo y una serie de valores de los que finalmente depende la calidad de vida del ser humano, tanto o más que la serie de comodidades que nos otorga la vida moderna, pero que en su gran mayoría tienen un alto coste ecológico.

Esa relación armónica entre el poblador, su medio físico, y las demás especies con las que tiene que compartir el ecosistema, es un valor cultural en sí mismo. Es, tal vez, el valor esencial del Patrimonio Cultural, entendido como un todo dinámico y vivo que supera con creces al ámbito de las manifestaciones materiales.

Así, podemos afirmar que la simbiosis entre conservación de la naturaleza y conservación del Patrimonio Cultural, puede ser no sólo enriquecedora para los que trabajamos en alguno de estos campos, sino brindarnos las herramientas estratégicas para lograr un planteamiento coherente que despierte el interés y, como consecuencia de ello, la conciencia social.

Solemos reclamar constantemente que los políticos no entienden las necesidades de la conservación. Y eso, en la mayor parte de casos, es cierto. Pero recordemos que un político

tiene siempre un termostato altamente sensible que mide la reacción y los intereses sociales. En una comunidad conscientemente interesada por preservar la calidad de vida que le otorga un medio ambiente puro y una cultura enriquecida por el pasado y, al mismo tiempo, viva, los políticos aprenderán a desarrollar una sensibilidad mayor. La clave está, entonces, en lograr que las colectividades asuman una posición de defensa y se interesen por las manifestaciones de su entorno y herencia.

Los avances logrados por los conservadores ambientales se verían sólidamente reforzados si incorporan a su pensamiento valores culturales de conservación. La labor de los conservadores de la cultura, se enriquecería si conseguimos que la conciencia social hacia la naturaleza, se proyecte también hacia el medio cultural. Se trata, entonces, de una cooperación enriquecedora en la que debemos comprometernos a trabajar de manera inmediata, con el rigor científico de ambas disciplinas y con la fuerza que nos da el saber que estamos motivados por el ideal de un mundo mejor no sólo para nosotros, sino para las generaciones del futuro.

A MODO DE CONCLUSIÓN.

A nivel mundial son numerosos los ejemplos de Espacios Naturales Protegidos que coinciden con una riqueza considerable en bienes arqueológicos, arquitectónicos y del patrimonio intangible. Citaré sólo un ejemplo: el Parque Nacional de Río Abiseo, en Perú, uno de los lugares que ha sido inscrito en la Lista del Patrimonio Mundial tanto por su importancia cultural como natural.

Las estrategias de gestión de estos espacios debe llevarse a cabo de tal forma que se conviertan en puntos neurálgicos para la coordinación de un sistema integral de conservación. Hay algunos países que han avanzado notablemente en ese sentido. Pero son muchos más los que no tienen programas para este trabajo conjunto. Sería tal vez importante que se inicie una serie de sesiones entre instituciones como la nuestra, ICOMOS, y el Comité Internacional para la Conservación de la Naturaleza, no sólo para evaluar las candidaturas de bienes que se desea inscribir en la Lista del Patrimonio Mundial, o la situación de aquellos que ya han sido consagrados, sino para elaborar una estrategia compartida que podría motivar la creación de una comisión permanente de ambas entidades para alcanzar este objetivo.

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CONSERVATION OF CULTURAL HERITAGE IN MEXICO

LISTING, CATALOGUING, REGISTERING AND DECLARATORY DECREES OF MONUMENTS, ZONES AND SITES.

In order to achieve the protection and conservation of Monuments, Historic Ensembles or Zones and Sites that comprise our Cultural Heritage, it is necessary to recognize, identify, list and register them.

The historical roots of this principle are to be found, among others, in the compilation of the Leyes de Indias (16th Century) ¹, which stipulate that those who found Indian graves or religious sites would have to register them. Later, in France, the first organization to establish “Inventories of Art Collections” is formed (1791), also its Committee of Art in order to elaborate inventories (1835), with the first List of Classified Monuments appearing in 1840. It is not until 1961 when a Decree on Registration and Inventory is issued in France, specifying the method to be followed.

A government office is established in Italy in 1875 in order to catalogue as an activity linked to excavations and museums, and publishes its first List of Monuments in 1902; many years later (1975) the Central Institute of Cataloguing is founded.

In Spain, a Royal Decree calls for the preparation of a Catalogue of Monuments and Art (June 1, 1900), and the Law 16/1985 related to Spanish Historic Heritage establishes that all properties deemed to be of cultural interest must be registered in a General Registry under public administration.

¹ Compilation of the Leyes de las Indias, printed in Madrid by King Charles II 's order: by Antonio Balbas, in 1756. Second Edition V.I.T.I. p.2.

Referring to International Documents, we found those issued during the Conference of Athens in 1931, which recommend the publication of an inventory with photographs, and the creation of a file. Countries participating in the Convention for the Protection of the Architectural Heritage of Europe, in 1985, were called to maintain inventories of monuments, architectural ensembles of buildings and sites that had the criteria to be considered “Architectural Heritage”. A listing that became a the very important subject of the protection process.

Experience in Mexico

The first formal inventory in Mexico were the Codices of Lorenzo Boturini (1804); years later, the regime of Porfirio Díaz (1876-1910) decided to write the “Republic’s Archaeological Chart” (May 11, 1896) in order to identify archaeological monuments. During the Mexican Revolution of 1910-1917, the first law ² was issued for the preparation of an inventory for properly classified artistic and historical monuments, buildings and objects, specifying the terms for the classification, the procedure to follow, the cases in which the owner of the property could not be affected, the declassification as well as the effects of the definitive classification.

In the same period, another Law about the Conservation of Monuments ³ was issued, stipulating that when a monument is registered as of historical or artistic interest, a ruling will be issued, allowing the owner of the property a maximum of thirty days to accept it or reject it; assuming that the owner would not object or his appeal is rejected, the monument would be inscribed in the Public Land Register Office.

In the post-revolution period, a Law about Protection and Conservation of Monuments ⁴ was promulgated, and for the first time it is mentioned the concept of a typical and picturesque aspect of towns, the protection of the monument surroundings, the elaboration of lists, instilling respect and love for feelings towards monuments and points of natural beauty, and promote their protection and conservation. This law, which was way ahead of its time —in aspects fully applicable today— also inspired similar legislations on state levels.

Four years later, the Public Education Ministry (**SEP**) issues another law ⁵ establishing the procedure to designate state and private monuments, including the designation by decree, of typical or picturesque towns or zones, as well as points of natural beauty.

A federal law ⁶ is promulgated in 1968 referring for the first time ever to the Cultural Heritage, providing the creation of the registry and cataloguing of properties inscribed as Heritage.

² Law on the Conservation of Historical and Artistic Monuments and Points of Natural Beauty (Promulgated on April 6, 1914).

³ Law on the Conservation of Monuments, Buildings, Churches and Historical or Artistic Objects. General Venustiano Carranza. 1916.

⁴ Law on the Protection and Conservation of Monuments and Points of Natural Beauty (Published on January 31, 1930)

⁵ Law on the Protection and Conservation of Archaeological and Historical Monuments, Typical Towns and Natural Beauty Points (Published on April 7, 1934)

⁶ Federal Law on the Nation's Cultural Heritage (December 23, 1968 – published on December 16, 1970)

Legal ordinances in force

The Cultural Heritage Conservation Law ⁷ issued in 1972 remains in force nowadays; it uses the same definition for monuments as the one employed in the law of 1934, following the same chronological criteria depending on the historical period in which the monuments were created:

- **Archaeological Monuments:** Produced by the peoples inhabiting the Mexican territory before the arrival of the Spaniards, as well as the remains of human, flora and fauna related to them. These monuments are property of the nation.
- **Historical Monuments:** Properties build from the 16th to the 19th centuries, as well as the documents and files, original manuscripts and scientific and technical collections from the same period.
- **Artistic Monuments:** Personal properties and buildings of relevant esthetical value, crated during the 20th century. ⁸

According to this ordinance, monuments are those expressly determined by this law, and also those made by a presidential declaratory decree, or even in its case by the minister of public education.

The law of 1972 includes archaeological, artistic and historic monument zones, which fall under the jurisdiction of federal government and the declaratory decree would be issued by the President. The law defines these as follows:

- **Archaeological Monument Zone** is the area comprising several archaeological buildings or where is presumed to be.
- **Artistic Monument Zone** is the area comprising several artistic monuments related among them, with open spaces or topographic elements and whose ensemble possesses a relevant esthetical value.
- **Historical Monument Zone** is the area comprising several historical monuments related to a national event linked to the country relevant past chapters.

⁷ Federal Law on Archaeological, Artistic and Historical Monuments and Zones (published on May 6, 1972).

⁸ Article 36. - By order of this law, Historical Monuments are determined to be: 1.- Buildings erected from the 16th to the 19th centuries that served as churches and their adjacent premises; archbishop's and bishop's sees and parish offices; seminaries, convents or any other building used for the administration, propagation and teaching of any religious cult; also those used for education and teaching, welfare and social aid purposes, public service and public ornamentation, and those used for civil and military authorities. The furniture and objects located or found inside of the aforementioned buildings and relevant private owned civil creative works made from the 16th to the 19th centuries inclusive.

This law will be enforced by the President, by **SEP** through the National Institute of Anthropology and History (**INAH**), the National Institute of Fine Arts (**INBA**) and the National Council for Culture and Arts (**Conaculta**), as well as the Social Development Ministry (**Sedesol**) and nowadays the Comptroller's Ministry (**Secodam**).

The law lays the basis for the public registry of archaeological and historic monument zones, under the auspices of **INAH**, and the public registry for artistic monuments and zones, as a dependency of **INBA**. Both institutes fulfill very important tasks for the protection and conservation of cultural heritage.

Although **INAH** was created in 1939 ⁹ as a legally recognized department of **SEP**, empowered to watch over, conserve and restore the nation's archaeological, historical and artistic monuments, as well as the objects located inside those monuments, it was not until 1986 ¹⁰ when its responsibilities were expanded to include formulating and promoting the National Historic Heritage Catalogue. This task includes all monuments, regardless of whether they are publicly or privately owned, as well as those of the archaeological and historical monument zones and to the Republic's Archaeological Chart, having furthermore to elaborate a Public Registry for monuments and zones.

The reason for giving **INAH** this new attribution underscores the difference between the activity of registering and those of cataloguing and listing both public and private properties. The catalogue implies a technical study that must include cultural characteristics and merits of the heritage, and not only a list of properties, being **SEP** the responsible of its elaboration.¹¹

It is worth mentioning that among the additions made to its Organic Law, **INAH** was given the faculty to propose the declaratory decrees of the already mentioned monuments and zones, with no detriment on the president's faculty for issuing them directly.

The regulations to the above mentioned Federal Monument Law ¹² establishes that in each public registry of the appropriate institutes must keep and update the monuments and zones listings, stipulating the information to be contained in each entry.

⁹ Organic Law on the National Institute of Anthropology and History.- Promulgated on December 31, 1938, published on February 3, 1939.

¹⁰ Revised Organic Law on the National Institute of Anthropology and History.- Decreed on December 9, 1985, published on January 13, 1986.

¹¹ Federal Organic Law on Public Administration.- Article 38, fractions XVIII y XIX.

¹² Law on Regulations of the Archaeological, Artistic and Historical Monuments and Zones, published on December 8, 1975.

Laws issued after 1972 have indirectly influenced the conservation of architectural and urban heritage, such as the Human Settlements Federal Law (1976) ¹³, which establishes that the federal government, states and municipalities will have each on its own level, to elaborate and execute urban development plans and programs aimed at meliorating the population's level and quality of life by preserving the cultural heritage. As a consequence of this norm, each one of the Mexican states issued a urban development law. Corresponding to the Federal District, its law establishes ¹⁴ three main tools for urban planning in Mexico City: the general program, the districts' programs and specific urban development programs referring to specific areas. All three indicate heritage zones, identifying and listing buildings of historical and artistic value, establishing the intervention norms according to the protection level and making the list of heritage sites and monuments situated inside the area affected by the respective program, indicating its location and level of protection, depending on its heritage value. Twenty-one out of 180 heritage zones located in Mexico City are currently catalogued.

There is a new law ¹⁵ in Mexico City on the same topic, but with more complete and up dated concepts than the 1972 Law; this new law defines a cultural monument as:

the tangible or intangible work of men, or nature regarding the meaning given to it by men, in which is reflected the thinking, feeling, way of life and way of relating with his environment, where one or few of the singular values (history, esthetics, science or technology) makes or has made it praiseworthy to be recognized as a legacy to future generations.

The Federal District law of 2000 determines that the catalogue comprises monumental zones, buildings and open spaces; that a department will be established within the Public Land Register Office, equipped with an electronic database, designated as the Architectural Urban Heritage's Public Registry, while an Information Center of this heritage will be installed within the Cultural Institute of Mexico City for its propagation, in a digital form, printed or by internet, of a database for public access with up dated information on:

- zones, monumental open spaces and monuments
- declaratory proposals in process
- programs for heritage rescuing, propagation and tourism
- index of directors in charge of conservation works
- laws and regulations for heritage recovery
- index of specialists on all diverse disciplines related to conservation and restoring
- index of associates, sponsors, funds and trustees whose purpose is to contribute to the conservation of heritage.

¹³ General Law on Human Settlements.- May 26, 1976 reformed on 9 July, 1993.

¹⁴ Federal District Law on Urban Development.- January 7, 1976. Reforms: December 23, 1995; December 28, 1998; February 23, 1999.

¹⁵ Federal District Law on Saving Urban Architectural Heritage, published on April 13, 2000.

Listing

Listing is one of the fundamental activities for heritage conservation, which is no longer perceived as a simple registration of properties or a collection of them at the moment of their identification, nor as a pile of valuable objects or just documentary evidence. It now includes the need to search for the history of its evolution and enrich it with the information obtained from new findings and historical research, becoming more of a flexible and dynamic instrument that is continuously enhanced.

The specific objective of cataloguing is to know the monuments in order to assure their protection. It is believed that the protection process of any monument begins with cataloguing, increasing its documentary and testimonial information regarding its essential characteristics of function, construction date and later alterations, construction materials and systems, property regulations, historic events, form and space aspects, damage and potential dangers.

We find the listing records of architectural heritage performed in Mexico in the catalogue of State owned churches and the registration of the national monuments carried out during Porfirio Díaz government, assigned by the Finance Ministry (1902) to the photographer Guillermo Kahlo (1872 – 1941), and later on, in the studies made during the 1920's and 1930's by the Finance Ministry's Office for the National Property in the states of Yucatán and Hidalgo, over the religious buildings. More recently, after the Monument Federal Law of 1972, **INAH** acquires, among other responsibilities, the elaboration of catalogues, registers and listings of cultural heritage.

In 1984 the National Listing Project for Real Estate Historic Monuments appears, having among its objectives to count and identify the historical monuments nation-wide and determine their location, their main functional characteristics, form and structure, and the extent to which they may be damaged; all of this information is needed to design intervention programs for their rehabilitation, restoration or conservation.

At the same time, the Cultural Program of the Borders ordered a listing of historical monuments in the states of Baja California, Sonora, Chihuahua, Coahuila, Nuevo León and Tamaulipas, in which community, municipal and state authorities participated along with experts from **INAH**. This endeavor led to the listing of 5,414 monuments.

Years later, between 1985 and 1992, this listing was performed in five other states ¹⁶ and in Mexico City's 16 political districts and "A" perimeter of its historic center area; the final result was the listing of 2,512 monuments.

What do we list?

Which properties comprise Mexico's listings?

	Federal level	State level
Archaeological monuments	INAH	
Archaeological monument zones	National Coordination Office for Archaeological Monuments	
Historical monuments	INAH	
Historical monument zones	National Coordination Office for Historical Monuments	List of heritage monuments Catalogue, heritage sites and monuments Regional list for Heritage monuments
Federal owned buildings, furniture and objects	Public Education Ministry - SEP Federal owned buildings , furniture and objects Catalogue	
Artistic monuments	INBA Cultural heritage artistic monuments and private property Catalogue	List of heritage monuments

How do we list?

Listing Procedures

INAH's National Coordination Office for Historical Monuments began in 1993 a new stage in the cataloguing task, using a new methodology supported on computerized systems in order to elaborate a database that will allow processing, backing and updating constantly and permanently all new recorded data, being the methodology divided in eight steps:

- Preliminary studies
- Historical research
- Planning and programming
- Field works
- Laboratory and/or desk work
- Systemizing
- Edition
- Publication

This methodology is explained in the Manual for Cataloguing procedures of Real Estate historic monuments (published in 1998), used for the cataloguing of the states of Chiapas, Durango, Nayarit, Colima, Morelos, Campeche and Quintana Roo, for specific projects in other states and municipalities, and for the catalogues of world heritage sites, among them those of Campeche, Morelia, Oaxaca, Puebla, Tlacotalpan and Zacatecas.

Summary:	Year	Monuments
Listed monuments	1993 to 2000	46,860
Listed monuments	preceding years	19,140

		66,000

Sixty percent of Mexico's estimated 110,000 historical monuments are already listed.

The effort has included the participation and hiring of independent enterprises and professionals as well as the collaboration of state and municipal authorities, students from several universities, and private institutions.

At this new stage of listing, the updating of previous listings has been considered a preponderant activity, implying the performance of new field projects in order to record the alterations that monuments have undergone, adding also those which were not included until now such as valuable examples of vernacular and industrial architecture.

Between 1995 and 2000, the information was updated to 8,070 monuments, representing an additional 12% on top of the previous 60% of catalogued monuments; currently, the list of buildings of Mexico City's Historic Center is being updated, whose previous catalogue was published in 1988 as an effort to determine the scope and nature of the changes that had taken place. The project considers up the updating of 3,100 monuments located within the so-called "A" perimeter with an eye toward obtaining greater knowledge of the zone's heritage, such as buildings, urban design, streets, alleys, squares, urban fixtures, etc. This updated list is of useful means for solving problems such as land use, peddlers, traffic, reutilization of inhabited buildings, and housing in order to restore the Historic Center its monumental importance.

The study even considered buildings whose value consisted of its architectural and urban context albeit lacking of any significant heritage value, as well as those buildings that interrupt the context in terms of number of floors, design or being a vacant lot. These buildings were included in order to obtain a general appreciation of the zone.

We show the listing files format used both by **INAH** and the **SEP**.

National File of the Historical Building Heritage Listing

- Identification number	The building is identified at a local and national level, the first numbers correspond to those of the National Institute of Geography and Statistics (INEGI)
- 1. - Location	State Municipality Town District Street and Number Another location
- 2. - Identification	Name of the architectural ensemble Name of the building Original function Current function Construction's date
- 3. - Characteristics	Façade Walls Floors

	Roof Levels Other elements
- 4. - Legal aspects	Legal situation of real estate
- 5. - Historical data	Oral Documentary Inscriptions
- 6. - Bibliography	Photographs
- 7. - Comments	Location plan
- 8. - Private property	Ground plan

File of the Heritage Listing of Federally owned Buildings. – SEP

It comprises, in addition to the identification number, name, registry's number and location, the following information:

- Building type	Bishop's see Religious order category
- Building date	Original function Current function
- Ground plan type	
- Evaluation	
- Conservation state	Structure Plumbing, water and electrical installations Finishing works
- Description	Photographs Plans Sketches

Files of the Federal owned Furniture and Objects Listing.

In addition to the index card and registry numbers, it contains:

- Object	Name of the piece Conservation state Artistic evaluation Measurement Materials
- Author	Period Technique
- Description	Photographs
- Comments	

Declaratory decrees

The Federal Law of 1972 includes both historical zone and monument declaratory decrees; since its promulgation, studies have been performed in those zones in order to develop appropriate strategies or special programs for their protection with the ultimate goal of achieving the presidential declaratory decree.

The required procedure demands:

- Specific request from the state or municipal government or from the interested civil association.
- To be included within the established programs of the National Coordination Office for Historic Monuments, through the adjunct-director's Office of Catalogues and Zones.
- That the urban design of the referred zone is previous to the 20th century.
- A field-work visit to identify the density and concentration of monuments.
- The elaboration of a technical file containing the research and compilation of historical data both from the site and the relevant buildings: historical and current urban design plans of its location, old photographs, oral chronicles, cadastral plans, etc.
- An architectural survey of historical buildings and urban survey of the zone.
- A cartographic delimitation plan showing the historic monuments and the surrounding architecture, pointing out their land use, building levels and public spaces.
- The elaboration of a proposal decree containing the proem or legal support and whereas.
- To hand the file with all required documents over **INAH's** Coordination Office for Legal Affairs in order to be checked, and after that, to **SEP** General Director Office for Legal Affairs.
- The endorsement of the ministers of **Sedesol** and **SEP**.
- The signature of the President.

The declaratory decrees used, until 1979, mentioned only the historical whereas and the area to be protected, delimiting their extension. Later, they included an index or list of monuments comprised within the zone to be declared, while the newest ones also contain a urban plan description, as well as the particular characteristics of the buildings, gaining with this a wider picture of the decreed zone.

From 1974 to the present, 42 historic monument zones have been decreed with another 35 more under consideration.

The procedures for the individual declaratory decree of historic monuments demands identical steps as mentioned above, as long as they apply for a specific and individual building. This means that an inspection visit is made, and the same respect to the historical research, architectural project and construction materials description, valuable private property, building functions and interventions, and relevant documents such as property titles or official real estate records.

The President will guarantee a proposal decree when the building is federally owned, while in the case of private property the guarantor will be the **SEP**'s minister.

As of declaratory decrees of artistic heritage, eight have been made on private property, artistic work of deceased painters ¹⁷, among them Diego Rivera, José Clemente Orozco, David Alfaro Siqueiros, Frida Kahlo, and 18 decrees on building heritage, including the public monuments of the Independence slope and the Palace of Fine Arts in Mexico City, other federal owned buildings and a few private owned ones; in the respective declaratory decrees are specifically determined the monument characteristics, specifications of owners or possessors obligations, and those of the neighboring houses in order to guarantee their preservation, prohibiting to change their function unless that it happens by decree, having to inscribe the declaratory decree in the Artistic monuments and zones Public Registry.

The opinion of the National Committee for Artistic Zones and Monuments is required for drawing up the declaratory decrees.

¹⁷ Declaratory decrees of Artistic Works Heritage of Painters:

Diego Rivera
José Clemente Orozco
David Alfaro Siqueiros
Frida Kahlo

**Date of publication
on the Official Daily Paper**

December 15, 1959
December 15, 1959
July 18, 1980
July 18, 1980

Legal and administrative consequences of Listing

As we could see at some part of this text, according to the federal law in force, monuments are those determined expressly in the law and those ones declared by decree.

The legal effects for the declared monuments are, among others:

- Their owners will have to conserve and, if it is the case, restore them after being authorized by either **INAH** or **INBA**, hereafter referred to as the Institutes.
- When the owner does not carry out the restoration works, the Institute will do them at their own expense.
- When the works were made without the respective authorization or permit, they will be suspended by an order from the Institute.
- The federal owned buildings' function, or change of function, must be made by a federal government's decree.
- Any change or ownership must be recorded on a public title, and the participant parts must give notice to the Institute within the next 30 days.
- All construction works and any restoration and conservation works which is due to be accomplished within a declared monument zone will have to comply the conditions established within the corresponding legal ordinances, and with the previously given authorization from the Institute.
- Definitive exporting of private owned artistic works declared as heritage is forbidden.

In the same law, we find directions referred to monuments, and not specifically, to declared monuments:

- Owners of historic buildings neighboring a monument intending to carry out works in them will have to obtain a permit from the Institute.
- Owners will have to inscribe their own historic buildings at the relevant registry. Inscription can be done by governmental order, giving previous personal notice to the owner.
- A provisional artistic monument declaratory decree can be issued in the event that there is a risk of irreparable damage to property with relevant esthetic value.
- In the declaratory decree of historical monument zones, there is a list of all buildings of the zone that were legally deemed historic monuments, so a ruling is issued to notify the owner.

- A legal resource is established to oppose the obligation of inscribing monuments at the Public Registry for Archaeological and Historical Monuments and Zones.

Concerning this last point, it is worth mentioning that the federal law in force does not contemplate any legal instrument for the affected owners to contest a declaratory decree issued on a historic monument, and for this reason the Supreme Court of Justice recently ruled ¹⁸ an unconstitutional law.

The dynamics of the social, cultural, political and economic development of Mexico during the last 30 years has exceeded the scope of the 1972 Federal Law on Monuments. Therefore, it is essential that we draw up a new General Law on the Cultural Heritage of the Nation, in which the following points must be reviewed and considered:

- The object of the law, the concepts of tangible and intangible heritage, definitions of monuments, sites and zones and the protection and conservation of their natural and visual surroundings.
- The coordination and joint partnership of federation, states, the Federal District and municipalities, creating appropriate institutions and the legal wherewithal for this purpose.
- A more extensive participation of society, as much from individuals as from civil organizations, religious associations, indigenous communities and cultural, academic and research institutions.
- Establishing compatibility with other ordinances issued to regulate urban development, land use, ecology and financing.
- The creation of a National Registry for Monuments, Zones, Sites and Property of the Cultural Heritage of the Nation, coordinated with relevant authorities in states and municipalities, as well as the installment of an information center to make accessible to the public a database, either printed, digital or internet supported.
- Formulating and promoting the Cultural Heritage Catalogue of the Nation, using and updating the already existing work in coordination with the relevant institutions and authorities, taking advantage of the new methodological processes and supported by the technological advances of the computerized systems.

...A lack of knowledge on sites, monuments and cultural objects comprising a community's heritage entails a definite risk of their deteriorating or being lost ¹⁹ ...

¹⁸ Entire Supreme Court of Justice.- Vol. XI, March 2000. Thesis P. XXI X / 2000 Page 96, Matter: Administrative Constitutional.

¹⁹ Conclusions and recommendations of Latin American and Caribbean countries' conservation centers director's meeting. Caracas, Venezuela, 1992.

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LISTING OF CULTURAL PROPERTY IN BULGARIA – A CASE STUDY OF A COUNTRY IN TRANSITION PERIOD

Bulgaria is located on the Balkan peninsula and has been always the crossing point of many civilizations. The last 12 years it is facing the challenges of transition from state-owned to market economy and our generation has the intricate task to preserve and pass on to the next generations our rich cultural heritage.

On a territory with population of less than 8 million people there are 40 000 monuments, originating from a wide historical range – from pre-historical to modern times. Seven of our monuments are included in the list of the World heritage. The previous practice of absolute domination of the state in the field of conservation is now giving way to the market forces and the private initiative. Due to limited resources the involvement of the State is drastically reduced, which poses a considerable challenge to finding financial support for protecting out cultural heritage. The burden of compensating for the active support of the state now falls on the legislative body, which should enact new laws, consistent with the present-day doctrine of conservation, and synchronized with world's leading standards, to stimulate new ways to provide for the preservation of our culture. Such laws would also act as a warrant towards the inclusion of Bulgaria in the European Union in the future.

Institutional consciousness for the value of the cultural heritage upon the Bulgarian land and the necessity for legal protection comes into existence in the middle of the 19-th century, a period when the first museum collections were organised. The foundations of the system for preservation of the cultural heritage were laid at the end of the very same century.

According to the existing Law for Monuments of Culture and Museums the **monuments of culture are landmarks left by individuals and society, providing a glance at the existing cultures at the times of their creation. These monuments contain artistic, spiritual, and historical significance, arising from historical events and lives of eminent people.** The monuments of culture are:

- Towns and villages, neighborhoods, streets
- Archeological sites
- Religious buildings and sites
- Memorials
- Objects with artistic or scientific significance
- Archival documents or objects containing information about past cultures
- Contemporary works of art after being accepted in museums

According to the national legislation the movable and immovable monuments are treated into two different laws. Following my competency I will reveal the listing of the immovable cultural property.

All sites or objects containing evidence of human existence and activity, which are physically inseparable from the environment in which they were created or to which they belong, are considered immovable cultural heritage.

The category of a monument of culture and the strategies to preserve it are stated in the pronouncement by the Ministry of Culture.

Categories of Immovable Cultural Heritage

The category of an immovable cultural monument is specified based on the following criteria:

- historical period
- spatial structure and territorial range
- cultural and scientific context
- location

According to the historical period the immovable cultural heritage is:

- pre-historical
- antique
- medieval
- renaissance
- modern time

According to the spatial structure and territorial range the two types of monuments are single and group monuments. The group monuments include:

- ensemble – territorial range including sites of immovable cultural heritage, which share some spatial, aesthetical and contextual similarities between each other and with the environment
- a complex – a type of ensemble, in which elements serve the same functional purpose
- historical settlement – a settlement, either naturally developed through time or planned, which contains cultural evidence of one or more historical periods
- historical zone – territorial range, including urban or rural territory, which contains cultural evidence of one or several historical periods

According to the cultural and scientific context of the immovable cultural heritage it is classified as:

- archeological – material evidence of human activity during previous historical periods, usually in the form of ruins, existing above or below ground, on the land or in the waters belonging to the country
- historical – sites and locations related to historical events and/or people
- architectural – buildings, equipment, or a combinations of both, which are significant to the progress of the architectural art and science
- artistic – works of art that are inseparable from its environment

- urban and cultural landscape – spatially defined, solid structures important to the process of urbanization and the relationship between the individual and the environment, which played supporting role to the development to the territory
- parks – spatially defined, solid structures important to the progress of park art and science
- ethnographical – evidence of lifestyle, crafts, skills, customs, beliefs, which is inseparable from its environment and is important from ethnographical standpoint
- industrial – buildings or groups of buildings and equipment important to the industrial culture and science

According to the location it is inside or outside of the settlement)

The category of the monuments is determined by their cultural and historical values. They are:

- of world importance, included in the UNESCO list of Monuments of Culture and Sites
- of national importance - samples with extraordinary value for the Bulgarian culture
- of local importance
- of ensemble importance
- for the purpose of information

The Procedure of Proposing Sites of Immovable Cultural Heritage for Monuments of Culture includes:

Identification

The identification of the sites of immovable cultural property and their elements and environment is a systematic process which includes researching, locating and describing. The results are recorded in an identification card.

The identification is done mainly by specialists during their planned expeditions. In case of accidental discoveries by somebody else - they do extra investigations. The declaration may be done also by professionals, as well as by some other physical or legal persons. The lists of the declared monument have to be sent to the municipality they belong to. The municipality and district authorities are obliged to mark them into the registers and the cadastral plans of the settlement. They inform all the people concerned who have the right to do objections. The final complex appraisal is made by the National Institute for Monuments of Culture according to its own standards and is approved by the Ministry of Culture. The different monuments of culture are ratified by different institutions: those of world important - by UNESCO through our National Committee, the historical settlements - by the Council of Ministers, all the remaining - by the Minister of Culture. The approved lists are published into the State newspaper, but the National Institute for Monuments of Culture is obliged to inform the authorities in the districts and the municipalities of the country.

Proposition

After a site is being identified, it is appraised by the National Institute of the Monuments of Culture and proposed for a status of monument of culture. This puts the site immediately under temporary protection as a monument of culture, until its final detailed appraisal of the cultural value and significance.

The following are specified with the proposition of a site:

- preliminary type
- preliminary category
- scope of temporary protection

Final Detailed Appraisal

The final appraisal establishes of the cultural value and the level of significance of the immovable cultural heritage according to the following criteria:

- authenticity and current condition
- scientific and artistic value
- relation to the environment
- relation to society

Based on the final appraisal NIMC establishes the type and the category of the site and the strategies to protect and preserve it.

Confirmation, Publication and Registration

New monuments of culture are **pronounced and confirmed** as such by the Ministry of Culture, which is advised on the matter by the National Institute of the Monuments of Culture (NIMC). NIMC must coordinate with the mayor or the leader of the municipality where the monument is located. The Ministry pronounces towns and villages, groups of monuments, or historical sites that are particularly important from a historical, archeological, ethnographic or architectural standpoint as reservations.

A status of a Monument of Culture is obtained after a monument is proposed by the NIMC and pronounced by the Ministry.

The lists of the newly confirmed monuments of culture are published in “ State Gazette and registered in the National List of Monuments of Culture.

The different monuments of culture are ratified by different institutions: those of world importance – by UNESCO through our National Committee, the historical settlements – by the Council of Ministers, all the remaining – by the Minister of Culture.

The municipality and district authorities are obliged to mark them into the registers and the cadastral plans of the settlement. They inform all the people concerned who have the right to do objections. The final complex appraisal is made by the National Institute for

Monuments of Culture according to its own standards and is approved by the Ministry of Culture. The approved lists are published into the State Gazette, but the National Institute for Monuments of Culture is obliged to inform the authorities in the districts and the municipalities of the country.

Legal, Administrative and Financial Consequences of establishing immovable cultural property as Monuments of Culture is mainly in regards of preservation, maintenance and promotion of the heritage.

All monuments of culture found as a result of archeological research is property of the state. Monuments that are intentionally undisclosed are confiscated by the state. The Ministry of Finance provides credit for research and preservation of monuments discovered during construction, when the resources, otherwise available, are not sufficient.

All owners of monuments of culture are obligated by law to maintain them in good condition and to inform the appropriate state and municipality institutions of any damage or actions that might endanger them. Owners are also obligated to provide access to the sites for the representatives of the institutions guiding the preservation of the monuments.

Reconstruction and alterations could be made only after the approval of the National Institute for Monuments of Culture and under its guidance. If construction, which violates the official guidelines of preserving a monument is performed, the new developments must be destroyed.

If an owner is not able to provide recourses needed in emergency to maintain or restore the condition of a monument the resources are provided by the State, and in return the property could be hypothecated.

The immovable monuments of culture can be used in accordance with their purpose by the owners under the guidelines provided by the NIMC.

The Ministry of Culture issues a special permit for the manufacturing of items, labels, or designer articles, which exhibit the image of a monument. An annual fee is charged for such permit

Multiple ownership of a monument is permitted if applicable, and if it does not put at risk the condition of the monument.

The sale, exchange, donation, and inheriting of monuments of culture are not taxed when any Government, State, or Municipality institution is involved. When an heir of a monument of culture donates the monument to any party, the transaction is not taxed, and if any taxes have been paid they are refunded.

The listing of the cultural property is one of the first and major phases of the wide range of activities included into the preservation field. It should respond the requests of the national strategy for preserving the continuity and identity of the heritage in an adequate way regarding the concrete social and economic framework (it is a pity, but some of the declared monuments were excluded from the list due to economical and political reasons).

Being a country in transition we are aware that the legislation should be transformed from restrictive to a stimulating one, which will guarantee more effective preservation and re-use of the heritage. The proper management in this field requires decentralization and thus, without denying the prior role of the state, the local initiatives will be activated.

Constructing the civil society the Non-governmental organizations take more important role as a mediator between the diverse social groups on one side and between the national and international institutions on another. They are partners and at the same part corrective factor in this sphere also.

The cultural resource in the Republic of Bulgaria and their role for preservation of the national cultural identity are essential factor in the endeavor of the sustainable development of the country. They are also undeniable evidence for our affiliation to the European and World Heritage.

**PRESERVATION IN AFRICA – GHANA’S
PROGRESS**

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The act of preservation is a laudable initiative to maintain the character of a place, which in itself preserves the past for the future. Preservation thus ensures that the history of a place is not forgotten.

It is in the light of the above that the promulgation of preservation by law by the Cape Coast Municipal Assembly in the year 2000 constitutes a more bold and positive approach towards preservation. Though the passage of the preservation bye-law is community based it gives a ray of hope that the successful implementation of the law will serve as a stimulus for other districts to consider preserving their identity thereby preserving the character of Ghana as a country.

Cape Coast Municipality covers an area of 122 square kilometres and is the smallest district in Ghana. The Municipality's capital, Cape Coast is also the capital of the Central Region of Ghana. The Municipality is bordered on the south by the Gulf of Guinea, to the West by the Komenda-Edina-Eguafo-Abrem District, to the east by the Abura-Asebu-Kwamankese District, and to the North by the Twifo Hemang Lower Denkyira District. The local administration of the municipality lies with the Cape Coast Municipal Assembly headed by its Chief Executive.

According to history Cape Coast (Oguaa) was founded in the 15th century. The importance of Cape Coast lies in the significant landmarks that it possesses. These historical heritage find expression in Nationalism, politics, education, religion, law and trade to mention a few.

Politico-administratively, Cape Coast in the early stages of the colonial era was the seat of government. In Cape Coast can be found Fort Victoria, Fort William and the Cape Coast castle. Thus Fort Victoria built in 1721, Fort William built in 1819-20 and the Cape Coast castle built in 1665, stand to tell the history of joint activity between Africans and Europeans.

Cape Coast has also been described as the cradle of education in Ghana. It has the oldest secondary institution, Mfantshipim school which was established in 1876 and the Wesley Girls Primary School which was established in 1844 by the Wesleyan Missionaries and several other schools.

In the field of religion, Cape Coast can also boast of the Wesleyan Chapel (construction started in 1838) with its numerous memorial tablets and other places of worship. Within Cape Coast there are several government houses, private houses of statesmen like John Mensah Sarbah, Jacob Wilson Sey and Kobina Sekyi.

There are also cemeteries, traditional vernacular houses and archaeological sites from all periods of the Municipality's history.

EXAMPLES OF HOUSES FOUND IN CAPE COAST

THE GOVERNOR'S (HERITAGE) HOUSE. This is a merchant building built in the 19th century. The building was restored in 1999. The Governor's house is now known as the Heritage House. Today it is used as an office building and houses a small exhibition reflecting the history of Cape Coast.

SARBAH HOUSE: Located on King Aggrey Street. This building was constructed of swish material. The original frames and some ironmongery are still intact. The house was constructed by the Mensah Sarbah family during the mid to late 19th century.

KOBINA SEKYI'S HOUSE: House number B23/3 on Commercial Street. This dwelling is one of the oldest structures situated near the Cape Coast Castle. It was built by a well known Cape Coast Lawyer, Kobina Sekyi. Part of the building façade is covered with a Porch supported by decorated cast iron columns.

The proximity of Cape Coast to other tourist sites like the Elmina Castle and Fort St Jago which are also World Heritage sites, the Dutch Cemetery in Elmina, the Kakum Forest Reserve with its Canopy Walkway and the Assin Attandanso Resource Reserve

which is among the few vestiges of tropical forest in this part of Africa adds to the significance of Cape Coast. The United States Agency for International Development (USAID) and the United States Committed of International Council on Monuments and Sites US/ICOMOS have been involved in a cultural rehabilitation programme in Cape Coast. The programme included documentation, inventory and rehabilitation of selected privately owned dwellings and sites in Cape Coast.

The need to preserve the uniqueness of Cape Coast thus cannot be overemphasised. In August 1999, representatives of the Cape Coast Municipal Assembly, the citizenry of Cape Coast, traditional rulers, and a team of International Experts met to discuss the concerns and needs of the community.

At this juncture I must acknowledge the work done by US/ICOMOS and co-sponsored by Conservation International and the Ghana Heritage Conservation Trust with support from USAID on Conservation and Tourism Development Plan for Cape Coast.

A major outcome of this work is the determination and commitment of the Cape Coast Municipal Assembly to the preservation of its cultural heritage. Consequently, two goals were set namely, protecting the Municipality's historical character through careful preservation of historic standards, and also enhancing the irreplaceable properties of historical and cultural significance that reflect Cape Coast's cultural, social economic and architectural history.

Fortunately for Cape Coast, the Local Government law, Act 462 empowers it to formulate, execute plans, programmes and strategies for effective mobilisation of the resources necessary for the overall development of the Municipality. The Municipal Assembly is also a planning authority for its area. No physical development including the construction of a building or other structure can be put up without prior approval in the form of a written permit issued by the Assembly.

The Municipal Assembly is further empowered to prescribe conditions for erection, construction, demolition, re-erection, repair, sanitation and ventilation of public and private buildings. The Assembly is also empowered to make byelaws for the purpose of performing the functions conferred upon it by the said law.

In the year 2000, the Cape Coast Municipal Assembly with the support of Conservation International, drafted a Historic Preservation Bye-law. The byelaw designated two areas as historic districts namely Cape Coast and Siwudu Historic Districts within the Municipality. Cape Coast Historic District contains much of the Central core of the Municipality including the Cape Coast Castle, the Wesleyan Chapel, schools, cemeteries, shrines, houses and commercial houses. The Siwudu District contains sites of traditional and ritual significance and buildings typical of earlier periods of history.

The members of the Assembly at its executive committee meeting voted favourably for the acceptance of the drafted law as law applicable within its area of administration. The purpose of this byelaw was set out as maintaining the aesthetic, cultural, educational and historic features of the Cape Coast municipality.

The bye-law makes it mandatory for all persons to procure a certificate of approval issued by a Commission which shall be established under the bye-law for any material change in the exterior appearance of a historic property or any building, structure, site or work of art within the historic district.

The byelaw has a Memorandum that states briefly the authority of the Cape Coast Municipal Assembly and also provides summarised briefing of the component parts of the byelaw. The byelaw has six (6) parts;

The first part creates the Cape Coast and Siwidu Historic Districts.

Part 1 section 2 deals with the prohibition to material changes in the exterior appearance of properties within the historic district unless a certificate of Approval is obtained from the Cape Coast Historic Preservation Review Commission. The remainder of the part 1 describes the application and review processes, factors to be considered by the Commission and the effect of inaction on the issuance of permits.

Part 2 of the byelaw provides criteria and procedures for the designation of additional historic districts by the Municipal Assembly on recommendation of the Commission. This part also includes requirements for notice and public hearings in connection with designations.

Part 3 creates the Commission as part of the planning functions of the Municipality. It establishes the number of members, their qualifications and terms provides for their compensations and sets out their powers and responsibilities. The Commission is also

given authority to adopt rules for the transactions of business design guidelines and standards to guide development and regulations and procedures for carrying out the byelaw.

Part 4 prohibits owners of historic properties from allowing their buildings or other structures to deteriorate by failing to provide ordinary maintenance and repair and provide for means of enforcement. Exceptions are set out for emergency measures to ensure public safety.

Part 5 contains the byelaw provision for inspection, enforcement, penalties and appeals.

Part 6 contains definitions for key terms contained in the byelaw. Part 6 is followed by the first and second schedules, which contains description of two historic districts. For the purpose of educating the members of the Municipality about its byelaws the Executive Committee of the Municipal Assembly has mandated its Justice and Security Committee to run radio programmes. During such radio programmes, the opportunity is given to the general public to ask questions and/or seek clarification on the provisions of the byelaw. It is hoped that this byelaw, which is the first of its kind in Ghana will stimulate discussions on preservation and ultimately lead to the passage of similar byelaws in the other districts.

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CULTURAL RESOURCE LISTING IN GHANA

By

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Ghana is located on the West Coast of Africa. It is bordered on the south by the Gulf of Guinea, on the north by Burkina Faso, on the West by Cote d'Ivoire and on the east by Togo. Ghana covers an area of 238,000 sq. km. and has a population of about 20 million.

Ghana is divided into 10 main regions namely, Upper West, Upper East, Northern Brong Ahafo, Ashanti, Eastern, Volta, Central, Western and Greater Accra.

The cultural heritage of Ghana constitutes unique possessions of outstanding universal value where protection, conservation and transmission to future generation cannot be compromised. Ghana's collection of cultural resources are either immovable or movable or intangible in character. This paper shall discuss Ghana's immovable cultural resources. Ghana's cultural resources that are immovable include, Forts, Castles, Old Merchant houses, ancient mosques, traditional buildings, cemeteries and historic town walls. Being a signatory to the World Heritage Convention, Ghana's definition of monuments falls in line with the definition set out in Article 1 of the convention, that is architectural works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and

combination of features which are of outstanding universal value from the point of view of history, art or science.

Thus, by an Executive Instrument published in 1972 (EI.42) (the National Monuments instrument), the forts and castles in Ghana were proclaimed to be National Monuments.

In 1979, the Forts and Castles found along the coast of Ghana between Keta and Beyin were listed in the World Heritage list. The Forts and Castles in Ghana reflect its earlier contact with the outside world.

EXAMPLES OF IMMOVABLE CULTURAL HERITAGE

CAPE COAST CASTLE:- This is located in Cape Coast in the Central Region of Ghana. The Cape Coast Castle initially called Carolusburg was built in 1630 by the Dutch on an abandoned lodge built earlier by the Portuguese. In 1665 it was used as the headquarters of the British Colonial administration in the Gold Coast until 1876 when the capital was moved to Accra. The castle is open to the public on admission charges and it houses two exhibitions a West African History Museum and a Building Museum. Presently it accommodates the Ghana Museums and Monuments Board offices.

ST GEORGE'S CASTLE: This castle is located in Elmina and is also referred to as the Elmina Castle. It was built by the Portuguese in 1482. St George is the oldest Castle on the coast of West Africa and the first European building in Sub Saharan

Africa. The castle is open to the Public on admission charges and houses a small museum reflecting the history of Elmina.

Apart from the forts and castles Ghana's rich cultural resource includes other architectural works some of which are mentioned below: -

ASANTE TRADITIONAL BUILDINGS

The buildings are 10 in number. It has been inscribed on the World Heritage list as rare surviving examples of significant traditional architectural and wealthy Asante Kingdom. These edifices built by talented "architects" have played their role in the history and culture of Asanteman. Their unique mural decorations were used for palaces, homes for the wealthy citizens and shrine houses.

THE DUTCH CEMETERY – ELMINA: - The cemetery was established in 1806 as is written on the Mausoleum. This structure was built for Dutch Governors who died on the coast. The large cotton trees, which form part of the monument, might well be the same trees, which were seen by travellers who visited Elmina in the mid 19th century. There are about 60 gravestones with inscriptions on them. The information on the rest of the gravestones either disappeared or is not readable and could not be found in the literature.

LARABANGA MOSQUE: - Larabanga built in the early 17th century by Muslim Merchants who were travelling from North Africa to Ghana to trade in salt and gold. The Mosque also served as a resting place for the merchants. It is the oldest and most powerful mosque in the Northern Region of Ghana. It is believed that the spiritual powers in the mosque restore fertility in women and also makes people wealthy.

WHAT DO WE LIST

In listing a property of cultural significance, three key concepts are adopted, namely: - historic significance, historic integrity and historic context.

Historic significance connotes the importance of a property to the history, architecture, archaeology, engineering or culture of a community, region or the nation.

This is achieved in several ways

- (a) The property's association with events, activities or patterns,
- (b) The property's association with important persons.
- (c) The property's distinctive physical characteristics of design, construction or form.
- (d) The property's potential to yield important information.

Historic context is information about historic trends and properties grouped by an important theme in the pre-historic or history of a community, region or the nation during a particular period of time. The theme relates to historic development of a community such as its commercial or industrial activities.

Historic integrity is the authenticity of a property's historic identity, evidenced by the survival of its physical characteristics. The historic integrity enables a property to illustrate significant aspects of its past. Not only must a property resemble its historic appearance, but it must also retain physical materials, design features, and aspects of construction dating from the period when it attained significance.

In Ghana, the Ghana Museums and Monuments Boards (GMMB) is solely responsible for the protection, conservation and management of forts, castles, old merchant houses and cemeteries located within the coastal belt, traditional buildings found in the middle belt and ancient mosques and historic walls located in the Northern belt of the country. The GMMB defines the general policy and resources of the immovable cultural heritage. The GMMB is a statutory body which derives its powers from the National Liberation Council Decree 387 of 1969. The Board by law could designate any property as a national monument. Thus, in Ghana immovable cultural heritage is protected by legislation. The government of Ghana provides funding for conservation and maintenance activities. GMMB staff takes all measures necessary for the protection of the sites from deterioration, damage dilapidation, collapse, unauthorised signage, notices and advertisements posted on the properties.

CONSEQUENCES OF LISTING

Administratively, when a property is listed, the GMMB gains full control over the property to manage, promote and preserve it. As the legal custodian of the listed property, the GMMB carries out routine inspection, prepares reports and make good defects for the purpose of monitoring the listed properties.

The responsibility of control and maintenance are functions of management. The historical integrity and authenticity of the cultural heritage is controlled and maintained by ensuring that the use of all parts and the spaces around the property, physical repair and maintenance of the fabric, access to the properties by visitors and the security of all parts against damage, fire and theft are properly managed. Experienced Administrators and Conservators implement effective management.

Educationally, by listing, the property is brought into the public domain. This gives opportunity for research work. Information on the property becomes available for study. This equally increases public awareness of the significance of the property and the need to protect and conserve properties.

Economically, survival of listed properties is of great importance because they represent the tangible evidence of our past, which bears witness to the long span of human history and forms the basis of tourism. Tourism offers economic returns in the form of tourist spending on sites; - ticket sales to the property sites purchase of souvenir, handicraft, accommodation and offering employment (tourist guides).

So long as our rich heritage remains standing, it is our responsibility to protect, conserve and manage them through listing.

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Dr. Werner von Trützschler

Cultural Resource Listing in Germany

Just how necessary legal protection is for our cultural heritage became very clear in divided Germany in the post war years. In the young Federal Republic of Germany, where it was initially thought that protection of monuments could be left to the discretion of existing forces in society, great numbers of valuable historic buildings fell victim to demolition during the decades of reconstruction. In the German Democratic Republic, on the other hand, significant cultural monuments were not infrequently given over to ruin because of chronic shortages of materials in the socialist planned economy.

But even today without state protection many historic objects would be irretrievably lost as sources and evidence of our human history. Protection of the cultural heritage is therefore laid down as a public responsibility in the constitutions of most of the states *Länder* (states) the Federal Republic of Germany.

1. The Term Monument

But what is to be considered “cultural heritage”? How should the term monument be defined or, to put it another way, how can that which is worth preserving be distinguished from that which is not worth preserving?

In Germany monument protection and maintenance fall under the legal jurisdiction of the individual *Länder*. Although the monument protection laws of the different *Länder* have a uniform regulative purpose, there is no uniform definition of the object to be regulated.

A crucial term, common to all the laws, is the cultural monument. In several of the laws it is defined simply as a “thing, whole thing, or part of a thing”, in some it is restricted to “things created by man from a past epoch.” Several laws differentiate further by distinguishing between built monuments and movable or immovable field monuments. The field monuments can again be classified as archaeological or paleontological monuments that are or were hidden in the ground. Cultural monuments also include monument ensembles (historic districts) as well as movable things that are not built monuments or field monuments.

But what turns a thing into an object worthy of protection? Which characteristics, what quality must an object possess so that we consider it necessary to place it under legal protection?

The answer to these questions is based on the realization that present-day conditions often have derived from the historic context. Thus the crucial function of the cultural monument is to document the cultural development of man, to reveal the intellectual, technical and artistic work of our ancestors and to make it possible to experience history through contemplation of the particular object. There is no doubt that monument protection and maintenance serve to protect objects of scientific research. But it is of prime importance to preserve the illustrative and identifying materials of the past for the general public and, not least, for the generations to come.

Thus another term that is central to the monument protection laws of all the *Länder* is the public interest in preservation. Within the context of what I have said before, it is the documentary value of an object that determines the extent of public interest in its preservation. This value has an inherent corrective function which keeps the term monument from getting out of hand.

Not every man-made object should already be placed under protection as a monument just because it exhibits a certain age. On the contrary, the critical factor is the information it provides about life, work and living conditions from past epochs. Public interest in preservation can thus be assumed if an object is illustrative of historic events or artistic, scientific, technical, folklore or urban design developments. Based on these criteria the monument value of an object is also wholly verifiable in court, in the interest of comprehensive legal protection as guaranteed by the constitution. In the dry words of the law (here for instance the Thuringian monument protection law), the term cultural monument is defined as follows:

“Cultural monuments in the sense of this law are things, whole things or parts of things whose preservation for historic, artistic, scientific, technical, folklore or urban design reasons or for reasons of historic townscape maintenance is within the public interest. Monument ensembles (historic districts) (paragraph 2) and archaeological monuments (paragraph 7) are also cultural monuments.”

2. Placing a Monument under Protection

How can effective monument protection be organized procedurally?

All the monument protection laws of the German *Länder* provide for registers (sometimes called monument books) or lists in which cultural monuments worthy of protection are enumerated, but the legal significance of the registration of an object varies from *Land* to *Land*.

Basically we distinguish between two different procedural systems, the constitutive system for placing a monument under protection and the so-called informative or declarative system. How are these to be understood?

2.2. The Constitutive System

The monument protection laws of several *Länder* follow the constitutive registration system: a monument is subject to the legal protection provisions only with registration in a monument list or through the decree of the public preservation agency prior to registration. Through its registration a thing is legally and obligatorily defined as having the character of a cultural monument. Registration simultaneously actuates the obligation to maintain the monument and the prohibition of changes. In these cases registration (or in some *Länder* a decree prior to registration) is therefore characterized as an encumbering administrative action.

An administrative action is understood as a decision or other sovereign measure which a public agency makes for regulating an individual case in the field of public law and which has an immediate external legal effect which might infringe the rights of a third party.

The fact that registration is characterized as an administrative action is significant because of the possibilities that an affected owner has for legal relief: an encumbering administrative action can be appealed before the administrative court.

In some cases the registration procedure with constitutive results can be too protracted to prevent threatened alteration or even demolition of an object that is worthy of preservation but has not yet been placed under protection. Therefore almost all of the monument protection laws that follow the constitutive registration system also include provisions for provisional protection. After such protection has been ordered – likewise through an administrative action – the object is considered registered for a certain length of time.

2.3.j The Declarative System

In other German *Länder*, in contrast, monument protection functions *ipso jure*. This means that application of the monument protection law to an object follows directly from the existence of the characteristics that meet the legal definition of monument. The execution of an administrative action is not needed in order for the monument protection provisions to be applicable. Rather, every object that fulfills the blanket clause of the definition is protected by the law, regardless of whether this object has already been listed in a monument register or not.

According to the declarative system registration thus does not legally bindingly determine whether an object is a cultural monument. Registration is directed to clarification and not to establishment of legal consequences. It does not have the significance of regulating an individual case and thus does not represent an administrative action in the sense of administrative procedure. Registration merely discloses that in the judgement of the responsible public preservation agency a particular object is a cultural monument worthy of protection. Thus registration has a purely informational character, intended to inform anyone with authority over an object as well as the public agency responsible for building permits.

The informational character of registration has an effect on possibilities for legal relief for an affected party: because the administration does not intervene in his rights, but rather merely informs him of the legally defined monument character, he does not have – at least not at this point in time – a right to appeal the registration.

However, there is no disadvantage in this for the encumbered owner. In the constitutive system for placing an object under protection the administrative action can no longer be appealed after a certain period of time as expired. Thus the affected party must react immediately in order not to lose his possibilities for legal relief.

In contrast a party affected by the declarative system can appeal the public agency's assumption of monument character for an object as soon as he is concretely burdened by any administrative measure that results from reference to the monument character. In general this case arises when an owner wants to make exterior or interior changes to a monument. As long as such measures do not take place the registration as such does not develop any encumbering effect.

The aforementioned applies to built monuments and archaeological monuments. Several *Länder*, however, do make the protection of movable monuments dependent on their registration.

Additional restrictions on registration serve to limit the otherwise incalculable number of movable objects that could be protected.

3. The Legal Consequences of Placement under Protection

What are the effects of registration of an object in a monument list? What consequences are associated with legal placement under protection?

I have already explained the educational (in the broadest sense of the word) effect with regard to our cultural past, in answer to the question of how to define the term cultural monument.

3.1. Prohibition of Adverse Affects

From a legal point of view, placement of an object under protection primarily actuates both prohibitions of adverse affects and preservation requirements. In order to make monument protection effective, the laws of most of the *Länder* include comprehensive prohibitions against changing the state of a cultural monument. The disadvantage of the changes is not at issue here. Even the best intentions of the concerned party are no guarantee that his actions are correct and justified for a monument. Therefore the legislators have made all planned changes subject to a prophylactic prohibition with a permit system.

Not only destruction of the monument or of its historic fabric is prohibited but also any change to its existing state. The intent of monument protection is to document artistic, architectural, social and historic epochs and developments. This is only possible if the design and fabric of a monument is preserved with as little change as possible.

The decision about whether a planned measure that would change a monument is to be permitted or not, given the interests of preservation, devolves on the responsible public preservation agency. The prerequisites for permits are differently regulated in the monument protection laws of the various *Länder*. Several laws link the granting or withholding of permission purely to the existence of reasons for monument protection. Other laws combine preservation concerns with other public interests. According to the latter, measures that have an adverse affect on the public interest in preserving a monument without changes can nonetheless be permitted if other public interests (for instance planning concerns) carry more weight in the individual case. Especially in procedures involving building permits various interests must always be weighed. These procedures include the monument permit process and are required for all large construction changes.

3.2. Preservation Requirements

The public interest in preservation of monuments is not only threatened by intended changes but also by the omission of necessary maintenance work. The monument protection laws therefore standardize positive requirements for preservation as well as prohibitions against adverse affects.

There are two parts to these regulations: first, a standard general preservation obligation which makes owners and sometimes also possessors responsible for preserving an object in a state that is appropriate for a monument and for maintaining it properly.

Second, if the obligated party does not fulfill the general preservation obligation, all the monument protection laws grant a public agency the possibility to order certain maintenance work at the cost of the obligated party.

However, almost all the monument protection laws limit the preservation obligation, or at least the obligation to bear its costs in case a public agency orders the work, to what can be reasonably expected of the obligated party. To compensate for the obligations and burden that are connected with a monument the state provides support in the form of public grants, financial assistance and tax advantages.

The monument protection laws also have an effect on the allowable use of built and archaeological monuments. Experience in the field of preservation has shown that unused historic buildings are more easily given up to ruin than buildings that are in use. Appropriate use of historic buildings is an aim of monument protection and maintenance. The original use of a building is part of its historic significance, and moreover it usually represents the most “gentle” type of use. Where preservation with the original use is not possible at least the use that best guarantees preservation of a building’s historic fabric should be the goal.

3.3. Further Legal Consequences

Further legal consequences of placing a monument under protection are contained in the obligation to inform the responsible public agency of existing defects on a monument and of any intention to sell the property. Most of the monument protection laws also provide the staff of the public preservation agency with the right to enter a property. In contrast none of the laws of the *Länder* call for a compulsory order making public access possible.

Finally, the *ultima ratio* of monument protection is the possibility of expropriation with compulsory compensation, if the preservation of the monument cannot be guaranteed in any other way or a danger to its continued existence cannot otherwise be prevented. Expropriation almost never occurs in practice, however, since money for compensation is usually not available.

4. Economic Effects of Placement under Protection

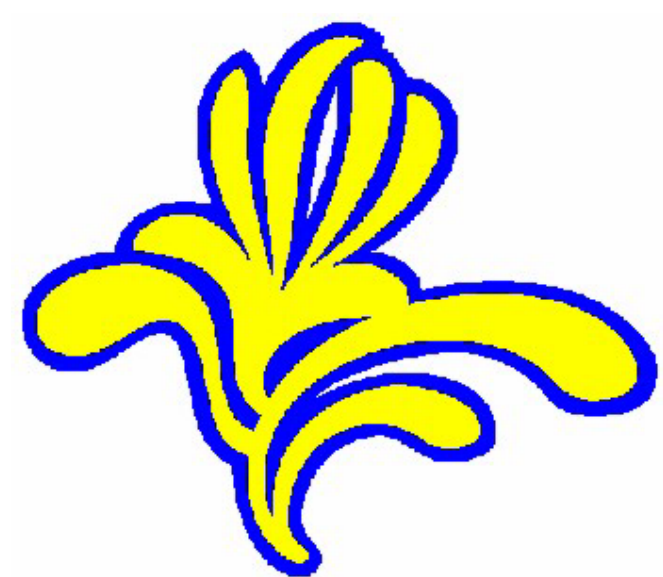
The laws for monument protection also give rise to various consequences from an economic point of view. Economic burdens can arise through the restriction of the legal status and the imposition of public obligations. To some extent the placement of a building under protection has a negative influence on the market value of a property. In addition there are increased costs to cover preservation. Often a potential increase in income is prevented by the limitations on use, so that an owner is not allowed to change to a type of use (for instance commercial use) that would produce more income. On the other hand for certain types of buildings, such as villas or apartment buildings (particularly in cities), monument status can increase the value thanks to tax advantages available for historic buildings.

Monument character is a prerequisite for reductions in income tax, property tax or inheritance tax, as well as for eligibility for different state, communal or private support programs.

Achieving a just balance between the various and sometimes opposing interests – namely the general public interest in the preservation of monuments as evidence of past epochs on the one hand and the interest of the owner in the largely undisturbed pursuit of his rights on the other hand – is the often difficult job of the public preservation agency and unfortunately also frequently of the relevant courts.

THE HAGUE CONVENTION 1954

Atlanta 03/04/2002 – 07/04/2002



**Cabinet of the Minister-President of the
Brussels Capital – Region**

**François-Xavier de DONNEA
Minister of State**

THE HAGUE CONVENTION 1954

The Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 is the outcome of a diplomatic conference that had been convened through the impulse given by the Netherlands in co-operation with UNESCO. A huge number of states is party to this Convention. Belgium has ratified it in 1960.

The Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict that was approved on 26 March 1999 and signed by Belgium on 17 May 1999, has not been ratified yet. This second Protocol has been signed by 32 other States. Twenty ratifications are required for this Protocol to enter in force. It's important to mention that one can only become party to this Second Protocol on the condition to be already party to the "Hague Convention". The Second Protocol is indeed an important supplement to the Convention of 1954 and it is impossible to adhere to the Second Protocol if one has not adhered to the Hague Convention. It was, as a matter of fact, impossible to amend the Convention for the Protection of Cultural Property as such in 1999. The Parties to the Convention should have come to an unanimous agreement. That is the reason why the decision was made to opt for a Second protocol with amendments that only apply to the Parties that have ratified this Second Protocol. The other Parties (98 States) that have not yet ratified the Second Protocol continue indeed to fall under the Convention of 1954.

Which Protection is offered under the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 ?

Article 1. Definition of cultural property

For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:

- a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;*
- b) (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and*

depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);

- c) *(c) centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as "centres containing monuments".*

Article 1 of the Convention gives an extensive definition of the term “cultural property”. But the question is which property comes under the protection as defined in the article referred to above. In this respect we can indeed rely on an international instrument i.e. the list of the 1972 UNESCO World Heritage Convention. But two problems arise in this respect. Firstly the properties in the list of the World Heritage Convention are very divergent and secondly when including valuable properties in the list, the possible military significance of the properties concerned is indeed never taken into account. A pretty good example is the “Waddenzee” which is worth being protected but during an armed conflict the possibility cannot be fully excluded to link a certain military necessity to it.

Which obligations have the States entered into under the Convention of 1954 ?

These obligations are of a different nature.

Article 3. Safeguarding of cultural property

The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.

Firstly in art. 3, the States undertake to take such measures as they consider appropriate already in peacetime for the safeguarding of cultural property. It goes without saying that already then some preparation is required for what could happen should an armed conflict break out. The problem in the initial Convention is that it is actually completely up to the Parties to see which measures they can take. In this respect the Second Protocol has introduced some very useful specifications.

Article 5: Safeguarding of cultural property (second protocol)

Preparatory measures taken in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict pursuant to Article 3 of the Convention shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property.

In peacetime the States shall make up an “**inventory**” of cultural property. In addition to this, they shall prepare the “**emergency plans**” required, should there for instance be a fire during an armed conflict. They shall also prepare the possible removal of cultural property and shall certainly appoint a competent authority in charge of the safeguarding of cultural property.

Which are the Critical Points or Deficiencies Encountered in the Original Convention of 1954?

In this respect we should be careful. 1954 was 1954, and things have changed!

It should nevertheless be pointed out that with respect to various points the Convention was actually not working properly. Firstly the question related to publicity and dissemination. Information should be disseminated but publicity among the general public and especially among the Armed Forces was very poor. Not only publicity was difficult but especially the concepts referred to in the Convention were very difficult for the Armed Forces to be implemented in the field. It is enough to think of the exception of “imperative military necessity”.

Article 28. Sanctions

The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

Other deficiencies were, although the 1954 Convention obliged the States to take criminal steps to repress the breaches of the Convention, that it went unheeded to a large extent because there is not any reference to breaches in the Convention. The Second Protocol of 1999 has fortunately remedied the shortcoming.

What are the Major Achievements of the Second Protocol ?

There are four:

- first, unlike the Hague Convention, the Second Protocol provides a clear definition of the notion “military necessity” for cultural property under general protection. This definition is based on the relevant provisions of Additional Protocol I to the Geneva Conventions and therefore ensures coherence in the

implementation of both instruments. Of course, no definition of the notion “military necessity” can prevent wanton destruction of cultural property in the event of armed conflict. However the new definition provides criteria that may be realistically evaluated and applied by the military;

- second, the Second Protocol creates a new category of “enhanced protection” for cultural heritage of the greatest importance for humanity that is protected by relevant national legislation and is not used for military purposes. The provision for special protection in the Convention have not proved effective so far. The new system of enhanced protection will be administered by an intergovernmental committee and even provides for provisional registration in emergencies;
- third, the Second Protocol elaborates stricter sanctions for serious violation against cultural property, defines conditions under which individual criminal responsibility will apply, sets forth conditions for prosecution, and deals with extradition and mutual legal assistance;
- fourth, unlike the Convention, the new Protocol establishes a twelve-member Intergovernmental Committee for the Protection of Cultural Property in the Event of Armed Conflict, which will be responsible for a number of tasks in the implementation of the new Protocol, such as the granting of enhanced protection, supervision of the implementation of this Protocol, and consideration of requests for international assistance. The creation of the new committee may be considered the most important achievement of the Second Protocol because the new supervisory body creates a structure of implementation and will implicate State Parties more directly in its application. This has also the effect of making the Convention and its two Protocols more visible.

The new Protocol, has not, however, fulfilled all expectations of States and international organisations raised before the conference! Because of strong opposition by some military participants, it has not made a modest advance in its penal provisions beyond those already existing in other instruments. Nor has it

substantially contributed to better protection of cultural property in non-international armed conflicts, because the current chapter 5 does not exceed the scope of the relevant provisions of the Convention or additional Protocol II to the Geneva Conventions. Finally, at the last minute, the delegates decided to delete an article providing protection for national and international members of the Blue Shield Organisation.

The elaboration and adoption of the Second Protocol is another step in the improvement of the protection of cultural heritage during hostilities and another major agreement of international humanitarian law. However, its success or failure will largely depend on two aspects: first, the attitude of major military powers toward it, and second, the willingness and capacity of its States Parties to transpose its provisions into their national legislation.

The Belgian Interministerial Commission of Humanitarian Law

I think it is quit relevant to briefly present the Commission.

One year after the ratification by Belgium of the Additional Protocols to the Geneva Conventions on 20 May 1987, the Belgian Government decided to set up “the Interdepartmental Commission for Humanitarian Law”. The proposal to set up this Commission had been made in 1986 by His Royal Highness Prince Albert, now King of the Belgians, who was the Chairman of the Belgian Red Cross at the time. After seven years, in 1994, the initial competence of the Commission has been considerably extended by the Council of Ministers. By Royal Decree of 6 December 2000 “the Interministerial Commission of Humanitarian Law” has been granted organic competence. Nowadays the Commission is responsible for four aspects.

These are as follows:

1. *study the implementing measures of the Conventions for Humanitarian Law at national level;*
2. *guarantee follow-up and co-ordination;*
3. *fulfil and advisory mission towards the Government;*
4. *create contacts with the Governments of the Regions and Communities that, as a result of the reform of the institutions, have become competent for a number of legal obligations in the humanitarian field.*

The Commission consists of representatives of the Prime Minister, of the Minister of Foreign Affairs and International Co-operation, of Defence, of Justice, of Budget, of the Interior, of Social Affairs, of Public Health as well as the three Communities and Regions. The Belgian Red Cross is also represented in the Commission.

In a first stage, the Commission has taken stock of 43 major provisions of humanitarian law that should be included into or formulated in a more explicit way in the legislation. For each provision in particular, there has been an analysis of the current situation prevailing in the Belgian legislation. The indispensable modifications have been decided upon to adapt it to the Conventions and Protocols. Eventually proposals of implementing measures to that end have been submitted to the Government. This thorough study was concluded about five years ago. Since

then, in addition to the follow-up and the updating of the 43 working papers, some themes are chosen every year in order to come to a rapid development of them.

Two years ago the Commission considered as theme “the protection of cultural property in the event of armed conflict”. This is a quite complicated issue taking into account the threefold structure of the Belgian State.

The Interministerial Commission of Humanitarian Law already examined the problem of the protection of cultural property and cult places in its working paper n°27. The first version dated back to 1988 and has in the meantime been adapted in 1996. The working papers were presented to the Government at the academic session on the occasion of the tenth anniversary of the Commission on 4 November 1997.

Considering the importance of those working papers, the Commission decided to entrust a special working group with the further study and development of this issue. In his letter of 4 May 1998, as a reaction to the creation of such working group, the Prime Minister wrote: “ taking into account the significant extension of competence of the Interministerial Commission of Humanitarian Law, as far as the protection of cultural property is concerned, to act as the only adviser for the Federal Government and that as such it should be considered as the valid representative of the competent federal, community and regional ministries”.

The mission of the meeting of 27 April 2000 was :

1. *give information on the obligations Belgium has accepted when approving the International Conventions for the protection of Cultural Property in the Event of Armed Conflict;*
2. *get the representatives of the federal, community and regional authorities that are in charge of the implementation of this special branch of humanitarian law round the table;*
3. *be informed by them of the kinds of implementing measures that were already taken by their authorities.*

Taking into account the relatively low probability of an armed conflict breaking out on our national territory, it appears that the study of the implementing measures can

fit in with a larger context since certain implementing measures show a twofold nature that can for sure be applied in wartime but also in peacetime during disasters whatever their nature may be. Similarly a National Committee of the Blue Shield was set up in 2001. This Committee consists of representatives of the cultural founder organizations of the International Committee of the Blue Shield (ICOM- International Council of Museums, ICOMOS, IFLA - International Federation of Library Associations and Institutions, ICA - International Council on Archives) but also of representatives of the federal, community and regional authorities as well as of other agencies and institutions. The International Committee of the Blue Shield's advisory part has been recognized in the new Protocol of 1999 itself.

Besides within the international political and strategic framework that has developed for the last decade, our Armed Forces have been entrusted with new missions. These missions are generally being referred to as “ peace operations” the civil-military co-operation aspect of which has become rather significant. In the execution of such missions, certain rules related to the protection of cultural property – a protection that was initially provided for in the event of armed conflicts – can undoubtedly be transferred to such operations and could consequently be applied in this respect. “Resolution I” to the 1954 Convention expressed the wish for the Armed Forces participating in a military action in compliance with the Charter of the United Nations to apply the provisions of the 1954 Convention. In this respect we can note that the United Nations secretary-general's Bulletin of 6 August 1999 “Observance by United Nations Forces of International Humanitarian Law” provides for in its art. 6.6. [*The United Nations force is prohibited from attacking monuments of art, architecture or history, archaeological sites, works of art, places of worship and museums and libraries which constitute the cultural or spiritual heritage of peoples. In its area of operation, the United Nations force shall not use such cultural property or their immediate surroundings for purposes which might expose them to destruction or damage. Theft, pillage, misappropriation and any act of vandalism directed against cultural property is strictly prohibited*] that the United Forces shall observe cultural property during military action.

The Act on Civil Protection of 31 December 1963 has been developed since 1960. These are the civilian measures and means to guarantee the population's protection and survival but also the safeguarding of the national heritage in the event of armed conflicts and also during other disasters. The implementing measures are not limited to those that must be taken within the framework of the legislation on Civil Protection. Several types of legislation and regulations, first federal next community and regional, have been developed in order to guarantee the protection of the heritage in its various components both movables and immovables. But these provisions do not mainly refer to armed conflicts situations.

Short Presentation of the National Implementing Measures

We have taken as a basis the Additional Protocols of 1977 the relevant provisions of which are articles 53 of the Protocol I and 16 of Protocol II. These provisions undoubtedly imply military and criminal implementing measures.

Military Measures

Reference is made to dissemination in the largest sense of the term, to education but also to the development of a doctrine within the Armed Forces. It also concerns implementing measures related to the conduct of operations: choice of the targets, the rules of engagement, the knowledge and recognition of cultural property, respect for the emblem, military intelligence (is it cultural property under special protection?), use of property since the latter cannot be used to support military activities.

For several years now Defence has developed programs on instruction, education and teaching of the Law of Armed Conflicts within the Armed Forces. Protection of cultural property is part of these programs at the various levels of the military chain of command and at the various milestones of the military career. The rules on protection of cultural property are also referred to in the military regulations and instructions. Instructions and military regulations will be adapted to the new regulations of the 1999 Protocol.

Article 7. Military measures (Hague Convention 1954)

- 1. The High Contracting Parties undertake to introduce in time of peace into their military regulations or instructions such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples.*
- 2. The High Contracting Parties undertake to plan or establish in peacetime, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it.*

It's indeed true that Article 7 of the Hague Convention also refers to specialised personnel and services. This personnel and services are not being provided for within the Belgian Armed Forces. Should circumstances occur some holders of other functions could certainly take care of part of these responsibilities (the advisers on the law of armed conflicts or the persons in charge of civilian affairs).

It should not however be lost sight of that the Ministry of Defence is anxious to protect its own monumental heritage (the barracks, fortresses, fortifications, ...). This issue is being dealt with in a directive within the Ministry of Defence with reference to a particular sign: “ protected military heritage”.

Special Protection

Special protection is being dealt with in articles 8 and 10 of the 1954 Convention and the Regulations for the execution of the Convention. This special protection that refers to refuges intended to shelter movable cultural property, centres containing monuments and and other immovable cultural property, is granted to cultural property by its entry in the “ International Register of Cultural Property under Special Protection”. We know that only a few properties have been entered i.e. the Vatican and refuges for cultural property in Germany, the Netherlands and Austria. Belgium has not asked for this entry of properties in this international register.

We should not mix up cultural property under special protection with the entry of properties as “World Heritage” in the sense of the Paris Convention of 16 November 1972. Several cultural properties in Belgium have been included in this World Heritage List (Beguine convents, belfries in Flanders and Wallonia,...). These properties should be granted a priority protection in the event of armed conflicts.

We should not mix up either special protection and “ World Heritage” with a new concept referred to in the 1999 Protocol i.e. “**enhanced protection**” (art. 10 – 14). The implementing measures related to “ enhanced protection” concern the conditions to comply with in order to be granted this protection, the entailing immunity regulations, the cases in which this protection could be lost and eventually a more concrete question: are there any properties to include and has a decision been made to include these properties in the “ International List of property under enhanced protection”?

Article 10 Enhanced protection

Cultural property may be placed under enhanced protection provided that it meets the following three conditions:

- a. it is cultural heritage of the greatest importance for humanity;*
- b. it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;*
- c. it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.*

Article 11 The granting of enhanced protection

- 1) Each Party should submit to the Committee a list of cultural property for which it intends to request the granting of enhanced protection.*
- 2) The Party which has jurisdiction or control over the cultural property may request that it be included in the List to be established in accordance with Article 27 sub-paragraph 1(b). This request shall include all necessary information related to the criteria mentioned in Article 10. The Committee may invite a Party to request that cultural property be included in the List.*
- 3) Other Parties, the International Committee of the Blue Shield and other non-governmental organisations with relevant expertise may recommend specific cultural property to the Committee. In such cases, the Committee may decide to invite a Party to request inclusion of that cultural property in the List.*
- 4) Neither the request for inclusion of cultural property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State, nor its inclusion, shall in any way prejudice the rights of the parties to the dispute.*
- 5) Upon receipt of a request for inclusion in the List, the Committee shall inform all Parties of the request. Parties may submit representations regarding such a request to the Committee within sixty days. These representations shall be made only on the basis of the criteria mentioned in Article 10. They shall be specific and related to facts. The Committee shall consider the representations, providing the Party requesting inclusion with a reasonable opportunity to respond before taking the decision. When such representations are before the Committee, decisions for inclusion in the List shall be taken, notwithstanding Article 26, by a majority of four-fifths of its members present and voting.*
- 6) In deciding upon a request, the Committee should ask the advice of governmental and non-governmental organisations, as well as of individual experts.*

- 7) A decision to grant or deny enhanced protection may only be made on the basis of the criteria mentioned in Article 10.
- 8) In exceptional cases, when the Committee has concluded that the Party requesting inclusion of cultural property in the List cannot fulfil the criteria of Article 10 sub-paragraph (b), the Committee may decide to grant enhanced protection, provided that the requesting Party submits a request for international assistance under Article 32.
- 9) 9. Upon the outbreak of hostilities, a Party to the conflict may request, on an emergency basis, enhanced protection of cultural property under its jurisdiction or control by communicating this request to the Committee. The Committee shall transmit this request immediately to all Parties to the conflict. In such cases the Committee will consider representations from the Parties concerned on an expedited basis. The decision to grant provisional enhanced protection shall be taken as soon as possible and, notwithstanding Article 26, by a majority of four-fifths of its members present and voting. Provisional enhanced protection may be granted by the Committee pending the outcome of the regular procedure for the granting of enhanced protection, provided that the provisions of Article 10 sub-paragraphs (a) and (c) are met.
- 10) Enhanced protection shall be granted to cultural property by the Committee from the moment of its entry in the List.
- 11) The Director-General shall, without delay, send to the Secretary-General of the United Nations and to all Parties notification of any decision of the Committee to include cultural property on the List.

Article 12 Immunity of cultural property under enhanced protection

The Parties to a conflict shall ensure the immunity of cultural property under enhanced protection by refraining from making such property the object of attack or from any use of the property or its immediate surroundings in support of military action.

Article 13 Loss of enhanced protection

1. Cultural property under enhanced protection shall only lose such protection:
 - a. if such protection is suspended or cancelled in accordance with Article 14; or
 - b. If, and for as long as, the property has, by its use, become a military objective.
2. In the circumstances of sub-paragraph 1(b), such property may only be the object of attack if:
 - a. the attack is the only feasible means of terminating the use of the property referred to in sub-paragraph 1(b);
 - b. all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to the cultural property;
 - c. unless circumstances do not permit, due to requirements of immediate self-defence:
 - i. the attack is ordered at the highest operational level of command;
 - ii. effective advance warning is issued to the opposing forces requiring the termination of the use referred to in sub-paragraph 1(b); and
 - iii. Reasonable time is given to the opposing forces to redress the situation.

Article 14 Suspension and cancellation of enhanced protection

1. Where cultural property no longer meets any one of the criteria in Article 10 of this Protocol, the Committee may suspend its enhanced protection status or cancel that status by removing that cultural property from the List.
2. In the case of a serious violation of Article 12 in relation to cultural property under enhanced protection arising from its use in support of military action, the Committee may suspend its

- enhanced protection status. Where such violations are continuous, the Committee may exceptionally cancel the enhanced protection status by removing the cultural property from the List.*
- 3. The Director-General shall, without delay, send to the Secretary-General of the United Nations and to all Parties to this Protocol notification of any decision of the Committee to suspend or cancel the enhanced protection of cultural property.*
 - 4. Before taking such a decision, the Committee shall afford an opportunity to the Parties to make their views known.*

Criminal Measures

Article 28 of the 1954 Convention orders the State Parties to impose criminal and disciplinary sanctions for the commission of breaches of the Convention. This provision is indeed rather succinct.

Article 28. Sanctions

The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

The new 1999 Protocol (art.15 – 21) completes and develops the provisions related to criminal responsibility and jurisdiction. This Protocol considers as serious violations, a certain number of offences referred to in art. 15 and provides for measures related to the other offences (art. 21).

These new provisions require implementing measures at national level especially to incriminate, repress, establish the rules on universal and national jurisdiction and the “aut dedere, aut iudicare” principle. The repression of the other offences also requires national measures.

Until now the criminal provisions in this respect essentially fall under common criminal law on the one hand. The criminal code represses indeed the offences against the properties but is not especially adapted to the international law offences.

On the other hand, there is the Act of 16 June 1993 on the repression of serious violations of International Humanitarian law in which a specific provision refers to the attacks against cultural property. One must know that this Act is going to be adapted (a proposal to adapt the text is on the table).

There is also the question to know if certain criminal measures should be taken by the Communities and/or the Regions that, within the framework of their authority, can include criminal provisions for the matters for which they are competent.

Reference should also be made to the Statute of the International Criminal Court adopted in Rome on 17 July 1998 and ratified by Belgium on 28 June 2000 (approved by act of 25 May 2000). This Statute includes provisions which , in the conditions they provide for, incriminate the attacks against historical monuments (art.2, a, ix) [*Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (art. statut)*]

Article 15 Serious violations of this Protocol

1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:

- a. making cultural property under enhanced protection the object of attack;
- b. using cultural property under enhanced protection or its immediate surroundings in support of military action;
- c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
- d. making cultural property protected under the Convention and this Protocol the object of attack;
- e. Theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

Article 16 Jurisdiction

1. *Without prejudice to paragraph 2, each Party shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 in the following cases:*
 - a. *when such an offence is committed in the territory of that State;*
 - b. *when the alleged offender is a national of that State;*
 - c. *in the case of offences set forth in Article 15 sub-paragraphs (a) to (c), when the alleged offender is present in its territory.*
2. *With respect to the exercise of jurisdiction and without prejudice to Article 28 of the Convention:*
 - a. *this Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law;*
 - b. *Except in so far as a State which is not Party to this Protocol may accept and apply its provisions in accordance with Article 3 paragraph 2, members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a State which is a Party to this Protocol, do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them.*

Article 17 Prosecution

1. *The Party in whose territory the alleged offender of an offence set forth in Article 15 sub-paragraphs 1 (a) to (c) is found to be present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law.*
2. *Without prejudice to, if applicable, the relevant rules of international law, any person regarding whom proceedings are being carried out in connection with the Convention or this Protocol shall be guaranteed fair treatment and a fair trial in accordance with domestic law and international law at all stages of the proceedings, and in no cases shall be provided guarantees less favorable to such person than those provided by international law.*

Article 18 Extradition

1. *The offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the Parties before the entry into force of this Protocol. Parties undertake to include such offences in every extradition treaty to be subsequently concluded between them.*
2. *When a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, the requested Party may, at its option, consider the present Protocol as the legal basis for extradition in respect of offences as set forth in Article 15 sub-paragraphs 1 (a) to (c).*
3. *Parties which do not make extradition conditional on the existence of a treaty shall recognise the offences set forth in Article 15 sub-paragraphs 1 (a) to (c) as extraditable offences between them, subject to the conditions provided by the law of the requested Party.*
4. *If necessary, offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be treated, for the purposes of extradition between Parties, as if they had been*

committed not only in the place in which they occurred but also in the territory of the Parties that have established jurisdiction in accordance with Article 16 paragraph 1.

Article 19 Mutual legal assistance

- 1. Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article 15, including assistance in obtaining evidence at their disposal necessary for the proceedings.*
- 2. Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, Parties shall afford one another assistance in accordance with their domestic law.*

Article 20 Grounds for refusal

- 1. For the purpose of extradition, offences set forth in Article 15 sub-paragraphs 1 (a) to (c), and for the purpose of mutual legal assistance, offences set forth in Article 15 shall not be regarded as political offences nor as offences connected with political offences nor as offences inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such offences may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.*
- 2. Nothing in this Protocol shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested Party has substantial grounds for believing that the request for extradition for offences set forth in Article 15 sub-paragraphs 1 (a) to (c) or for mutual legal assistance with respect to offences set forth in Article 15 has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.*

Article 21 Measures regarding other violations

Without prejudice to Article 28 of the Convention, each Party shall adopt such legislative, administrative or disciplinary measures as may be necessary to suppress the following acts when committed intentionally:

- a. any use of cultural property in violation of the Convention or this Protocol;*
- b. any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or this Protocol.*

Brussels, 20 March 2002
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