

HISTORICAL PERSPECTIVE OF HERITAGE LEGISLATION.
BALANCE BETWEEN LAWS AND VALUES

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HISTORICAL PERSPECTIVE OF HERITAGE LEGISLATION. **BALANCE BETWEEN LAWS AND VALUES**

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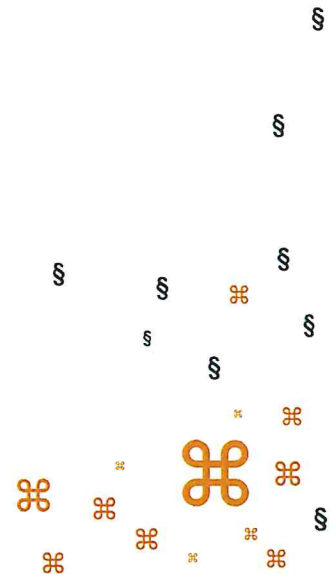
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PROCESSES AND NEEDS OF REFORMING THE LEGISLATION IN THE FEDERAL REPUBLIC OF GERMANY

WOLFGANG KARL GÖHNER

Preamble

The EU is currently facing multifaceted changes. The global environment is rapidly changing, starting from the instabilities in the Near East and North Africa, the refugee crisis and terrorist threats and attacks, to the emerging (economic) powers in Asia and the development of a multi-polar world of global stakeholders. On the other hand, the EU is facing some major challenges from the inside, such as a crisis of confidence among its citizens, growing populism and Euroscepticism, a lack of solidarity among its member states and calls for multi-speed Europe and "exits" from the Union.

However, this is not the first time the EU has faced multiple crisis. Over the years, we had intense debates about the need to reform the European Community and to face the declining popularity of the European vision, and in the end the Single European Act and an even stronger Union emerged.

Some of the fundamental values of our European project, like ever-lasting peace, freedom of the Europeans, the free movement for example or the single currency, are as well endangered as the European prism as a whole. All member states need to invest themselves fully in what they subscribed to, because that has been the problem for a while now. We have seen over-promising and under-delivering in many things including the migration crisis. So, if the member states put their minds and their hearts behind the common solutions we clearly want, the project will be a success for everyone.

The whole concept of the EU is that we are a family of nations, that we are all equals among equals. The fundamental premise is that we are all equals in the same boat with the same responsibilities and of course the same rights. The best way to ensure that our EU remains a family of equals is for a first step, to strengthen the European idea and its implementation in the brains and hearts of the Europeans!

Europe's Cultural Heritage is an essential part of our common European as well as local identity. Its preservation and promotion is our permanent task. Following the slogan "Sharing heritage", all Europeans are invited within the upcoming «European Cultural Heritage Year (ECHY) 2018»¹, just proposed by the European Commission to discover Europe's Cultural Heritage and to experience their own cultural background.² The ECHY 2018 will include all forms of Cultural Heritage. Archaeological and built heritage can serve as a starting-point, since it offers a unique opportunity for children and young people in particular to experience history and culture and other tangible and intangible Cultural Heritage directly and as part of their daily lives. The aim of the year is to raise awareness of the European dimension of Cultural Heritage.

Let us be aware, that our common Europe with its national characteristics and State sovereignties is indispensable for the peace and prosperity on the continent, but also for the values that constitute Europe. These are reflected at best in our various local, regional, national and European buildings, monuments and archaeological sites. With ECHY 2018 and sharing our Cultural Heritage, we want

- ✿ to regain us as Europeans,
- ✿ actively promote ourselves to understand us better,
- ✿ to understand "the others",
- ✿ to feel comfortable again and
- ✿ finally, to feel well at home.

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¹ "European Cultural Heritage Year 2018," Deutsches Nationalkomitee für Denkmalschutz, accessed November 17, 2017, http://www.dnk.de/_uploads/media/2007_2016-06-01_EN_ECHY-Status%20Report.pdf.

² "European Year of Cultural Heritage proposed for 2018," Culture, European Commission, accessed November 18, 2017, https://ec.europa.eu/culture/news/20160830-commission-proposal-cultural-heritage-2018_en.

“Patria est, ubicumque est bene”³

So far, it did not succeed fully, to develop resp. to create an identity and a sense of community sufficiently beyond the borders of nations. In preparation for and during the ECHY 2018, decades of failure can be rescheduled to make sure that deeper European identities might evolve - without losing our previous roots and identities in this approach. Identity is based less on ethnic or religious categories, rather on the loyalty of each individual to our European values, especially our very similar constitutional principles, the fundamental principles of democracy, the respect for the dignity of each individual, the tolerance, as well as our European immanent self-understanding as cultural experienced people and cultural nation(s).

In preparation, during the ECHY 2018 and naturally afterwards, we Europeans must and will burn – at least more than before – for our (built and archaeological) Cultural Heritage, to be European, for our Europe and for the peace, the security, the freedom and the prosperity, which was given to us. Let us stay together on the basis of our European Cultural Heritage as our common fundament and fourth pillar of European sustainable development, of our EEA- Member States’ and the EU’s sustainability approach, complementing their economic, social and environmental dimensions.

Introduction

The protection and care of our Cultural Heritage is a task on behalf of society that transcends boundaries of states and nations. In Europe at least, we share a common past and a common heritage. However, German Conservation and Protection laws and the organisation of Conservation and its administrations differ from these in other European countries and indeed in most countries in the world quite intensively. Due to our quite special “German history” there was created a quite special federalism on the territory of the western part of the former “Deutsches Reich” after World War II; in a legal understanding there are nowadays existing seventeen States on this territory: the sixteen “Länder”, which have given only some competencies and powers to the seventeenth State, the Federal Republic of Germany. In conformity with the jurisdictional and legislative requirements, the sixteen German States as well as the Federal Republic of Germany are responsible for formulating, developing and applying, as far as possible, a policy whose principal aim is to co-ordinate and to make use of all the scientific, the technical, the cultural and other resources available to secure the effective protection, conservation and presentation of the cultural heritage. Otherwise, legally there is a main and rather complete responsibility of the “Länder”, esp. for Culture and Cultural Heritage. The Constitutions of most of the sixteen German “Länder” emphasise the protection and active care of historic buildings and sites as state objectives. Currently, sixteen German conservation laws (DSchG)⁴ are existing, which have been emerged, recast or updated in four waves in the periods from 1971 to 1978, 1991-1993, 2001-2010 and once again from 2011 until today.⁵

In the former German Democratic Republic (DDR) and the eleven “old” German States in Germany there were created Cultural Heritage Protection laws during the first wave, accompanying the European and world wide discussion about Cultural Heritage in the sixties and seventies of the last Century. The new Cultural Heritage Protection laws of the so-called “new countries” in Germany (second wave) based on their partner countries of the former Federal Republic of Germany (“old countries”), but they had the chance to react on what one could “learn” over fifteen to twenty years of Cultural heritage administration. During the third wave the German States were looking for solutions balancing the confrontation of new use requirements on the monuments, for example like energy efficiency, climate protection, energy transformation, accessibility. Nowadays, during the second decade of the 21st Century, I have the impression, that there are no major systematical changes, but some reaction on democratic developments like the necessity of much more participation of the citizens inside the protection system.

The comparative analysis shows owed to the federalism in Germany partly considerable differences, but much more conformity, esp. as regards the monument-professional principles. Although, the regional diversity of Conservation and Preservation in Germany is quite unusual, there is, however, a widespread consensus amongst the State Conservation Offices on the definition and assessment of monuments, historic buildings and sites, the principles of their conservation and restoration, and the interpretation of the Conservation work to the public. Therefore, the differences in monument concept, system of protected status, relative to permits are significant according to different laws (of the sixteen “Länder”), responsibilities, duties and treasure shelves (i.e. the official law of treasure finds). At least during the “third wave” one could recognize some ideas and trends towards the abolition of the lower monument protection authorities and their inclusion in the construction management, but also towards the abolition of the State Conservation Offices in some German “Länder”. In particular, a change is increasingly to determine concerning the legal status of the owner; to a partially comprehensive “Inducer principle” and on the compatibility of the monument.

The following analyses and comparisons refer to all German monument protection laws and are designed to provide an overview of the legal situation.^{6 and 7}

Tasks and definitions:

Monument Conservation and Preservation

Monument conservation describes “the statutory and legal task and responsibility, the preservation expert advice and care for the public monument” (see f. e. § 1 para. 1 sentence 2 DSchG Thuringia). The Monument Conservation laws use both terms at the same time, synonymous and without distinction. Conservation and preservation are public tasks in all German States. The “Grundgesetz” (Constitution of the Federal

3 Cicero, in: “Tusculanae disputationes” 5, 108, <http://www.thelatinlibrary.com/cicero/tusc5.shtml#108>, accessed 17.11.2017.

4 <http://media.wv-goehner.de/1.252%20-%20Denkmalschutzgesetz%20-%20Deutschland%20-%20Normtexte%20-%20aktuell%20-%20Stand%2006.07.2017.pdf>, accessed 18.11.2017.

5 Hesse (2011) and an ongoing legislative procedure for a new law), Lower Saxony (2011), Hamburg (2013), North Rhine-Westphalia (2013), Baden-Württemberg (2014), Saxony (2014), Schleswig-Holstein (2014)

6 See: Wolfgang Karl Göhner, „The German Conservation Laws by Dieter J. Martin (2006), revised and updated by Wolfgang Karl Göhner (2011)”, in Achim Hubel (ed.) / Sabine Bock / Rainald Drewello / Johannes Geisenhof / Wolfgang Karl Göhner / Dieter J. Martin / Manfred Schuller, *Preservation. History, issues, tasks. An introduction*, Reclam non-fiction, Reclam Universal-Bibliothek No. 18813, Philipp Reclam jun. (Stuttgart: GmBH & Co. KG 2nd Edition 2011), 352-378. ISBN 978-3-15-018813-2.

7 See: Wolfgang Karl Göhner, „INDUMAP Handbook on dealing with the industrial monument, Chapter 2.1: Obtaining and Maintaining Monument status – Monument Law: Basic terminology and principles”, in *INDUMAP (industrial monument action planning) Action plan for the sustainable management of industrial monuments*.

Republic of Germany, so-called "Basic Law") contains no relevant corresponding standard for Culture and Cultural Heritage contrary to art. 150 of the Constitution of the Deutsches Reich, the so-called "Weimar Constitution". In part, the German States have anchored the monument protection or at least the cultural life in their national constitutions with State objectives terms or sentences.⁸ "The task is summarized quite well in § 1 DSchG Bremen: "Monument protection and heritage conservation have the task to explore cultural monuments scientifically, to maintain, to protect and to promote their involvement in urban development, spatial planning and land care". The conservation laws of the German States mostly contain a general task, partly abstract, sometimes related only to the State, sometimes on local authorities resp. the municipalities; in the executing State conservation laws of Bavaria and North Rhine-Westphalia such provisions may be missing due to the existing constitutional requirements of this "Länder". If rules are missing or if gaps e. g. in the field of research exists, these tasks "monument protection" and "preservation" can be revealed from the entire regulatory coherence of the laws. The task is regularly regarded as State task, for the municipalities they are usually established in the sphere of transferred tasks or established as mandatory items under State authority. The true assignment of monument protection to the law of public safety and order (so-called "police law") is included in § 6 para. 1 DSchG Berlin and § 16 para. 4 DSchG Brandenburg. § 20 para. 3 sentence 2 DSchG North Rhine-Westphalia added: "As such, the tasks assigned to them under this Act apply as emergency response".

The term of the monument

There is not a uniform and binding legal term what is meant by "monument" in Germany and the German States. The humanities and in particular the art-historical remarks to the term "monument" is barely manageable. The names of famous conservators like Dehio, Riegl, Dvorák, Breuer, Mörsch, Sauerland, Lipp, Hubel, Petzet and many others are witness for this purpose. Attempts, to define the term "Monument" in more uniform and precise way for the application of Protection law have hardly subsided despite the long-present legal definitions, the faculty literature and extensive case law. The efforts for a legal monument protection within the framework of international and German standards, that date far back, have designed foundations though for a general term of "Monument", but they each assumed self-defined protection goods. A uniform legal term did not originate out of this.⁹

Monument and Cultural Monument are synonyms and so-called indeterminate legal terms that require an interpretation that is subject to judicial review in its entirety. Scale is the knowledge and opinions of a wide circle of experts. Otherwise, the monument protection legislation in Germany does not use the terms "monument ability" and "worthiness of the monument". The have been worked out by the case-law. "Monument ability" includes the property of the object, in case the monument, and the subsumption under the various categories for "monument importance", which

are given by the Protection law of each "Land". "Monument worthiness" rewrites the interest required by the laws as a legal condition of the object to be qualified as a "Monument"¹⁰ "The definition of general public interest is an expression of the constantly changing cultural self-image of society. So, the inventory work was subject to constant change since its early beginning about 200 years ago"¹¹

The monument types

With the exception of Baden-Württemberg all Protection Laws of the "Länder" make differences at least between constructions (constructive Monuments), archaeological sites and movable monuments (including such as part of monuments or of archaeological sites). Hamburg, Hesse, Schleswig-Holstein and Thuringia do not particularly highlight the architectural monuments, but make differences usually between immovable and movable monuments and mention separately the archaeological or archaeological monuments. The legal regulations in Bavaria, so far composed in the first wave, will focus on the (architectural) monuments.

Built Monuments are structural systems or parts thereof or "constructions" (e. g., Rhineland-Palatinate, Saxony), in addition, multitudes of structural systems (see, f. e. Bavaria, Berlin, Brandenburg, Mecklenburg-Western Pomerania, Lower Saxony, North Rhine-Westphalia, Thuringia). This term is partly associated explicitly with the respective building regulations of each "Land", whereby structural systems are firmly connected with the ground and made out of construction materials. In Baden-Württemberg, Hesse, Schleswig-Holstein and Thuringia built monuments are not mentioned separately; they refer to the generic terms "Monument" or "Cultural Monument".

Archaeological monuments are movable or immovable objects that are in the ground or were found there (see, f. e. art. 1 para. 4 DSchG Bavaria¹²). Almost all conservation laws (with the exception of Baden-Württemberg and Rhineland-Palatinate) define and treat the immovable and movable (finds) archaeological monuments in separate regulations. While some States made the requirement that archaeological monuments and sites must be created by man (see, Bavaria, to a limited extent also Saxony) or must be evidence of human life (Hamburg, Lower Saxony, Saxony-Anhalt), in other legislations products of animal and plant life and even paleontological monuments are included too.¹³

The term "green site" is not used directly in the German conservation laws. »A garden monument is a park, a garden or park area, a cemetery, an avenue or other certificate of garden and landscape design. Its accessories and its facilities belong to the "garden monument" insofar since they are forming a unit with it (see § 2 para. 4 DSchG Berlin). In a broader sense, also landscapes can be regarded as such "green sites".¹⁴

In detail not stationary, that means movable monuments are described very clearly in § 2 para. 2 no. 5 DSchG Saxony-Anhalt: "Cultural monuments in the meaning of

http://www.indumap.de/sites/default/files/handbuch/dateien/1_253_-_indumap_-_aktionsplan_fuer_den_umgang_mit_industriedenkmalern_-_kapitel_2.1.pdf, accessed 18.11.2017.

⁸ Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*, 3rd edition (Munich: 2010), lit. B II, 4.

⁹ Felix Hammer, in Dieter Martin / Michael Krautzberger (ed.) *Handbook of conservation and preservation*, 3rd edition (Munich: 2010), lit. A II.

¹⁰ Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*, 3rd edition (Munich: 2010), lit. C I, lit. J.

¹¹ Association of the State Monument Conservators in the Federal Republic of Germany (VDL) 2005, 1, <http://www.vdl-denkmalpflege.de/fileadmin/dateien/Arbeitsblätter/Nr24.pdf>, accessed 18.11.2017.

¹² Margaret Thomas Will / Wolfgang Karl Göhner, *Bavarian Law for the Protection and Preservation of Monuments (Monument Protection Law) from 25th June 1973 (BayRS 2242-1-K), last revised 27th July 2009, (GVBl. p. 385, 390 f.)* (aktualisierte Ergänzung zu Margaret Thomas Will's Übersetzung vom Oktober 1996).

¹³ Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*, 3rd edition (Munich: 2010), lit. J I.

this law are ... movable cultural monuments and archaeological finds as individual objects and collections, such as tools, equipment, furniture, vessels, weapons, jewelry, costume stock share, clothing, cut objects, objects of art and the arts and crafts, coins and medals, means of transport, machines and technical units, parts of constructions, skeletal remains of humans and animals, plant residues and other legacies".¹⁵

All conservation laws define also aggregates of monuments of all kinds as monuments. Majorities of structures with historical value are defined in most of the German Conservation laws as its own kind of monument and refer to them synonymous as area, site, ensemble or material entity. In the ensemble of structural system the monument characteristic can overlap several times: A single monument can be in a street ensemble, which is in turn located in a town ensemble. Structural systems in the ensemble are by definitions monuments itself. There are no legal gaps in the ensemble, all components are part of the "monument", some in a constitutional way, some not.¹⁶ The vicinity, which is protected in some German Conservation Laws, or environment is not allowed to be expressed in meters, but both include the effect context or scope ("aura") of the monument. Some monument protection laws describe the environment even as a monument and as a legal part of the monument.

Further, some conservation laws protect majorities of movable property (like archives, collections and museums).¹⁷

Material entities of archaeological monuments can both be majorities of immovable monuments as well as majorities of finds (movable monuments). Uniform complexes of finds, both as excavation context or as grave fields in situ, are mostly treated as unified archaeological monuments. The German conservation laws do not make any arrangements for the context of finds and their sites. Protected excavation areas and archaeological reserves don't indicate a material entity of archaeological monuments, but as areas, where archaeological monuments can or could be found.¹⁸

Monuments can not only be whole objects, but also parts of an object with historical value such as the façade of a house or a so-called "House Madonna". Also movable or immovable accessories and movable or immovable equipment can be part of a monument in this legally understanding. Insofar, the civil law terms and concepts are not decisive.¹⁹

Protected status

In common parlance, protection means any official act in which an object is recognised as or placed under monument protection. The German Conservation Laws differ between the so-called constitutive and declaratory (informational) system of the protected status. Several "Länder" mix elements of both systems. Brandenburg

switched in 2004, Hamburg in 2013 to the declaratory system. Indeed, the conservation laws differ significantly in the question of legal acts and the legal consequences of the protected status.²⁰ As far as the monument lists have only declaratory meaning and an informational importance, often only very short texts were (are) formulated, that make the monument identifiable (example: only eight volumes were sufficient in 1973 to present the Bavarian monument list with all listed built monuments and archaeological monuments!). Otherwise, higher requirements are demanded for protected status in the constitutive system. If systems are not effectively protected, tax benefits are eliminated. The Federal Building Code – other than the German Federal tax law – does not refer to the Conservation Laws of the "Länder" and their monument terms. In the framework of urban land use planning, all built and archaeological monuments have to be considered without respect of their proper registration or determination.

Authorities

The conservation authorities and the monument authorities, (in particular still also) the Building Authority are involved in the enforcement of Monument Conservation laws. The municipalities and the security authorities do have additionally further a variety of tasks. Regularly, protection and maintenance of monuments is explicitly named or mentioned in context of regulations as tasks of monument protection and preservation. Also mentioned are in part research, public relations and collaboration with the owners. The special obligation of public authorities (especially for building guide plans, plan findings and in the road construction!) is put forward by almost all "Länder", most clearly formulated in art. 141 of the Bavarian Constitution, added in art. 83 combined with art. 3 para. 2 of the Bavarian Constitution for the municipalities.

Conservation authorities are regularly services of the so-called "General internal management". The "Länder" have established also the competent Monument Conservation authorities (in North Rhine-Westphalia: Monument Preservation Offices). They are responsible regularly for the acquisition and exploration of the monuments, the preparation of opinions and the granting of conservational or archaeological professional support to measures. Some "Länder" have yet separate authorities for construction and archaeological monuments. Individual "Länder" grant a degree of professional independence to their Monument Conservation Office. The competent authorities for opinions, advice and consulting are not bound by administrative instructions in Brandenburg and North Rhine-Westphalia; they are entitled to pass their opinion on authorities and concerned parties. In Saxony-Anhalt the Monument Conservation Offices have to consider only professional aspects for opinions and assessments. In other "Länder", the competent Monument Conservation offices are fully integrated into the hierarchy of authority, and thus are subject to the authority of the superior authority, including the right of instruction.

14 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. C IV (preservation); D VIII (handing).

15 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. B I, II, J I, III 7.

16 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. C III (to the very difficult legal situation); F III (to the urban monument).

17 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. C III (to the very difficult legal situation); F III (to the urban monument).

18 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. J III.

19 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. C II.

20 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. C VI; J III.

The monument protection laws contain only a few formulations on the status and the tasks of municipalities; actually, they are the main actors of preservation and conservation in practice.²¹

Almost all conservation laws (except Mecklenburg-Western Pomerania and Lower Saxony) assigned voluntary advisory committees to the authorities at different levels. They have the task to advise the "Länder"-government (e. g. Bavaria, Berlin etc.) or the law enforcement authorities (such as Hamburg, Hesse) or the competent authorities (such as Bremen). The majority of the "Länder" provided volunteer officers to strengthen the idea of monument preservation and in particular the integrating of the special historical knowledge and monument knowledge at the local level. Special traditions exist insofar in Bavaria (Local Heritage Conservators) and Saxony.²²

The Legal Conservation Procedures

Not only Monument Protection laws have to be observed when dealing with monuments. Mostly, they are included in the rule of law, as the scheme "System of monument Protection Law" shows.²³ The Monument Protection laws provide for the adoption of standards such as regulations, statutes or regulations, as well as the norm-setting of the municipalities through development plans, design rules, conservation and renovation statutes for different areas.

The conservation laws use the synonymous term permission, approval and exemption for necessary exceptions or permissions. In general, any kind of monument may be changed, completely or partially removed or destroyed, removed from its site or place of storage, repair set, restored or changed in its use only with permission. Most conservation laws contain additional licensing requirements for archaeological monuments.

For the procedure, almost all conservation laws have adopted special and individual measures. Usually, a distinction is made between the tasks of providing expert opinion of the competent Monument Conservation authorities and the implementation of the tasks of the monument protection authorities.²⁴ The distribution between the different authorities prompted most legislators to include regulations relating to the internal procedures of these authorities directly in the Monument Protection laws, although internal administrative regulations would in principle be sufficient. For several years the nationwide tendency is that only behavior of the competent Monument Conservation Office is necessary instead of consensus, which was implemented into the German Conservation laws during the "first wave"; insofar, Brandenburg provides "collective opinions" (§ 19 para. 4 DSchG Brandenburg).²⁵

Only in some "Länder" (such as Baden-Württemberg) fees are charged for official acts according to the conservation laws. Otherwise, almost all countries charge fees for

the issuance of tax certificates and building regulatory decisions of deviation. Some "Länder" determine the reimbursement of expenses for archaeological investigations of the competent authorities. Further, for substitute performance resp. direct implementation of Monument Preservation actions the authorities can impose and collect fees on the basis of administrative enforcement law.

The Monument Compatibility

The German Conservation Laws do not directly use the term of monument compatibility. In environmental law the parallel concept of "environmental compatibility" exists and even an environmental impact assessment (EIA) for certain projects was explicitly introduced. Monument compatibility meanwhile belongs to the fixed components of the terminology of monument protection and preservation. With this term corresponds to the legally binding overall objective of the preservation laws, to preserve the inherited substance of the monuments in case of all kinds of interventions absolutely or at least in an optimized way. This overall objective is expressed in following formulations of the approvability of measures under the monument protection laws such as "there are important reasons favor the unaltered preservation of the existing condition" (Bavaria, Mecklenburg-Western Pomerania, Thuringia), "if reasons of monument protection are not opposed to it", "Interventions should be kept to a necessary minimum" (Saxony-Anhalt). In addition, the monument protection laws are largely limited themselves to determine definitions, bids, bans and administrative procedures. To the substantive principles of monument protection and preservation only the approaches in the above formulations are abstract and generalized as in many other areas of regulation, so that they require the completion and interpretation according to the belonging to a single species of monuments, according to the conditions of the concrete monument, and according to the individual situation.

The interpretation and concretization of Monument Protection laws with regard to the details of monument compatibility is provided by the principles of conservation and protection of monuments, developed over decades of practice, and laid down in international agreements (e. g. Charters of Venice, Lausanne, Washington, Florence, La Valletta) and in various policy papers such as of the Association of State Conservators in Germany, of the German National Committee for Cultural Heritage and the Alps-Adriatic Working Community, and meanwhile finally confirmed in numerous judgements.²⁶

The owners

All Monument Conservation laws are in general aimed at the owner as first and most important addressees. Completely unsystematically, also other persons than the owner are held liable in the Cultural Heritage obligation by the Conservation Laws of the "Länder" such as e. g. heritage building legitimate (Lower Saxony), usufruct-authorized

21 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. E 1.3.

22 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. E 1.4.

23 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. B 1.

24 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. E IV 1.

25 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. E IV.

26 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. D II; JV (in detail).

27 Bundesverfassungsgericht (BVerfG), decision of March 2nd, 1999, case-no.: 1 BvL 7/91, *Decisions to Monument law*, edited by Wolfgang Eberl (u. a.), loose-leaf edition, (Stuttgart: 1997 et seq.), 1.1, no. 7.

persons (Lower Saxony), “responsible persons”, “possessors” (such as Baden-Württemberg, Rhineland-Palatinate), “persons otherwise having legal responsibility for the disposition of real property” (Bavaria, also others Brandenburg, Berlin, Bremen), “inkind or mandatories having legal responsibility” (art. 5 sentence 2 DSchG Bavaria), “beneficial owners” (e. g. § 7 DSchG North Rhine- Westphalia, § 7 para. 1 DSchG Saarland), “Responsible persons for the maintenance” (such as Hesse, Mecklenburg-Western Pomerania), “inducer” (e.g. Berlin, Thuringia), “seller” and “purchaser” (Hesse, Mecklenburg-Western Pomerania) and “Explorer” or “Finder” (all Conservation laws of the “Länder”). Also, these other people cannot arbitrarily be held responsible by laws and authorities; also, they can rely in particular on the fundamental right of property, the principle of proportionality and the principle of equality.

The owners often see themselves as the stepchildren of monument protection. The formulation of the conservation laws, according to an originally more authoritarian, State-oriented thinking, is treating the owners as responsible and to be controlled subjects. The idea of applying the service to the authorities to assist the owners in meeting their often harsh duties, only gain weight since the mid-1990s. In this sense, the jurisdiction developed a now also potentially existing entitlement for Monument Protection and Conservation of the area character.

The property rights of the Grundgesetz (the Federal basic law) is mentioned – but only by the respective law and its enforcement as restricted fundamental rights – in several Monument Conservation laws of the “Länder”. At least since the radical decision of the Federal Constitutional Court of March 2nd, 1999²⁷, subjective public rights of the persons emerge. But, direct financial support however is subject to the budgetary situation or the provision of funds. However, there is a legal right to the grant of the tax certificate if the legal requirements are met.

Of course exemplary behavior is expected from the institutions of the public sector. Mostly, obligations in the performance of public functions, in particular planning, public measures and the preparation of development plans are stressed. Usually, special rules are applied for churches and confessional organisations on their concerns.²⁸

The civil and legal rights situation to ownership in case of treasure finds are regulated in § 984 Federal Civil Code (BGB), which rules, that explorers and land owner each become co-owner of the half. This legal situation is nowadays only valid in Bavaria. In derogation of this, the fifteen other German “Länder” meanwhile wanted to introduce a treasure shelf.²⁹

Maintenance Obligations

The owners and other designated persons of cultural monuments are obliged to maintain, to repair and protect them from dangers according to conservation prin-

ciples within the framework of feasibility, similar to this the laws describe the legally binding duty of conservation for all types of monuments. Contrary to the obligation of authorization the obligation of conservation is not a procedural obligation, but a substantive legal obligation. In the laws owners, persons otherwise having legal responsibility for the disposition of real property, beneficial owners, responsible persons for the maintenance, heritage building legitimate and usufruct- authorized persons are named as responsible persons with rare variety. In practice the differences can have different affects, in particular if the owner is poor, but the tenant is rich, or if the owner is rich and the heritage building legitimate is poor, etc. The range of the maintenance obligation arises from the context of the statutory provisions.³⁰

Feasibility: The monument right is characterized by the principle of feasibility as limit to monument duties due to constitutional provisions. This applies for example for the matters of maintenance obligations, very limited for the suitability for approval, the benefits and the right to compensation. The laws themselves contain more and more details of feasibility which can be understood in part as general principles of law and discharge of the constitutional principle of proportionality. Behavior is conceived by the monument preservation laws as feasible, when after consideration of all relevant individual aspects, taking account of the objective situation and taking account of the constitutional principle of restricting the property rights (art. 14 para. 2 sentence 1 GG) comes to the conclusion, that from a monument protection open-minded owner (so BVerfG, decision of 2 March 1999, loc. cit.)³¹ such conduct in cases of this kind may reasonably be required.³²

Obligation to cost bearing, inducer principle: In case of interference into a cultural monument, the responsible person has to bear all the costs incurred for the preservation and proper repair, salvage and documentation of the cultural monument. (Mecklenburg-Western Pomerania and Thuringia). The possible costs of interventions will arise for the builders as the initiator even without explicit statement and not for the monument authorities. This also applies to all activities of the public sector. As far as countries at all mention the duty of cost bearing, their provisions are selective, i.e. they apply to special kinds of monuments or to individual cost factors.³³

Other duties: Use obligations, prohibition of the use and the lack of use belong to the main problems of the practice of monument protection. Almost all laws made arrangements for at least one of these problems. Comprehensively and exemplary in the context of the constitutional requirements for architectural monuments the formulation of art. 5 DSchG Bavaria says:

“Article 5 Use of Built Monuments:³⁴ Built monuments should be used for their original purpose, to the extent that this is possible. If built monuments are not used according to their original purpose, the owner or those otherwise having legal responsibility over the use should strive for a use which is similar or equivalent. If this is not possible, a use which ensures the long-term preservation of the

28 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. G 18; D VII 2 (dealing with ecclesiastical monuments).

29 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. J VII.

30 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. G IV.

31 Bundesverfassungsgericht (BVerfG), decision of March 2nd, 1999, case-no: 1 BvL 7/91, *Decisions to Monument law*, edited by Wolfgang Eberl [u. a.], loose-leaf edition, (Stuttgart: 1997 et seq.), 1.1, no. 7.

32 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. G II 3.

33 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. D III 4 (with details on the substantive responsibilities); H III.

34 Margaret Thomas Will / Wolfgang Karl Göhner, *Bavarian Law for the Protection and Preservation of Monuments (Monument Protection Law) from 25th June 1973 (BayRS 2242-1-K)*, last revised 27th July 2009 (GVBl. p. 385, 390 f.) [aktualisierte Ergänzung zu Margaret Thomas Will's Übersetzung vom Oktober 1996].

monument's historic fabric should be chosen. If various uses are possible, that use which has the least adverse effect on the built monument and its appurtenances should be chosen. The state, the local governments and other bodies should support owners and occupants. If the conditions of Article 4 Paragraph 2 are fulfilled, the owner and those parties otherwise having legal responsibility over the use can be obligated to implement a certain type of use; insofar as they are not obligated to implement this use, they can be obligated to allow certain types of use.³⁵

Procedure obligations: The authorizations and permits according to monument protection laws are administrative acts which require participation within the meaning of administrative procedural law; for the beginning of proceedings an application is needed according to the respective requirements of the administrative procedural law of the countries. Exemplary art. 15 DSchG Saxony-Anhalt formulated the obligations:

"(1) The application for approval has to be made in written form All documents required for processing are to be attached. The Supreme monument protection authority is empowered to lay down rules about the scope, content and form of the documents which have to be added through regulation. (2) The applicant is responsible for ensuring that the initiated measure is compatible with monument law...."

This formulation contains several principles that apply in other countries without expressed wording.

Information should be provided by owners, entitled persons for disposal and use as well as by initiators. The statutory formulations are regularly very general in nature and relate to the information required to carry out the tasks of the authorities.

Toleration obligations are provided for entering houses or apartments, as well as partly for public access, for the elimination of deficiencies of monuments by the authorities, for the implementation of official excavations, for the leaving of places of recovery, for the recovery and securing of finds to varying degrees of intensity and range. Similarly, the transfer obligation of finds is handled.³⁶

Reporting obligations follow different motives. They serve the notification of defects, of sales, of monument suspicion, change of locations, repairs and excavation work (Rhineland- Palatinate) as well as finds.

Government orders, measures and sanctions

The aim of enforcement of monument protection laws is to ensure care and preservation of the substance of the monuments as well as the meaningful use of built mon-

uments, then always ensuring the monument compatibility from acts and omissions in particular cases (to the special features of archaeological monuments which are regularly destroyed in case of excavation and which - despite the obligations arising from the Charter of La Valletta, and the German Federal law for that purpose by October 9th, 2002³⁷ - remain only in finds and documentation³⁸). Formally, monument compatibility is ensured by permission and approval procedures. The principles of monument compatibility are legally implemented by appropriate requirements in authorizations and permissions. The applicant and the executing companies such as architects, restorers, craftsmen, excavators and other conservators etc. are materially responsible for observing monument compatibility. If an authorization is granted, the initiator in all areas of law has to take responsibility for compliance with its content and incidental provisions.³⁹

Regulations for conservation, maintenance, repair, etc.: If necessary, the authorities may adopt arrangements for the enforcement of maintenance obligations. art. 4 para 2 DSchG Bavaria:

"The persons named in Paragraph 1 can be obligated to carry out certain preservation measures, in whole or in part, insofar as this can be reasonably demanded, giving due consideration to their other responsibilities and obligations. Insofar as they cannot carry out these measures themselves, they can be obligated to allow measures to be carried out by others."⁴⁰

In part, the laws contain general authority standards for emergency response for monuments, which can prohibit certain harmful uses and initiate specific uses.⁴¹ Some countries have general authority standards for so-called direct measures of the monument authorities.

Right of first refusal: More than half of Germany's monument protection laws contain public rights of first refusal mostly in favor of the public sector for sales of monuments. The legal structures of individual "Länder" are characterized by an extraordinary fragmentation.

Sanctions: Some monument protection laws explicitly stipulate that unapproved or implemented measures divergent from the authorization are ceased, i. e. can be prevented (Bavaria, Berlin, Mecklenburg-Western Pomerania, Saxony-Anhalt). In some countries there can be resorted to general legal authority standards on monument protection law, construction law or security law.

The most important problems of enforcement of monument protection laws contain issues of compensation of initiators and recovery of damages done to monuments; in practice legal options are seldom exploited. Legal basis of a recovery request may be such as art. 15 para. 3 DSchG Bavaria⁴²:

35 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*, 3rd edition (Munich: 2010), lit. D V.

36 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*, 3rd edition (Munich: 2010), lit. G IV.

37 *Federal Law Gazette II*, 2709 et seq., http://www.blfd.bayern.de/medien/dsg_konvent_la_valletta.pdf

38 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*, 3rd edition (Munich: 2010), lit. J V.

39 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*, 3rd edition (Munich: 2010), lit. D III 4.

40 Margaret Thomas Will / Wolfgang Karl Göhner, *Bavarian Law for the Protection and Preservation of Monuments (Monument Protection Law) from 25th June 1973 (BayRS 2242-1-K)*, last revised 27th July 2009 (GVBl. p. 385, 390f) (aktualisierte Ergänzung zu Margaret Thomas Wills Übersetzung vom Oktober 1996).

41 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*, 3rd edition (Munich: 2010), lit. E VII (for details of orders).

42 Margaret Thomas Will / Wolfgang Karl Göhner, *Bavarian Law for the Protection and Preservation of Monuments (Monument Protection Law) from 25th*

"If actions according to Articles 6, 7, 8 Paragraph 2 or Article 10 Paragraph 1 are carried out without the required permission, building permit or exploitation permit, the Local Monument Protection Authority can require restitution of the original condition, insofar as this is possible; or the restoration in some other fashion of built monuments, archaeological monuments and listed movable monuments can be required."⁴³

The so-called "golden reins" of the competent authorities are the withdrawal of subsidies and the denial of tax certificates.

Misdemeanors are acts which realize the facts of a law that allows for the punishment with a fine. They have to be distinguished from criminal offences and offences of the Criminal Code (StGB), who are threatened with imprisonment or monetary penalty. In art. 21 DSchG Saxony-Anhalt a criminal offence is formulated:

"A person who intentionally destroys a cultural monument or a substantial part of a cultural monument or impairs the monument characteristics without the required authorization according to art. 14 para.1 and 2 is punished with imprisonment up to two years or with a fine."

According to the in part extensive catalogues of laws (such as art. 33 DSchG Rhineland-Palatinate) a person acts disorderly, who i. e. does not grant information, file a complaint, destroys monuments or decomposes them, changes its existence, affects not only temporarily its appearance, removes them, or pieces of equipment from its location, builds installations near a monument without permission, does not show finds, does not receive it, provides unapproved research, does not announce construction or performs hazardous works in protected excavation areas.⁴⁴

All monument protection laws provide legal bases for expropriation. Usually, the classic form of the deprivation of property is intended. Some countries allow also the compulsory burden of ownership such as with an easement. The fundamental fact of expropriation for the rescue of monuments is concisely formulated in art. 17 para. 1 DSchG Berlin:

"Can danger for the stock, the character or appearance of a monument not be repelled in other ways, the expropriation in favor of the state of Berlin is allowed."⁴⁵

Costs, financing

The cost and financing of measures for monuments are the main problem of conservation in our time. In general, it is a matter of private and public owners and building owners, to define their project, to prepare, to plan, to determine the costs, to ensure the financing and perform the actions as compatible with monument status as possible. The public sector contributes with grants and tax benefits; occasionally, there is entitlement to compensation.⁴⁶

Donations in the form of grants, and occasionally in the form of loans (such as Berlin, North Rhine-Westphalia) are providing in all monument protection laws. The formulations are characterized by the non-binding nature of the assistance ("within the framework of the budgetary position"). In detail see the specific of the monument and other benefits which can benefit also monuments and places like about the urban development promotion and the renovation of villages.⁴⁷

The tax benefits granted in federal law promote measures for the conservation of monuments. They are significant in scope because they are relevant for financial relief and for the ascertainment of conservation requirements with regard to feasibility.^{48 and 49}

The much-disputed decisions of the Federal Constitutional High Court to the so-called "Waterbased extraction" and specially from March 2nd, 1999⁵⁰ to the former Rhineland-Palatinate Heritage Act show that the monument protection laws are not or at least not to the full extent were compliant with the latest case law, so far as the requirements for compensation and a compensation claim for ownership restrictions based on the right of the monument are concerned.⁵¹ This resulted in numerous lawsuits to the alleged illegality of regulatory shortcomings in case of refusal of demolition of monuments by the authorities; the currently predominant problem is not based on fundamental questions, but emerges from the effective determination of constitutional social binding limits when demolition requests or other requests for change in each individual case as well as actions and procedural obligations of the persons are concerned.

Peculiarities and idiosyncrasies of individual countries

Only a few "Länder" have regulated following special features:

- ☞ Historic preservation plan: Two different legal institutions are meant by this term: Brandenburg, North Rhine-Westphalia and Thuringia allow the preparation of conservation plans of the municipalities. The lineup is discharge of the constitutional planning authority of municipalities, art. 28 para. 2 GG. This differ to historic preservation plan according to § 8 para. 3 DSchG Berlin, which can be enforced from the owner for his monument.
- ☞ Servitude: On basis of the exemplary § 7 para. 5 sentence 2 DSchG Saarland in the sale of architectural monuments public authorities may require the registration of a limited personal easement after § 1090 Federal Civil Code (BGB). This seems appropriate without a specific statutory authorization yet, to enforce conservation measures by buyers of monuments and sites with monuments conservation regardless of feasibility and to secure this permanently and effectively.
- ☞ Title deeds: Hesse, the Saarland and Saxony allow the registration of a use restriction in the land registry for the protection of monuments.

June 1973 (BayRS 2242-1-K), last revised 27th July 2009 (GVBl. p. 385, 390 f.)" (aktualisierte Ergänzung zu Margaret Thomas Wills Übersetzung vom Oktober 1996) - nowadays art. 15 para. 4 DSchG Bavaria (see note 4).

43 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*, 3rd edition (Munich: 2010), lit. E III, VII.

44 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*, 3rd edition (Munich: 2010), lit. E VI.

45 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*, 3rd edition (Munich: 2010), lit. G II 2; E V.

46 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*, 3rd edition (Munich: 2010), lit. H (detailed costs and funding).

47 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*, 3rd edition (Munich: 2010), lit. H IV; V.

48 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*, 3rd edition (Munich: 2010), lit. H VI; VII (overview of monument-specific and non-specific monument tax benefits).

49 Reinhold Leins / Gerhard Bruckmeier, "Monuments in private property - tax relief assistance", *DNK-Publication series* vol. 59 (Berlin / Bonn),

- ✎ Disasters: A special provision is foreseen in the Monument Protection laws of North Rhine-Westphalia, Rhineland-Palatinate, Saarland and Saxony. Important instructions are given in the "Recommendations of the Council of Europe for the protection of the architectural heritage against natural disasters" of November 23rd, 1993.⁵²
- ✎ Marking: F. e. Brandenburg, Mecklenburg-Western Pomerania, Saxony-Anhalt, Saxony provide an identification of the monuments and a corresponding duty of tolerance; selected monuments should get provided with the blue and white flag due to art. 6 and 16 of the "Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention" ("Hague Convention", 1954).⁵³
- ✎ Transfer claim and takeover law: § 22 DSchG Hamburg evidences a transfer interest of the country if the compensation would exceed a certain threshold. Vice versa, in North Rhine-Westphalia (§ 31 DSchG North Rhine-Westphalia) and in the Saarland (§ 17 para. 3 DSchG Saarland) there is a claim of the owner for a takeover against the "Land" under certain circumstances.
- ✎ Compensation: In North Rhine-Westphalia, the owners have to pay compensation for value increases caused by public contributions (see, § 35 para. 5 DSchG North Rhine-Westphalia).
- ✎ Objective: A kind of a historic preservation plan in the sense of a forward-looking planning for monuments represents the target relationship proven in practice. According to § 7 para. 3 No. 1 DSchG Mecklenburg-Western Pomerania it has to be set up by the owner and to be confirmed by the competent Conservation authority. This kind of submission may be required also in Thuringia to supplement the application (see, § 14 para. 1 sentence 5 DSchG Thuringia).

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50 Bundesverfassungsgericht (BVerfG), decision of March 2nd, 1999, case-no. 1 BvL 7/91, Decisions to Monument law, edited by Wolfgang Eberl (u. a.), loose-leaf edition, (Stuttgart: 1997 et seq.), 1.1, no. 7.

51 Dieter Martin / Michael Krautzberger (ed.), *Handbook of conservation and preservation*. 3rd edition (Munich: 2010), lit. G II; G III 8.

52 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804d763>, accessed 18.11.2017; Monument protection. Texts to monument protection and preservation. German National Committee for Cultural Heritage (DNK), vol. 52, 4th edition (2007), 215 et seq.; *Preservation, historic preservation, archaeology. Manual, arr.* by Dieter J. Martin (u. a.), loose-leaf edition, (1997 et seq.), code 48.96.

53 http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html, accessed 18.11.2017; "Monument protection. Texts to monument protection and preservation," German National Committee for Cultural Heritage (DNK) vol. 52, 4th Edition (2007), 30 et seq.

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